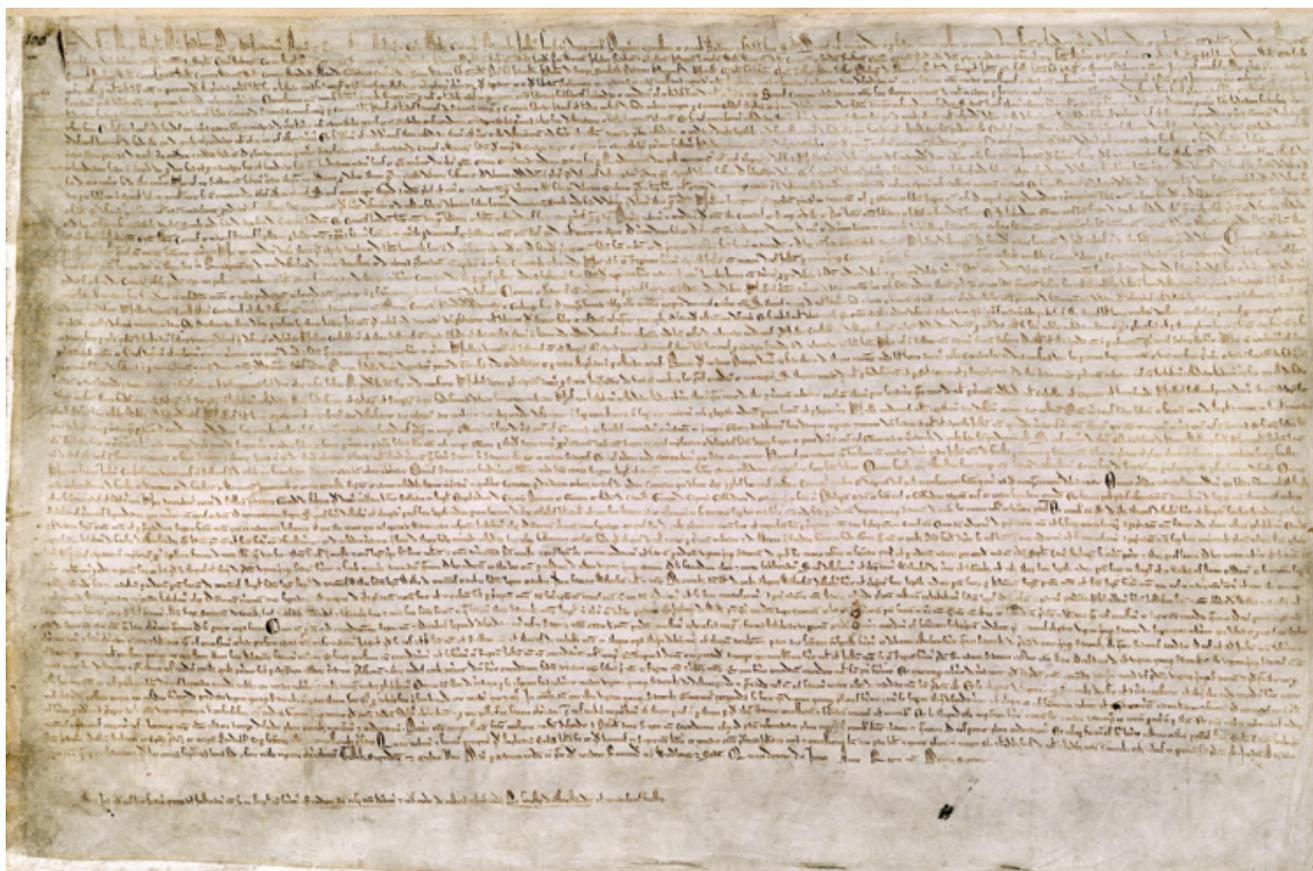


Online Library of Liberty

A collection of scholarly works about individual liberty and free markets. A project of Liberty Fund, Inc.

The Concise Magna Carta: The 63 Clauses in Latin, English, and with Commentary (1215, 1914, 2015)



Magna Carta (1215)

Edition used:

Magna Carta: A Commentary on the Great Charter of King John, with an Historical Introduction, by William Sharp McKechnie (Glasgow: Maclehose, 1914).

About this Title:

The text, translation, and commentary has been taken from William Sharp McKechnie's edition of 1914. The lengthy historical introduction and appendices have been removed for reasons of space. To see them, please consult the complete edition of the book. For additional material on Magna Carta in the Online Library of Liberty, see:

- <http://oll.libertyfund.org/groups/132>
- *Magna Carta Commemoration Essays*, edited by Henry Elliot Malden, M.A. with a Preface by the Rt. Hon. Viscount Bryce, O.M., Etc. For the Royal Historical Society, 1917. <http://oll.libertyfund.org/titles/339>
- and this collection of more recent essays, Ellis Sandoz, *The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of Rule of Law*, edited and with an Introduction by Ellis

Sandoz (Indianapolis: Liberty Fund, 2008). <<http://oll.libertyfund.org/titles/2180>>

Copyright information:

The text is in the public domain.

Fair use statement:

This material is put online to further the educational goals of Liberty Fund, Inc. Unless otherwise stated in the Copyright Information section above, this material may be used freely for educational and academic purposes. It may not be used in any way for profit.

About the OLL and Liberty Fund

The Online Library of Liberty is a project of Liberty Fund, Inc., a private educational foundation established in 1960 to encourage the study of the ideal of a society of free and responsible individuals. The OLL website has a large collection of books and study guides about individual liberty, limited constitutional government, the free market, and peace.

For more information see:

- Liberty Fund: www.libertyfund.org
- OLL: oll.libertyfund.org

Table of Contents:

- [TEXT, TRANSLATION, AND COMMENTARY](#)
- [PREAMBLE.1](#)
- [CHAPTER ONE.](#)
- [CHAPTER TWO.](#)
- [CHAPTER THREE.](#)
- [CHAPTER FOUR.](#)
- [CHAPTER FIVE.](#)
- [CHAPTER SIX.](#)
- [CHAPTER SEVEN.](#)
- [CHAPTER EIGHT.](#)
- [CHAPTER NINE.](#)
- [CHAPTER TEN.](#)
- [CHAPTER ELEVEN.](#)
- [CHAPTER TWELVE.](#)
- [CHAPTER THIRTEEN.](#)
- [CHAPTER FOURTEEN.](#)
- [CHAPTER FIFTEEN.](#)
- [CHAPTER SIXTEEN.](#)
- [CHAPTER SEVENTEEN.](#)
- [CHAPTER EIGHTEEN.](#)
- [CHAPTER NINETEEN.](#)
- [CHAPTER TWENTY.](#)
- [CHAPTER TWENTY–ONE.](#)
- [CHAPTER TWENTY–TWO.](#)
- [CHAPTER TWENTY–THREE.](#)
- [CHAPTER TWENTY–FOUR.](#)
- [CHAPTER TWENTY–FIVE.](#)
- [CHAPTER TWENTY–SIX.](#)
- [CHAPTER TWENTY–SEVEN.](#)

- [CHAPTER TWENTY-EIGHT.](#)
- [CHAPTER TWENTY-NINE.](#)
- [CHAPTER THIRTY.](#)
- [CHAPTER THIRTY-ONE.](#)
- [CHAPTER THIRTY-TWO.](#)
- [CHAPTER THIRTY-THREE.](#)
- [CHAPTER THIRTY-FOUR.](#)
- [CHAPTER THIRTY-FIVE.](#)
- [CHAPTER THIRTY-SIX.](#)
- [CHAPTER THIRTY-SEVEN.](#)
- [CHAPTER THIRTY-EIGHT.](#)
- [CHAPTER THIRTY-NINE.](#)
- [CHAPTER FORTY.](#)
- [CHAPTER FORTY-ONE.](#)
- [CHAPTER FORTY-TWO.](#)
- [CHAPTER FORTY-THREE.](#)
- [CHAPTER FORTY-FOUR.](#)
- [CHAPTER FORTY-FIVE.](#)
- [CHAPTER FORTY-SIX.](#)
- [CHAPTER FORTY-SEVEN.](#)
- [CHAPTER FORTY-EIGHT.](#)
- [CHAPTER FORTY-NINE.](#)
- [CHAPTER FIFTY.](#)
- [CHAPTER FIFTY-ONE.](#)
- [CHAPTER FIFTY-TWO.](#)
- [CHAPTER FIFTY-THREE.](#)
- [CHAPTER FIFTY-FOUR.](#)
- [CHAPTER FIFTY-FIVE.](#)
- [CHAPTER FIFTY-SIX.](#)
- [CHAPTER FIFTY-SEVEN.](#)
- [CHAPTER FIFTY-EIGHT.](#)
- [CHAPTER FIFTY-NINE.](#)
- [CHAPTER SIXTY.](#)
- [CHAPTER SIXTY-ONE.](#)
- [CHAPTER SIXTY-TWO.](#)
- [CHAPTER SIXTY-THREE.](#)

Edition: current; Page: [i]Edition: current; Page: [183]

TEXT, TRANSLATION, AND COMMENTARY

Edition: current; Page: [184] Edition: current; Page: [185]

PREAMBLE.1

Johannes Dei gratia rex Anglie, dominus Hibernie, dux Normannie et Aquitannie, et comes Andegavie, archiepiscopis, episcopis, abbatibus, comitibus, baronibus, justiciariis, forestariis, vicecomitibus, prepositis, ministris et omnibus ballivis et fidelibus suis salutem. Sciatis nos intuitu Dei et pro salute anime nostre et omnium antecessorum et heredum nostrorum, ad honorem Dei et exaltationem sancte Ecclesie, et emendacionem regni nostri, per consilium venerabilium patrum nostrorum, Stephani Cantuariensis archiepiscopi tocius Anglie primatis et sancte Romane ecclesie cardinalis, Henrici Dublinensis archiepiscopi, Willelmi Londoniensis, Petri Wintoniensis, Joscelini Bathoniensis et Glastoniensis, Hugonis Lincolniensis, Walteri Wygorniensis, Willelmi Coventriensis, et Benedicti Roffensis episcoporum; magistri Pandulfi domini pape subdiaconi et familiaris, fratris Aymerici magistri milicie Templi in Anglia; et nobilium virorum Willelmi Mariscalli comitis Penbrocie, Willelmi comitis Sarresburie, Willelmi comitis Warennie, Willelmi comitis Arundellie, Alani de Galeweya constabularii Scocie, Warini filii Geroldi, Petri filii Hereberti, Huberti de Burgo Edition: current; Page: [186] senescalli Pictavie, Hugonis de Nevilla, Mathei filii

Hereberti, Thome Basset, Alani Basset, Philippi de Albinacio, Roberti de Roppeleia, Johannis Mariscalli, Johannis filii Hugonis et aliorum fidelium nostrorum.

John, by the grace of God, king of England, lord of Ireland, duke of Normandy and Aquitaine, and count of Anjou, to the archbishops, bishops, abbots, earls, barons, justiciars, foresters, sheriffs, stewards, servants, and to all his bailiffs and liege subjects, greeting. Know that, having regard to God and for the salvation of our souls, and those of all our ancestors and heirs, and unto the honour of God and the advancement of holy Church, and for the reform of our realm, [we have granted as underwritten]¹ by advice of our venerable fathers, Stephen, archbishop of Canterbury, primate of all England and cardinal of the holy Roman Church, Henry archbishop of Dublin, William of London, Peter of Winchester, Jocelyn of Bath and Glastonbury, Hugh of Lincoln, Walter of Worcester, William of Coventry, Benedict of Rochester, bishops; of master Pandulf, subdeacon and member of the household of our lord the Pope, of brother Aymeric (master of the Knights of the Temple in England), and of the illustrious men² William Marshal, earl of Pembroke, William, earl of Salisbury, William, earl Warenne, William, earl of Arundel, Alan of Galloway (constable of Scotland), Waren Fitz Gerald, Peter Fitz Herbert, Hubert de Burgh (seneschal of Poitou), Hugh de Neville, Matthew Fitz Herbert, Thomas Basset, Alan Basset, Philip d'Aubigny, Robert of Roppesley, John Marshal, John Fitz Hugh, and others, our liegemen.

The Great Charter of John opens, in the form common to royal charters of the period, with a greeting from the sovereign to his magnates, officials, and faithful subjects, and announces, in the pious legal formula used by impious and pious kings alike, that he had made certain grants by the advice of counsellors whom he names. Three features call for comment.

I. The King's Title. Points of interest are suggested by the form of royal style here adopted. John's assumption of the royal plural "Sciatis Nos" reads, in the light of Edition: current; Page: [187] subsequent history, as a tribute to his arrogance rather than his greatness, when compared with the humbler first person singular used by his father. In this particular, however, Richard, not John, had been the innovator.¹ For a further alteration, John was alone responsible: to the titles borne by his father and brother, he added that of "lord of Ireland." When the wide territories of Henry II., had been distributed among his elder sons, the young John (hence known as "John Lackland") was left without a heritage, until his father bestowed on him the island of Ireland, recently appropriated; and this brought with it the right to style himself "dominus Hiberniae," a title retained after he had outlived his brothers and inherited their wide lands and honours.

John began his reign in 1199 as ruler over the undivided possessions of the House of Anjou from the Cheviots to the Pyrenees. These lands were held, by him as by his father, under a variety of titles and conditions. Anjou, the original fief of the Plantagenet race, still carried with it only the title of count. Henry II. had, at an early age, become duke of Normandy in his mother's right, and thereafter duke of Aquitaine by marriage with Eleanor, its heiress.² These fiefs were held by Henry and his sons under the King of France as Lord Paramount. Long before 1215, John had lost these wide dominions, except the most distant of them all, his mother's dowry of Aquitaine. Anjou and Normandy were irretrievably lost, but he still retained their empty titles; and in this Henry III. followed him at first, until, by the Treaty of 1259, he surrendered to Louis IX. all claim to Normandy and Anjou with their dependencies, in return for a confirmation of his claims on Aquitaine.³

Of Ireland, John was still, as formerly, "lord" not "king."⁴ The exact denotation of "dominus" has formed Edition: current; Page: [188] the subject of learned controversy. It is not, as has sometimes been suggested, an inferior title to that of rex, appropriate only to a preliminary stage of the process culminating in kingship. The two words imply distinct relationships differing in kind. The one is national and the other personal and feudal. Kingship is conferred by "election" (or at least proclamation) followed by coronation; lordship depends on the feudal contract made with the individual vassal, by homage and fealty.¹ England, alone of John's possessions, was held by the style of "Rex," implying sovereign rule, although John in 1213 had accepted Innocent as feudal overlord. In calling himself "Rex Angliae," in place of "Rex Anglorum" (as Henry I. had done), he followed precedents of Stephen and of Henry II.²

No vindication of John's title is given. The simple words, "Dei gratia rex Angliae," may be contrasted with the laboured attempt of Stephen's second and more formal charter of liberties (of April, 1136) to set forth a valid title to the throne; where he describes himself as appointed ("electus") by consent of clergy and people; consecrated by William, Archbishop of Canterbury and Legate of Holy Roman Church; and thereafter confirmed by Innocent, Pontiff of the Holy See of Rome.³

Conscious of the claims of his cousin Matilda, Stephen here ignores the element of hereditary succession in

determining the title to the Crown, and emphasizes the element of appointment or “election,” both of which were blended in the twelfth, as in earlier centuries, in proportions not easy to define with accuracy. Professor Freeman pushed to excess the supposed right of the Witenagemot to elect the King, and transferred it to the Norman Curia. A recent German writer, Dr. Oskar Rössler,⁴ denies that the Edition: current; Page: [189] Normans admitted the elective element at all. The theory now usually held is a mean between these extremes, namely, that the Norman Curia had a limited right of selecting among the sons, brothers, or near relations of the last King, the individual best suited to succeed him.¹ Such a right, never authoritatively enunciated, gradually sank to an empty formality. Its place was taken, to some extent, by the successful assertion by the spiritual power of a claim to give or withhold the consecrating oil, without which no one could be recognized as rex. John, secure in possession, contents himself with the terse assertion of the fact of kingship: “John, by God’s grace, King of England.”

II. The Names of the consenting Nobles. It was natural that the Charter should place on record the assent of those magnates who remained in at least nominal allegiance, and were therefore capable of acting as mediators.² The leading men in England during this crisis may be arranged in three groups: (1) the leaders of the host opposed to John at Runnymede; (2) the agents of John’s oppressions, extreme men, mostly aliens, many of whom were in command of royal castles or of mercenary levies; and (3) moderate men, churchmen or John’s ministers or relations, who, whatever their sympathies might be, remained in allegiance to the King and helped to arrange terms of peace—a comparatively small band, as the paucity of names recited in Magna Carta testifies.³ The men, here made consenters to John’s grant, are again referred to, Edition: current; Page: [190] though not by name, in chapter 63, in the character of witnesses.

III. The Motives of the Grant. The preamble contains a statement of John’s reasons for conceding the Charter. These are quaintly paraphrased by Coke:¹ “Here be four notable causes of the making of this great charter rehearsed. 1. The honour of God. 2. For the health of the King’s soul. 3. For the exaltation of holy church, and fourthly, for the amendment of the Kingdom.” The real reason must be sought in another direction, namely, in the army of the rebels; and John in after days did not scruple to plead consent given under threat of violence, as a reason for voiding his grant. The technical legal “consideration,” the quid pro quo which John received as the price of this confirmation of their liberties was the renewal by his opponents of the homage and fealty that they had solemnly renounced. This “consideration” was not stated in the charter, but the fact was known to all.²

CHAPTER ONE.

In primis concessisse Deo et hac presenti carta nostra confirmasse, pro nobis et heredibus nostris in perpetuum, quod Anglicana ecclesia libera sit, et habeat jura sua integra, et libertates suas illesas; et ita volumus observari; quod apparet ex eo quod libertatem electionum, que maxima et magis necessaria reputatur ecclesie Anglicane, mera et spontanea voluntate, ante discordiam inter nos et barones nostros motam, concessimus et carta nostra confirmavimus, et eam obtinuimus a domino papa Innocencio tercio confirmari; quam et nos observabimus et ab heredibus nostris in perpetuum bona fide volumus observari.³ Concessimus eciam omnibus liberis hominibus regni nostri, pro nobis et heredibus nostris in perpetuum, omnes libertates subscriptas, Edition: current; Page: [191] habendas et tenendas eis et heredibus suis, de nobis et heredibus nostris.

In the first place we have granted to God, and by this our present charter confirmed for us and our heirs for ever that the English church shall be free, and shall have her rights entire, and her liberties inviolate; and we will that it be thus observed; which is apparent from this that the freedom of elections, which is reckoned most important and very essential to the English church, we, of our pure and unconstrained will, did grant, and did by our charter confirm and did obtain the ratification of the same from our lord, Pope Innocent III., before the quarrel arose between us and our barons: and this we will observe, and our will is that it be observed in good faith by our heirs for ever. We have also granted to all freemen of our kingdom, for us and our heirs forever, all the underwritten liberties, to be had and held by them and their heirs, of us and our heirs forever.

This first of the sixty–three chapters of Magna Carta places side by side, bracketed equal as it were, (a) a general confirmation of the privileges of the English church, and (b) a declaration that the rights to be afterwards specified were granted “to all freemen” of the kingdom and to their heirs for ever. The manner of this juxtaposition of the church’s rights with the lay rights of freemen, suggests an intention to make it clear that neither group was to be treated as of more importance than the other. If the civil and political rights of the nation at large occupy the bulk of the Charter, and are defined in their minutest details, the church’s rights receive a prior place.¹ A twofold division thus suggests itself.

I.: The Rights of the Church.

A general promise that the English church should be free was accompanied by specific confirmation of the separate charter, guaranteeing freedom of canonical election, granted on 21st November, 1214.

(1): Quod Anglicana ecclesia libera sit.

This emphatic declaration, which has no counterpart in the Articles of the Barons, is repeated twice in Magna Carta, at the beginning and the end respectively. If the original scheme of the barons showed no special tenderness for churchmen's privileges, Stephen Langton and his bishops were careful to have that defect remedied. It is interesting Edition: current; Page: [192] to note that, where the charters of Henry II. and earlier Kings spoke of "holy church," Magna Carta speaks of "ecclesia Anglicana." When English churchmen found that the tyrant, against whom they made common cause with English barons and townsmen, received sympathy and support from Rome, the conception of an English church that was something more than a mere branch of the church universal, began to take clearer shape. The use of the words ecclesia Anglicana may indicate, perhaps, that under the influence of Stephen Langton, English churchmen were beginning to regard themselves as members of a separate community, that looked for guidance to Canterbury rather than to Rome. John was now the feudal dependent of the Holy See, and the "liberty of the English church" had to be vindicated against the King and his lord paramount: the phrase had thus an anti-papal as well as an anti-monarchical bearing.

In promising that the English church should be free, John used a phrase that was deplorably vague; it scarcely needed stretching, to cover the widest encroachments of clerical arrogance. Yet the formula was by no means a new one: both Henry I. and Stephen had confirmed the claim of holy church to its freedom.¹

Henry II. had agreed in 1173 to give greater freedom of elections, and in 1176 that he would not keep sees vacant for longer than one year,² but avoided sweeping promises of unlimited freedom. His whole reign, indeed, was an effort, not unsuccessful, in spite of the disastrous consequences of Becket's murder, to deprive the English church of what she considered her freedom. John in 1215 receded from the ground occupied by his father, confirming by the Great Charter the promise given by the weakest of his Norman predecessors, in a phrase repeated in all subsequent confirmations.

It by no means follows that "freedom of the church," as promised by Stephen, meant exactly the same thing as "freedom of the church" promised by John and his successors. Edition: current; Page: [193] The value to be attached to such assurances varied in inverse ratio to the strength of the Kings who made them, and this is well illustrated by a comparison of the charters of Henry I., Stephen, and John. Henry used words, which may possibly be interpreted as defining and restricting the grant of freedom,¹ until it meant little more than freedom from the graver abuses of Rufus' reign. Stephen's charter, on the contrary, supplements the same phrase by definite declarations that the bishops should have sole jurisdiction over churchmen and their goods, and that all rights of wardship over church lands were renounced, thus making it a "large and dangerous promise."²

"Freedom of the church" had come in 1136 to include "benefit of clergy" in a specially sweeping form, and much besides.³ It is easy to understand why churchmen cherished an elastic phrase which, wide as were the privileges it already covered, might readily be stretched wider. Laymen, on the contrary, contended for a more restrictive meaning; and the Constitutions of Clarendon must be viewed as an attempt to settle disputed points of interpretation. Henry II. substantially held his ground, in spite of his nominal surrender after Becket's murder. Thanks to his firmness, "the church's freedom" shrank to more reasonable proportions, so that the well-known formula, when repeated by John, was emptied of much of the content found in it by Stephen's bishops. Chapter 18 of Magna Carta embodied, apparently with the approval of all classes, the principle that questions of church patronage (assizes of darrein presentment)⁴ should be settled before the King's Justices, a concession to the civil power inconsistent with the more extreme interpretations formerly put by churchmen on the phrase.

In later reigns, the pretensions of the church to privileged treatment were reduced to narrow bounds, and the process of compression was facilitated by that very elasticity on which the clergy had relied as being favourable to the expansion of their claims. It was the civil government Edition: current; Page: [194] which benefited in the end from the vagueness of the words in which Magna Carta declared quod Anglicana ecclesia libera sit.¹

(2): Canonical Election.

The charter, granted to the church on 21st November, 1214, had been reissued on 15th January.² Its tenor may be given in three words, “freedom of election.” In all cathedral and conventual churches and monasteries, the appointment of prelates was to be free from royal intervention for the future, provided always that licence to fill the vacancy had first been asked of the King. The bishops present at Runnymede succeeded in having this concession inserted in the very forefront of Magna Carta.

Henry III. in his reissues was made to repeat the phrase *quod Anglicana ecclesia libera sit*, but omitted all reference alike to canonical election and to John’s charters to the church. With the Pope’s connivance or support, he reduced the rights of cathedral chapters to the sinecure they had been before 1215. It is true that Henry was prone to lean on the papal arm, and that the Curia at Rome rather than the Curia Regis often dominated appointments to vacant sees: the canons elected the nominee of king or pope, as each was, for the moment, in the ascendant.³ In spite of Magna Carta, the independence of the English church retrograded during the long alliance between Henry III. and successive occupants of the papal throne.⁴

Edition: current; Page: [195]

II.: Civil and Political Rights.

After providing thus briefly for the church, chapter one proceeds to give equal prominence, but at greater length, to the grant or confirmation of secular customs and liberties. A general enacting clause leaves details to the remaining sixty-two chapters of the Charter. Some of the more important points involved have already been discussed in the Historical Introduction—for example, the feudal form of the grant, better suited, according to modern ideas, to the conveyance of a specific piece of land, than to the securing of the liberties of a mighty nation; and the vexed question as to what classes were intended, under the description of “freemen,” to participate in these rights.¹

Another interesting point, though of minor importance, calls for separate treatment. John does not state that his grants of civil and political rights had been made spontaneously. Whether deliberately or not, there is here a marked distinction between the phraseology applied to secular and to ecclesiastical rights respectively. While the concessions to churchmen are said to have been granted “*mera et spontanea voluntate*,” no such statement is made about the concessions to freemen. John may have favoured this omission with an eye to the future repudiation of the Great Charter on the ground that it had been sealed by him under compulsion. Perhaps it was to anticipate the repetition of such arguments that the words *spontanea et bona voluntate nostra* were inserted in the preamble of the reissue of 1225, which had been purchased by a liberal grant.²

Edition: current; Page: [196]

CHAPTER TWO.

Si quis comitum vel baronum nostrorum, sive aliorum tenencium de nobis in capite per servicium militare, mortuus fuerit, et cum decesserit heres suus plene etatis fuerit et relevium debeat, habeat hereditatem suam per antiquum relevium; scilicet heres vel heredes comitis de baronia comitis integra per centum libras; heres vel heredes baronis de baronia integra per centum libras; heres vel heredes militis de feodo militis integro per centum solidos ad plus; et qui minus debuerit minus det secundum antiquam consuetudinem feodorum.

If any of our earls or barons, or others holding of us in chief by military service shall have died, and at the time of his death his heir shall be full of age and owe “relief” he shall have his inheritance on payment of the ancient relief, namely the heir or heirs of an earl, £100 for a whole earl’s barony; the heir or heirs of a baron, £100 for a whole barony; the heir or heirs of a knight, 100s. at most for a whole knight’s fee; and whoever owes less let him give less, according to the ancient custom of fiefs.

Preliminaries concluded, the Charter attacked what was, in the barons’ eyes, the chief of John’s abuses, his arbitrary increase of feudal obligations. The Articles of the Barons, indeed, had plunged at once into this most crucial question without a word by way of pious phrases or legal formulas.

I.: Assessment of Reliefs.

Each “incident” had its own possibilities of abuse, and the Great Charter deals with these in turn. The present chapter defines the reliefs to be henceforth paid to John.¹ Vagueness as to the amount due was a natural corollary of doubts as to whether the hereditary principle was binding: the lord took as much as he could grind from the inexperience or timidity of the youthful vassal.

A process of definition, however, was early at work: some conception of a “reasonable relief” was evolved. Yet the criterion varied.² Henry I., when bidding against duke Edition: current; Page: [197] Robert for the throne, was willing, in words if not in practice, to accept the limits set by contemporary opinion. His Charter of Liberties promised that reliefs should be “just and lawful”—an elastic phrase, liberally interpreted by exchequer officials in their royal master’s favour. When Glanvill wrote the sums to be taken by mesne lords had been fixed; but the Crown remained free to exact higher rates. *Baroniae capitales* were charged relief at sums which varied *juxta voluntatem et misericordiam domini regis*.¹

Every year, however, made for definition; custom pointed towards 100s. for a knight’s fee, and £100 for a barony. Two entries on the Pipe Roll of 10 Richard I. amusingly illustrate the unsettled practice: £100 is described as a “reasonable relief” for a barony, and yet a second entry records an additional payment by way of “fine” to induce the King to accept the sum his own roll had just declared Edition: current; Page: [198] “reasonable.”¹ John was more openly regardless of reason. The Pipe Roll of 1202 shows how an unfortunate heir failed to get his heritage until he paid 300 marks, with the promise of an annual “acceptable present” to the King.²

If John could ask so much, what prevented him asking more? He might name a prohibitive price, and so defeat the hereditability of fiefs altogether. Such arbitrary exactions must end, so the barons were determined in 1215: custom must be defined, so as to prevail henceforth against royal discretion. The first demand of the Articles of the Barons is, “that heirs of full age shall have their heritage by the ancient relief to be set forth in the Charter,” as though the final bargain had not yet been made. Here it is, then, duly set forth and defined as £100 for an “earl’s barony,” £100 for “a baron’s barony,” 100s. for a knight’s fee, and a proportional part of 100s. for every fraction of a knight’s fee. This clause produced the desired effect. These rates were strictly observed by the exchequer of Henry III., as we know from the Pipe Rolls of his reign. Thus, when a certain William Pantoll was charged with £100 for his relief on the mistaken supposition that he had a “barony,” he protested that he held only five knights’ fees, and got off with the payment of £25.³ The relief of a barony was subsequently reduced from £100 to 100 marks. The date of this change, if we may rely on Madox,⁴ lies between the twenty–first and thirty–fifth years of Edward I.⁵

Apparently all who paid reliefs to the King were mulcted in a further payment (calculated at 9 per cent. of the relief) in name of “Queen’s Gold,” to the private purse of the Queen Consort, collected by an official representing her at the exchequer.⁶

The charter here says nothing of socage or serjeanty.⁷ Edition: current; Page: [199] (a) Socage. The barons were not vitally interested in socage, that being, in the normal case, the tenure of humbler men.¹ In later reigns the King, like an ordinary mesne lord, contented himself with one year’s rent of socage lands in name of relief. (b) Serjeanty. The barons cannot have been indifferent to the fate of serjeanties, since many of them held great estates by such tenures. Possibly they assumed that the rules applied to knights’ fees and baronies would apply to serjeanties as well. The Crown acted on quite a different view; large sums were frequently extorted by Henry III. By the reign of Edward I., however, the exchequer limited itself to one year’s rent² for petty serjeanties, which thus fell into line with socage.³

II.: Units of Assessment.

Some explanation is required of the three groups into which Crown estates were thus divided—knights’ fees, barons’ baronies, and earls’ baronies.

(1): *Feodum militis integrum*.

There is little doubt, in light of evidence accumulated by Mr. Round in his *Feudal England*, that William I. stipulated verbally for the service of a definite number of knights from every fief bestowed by him on his Norman followers. A knight’s fee (or scutum) became the measure of feudal assessment: *servitium unius militis* was a well–known legal

unit. But difficult problems emerge when it is asked what equation, if any, existed between land and service. Unsuccessful attempts have been made to identify the knights' fee with a fixed area of five hides on the one hand, or with a fixed annual value of £20 upon the other. Prof. Vinogradoff⁴ has shown conclusively that no fixed ratio exists. Fees have been found as small as one hide and as large as 48; and they vary in Edition: current; Page: [200] value from place to place, as well as from reign to reign. William I. allowed himself a wide discretion in saddling estates with service: favoured foundations like Gloucester and Battle Abbey enjoyed complete exemption. Yet he did not distribute burdens in pure wantonness; and the majority of holdings approximated to a normal standard of extent and value. Under Henry II. two types appear, the larger of 16 marks and the smaller of 10. Under Edward I. a general appreciation of values seems to have raised the former standard to £20.¹

The Crown tenant's holding consisted of a fixed number of knights' fees—usually a multiple of five (a troop of ten mounted soldiers forming the military unit of the Norman Kings); and each fee, whatever might be its acreage or rental, owed the service of one knight. Each fee, under the Great Charter, paid relief at 100s., unless the estate, of which it formed part, was reckoned as a barony.

(2): Baronia integra.

The word "barony" has undergone many changes.² A "barony" at the Norman Conquest differed in almost every respect from a "barony" at the present day. The word *baro* was originally synonymous with *homo*, meaning, in feudal usage, a vassal of any lord. It soon became usual, however, to confine the word to king's men; "barones" were identical with "crown tenants"—a considerable body at first; but a new distinction arose (possibly as a consequence of the procedure for summoning them to a Great Council as stipulated for in chapter 14 of Magna Carta) between the great men and the smaller men (*barones majores* and *minores*). The latter were called knights (*milites*), while "baron" was reserved for the greater tenants.³ For determining what constituted a "barony," however, it was impossible to lay down any Edition: current; Page: [201] absolute criterion. Mere size was not sufficient. Under Henry II. baronies still paid relief at the King's good pleasure.¹ Richard and John were more rapacious than their father. John, indeed, forced William de Braose, who was heir to the barony of Limerick, to promise a relief of 5000 marks—a sum he was quite unable to pay.² Magna Carta, here not merely declaratory, but making an addition to existing custom, fixed £100 as the relief for a full barony (a sum afterwards reduced to 100 marks) irrespective of size or value.³

(3): Baronia comitis integra.

Where a modern eye expects to find "earldom," the text reads "earl's barony."⁴ But "earldom" originally meant an office, the chief magistracy of a county, not a title of dignity nor the ownership of land: whereas "relief" was due for the land, not the office. Therein lies also the explanation why the earl originally paid no more for his barony than the baron paid for his.

The position of an earl under the Norman Kings had been something far different from a modern "earldom": it did not pass, as matter of course, from father to son without the King's confirmation; it did not carry with it any right to demand entry to the King's Council; it was not one of several "steps in the peerage," a conception that did not then exist.⁵

The policy of the Conqueror had been to bring each county as far as possible under his own direct authority; many districts had no earls, while in others the connection Edition: current; Page: [202] of an earl with his titular shire was reduced to a shadow, the only points of connection being the right to enjoy "the third penny" (that is, the third part *pro indiviso* of the profits of the county court) and the right to bear its name. It is true that, in addition, the earl usually held valuable estates in the shire, but he did this only as any other land-owner might. For purposes of taxation the whole of his lands were reckoned as one unit, here described as *baronia comitis integra*, the relief on which was taxed at £100.

Very gradually, in after ages, the conception of an earldom suffered change. The official character made way for the idea of tenure, and later on for the modern conception of a hereditary dignity conferring rank and privileges. The period of transition, when the tenurial idea prevailed, is illustrated by the successful attempt of Ranulf, earl of Chester and Lincoln, in the reign of Henry III. to dispose of one of his two earldoms—described by him as the *comitatus* of Lincoln.¹ Earls are now, like barons, created by letters patent, and need not be land-owners. Thus the words "barony" and "earldom," so diverse in their origin and early development, became closely united in their later history.

III.: Liability of Church Property to “Relief.”

The Charter of John, unlike that of Henry I., makes no mention of the lands of vacant sees in this connection, probably because the main question had long been settled in favour of the church. The position of a bishopric was, however, a peculiar one: each prelate was a Crown tenant, and his fief was reckoned a “barony,” entitling its owner to all the privileges, and saddling him with all the feudal obligations of a baron.²

It was not unnatural that, when a prelate died, the Crown should demand “relief” from his successor. Thus, in Edition: current; Page: [203] 1092, Herbert Losinga paid £1000 of relief for the see of Thetford, an act of simony for which his conscience pricked him. Such demands met with bitter opposition. The Crown, unwilling to forego its feudal dues, endeavoured to shift their incidence from the revenues of the see to the shoulders of the feudal under-tenants. After bishop Wulfstan’s death on 18th January, 1095, a writ was issued in William’s name to the freeholders of the see of Worcester, calling on each of them to pay, as a relief due on their bishop’s death, a specified sum, assessed by the barons of exchequer.¹

In revenge for such extortions, the historians of the day, recruited from the clerical class, have heartily commended Rufus and Flambard to the opprobrium of posterity. Henry I., in his coronation Charter, promised to exact nothing during vacancies from the demesne of the church or from its tenants.² No corresponding promise was demanded from John, a proof that such exactions had ceased. The Crown no longer extorted relief from church lands, although wardship was, without protest, enforced during vacancies.

CHAPTER THREE.

Si autem heres alicujus talium fuerit infra etatem et fuerit in custodia, cum ad etatem pervenerit, habeat hereditatem suam sine relevio et sine fine.

If, however, the heir of any one of the aforesaid has been under age and in wardship, let him have his inheritance without relief and without fine when he comes of age.

The Crown is here forbidden to exact relief where it had already enjoyed wardship. It was hard on the youth, escaping from leading-strings, to be met, when he “sued Edition: current; Page: [204] out his livery,” with the demand for a large relief by the exchequer which had appropriated all his revenues.¹

Such double extortion had long been forbidden to mesne lords; Magna Carta was extending similar limitations to the King. The grievance complained of had been intensified by an unfair expedient which John sometimes adopted. In cases of disputed succession he favoured the claims of a minor, enjoyed the wardship, and thereafter repudiated his title altogether, or confirmed it only in return for an exorbitant fine. The only safeguard was to provide that the King should not enjoy wardship until he had allowed the heir to perform homage, which pledged the King to “warrant” the title against all rival claimants. This expedient was actually adopted in the revised Charter of 1216.²

The alterations in that reissue were not altogether in the vassal’s favour. Another addition made a reasonable stipulation in favour of the lord, which illustrates the theory underlying wardship. Only a knight was capable of bearing arms; hence, the lord held the lands in ward until the minor should reach man’s estate. Ingenious attempts had apparently been made to defeat these legitimate rights of feudal lords by making the infant heir a “knight,” thus cutting away the basis on which wardship rested. The reissue of 1216 provided that the lands of a minor should remain in wardship, although he was made a knight.³ Incidentally, the same Charter declared twenty-one years to Edition: current; Page: [205] be the period at which a military tenant came of age, a point on which John’s Charter is silent.

In one case, exceptionally, wardship and relief might both be exacted on account of the same death, though not by the same lord. Where the dead man had formerly held two estates, one of the Crown and one of a mesne lord, the Crown might claim the wardship of both, and then the disappointed mesne lord was allowed to exact relief as a solatium for his loss.¹

CHAPTER FOUR.

Custos terre hujusmodi heredis qui infra etatem fuerit, non capiat de terra heredis nisi rationabiles exitus, et

rationabiles consuetudines, et rationabilia servicia, et hoc sine destructione et vasto hominum vel rerum; et si nos commiserimus custodiam alicujus talis terre vicecomiti vel alicui alii qui de exitibus illius nobis respondere debeat, et ille destructionem de custodia fecerit vel vastum, nos ab illo capiemus emendam, et terra committatur duobus legalibus et discretis hominibus de feodo illo, qui de exitibus respondeant nobis vel ei cui eos assignaverimus; et si dederimus vel vendiderimus alicui custodiam alicujus talis terre, et ille destructionem inde fecerit vel vastum, amittat ipsam custodiam, et tradatur duobus legalibus et discretis hominibus de feodo illo qui similiter nobis respondeant sicut predictum est.

The guardian of the land of an heir who is thus under age, shall take from the land of the heir nothing but reasonable produce, reasonable customs, and reasonable services, and that without destruction or waste of men or goods; and if we have committed the wardship of the lands of any such minor to the sheriff, or to any other who is responsible to us for its issues, and he has made destruction or waste of what he holds in wardship, we will take of him amends, and the land shall be committed to two lawful and discreet men of that fee, who shall be responsible for the issues to us or to him to whom we shall Edition: current; Page: [206] assign them; and if we have given or sold the wardship of any such land to anyone and he has therein made destruction or waste, he shall lose that wardship, and it shall be transferred to two lawful and discreet men of that fief, who shall be responsible to us in like manner as aforesaid.

This chapter and the next treat of wardship,¹ a muchhated feudal incident, which afforded opening for grave abuses. It is a mistake, however, to regard its mere existence as an abuse: it seems to have been perfectly legal in England from the date of the Norman Conquest, although some writers² consider it an innovation devised by William Rufus and Flambarð. Their chief argument is that Henry I., in promising redress of several inventions of Rufus, promised also to reform wardship. This shows that wardship was abused, but does not prove it an innovation.

The Charter of Henry committed him to drastic remedies, which would have altered the character of wardship altogether. Clause 4 of that document removed from the lord's custody both the land and the person of the heir, and gave them to the widow of the deceased tenant (or to one of the kinsmen, if such kinsman had, by ancient custom, rights prior to those of the widow).³ This was one of the many promises which the "lion of justice" never kept. Wardship continued to be exercised as before, over lay fiefs, throughout the reigns of Henry I. and Stephen. Article 4 of the Assize of Northampton (1176) merely confirmed the existing practice when it allowed wardship to the lord of the fee.⁴ The barons in 1215 made no attempt to revert to the drastic remedies of the Charter of Henry I., although the evils complained of had become worse under John's misgovernment.

It must be remembered that "wardship" placed the property and person of the heir at the mercy of the Crown. Even if the popular belief as to the fate met by prince Edition: current; Page: [207] Arthur at his uncle's hands was unfounded, John was not the guardian to inspire confidence in the widowed mother of a Crown tenant whose estates the King might covet. Further, the King might confer the office, with the delicate issues involved, upon whomsoever he would. When such a trust was abused, it was difficult to obtain redress. In 1133, a guardian, accused de puella quam dicitur violasse in custodia sua, paid a fine to the Crown, if not as hush money, at least in order to obtain protection from being sued elsewhere than in the Curia Regis.¹

Guardians were of two kinds. The King might entrust the lands to the sheriff of the county where they lay (or to one of his bailiffs), such sheriff drawing the revenues on the Crown's behalf, and accounting in due season at the exchequer. Alternatively, the King might make an out-and-out grant of the office, with all its profits, to a royal favourite or the highest bidder. Commentators of a later date² apply the word "committee" to the former type of guardian, reserving "grantee" for the latter. This distinction, mentioned by Glanvill,³ obtains recognition in this passage of the Charter. Neither type was likely to have the interests of the minor at heart. They had always strong inducements to exhaust the soil, stock, and timber, uprooting and cutting down whatever would fetch a price, and replacing nothing. The heir too often found impoverished lands and empty barns.

William Marshal's experience affords apt illustration. Early in Richard's reign, he married Isabel of Clare, but John, Dominus Hiberniae, refused seisin of the bride's Irish lands. When Richard was appealed to, John tried to make conditions: "provided the grants of lands I have made to my men hold good and be confirmed," to which the King aptly replied: "That cannot be: for what would then remain to him, seeing that you have given all to your people?"⁴

The remedies proposed by Magna Carta were too timid Edition: current; Page: [208] and half-hearted; yet something was effected. It was unnecessary to repeat the recognized rule that the minor must receive, out of the revenues, maintenance and education suited to his station; but the Crown was restrained by chapter 3 from exacting relief where wardship had already been enjoyed; chapter 37 forbade John to exact wardship in certain cases where it was not

legally due; while here in chapter 4 an attempt was made to protect the estate from waste.

The promised reforms included a definition of “waste”; punishment of the wasteful guardian; and protection against repetition of the abuse. Each of these calls for comment. (1) The definition of waste. The Charter uses the words “vastum hominum vel rerum” (a phrase which occurs also in Bracton).¹ It is easy to understand waste of goods; but what is “waste of men”? An answer may be found in the “unknown Charter of Liberties,”² which binds guardians to hand over the land to the heir “sine venditione nemorum et sine redemptione hominum.” To enfranchise villeins was one method of “wasting men.” The young heir, when he came to his estates, must not find his praedial serfs emancipated.³ In 1259, the Provisions of Westminster (c. 20) forbade “farmers” to make waste, or sale, or exile, of woods, or houses, or men. The statute of Marlborough placed such defaulters at the King’s mercy.

(2) Punishment of wasteful guardians. The Charter provides appropriate punishment for each of the two types of guardian. John promises to take “amends,” doubtless of the nature of a fine, from the “committee” who had no personal interest in the property; while the “grantee” is to Edition: current; Page: [209] forfeit the guardianship, thus losing a valuable asset for which he had probably paid a high price. While the Statute of Westminster¹ merely repeated the words of Magna Carta, the Statute of Gloucester² enacted that the grantee who had committed waste should not only lose the custody, but should, in addition, pay to the heir any balance between the value of the wardship thus forfeited and the total damage. More severe penalties were found necessary. Statute 36 Edward III (c. 13) enacted that King’s escheators, guilty of waste, should “yield to the heir treble damages.” If the boy was still a minor, his friends might bring a suit on his behalf; or after he was of full age he might bring it on his own account.³

(3) Provision against recurrence of the waste. It was only fair that reasonable precautions should be taken to prevent the heir who had already suffered hurt, from being similarly abused a second time. John promised to supersede the keeper guilty of waste, by two trustworthy free-holders on the heir’s estate. These men, from their local and personal ties to the young heir, might be expected to deal tenderly with his property. The “unknown Charter” proposed a more drastic remedy: the lands were to be entrusted at once to four knights of the fief, without waiting until damage had been done. Even the milder provision of Magna Carta was an innovation, and there is no evidence that it was ever put in force.

CHAPTER FIVE.

Custos autem, quamdiu custodiam terre habuerit, sustentet domos, parcos, vivaria, stagna, molendina, et cetera ad terram Edition: current; Page: [210] illam pertinentia, de exitibus terre ejusdem; et reddat heredi, cum ad plenam etatem pervenerit, terram suam totam instauratam de carrucis et waynagiis, secundum quod tempus waynagii exiget et exitus terre rationabiliter poterunt sustinere.

The guardian, moreover, so long as he has the wardship of the land, shall keep up the houses, parks,¹ fishponds, stanks,² mills, and other things pertaining to the land, out of the issues of the same land; and he shall restore to the heir, when he has come to full age, all his land, stocked with ploughs and “waynage,”³ according as the season of husbandry shall require, and the issues of the land can reasonably bear.

These stipulations form the complement, on the positive side, of the negative provisions of chapter 4. It was not sufficient to prohibit acts of waste; the guardian must keep the estates in good repair.

I.: The Obligations of the Warden of a Lay-fief.

It was the duty of every custodian to preserve the lands from neglect, together with all the usual equipment of a medieval manor. Outlay thus required formed, in modern language, a first charge on the revenues, before the balance was appropriated by the “grantee,” or paid to the exchequer by the “committee.”

This clause expands and improves the corresponding Article of the Barons; but the obligation to restore the land and its appointments “in as good order as the revenues would bear” came to be regarded as too stringent, obliging the guardian to use up surplus revenue in repairing waste committed in the time of the deceased. Henry’s charters modified this: the guardian need only hand over the land and appointments in as good condition as he had received them.⁴

New methods of abusing wardship were invented after Edition: current; Page: [211] Magna Carta. The Statute of

Marlborough (c. 16) gave to a ward, kept out of his heritage, an action of mort d'ancestor against a mesne lord, but not against the Crown.¹ The Statute of Westminster I. (c. 48) narrates that heirs were often carried off bodily to prevent them raising actions against guardians. The whole subject was regulated in 1549 by Statute 32 Henry VIII. c. 46, which instituted the Court of Wards and Liveries, the expensive and dilatory procedure of which caused increasing discontent, until an order of both Houses of Parliament, dated 24th February, 1646, abolished it along with "all wardships, liveries, primer seisins, and ouster les mains."² This ordinance was confirmed at the Restoration by Statute 12 Charles II. c. 24.³

II.: Wardships over Vacant Sees.

The church had its own grievances. The Constitutions of Clarendon⁴ had stipulated that each prelate should hold his Crown land sicut baroniam; and this view ultimately prevailed. It followed that all appropriate feudal burdens affected church fiefs equally with lay fiefs. The lands of a see were, however, the property of an undying corporation (to use the language of a later age): a minority was impossible, and therefore, so it might be argued, wardships could never arise. Rufus objected to this reasoning, and devised a substitute for ordinary wardships by keeping sees long vacant, and meanwhile appropriating the revenues. Henry I., while renouncing all pretensions to exact reliefs, retained his right of wardship, promising merely that vacant sees should neither be sold nor farmed out. Stephen went further, renouncing expressly all wardships over church lands; but Henry II. ignored this concession, and reverted to the practice of his grandfather. In his reign the wardship of the rich properties of vacant sees formed a valuable asset of the exchequer. During a vacancy the Crown drew not only the rents and issues of the soil, but also the various feudal payments which the under-tenants would otherwise Edition: current; Page: [212] have paid to the bishop. The Pipe Roll of 14 Henry II.¹ records "reliefs" of £30 and £20 paid by tenants of the vacant see of Lincoln for six and four knights' fees respectively.²

John reserved his wardships in his charter to the church; and Stephen Langton thought, perhaps, it was unnecessary to press for their renunciation, since the promise not to delay elections would render such wardship unprofitable.³

The omission was supplied in 1216, when the provisions applicable to lay fiefs were extended to vacant sees, with the added proviso that church wardships should never be sold.

These provisions were supplemented by later acts. An Act of 14 Edward III. (stat. 4, cc. 4 and 5) gave to the dean and chapter of a vacant see a right to pre-emption of the wardship at a fair price. If they failed to exercise this, the King's right to appoint escheators or other keepers was confirmed, but under strict rules as to waste.

CHAPTER SIX.

Heredes maritentur absque disparagacione, ita tamen quod, antequam contrahatur matrimonium, ostendatur propinquus de consanguinitate ipsius heredis.

Heirs shall be married without disparagement, yet so that before the marriage takes place the nearest in blood to that heir shall have notice.

The Crown's right to regulate the marriages of wards had become an intolerable grievance. The origin of this feudal incident and its extension to male as well as female minors have been elsewhere explained.⁴ John made a regular traffic in the sale of wards—maids of fourteen and widows alike. The Pipe Roll of John's first year⁵ records how the chattels of Alice Bertram were sold because she refused "to come to marry herself" at the King's summons. Edition: current; Page: [213] Only two expedients were open to those who objected to mate with the men to whom John sold them. They might take the veil, become dead in law, and forfeit their fiefs to escape the burdens inherent in them; or they might outbid objectionable suitors. Brief entries in John's Exchequer Rolls condense many a tragedy. In his first year, the widow of Ralph of Cornhill offered 200 marks, with three palfreys and two hawks, that she might not be espoused by Godfrey of Louvain, but remain free to marry whom she chose, and yet keep her lands. This was a case of desperate urgency, since Godfrey, for love of the lady or of her lands, had offered 400 marks, if she could show no reason to the contrary. It is satisfactory to learn that the lady escaped.¹

Sometimes John varied his practice by selling, not the woman herself, but the right to sell her. In 1203 Bartholomew de Muleton bought for 400 marks the wardship of the lands and heir of a certain Lambert, along with the widow, to be married to whom he would, yet so that she should not be disparaged.²

Great stress was placed on “disparagement”—that is, forced marriage with one not an equal. William of Scotland, by the treaty of 7th February, 1212, conferred on John the right to marry prince Alexander to whom he would, “but always without disparagement.”³ Such proviso was understood where not expressed. It is not surprising, then, to find it confirmed in Magna Carta. The Articles of the Barons had, indeed, demanded that a royal ward should only be married with consent of the next of kin. In our text, this is softened down to the mere intimation of an intended marriage: the opportunity was still afforded of protesting against an unsuitable match. Insufficient as the provision was, it was omitted from the reissues of Henry’s reign. The sale of heiresses went on unchecked.

Magna Carta made no attempt to define disparagement, but the Statute of Merton⁴ gave two examples,—marriage Edition: current; Page: [214] to a villein or a burgess. This was not an exhaustive list. Littleton¹ adds other illustrations:—“as if the heir that is in ward be married to one who hath but one foot, or but one hand, or who is deformed, decrepit, or having an horrible disease, or else great and continual infirmity, and, if he be an heir male, married to a woman past the age of childbearing.” Plenty of room was left for forcing on a ward an objectionable spouse, who yet did not come within the law’s definition of “disparagement.” The barons argued in 1258 that an English heiress was disparaged if married to anyone not English born.²

Was it in the power of the far-seeing father of a prospective heiress, by bestowing her in marriage during his own life-time, to render nugatory the Crown’s right to nominate a husband? Not entirely: the Charter of Henry I. reserved the King’s right to be consulted by the barons before they bestowed the hand of female relations in marriage. Magna Carta is silent on the point. Bracton³ thus explains the law:—No woman with an inheritance could marry without the chief lord’s consent, under pain of losing such inheritance; yet the lord when asked was bound to grant consent, if he failed to show good reason to the contrary. He could not, however, be compelled to accept homage from an enemy or other unsuitable tenant. The Crown’s rights in such matters were apparently the same as those of a mesne lord.⁴

Edition: current; Page: [215]

CHAPTER SEVEN.

Vidua post mortem mariti sui statim et sine difficultate habeat maritagium et hereditatem suam, nec aliquid det pro dote sua, vel pro maritaggio suo, vel hereditate sua quam hereditatem maritus suus et ipsa tenuerint die obitus ipsius mariti, et maneat in domo mariti sui per quadraginta dies post mortem ipsius, infra quos assignetur ei dos sua.

A widow, after the death of her husband, shall forthwith and without difficulty have her marriage portion and inheritance; nor shall she give anything for her dower, or for her marriage portion, or for the inheritance which her husband and she held on the day of the death of that husband; and she may remain in the house of her husband for forty days after his death, within which time her dower shall be assigned to her.

No forethought of a Crown tenant, setting his house in order, could rescue his widow from the unfortunate position into which his death would plunge her. He must leave her without adequate protection against the tyranny of the King, who might inflict terrible hardships by harsh use of rights vested in him for the safeguard of his feudal incidents. She might, if deprived of her “estovers,” find herself in actual destitution, until she had made her bargain with the Crown. She had a right, indeed, to one-third of the lands of her husband (her *dos rationalis*) in addition to any lands she might have brought as a marriage portion; but she could only enter into possession by permission of the King, who had prior claims and could seize everything by his prerogative of *primer seisin*.¹ This chapter provides a remedy. Widows shall have their rights without delay, without difficulty, and without payment.

I.: The Widow’s Share of Real Estate.

Three words are used:—*dos*, *maritagium*, and *hereditas*.

(1): Dower.

A wife’s dower is here the portion of her husband’s lands set aside to support her in her widowhood. It was customary from an early date for a bridegroom to Edition: current; Page: [216] make provision for his bride on the day he married her. The ceremony formed a picturesque feature of the marriage rejoicings, taking place literally at the church door, as man and wife returned from the altar. The share thus set apart for the young wife was known as her *dos* (or

dowry), and would support her if her husband died. In theory, the transaction between the spouses partook of the nature of a contract. The wife's rôle, however, was a passive one: her concurrence was assumed. Yet, if no provision was made at all, the law stepped in, on the presumption that the omission had been unintentional, and fixed the dower at one-third of all his lands.¹

John's Magna Carta contents itself with the brief enactment "that a widow shall have her dower." The Charter of 1217 goes farther, containing an exact statement of the law as it then stood:—"The widow shall have assigned to her for her dower the third part of all her husband's land which he had in his lifetime unless a smaller share had been given her at the door of the church." Lawyers of a later age have, by a strained construction of the words in *vita sua*, made them an absolute protection to a wife against all attempts to lessen her dower by alienations granted without her consent during the marriage.² Magna Carta contains no warrant for such a proposition, although a later clause (chapter 11) secures dower lands from attachment by the husband's creditors, Jews or others.

(2): Maritagium.

It was customary for a land-owner to bestow marriage portions on his daughters. Land so granted was usually relieved from burdens of service and homage. It was hence known as "frank-marriage" (*liberum maritagium*), which almost came to be recognized as a separate form of feudal tenure. Such grants could be made without the consent of the tenant's expectant heirs. Maritagium was thus "a provision for a daughter—or perhaps Edition: current; Page: [217] some other near kinswoman—and her issue."¹ The husband was, during the marriage, treated as virtual owner; but, on his death, the widow had an indisputable title.

The obvious meaning, however, has not always been appreciated. Coke² reads the clause as allowing to widows of under-tenants a right denied (by chapter 8) to widows of Crown tenants—namely "freedom to marry where they will without any licence or assent of their lords." This interpretation is inherently improbable, since the barons at Runnymede desired to place restrictions on the King, not upon themselves; and it is opposed to the law as expounded by Bracton.³

Daines Barrington⁴ invents an imaginary rule of law in order to explain a supposed exception. An ordinary widow, he declares, could not marry again within a year of her husband's death, but widows of landowners were privileged to cut short this period of mourning. "Maritagium" is thus interpreted as a landowning widow's right of speedily entering on second nuptials. This is a complete inversion of the truth; the possession of land really restricted freedom of marriage. Yet several later authorities follow Barrington's mistake.⁵ This is the more inexcusable in view of the clear explanation given a century ago by John Reeves,⁶ who distinguished between two kinds of marriage portion: *liberum maritagium*, whence no service whatever was exigible for three generations, and *maritagium servitio obnoxium*, liable to the usual services from the first, Edition: current; Page: [218] although exempt from homage until after the death of the third heir.¹

(3): Hereditas.

Is the third item here mentioned simply another name for either *dos* or *maritagium*? Or, is it something different? It is possible that "the inheritance which her husband and she held on the day of the death of that husband" denotes lands that had come to the lady as heiress on the decease of relations, not as a gift at her marriage. Such lands might be described as held by both spouses; for a husband might even attend Parliament as a baron on the strength of his wife's barony.

II.: The Widow's Share of Personal Estate.

The present chapter says nothing of the widow's "peculiar" or share of her deceased husband's money and chattels; but chapter 26 secured to her the portion of one third allowed her by the existing law.

III.: Provision for the Widow's immediate Needs.

Intricate questions might arise before the land was divided into aliquot portions. Meanwhile, temporary provision must be made for her support. This was of two kinds:

(1): Quarantine.

Magna Carta confirmed her right to the family home for forty days, known to later lawyers as the widow's quarantine. The charter of 1216 notes an exception, on which John's Charter is silent: if the husband's place of residence had been a castle, the widow could not stay there; feudal strongholds were not for women. In such cases another residence must be substituted. In later days, widows were provided with a writ, "de quarentina habenda," directing the sheriff to do her right.²

(2): Estovers of Common.

The widow required more than the protection of a roof; until her dower lands had been assigned to her, no portion of the produce of her husband's manors could be strictly called her own. The estate was held "in common" between her and her husband's heir. It was only fair that, until her rights were ascertained, she Edition: current; Page: [219] should be allowed a reasonable share of the produce. Neither John's Charter nor the first issue of Henry III. said anything on this head. The reissue of 1217 supplied the omission, expressly confirming her right to rationabile estoverium suum interim de communi. Many explanations of the word estovers might be cited: from Dr. Johnson, who defines it broadly as "necessaries allowed by law," to Dr. Stubbs, who narrows it to "firewood."¹ It was the right to supply one's personal or domestic wants: this varied in extent from full supply of all things necessary for the maintenance of life, down to a right to take one kind of produce for one specific purpose only.²

In this passage the word bears its wider signification. Such was Coke's view,³ who held that it implied the widow's right to "sustenance" of every kind, including the right to kill such oxen on the manor as she required for food. Estovers "of common" should thus be read as extending the widow's right of consumption for her own and her household's use over every form of produce held "in common" by her and the heir's guardian prior to a final division.⁴ She could not, however, cut down trees.

Edition: current; Page: [220]

CHAPTER EIGHT.

Nulla vidua distringatur ad se maritandum dum voluerit vivere sine marito; ita tamen quod securitatem faciat quod se non maritabit sine assensu nostro, si de nobis tenuerit, vel sine assensu domini sui de quo tenuerit, si de alio tenuerit.

No widow shall be compelled to marry, so long as she prefers to live without a husband; provided always that she gives security not to marry without our consent, if she holds of us, or without the consent of the lord of whom she holds, if she holds of another.

Wealthy widows were glad to escape from John's clutches by agreeing to buy up the Crown's rights for a lump sum. In the year of Magna Carta, Margaret, widow of Robert fitz Roger, paid £1000;¹ and a few years earlier Petronilla, countess of Leicester, had given 4000 marks.² The Pipe Rolls mention numerous smaller sums; in 1200, Juliana, widow of John of Kilpec, accounts for 50 marks and a palfrey.³ Horses, dogs, and falcons were frequently given in addition to money fines, and testify eloquently to the greed of the King, the anxiety of the victims, and the extortionate nature of the system. In return, formal charters were obtained, a good example of which is that granted to Alice, countess of Warwick, dated 13th January, 1205,⁴ containing concessions that she should not be forced to marry; that she should be sole guardian of her sons; that she should have one-third part of her late husband's lands as her reasonable dower; and that she should be quit from attendance at courts of shire and hundred, and from payment of sheriff's aids during her widowhood. Another charter, of 20th April, 1206, shows what a widow might expect if she failed to make her bargain with the Crown: John granted to Richard Fleming, an alien as his name Edition: current; Page: [221] implies, the wardship of the lands of the deceased Richard Grenvill, with the rights of marriage of the widow and children.¹

Magna Carta, in substituting a rule of law for the provisions of these private charters, repeated at greater length the promises made (and never kept) by Henry I. in his coronation charter: no widow was to be constrained to marry against her will. This liberty must not be used, however, to the prejudice of the Crown: the widow could not marry without the King's consent. Magna Carta provided that she must find security to this effect, an annoying, but not unfair stipulation. The Crown, in later days, compelled the widow, when having her dower assigned to her in

Chancery, to swear not to marry without licence under penalty of a fine of one year's value of her dower.²

CHAPTER NINE.

Nec nos nec ballivi nostri seisiemus terram aliquam nec redditum pro debito aliquo, quamdiu catalla debitoris sufficiunt ad debitum reddendum; nec plegii ipsius debitoris distringantur quamdiu ipse capitalis debitor sufficit ad solutionem debiti; et si capitalis debitor defecerit in solutione debiti, non habens unde solvat, plegii respondeant de debito; et, si voluerint, habeant terras et redditus debitoris, donec sit eis satisfactum de debito quod ante pro eo solverint, nisi capitalis debitor monstraverit se esse quietum inde versus eosdem plegios.

Neither we nor our bailiffs shall seize any land or rent for any debt, so long as the chattels of the debtor are sufficient to repay the debt; nor shall the sureties of the debtor be distrained so long as the principal debtor is able to satisfy the debt; and if the principal debtor shall fail to pay the debt, having nothing wherewith to pay it, then the sureties shall answer for the debt; and let them have the lands and rents of the debtor, if they desire them, until they are indemnified for the debt which they have paid for him, unless the principal debtor can show proof that he is discharged thereof as against the said sureties.

Edition: current; Page: [222]

The Charter passes to another group of grievances. Chapters 9 to 11 treat of debts, usury, and the Jews, and should be read in connection with chapter 26, which regulates procedure for attaching personal estate of deceased Crown tenants who were also Crown debtors. The present chapter, although general in its terms, had special reference to cases where the Crown was creditor; while the two following chapters treat more particularly of debts contracted to money lenders.

The fact that John's subjects were indebted to his Exchequer did not imply that they had borrowed from the King. What with feudal incidents and scutages, and indiscriminate fines, a large proportion of Englishmen must have been permanently indebted to the Crown. At John's accession many northern barons still owed scutages imposed by Richard. John remitted none of the arrears, while imposing new burdens of his own: the attempts made to collect these debts intensified the friction between John and his barons.¹

Three rules were laid down. (1) The personal estate of a debtor must be exhausted before his real estate or its revenues were attacked. To take away his land might deprive him of his means of livelihood; for chattels could not yield a permanent revenue.² This rule has not found a place in modern systems of law, which usually leave the option with the creditor. (2) The estate of the chief debtor had to be exhausted before proceedings could be instituted against his sureties. Magna Carta thus enunciated for English law a rule that has found favour in most systems of jurisprudence. The man who is only a surety for another's debt is entitled to immunity, until the creditor has taken all reasonable steps against the principal debtor. Such a right is known to the civil law as *beneficium ordinis*, and to Scots law as the "benefit of discussion." (3) If Edition: current; Page: [223] these sureties had, after all, to pay the debt in whole or part, they were allowed "a right of relief" against the principal debtor, being put in possession of his lands and rents. This rule has some analogy with the equitable principle of modern law, which gives to the surety who has paid his principal's debt, the right to whatever the creditor held in security.

Even when the Crown's bailiffs obeyed Magna Carta, they might still inflict terrible hardship upon debtors. Sometimes they seized goods valuable out of all proportion to the debt; and an Act of 1266¹ forbade this practice when the disproportion was "outrageous." Sometimes they attempted to extort prompt payment by selecting whatever chattel was most indispensable: oxen were taken from the plough and allowed to die of neglect. The practice of the Exchequer, in the days of Henry II., had been more considerate; oxen were to be spared as far as possible where other personal effects were available.² John's charter has no such humane provision,³ and the abuse continued. The Act of 1266, already cited, forbade officers to drive away the owner who came to feed his impounded cattle at his own expense. The *Articuli super cartas*⁴ went further, prohibiting seizure of beasts of the plough so long as other effects might satisfy the debt.⁵

CHAPTER TEN.

Si quis mutuo ceperit aliquid a Judeis, plus vel minus, et moriatur antequam illud solvatur, debitum non usuret
Edition: current; Page: [224] quamdiu heres fuerit infra etatem, de quocumque teneat; et si debitum illud inciderit in

manus nostras, nos non capiemus nisi catallum contentum in carta.

If one who has borrowed from the Jews any sum, great or small, die before that loan be repaid, the debt shall not bear interest while the heir is under age, of whomsoever he may hold;¹ and if the debt fall into our hands, we will not take anything except the principal sum² contained in the bond.

Usury, denied by law to Christians, was carried on by Jews under disadvantages and risks. The rates of interest were proportionately high, ranging in normal cases from two to four pence per pound per week; that is, from 43 $\frac{1}{3}$ to 86 $\frac{2}{3}$ per cent. per annum.³ During his nonage a ward had nothing wherewith to discharge either principal or interest, since he who had the wardship drew the revenue. At the end of a long minority, an heir would have found the richest estates swallowed up by a debt which had increased automatically ten or twenty-fold.⁴

Magna Carta prevented this injustice to the ward; but, in doing so, inflicted some injustice on the money-lenders. During the minority no interest at all, it was provided, should accrue to Jew or other usurer; while, if the debt passed to the Crown, the King must not use his prerogative to extort more than a private debtor might; he must confine himself to the principal sum specified in the document of debt. The provision that no interest should run Edition: current; Page: [225] during minorities was confirmed by the Statute of Merton,¹ which made it clear, however, that its provisions should not operate to discharge the principal sum or interest accrued before the ancestor's death. The Statute of Jewry, of uncertain date,² made interest irrecoverable by legal process. All previous acts against usury were repealed by the statute 37 Henry VIII. c. 9, which, however, forbade the exaction of interest at a higher rate than 10 per cent., and this remained the legal rate until reduced to 8 per cent. by 21 James I. c. 17.

I.: The History of the Jews in England.

In the policy of the Crown towards aliens of the Hebrew race, three periods may be distinguished. From the Norman Conquest to the coronation of Richard I., the Jews were fleeced and tolerated; during the reigns of Richard and John and the minority of Henry III., they were fleeced and protected; and finally they were fleeced and persecuted, this last stage ending with the ordinance of 1290, which banished Jews from England. The details of this long story of hardship and oppression, tempered fitfully by royal clemency, can be only glanced at here. There were Jews in England before the Norman Conquest; but the first great influx came in the reign of Rufus, whose financial genius recognized in them an instrument for his gain, and who would the more gladly protect them, as likely to prove a thorn in the side of his enemy the Church. A new immigration led to the disarming of Jews in 1181, a measure which left them at the mercy of the Christian rabble.

When a disturbance occurred at the coronation of Richard I., on 3rd September, 1189, a general massacre took place in London. York and other towns were not slow to follow this example. The King was moved to anger, not so much by the sufferings of the Jews, as by the destruction of their bonds; for the more the Jews had, the more could be extorted from them. Richard, returning from captivity a few years later, in urgent need of money, determined to prevent a repetition of such interference with a valuable source of revenue. His motive was selfish, but Edition: current; Page: [226] that was no reason why the Israelites should not pay for a measure designed for their own protection. Assembled at Nottingham, they granted a liberal aid, in return for a new expedient devised to secure their bonds. This scheme,¹ for the details of which Richard was probably indebted to the genius of his great justiciar, Archbishop Hubert Walter, was of a comprehensive and practical character. In London, York, and other important cities, offices or bureaus were established under the Crown's protection, containing treasure chests, called *archae*, fitted with triple locks, to be opened in presence of custodians, known as *chirographers*, who kept the keys. These were four in number, two Christians and two Jews, chosen by juries summoned for that purpose by the sheriff; and they were obliged to find sureties. Only in their presence could loans be validly contracted between Jews and Christians; and it was their duty to see such bargains reduced to writing in duplicate copies. No contract was binding unless a written copy or *chirograph* had been preserved in one or other of those repositories or arks, which thus served every purpose of a modern register, and other purposes as well. If the money-lender suffered violence and was robbed of his copy of the bond, the debtor was still held to his obligations by the duplicate which remained. If the Jew and all his relatives were slain, even then the debtor did not escape, but was confronted by a new and more powerful creditor, the King himself, armed with the *chirograph*. Lists of transactions were preserved, and all acquittances and assignments of debts, known from their Hebrew name as "*starrs*," had to be carefully enrolled.² Stringent rules, codified by Hubert Walter, were issued to the judges when starting on their circuit in September, 1194.³

If this cunningly-devised system prevented the Christian debtor from evading his obligations, it also placed the

Jewish creditor completely at the mercy of the Crown; for the exact wealth of every Jew could be accurately Edition: current; Page: [227] gauged from a scrutiny of the contents of the archæ. The King's officials knew, to a penny, how much it was possible to wring from the coffers of the Jews, whose bonds, moreover, could be conveniently attached until they paid the tallage demanded. The custom of fixing on royal castles as the places for keeping these arks, probably explains the origin of the special jurisdiction exercised over Jews by King's constables ("qui turres nostras custodierunt").¹ In their dungeons, horrible engines were at hand for enforcing obedience. Such jurisdiction, however, extended legitimately over trivial debts only.² Important pleas were reserved for the officials of the exchequer of the Jews, a special government department, which controlled and regulated the whole procedure. Evidences of the existence of this separate exchequer have been traced back to 1198, although no record has been found of a date prior to 1218.³ John, while despising the Jews, protected their wealth as a reservoir from which he might draw in time of need. Thus, by a charter dated 10th April, 1201, he took 4000 marks for confirming their privileges; and he obtained a similar amount after his rupture with Rome. The charter of 1201 was only a confirmation of rights already enjoyed by English Jews in virtue of the liberal interpretation put upon the terms of an earlier charter, granted by Henry I. to a particular father in Israel and his household, but subsequently extended, with the tacit concurrence of the Crown, to the whole Hebrew race. Under John's charter they enjoyed valuable and definite privileges, which exempted them from all jurisdictions except those of the King's justices and castellans.⁴

When a repetition of the massacres that had disgraced his brother's coronation was threatened in 1203, John promptly ordered the mayor of London to suppress all Edition: current; Page: [228] such attempts: his promise of protection, "even though granted to a dog," must be held inviolate.¹ Protection was accorded, however, only that they might furnish a richer booty when the occasion came: suddenly John issued orders for a wholesale arrest of Jews throughout England. The most wealthy members of their community were brought together at Bristol, and, on 1st November, 1210, compelled to give reluctant consent to a tallage of the enormous sum of 66,000 marks. This amount had been fixed as the result of an exaggerated estimate of the contents of the archæ, and was more than they could pay. The methods adopted by John's castellans to extort arrears are well known, especially the case of the unfortunate Jew of Bristol, from whom seven teeth were extracted, one each day, until he consented to pay the sum demanded.²

It was doubly hard that the race thus plundered and tortured by the King should be subjected to harsh treatment by the King's enemies on the ground that they were pampered protégés of the Crown. Yet such was the case: on Sunday, 17th May, 1215, when the insurgents on their way to Runnymede entered London, they robbed and murdered Jews, using the stones of their houses to fortify the city walls.³ It is not to be wondered, then, that the same insurgents, in forcing on King John the demands that formed the basis of Magna Carta, included provisions against usury.

The advisers of the young Henry in 1216 omitted these clauses, but not from love of the Jews. They were unwilling to impair so useful a source of revenue, which has been compared to a sponge which slowly absorbed the wealth of the nation, to be quickly squeezed dry again by the King. The Jews were always willing to disgorge a portion of their gains in return for protection in the rest; but their lot became hard indeed when Henry III., urged by popular clamour and the wishes of the Pope, began a course of active persecution. In 1253, a severe ordinance inflicted vexatious regulations on the Hebrews, almost converting Edition: current; Page: [229] their quarters in each great city into ghettos, like those of the Continent of Europe.

This was merely the commencement of oppressive measures, the outcome of the growing hatred with which Christians regarded Jews—a result partly of the heated imagination of the rabble, ready to believe unauthenticated stories of the crucifixion of Christian children, and partly of the fact that rich Jews, in spite of all persecution, had possessed themselves of the landed estates of freeholders and barons and claimed to act as lords of Christian tenants, enjoying wardships, escheats, and advowsons, as any Christian might have done. The scope of this enquiry excludes any detailed account of the stages through which repressive legislation passed. The Statute of Jewry, however,¹ was of exceptional importance; taking from usurers the right to recover interest by legal process, and limiting execution for the principal to one half of the debtor's lands and chattels. In return, some temporary concessions were granted. One by one, however, these privileges were again withdrawn, until the end came in 1290 with the issue of a decree of perpetual banishment by Edward I., who was compelled to sacrifice his royal preserve of Jews, in deference to national prejudice.

II.: Legal Position of the Jews.

All through these vicissitudes of fortune, the legal status of the Jews had remained unchanged in essentials. Their position was doubly hard; they were plundered by the Crown and persecuted by the populace. If John saved them

from being robbed by his Christian subjects, it was that they might be better worth the robbing by a Christian king. Yet, for this protection, at once fitful and interested, the Jews had to pay a heavy price; not only were they liable to be tallaged arbitrarily at the King's will, without limit and without appeal, but they were hated by rich and poor as the King's allies. Such feelings would of themselves account for the unsympathetic treatment accorded to money-lenders by Magna Carta; two other reasons contributed. Usury was looked on in the Middle Ages as immoral Edition: current; Page: [230] (although illegal only for Christians); while excessive interest was habitually exacted.

The feudal scheme of society had no place for Jews. They shared the disabilities common to aliens, in a form unmitigated by the protection extended to other foreigners by their Sovereigns and by the Church. As exiles in a foreign land, exposed to attacks of a hostile mob, they were forced to rely absolutely on the arm of the King. The Jews became the mere perquisites or chattels of the Crown, in much the same way as the villeins became the serfs or chattels of their lords. Rights they might have against others by royal sufferance, but they had no legal remedy against their master. In the words of Bracton,¹ "the Jew could have nothing of his own, for whatever he acquired, he acquired not for himself but for the king." His property was his merely by royal courtesy, not under protection of the law. When he died, his relations had no legal title to succeed to his mortgages, goods, or money; the exchequer, fortified by an intimate knowledge of the extent of his wealth (for that consisted chiefly in registered bonds), stepped into possession and could do what it pleased. The King usually, indeed, in practice contented himself with one-third of the whole; but if the relations of the deceased Jew received less than the balance of two-thirds, they would be well advised to offer no remonstrance. The Crown did not admit a legal obligation; and there was no one either powerful enough, or interested enough, to compel fulfilment of the tacit understanding that restricted the royal claims. Whatever the Jew had amassed belonged legally and potentially not to him but to the Crown. Magna Carta, in striking at money-lenders, was striking at the King.

CHAPTER ELEVEN.

Et si quis moriatur, et debitum debeat Judeis, uxor ejus habeat dotem suam, et nichil reddat de debito illo; et Edition: current; Page: [231] si liberi ipsius defuncti qui fuerint infra etatem remanserint, provideantur eis necessaria secundum tenementum quod fuerit defuncti, et de residuo solvatur debitum, salvo servicio dominorum; simili modo fiat de debitis que debentur aliis quam Judeis.

And if anyone die indebted to the Jews, his wife shall have her dower and pay nothing of that debt; and if any children of the deceased are left under age, necessaries shall be provided for them in keeping with the holding of the deceased; and out of the residue the debt shall be paid, reserving, however, service due to feudal lords; in like manner let it be done touching debts due to others than Jews.

If the preceding chapter deprived Jews of part of their interest, the present one deprived them of part of the security on which they had lent the principal. The widow's dower lands were discharged from her husband's debts, only two-thirds of the original security thus remaining under the mortgage. Even this must submit to a prior claim, namely the right of the debtor's minor children to such "necessaries" as befitted their station in life. Magna Carta, at the same time, with characteristic care for feudal rights, provided that the full service due to lords of fiefs must not be prejudiced, whoever suffered loss. Finally, these rudiments of a law of bankruptcy were made applicable to Gentile creditors equally as to Jews. These provisions, with others injuriously affecting the royal revenue, were omitted in 1216, not to be restored in future charters: but they were re-enacted in their essential principle, though not in detail, by the Statute of Jewry, which limited a creditor's rights of execution to one moiety of his debtor's lands and chattels.

CHAPTER TWELVE.

Nullum scutagium vel auxilium ponatur in regno nostro, nisi per commune consilium regni nostri, nisi ad corpus nostrum redimendum, et primogenitum filium nostrum militem faciendum, et ad filiam nostram primogenitam Edition: current; Page: [232] semel maritandam, et ad hec non fiat nisi racionabile auxilium: simili modo fiat de auxiliis de civitate Londonie.

No scutage nor aid shall be imposed on our kingdom, unless by common counsel of our kingdom, except for ransoming our person, for making our eldest son a knight, and for once marrying our eldest daughter; and for these there shall not be levied more than a reasonable aid. In like manner it shall be done concerning aids from the city of London.

This is a famous clause, greatly valued at the time it was framed because of its precise terms and narrow scope (which made evasion difficult), and even more highly valued in after days for different reasons. It came indeed to be interpreted in a broad general sense by enthusiasts who, with the fully-developed British Constitution before them, found in it the modern doctrine that the Crown can impose no financial burden on the people without consent of Parliament. Before discussing how far such an estimate is justified, it will be necessary to examine the historical context, with special reference to two classes, feudal tenants and the citizens of London respectively.

I.: Protection of Crown Tenants from arbitrary Exactions.

Apart from payments such as reliefs and amercements, the occasions of which were independent of the royal will, feudal exactions were of two types: scutages and aids. By these two expedients the King could arbitrarily increase the burdens of his feudal tenants beyond the letter of the original feudal contract. Recognized usage, however, required the consent of the vassals before they were subjected to extraordinary exactions. The barons were within their rights in seeking to embody this general principle in Magna Carta, although it would appear (from comparison of the versions of 1215, 1216 and 1217) that they had difficulty in devising a proper formula to give effect to it. The present chapter attempts a rough compromise of the question at issue, by requiring consent of the Crown tenants to all scutages and also to aids other than the recognized three.¹

(1): Feudal aids.

The three recognized aids are here Edition: current; Page: [233] specified, but no reform is attempted with regard to them, and in particular (in marked contrast to the care taken in chapter two to define the exact rate of “relief”), nothing is said of the amount payable in name of “aid.” It is only the extraordinary aids¹ that are regulated by this chapter: these are not to be taken without “common counsel” or the “Common Council”—for the Latin will bear either of these two meanings, which indeed in 1215 were probably not yet differentiated from each other. If the Crown tenants by “common counsel” could refuse a grant, they could a fortiori make one upon conditions; fixing, for example, the amount of an extraordinary aid as well as the occasions of its payment. So far as aids were concerned, there was here no innovation upon existing practice.

(2): Scutage.

With regard to scutage, the requirement of consent was something very different. Scutage, in lieu of military service, was of the essence of the feudal relation: to make it impossible for the Crown ever to levy a scutage without consent of those who had to pay, was to go much beyond redress of the grievance suffered under John: it was to impose on him restrictions that his father had never acknowledged.²

The total omission of this chapter in 1216 may have been partly occasioned by the consciousness that it contained an innovation unwarranted by custom: the reissue of 1217 said nothing of aids, and contented itself, in regard to the vexed question of scutages, with the vague declaration that for the future these should be taken as had been the custom under Henry II.³

In spite, however, of the omission of chapter 12 from all reissues of the Great Charter, it was customary for Henry’s advisers to consult “the Common Council” before exacting a scutage or aid. This was done, for example, in 1222, Edition: current; Page: [234] when a Council granted an “aid for the Holy Land” of three marks for an earl, one mark for a baron, and twelve pence for a knight.¹ The consent of a Council, indeed, was usually taken even for one of the three recognized feudal aids.

II.: Protection of London from arbitrary Exactions.

Some attempt was made to protect the men of London from arbitrary demands: the insurgent leaders in this way discharged part of their debt to an ally with claims upon their gratitude.² The Articles of the Barons contained important provisions affecting London; and these were embodied in the Charter in slightly altered terms.³ The present clause, for example, uses only one word, “aids,” where the 32nd Article of the Barons referred to “tallages and aids.” There is no evidence to show whether the omission had been deliberately planned, or was the result of inadvertence; and the ambiguity inherent in both words makes it dangerous to hazard a dogmatic opinion on the practical effect of

the alteration. Yet a clearly-marked line can be traced between the respective meanings of the two terms when they are technically used.⁴

(1): “Aid,”

a vague word, is applicable to any payment that can be regarded as, in any sense, a freewill offering. It embraced gifts to the Crown, whether from prelate or burgess or feudal baron. London was stimulated towards acts of generosity by Kings of England both before and after John. There were times when “voluntary” aids (like the “benevolences” of Tudor days) could not safely be withheld.⁵

Edition: current; Page: [235]

(2): Tallage

would appear to mean a toll or exaction imposed on individuals who had no option of refusal. Villeins were talliable at their lord’s caprice, without appeal. Liability to tallage, however, did not necessarily imply servile status; for the King could tallage all inhabitants of towns on royal demesne. London itself, for all its wealth, political importance, and chartered privileges, still shared this unwelcome liability.¹

(3): Comparison of Aid and Tallage.

The “aid,” being a voluntary offering, differed fundamentally from tallage, which was a forced payment. In theory, the citizens were free to name the sum they proposed to pay. If the King was satisfied, the city collectively became responsible for assessing, collecting and paying over the money: the King’s representatives had no need nor right to interfere with individual citizens. The amount of a tallage, on the contrary, was fixed by the King’s Justices, assessed by them per capita on individual citizens, who were subject to direct distraint by the agents of the Crown. It was to the advantage of a borough to forestall, by a liberal aid, the Crown’s anticipated demand for a tallage, for the hated tax-gatherer was thus kept outside the city gates. An aid was more to the King’s advantage also than a tallage: not only was he saved the trouble, expense, and delay of collection, but he obviated risk of loss through the insolvency of some of the individuals fixed upon.

A story told by Madox² brings out the contrast. A dispute had arisen between the King and the Londoners in 1255. To Henry’s demand for 3000 marks of “tallage,” they at first replied by offering 2000 marks of “aid,” which the King refused. The citizens then denied outright their liability to tallage, but were confronted with entries in Exchequer and Chancery Rolls which contradicted their contention. On the morrow, the mayor and citizens Edition: current; Page: [236] acknowledged that they were talliable, and paid the sum demanded.

(4): London’s attempts to escape tallage.

There is ample evidence that London in John’s reign was galled by the liability to tallage, and was ready to seize any loophole of escape. John’s letter to the city in 1206¹ refers to the serious damage done to his capital by the manner in which tallages had been assessed and collected. A document compiled about 1210, in the interests of London, partly from authentic sources, purporting to be a Charter by William I., declares that all freemen shall hold their lands and possessions “free from every unjust exaction and from every tallage.”² Finally, Miss Bateson in 1902³ called attention to a document of nine articles, which seem to be the heads of a petition prepared by the Londoners, probably in 1215, in which they ask inter alia the abolition of all tallages except per communem assensum regni et civitatis.

(5): Effects of omission of “tallage” from Magna Carta.

Why, if not through pure inadvertence, was the word “tallage,” occurring in Articuli Baronum, omitted from the Charter? Widely different answers have been given. Prof. G. B. Adams⁴ ingeniously argues that the omission was deliberately made in the interests of London. That city, now a full-blown commune, enjoyed the status of a feudal vassal: though liable to aids, its burghers resented any allusion to the servile “tallage” in connection with themselves. If Prof. Adams here interprets their attitude aright, the Londoners were ill-advised to refuse, on any such punctilio, to secure in the Charter incorporation of a definite protection from arbitrary tallage by the Crown—a grievance from

which they were destined to suffer for more than a century thereafter.

The true explanation, however, is more likely to lie in an opposite direction. The omission was, perhaps, made deliberately to the detriment of London, in deference to John's strong feeling on a point that did not affect the Edition: current; Page: [237] barons personally. John, for his part, would be readily persuaded to renounce the right to take "aids" from the wealthy traders of the capital, if he preserved the more drastic privilege of tallaging them at will. The word "tallage" was dropped from the Charter, not to gratify London's pride, but to enable the Crown to have access to the city's treasure chests.

(6): Nature of the protection accorded to London.

The arrangement of this chapter is noteworthy: after securing redress of abuses pressing on the barons, a few comparatively careless words are added: "in like manner it shall be done concerning aids from the city of London." The words "in like manner" are difficult to interpret, for the two cases are far from parallel. Do they mean that no aid can be taken from London without the same "common counsel of the realm" previously stipulated for the taking of scutages from the tenants in chief? Probably not, for the method provided in chapter 14 for obtaining "the common counsel" would have been peculiarly ill-adapted to protect the Londoners, whose interests were not represented in the baronial assembly. The Petition of nine heads¹ had asked more than this, namely, that no tallage should be taken without common assent "of the kingdom" (that is, of the baronial assembly) and "of the city"—a double consent being thus required, as though "the common counsel" was not enough.

High authorities suggest a different explanation for the clause in chapter 12, which is read simply as an assertion that only "reasonable" aids should be taken from London.² If that be so, no criterion of reasonableness is suggested, and such might be difficult to find.³ Subsequent history sheds no clear light on the intention of this clause. As the chapter was omitted from all reissues, no occasion ever arose of testing its meaning by actual practice.

In deciding between the two suggested explanations, Edition: current; Page: [238] however, it should be noted that, though "councils" framed on the model of 1215 continued for half a century to meet, they made no claim to interfere with the Crown's right to tallage London. Neither Henry nor Edward waited for the "common counsel of the realm" before enforcing their demands.

Whatever may have been the intention of the framers of this clause with regard to London, it is notable that they allowed that city to stand alone. Magna Carta completely ignored that provision of the Articles of the Barons which extended the same protection "to citizens of other places who thence have their liberties," meaning the boroughs whose chartered privileges had been modelled upon those of the metropolis.¹ Here, again, the alteration was probably a concession to John made by the barons at their allies' expense.²

(7): Later history of the Crown's right to tallage the towns.

The Crown continued at intervals to take tallages from London until 1340. It has sometimes been maintained, indeed, that the Confirmatio Cartarum of 1297 was intended to abolish this prerogative, and a document once considered an authoritative version of the Confirmatio bore the suggestive title of De tallagio non concedendo. It is now well known that the latter document is unauthentic; while, if the Confirmatio itself was intended to relieve the towns from tallages, it signally failed. Edward III. exacted tallages from London and other towns. Parliament, however, succeeded, in 1340, in passing a statute which abolished unparliamentary taxation of every kind. This act, sometimes styled by modern writers "the real statutum de tallagio non concedendo," finally settled the law,³ but did not prevent the King from trying to break that law. Edition: current; Page: [239] Edward frequently disregarded the restrictions placed upon his financial resources, and with varying success. He rarely did so, however, without meeting protests; and the rule of law laid down in the act of 1340 was never repealed.

III.: Magna Carta and the Theory of Parliamentary Taxation.

It is a commonplace of our text-books that chapters 12 and 14, taken together, amount to the Crown's absolute surrender of all powers of arbitrary taxation, and even that they enunciate a doctrine of the nation's right to tax itself.¹ Yet the very idea of "taxation" in its abstract form, as opposed to specific tallages and exactions, levied on definite things or individuals, is essentially modern. The doctrine of the day was that the King in normal times ought "to live

of his own," like any other land-owning gentleman. A regular scheme of "taxation" to meet the ordinary expenses of government was undreamt of. It is too much to suppose, then, that our ancestors in 1215 sought to abolish something which, strictly speaking, did not exist. The famous clause treats, not of "taxation" in the abstract, but of the scutages and aids already discussed. It does not concern itself with the rights of Englishmen as such, but chiefly with the interests of barons who held freeholds of the Crown, and incidentally and inadequately with those of the citizens of London. Several considerations place this beyond reasonable doubt.

(1) The terms of the restriction are by no means wide or sweeping; but precise, accurate, and narrow. The "common counsel of the realm" was required for three exactions at the most: for scutages and for extraordinary aids from feudal tenants, and possibly also for aids from the city of London: that is all. Not a word is said of other forms of taxation or other groups of taxpayers. (2) If under-tenants received, by chapter 15, protection against mesne lords, they received none against the King. The Charter affected, not national "taxation," but feudal dues. Edition: current; Page: [240] (3) The scant measure of protection did not extend even to all Crown tenants. The King's villeins were, of course, excluded; and so were even freeholders whose tenure was other than that of chivalry. Socage tenants were left liable to carucage, while the Crown's right to raise the "farms" of its own demesnes was reserved.¹ (4) The Crown's initiative in "taxation" (here restricted in regard to "aids" and "scutages") was, under many other names and forms, left intact. The King required no consent before taking prises and custom dues from merchandise reaching or leaving England, or before taking tolls and fines at inland markets under the plea of regulating trade. Tallages also were exigible at discretion from aliens and Jews, from tenants of demesne, from London and other chartered towns. (5) The assembly to be convened for taking "common counsel" was a narrow body, representative neither of the ranks and classes of the community, nor of the separate national interests, nor yet of the various districts of England. Its composition was homogeneous, an aristocratic council of the military tenants of the Crown, convened in such a way that only the greater among them were likely to attend.²

These facts serve as a warning not to read into Magna Carta modern conceptions which its own words will not warrant. This famous clause was far from formulating any doctrine of self-taxation; it primarily affected impositions levied by John, not qua sovereign but qua feudal lord. Such as it was, it was omitted, along with its corollary (chapter 14), in 1216 and subsequent reissues.

CHAPTER THIRTEEN.

Et civitas Londonie habeat omnes antiquas libertates et liberas consuetudines suas, tam per terras, quam per aquas. Preterea volumus et concedimus quod omnes alie civitates, Edition: current; Page: [241] et burgi, et ville, et portus, habeant omnes libertates et liberas consuetudines suas.

And the city of London shall have all its ancient liberties and free customs, as well by land as by water; furthermore, we decree and grant that all other cities, boroughs, towns, and ports shall have all their liberties and free customs.

A full list of London's liberties and customs would be a long one; and to relate how each of these grew up and was confirmed by the Crown need not be here attempted. The most cherished of the privileges enjoyed in John's day by the citizens were the right to appoint a civic chief, who bore the name of mayor, and the right to choose the sheriffs who should collect the city's firma¹ (or annual rent payable to the exchequer), so as to obviate the intrusion of royal bailiffs. Only a brief account of the way in which the metropolis obtained these privileges is here required.

The chief feature of London before the Norman Conquest seems to have been lack of proper municipal organization. Dr. Stubbs describes the capital during the eleventh century as "a bundle of communities, townships, parishes, and lordships, of which each has its own constitution."² It was thus a collection of small administrative units, rather than one large unit. Some semblance of legal unity was, it is true, afforded by the folk moot, in which the citizens regularly assembled; by its smaller council known as "husteng"; and perhaps also by its "cnihtengild" (if, indeed, this third body be not entirely mythical); while the existence of a "portreeve" shows that for some financial purposes the city was treated as one whole. London, however, prior to the reign of Henry I. was far from possessing the machinery of an efficient municipal government.

The first step towards a constitution is generally supposed to have been taken by the citizens when they obtained a charter from Henry I. in the last years of his reign (1130-35). This is not strictly accurate. London, indeed, by that Edition: current; Page: [242] grant gained valuable privileges; but it did not obtain a constitution. The chief rights actually conferred by Henry were as follows:—(1) The firma was fixed at the reduced rate of £300 per annum, the

citizens obtaining a lease in perpetuity of their own city with the surrounding county of Middlesex — the grant being made to the citizens and their heirs; (2) they acquired the right to appoint the sheriffs of London and Middlesex, implying the exclusion of the King's tax-collectors by men of their own choosing; (3) a similar right of appointing their own nominee as justiciar was also conferred on them, to the exclusion apparently of the royal justices of eyre. Many minor privileges were confirmed which need not here be specified. Mr. J. H. Round¹ argues with convincing force that these concessions, important as they were, did not confer a civic constitution upon London. Henry's charter, in his opinion, confirmed the separate jurisdictions and franchises, perpetuating the old state of disunion, rather than creating a new principle of cohesion. Mr. Round proves, further, that the new concessions were cancelled by Stephen in 1141, when Geoffrey de Mandeville compelled Stephen to appoint him as sheriff and justiciar of London. Earlier in the same year, the citizens had risen against Matilda and tried to establish a sworn Commune, presumably of the continental type.² When London was placed in Earl Geoffrey's hands, all vestige of this would be swept away, along with any of the privileges granted by Henry I. that had endured till then.

Henry II., indeed, granted a charter in 1155, which is usually interpreted as a full confirmation of the concessions of the earlier Henry.³ Mr. Round has proved the error of this opinion.⁴ The charter of 1155 restricted, rather than enlarged, the privileges of London, being couched in cautious and somewhat grudging terms. The main concessions of the earlier charter were omitted: the citizens no longer elected their sheriffs or justiciar; the reduction of the Edition: current; Page: [243] firma to £300 was not confirmed; and subsequent pipe rolls show that Henry doubled that amount.

The next crisis came early in Richard's reign. Then it was, perhaps, that London obtained its municipal constitution. Then also it may have regained the privileges precariously held under Henry I. and Stephen. The form in which the constitution came at last was, Mr. Round argues, borrowed from France, and was neither more nor less than the Commune, so well known on the Continent in the twelfth and thirteenth centuries. Mr. Round¹ has shown that these concessions were not, as has sometimes been supposed, voluntarily granted in 1189 by Richard I., but were extorted from his brother John, when that ambitious prince was bidding for powerful allies to support his claim to act as Regent. London, Mr. Round maintains, got its constitution on 8th October, 1191, under picturesque and memorable circumstances. While Richard tarried in the Holy Land, a scramble took place at home for the right to represent him. The Chancellor Longchamp had been appointed Regent; but John, wily and unscrupulous, ousted him, with the help of the men of London. At the critical moment, the metropolis had offered support on conditions, which included restoration of the short-lived privileges conferred by Henry I., and, in addition, a municipal constitution of the continental type.

Mr. Round, in a notable passage, describes the scene. "When, in the crisis of October, 1191, the administration found itself paralysed by the conflict between John, as the King's brother, and Longchamp, as the King's representative, London, finding that she held the scales, promptly named the 'Commune' as the price of her support. The chronicles of the day enable us to picture to ourselves the scene, as the excited citizens, who had poured forth overnight, with lanterns and torches to welcome John to the capital, streamed together on the morning of the eventful 8th October at the well-known sound of the great bell, swinging out from its campanile in St. Paul's Churchyard. There they heard John take the oath to the 'Commune,' Edition: current; Page: [244] like a French king or lord; and then London, for the first time, had a municipality of her own."¹

For any accurate definition of a Commune we look in vain to contemporary writers. Richard of Devizes² quotes with approval, "Communia est tumor plebis, timor regni, tepor sacerdotii." Some insight has been gained in recent years, however, into its exact nature. A Commune was a town that had obtained recognition as a corporate entity, as a link in the feudal chain, becoming the free vassal of the King or other lord, and itself capable of having subvassals of its own.³ Its chief institutions were a mayor and elective council, generally composed of twenty-four members, some or all of whom were known as *échevins* or *skivini*. Perhaps, the chief peculiarity of the Commune was the method of its formation, namely, by popular association or conspiracy, involving the taking of an oath of a more or less revolutionary nature by the citizens, and its subsequent ratification by those in authority. It is generally admitted that these communes, though revolutionary in origin, were not necessarily democratic in their sympathies.

From 1191 onwards, London was governed by its own mayor, an official chosen by the citizens, but holding office for life, until the citizens obtained a further concession in 1215. It has sometimes been argued that as a mayor was the natural head of a Commune, the continued existence of the one implied the existence of the other. It seems more likely, however, that if a Commune was actually set up in 1191, it did not long survive Richard's return from captivity. Mayors were to be found in the twelfth century ruling over boroughs that were not technically "Communes"; and Richard may have been willing to accept a mayor of London's choosing, while he repudiated the

city's claim to independence as a Commune.

When John became King, he granted three charters to the capital for a gersuma (or slump payment) of 3000 Edition: current; Page: [245] marks.¹ All franchises specified in the charter of Henry I. were confirmed, with one exception: the liberty to appoint a justiciar of their own, now seen to be inconsistent with the Crown's centralizing policy, was abandoned. None of these charters made mention of mayor or commune, but they confirmed some minor privileges gained in Richard's reign.²

A fourth charter, dated 20th March, 1201, was of temporary interest. The fifth and last of the series came in the crisis of 1215, and some light is possibly shed on it by comparison with the petition of nine articles already mentioned,³ which seems to represent the demands made by the Londoners at that date. Besides exemption from arbitrary tallage and several minor concessions, they demanded the control of Thames, the annual election of their mayor in the folkmoot, freedom of access for foreign traders, and the right to distrain for debt against the persons and property of debtors.

Some of these demands were granted by John's fifth charter, dated 9th May, 1215, some five weeks previous to Magna Charter, and representing the bait thrown by John to gain their support in this new crisis as he had gained it in the earlier crisis of 1191. The men of London obtained the right to appoint a mayor annually, and, if they chose, to depose him at the year's end and appoint another in his place, a right which Miss Norgate aptly calls "the crowning privilege of a fully constituted municipality."⁴ The charter at the same time confirms all liberties already enjoyed, "as well within London as without, as well on water as on land, *salva nobis chamberlengia nostra.*" The control of Thames and Medway, mentioned with more particularity in Magna Carta, seems to be here granted; while the freedom of access of foreign merchants is qualified Edition: current; Page: [246] by John's reservation of the right to take toll from them by appropriating such of their choicest wares as his chamberlain might select for the royal household.¹

If the nine articles contain London's demands in 1215, the Charter of 9th May gives what John was willing to promise in return for the city's support; and the *Articuli Baronum* what the barons compelled him to grant to the city after it had preferred their alliance to his; while Magna Carta shows some slight modifications in the King's favour.

Such was the London whose privileges were confirmed by chapter 13 of Magna Carta in words that avoided details and confined themselves to a general confirmation of ancient "liberties and free customs."² Neither mayor nor Commune is mentioned; but the question has been raised whether by implication the Great Charter does not recognize the existence of one or both of these.

As the charter of 9th May had granted to London the right to elect a mayor, and as the mayor was appointed one of the 25 executors under chapter 61, it is clear that Magna Carta accepted that magistrate as head of the city's government; and the recognition of a mayor has sometimes been held to suggest also the recognition of a Commune. Professor Adams, on the other hand, has based an argument for the existence of a Commune after June, 1215, mainly upon the omission of the word tallage from chapter 12, which thus makes it possible to infer that an auxilium is the only imposition to be lawfully levied on London.³ He seeks to show, further, that London lost this status of a Commune in 1216, when the charter was reissued without the chapter associating London with the payment of auxilium: "this clause was omitted, and with it London's legal right to a Commune fell to the ground."⁴

Edition: current; Page: [247]

It is pertinent to note, however, that the Patent Rolls for 1221¹ refer to "the mayor and Commune of London." If this implies the existence of a real Commune of the continental type, the date of its final abolition may possibly have been the year following, when London quarrelled with the young King's ministers and had difficulty in making peace.² On the whole, it must be left an open question whether or not the privileges granted to London in 1215 included the establishment of a Commune, and, if so, when that form of municipal government came to an end.

In this chapter of John's Magna Carta (in contrast with the last clause of chapter 12), London did not stand alone. "All other cities, boroughs, towns and ports" were confirmed in their liberties and free customs. A specification of these was, of course, impossible; each borough was left to prove its privileges as best it might. In the reissues of Henry, London shared the distinction of being mentioned by name with "the barons of the Cinque ports," who from their wealth, their situation, and their fleet, were allies worth conciliating. They played, indeed, a prominent part in the decisive naval victory gained by Hubert de Burgh on 24th August, 1217.³

Among the most cherished privileges claimed by the chartered boroughs were the rights to exact tolls and to place oppressive restrictions upon rival traders not members of their guilds, foreigners and denizens alike. The general confirmation of privileges in this chapter has been held to contradict chapter 41, which grants protection and immunities to foreign merchants.⁴ The inconsistency, however, is perhaps greater in appearance than reality, since the later chapter aimed at abolition of “evil customs” inflicted by the King, not of those inflicted by the boroughs. At the same time, any favour shown to aliens would be bitterly resented by English traders. If the charter had been put in force in its integrity, the more specific privileges in favour of foreign merchants would have prevailed in Edition: current; Page: [248] opposition to the vague confirmation of borough “liberties,” wherever the two conflicted.¹

Other portions of John’s Great Charter that specially affected Londoners were the last clause of chapter 12, and chapters 33 and 41; while many of the privileges granted or confirmed in other chapters were shared by them.

CHAPTER FOURTEEN.

Et ad habendum commune consilium regni, de auxilio assidendo aliter quam in tribus casibus predictis, vel de scutagio assidendo, summoneri faciemus archiepiscopos, episcopos, abbates, comites, et majores barones, sigillatim per litteras nostras; et preterea faciemus summoneri in generali, per vicecomites et ballivos nostros, omnes illos qui de nobis tenent in capite; ad certum diem, scilicet ad terminum quadraginta dierum ad minus, et ad certum locum; et in omnibus litteris illius summonicionis causam summonicionis exprimemus; et sic facta summonicione negocium ad diem assignatum procedat secundum consilium illorum qui presentes fuerint, quamvis non omnes summoniti venerint.

And for obtaining the common counsel of the kingdom anent the assessing of an aid (except in the three cases aforesaid) or of a scutage, we will cause to be summoned the archbishops, bishops, abbots, earls, and greater barons, severally by our letters; and we will moreover cause to be summoned generally, through our sheriffs and bailiffs, all others who hold of us in chief, for a fixed date, namely, after the expiry of at least forty days, and at a fixed place; and in all letters of such summons we will specify the reason of the summons. And when the summons has thus been made, the business shall proceed on the day appointed, according to the counsel of such as are present, although not all who were summoned have come.

This chapter, which has no equivalent among the Articles of the Barons, appears here incidentally: it would never have found a place in Magna Carta but for the need of machinery to give effect to chapter 12.²

Edition: current; Page: [249]

As chapter 12 is frequently supposed to enunciate a general doctrine of taxation, so this one is cited as enunciating a doctrine of parliamentary representation; while the close connection between the chapters is taken as evidence that the framers of Magna Carta had grasped the essentially modern principle that taxation and representation ought always to go together.¹ In this view, the barons at Runnymede are given credit for anticipating the best features of modern parliamentary government. The text, however, will scarcely bear so liberal an interpretation.² Vital points of difference between the principles of Magna Carta and the modern doctrine of representation are revealed by analysis.

Under chapter 12, scutages and extraordinary aids could only be levied “with common counsel of our kingdom,” and now chapter 14 fixes authoritatively the composition of an assembly charged with this function. The same Latin words which signify joint “consent” or counsel came to signify also the “Common Council,” afterwards of vital constitutional importance, continuing under a new name the old curia regis, and passing in turn into the modern Parliament. The duties and constitutional importance of this commune concilium may be considered under six heads.

I.: Nature of the Summons.

Formal writs had to be issued, specifying the time, place, and reason of assembling, at least forty days in advance. Each of the really powerful men of the realm—archbishops, bishops, abbots, earls, and “other greater barons”—received a separate writ addressed to him individually, while the “smaller barons” were summoned collectively and indirectly through the sheriffs and bailiffs of each district.

II.: Composition of the Council.

It is clear that the meetings contemplated were purely baronial assemblies, since none but Crown tenants were invited to attend. "The common consent of my kingdom," in John's mouth, was Edition: current; Page: [250] synonymous with "the consent of my barons."¹ The King's Council had by this time freed itself from any complicated theories as to its own composition, which may ever have hampered it. It was now entirely homogeneous, a feudal muster of Crown-vassals.²

It is unnecessary here to examine the rival theories professing to explain the composition of the Anglo-Saxon Witenagemot, or to discuss the exact connection between that institution and the Curia Regis of the Norman Kings. As matter of fact, the early constitution of the court of the Conqueror or of Rufus seems to have been monarchic rather than aristocratic or democratic; that is to say, it depended to a great extent on the personal will of the King. No evidence exists, of date anterior to the Great Charter, of any magnate thrusting himself unbidden into a royal council or forcing the King to issue a formal invitation. On one occasion, indeed, the action of Henry II. in omitting to issue a writ laid him open to criticism. This was in October, 1164, when a special council was summoned to Northampton to pass judgment upon questions at issue between the King and Thomas à Becket. The primate was ordered to appear for judgment; but the formal writ of summons, which every holder of a barony was wont to receive, was withheld. Apparently, contemporary opinion condemned this omission.³ It is safer to infer, then, that as early as 1164, the method of issuing these writs had Edition: current; Page: [251] become uniform, but this constitutional understanding was not reduced to writing until embodied in Magna Carta. It was in 1215 that the magnates of England formulated a distinct claim to be present at the King's councils; and even then the demand only referred to assemblies summoned for one specific purpose. Previously, attendance was reckoned not as a privilege, but rather as a burden incident to the possession of land.¹

Mr. Round² maintains that under John "the writ of summons suddenly assumed a very real importance," and argues, with much plausibility, that the present chapter proves "that the Crown had been endeavouring to use the writ as a means of excluding its opponents from the assembly." The barons, on their part, unable to assert a right to attend uninvited, "insisted that they all must be summoned."

III.: Position of "Minor Barons."

Crown-tenants varied in power and position from the great earl, who owned the larger share of one or more counties, to the small freeholder with a few hides or acres of his own. A rough division was drawn somewhere in the midst; but the boundary was vague, and this vagueness was probably encouraged by the Crown, whose requirements might vary from time to time.³ The Crown-tenants on one side of this fluctuating line were barones majores; those on the other, barones minores. The distinction had been recognized as early as the days of Henry II.;⁴ but Magna Carta helped to stereotype it, and contributed to the growing tendency to confine the word "baron" to the greater men.⁵ The smaller barons grudged the long journeys and the expense of attending Councils whose decisions they were powerless Edition: current; Page: [252] to influence; and they found a more fitting sphere for their energies in the meetings of the shire. For these reasons, they were prepared to ignore any summonses they might receive. In this respect, in Mr. Round's¹ opinion, the feudal theory "broke down in England."

Three distinct theories have been advanced as to the position occupied by the "minor barons" in the Common Council. (1) The duty of attendance was burdensome on the poorer Crown-tenants. It has been suggested that the device of inviting them by general summons was intended as an intimation that they need not come. This is the view taken by Prof. Medley.² (2) Dr. Hannis Taylor holds an opposite opinion, reading this chapter as an attempt "to rouse the lesser baronage to the exercise of rights which had practically passed into desuetude."³ If such an attempt had really been made, and had succeeded, the result would have been to leave no room for the future introduction of the representative principle into the national council. (3) A third theory holds that the smaller Crown-tenants were called in a representative capacity. A few knights (probably elected for this purpose by their fellows) were expected to attend to represent the others. Dr. Stubbs seems predisposed towards this opinion, although he expresses himself with his usual caution.⁴

It may be suggested, even at the risk of seeming to invent a fourth theory in a series already too numerous, that to the great men who framed the clause it was a matter of supreme indifference whether their humbler fellow-tenants attended or stayed away. The general summons expressed neither an urgent desire for their presence, nor yet an intimation that they were not wanted; but merely conformed with established usage, and left with each "minor baron" the decision whether he should come or stay away. Edition: current; Page: [253] His presence would make little difference upon the deliberations of the magnates.

IV.: Representation.

It is well to hesitate before applying to ancient institutions a word so essentially modern as “representation.” In a sense, the reeve and four best men of every village “represented” their fellows in the county court from an early age; and in a somewhat different sense the feudal lord “represented” his free tenants and villeins in the King’s court; but in neither instance was there anything approaching the definite relation which exists at present between the member of Parliament and his constituents. Magna Carta shows no tendency whatever to adapt this expedient of representation, even in its crudest form, to the composition of the Common Council. The councillors whose summons was enjoined were all of one type, military tenants of the Crown, each of whom was to attend in his own interests not in those of his class, still less of his district or of the community as a whole. The barons, great and small, might be present, each man for himself; but the other contributors to the King’s exchequer were ignored.¹

V.: Powers of the Council.

It was not until long after the days of Magna Carta that Parliament secured the most important of those functions now deemed essential to its existence. No claim was made on behalf of the commune concilium to be consulted in the making of laws or in the performance of administrative duties by the Crown: no effort was made towards formulating any doctrine of ministerial responsibility. This assembly, narrow and aristocratic in composition, had only one right secured to it, a limited control over taxation. Even here, as we Edition: current; Page: [254] have seen, no general claim was put forward. It had no right to control the national purse: the barons merely protected their own individual pockets against an increase of feudal burdens. A modern Magna Carta would have contained a careful list of the powers and privileges of “the common council of the realm.”¹

It would, indeed, have been an evil thing for England, if this narrow baronial assembly had established a claim to tax the important classes of the community, townsmen and vassals of mesne lords, who were totally unrepresented in it. Doubtless, it would have been ready enough to substitute, if it could, a scheme of taxation that relieved Crown-tenants of the burden of scutages and aids, at the expense of their humbler neighbours.

VI.: Rights of Majorities and Minorities.

The medieval conception of solidarity was defective; the King’s council acted too much like a fortuitous gathering of unrelated individuals, and too little like a recognized organ of the body politic. “No new exactions without consent of the individual taxed” was nearer the ideals of 1215 than “no taxation without consent of Parliament.” Each “baron” was summoned on his own behalf; and it is doubtful how far a dissenting minority could be bound by a decision of the rest. Accordingly, the framers of Magna Carta deemed it necessary to assert what would be too obvious to modern politicians to require assertion—namely, that when the commune concilium had been properly convened, its power to transact business should not be lost because a section of those summoned chose to stay away. “The business shall proceed on the day appointed, according to the advice of such as shall be present, although all that were summoned do not come.” Not all business was competent, however, for the cause of summons had to be mentioned in the writs. If these writs were in order, the Council, so we may presume, had power to impose aids or scutages on those who were absent.²

Edition: current; Page: [255]

Nothing is said, however, as to the validity of a protest made by those who came and expressed disapproval. As the substance of this chapter was observed in practice (though omitted from subsequent confirmations), a precedent of the year 1221 may illustrate the interpretation put upon it by contemporary practice. A Council summoned by William Marshal had consented to a scutage, and the Bishop of Winchester was assessed at 159 marks for his knight’s fees. He refused to pay, on the ground, quite untenable by modern standards, that he had dissented from the grant. The plea was accepted by the Regent, and the exchequer adjudged bishop Peter quit of the payment.¹ The incident shows how far the statesmen of the day were from realizing the principles of modern political theory. They had not yet grasped the conception of a Council endowed with constitutional authority to impose its will on a dissenting minority. Here it was apparently a minority of one.²

From this time forward the Common Council was almost invariably consulted before the Crown attempted to levy such contributions; and sometimes was bold enough to make conditions or to decline payment altogether, the first

instance on record of an outright refusal taking place in a Parliament held at London in January, 1242.³ The barons, in October, 1255, if Matthew Paris has not fallen into error, considered that the provisions of chapters 12 and 14 of John's Magna Carta were still in force, although they had been omitted in the reissues of Henry III. When the King asked a liberal aid in furtherance of his scheme for securing the Crown of Sicily for his son Edmund, those present at the Council deliberately refused, on the ground that some of their peers had not been summoned "according to the tenor of Magna Carta."⁴

Edition: current; Page: [256]

CHAPTER FIFTEEN.

Nos non concedemus de cetero alicui quod capiat auxilium de liberis hominibus suis, nisi ad corpus suum redimendum, et ad faciendum primogenitum filium suum militem, et ad primogenitam filiam suam semel maritandam, et ad hec non fiat nisi racionabile auxilium.

We will not for the future grant to any one licence to take an aid from his own free tenants, except to ransom his body, to make his eldest son a knight, and once to marry his eldest daughter; and on each of these occasions there shall be levied only a reasonable aid.

This chapter confers on the tenants of mesne lords protection similar to that already conferred on Crown-tenants: money is no longer to be extorted arbitrarily by their lords.¹ Different machinery, however, had here to be adopted, since the expedient of chapter 12 ("the common counsel of the realm") was inapplicable.

I.: Points of difference between tenants-in-chief and under-tenants.

Tenants of mesne lords were in some respects better off than tenants of the King,² but in others their position was worse. Not only had they to satisfy demands of their own lord for "aids," but part of every burden laid by the King upon that lord's shoulders was transferred to theirs. In seeking to protect under-tenants, Magna Carta looked, not to the common council, but to the King. No mesne lord could compel his tenants to contribute to his necessities without written licence from the Crown; and the Crown was now forbidden to issue such licences except upon the usual three occasions.³ Edition: current; Page: [257] Contrast this procedure with that which affected Crown-tenants:—

(1) While chapter 12 had spoken of "aids and scutages," this one speaks of "aids" alone. The omission can be readily explained: a mesne lord in England had no admitted right of private war, and was debarred from demanding scutage upon his own initiative. He might, indeed, allocate upon his freeholders part of any scutage which the Crown had taken from him; but the barons who framed the Charter had no intention to renounce so just a right. The restriction of this clause to "aids" was thus intentional.

(2) It would have been absurd to require "the common counsel of the realm" for every aid paid by the freeholders of a manor. The embryo Parliament had no time for petty local affairs; and the present chapter makes no such suggestion. Some substitute had, however, to be found. A natural expedient would have been to compel the mesne lord, who wished an aid, to take "the common consent" of the freeholders of his manor, assembled in court baron, as in a local Parliament. This course was sometimes followed. Henry Tracey, for example, in 1235 (although armed with a royal writ), convened his Devonshire knights and obtained their consent to an aid of 20s. per fee on his daughter's marriage.¹ No such obligation, however, had been placed on mesne lords by Magna Carta, which had sought a practical substitute for "the common counsel of the realm" in a different direction.

(3) A check upon such exactions was sought, not in the court baron, but in the need for a royal licence. The necessity for this may at first have been a practical, rather than a legal, one; for executive power lay with the officers of the Crown alone, and the sheriff gave his services only at the King's command.² The Crown thus exercised what Edition: current; Page: [258] was virtually a power of veto over all aids taken by mesne lords. Such a right, conscientiously used, would have placed an effectual restraint on their rapacity. John, however, sold writs to every needy lord who proposed to enrich himself at his tenants' expense. Magna Carta forbade the two tyrants thus to combine against sub-tenants, enunciating a hard-and-fast rule which, if duly observed, would have struck at the root of the grievance: no writ could be lawfully issued except on the three well-known occasions.

II.: The Influence of Magna Carta upon later Practice.

This chapter, along with chapters 12 and 14, was discarded by Henry III.; and little difference, if any, can be traced between the practices that prevailed before and after 1215. Mesne lords invariably asked the Crown's help to collect their aids. They could not legally distraint their freeholders, except through the sheriff, and this was, in part at least, a result of Magna Carta.¹

Henry III., however, disregarded the rule which forbade the licensing of extraordinary aids. Like his ancestors, he was prepared to grant writs on almost any plausible pretext. From the Patent and Close Rolls, as well as from other sources, illustrations of the Crown's earlier and later practice can readily be collected:

(1): Scutages.

In 1217, for example, Henry granted permission to all Crown tenants who had served in person to collect scutage from their knights.²

(2): Ordinary Aids.

(a) John in 1204 authorized the collection of "an effectual aid" from the knights and freeholders Edition: current; Page: [259] of the Constable of Chester for the ransom of their lord.¹ (b) A royal writ in 1235 allowed Henry Tracey, as already mentioned, to take an aid for his daughter's marriage.

(3): Special Aids.

(a) When a fine of sixty marks was incurred in 1206 by the Abbot of Peterborough, John allowed him to distraint his under-tenants.² (b) An heir, paying relief, might likewise take reasonable contributions from freeholders.³ (c) The lord's debts were frequently paid by his tenants. The returns to the Inquest of 1170 contain particulars of "sums given individually by some forty burgesses of Castle Rising towards paying off the mortgages of their lord, the Earl of Arundel, who was clearly in the hands of the Jews"⁴ while in 1234 the Earl of Oxford and the Prior of Lewes each obtained a letter patent distraining tenants to contribute to discharge their debts.⁵ Evidence is thus preserved that Henry III. took full advantage of the omission from his own charters of this part of his father's promises. He did not question the justice of such writs, if good fees were paid. His letters authorized the taking of a "reasonable" aid, without hinting at any mode of determining what that was. This is illustrated by the procedure adopted by Henry Tracey in 1235, when he debated with his assembled knights of Devonshire the amount to be paid as "reasonable," and finally accepted 20s. per fee.⁶ This same mesne lord, however, twelve years later, obtained a writ bidding the sheriff of Somerset assist him to collect "the scutage of Gascony" at 40s. per fee.⁷

The first Statute of Westminster virtually reverted to the rule laid down in 1215, for its terms imply that aids could only be taken on the three well-known occasions. Only Edition: current; Page: [260] 20s. could be taken from a knight's fee and an equal sum from land held in socage of the annual value of £20. No aid for a knighthood could be taken before a son was 15 years of age, or for a marriage until a daughter was 7.

CHAPTER SIXTEEN.

Nullus distringatur ad faciendum majus servicium de feodo militis, nec de alio libero tenemento, quam inde debetur.

No one shall be distrained for performance of greater service for a knight's fee, or for any other free tenement, than is due therefrom.

For military tenants, the transition from scutage to service was a natural one. John declared that no freeholder should be constrained to do more service for his lands than he was legally bound to do. Disputes might arise, however, as to what extent of service actually was due in each particular case, and Magna Carta did nothing to remove such ambiguities. The difficulties of definition, indeed, were enormous, since the duration and conditions of service might vary widely, in consequence of special exemptions or special burdens which appeared in title deeds or rested upon immemorial usage. The barons could not enter on so intricate and laborious a task.

One grievance may have been specially in their minds. They had frequently objected to serve abroad, particularly during John's campaigns in Poitou.¹ To force them to serve in the south of France, or to fine them for staying at

home, was, they may well have argued, to distrain them ad faciendum majus servicium de feodo militis quam inde debetur. When they inserted these words in the Charter, they doubtless regarded them as a prohibition of compulsory service in Poitou, at all events.² The clause was Edition: current; Page: [261] wide enough, however, to include minor grievances. The barons did not confine its provisions to military service, but extended it to other forms of freehold tenure (“nec de alio libero tenemento”). No freeholder, whether in socage, serjeanty, or frankalmoin, could in future be compelled to render services not legally due.

If the barons thought they had thus settled the vexed questions connected with foreign service, they deceived themselves. Although this chapter (unlike those dealing with scutage) remained in all subsequent confirmations, it was far from preventing disputes. Yet the disputants in future reigns occupied somewhat different ground. From the days of William I. to those of Charles II., when the feudal system was abolished, quarrels frequently arose, the most famous of which, in 1297, led to Edward’s unseemly wrangle with his hereditary Constable and Marshal, who refused to embark for Gascony except in attendance on the King’s person.¹

It has been shown in the Introduction² how the obligations of a military tenant fell naturally into three groups (services, incidents, and aids), while a fourth group (scutages) was added when the Crown commuted military service for its equivalent in money. Feudal grievances may be arranged in four corresponding groups, each redressed by special clauses of Magna Carta: abuse of aids by chapters 12, 14, and 15; of feudal incidents, by chapters 2 to 8; of scutage, by chapters 12 and 14; and of service, by the present chapter.

CHAPTER SEVENTEEN.

Communia placita non sequantur curiam nostram sed teneantur in aliquo loco certo.

Common pleas shall not follow our court, but shall be held in some fixed place.

Edition: current; Page: [262]

An attempt was here made to render royal justice cheaper and more accessible. Law-suits in which the Crown had no special interest, common pleas, were to be held in some pre-appointed spot, and no longer to follow the King from place to place. The full extent of this boon will be better appreciated after a short consideration of the method of dispensing justice adopted by Henry II. and his sons.

I.: The Curia Regis as a Court of Law.

The evil complained of was a characteristically medieval one, and arose from the fact that all departments of government were centred in the King’s household. This Curia Regis, indeed, united in itself the functions of the modern Cabinet, of the administrative departments (such as the Home Office, the Foreign Office, and the Admiralty), and of the various legal tribunals. It was the parent inter alia of the Court at St. James’s and the courts at Westminster. Nothing could be done outside of the royal household, and that household never tarried long in any one spot. Everything was focussed to one point, but to a point constantly in motion. Wherever the King went, there the Curia Regis, with all its departments, went also. The entire machinery of royal justice followed Henry II., as he passed, sometimes on the impulse of the moment, from one of his favourite hunting seats to another. Crowds thronged after him in hot pursuit, since it was difficult to transact business of moment elsewhere.

This meant intolerable delay, annoyance, and expense. The case of Richard of Anesty is often cited in illustration. His own account is a graphic record of his journeyings in search of justice, throughout a period of five years, during which he visited in the King’s wake most parts of England, Normandy, Aquitaine, and Anjou. The plaintiff, although ultimately successful, paid dearly for his legal triumph. Reduced to borrow from the Jews to meet enormous outlays, mostly travelling expenses, he had to discharge his debts with accumulations of interest at the ruinous rate of 86 $\frac{2}{3}$ per cent.¹

II.: Common Pleas and Royal Pleas.

Long before 1215, Edition: current; Page: [263] litigations conducted before the King’s courts had come to be divided roughly into two classes, according as the royal interests were or were not specially affected by the issue. Those on one side of this fluctuating line were known as royal pleas, or “pleas of the Crown,” provisions for holding which are

contained in chapter 24, those on the other side as ordinary or “common pleas,” to which alone the present chapter refers. As these ordinary suits did not require to be determined in the royal presence, it was possible to appoint a bench of judges to sit permanently in some fixed spot, selected to suit the convenience of litigants. No town was named in Magna Carta; but Westminster, even then the natural home of law, was probably intended from the first. It is Westminster that Sir Frederick Pollock has in mind when he writes: “We may also say that Magna Carta gave England a capital.”¹ The barons in 1215, in asking this reform, were not insisting on any startling innovation, but demanding merely the observance of a rule long recognized. During most of John’s reign, a court did sit at Westminster dispensing justice, with more or less regularity; and there most “common pleas” were tried, unless John ordered otherwise.² Magna Carta confirmed the understanding that “common pleas” should not dance attendance on the King, though it did not name any one fixed place where they should be tried.³

III.: Influences of Magna Carta on genesis of Courts of Common Law.

The ultimate consequences of this reform reached further than was foreseen. Intended to remove a practical grievance, it had important effects on the development of the English Constitution. By securing for common pleas a permanent home, it gave an impetus to Edition: current; Page: [264] the disintegrating tendencies already at work within the many-sided household of the King. It helped forward the cleavage destined to divide completely the future Courts of Westminster from the Court of St. James’s and from Downing Street. Nor was this all: the special treatment accorded to “common pleas” emphasized the distinction between them and royal pleas, and so contributed to the splitting up of the same Curia Regis, on its judicial side, into two distinct tribunals. One little group of judges were set apart for hearing common pleas, and known as “the King’s Judges of the Bench,” or more briefly as “the Bench,” and at a later date as the Court of Common Pleas. A second group, reserved for royal pleas, became the court Coram Rege, known subsequently as the Court of King’s Bench. There were thus two benches: a common bench for common pleas and a royal bench for pleas of the Crown.¹

The double process, by which these two small courts separated slowly from the parent court and from each other, began long prior to Magna Carta, and was not completed before the close of the thirteenth century. These benches were also closely linked with a third bench, known for centuries as the Court of Exchequer, which was in its origin merely one department of that government bureau, the King’s financial Exchequer in which money was weighed and tested and the royal accounts drawn up. Many disputes or pleas affecting Crown debts had to be there decided, and a group of officials were set aside to try these. These men, called “barons of the exchequer,” formed what was in fact, though not in name, a third bench or court of justice.

All three of the Courts of Common Law were thus offshoots of the King’s household. In theory, each of these ought to have confined itself to a special class of suits—royal pleas, common pleas, and exchequer pleas respectively; but, by a process known to law-courts in all ages, each encroached on the jurisdictions and fees appropriate to the others, until they became, for most purposes, three sister courts of co-ordinate authority. They were bound Edition: current; Page: [265] to decide all suits according to the technical and inflexible rules of common law; and their jurisdiction required a supplement, which was supplied by the genesis of the Court of Chancery, dispensing, not common law, but equity, which professed to give (and, for a short time, actually did give) redress on the merits of each case as it arose, unrestrained by precedents and legal subtleties.

IV.: The Evolution of the Court of Common Pleas.

The comment usually made upon the present chapter is that we have here the origin of the Court of Common Pleas. Now, legal institutions do not spring, full-fledged, into being: the Common Pleas, like its sister Courts of King’s Bench and Exchequer, was the result of a long process of bifurcation from a common stem.

Three stages may be emphasized. (1) The earliest trace of a definite bench, set apart for common pleas, is to be found in 1178. Henry II., returning from Normandy, found that there had been irregularities. To prevent their recurrence, he effected changes, the exact nature of which is matter of dispute. A contemporary writer¹ relates how Henry chose two clerks and three laymen from the officials of his own household, and gave to these five men authority to hear all complaints and to do right “and not to recede from his court.” It was long thought that this marked the origin of the King’s Bench,² but Mr. Pike³ has conclusively proved that the bench thus established was the predecessor, not of the royal bench, but rather of the bench for common pleas.

In 1178, then, these five judges were set apart to hear ordinary suits; but they were specially directed not to leave

Henry's court; so that common pleas still "followed the King," even ordinary litigants in non-royal pleas having to pursue the King in quest of justice as he passed from place to place in quest of sport or business.

It must not be supposed that the arrangement thus made Edition: current; Page: [266] settled the practice for the whole period of thirty-seven years preceding the grant of Magna Carta. On the contrary, it was merely one of many experiments tried by that restless reformer, Henry of Anjou; and the separate bench then instituted may have been pulled down and set up again many times. It had probably, at best, a fitful and intermittent existence. There is evidence, however, that some such court did exist and did try common pleas in the reigns of Richard and John.¹ On the other hand, this tribunal had in John's reign ceased to follow the King's movements habitually, and established itself at Westminster.² It was in 1215 considered an abuse for John to try a common plea elsewhere.

(2) Magna Carta, in 1215, gave authoritative sanction to this understanding, and thus marks a stage in the evolution of the Court of Common Pleas.³ Ordinary pleas were no longer to follow the King.⁴ Young Henry renewed this promise, and his minority favoured its strict observance: a mere boy could not make progresses through the land dispensing justice as he went. Accordingly, all pleas continued for some twenty years to be heard at Westminster. The same circumstance may have temporarily arrested the process of cleavage between the two benches.

(3) About 1234, Henry began to follow the precedent, set by his ancestors, of moving through his realm with judges in his train. While one group went with him, another remained at Westminster: some method of allocating business had therefore to be found. Common pleas, in accordance with Magna Carta, remained stationary; while pleas of the Crown went on their travels. The split between the two benches now became absolute: from the Edition: current; Page: [267] year 1234, two continuous series of distinct rolls can be traced, known respectively as rotuli placitorum coram rege and rotuli placitorum de banco. If any date in the history of one law court, which is in process of becoming two, can be reckoned as marking the point of separation, it should be that at which separate rolls appear. The court's memory lies in its records, which are thus closely associated with its identity. The common bench and the royal bench had become distinct.¹ While Henry and his justices sat in judgment at Worcester, in 1238, a litigant protested against his suit being tried before them. It was a "common plea" and therefore, he argued, ought not to follow the King, in violation of Magna Carta. At Westminster only, not at Worcester or elsewhere, could his case be heard.²

With royal pleas it was different: for long they continued to follow the King's person without any protest being raised; and the Court of King's Bench did not finally settle at Westminster for nearly a century after the Court of Common Pleas had been established there. It is doubtful whether, even in 1258, a separate royal bench had been constituted.³ So late as 1300, Edward I. ordained, by the Articuli super cartas, that "the Justices of his Bench" (as well as his Chancellor) should follow him, so that he might have at all times near him "some sages of the law, which be able duly to order all such matters as shall come into the Court at all times when need shall require."⁴ The matters here referred to were royal pleas: common pleas were tried at Westminster.

V.: Common Pleas and the Exchequer.

Records speak of the curia regis meeting for legal business ad scaccarium (that is, in the room where the business of the Exchequer of Accounts was normally transacted) long before the genesis of a separate Court of Exchequer.⁵

Formal sessions of the Exchequer for auditing the Edition: current; Page: [268] Sheriffs' accounts could only be held at Westminster, where the necessary apparatus was kept; but "the Exchequer," using that elastic word in a somewhat different sense, with much of its impedimenta of writs and tallies, would accompany the King on his progresses through the realm. In 1210, for example, the Exchequer was at Northampton; in 1266, at St. Paul's; in 1277, at Shrewsbury; and in 1299, at York.¹

Now, the Exchequer, when it sat as a Court of law, was ever willing—for a consideration—to place its potent procedure, devised for the King's use, at the disposal of private creditors, treating "common pleas" as "exchequer pleas." Ordinary debtors, summoned to answer for their debts before the barones scaccarii were subjected to more rapid pressure than they would have experienced elsewhere. Debtors were thus as anxious to escape the jurisdiction of the Exchequer, as creditors were to invite it.

Both before and after Magna Carta, it would appear that common pleas were sometimes tried at sessions of the Exchequer, held not only at Westminster but also during its wanderings in the King's train. It was natural enough that defendants who found themselves hustled by the stringent Exchequer process should seek shelter under the present

chapter of the Great Charter. That they did so is proved by the words of the *Articuli super Cartas* of 1300, which declared that no common pleas should henceforth be held in the Exchequer “contrary to the form of the Great Charter.”²

The implication of this clause of the statute of 1300 has sometimes been accepted literally.³ *Magna Carta*, however, Edition: current; Page: [269] in set terms at least, contains no such prohibition. If the present chapter excludes common pleas from the jurisdiction of a travelling Exchequer equally as from that of a travelling King’s bench, its words cannot be so stretched as to apply to normal sessions of the Exchequer held at Westminster. The *Articuli super Cartas*, however, attempted what the Charter of 1215 did not. After 1300 it was clearly illegal to hold any pleas in the Exchequer, unless such as affected the Crown and its ministers. Subsequent statutes confirmed this; but their plain intention was always defeated by the ingenious use of legal fictions and the connivance of the barons of Exchequer, who welcomed the increase of fees that kept pace with the increase of business.¹

CHAPTER EIGHTEEN.

Recogniciones de nova disseisina, de morte antecessoris, et de ultima presentacione, non capiantur nisi in suis comitatibus et hoc modo; nos, vel si extra regnum fuerimus, capitalis justiciarius noster, mitemus duos justiciarios per unumquemque comitatum per quatuor vices in anno, qui, cum quatuor militibus cujuslibet comitatus electis per comitatum, capiant in comitatu et in die et loco comitatus assisas predictas.

Inquests of novel disseisin, of mort d’ancestor, and of darrein presentment, shall not be held elsewhere than in their own Edition: current; Page: [270] country—courts,¹ and that in manner following,— We, or, if we should be out of the realm, our chief justiciar, will send two justiciars through every county four times a year, who shall, along with four knights of the county chosen by the county, hold the said assizes in the county court, on the day and in the place of meeting of that court.

Provision is here made for holding before the King’s travelling justices, frequently and in a convenient manner, three species of judicial inquests known as “petty assizes.” These are of exceptional interest from their connection with the genesis of trial by jury and the Justices of Assize.

I.: The Curia Regis and the travelling Justices.

From an early date, certainly from the accession of Henry I., it was the Crown’s practice to supplement the labours of its officials at the royal exchequer by the occasional despatch of chosen individuals to inspect the provinces, collecting information and revenue, and, incidentally, hearing lawsuits. Justice was thus dispensed in the King’s name by his delegates in every shire of England, and a distinction arose between two types of royal courts: (1) the King’s Council and its offshoots (including the three courts of common law and the court of chancery), which at first followed the King’s person, but gradually, as already shown,² found a settled home at Westminster; and (2) the courts of the itinerant justices which exercised such delegated authority as the Crown chose from time to time to entrust to them. The sphere of labour of these commissioners, as they passed from district to district, was the court of each shire, convened to meet them. They formed, in this way, a link between the old local popular courts and the system of royal justice. These travelling justices were of two types, Justices in Eyre and Justices of Assize respectively.

(a) The Justices in Eyre were the earliest form of travelling judges, though their original duties were rather financial and administrative, than strictly judicial. Their Edition: current; Page: [271] history extends from Henry I. to the end of the fourteenth century.¹ Their outstanding characteristics were the sweeping nature of their commissions (*ad omnia placita*), the harsh and drastic way in which they used their authority, and their intense unpopularity. Their advent was dreaded like a pestilence: each district visited was left impoverished by fines and penalties. On one occasion, the men of Cornwall “from fear of their coming, fled to the woods.”² An eyre was only resorted to at long intervals—seven years came to be the recognized term—and was a method of punishing delinquencies and miscarriages of justice and of collecting royal dues. It was not a visit from these hated Justices of Eyre that the barons in 1215 desired to have four times a year.

(b) The Justices of Assize also were travelling judges, but in their original form at least, possessed hardly another feature in common with the Justices in Eyre. Their history extends from a period not earlier than the reign of Henry II. down to the present day.³ They seem to have been popular from the first, as they used a speedy and rational procedure; while the scope of their jurisdiction, although extended as their popularity increased, was limited by the

terms of their commissions. They were regarded, not as royal tax-gatherers armed with harsh powers of coercion, but as welcome bearers of justice to the doors of those who needed it.

At first their duties were confined to enquiries of the kind mentioned in the text, known as “assizes”; and the new species of travelling judges were hence called “Justices of Assize,” a name that has clung to them for centuries, although their jurisdiction has been gradually increased till it now includes both civil and criminal pleas of every description, and although meanwhile the invention of new forms of process has superseded the old “assizes,” and at Edition: current; Page: [272] last necessitated their total abolition.¹ They are still “justices of assize” in an age which knows nothing of the old assizes.

II.: Nature and Origin of the Petty Assizes.

The institution of the “assizes”—particular forms of the sworn inquest—occupied a prominent place among the expedients by which Henry II. hoped to substitute a more rational procedure for the form of proof known as trial by combat.²

The duellum, introduced at the Norman Conquest, remained for a century the chief method in use among the upper classes for determining serious litigations. Gradually, however, it was confined to two groups of pleas, one civil and the other criminal: appeals of treason and felony on the one hand, and suits to determine title to land on the other.³ The process of restriction was carried further by Henry II., who provided for the defendant or accused party, wherever possible, an option to trial by battle. Under chapter 36 will be explained the expedient adopted for evading combat in criminal cases. The present chapter relates to certain important groups of civil pleas,⁴ namely, the three Petty Assizes, the frequent use of which was now insisted on, although the Grand Assize was still viewed askance, for reasons to be explained in connection with chapter 34.

Edition: current; Page: [273]

(1): The Grand Assize

is not mentioned in Magna Carta; but some acquaintance with it is necessary to an appreciation of the Petty Assizes. In the troubled reign of Stephen, lands changed hands frequently: there was hardly an important estate in England to which, at Henry’s accession, two or more rival magnates did not lay claim. Constant litigations resulted, and the only legal method of deciding the issue was the duellum.

Henry II. introduced a startling innovation. The actual holder of a property de facto, when challenged to combat by a rival claimant, was allowed an option: he might force the claimant (if the latter persisted) to refer the matter to the oath of twelve knights of the neighbourhood. Henry’s ordinance provided for the appointment of these recognitors. Four leading knights of the county were first to be chosen, on whom was placed the duty of selecting twelve knights of the particular district where the lands lay, and these, with all due solemnity and in presence of the King’s justiciars, declared upon oath to which suitor the lands belonged. Their decision was final, and determined the question of ownership for all time.¹ The name Grand Assize was applied alike to the procedure and to the knights who gave the verdict.

The procedure was slow; many formalities and possibilities of delay intervened, involving expensive journeys to the central Curia, first by the four appointing knights and afterwards by the twelve appointed. Months and even years might elapse before the final verdict was obtained. To lighten these hardships in comparatively unimportant cases, the Capitula of 1194 authorized Justices of Eyre to hold Grand Assizes where the lands did not exceed £5 in annual value.²

Normally, however, this procedure was for the King’s central Curia, neither for county court nor yet for baronial jurisdictions. For one thing, only magnates with wide Edition: current; Page: [274] demesnes were likely to command the attendance of twelve knights (or even of twelve freeholders) from their own territories. In combination with the rule given by Glanvill,¹ that no plea concerning title to land could be commenced in any court without royal writ, and with the use made by the King of the writ praecipe,² the Grand Assize, while superseding trial by battle, became also an expedient for curtailing the jurisdiction of mesne lords. It is easy to understand why (unlike the petty assizes) it never became popular with the magnates.

Valuable boon as was the option to substitute the verdict of twelve knights for the duellum in questions of title to land, the reform had one obvious weak point: the option conferred might sometimes be usurped by the wrong man, if a turbulent claimant took the law into his own hands, evicted the holder by the rude method of self-help, and thereafter claimed the protection of Henry's ordinance. In such a case the man of violence—the holder mala fide—would enjoy the option intended for his innocent victim.

(2): The petty assizes

may, perhaps, have been the outcome of Henry's determination to prevent misuse of his new engine of justice.³ If a demandant alleged that the present possessor had usurped his place by violence, the King allowed the preliminary plea thus raised to be summarily decided by the oath of twelve local landowners, according to a procedure known as a petty assize. These petty assizes, of which three are here mentioned, related to questions of "possession," as opposed to "ownership."

(a) Novel disseisin. The word "seisin," originally synonymous with "possession" in general, was gradually restricted by medieval lawyers to the possession of real estate. "Disseisin" thus meant the interruption of seisin Edition: current; Page: [275] (or possession) of land; and was the technical term applied to violent acts of eviction. "Novel" implies that such ejection was of recent date; for a summary remedy could be given only where there had not been undue delay in applying for it.¹

The first of the petty assizes, then, was a rapid and peaceable method of ascertaining, by reference to sworn local testimony, whether an alleged recent eviction had really taken place or not. Without any of the law's delays, without any expensive journeys to the King's Court or to Westminster, but quickly and in the district where the lands lay, twelve local gentlemen determined upon oath all allegations of this nature. If the recognitors of the petty assize answered "Yes," then the evicted man would have "seisin" immediately restored to him, and along with "seisin" went the valued option of determining what proof should decide the "ownership,"—whether it should be battle or the Grand Assize. An ordinance instituting this most famous of the three petty assizes was issued probably in 1166, a year fertile in legal expedients.

(b) Mort d'ancestor. The protection afforded to the victim of "disseisin" did not remove all possibility of justice miscarrying; interested parties, other than the man ejected, were unprotected. An heir might be deprived of his tenement by his lord or by some rival claimant before he had an opportunity to take possession; never having been "in seisin," he could not plead that he had been disseised. For the benefit of such an heir, a second petty assize, known as "mort d'ancestor," was invented.² This is mentioned in article 4 of the Assize of Northampton, issued in 1176, where procedure, essentially similar to, though not quite so speedy as that already described, was put at the heir's disposal. If successful, he took the lands temporarily, subject to all defects in his ancestor's title, leaving as before the question Edition: current; Page: [276] of absolute ownership to be determined (if challenged) by the more cumbrous machinery of the Grand Assize.

(c) Darrein presentment. Advowson (or the right of appointing to a vacant church) was then, as now, a species of real estate. Such patronage was highly prized, affording a living for a younger son or needy relative; or it might be converted into cash. Disputes often arose as to possession and ownership of advowsons. Any one who claimed the absolute property, as against the holder, must offer battle, as in the case of any other form of real estate; and the Charter says nothing on this head.¹

The less vital question of possession was more rapidly determined: if a benefice fell vacant, and two proprietors claimed the patronage, the Church could not remain without a shepherd until the question was decided.² No; the man in possession was allowed to make the appointment. But who was the man in possession? Clearly he who had (or whose father had) presented a nominee to the living when the last vacancy occurred. Here, however, there might be a dispute as to facts. Twelve local men decided which claimant had made the last appointment (the "darrein presentment"); and the claimant thus preferred filled up vacancies, until ousted by battle or the Grand Assize.

All three forms of petty assize were merely new applications of the royal procedure known in England, since the Norman Conquest, as *inquisitio* or *recognitio*.³

III.: Aims of Magna Carta.

If the petty assizes were objects of suspicion when first invented by Henry II., public opinion, half a century later, had vindicated their wisdom. The insurgent barons in 1215 were far from demanding their abolition; their new grievance was rather that sessions Edition: current; Page: [277] of assize were not held often enough. In prescribing the way in which these assizes must be held, several points were emphasized:—(1) No inquiry of the kind was to be held elsewhere than in the county where the property was situated. This was intended to meet the convenience of litigants, of those who served on assizes, and of all concerned.¹ Within two years it was seen that this provision went too far. It was more convenient to hold certain inquiries before the Bench at Westminster, and the reissue of 1217 made two modifications: (a) Assizes of darrein presentment were thereafter to be taken before “the Justices of the Bench”; (b) any novel disseisin or mort d’ancestor, revealing points of special difficulty, might also be reserved for the decision of the Bench. An element of uncertainty was thus introduced, of which the Crown took advantage. In a reported case of the year 1221, it was decided that an assize of mort d’ancestor should be held in its own county, not at Westminster.²

(2) John’s Charter further insists on quarterly circuits of Justices of Assize; so that litigants in every county of England might have four opportunities each year of having their disputes thus settled. Such frequency involved expense and labour out of proportion to the good effected. The Charter of 1217, accordingly, provided that circuits should be made only once a year. In 1285, however, it was enacted that they might be held three times a year, but not oftener.³

(3) The Charter regulates the composition of the tribunal. Two justices appointed by the King (or by his chief justiciar) are directed to hold the assizes, along with four knights of the shire. The bench of six thus combines Edition: current; Page: [278] representatives of the Curia with local landowners. No mention is made of the twelve recognitors: nor was this necessary, as their functions and status were well known in 1215, and their verdict formed the essential feature of the procedure.¹ Chapter 19 provides that the classes, from whom recognitors had to be selected, should attend in sufficient numbers “for the efficient making of judgments.”

(4) The four knights were to be “elected” by the county court (quatuor militibus . . . electis per comitatum).² and emphasis has been laid on this provision by historians searching for ancient prototypes of modern institutions. These knights have been incautiously welcomed as county magistrates elected on a more or less extended suffrage.³

As the provisions of the reissue of 1217 are more carelessly expressed, and as in particular they contain no word implying “election,” it is sometimes assumed that a change was intended; that a step tentatively taken towards representative local government in 1215 was deliberately retraced two years later.⁴ “Electus,” however, in medieval Latin was a vague word, differing widely from the ideas usually associated with a modern “election,” and applied indiscriminately to all methods of appointment or selection, even to the proceedings of officers engaged by Edward I. to compel the impressment of soldiers. The twelve knights were to be “appointed,” not “elected,” in the county court; and it remains doubtful whether the sheriff, the magnates, or the body of the suitors, would have the chief share in the appointment. No evidence is forthcoming that any importance was attached in 1217 to the word “electus,” and its omission may have been due to inadvertence.

Edition: current; Page: [279]

IV.: Effects of Magna Carta.

The stipulations of the Great Charter were not strictly followed in practice. It was not the custom under Henry III. for the Crown to grant general commissions to hold petty assizes. On the contrary, each litigant was left to make separate application to the King, who would then assign a justice by letters patent to preside over that one particular plea. Hundreds of such commissions might be issued in one year, and recognitors were separately summoned for each one of these. In 1258 the Petition of the Barons (c. 19) complained of this, and an attempt was made at organization. The Statute of Westminster II. (c. 30) ordained that two sworn justices should be assigned, before whom and none others assizes of Novel Disseisin and Mort d’ancestor (along with attaints) should be taken. They were to go on circuit three times a year, and to associate with themselves one or more of the discreetest knights of each county—instructions which fall short of the stipulations of Magna Carta.¹

V.: An Erroneous View.

Hallam, commenting on this chapter, seems to have misapprehended the issues at stake. “This clause stood opposed on the one hand to the encroachments of the King’s court, which might otherwise, by drawing pleas of land to itself,

have defeated the suitor's right to a jury from the vicinage: and, on the other, to those of the feudal aristocracy, who hated any interference of the Crown to chastise their violations of law, or control their own jurisdiction." ² Hallam thus interprets the chapter as denoting a triumph of the old local popular courts over both the King's courts and the courts of the feudal magnates. It denoted no such thing, but marked in reality a triumph (so far as it went) of the King's courts over the tribunals of the feudal magnates—courts baron, as they were afterwards called. The assizes, it is true, were to be taken in the county court, but they were to be taken there by the King's justices. The county courts by this time had fallen completely under the King's domination, and were to all intents and purposes royal courts. The present chapter is thus conclusive evidence of the triumph of the King's justice, which was the best article in the market, and, in spite of all defects, deserved the popularity it had won.

VI.: Later History of the Justices of Assize.

Whatever may have been the exact date when there first went on tour throughout England travelling judges entitled to the description of "Justices of Assize," such circuits, once instituted, continued to be held at more or less regular intervals from the beginning of the thirteenth century to the present day. Their jurisdiction steadily widened under successive kings, from Henry II. to Edward III.; and they gradually superseded the older Justices of Eyre, taking over such functions as were not inconsistent with the change from the medieval to the modern system of justice. ¹

For centuries it was customary for the Crown to issue to the justices of each new circuit several commissions, each conferring jurisdiction over a different class of pleas. Founding on the authority of Sir Francis Bacon, historians have been wont to enumerate five distinct commissions. ²

(1) The commission of assize, already discussed, allowed them to hold petty assizes, but not (in the normal case) the grand assize. ³

(2) Commission of Nisi Prius. Under Statute Westminster II. c. 30, the sheriff was directed to summon jurors to Westminster "unless at an earlier date" (nisi prius) the justices of assize should happen to arrive in the county in question. This was interpreted as creating a jurisdiction in the justices of assize to try all non-criminal pleas of the county—a jurisdiction afterwards known as "nisi prius." Thereafter, any such plea, whether begun in King's Bench or Common Pleas, might be determined locally in its appropriate shire as well as at Westminster. According to the opinion generally received, a separate commission of "nisi prius" was issued to each group of justices of assize, but it has recently been urged that no separate commission was required, the one jurisdiction being merely incidental to the other. ¹

(3) The commission of gaol delivery was, subsequently to 1299, conferred on the justices of assize, in accordance with a statute of that year, ² authorizing them to inspect all gaols and enquire into all charges against prisoners, and to set free those unjustly detained. Previously, similar powers had been spasmodically conferred on separate commissioners, who had too often abused their authority.

(4) Commissions of Oyer and Terminer, issued spasmodically from as early a date as 1285, ³ to more or less responsible individuals, were from 1329 onwards conferred exclusively on the justices of assize, who thus obtained authority ⁴ "to hear and determine" all criminal pleas pending in the counties they visited. This, combined with the commission of gaol delivery, amounted to a full jurisdiction over crimes and criminals of every kind and degree; just as the commission of assize (with or without an added commission of nisi prius) conferred full jurisdiction over civil pleas. ⁵

(5) In the generally received opinion, a fifth commission was invariably issued to the justices, in the form of a special commission of the peace, from the reign of Edward III. onwards. ⁶

Edition: current; Page: [282]

The justices of assize, from the small beginnings referred to in John's Great Charter, thus gathered to themselves the powers exercised originally by various sets of commissioners. They have continued for many centuries to perform the functions conferred by these various commissions, and form a characteristic part of the judicial system of England.

CHAPTER NINETEEN.

Et si in die comitatus assise predicte capi non possint, tot milites et libere tenentes remaneant de illis qui interfuerint comitatui die illo, per quos possint iudicia sufficienter fieri, secundum quod negocium fuerit majus vel minus.

And if any of the said assizes cannot be taken on the day of the county court, let there remain of the knights and freeholders, who were present at the county court on that day, as many as may be required for the efficient making of judgments, according as the business be more or less.

This supplement to the preceding chapter prescribed the course to be followed when press of business prevented some of the assizes on the agenda from being disposed of on the court day. The shiremoot lasted for one day only, and to hold an adjourned session of all the suitors would inflict hardship on those whose presence was required elsewhere. The framers of the charter here sought to provide for the presence of a sufficient supply of recognitors, without insisting on the continued attendance of the whole body of suitors. They were doing their best to give effect to two requirements of the *Articuli Baronum* not readily reconcilable, namely, that only those actually required as recognitors should be summoned (article 8); and that assizes should be “shortened” (article 13), implying the presence of sufficient recognitors for a rapid despatch of business.

The terms of *Magna Carta* made it clear that assizes in the normal case should be held in the county court—a point upon which the Articles had been silent. This was a salutary provision, since a healthy publicity accompanied Edition: current; Page: [283] the proceedings of the shiremoot. If there was more business than could be got through in one day, a compromise must be made between the claims of litigants wishing their pleas hastened and the desire of other people to be discharged from further attendance. The justices were directed to complete their labours on the morrow, but were forbidden to retain anyone in attendance except the actual parties to suits and a sufficient number of jurors. Those whom *Magna Carta* thus compelled to wait a second day were exactly those whose presence the Articles had required upon the first day. The discrepancy between the two documents might be explained on the supposition that the device of synchronizing the visit of the justices with the date of holding the monthly shiremoot was only thought of after the Articles of the Barons had been sealed.¹

The Charter of 1217 made a different provision for the same contingency. Unfinished assizes need no longer be taken in their own county on the day following the county court, nor, indeed, on any other day. The judges received full authority to bring them to a conclusion elsewhere on their circuit according as it might suit their convenience. This concession to the justices, taken in connection with the further provisions of 1217, reserving all *darrein presentments*, together with other assizes of any difficulty, for the decision of the bench, shows a comparative disregard of the convenience of jurors, who might, in the option of the justices, find themselves compelled either to follow the assizes from shire to shire, or else to undertake the irksome journey to Westminster, from which the Charter of 1215 had relieved them.²

Edition: current; Page: [284]

CHAPTER TWENTY.

Liber homo non amercietur pro parvo delicto, nisi secundum modum delicti; et pro magno delicto amercietur secundum magnitudinem delicti, salvo contenemento suo; et mercator eodem modo, salva mercandisa sua; et villanus eodem modo amercietur salvo waynagio suo, si inciderint in misericordiam nostram; et nulla predictarum misericordiarum ponatur, nisi per sacramentum proborum hominum de visneto.

A freeman shall not be amerced for a slight offence, except in accordance with the degree of the offence; and for a grave offence he shall be amerced in accordance with the gravity of the offence, yet saving always his “contentment”; and a merchant in the same way, saving his “merchandise”; and a villein shall be amerced in the same way, saving his “wainage”—if they have fallen into our mercy: and none of the aforesaid ameracements shall be imposed except by the oath of honest men of the neighbourhood.

This is the first of three chapters that seek to remedy abuses connected with royal ameracements. To understand what these were requires some knowledge, not only of the system of legal procedure of which they formed part, but also of previous systems.

I.: Three stages of criminal law.

The efforts made in medieval England to devise machinery for suppressing crime took various forms. Three periods may be distinguished.

(1): The bloodfeud.

The earliest method of redressing wrongs was retaliation, or the bloodfeud. The injured man, or his heir, took the law into his own hands and exacted satisfaction by the aid of battle-axe or spear.

Edition: current; Page: [285]

(2): Fixed money-payments.

At some early, but uncertain, date it became customary to accept money in lieu of vengeance. The new practice, at first exceptional, was gradually extended. It was made compulsory to offer solatium in money, and, finally, to accept it when offered. The right of private revenge was lawful only after the aggrieved individual had demanded, and been refused, compensation at the recognized rate. Various codes formulated rules for determining the amounts thus payable. Each man had his money value or wer (from the simple freeman, reckoned at 200 shillings, up to prelates and lay nobles, estimated at much higher figures). Slighter wrongs could be compensated by smaller sums, known as bots: so much for a foot, or an eye, or a tooth. The King or other lord exacted further payments from the wrong-doer, under the name of wites, which are sometimes explained as the price charged by the magistrate for enforcing payment of the wer or bot; sometimes as sums due to the community, on the ground that every evil deed inflicts a wrong on society in general, as well as upon its victim.

(3): Amercements.

A third system succeeded. This is found in working order soon after the Norman Conquest, but was still regarded as an innovation at the accession of Henry I. It is known as the system of amerancements. None of our authorities contains an entirely satisfactory account of how the change took place; but the following suggestions may be hazarded. The sums demanded from a wrong-doer, who wished to buy himself back under protection of the law, became increasingly burdensome. He had to satisfy claims of the victim's family, of the victim's lord, of the lord within whose territory the crime had been committed, of the church, mayhap, whose sanctuary had been invaded, of other lords who could show an interest of any sort, and finally of the King as lord paramount. It became practically impossible to buy back the peace once it had been broken. The Crown, however, stepped in, and offered protection on certain conditions: the culprit surrendered himself and all that he had to the King, placing himself "in misericordiam regis," and delivering a tangible Edition: current; Page: [286] pledge (vadium) as evidence and security of the surrender.¹ Strictly speaking, the man's life and limbs and all that he had were at the King's mercy.² The Crown, however, found that it might defeat its own interests by excessive greed; and generally contented itself with moderate forfeits. Rules of procedure were formulated: the amounts taken were regulated partly by the wealth of the offender, and partly by the gravity of the offence. Further, it became a recognized rule that the amount should be assessed by what was practically a jury of the culprit's neighbours; and attempts were also made to fix a maximum.³

Thus a sort of tariff grew up, which the Crown usually respected in practice, without abandoning the right to demand more. Such payments were known as "amerancements." For petty offences, men were constantly placed "in mercy": for failure to attend meetings of hundred or county; for false or mistaken verdicts; for infringements of forest rights. The Charter of Henry I. (chapter 8) had promised a remedy, drastic indeed but of a reactionary and impossible nature. His promise, to abolish altogether the system of amerancements (then of recent introduction) and to revert to the earlier Anglo-Saxon system of bots and wites, was made only to be broken.⁴

Edition: current; Page: [287]

II.: Magna Carta and Amercements.

No one could expect to pass through life (perhaps hardly through a single year) without being subjected to amerancements.¹ Three chapters of Magna Carta accordingly are occupied with remedies. Chapter 20 seeks to protect the ordinary layman; chapter 21, the barons; and chapter 22, the clergy—thus anticipating the conception of three estates of the realm;—commons, nobles, clergy. The "third estate" is analysed for purposes of this clause, into three

subdivisions—the freeman, the villein, and the merchant.²

(1): Amercement of freeholders.

The great object of the reforms here promised was to eliminate the arbitrary element; the Crown must conform to its own customary rules. With this object, safeguards were devised for freemen. (a) For a slight offence, only a petty sum could be taken. This was nothing new: the records of John's reign show that, both before and after 1215, very small amounts were often taken: threepence was a common sum. (b) For grave offences, a larger sum might be assessed, but not out of proportion to the offence. (c) In no case could the offender be pushed absolutely to the wall: his means of livelihood must be saved to him. Even if all other effects had to be sold off to pay the amount assessed, he was to retain his "contentment," a word to be afterwards discussed. (d) Another clause provided machinery for giving effect to these rules. The amount must be fixed, not arbitrarily by the Crown, but by impartial assessors, "by the oath of honest men of the neighbourhood." In the reissue of 1216 "honest men" became "honest and lawworthy (legalium) men," a purely verbal change.³

Edition: current; Page: [288]

There were apparently two steps in the fixing of ameracements. (a) In the case of a commoner, the penalty under normal circumstances would be assessed provisionally by the King's justices on circuit, with the assistance of the sheriff. It was their duty to see that the amount was proportionate to the gravity of the offence.¹ (b) Thereafter, the sheriff or his serjeants, in full county court, with the assistance of twelve neighbours, taxed the ameracements, reducing them in accordance with their knowledge of the wrong-doer's ability to pay.²

The Pipe Rolls afford illustrations of the practice. In the fourteenth year of Henry II.³ a certain priest (who, in this respect, stood on the same footing as a layman) had been placed "in misericordiam" of 100 marks by William fitz John, one of the King's justices, but that sum was afterwards reduced to 40 marks "per sacramentum vicinorum suorum." It seems a safe inference that, on the priest pleading poverty, the question of his ability to pay was referred to local recognitors with the result stated. This priest was subsequently pardoned altogether "because of his poverty."⁴

Magna Carta in this chapter, treating of the ameracements of freeholders, merchants and villeins, makes no reference to the part played by the King's justices, but only to the functions of the jury of neighbours.⁵ All this is in marked contrast with the provisions of chapter 21, regulating the treatment to be accorded to earls and barons who made default.

(2): Amercement of merchants.

The trader is in the same position as the liber homo, except that it is his "merchandise," not his "contentment," that is protected. The word Edition: current; Page: [289] is capable of two somewhat different shades of meaning. Narrowly interpreted, it may refer to his wares, the stock-in-trade without which the pursuit of his calling would be impossible. More broadly viewed, it might mean his business itself, his position as a merchant. The difference is of little practical import: in either view the Charter saves to him his means of earning a living.¹

Some boroughs, indeed, had anticipated Magna Carta by obtaining in their own charters a definition of the maximum amercement exigible, or in some cases of the amercing body. Thus, John's Charter to Dunwich of 29th June, 1200,² provides that the burgesses shall only be amerced by six men from within the borough, and six men from without. The capital had special privileges: in his Charter to London, Henry I. promised that no citizen in misericordia pecuniae should pay a higher sum than 100s. (the amount of his wer).³ This was confirmed in the Charter of Henry II., who declared "that none shall be adjudged for ameracements of money, but according to the law of the city, which they had in the time of King Henry, my grandfather."⁴ John's Charter to London of 17th June, 1199, also referred to this;⁵ and the general confirmation of customs, contained in chapter 13 of Magna Carta, would further strengthen it. In all probability, the earlier grant covered trivial offences only (such as placed the offender in the King's hands de misericordia pecuniae). The present chapter is wider in its scope, applying to grave offences also, and embracing merchants everywhere, not merely the burgesses of chartered towns.

(3): Amercements of villeins.

The early history of villeins as a class is enveloped in the mists that still surround the rise of the English manor. Notwithstanding the brilliant efforts of Mr. Frederic Seebohm⁶ to find the origin of Edition: current; Page: [290] villeinage in the status of the serfs who worked for Roman masters upon British farms long before the Teutonic immigrations began, an older theory still holds the field, namely, that the abject villeins of Norman days were descendants of free-born “ceorls” of Anglo-Saxon stock. On this theory, most of England was once cultivated by Anglo-Saxon peasant proprietors grouped in little societies, each of which formed an isolated village. These villagers were slowly sinking from their originally free estate during several centuries prior to 1066: but the process of their degradation was completed rapidly and roughly by the Norman conquerors. The once free peasantry were crushed down into the dependent villeins of the eleventh and twelfth centuries.

Whichever theory may be the correct one, the position, economic, legal, and political, of villeins in the thirteenth century has been ascertained with certainty. Economically they were part of the equipment of the manor of their lord, whose fields they had to cultivate as a condition of being left in possession of acres, in a sense, their own. The services exacted, at first vague and undefined, were gradually specified and limited. They varied from century to century, from district to district, and even from manor to manor; but at best the life of the villein was, as a contemporary writer has described it, burdensome and wretched (*graviter et miserabiliter*). After his obligations were discharged, little time was left him for the ploughing and reaping of his own holding. The normal villein possessed his virgate or half virgate (thirty or fifteen scattered acres) under a tenure known as *villanagium*, sharply distinguished from the freeholder’s tenures. He was a dependent dweller on a manor which he dared not quit without his master’s leave.

It is true that he had rights of a proprietary nature in the acres he claimed as his own; yet these were determined, not by the common law of England, but by “the custom of the manor,” or virtually at the will of the lord. These rights, such as they were, could not be pled elsewhere than before the court customary of that manor over which the Edition: current; Page: [291] lord’s steward presided with powers wide and undefined. Politically his position was peculiar: allowed none of the privileges, he was yet expected to perform some of the duties, of the freeman. He attended the shire and hundred courts, and acted on juries, thus suffering still further encroachments on the scanty portion of time he might call his own, but preserving for a brighter day a vague tradition of his earlier liberty.

This chapter extends some measure of protection to villeins. Two questions, however, may be asked:—What measure? and from what motive? One point is clear: the villeins were protected from the abuse of only such amercements as John himself might inflict, not from the amercements of their manorial lords; for the words used are “*si inciderint in misericordiam nostram*.” A villein in the King’s mercy shall enjoy the same consideration as the freeholder or merchant in similar plight—his means of livelihood being saved to him. The word now used is neither “*contenement*” nor “*merchandise*,” but “*waynagium*,” the meaning of which has been the subject of discussion. Coke defined it as “the *contenement* of a villein; or the furniture of his cart or wain,” and Coke has been widely followed. The word, however, has apparently no connexion with wains or wagons, but is merely a Latinized form of the French word “*gagnage*,” of which Godefroy gives five meanings: (a) gain; (b) tillage; (c) crop; (d) land under the plough; (e) grain. Professor Tait is inclined to read the word, in its present context, as equivalent either to “crops” or to “lands under cultivation,” and to translate the clause “saving his tillage.”¹ What was the motive of these restrictions? It is usually Edition: current; Page: [292] supposed to have been clemency, the humane desire not to reduce a poor wretch to absolute beggary. It is possible, however, to imagine a different motive; the villein was the property of his lord, and John must respect the vested interests of others. That the King might do what he pleased with his own property, his demesne villeins, seems clear from a passage usually neglected by commentators, namely, chapter 16 of the reissue of 1217. Four important words were there introduced—*villanus alterius quam noster*: the king was not to inflict crushing amercements on villeins “other than his own,” thus leaving villeins on royal manors unreservedly in his power.¹

It must not be thought, however, that the position of the King’s villeins was worse than that of villeins of an ordinary unroyal manor. On the contrary, it has been clearly shown² that the King’s peasants enjoyed privileges denied to the peasants of other lords. Magna Carta protected a lord’s villeins from the King, not from the lord who owned them. That “great bulwark of the people’s rights” left the bulk of the rural population of England at the mercy of their lords. The King must not take so much from any lord’s villeins as to destroy their usefulness as manorial chattels; that was all.³

(4): The difference between fines and amercements.

In the thirteenth century, these terms were sharply contrasted. “Amercement” was applied to sums imposed in

punishment Edition: current; Page: [293] of misdeeds; the law-breaker had no option of refusing, and no voice in fixing the amount. "Fine," on the contrary, was used for voluntary offerings made to the King to obtain some favour or to escape punishment. Here the initiative rested with the individual, who suggested the amount to be paid, and was, indeed, under no legal obligation to make any offer at all. This distinction between fines and amercements, absolute in theory, could readily be obliterated in practice. The spirit of the restriction placed by this chapter and by the common law upon the King's prerogative of inflicting amercements could often be evaded. The Crown might imprison its victims for an indefinite period, and then graciously allow them to offer large payments to escape death by fever or starvation in a noisome gaol: enormous fines might thus be taken, while royal officials were forbidden to inflict arbitrary amercements.

With the gradual elimination of the voluntary element the word "fine" came to bear its modern meaning, while "amercement" dropped out of ordinary use."¹

(5): Contenement.

This word, which occurs in Glanvill² and in Bracton,³ and also (in its French form) in the Statute of Westminster, I.,⁴ as well as in Magna Carta, has formed a text for many commentators from Coke's days to our own. By comparing the entries from exchequer rolls brought together by Madox,⁵ it appears that to save a man's "contenement" was to leave him sufficient for the sustenance of himself and those dependent on him. The word comes from the French "contenir," and has many shades of meaning, as capacity, maintenance, appearance, social condition or grade. A free man is not to be so crushed by an amercement that he cannot maintain himself in his former condition.⁶ Several entries on Exchequer Rolls of Henry Edition: current; Page: [294] III. and Edward I., collected by Madox,¹ throw light on the way in which a "contenement" might be saved to the man amerced. Thus in 40 Henry III. the officials of the exchequer, after discussing an offender's failure to pay an amercement of 40 marks, ordered inquiry to be made, "how much he was able to pay the King per annum, saving his own sustenance and that of his wife and children," an excerpt which illustrates the more humane side of exchequer procedure. In 14 Edward I. again, the officials of that day, when ferreting out arrears, found that certain poor men of the village of Doddington had not paid their amercements in full. An inquiry was set on foot, and the barons of exchequer were ordered to fix the dates at which the various debtors should discharge their debts (evidently an arrangement for payment by instalments) "salvo contenemento suo."²

These illustrations of the procedure of later reigns, agreeing closely with the rules laid down by the Great Charter, show how a man's contenement might be saved to him without loss to the Crown. Magna Carta apparently desired that time should be granted in which to pay up debts by degrees. Meanwhile, the amerced freeman was not forced to part with what was necessary to maintain him, with his wife and family, in his proper station in life.

Edition: current; Page: [295]

CHAPTER TWENTY-ONE.

Comites et barones non amercientur nisi per pares suos, et non nisi secundum modum delicti.

Earls and barons shall not be amerced except through their peers, and only in accordance with the degree of the offence.

Amercement of earls and barons. It is noteworthy that the *Articuli Baronum* contain no provisions corresponding to this chapter, which forms in one sense a supplement to chapter 20, and in another to chapter 39 of John's Charter. How is the omission from the earlier document to be explained? Was it an oversight? Was the present clause added at Runnymede as an afterthought for the sake of symmetry? Had the barons no personal grievances under this head to redress? Were they too disinterested to urge them? Or was the grievance of so notable a kind and so hard to remedy that they hesitated till the last moment before committing themselves to any form of expression? There is no contemporary evidence on which to base a conclusive answer to these questions; but much may be said for answering the last of them in the affirmative.

The equally natural question as to what the actual words of the Charter stood for in the minds of the barons is also hard to answer. When they mentioned amercement per pares suos, what exactly did they desire? Bracton¹ has a famous gloss on this chapter, in which these words seem at first sight to be replaced by the phrase "et hoc per barones

de scaccario vel coram ipso rege.” Is this to be taken as an honest paraphrase? or does it represent a deliberate attempt by Crown lawyers to pervert the plain words of the Charter to authorize precisely what they had been originally intended to forbid?—to substitute the decision of a small knot of royal officials for that of the community of feudal barons? While the problem is Edition: current; Page: [296] perhaps insoluble, some suggestions may be founded on a consideration of the actual practice before and after 1215.¹

The plea rolls contain no distinct evidence of two stages in the amercement of barons, corresponding to those described in connexion with commoners. It is clear, however, that the justices on circuit had no power to fix the amercements imposed on them: in their case a blank was usually left to be afterwards filled in at the exchequer. “For this purpose, a separate roll or schedule was prepared containing the names of the amerced barons with the offences for which they were penalised, and this was sent to the exchequer with the other estreats.”²

This was the course followed at an eyre held at Hertford in 1198–9: when a list of the amerced was prepared and definite sums were entered after each ordinary offender’s name, blanks were left after the names of Gerard de Furnivall and Reginald de Argenton, each of whom was reserved for special treatment “as a baron,” and as such “to be amerced at the Exchequer for a disseisin.” The Pipe Roll of John’s first year shows that this procedure was carried out.³

Magna Carta, then, had good precedents for insisting that barons ought not to be amerced by the justices of eyre in the course of their circuits; but what exactly did it mean by demanding amercement “by their peers”? In asking amercement per pares suos, were they merely acquiescing in John’s current practice? Did they desire to substitute the decision of a full commune concilium, as defined in chapter 14, for that of the King’s professional justices? Did they merely ask for the presence of a few barons at Edition: current; Page: [297] the exchequer, when one of their own class was being amerced? Or, did they refer to a second stage of procedure in which the amercements of barons should be taxed or reduced by other barons, just as (in the procedure referred to in chapter 20) amercements of commoners were taxed by a jury of neighbours?

If the last query could be answered in the affirmative, a clue would be afforded to the interpretation of Bracton’s gloss:—“Comites vero vel barones non sunt ameraciandi nisi per pares suos et secundum modum delicti et hoc per barones de scaccario vel coram ipso rege.”¹ The words “et hoc” may here refer merely to the first stage in the process, the provisional fixing of the amount at the exchequer secundum modum delicti, while the function of the baron’s “peers” was to “tax” this amount, with reference to the circumstances of the defaulting baron. If this interpretation of Bracton be admissible and if he has accurately paraphrased the substance of this chapter, then the barons were asking no more for themselves than they had already asked for their humble dependents. They were unlikely to ask less.

In the fourteenth century several cases are recorded in the course of which defaulters, in the hope of escaping with smaller payments, protested against being reckoned as barons. Thomas de Furnivall, for example, in the nineteenth year of Edward II. complained that he had been amerced as a baron “to his great damage, and against the law and custom of the realm,” whereas he really held nothing by barony. The King directed the Treasurer and Barons of Exchequer “that if it appeared to them that Thomas was not a baron, nor did hold his land by barony, then they should discharge him of the said imposed amercement; provided that Thomas should be amerced according to the tenor of the great Charter of Liberties,”² that is to say, as a simple freeholder according to the provisions of chapter 20. It is clear that Thomas de Furnivall was confident that a local jury would “tax” him at a lower figure than that fixed by the Exchequer barons. A few Edition: current; Page: [298] years earlier the Abbot of Croyland had made a similar claim, but without success.¹

At a later date, barons and earls were successful in securing by another expedient some measure of immunity from excessive exactions. They had established, prior to the first year of Henry VI., a recognized scale of amercements with which the Crown was expected, in ordinary circumstances, to content itself.² In the reign of Edward VI. a duke was normally amerced at £10, and an earl or a bishop at 100s.³

CHAPTER TWENTY-TWO.

Nullus clericus amercietur de laico tenemento suo, nisi secundum modum aliorum predictorum, et non secundum quantitatem beneficii sui ecclesiastici.

A clerk shall not be amerced in respect of his lay holding except after the manner of the others aforesaid; further, he

shall not be amerced in accordance with the extent of his ecclesiastical benefice.

Amercement of the clergy. The churchman was to receive the same favourable treatment as the layman in all respects, and to enjoy one additional privilege. In proportioning the amercement to his means, no account was to be taken of the value of his “church benefice.” There is room, however, for doubt as to the precise nature of this privilege, which seems to depend for its point on an antithesis between “lay tenement” and “ecclesiastical benefice.”

In a well-known article of the Constitutions of Clarendon Edition: current; Page: [299] (c. 9), a contrast is drawn between *laicum feudum* and *tenementum pertinens ad eleemosinam*. It is possible that Magna Carta means to observe the same distinction between “lay fee” and “frankalmoin,” reckoning the former, but not the latter, in estimating a clerk’s ability to pay amercements.

A more likely interpretation is that the contrast is drawn between lands owned by a clerk absolutely, and lands belonging to the church and held by the clerk in *liferent*. The plausibility of this conjecture is strengthened by alterations, apparently of a purely verbal nature, made in reissues of the Charter. The “*de laico tenemento*” of 1215 was omitted altogether in 1216; and in 1217, the provision took this final form: “*Nulla ecclesiastica persona ameriatur secundum quantitatem beneficii sui ecclesiastici, sed secundum tenementum¹ suum et secundum quantitatem delicti.*” The substitution of ecclesiastical “person”—a word fast acquiring even then a connotation like that of the “parson” of present-day colloquial speech—for “clerk” has no significance, but the main antithesis drawn would seem to be between the “benefice” or mere *liferent* and the “tenement” or fief held in perpetuity. In taxing a clerk’s amercement, no account was to be taken of possessions of which he was not really owner.

CHAPTER TWENTY-THREE.

Nec villa nec homo dstringatur facere pontes ad riparias, nisi qui ab antiquo et de jure facere debent.

No village or individual² shall be compelled to make bridges at river banks, except those who from of old were legally bound to do so.

Edition: current; Page: [300]

The object of this chapter is obvious; to compel the King to desist from his practice of illegally increasing the burden of the obligation to keep in repair all bridges over rivers. John might continue to exact what his ancestors had exacted; but nothing more. So much lies on the surface of the Charter, which explains, however, neither the origin of the obligation nor the reasons that made John keen to enforce it.

I.: Origin of Obligation to make Bridges.

The Norman kings seem to have based their claim to compel their subjects to maintain bridges upon the ancient tripartite obligation¹ (known as the *trinoda necessitas*). Three duties were required of all the men of England in the interests of the commonweal: attendance on the *fyrð* or local militia; the making of roads, so necessary for military purposes; and the repairing of bridges and fortifications. Gradually, as feudal tendencies prevailed, the obligation to construct bridges ceased to be a personal burden upon all freemen, and became a territorial burden.² The present chapter seems to be a particular application of the general principle enunciated in chapter 16. “*Brigbot*” required special treatment because of the prominence into which it had been forced by John.

II.: The King’s interest in the Repair of Bridges.

Part at least of John’s motives for making an oppressive use of this prerogative must be sought in his rights of falconry. Whenever John proposed to ride a-fowling, with his hawk upon his wrist, he issued letters compelling the whole country-side to bestir themselves in the repair of bridges. Several such writs of Henry III. are extant. The exact words vary somewhat, but comparison leaves no room for doubt either as to the nature of the commands conveyed or the reasons for issuing them. Addressed to sheriffs of such counties as the King was likely to visit, these letters Edition: current; Page: [301] gave instructions for repair of bridges, and a prohibition against the taking of birds before the King had enjoyed his sport. Both points are well brought out in a Letter Close of Henry III., dated 26th December, 1234, which directed “all bridges on the rivers Avon, Test, and Itchen to be repaired as was wont in the time of King John, so that when the lord King may come to these parts, free transit shall lie open to him for

‘revaying’ (ad riviandum) upon the said rivers.” The sheriff is to issue a general prohibition against any one attempting to “revaye” along the river banks, previous to the coming of the King.¹ The Latin verb, for which the Old English word “revaye” or “ryvaye” is an exact equivalent, has been the subject of misconception; but conclusive evidence has recently been adduced to prove that it referred to the medieval sport of fowling, that is to the taking of wild birds in sport by means of hawks and falcons.²

These writs prove that the Crown claimed a preferential right to this form of sport along the banks of certain rivers; and these “preserved” rivers were said to be “in defence” (in defenso), a phrase which occurs also in a later chapter of Magna Carta.³

Two distinct hardships were thus imposed by the King’s exercise of his rights of falconry, one negative and the other positive. Between the King’s intimation and his arrival at the indicated rivers, the sport of other people was forbidden, while whole villages had to forsake their ploughs to reconstruct otherwise useless bridges. A wise king would be careful to use such rights so as to inflict a minimum of hardship. John knew no moderation, placing “in defence” not merely a few banks at a time, but many Edition: current; Page: [302] rivers indiscriminately, including those which had never been so treated in his father’s day, and demanding that all bridges everywhere should be repaired, with the object, not so much of indulging a genuine love of sport, as of inflicting heavy ameracements on those who neglected prompt obedience to his commands. Great consternation was aroused when John at Bristol in 1209 prohibited the taking of birds throughout the entire realm of England.¹

Both grievances were redressed by Magna Carta. The present chapter promised not to impose the burden on those from whom it was not legally due.² Chapter 47, in which he agreed to withdraw his interdict from all rivers which had not been previously “in defence,” and to disafforest all forests of his own creation, was entirely omitted in the Charter of 1216;³ but in 1217 it reappeared in a new position and expressed in different words. The provision in the original chapter 47 that related to forests was relegated to the Carta de Foresta, and the other part of that chapter, relating to falconry, was joined to a clause which redressed another grievance growing from the same root. Chapter 19 of Henry III.’s Charter, in its final form, repeats word for word the terms of the present chapter of John, while in chapter 20 Henry proceeds to declare “that no river shall in future be placed in defence except such as were in defence in the time of King Henry, our grandfather, throughout the same places and during the same periods as they were wont in his day.”

This express prohibition seems to have prevented the Crown from extending its prerogatives further in this direction. Yet Henry III. had ample opportunities of harassing his subjects by an inconsiderate use of the rights Edition: current; Page: [303] still left to him. In many cases dubiety existed as to what banks had actually been “preserved” by Henry II., and a vague general command left in cruel uncertainty the district to be visited. Henry III. made important concessions: after the year 1241, he specified the particular river along whose banks he intended to sport, and sometimes announced the exact date at which he expected to arrive. As no writs appear subsequent to 1247, it is possible that he was induced to abstain from the exercise of a right which inflicted hardships out of all proportion to the benefits conferred on the King.¹

The Crown, however, had not renounced its prerogatives, and several writs still exist to show that Edward I. occasionally allowed his great nobles to share in the royal sport. Licences were granted in 1283 to the Earl of Hereford and to Reginald fitz Peter, and in the following year to the Earl of Lincoln. On 6th October, 1373, Edward III. commanded the sheriff of Oxfordshire to declare that all bridges must be repaired and all fords marked out with stakes, for the crossing of the King “with his falcons” during the approaching winter.²

III.: Erroneous Interpretations.

It is not surprising that a pastime so passionately followed as falconry, should have left its traces on two chapters of Magna Carta, the full import of which has not been appreciated by commentators, partly from failure to read them together, but chiefly through the assumption that the words ad riviandum and in defenso referred to fishing rather than to fowling.³

It has been confidently inferred that the framers of Magna Carta, when forbidding additional banks to be put “in defence,” equally as when demanding the removal of “weirs” from non-tidal waters,⁴ intended to preserve public rights of fishing against encroachment. This is an error: in the Middle Ages, fishing was a means of procuring food, not a popular form of sport: to depict John and his action-loving Edition: current; Page: [304] courtiers as exponents

of the gentle art of Isaac Walton is a ridiculous anachronism.

It is true that the value of fish as an article of diet led in time to legislation directed primarily to their protection; but apparently no statute with such a motive was passed previous to 1285.¹ It is further true that in the reign of Edward I. it became usual to describe rivers, over which exclusive rights of fishing had been established by riparian owners, as being in defenso;² but rivers might be “preserved” for more purposes than one.

From Edward’s reign onwards, however, rights of fishing steadily became more valuable, while falconry was superseded by other pastimes. Accordingly a new meaning was sought for provisions of Magna Carta, whose original motive had been forgotten. So early as the year 1283 the words of a petition to the King in Parliament show that “fishing” had been substituted for “hawking,” in interpreting the prohibition referred to in chapter 47 of John’s Charter. The men of York complained that Earl Richard had interfered with their rights of fishing by placing in defenso the rivers Ouse and Yore “against the tenor of Magna Carta.”³ This error, which thus dates from 1283, has been accepted for upwards of five hundred years by all commentators on Magna Carta. The credit for dispelling it is due to Mr. Stuart A. Moore and Mr. H. S. Moore in their *History and Law of Fisheries*, published in 1903.⁴

CHAPTER TWENTY-FOUR.

Nullus vicecomes, constabularius, coronatores, vel alii ballivi nostri, teneant placita corone nostre.

No sheriff, constable, coroners, or others of our bailiffs, shall hold pleas of our Crown.

Edition: current; Page: [305]

The main object of this provision is not open to doubt: men accused of crimes must be tried before the King’s judges and not by local magistrates of whatsoever kind. Innocent men dreaded the jurisdiction of the local tyrants whose harshness had earned widespread hatred. The sheriffs and castellans deserved their bad repute: the records of the age overflow with tales of their cruelties and oppressions. It ought not to be forgotten, however, that if this chapter contains a condemnation of the local administration of justice, it testifies to the comparative purity of the justice dispensed by the King’s own judges. So far there is no difficulty; but differences of opinion exist as to certain points of detail.

I.: Pleas of the Crown.

Pleas were royal or common according as the interests of the Crown were or were not involved. This classification has already been discussed in connection with chapter 17. The present chapter concerns itself only with “pleas of the Crown,” a phrase which had, even in 1215, considerably altered its original meaning. In the eleventh century it had denoted royal business, whether relating to judicial procedure or not, embracing all matters connected with the King’s household or his estates, with the collection of his revenue, or the administration of his justice, civil as well as criminal. Gradually, however, the usage of the word altered in two respects, contracting in one direction, while expanding in another. It ceased to be applied to financial business and even to non-criminal, judicial business, and was reserved for criminal trials held before the King’s judges. This process of contraction had been nearly completed before the accession of John.

A tendency in an opposite direction had been for some time in progress; the distinction drawn in early reigns between petty trespasses, which were left in the province of the sheriff, and grave offences, which alone were worthy of the King’s attention, was being slowly obliterated.¹ The central courts extended their activity over all misdeeds, however trivial, until the whole realm of criminal law fell Edition: current; Page: [306] under the description of “pleas of the Crown.” In John’s reign this process of expansion was far from complete: the words then, indeed, embraced grave criminal offences tried in the King’s great courts, but not the petty offences disposed of in the sheriff’s tourn or elsewhere.¹

North of the Tweed the same phrase has had a different history: in modern Scots law its connotation is still a narrow one; and this is a result of the slow growth of the Scottish Crown in authority and jurisdiction, in notable contrast to the rapidity with which the English Crown attained its zenith. The Kings of Scotland failed to crush their powerful vassals, and pleas of the Scottish Crown, exclusively reserved for the High Court of Justiciary, formed a meagre list—the four heinous crimes of murder, robbery, rape, and arson. The feudal courts of the Scottish nobles long

preserved their wide jurisdiction over all other offences. When the heritable jurisdictions were at last abolished, in 1748, the old distinction, so deeply rooted in Scots law, still remained. The sheriff court had no cognizance, until late in the nineteenth century, over the four crimes specially reserved for the King's judges.² Thus in Scotland the historic phrase "pleas of the Crown" is, even at the present day, confined to murder, robbery, rape, and fire-raising, while to an English lawyer it embraces the entire realm of criminal law.

II.: Keeping and Trying Criminal Pleas.

The machinery for bringing criminals to justice, as organized by Henry II., was somewhat elaborate. For our present purpose, it may be sufficient to emphasize two important stages in the procedure. An interval had always to elapse between the commission of grave crimes and the formal trial of the accused, for the coming of the itinerant justices took place only at intervals of about seven years. Meanwhile, preliminary Edition: current; Page: [307] steps were taken to collect and record evidence, which might otherwise be lost. The magistrate responsible for these preliminary steps was said to "keep" the pleas (custodire placita)—that is, to prevent them from passing out of mind¹ while waiting for the justices who would formally "hold" or "try" or "determine" them (placitare or habere or tenere placita).

Before the reign of John, the two functions had been entrusted to two distinct types of royal officials. The local magistrates of each district "kept" royal pleas, while only the King's justices could "hold" them. The process of differentiation was accelerated in consequence of the jealousy with which the Crown regarded the increasing independence of the sheriffs. The elaborate instructions issued in 1194 to the justices, whom Archbishop Hubert Walter was despatching through the counties, contain provisions intended to keep the pretensions of sheriffs within bounds:² they were expressly forbidden to act as justices within any counties in which they had acted as sheriffs since Richard's coronation.³

It is safe to infer that the "trying" of royal pleas was the province from which the sheriff was thus to be excluded. Even with regard to the "keeping" or preliminary stages of such pleas, the sheriff was by no means left in sole command. The justices received instructions⁴ to cause three knights and one clerk to be chosen in each county as "custodes placitorum coronae." It is possible that these new local officers, specially entrusted with the duty of "keeping" royal pleas, were intended rather to co-operate with, than to supersede, the sheriffs in this function; but, in any view, the sheriffs had no longer a monopoly of authority in their bailiwicks. Magistrates, to be afterwards known as coroners, were thenceforward associated with them in the administration of the county.⁵

Edition: current; Page: [308]

The ordinance of 1194 seems to have settled subsequent practice in both respects. Sheriffs, while still free to punish petty offenders in their half-yearly tourns or circuits, allowed the coroners to "keep" royal pleas, and the justices to "try" them. Public opinion of the day approved both rules. Yet John condoned and encouraged irregularities, allowing sheriffs to meddle with pleas of the Crown, even when no coroners were present to check their arbitrary methods;¹ and allowing them to give final judgments, involving loss of life or limb, without waiting for the Justices.² He employed the same men to visit as justices the very counties they had oppressed as sheriffs. The notorious Engelard of Cigogné, branded by name in chapter 50 of Magna Carta, acted as justice in his own county of Gloucester.³

The Articles of the Barons condemned such practices; and Magna Carta, in this first of a series of clauses directed against sheriffs' misdeeds, forbade them under any circumstances to try royal pleas.

III.: The Intention of Magna Carta.

The barons were merely demanding that the Crown should observe the rules it had laid down for its own guidance: caprice must give way to law. Sheriffs must not usurp the functions of coroners; nor must sheriffs and coroners together usurp those of King's justiciars. John's opponents associated these two irregularities, and may have assumed that expressly to abolish one implied an intention to abolish both. Some such supposition would explain a peculiar discrepancy between the Articles and the Charter. While Article 14 demanded redress of one grievance, Magna Carta granted redress of a different one. The earlier document required that coroners should always be associated with the sheriff when he meddled with pleas of the Crown: the Charter forbade sheriffs and coroners to "try" pleas Edition: current; Page: [309] of this description. These two provisions are the complements of each other. Magna Carta would seem to be here incomplete.

The prohibition against sheriffs trying pleas of the Crown was repeated in all reissues of the Charter; and, although not strictly enforced in Henry's reign, soon became absolute. Thus sheriff Ralph Musard was one of seven justices of eyre who went on circuit in 1221, but he was prohibited from sharing the labours of his colleagues when they sat in Gloucestershire, where he was still sheriff.¹ Under Edward I. no one could determine such pleas unless armed with a royal commission to that effect;² and the commission would take the form either of gaol delivery, of trailbaston, or of oyer and terminer.³

IV.: An Erroneous View.

Hallam misunderstood the object of this provision. Commenting on Henry's Charter of 1225, he declares that the "criminal jurisdiction of the Sheriff is entirely taken away by Magna Carta, c. 17."⁴ This is a mistake: both before and after the granting of the Charter, the sheriff exercised criminal jurisdiction, and that of two kinds. Along with the coroners, he conducted preliminary enquiries even into pleas of the Crown; while in his tourn (which was specially authorized to be held twice a year by chapter 42 of the very Charter quoted by Hallam) he was made responsible for every stage in the trial of trivial offences. He heard indictments and then condemned and punished petty offenders in a summary manner.⁵ Several statutes of later reigns confirmed, even while regulating, the authority of the sheriff to take indictments at his tourns.⁶ until this jurisdiction was transferred, Edition: current; Page: [310] by an act of the fifteenth century, to the justices of peace assembled in Quarter Sessions.¹

All that Magna Carta did was to insist that no sheriff or local magistrate should encroach on the province reserved for the royal justices, namely the final "trying" of such grave crimes as had now come to be recognized as "pleas of the Crown."² The Charter did not even attempt to define what these were, leaving the boundary between great and small offences to be settled by use and wont. In all this, it was simply declaratory of existing practice, making no attempt to draw the line in a new place.³

Professor Hearnshaw⁴ propounds a theory that better fits the facts. He holds that this chapter defined and consolidated the sheriff's authority, giving him a recognized sphere of action of his own: in 1215 "leet jurisdiction came into existence. It was the jurisdiction left by the Great Charter to the sheriff in his tourn," while chapter 42 of the reissue of 1217, forbidding the tourn to be held oftener than twice a year, marked it off "from the ordinary civil jurisdiction of the three-weekly hundred court."

V.: Local Magistrates under John.

The urgent need of restricting the authority of the sheriffs can be abundantly illustrated from contemporary records. Ineffectual attempts had, indeed, been made more than once to restrain their evil practices, as in August, 1213, when directions were issued from the Council of St. Alban's commanding the sheriffs, foresters, and others, to abstain Edition: current; Page: [311] from unjust dealing.¹ and, again, some two months later, when John, at the instance of Nicholas, the papal legate, promised to restrain their violence and illegal exactions.² Little or nothing, however, was effected; and Magna Carta, in addition to condemning specified evils, contained two general provisions: chapter 45, which indicated what type of men should be appointed as Crown officials, and the present chapter, which forbade local magistrates to encroach on the province of the King's justices. These local magistrates are comprehensively described under four different names.³

(1): The Sheriff.

No royal officer was more justly hated than the sheriff. The chapter under discussion affords strong evidence alike of his importance and of the jealousy with which his power was viewed. A brief sketch of the growth of the office is all that is here possible. Long before the Conquest, in each shire of England, the interests, financial and otherwise, of the kings of the house of Wessex had been entrusted to an agent of their own appointing, known as a scir-gerefa (or shire-reeve). These officers were continued by the Norman monarchs with increased powers, under the new name of vice comites.⁴

In England, during the Anglo-Saxon period, the chief power over each group of shires had been shared among three officers—the bishop, the earl, and the sheriff. The bishop, by the natural differentiation of functions, soon confined his labours to spiritual affairs; while the policy of the Conqueror relegated the earl to a position of dignity severed from the possession of real power. Thus the sheriff was left without a rival within his shire. For a period of at least

one hundred years after the Norman Edition: current; Page: [312] Conquest, he wielded an excessive local authority as the sole tyrant of the county. He was not indeed irresponsible, but it was difficult for his victims to obtain the ear of the distant King, who alone was strong enough to punish him.

To appreciate the full authority enjoyed by a sheriff who retained the King's confidence, we must remember the varied nature of his powers. He was not only local magistrate, local tax-gatherer and local judge, but he commanded the troops of his bailiwick. A royal favourite might have several counties and one or more royal strongholds in his custody. The military power of Fawkes de Breauté, for example, must have been enormous, for it embraced the forces of Northampton, Cambridge, Huntingdon, Bedford, Buckingham, and Oxford.¹ How powerful such men had become is shown by their pretensions after King John's death, when they claimed to hold their bailiwicks as matter of right throughout his son's minority. Preposterous as this demand seems, Henry's advisers gave effect to it, when they confirmed the appointment of all John's sheriffs (with the one exception of the notorious Stephen Harengod), thus weakening the central government at a time when it needed all its strength.²

The sheriff, however, had passed the zenith of his power before the reign of John. That King's father had been strong enough to show the disobedient sheriff his proper place, as he did notably in 1170. John, however, had his own reasons for giving a freer hand to the agents of his evil will, foreigners and desperadoes, whose services he rewarded in this way. This recrudescence of the sheriff's powers must be added to the causes contributing to the revolt of 1215.

It has already been explained how in 1194 the sheriff's powers were restricted. To the next year is usually traced the origin of the justices of the peace, who gradually took over the duties of the sheriff, until they practically superseded him as the ruling power in the county. In Tudor Edition: current; Page: [313] days a new rival appeared in the Lord Lieutenant, then first appointed in each shire to represent the Crown in its military capacity. The fall of the sheriff was thus gradual, although finally complete. From presiding, as he did in his golden age, over all the business of the district—financial, administrative, military, and judicial—the sheriff has become, in England at the present day, a mere honorary figure-head of the county executive. A high sheriff is still chosen annually by King George for each county by pricking at random one name out of a list of three leading land-owners presented to him for that purpose. He is responsible, during his year of office, for the execution of all writs of the superior Courts within his county, including the execution of criminals, for returning the names of those elected to serve in the House of Commons, and for many other purposes; but his responsibility is chiefly theoretical. The real duties of his office are now performed by subordinates. What really remains to him is an empty and expensive honour, usually shunned rather than courted. In Scotland and America, the sheriff also exists at the present day, but his position and functions have in these countries developed in very different directions. In Scotland, in opposition to what has happened in England and America, the sheriff has remained emphatically a judicial officer, the judge of the local court of his shire, known as “the Sheriff Court.” He has thus retained intact his judicial functions, to which such administrative duties as still remain to him are subordinate. In the United States of America, on the contrary, the sheriff is a purely executive official, possessing perhaps more real power, but notably less honour and social distinction, than fall to the lot of the English high sheriff. The duties of his office are sometimes performed by him in person; he may even set out at the head of the posse comitatus in pursuit of criminals. Three completely different offices have thus sprung from the same constitutional root, and all three are still known by one name.

(2): The constable.

Portions of certain counties were exempted from the sheriff's bailiwick. Districts afforested Edition: current; Page: [314] were administered by wardens, assisted by verderers, who excluded the sheriff and coroners; while royal fortresses, together with the land immediately surrounding them, were under command of officers known indifferently as castellans or constables.¹ The offices of warden of a particular forest and warden of an adjacent royal castle were frequently conferred on the same individual. Indeed, chapter 16 of the Forest Charter of Henry III. seems to use the term “castellans” as the recognized name of forest wardens, whom it forbids to hold “pleas of the forest.”

The name constable has at different periods been applied to officers of extremely different types. The King's High Constable, a descendant of the horse-thegn of the Anglo-Saxon kings, was originally the member of the royal household responsible for the King's stables. At a later date, he shared with the Earl Marshal the duties of Commander-in-chief. The name of constable came to be applied also to commanders of small bodies of troops, whether in castles or elsewhere. At a later date the word was used in connection with duties of watch and ward: each hundred had its high constable and each village its petty constable in the fourteenth and fifteenth centuries.² The name is at the present day, confined to members of the police force.

The word, as used in Magna Carta, denoted the captain of a royal castle.³ Such an office was one of trust; and wide powers were conferred upon its holder. He acted as gaoler of prisoners confined to the safe-keeping of his dungeons. He had authority, under certain ill-defined restrictions, to take whatever he thought necessary for provisioning the garrison—a privilege the exercise of which frequently led to abuses, guarded against by chapters 28 Edition: current; Page: [315] and 29 of Magna Carta. He had also, to a limited extent, judicial authority. Not only did he try pleas for small debts to which Jews were parties, but he enjoyed a jurisdiction over all petty offences committed within the precincts of the castle, analogous to that of the sheriff within the rest of the county. The power of trying and punishing misdemeanours was not taken away by the Great Charter, and was confirmed by implication in 1300 by a statute which directed that the constable of Dover Castle should not hold, within the castle gate, “foreign” pleas of the county which did not affect “the guard of the castle.”¹ The Articles of 1309 complained that constables of the King’s castles took cognizance of common pleas.² In the reign of Henry IV. complaint was made that constables of castles were appointed justices of the peace, and imprisoned in one capacity the victims they had unjustly condemned in another. This practice was put down by statute in 1403.³

It would appear that at an earlier period the constable of the hundred sometimes acted as deputy-sheriff. Chapter 12 of the Assize of Northampton provided that when the sheriff was absent the nearest castellan might take his place in dealing with a thief who had been arrested. His interference outside his own precincts must, however, have been regarded with great jealousy, and the coroners, after their appointment in 1194, would naturally act as substitutes during the sheriff’s absence.

(3): The coroners.

The coroners of each county, after their institution in 1194, seem to have shared with the sheriff most of the powers of which the latter had previously enjoyed a monopoly. They were appointed by the whole body of freeholders assembled in the county court,⁴ and the nature of their duties is explained by the oath of office Edition: current; Page: [316] sworn in the same words for many centuries, “ad custodienda ea quae pertinent ad coronam.” Their duty was to guard royal interests generally; and their “keeping” of royal pleas was merely one aspect of this wider function. Besides “attaching” those suspected of crimes—that is, receiving formal accusations and taking such sureties as might be necessary, it was their duty to make preliminary investigations; to examine the size and nature of the victim’s wounds in a charge of mayhem;¹ and to keep a watchful eye on royal windfalls, including deodands, wrecks, and treasure-trove. They had also to appraise the value of chattels forfeited to the King. When felons took refuge in sanctuary, it was the coroner who arranged for their leaving the country on forfeiting all that they had. They kept a record of those who had been outlawed, and received “appeals” of criminal charges.²

Magna Carta forbade the coroner to determine pleas of the Crown; but, even after 1215, he sometimes did justice upon felons caught red-handed. An act of Edward I.³ accurately defined his duties, empowering him to attach pleas of the Crown and to present criminals for trial, but forbidding him to proceed further alone.

The coroner’s functions, originally so wide and varied, have been gradually narrowed down, until at the present day the duty usually associated with his office is the holding of inquests on dead bodies where there are suspicious circumstances.⁴ He is still responsible for treasure-trove and he is also competent to act as the sheriff’s substitute in case of illness or absence during the year of office.

(4): The bailiffs.

The mention by name of three classes of local officers is supplemented by the addition of an indefinite word sufficiently wide to cover all grades of Edition: current; Page: [317] Crown officials. The term “bailiff” may be applied to every individual to whom authority of any sort has been delegated by another. It would include the men who actually served writs, or distrained the goods of debtors; and also generally all local officials of every description, holding authority directly or indirectly from the Crown. The district over which his office extended was called his “bailiwick,” a term often applied to the county considered as the sphere of the sheriff’s labours.¹

CHAPTER TWENTY-FIVE.

Omnes comitatus, hundrede, wapentakii, et trethingii, sint ad antiquas firmas absque ullo incremento, exceptis dominicis maneriis nostris.

All counties, hundreds, wapentakes, and trithings (except our demesne manors) shall remain at the old rents, and without any additional payment.

This provision, directed against the sheriffs, shows a determination to get to the root of the disease, instead of merely attacking the symptoms. The rents at which the counties (or parts of them) were farmed out to the sheriffs must no longer be arbitrarily raised, but were to remain at the old figures which had become stereotyped from long usage. To understand how such increases would injuriously affect the inhabitants of the county, some explanation is necessary. Centuries before the Norman Conquest, England had been already mapped out into shires on lines substantially the same as those which still exist. Each county had been subdivided into smaller districts known as “hundreds” in the south, and as “wapentakes” in the Danish districts of the north; while intermediate divisions existed, exceptionally, in some of the large counties such as York and Lincoln, each of which had three “trithings” or ridings.

Edition: current; Page: [318]

In commenting upon chapter 24, it has been explained how the Anglo-Saxon Kings entrusted their interests in each shire to an officer called a sheriff, and how a similar officer under the Norman Kings became the chief magistrate in the county. His financial duties, however, long remained the most important. Even before 1066, the sheriff had ceased to be a mere intermediary, who lifted the King’s rents and paid over, pound by pound, the yearly varying sums he might receive. He had become a firmarius, buying for a yearly rent the right to appropriate to his own uses the revenues of the county. The Crown got the exact sum stipulated for, known as the firma comitatus; while the balance, if any, remained with the sheriff. In plain words, the sheriff speculated in the returns: it was his business, by fair means or foul, to make sure of a handsome surplus.

Authorities differ as to the exact list of items purchased by the firma comitatus; but the two chief sources of revenue were the profits of justice in the local courts, and the rents of royal manors.

William I. sharply raised the farms, and his successors endeavoured, whenever possible, to increase them further. Now, it might seem at first sight that these additional burdens concerned exclusively the Crown and the sheriff, but such was by no means the case. The sheriff took care to pass on the burden to the shoulders of those subject to his authority. His rule tended always to be oppressive, but his unjust exactions would be doubled when the amount of the firma had recently been raised.

Under the vigilant rule of Henry II., some measure of relief was obtained by the shires from the misdeeds of their local tyrants, since that far-seeing King knew that his own best interests called for curtailment of the sheriffs’ pretensions. He punished their excesses and deprived them of office. John, on the contrary, appointed men of a less reputable type, and gave them rope. In return, he wrung more money from them. Not content with exacting the annual firma and the additional sum known as “increment,” which had now become stereotyped as a fixed and recognized Edition: current; Page: [319] payment,¹ John from 1207 onwards exacted a third payment under name of proficuum, and allowed his sheriffs to inflict new severities to recoup themselves for their additional outlay.

Magna Carta made no attempt to abolish the practice of farming out the shires, but forbade alike the increase of the farm and the exaction of proficuum. The barons here made an innovation which was unfair to John. If it benefited the men of the counties in dealing with their sheriffs, it gave the sheriffs an undeserved advantage over the exchequer. The total value of the various assets included in the firma comitatus had greatly increased in the past, and would probably continue to increase in the future. Therefore, it was unfair to bind the Crown by a hard-and-fast rule which would practically make a present of this future “unearned increment” to the sheriff. To stereotype the firma was to rob the Crown, which required increased revenues to meet the increased cost of its expanding duties.²

Although this chapter was omitted from all reissues, the Crown, during Henry III.’s minority, forbore to exact the proficuum, reverting to the practice prior to the seventh year of his father’s reign. After he had been declared of age, however, increased sums were again taken.³ There was, indeed, no valid reason why the unearned increment should go to the sheriff rather than to the King: it was sufficient to provide against the fixing of the amounts too high. The Articuli super cartas, accordingly, while conceding to the counties the right of electing their own sheriffs, declared that neither the bailiwicks and hundreds Edition: current; Page: [320] of the King, nor those of great lords ought to be put to farm at too high rates. The evil, however, continued under a new form; sheriffs, while only paying a moderate farm themselves, sublet parts of their province at much higher rates, thus appropriating the increment denied to the exchequer, while the bailiffs who had paid the increase could not “levy the said ferm without doing extortion and duress to the people.”¹ Three successive acts prohibited this practice, declaring that hundreds and wapentakes must

either be kept in the sheriff's own hands, or sublet, if at all, at the old fixed farms only.²

One exception to the scope of its own provisions was deliberately made by Magna Carta—an exception of an important and notable nature; the demesne manors of the Crown were left exposed to arbitrary increases of their annual rents. Now, the chief items contained in the firma were, as already explained, the rents of these manors and the profits of the local courts. It would thus appear, in the light of this exception, that the aim of Magna Carta was to prevent an increase under the second head—to prevent, that is, the local courts being made the instruments of extortion; and this apparently was the precise object of chapter 42 of the reissue of 1217.

That chapter struck at one of the most fertile of the sheriffs' expedients for swelling the profits of their office. It was their practice to summon the various district courts with unnecessary frequency and at inconvenient times and places, fining every suitor who failed to attend. The Charter of 1217 reaffirmed the ancient usage³: no county court should meet in future oftener than once a month; no sheriff or bailiff should make his "tourn" through the hundreds oftener than twice a year, to wit at Easter and Michaelmas, and that only at the accustomed place; view of frankpledge should only be held once a year at Michaelmas, and the sheriff must not seek "occasions," but content Edition: current; Page: [321] himself with what he was wont to get for taking his "view" under Henry II.; all liberties must be respected; and any district in which the courts meet by custom less frequently than is normal, shall have the benefit of such exceptional local usage.¹

In a curious case² that came before the justices in 1226, this clause was pleaded as a defence against a charge of impeding the sheriff of Lincoln in the performance of his duties of holding "counties," "thethings" (or courts of ridings), and wapentakes: the sheriff, against custom, was holding county courts oftener than once in five weeks and for more than one day at a time, and was holding a wapentake in Ancaster oftener than twice a year, and not according to the charter of liberty.

In another plea (1231)³ juries testify that since the making of "carta de Runemed" (here evidently used for the Charter of 1217) the sheriff has come into the hundred twice instead of once a year (as the old custom was) to take view of frankpledge and to make attachments of pleas of the Crown.

After 1217, in absence of express royal grant or prescription to the contrary, the rule formulated in Henry's second reissue of Magna Carta fixed the times of holding the "tourn" of the sheriff, and this was extended also to the "leet" jurisdiction, which in the liberties took the place of the tourn.⁴

CHAPTER TWENTY-SIX.

Si aliquis tenens de nobis laicum feodum moriatur, et vicecomes vel ballivus noster ostendat litteras nostras patentes de summonicione nostra de debito quod defunctus nobis debuit, liceat vicecomiti vel ballivo nostro attachiare, et inbreviare catalla defuncti, inventa in laico feodo, ad Edition: current; Page: [322] valenciam illius debiti, per visum legalium hominum, ita tamen quod nichil inde amoveatur, donec persolvatur nobis debitum quod clarum fuerit; et residuum relinquatur executoribus ad faciendum testamentum defuncti; et, si nichil nobis debeatur ab ipso, omnia catalla cedant defuncto, salvis uxori ipsius et pueris rationabilibus partibus suis.

If any one holding of us a lay fief shall die, and our sheriff or bailiff shall exhibit our letters patent of summons for a debt which the deceased owed to us, it shall be lawful for our sheriff or bailiff to attach and catalogue chattels of the deceased, found upon the lay fief, to the value of that debt, at the sight of law-worthy men, provided always that nothing whatever be thence removed until the debt which is evident¹ shall be fully paid to us; and the residue shall be left to the executors to fulfil the will of the deceased; and if there be nothing due from him to us, all the chattels shall go to the deceased, saving to his wife and children their reasonable shares.

The primary object of this chapter was to regulate the procedure to be followed in attaching the personal estates of Crown tenants who were also Crown debtors. Incidentally, it throws light on the right of bequeathing property.

I.: Nature of the Grievance.

When a Crown tenant died it was almost certain that arrears of scutages, incidents, or other exactions remained unpaid. The sheriff and bailiffs of the district, where deceased's estates lay, were in the habit of seizing everything they could find on his manors, under excuse of securing the interests of their royal master. They attached and sold

chattels out of all proportion to the sum actually due. A surplus would often remain in the sheriff's hands, which he refused to disgorge.

Magna Carta sought to make such irregularities impossible, by defining the procedure to be followed. The sheriff and his bailiffs were forbidden to touch a single chattel of a deceased Crown tenant, unless they came armed with legal warrant in the form of royal letters patent vouching the existence and the amount of the Crown debt. The officers of the law were allowed to attach only as many chattels as might reasonably be expected to satisfy the debt due to the exchequer; and everything so taken must be carefully Edition: current; Page: [323] inventoried. All this was to be done "at the sight of lawful men," respectable, if humble, neighbours specially summoned for that purpose, whose function it was to form a check on the actions of the sheriff's officers, to prevent them from appropriating anything not included in the inventory, to assist in valuing each article and to see that no more chattels were distrained than necessary. A saving clause protected the interests of the Crown by forbidding the removal from the tenant's fief of any chattels, even those not so attached, until the full ascertained amount had been paid to the exchequer. Not till then could a division take place among the deceased man's relatives or legatees.

These provisions should be read in connection with chapter 9,¹ which provided that diligence for Crown debts must proceed against personal estate before the debtor's freehold was distrained, and laid down other equitable rules applicable alike to a deceased Crown debtor and to a living one.

II.: The Right to Bequeath.

The main interest of this chapter, for the historian of law and institutions, lies in a different direction; in the light thrown on the right of making Wills in 1215. The early law of England had difficulty in deciding how far it ought to acknowledge the claims made by owners of property, both real and personal, to direct its destination after death. Various influences were at work, prior to the Norman Conquest, to make the development of this branch of law illogical and capricious.² Of the law of bequests in the twelfth century it is possible to speak with greater certainty; definite principles had by that time received recognition. All testamentary rights over land or other real estate were then denied, not, as has sometimes been maintained, in the interests of the feudal lord, but rather of the expectant heir.³ Many reasons contributed to this result. For one thing, it had become necessary to prevent churchmen from using their spiritual Edition: current; Page: [324] influence to wring bequests from dying men to the impoverishment of the heir. Churchmen, in compensation as it were for the obstacles thus opposed to their thirst for the land of the dying, ultimately, but not before the reign of Henry III., made good their claim to regulate all Wills dealing with personal estate; that is money, goods, and chattels.

Under Henry II. no such right had been admitted. The Assize of Northampton (1176) directed that heirs should divide the chattels according to the provisions made in the Will, without any reference to the supervision of the bishop or his clergy. Glanvill twice gives a writ directing the sheriff to uphold the Will of a testator; but no trace of any similar writ appears in the Registers of the early years of Henry III.: "the state has had to retreat before the church."¹

This victory of the ecclesiastical courts was probably won shortly after 1215. John's Charter makes no admission of any right of the church in the "proving" of Wills; but it does admit (in chapter 27) the church's right to "superintend" the division of the goods of intestates, an insidious privilege, which was used as a lever during the minority of Henry (a ward of Holy See), and thus helped to give the courts Christian an excuse for deciding also as to the validity of Wills. It was apparently in John's reign that the practice of appointing executors to carry out the Will of the deceased became general. Henry II. in his own case had entrusted this duty to individuals whom he named, but did not describe as "executors," a word, however, used in its technical sense in King John's Will.²

John claimed that his subjects could not make valid Wills without his consent, which had, as usual, to be paid for. Such, at least, is the inference to be drawn from the existence of writs granting licences to make a Will, or confirming one that had been made.³ The King's interference Edition: current; Page: [325] in this province seems to have been regarded as an illegal encroachment.

Magna Carta declares that all the chattels (or the residue after paying Crown debts) "shall go to the deceased" for "the executors to fulfil the will of the deceased," but immediately adds the saving clause, that "all the chattels" means only what remains after deducting the "reasonable shares" of wife and children. This seems to exclude, by implication, the King's right to interfere on the plea that he had not licensed a Will, while it keeps alive an ancient rule that a testator could only dispose of part of his pecunia (or personal estate), his widow and children having absolute claims to the

rest.

The Charter did not define these “reasonable shares”; but custom had already fixed them at the same proportions of the whole as the law of Scotland observes at the present day. When a Scotsman dies, leaving wife and children, his movable or personal estate falls into three equal parts, known respectively as the widow’s part (or *jus relictae*), the “bairns’ ” part (or *legitim*, the *legitima portio* of the Roman law), and “the dead’s part.”¹ If he attempts to dispose of his entire estate, wife and children may claim their legal rights, and “break the Will.” Where a wife survives, but no children (or a child and no wife), the division is into two equal portions. Magna Carta recognizes a similar division; and we know from Glanvill that, if the dead man’s Will had attempted to defeat the just claims of wife or children, the writ *de rationabili parte bonorum* would give them relief.²

The conception of a “dead’s part” or portion to be dispensed in charity and good works for the benefit of the deceased’s soul was, of course, in great measure due to the influence of the church, which was not unwilling to stimulate the belief that one of the best methods of affecting this was to leave money to itself. Under Henry III. the bishop of the diocese made good his claim to “prove” Wills (that Edition: current; Page: [326] is to determine whether they were valid), and to control the “executors” in carrying out the dead man’s instructions. Where the testator’s intentions were ambiguous, the “ordinary” would see to it that deceased’s soul did not suffer through giving too little to the church.

The reissue of 1216 makes no alteration on this chapter of John’s Charter: that of 1217 omits “*et pueris*,” probably through a clerical blunder, for the words were restored in 1225. As mere disuse does not abrogate an English statute, this provision remained in force until repealed by implication by the Wills Act of 1837.¹

Long subsequent to the thirteenth century, the laws of England and Scotland as to the rights of succession of wife and children seem to have remained identical: but, while Scots law is unaltered to the present day, English law has, by slow steps, the details of which are obscure, entirely changed. The rule that acknowledged the children’s right to one third of the personal estate was gradually relaxed, while the testator became sole judge what provision he ought to make for his sons, until at last a purely nominal sum of money was all that was required. The law of England, at the present day, does not compel a father to leave son or daughter even the proverbial shilling. The phrase “to cut off a son with a shilling,” which still lives in popular usage, may perpetuate the tradition of an intermediate stage of English law, where some provision, however inadequate, had to be made, if the Will was to be allowed to stand.

CHAPTER TWENTY–SEVEN.

Si aliquis liber homo intestatus decesserit, catalla sua per manus propinquorum parentum et amicorum suorum, per visum ecclesie distribuantur, salvis unicuique debitis que defunctus ei debebat.

If any freeman shall die intestate, his chattels shall be distributed by the hands of his nearest kinsfolk and friends, under supervision of the church, saving to every one the debts which the deceased owed to him.

Edition: current; Page: [327]

Here the Great Charter proceeds to remedy an evil connected with intestate succession, a natural sequel to the subject of testate succession.¹ In light of subsequent history, the words most worthy of notice are probably “*per visum ecclesiae*,” which appear also in the Articles of the Barons. There were good reasons for welcoming the intervention of the bishop’s court as a substitute for the scramble that often took place for an intestate’s chattels; but the jurisdiction thus gained by the church was quickly put to other uses.

The placing of this powerful weapon in the hands of the church was only incidental to the main purpose of this chapter. This was (while safeguarding the interests of creditors) to secure to the deceased’s kinsmen and friends the right to make an equitable division of his chattels. By implication the Charter says “hands off” to John, and indeed to any lord superior, whether the King or another.

In the Middle Ages all classes of men, good and bad alike, exhibited an extreme horror of dying intestate.² Several causes contributed towards this frame of mind. Churchmen, from motives not unmixed, inculcated the belief that a dying man’s duty was to leave part at least of his personal estate for religious and charitable objects. The bishop or priest, who had power to withhold extreme unction from dying men, was in a strong position to force advice upon penitents who believed the church to hold the keys of heaven. Motives of a more worldly nature lent their weight. If a

man died intestate, his lord seized his chattels. Henry I. in his Coronation Charter renounced this right over Crown tenants under certain circumstances: if a baron or “man,” cut off by war or infirmity (the words have a grudging, hesitating sound), had given no instructions for disposal of his pecunia, his wife and children and legitimi homines (or vassals) should divide it “for his soul” as seemed best to them.³ Stephen, in his second or Oxford Edition: current; Page: [328] Charter,¹ gave up all such claims, as regards the property of prelates and clerks, who were confirmed in their rights of making Wills.

These promises were not kept: in Glanvill’s day, the King, like other feudal lords, appropriated the goods of intestates.² Henry II. continued to treat intestacy, especially in the case of clerks, as an excuse for forfeiture.³ Magna Carta contained a clear pronouncement against this practice. The kinsmen and friends of the deceased, without royal interference, were to divide the chattels under supervision of the church: the King’s courts were excluded. No scheme of intestate succession was set forth; but where wife and children survived, the tripartite division was clearly implied. In the distribution of the dead’s part, the prelates allowed themselves liberal discretion: something went to the poor, but more might be spent on masses, while a portion would be retained as remuneration for trouble expended.

In 1216 this provision of John’s Charter was withdrawn. Why? Had a suspicion crossed the mind of William Marshal that it conferred a dangerously elastic privilege upon the church? Did the legate Gualo refuse to trust the English prelates with authority? Did the young King’s advisers, conscious of their urgent need of money, determine to reserve what rights the indefinite earlier law allowed them of taking part in the scramble for the coin and chattels of intestates?

Irregularities continued during Henry’s reign: Bracton¹ thought it necessary to urge that intestacy was not a crime. But his direct condemnation of the feudal lords’ practice of seizing chattels is confined to cases of sudden death. Yet it was neither King nor barons, but the church that triumphed: the rule, enunciated in John’s Charter, though omitted from all reissues, settled the practice of later years.² The personal estate of intestates was administered “under supervision of the church,” and the same supervision was ultimately extended over the Wills and estates of men who had died testate.

CHAPTER TWENTY-EIGHT.

Nullus constabularius, vel alius ballivus noster, capiat blada vel alia catalla alicujus, nisi statim inde reddat denarios, aut respectum inde habere possit de voluntate venditoris.

No constable or other bailiff of ours shall take corn or other provisions from any one without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller.

This chapter is the first of several that redressed abuses springing from the exercise of the royal right of purveyance.

I.: Purveyance in General.

The Norman and Angevin Kings of England were compelled by their administrative duties and induced by the pleasures of the chase to move constantly from district to district. The difficulties must have been great of finding sufficient food for the retinues surrounding the King in peace or war. It was to the interests of the community that the work of government should not be brought to a stand-still for want of supplies. No opposition was made when the King arrogated to himself the privilege of appropriating, under fair conditions, the necessaries his household might require. Such a right, not unlike that enjoyed in modern times by the commander of an army encamped in an enemy’s country, was allowed to the Kings of England in their own land in time of peace. This was known as purveyance.¹ Unfortunately, the conditions under which supplies might be requisitioned were left vague: the privilege was subject to abuse. In theory it was a right of pre-emption; the provisions seized were to be paid for at the market rate: but practice tended to differ lamentably from theory. In the absence of a neutral arbitrator to fix the value of the goods, the unfortunate seller was thankful to accept any pittance offered by royal officials, who might subsequently, indeed, charge a higher rate against the Crown. Payment was often indefinitely delayed or made not in coin but in exchequer tallies, “a vexatious anticipation of taxation,” since these could only be used in payment of Crown dues.

Magna Carta did not abolish purveyance, and placed no restrictions upon its use for the legitimate purpose of supplying the King’s household. Some slight attempt to control its exercise was made sixty years later in the Statute

of Westminster I.; but without producing much effect.² The Articles of 1309³ complained that the King's purveyors took great quantities of corn, malt, and meat without paying even by exchequer tallies. The grievances connected with purveyance continued, throughout four centuries, as a fertile source of vexation to the people and of friction between parliament and the King. An attempt, made by the House of Commons to induce James I. to surrender this prerogative for a money grant, ended in failure, with the abandonment of the abortive treaty known as "the Great Contract." In the general re-settlement of the revenue, however, at the Restoration, purveyance and pre-emption, Edition: current; Page: [331] which had fallen into disuse during the Commonwealth, were abolished.¹ Yet in the following year a new statute² virtually revived one branch of the right under essential modifications: when royal progresses were necessary in the future, warrants might be issued from the Board of Green Cloth, authorizing the King to use such carts and carriages as he might require, at a fair rate of hire specified in the Act of Parliament.

II.: Branches of Purveyance restricted by Magna Carta.

A practice tolerated because of its absolute necessity, when confined to providing for the needs of the King's household, became intolerable when claimed by every castle-warden, sheriff, and local bailiff, for his own personal or official needs. Discretionary authority was vested by John in a class of officials least qualified to use it, unscrupulous foreign adventurers hired to intimidate the native population, responsible to no one save the King, and careful never to issue from their strongholds except at the head of their reckless soldiery. The Great Charter contained a few moderate provisions for checking the abuses of purveyance.

(1): Provisioning of castles.

Commanders of fortresses were left free by Magna Carta to help themselves to such corn and other supplies as they deemed necessary for their garrisons. Immediate payment, however, must be made in current coin (not in exchequer tallies) for everything they requisitioned, unless the owner consented to postpone the date of payment. The Charter of 1216 made a slight modification in favour of castellans. Payment for goods taken from the town where the castle was situated might be legally delayed for three weeks, a term extended in 1217 to forty days. Such relaxation was perhaps necessary to meet the case of a warden with an empty purse called on to provide against an unexpected siege or other emergency; but the peaceful townsmen, over whose dwellings the dark walls of a feudal stronghold loomed, would not dare to press unduly for payment. Under Henry's Charters, as under that of John, immediate payment had to be tendered to owners Edition: current; Page: [332] who lived elsewhere than in this neighbouring town.¹

(2): Requisitioning horses and carts.

The provisions of chapter 30, modified in subsequent reissues, sought to prohibit sheriffs from commandeering wagons that were the property of freemen.

(3): Appropriation of timber.

The succeeding chapter confined the King and his officers to the use of such wood as they could obtain from the royal demesnes.²

III.: Branches of Purveyance not mentioned in Magna Carta.

A wide field was left alike for the use and the abuse of this prerogative, after due effect had been given to these moderate provisions. Two minor aspects of purveyance came into prominence in later history.

(1): Requisition of forced labour.

Hallam explains how the King's rights of pre-emption were extended, by analogy, to his subjects' labour. "Thus Edward III. announces to all sheriffs that William of Walsingham had a commission to collect as many painters as might suffice for 'our works in St. Stephen's chapel, Westminster, to be at our wages as long as shall be necessary'; and to arrest and keep in prison all who should refuse or be refractory; and enjoins them to lend assistance. Windsor Castle owes its massive magnificence to labourers impressed from every part of the kingdom. There is even a

commission from Edward IV. to take as many workmen in gold as were wanted, and employ them at the King's cost upon the trappings of himself and his household.”³ Perhaps, however, such demands did not form a legal branch of purveyance, but were merely instances of illegal royal encroachments.

(2): Billeting of soldiers in private houses.

This practice, Edition: current; Page: [333] which may be considered a branch of purveyance, has always been peculiarly abhorrent to public opinion in England. It is as old as the reign of John; for, when that King visited York in 1201, he complained bitterly that the citizens neither came out to meet him nor provided for the wants of his crossbow-men. His threats and demands for hostages were with difficulty turned aside by a money payment of £100.¹ Charles I. made an oppressive use of this prerogative, punishing householders who refused to pay illegal taxes by quartering his dissolute soldiery upon them, a practice branded as illegal by the Petition of Right in 1628.²

CHAPTER TWENTY-NINE.

Nullus constabularius dstringat aliquem militem ad dandum denarios pro custodia castris, si facere voluerit custodiam illam in propria persona sua, vel per alium probum hominem, si ipse eam facere non possit propter rationabilem causam; et si nos duxerimus vel miserimus eum in exercitum, erit quietus de custodia, secundum quantitatem temporis quo per nos fuerit in exercitu.

No constable shall compel any knight to give money in lieu of castle-guard, when he is willing to perform it in his own person, or (if he himself cannot do it from any reasonable cause) then by another responsible man. Further, if we have led or sent him upon military service, he shall be relieved from guard in proportion to the time during which he has been on service because of us.

Castle-guard, or the liability to serve in the garrison of a royal fortress, formed part of the feudal obligations of the owners of certain freeholds. This service was sometimes due in lieu of attendance in the army; more usually the tenant who owed garrison duty owed knight's service as well.³ It was probably this duplication of duties that prevented Edition: current; Page: [334] castle-guard from hardening into a separate tenure.¹ John preferred to commute personal service of castle-guard for money payments (analogous to the scutage paid in lieu of knight's service), and to man his feudal towers with soldiers of fortune rather than with rebellious Englishmen. Captains of royal castles were, therefore, in the habit of demanding money even from those who offered personal service. What was worse, when the freeholder followed John on distant service, he was mulcted in a money payment because he had not stayed at home to perform garrison duty during the same period. Both abuses were forbidden in 1215.² In certain circumstances, however, this prohibition would have deprived the King of what was equitably due to him. Suppose he had granted two fiefs to the same tenant—one by simple knight's service, the other by castle-ward. A double holding implied double service; the tenant could not in fairness plead that the service of one knight, rendered abroad, operated as the full discharge of the services of two knights due from his two separate fiefs. Castle-guard must in such a case be performed by an efficient deputy, or else the usual compensation be paid. The reissue of 1217 amended John's Charter to this effect. Service with the army abroad operated as a discharge of castle-guard at home, but not where the tenant owed two services for two distinct fiefs.³

CHAPTER THIRTY.

Nullus vicecomes, vel ballivus noster, vel aliquis alius, capiat equos vel carectas alicujus liberi hominis pro cariagio faciendo, nisi de voluntate ipsius liberi hominis.

No sheriff or bailiff of ours, or other person, shall take the horses or carts of any freeman for transport duty, against the will of the said freeman.

Edition: current; Page: [335]

The Charter here returns to the subject of purveyance, one branch of which is practically abolished, except as affecting villeins. No carts or horses belonging to a freeman were to be requisitioned by any sheriff or bailiff for the King's use without the owner's consent; that is to say, they could not be requisitioned at all. Protection, however, was limited to freemen; the inference is that the horses and implements of villeins were left at the disposal of the Crown.

The relative chapter of the reissue of 1216 partially restored this branch of purveyance; consent of the owner, even when a freeman, need not be obtained, provided hire was paid at rates that were fixed: 10d. per diem for a cart with two horses, 1s. 2d. for one with three.¹ The prerogative, though restored, was not to be abused.

In 1217 it was again slightly restricted in favour of the upper classes. No demesne cart of any “parson” (ecclesiastica persona), or knight, or lady, could be requisitioned by the bailiffs. The “demesne” carts were, of course, those that belonged to the owner of the manor as opposed to the carts of the villeins: the rights of villeins, if they had any, must not stand against the rights of the Crown. Yeomen and small freeholders were also left exposed to this annoying form of interference. Abuses continued. Purveyors would lay hands on all horses and carts in the countryside—far more than they required—choosing perhaps the season of harvest or some equally busy time. The owners, who urgently required them for their own purposes, had to pay ransom to regain possession. Edward I. enacted that perpetrators of such deeds should be “grievously punished by the marshals,” if, as members of his household, they were amenable to the summary jurisdiction of his domestic tribunal, or, if not members, then they should pay treble damages and suffer imprisonment for forty days.²

Edition: current; Page: [336]

CHAPTER THIRTY–ONE.

Nec nos nec ballivi nostri capiemus alienum boscum ad castra, vel alia agenda nostra, nisi per voluntatem ipsius cuius boscus ille fuerit.

Neither we nor our bailiffs shall take, for our castles or for any other work of ours, wood which is not ours, against the will of the owner of that wood.

Purveyance of timber growing elsewhere than on royal manors is here prohibited in absolute terms. In marked contrast with the limited restrictions placed upon other branches of purveyance, this branch is taken away, not merely from local officials, but from the King himself.¹ There was an obvious reason for greater stringency in this case: the King’s own extensive demesne woods furnished timber in abundance, whether for building purposes or for firewood, leaving him no excuse for taking, especially if for nothing, the trees of other people.

The purveyors of James I., shortly after his accession, transgressed this provision of Magna Carta by requisitioning timber for repairing the fortifications of Calais. A decision against the Crown was given by the Barons of Exchequer in the second year of James’s reign, and a proclamation was issued, bearing date 23rd April, 1607, disclaiming any right to such a prerogative. The guilty purveyors were brought before the Star Chamber.²

CHAPTER THIRTY–TWO.

Nos non tenebimus terras illorum qui convicti fuerint de feloniam, nisi per unum annum et unum diem, et tunc reddantur terre dominis feodorum.

Edition: current; Page: [337]

We will not retain beyond one year and one day, the lands of those who have been convicted of felony, and the lands shall thereafter be handed over to the lords of the fiefs.

I.: The Crown’s Claim to Property of Felons.

The Crown had established certain rights, not too well defined, in the property of criminals formally indicted and sentenced for felony. John, here as elsewhere, took advantage of the vagueness of the law to stretch prerogative to its limit. Magna Carta, therefore, attempted to define the exact boundaries of his rights. Custom gave the felon’s land to his feudal lord, and his chattels to the lord who tried him. The Crown encroached on the rights of both, claiming the real estate of felons, as against mesne lords, and their personal estate, as against lords who had jurisdiction.

(1): The felon’s lands.

No difficulty arose when Crown tenants were convicted, for the King was lord of the fief as well as lord paramount, and claimed the whole lands as escheat. When the condemned man was the tenant of a mesne lord, however, a conflict of interests occurred, and here a distinction, which gradually became hard and fast, was drawn between treason and felony.¹ Treason was an offence against the person of the sovereign, and it was probably on this ground that the King made good his claim to seize as forfeit the entire estate, real and personal, of every one condemned to a traitor's death. With regard to ordinary felons, what looks like a compromise was arrived at. The King secured the right to lay waste the lands in question and to appropriate everything he could find there during the space of a year and a day; after which period he was bound to hand over the freehold thus devastated to the lord who claimed the escheat. Such was the custom during the reign of Henry II. as described by Glanvill,² who makes it perfectly clear that, before the lands were given up at the expiration of the year, houses were thrown down and trees rooted up. The lord, when at last he entered into possession of the escheated lands found a desert, not a prosperous manor.¹

Coke has attempted to give a more restricted explanation of the Crown's rights in this respect, maintaining that the "year and day" was not an addition to, but a substitute for, the earlier right of "waste," that the King renounced his barbarous claims in return for the undisputed enjoyment of the ordinary produce for one year only, and agreed, in return to hand over the land with all buildings and appurtenances intact.² The authorities he cites, however, are inconclusive, and the weight of evidence on the other side leaves little room for doubt. Not only does the phrase, "year, day, and waste" commonly used, create a strong presumption; but Glanvill's words in speaking of the earlier practice are quite free from ambiguity, while the document known as the *Praerogativa Regis* is equally explicit for a period long after Magna Carta.³ Waste, indeed, was a question of degree, and the Crown was not likely to be scrupulous in regard to felons' lands, when it allowed wanton destruction even of Crown fiefs held in honourable wardship.⁴

Wide as were the legal rights of the Crown, John extended them illegally. When his officers had once obtained a footing in the felon's land, they refused to surrender it to the rightful lord after the year and day had expired. In 1205, Thomas de Aula paid 40 marks and a palfrey to get what he ought to have had for nothing, namely, the lands escheated to him through his tenant's felony.¹ Magna Carta prohibited such abuses, and settled the law for centuries.² The Crown long exercised its rights, thus limited, and Henry III. sometimes sold his "year, day, and waste" for considerable sums. Thus, in 1229 Geoffrey of Pomeroy was debited with 20 marks for the Crown's rights in the lands of William de Streete and for his corn and chattels. This sum was afterwards discharged, however, on the ground that the King, induced to change his mind, doubtless by a higher bid, had bestowed these rights on another.³

(2): The felon's chattels.

From an early date the King enjoyed, like other owners of courts, the right to the goods of the offenders he condemned. When Henry II. reorganized the system of criminal justice, and formulated, in the Assizes of Clarendon and Northampton, a scheme whereby all grave offenders should be formally indicted, and thereafter reserved for the coming of his own justices, he established a royal monopoly of jurisdiction over felons; and this logically implied a monopoly over their chattels—an inference confirmed by the express terms of article five of the earlier Assize. As the list of "pleas of the Crown" grew longer, so this branch of royal revenue increased proportionately, at the expense of the private owners of "courts leet." The goods of outlaws and fugitives from justice likewise fell to the exchequer—the sheriff who seized them being responsible for their appraised value.⁴

Edition: current; Page: [340]

The magnates in 1215 made no attempt to interfere with this branch of administration, tacitly acquiescing in Henry II.'s encroachments on their ancestors' criminal jurisdictions and perquisites. Under Henry III. and Edward I., the forfeited goods of felons continued to form a valuable source of revenue. In 1290 the widow of a man who had committed suicide, and therefore incurred forfeiture as a *felo de se*, bought in his goods and chattels for £300, a high price, in addition to which the Crown specially reserved its "year, day and waste."¹

II.: Indictment, Conviction, and Attainder.

The Crown could not appropriate the property of men merely suspected of crime, however strong might be the presumption of guilt. Mere accusation was not enough; a formal judgment was required. The Charter refers to the

lands of a “convicted” offender, and conviction must be distinguished from indictment on the one hand, and from attainder on the other; since these formed three stages in the procedure for determining guilt.

(1): Indictment.

It has been already shown² how Henry of Anjou tried to substitute, wherever possible, indictment by a jury for private appeal in criminal suits. The Assize of Clarendon authorized such indictments to be taken before sheriffs, and we learn from Bracton that, immediately the formal accusation had been made, the sheriff became responsible for the safety of the accused man’s property, both real and personal. With the help of the coroners and of law-worthy men of the neighbourhood he must have the chattels appraised and inventoried, and hold them in suspense until the “trial,” providing therefrom in the interval “estovers,” that is, sufficient sustenance for the accused and his family.³

If the prisoner was acquitted or died before conviction, the lands and chattels were restored to him or to his relatives, the Crown taking nothing. Reginald of Cornhill, sheriff of Kent, was discharged in 1201 from liability for the appraised value of the goods of a man who, after indictment for burning a house, had died in gaol non convictus. As Edition: current; Page: [341] the Pipe Roll states, his chattels did not pertain to the King.¹

(2): Conviction.

Only the justices could “try” the plea, that is, give sentence according to success or failure in the test appointed for the accused man to perform.² Prior to 1215 the usual test was ordeal of water in the ordinary case, or of the red-hot iron in the case of men of high rank and of women. If the suspected person failed, sentence was a mere formality; he had “convicted” himself of the felony. As a consequence of the condemnation of ordeal by the Lateran Council of 1215, the verdict of a petty jury became the normal “test” that branded an offender as convictus. This was long looked on as an innovation, and accordingly the law refused to compel the accused, against his will, to trust his fate to this new form of trial. He might refuse to “put himself upon his country,” and by “standing mute” make his “conviction” impossible, saving himself from punishment and depriving the King of his chattels and “year and day.” For centuries those responsible shrank from the obvious course of treating silence as equivalent to a plea of guilty; but while liberty to refuse a jury’s verdict was theoretically recognized, barbarous measures were in reality adopted to compel consent. The Statute of Westminster in 1275³ directed that all who refused should be imprisoned en le prison forte et dure. This statutory authority for strict confinement was liberally interpreted by the agents of the Crown, who treated it as a legal warrant for revolting cruelties. Food and drink were virtually denied, a little mouldy bread and a mouthful of impure water only being allowed upon alternate days; and at a later date the prisoner was slowly crushed to death under great weights “as heavy, yea heavier than he can bear.” Brave men, guilty, or mayhap innocent, but suspicious of a corrupt jury, preferred thus to die in torments, that they might save to their wives and children the property which would upon conviction have fallen to the Crown. The fiction was carefully maintained that the victim of such barbarous treatment Edition: current; Page: [342] was not subjected to “torture,” always illegal at common law, but merely to peine forte et dure, a perfectly legal method of persuasion under the Statute of 1275. This procedure was not abolished until 1772; then only was an accused man for the first time deprived of his right to “have his law”—his claim to ordeal as the old method of proving his innocence. Until that date, then, a jury’s verdict was treated as though it were still a new-fangled and unwarranted form of “test” usurping the place of the ordeal, although the latter had been virtually abolished early in the thirteenth century.¹

(3): Attainder.

Coke in commenting on this passage draws a further distinction between “conviction,” which directly resulted from a confession or a verdict of guilty, and “attainder” which required a formal sentence by the judge. In his age, apparently, it was the attaint that implied forfeiture; looking as usual at Magna Carta through seventeenth-century glasses, he seems surprised to find “convicted” used where he would have written “attainted.” Yet this distinction, if recognized in 1215, must have been immaterial then. It was under the Tudor sovereigns that the doctrine of the penal effects of attainder was elaborated. When sentence was passed on a felon, a blight fell on him: his blood was impure, and his kindred could inherit nothing that came through him. The Crown reaped the profit.²

Statutes of the nineteenth century modified the harshness with which this rule bore on the felon’s innocent relations:³ finally the Forfeiture Act of 1870⁴ abolished “corruption of blood” and deprived the Crown of all interest in the estates of felons, alike in escheats and chattels. Thus the word “attainted” has become practically obsolete. A Edition:

current; Page: [343] criminal who is fulfilling the term of his sentence is known, not as a man attainted, but simply as a “convict,” the same word as was used in Magna Carta.

CHAPTER THIRTY-THREE.

Omnes kydelli de cetero deponantur penitus de Tamisia, et de Medewaye, et per totam Angliam, nisi per costeram maris.

All kydells for the future shall be removed altogether from Thames and Medway, and throughout all England, except upon the sea shore.

The object of this provision is not open to doubt; it was intended to remove from rivers all obstacles likely to interfere with navigation. Its full importance can only be understood when the deplorable state of the roads is kept in view. The water-ways were the great avenues of commerce; when these were blocked, townsmen and traders suffered loss, while those who depended on them for necessaries, comforts, and luxuries, shared in the general inconvenience. Magna Carta mentions only one kind of impediments, namely, “kydells” (or fish-weirs), not because of the purpose to which these were put, but because they were the form of obstruction that called for repressive measures at the moment. This word seems to have been used by the framers of Magna Carta in a wide general sense, embracing all fixed contrivances or “engines” intended to catch fish, and likely by their bulk to interfere with the free passage of boats.¹

It has been gratuitously assumed that the motive for prohibiting “kydells” must have been of a similar nature to the motive for constructing them; and that therefore the object of the present chapter was to prevent any monopoly in rights of fishing. Law courts and writers on jurisprudence for many centuries endorsed this mistaken Edition: current; Page: [344] view, and treated Magna Carta as an absolute prohibition of the creation of “several” (or exclusive) fisheries in tidal waters.¹ Although this legal doctrine has been frequently and authoritatively enunciated, it rests on a misconception. The Great Charter sought to protect freedom of navigation, not freedom of fishing; and this is obvious from the last words of the chapter: kydells are to be removed from Thames and Medway and throughout all England “except upon the sea-shore.” It would have been a manifest absurdity to allow monopolies of taking fish in the open seas, while insisting on freedom to fish in rivers, the banks of which were private property. The sense is clear: no objection was taken to “kydells” so long as they did not interfere with navigation.

The erroneous view, however, had much to excuse it, and acquired plausibility from the circumstance that the destruction of obstacles to the free passage of boats incidentally secured also free passage for salmon and other migratory fish; and that later statutes, when legislative motives had become more complicated, were sometimes passed with both of these objects in view. The change is well illustrated by a comparison of the words of two statutes of 1350 and of 1472 respectively. The first of these repeats the substance of this chapter, and thus explains its object: —“Whereas the common passage of boats and ships in the great rivers of England be oftentimes annoyed by the inhancing of gorges, mills, weirs, stanks, stakes, and kydells.”² Here there is no allusion to fish or rights of fishing. The later Act, while confirming, under penalties, previous statutes for the suppression of weirs, not only states its own intention as twofold, namely, to protect Edition: current; Page: [345] navigation of rivers, and “also in safeguard of all the fry of fish spawned within the same,” but retrospectively and unwarrantably attributes a like double motive to Magna Carta.¹

So far as Thames and Medway were concerned, this provision contained nothing new. To the Londoners, indeed, the keeping open of their river for trade was a matter of vital importance. The right to destroy kydelli had been purchased from Richard I. for 1500 marks, and a further sum had been paid to John to have this confirmed. These charters (dated 14th July, 1197, and 17th June, 1199) “granted and steadfastly commanded that all kydells that are in the Thames be removed wheresoever they shall be within the Thames; also we have quit-claimed all that which the Warden of our Tower of London was wont yearly to receive from the said kydells. Wherefore we will and steadfastly command that no warden of the said Tower, at any time hereafter, shall exact anything of any one, neither molest nor burden nor make any demand of any person by reason of the said kydells.” John’s Charter went further than that of Richard, making it clear that the prohibition referred to Medway as well as to Thames, and granting the right to inflict a penalty of £10 upon anyone infringing its provisions.²

Magna Carta confirmed this provision and extended it to all rivers, and this was repeated in the reissues of Henry III. The citizens of London, not content with a clause in a general enactment, purchased for 5000 marks Edition: current;

Page: [346] three new charters exclusively in their own favour. One of these, dealing with kydells in Thames and Medway, was issued by Henry on 18th February, 1227, in terms almost identical with those of Richard and John.¹

CHAPTER THIRTY–FOUR.

Breve quod vocatur Praeceptum de cetero non fiat alicui de aliquo tenemento unde liber homo amittere possit curiam suam.

The writ which is called praecipium shall not for the future be issued to anyone, regarding any tenement whereby a freeman may lose his court.

The grievance here dealt with lay at the heart of the quarrel of 1215, and the remedy adopted proved a vital factor in the history of royal jurisdiction in England. In extorting from John a solemn promise to restrict the use of this particular writ, the barons gained something of infinitely greater value than a petty reform of court procedure; they committed their enemy to a reversal of a line of policy vigorously pursued for half a century. The process by which the jurisdiction of the King's courts was undermining that of the feudal courts was now to be arrested.² Magna Carta, by this apparently inoffensive clause, was grappling in reality with an urgent problem of the day, fraught with tremendous practical issues alike for King and barons. This can only be understood in connection with the technical details on which it hinges.

I.: Royal Writs and Feudal Jurisdictions.

In pleas of disputed titles to land, feudal theory gave sole jurisdiction to the lord of the fief. No principle was more absolutely established than this: no person, neither King nor Emperor, had any right to interfere, except on the one ground of failure of justice. Not even Henry II. dared to repudiate this universal rule; but he adopted expedients Edition: current; Page: [347] to render it inoperative. If Glanvill may be trusted, Henry was strong enough to obtain acquiescence in his prohibition of any plea, concerning ownership of a lay fee, being tried in a seignorial court without the licence of a royal precept.¹

Henry also invented, or adopted from precedents of the Carolingian Emperors, two types of writ, the virtual effects of which were to evoke causes from the lords' courts to his own, without too open an infringement of feudal principle.² These were the Writ of Right and the Writ Praecipium. The Writ of Right proceeded on the principle that a lord superior was bound to see that his vassals dispensed justice to their rear vassals. When a freeholder, the tenant of a mesne lord, complained to the King that justice was refused him, the King formally commanded the remiss lord "to do full right" to the complainant, and added the threat that, unless he did so, the King himself would. The writ, known as a *breve de recto tenendo*, was thus issued to the owner of a feudal court; professed to afford him an opportunity of obedience by trying the plea in his court; and avoided conflict with feudal theory by justifying the proposed royal interference as "pro defectu justitiae." It afforded, however, excellent opportunities for the insidious encroachments of the royal courts at the behest of powerful kings, who retained in their own hands the right to define what constituted a failure to do justice.³

The Writ Praecipium in its origin and antecedents differed fundamentally from the Writ of Right: it was addressed to the sheriff, not to the owner of a franchise; it was a more direct violation of feudal rights, for it made no allegation of failure of justice but simply ignored the lord's jurisdiction, bidding the sheriff command the tenant to restore the land in question to the demandant; or else to appear before the royal court to explain his reasons for disobedience. No opportunity was afforded the mesne lord of hearing the plea. The whole procedure, almost without disguise or excuse, was an open transference of the dispute from the Edition: current; Page: [348] manorial court to that of the King.¹ The writ, which on the surface reads merely as a summary and final command to hand over the estate to another, is really an "original writ" commencing a litigation in the King's court. One important effect of its issue was that all proceedings instituted in inferior tribunals must immediately stop.

The feudal lord, in whose court baron the plea would naturally have been decided, was thus robbed by the King of his jurisdiction. With it, he lost also authority over his tenants, and numerous fees and perquisites. The writ praecipium was thus an ingenious device for "evoking" a particular cause from the manorial court to the King's court.²

The two types of writ, praecipium and writs of right, at first contrasted as alternative methods of bringing a plea under royal jurisdiction, came in time to have entirely different relations. The person to whom the preliminary writ was

issued, whether sheriff or lord of a franchise court, ceased to be of much importance, when the writ had become a mere formality. The essential feature of a Writ of Right came to be that it dealt with ownership as opposed to mere possession: all royal writs that originated pleas involving title to land were then reckoned Writs of Right, which now embraced an important species of the originally opposed genus of writs praecipe.³ Thus, in one place, writs praecipe and writs of right overlapped each other.⁴

The motives of Henry II., in instituting his legal reforms, were probably mixed; and it is not easy to determine whether he favoured his new writs most because they really Edition: current; Page: [349] stimulated the flow of justice in the feudal courts, or because they afforded facilities for sapping their strength. While reforming the entire administration of justice in England, the King hoped, by the same means, to destroy gradually the feudal privileges of his magnates. He intended to draw into his own courts all pleas relating to land. Questions of property were to be tried before his justices, by combat or, at the tenant's option, by the grand assize; questions of possession (without any option) by the appropriate petty assize. The barons showed no desire to dispute the Crown's assumption of a monopoly over the petty assizes; indeed they cordially acquiesced in this by the terms of chapter 18 of the Charter. The grand assize was another matter; they refused to be robbed of their right to determine, in their own courts baron, proprietary actions between their own tenants. Indeed, for such wholesale extension of the King's jurisdiction over pleas of land, Henry II. had absolutely no precedent. He had made the Crown strong and then used its power for his own aggrandizement. The King's courts had increased their authority, as a distinguished American historian has expressed it, "by direct usurpation, in derogation of the rights of the popular courts and manorial franchises, upon the sole authority of the King."¹

While undermining the feudal courts, Henry was devising improved methods of dispensing justice in his own. Efforts were being successfully made, as has been shown,² to substitute the grand assize for trial by combat; and the desire for the more rational mode of proof favoured the King's policy of removing important litigations to his own court. The assize procedure must be taken along with the writ of right and the writ praecipe as parts of one scheme of reform.

II.: The Intention of Magna Carta.

The present chapter Edition: current; Page: [350] says nothing of the Writ of Right, but guards against the abuse of the Writ Praecipe, without attempting to interfere with its employment within its legitimate sphere, that is to say, in settling disputes as to Crown fiefs. John might keep his own court, and issue praecipis to his own tenants; but let him respect the rights of other feudal lords and not use his writs as engines of encroachment upon manorial jurisdictions. For the future, such writs must not be issued "concerning any tenement whereby a freeman may lose his court." Writs praecipe might be freely used for any other purpose, but not for this. This one purpose, however, was exactly what had specially recommended them to King Henry.

The present chapter must, therefore, be regarded as one of the most reactionary in the Charter: the barons had forced John to promise a complete reversal of the deliberate policy of his father.

Here, then, under the guise of a small change in legal procedure, was concealed a notable triumph of feudalism over the centralizing policy of the monarchy—a backward step, which, if given full effect to, might have ushered in a second era of feudal turbulence such as had disgraced the reign of Stephen. We are told on high authority that John's acknowledgment of "the claims of the feudal lord to hold a court which shall enjoy an exclusive competence in proprietary actions" was one which "Henry II. would hardly have been forced into."¹ That may well be; but John had already more than once rejected this proposal with vehemence. In 1215, he could no longer strive against the inevitable, and agreed under compulsion to provisions which he had no intention to keep. The concession, although insincere, was nevertheless an important one. The substance of chapter 34 was repeated, with some trivial verbal alterations, in all future issues of Magna Carta.²

Edition: current; Page: [351]

Why did the barons, it may be asked, while attacking the writ praecipe, allow the writ of right patent to go unscathed? History is silent; but inferences may be drawn. The barons had no legal ground for condemning the legitimate use of the writ of right even when it deprived a baron or other freeman of his court. Feudal theory sanctioned this procedure, unless where it was abused; and it was difficult to define abuse of the procedure. If "pro defectu justitiae" was honestly alleged, the King had a right to interfere, well grounded in feudal law. The interference, too, even where

unwarranted, was of a subtle nature, and difficult to guard against. Finally, encroachments initiated by this procedure had not been attempted before 1215 to any noticeable extent: the barons had no premonition of the new uses to which the writ of right would be put, after the channel of royal aggression by way of the praecipe had been closed. The writ of right patent was a cumbrous process, and its short day of usefulness came after the granting of Magna Carta.

III.: Expedients for evading Magna Carta.

One question remains: was this provision observed in practice? The answer is that its letter was stringently observed, but its spirit was evaded. Writs praecipe that deliberately evoked suits, other than those of Crown tenants, to the King's courts ceased to be issued, but the sphere denied to the writ was made as narrow as possible; and methods were devised for reducing seignorial courts practically to impotence, without direct violation of the terms of the Great Charter.

(1): The letter of the law.

The Chancery, in obedience to Magna Carta, ceased to issue this particular form of writ in such a manner as to cause a freeman "to lose his court." It was still issued to Crown tenants; but strictly denied to under-tenants, who were thus left to find redress at the feudal court of the magnate from whom they held their land.¹

Edition: current; Page: [352]

The measure thus forced on the Crown in the selfish interests of the baronage, inflicted hardship on tenants of mesne lords: the court baron was now their only source of feudal justice, and in that court they could not get the benefit of the improved methods of royal procedure. In particular, the grand assize was a royal monopoly. The magnates, indeed, desired to adopt it, but they had difficulty in getting together twelve knights willing to act as jurors.¹ Whatever hopes the barons entertained of overcoming such difficulties were disappointed: in 1259 the Provisions of Westminster declared that freeholders should not be compelled to swear against their will "since no one can make them do this without the King's warrant."² It was the deliberate policy of Edward I. to exaggerate all such difficulties, putting every obstacle in the way of private courts, until he reduced their jurisdictions to sinecures.³

(2): Evasion of its spirit.

While the letter of Magna Carta was strictly kept, its spirit was evaded. It was impossible to give loyal effect to an enactment that went Edition: current; Page: [353] directly counter to the whole stream of progress. Manorial justice was falling into disrepute, while royal justice was becoming more efficient and more popular. Under-tenants, deprived of access to the King's court by the direct road of the writ praecipe, sought more tortuous modes of entrance. Legal fictions were devised. The problem was how to evade Magna Carta without openly infringing it: the King's justices and would-be litigants in the King's courts formed a tacit alliance for this end, but had to proceed by wary steps, in the teeth of opposition from the powerful owners of seignorial courts. Three methods were adopted by the Crown:—

(a) Magna Carta had not condemned the writ praecipe, but only its abuse; and abuse was sometimes difficult to define. That writ remained the normal procedure in cases of Crown holdings,¹ and a liberal interpretation of this exception would sometimes pass unchallenged, though there seems no ground for supposing that any recognized legal fiction of this nature came into use. Then, besides the later developments of the praecipe (to be afterwards described), the King claimed, in spite of Magna Carta, to grant *ex gratia speciali* the very writ complained of.²

(b) When the use of the writ praecipe was barred, the King could fall back on the more cumbrous procedure instituted by writ of right, the potentialities of which were developed after 1215. Coke³ cites an instance from the 34th year of Edward I., where a demandant admitted that the lands in dispute were not held of the King in capite but of his brother Edmund, and therefore he could not proceed by way of praecipe, but he might, if he so desired, proceed by writ of right patent in the King's curia. This substitution of the writ of right for the praecipe is described by Professor Maitland⁴ as "a victory of feudalism consecrated by the Great Charter."

When a tenant, whose title was challenged in his lord's court, applied to the King for a grand assize, the plea was practically certain, by one avenue or another, to reach the Edition: current; Page: [354] Curia Regis.¹ The rule that no

one need defend his *liberum tenementum* unless summoned by a royal writ also worked towards the same end. But many difficulties lay in the path of the writ of right.² The Petition of the Barons of 1259 (chapter 29)³ illustrates one attempt to make the most of these. Moreover, the whole procedure was dilatory, expensive, and inelastic, and it was gladly abandoned, after the invention of less direct but more convenient methods of effecting the same purpose.

(c) The procedure which rendered recourse to the writ of right unnecessary was instituted by one of various writs developed from the older *praecipe* and known as writs of entry. These writs instituted procedure in the King's court on the averment of some recent flaw in the tenant's title, which could be settled without opening up the whole matter of the ownership. This was a subterfuge, for the settling of the special point virtually decided the general question of ownership without appeal. Although probably not invented for the express purpose of defeating this chapter of the Great Charter, these writs were soon applied to that purpose. One of the most useful of their number was the writ of *cosinage*, devised by William of Raleigh, extending to others than the dispossessed heir the simple procedure of the petty assizes. As early as 1237, it was decided in the King's court that such a writ did not violate the Charter.⁴ Writs of entry were thus, from the point of view of the magnate with his private court, wolves in sheep's clothing. They professed to determine a question of possession, but really decided a question of ownership. At first, the pleas to which they could be applied were few and special. Steadily, new forms of action were devised to cover almost every conceivable case. The process of evolution was a long one, commencing soon after 1215, and virtually concluding with chapter 29 of the Statute of Marlborough, Edition: current; Page: [355] or rather with the liberal construction which Crown lawyers placed upon that statute in the following reign.

Edward I., at the height of his power, and eager to set his house in order, shrank from an open breach of the Great Charter, gladly adopting subtle expedients to oust mesne lords from rights secured to them by the present chapter. In Edward's reign the legal machinery was brought to perfection, so that thereafter no action relating to freehold was ever again tried in the courts baron of the magnates, but, in direct violation of the spirit of Magna Carta, decided in the courts of the King.¹

The demandant had no need to infringe the prohibition against the older form of writ *praecipe* when he could obtain another writ, equally effective. A writ of entry was, indeed, to a peaceable demandant, preferable to a writ *praecipe*, which could only be issued to one prepared to offer battle, the option of accepting lying with his adversary. Crown tenants, even, who could obtain the original writ *praecipe*, came to prefer the modern substitute; and clause 34 of Magna Carta was virtually obsolete.

IV.: Influence on later legal development.

One of the indirect effects of the clause was of a most unfortunate nature. The necessity it created for effecting reforms by a tortuous path did great and lasting harm to the form of English law. Legal fictions have indeed their uses, by evading technical rules of law in the interests of substantial justice. The price paid for this relief, however, is usually a heavy one. Complicated procedures and underhand expedients have to be invented, and these lead in turn to new legal technicalities of a more irrational nature than the old ones. It would have been better in the interests of scientific jurisprudence, if so desirable a result could have been effected in a more straightforward manner. The authors of Magna Carta must bear the blame.²

Edition: current; Page: [356]

CHAPTER THIRTY-FIVE.

Una mensura vini sit per totum regnum nostrum, et una mensura cervisie, et una mensura bladi, scilicet quarterium Londonie, et una latitudo pannorum tinctorum et russetorum et halbergetorum, scilicet due ulne infra listas; de ponderibus autem sit ut de mensuris.

Let there be one measure of wine throughout our whole realm; and one measure of ale; and one measure of corn, to wit, "the London quarter"; and one width of cloth (whether dyed, or russet, or "halberget"),¹ to wit, two ells within the selvages; of weights also let it be as of measures.

This chapter confirmed the provisions of various ordinances that sought to regulate the sale of commodities. Assizes of bread and beer were issued from time to time, and also assizes of weights and measures, and of wines. Richard's Assize of Cloth, for example, of 20th November, 1197, was, according to modern conceptions of the proper sphere of

government, partly commendable and partly ill–advised. It strove, on the one hand, to overcome the inconvenience experienced by traders, who met with varying standards as they moved their wares from place to place. What was of more importance, the Assize sought to obviate frauds perpetrated upon buyers under shelter of ambiguous weights and measures. The London quarter must, therefore, be used everywhere for corn; and one measure for wine or beer: so far, good. On the other hand, the ordinances of Richard went further than modern ideas of laissez faire would tolerate. In particular, freedom of trade was interfered with by the regulations reported by Roger of Hoveden.² No cloth, he tells us, was to be woven except of a uniform width, namely, “two ells within the lists.”³

Edition: current; Page: [357]

Dyed cloths, it was provided, should be of equal quality through and through, as well in the middle as at the outside. Merchants were prohibited from darkening their windows by hanging up, to quote the quaint language of the ordinance, “cloth whether red or black, or shields (scuta) so as to deceive the sight of buyers seeking to choose good cloth.” Coloured cloth was only to be sold in cities or important boroughs. Here we have a sumptuary law meant to ensure that the lower classes went in modest grey attire. Six lawful men were to be assigned to keep the Assize in each county and important borough. These custodians of measures must see that no goods were bought or sold except according to the standards; imprison those found guilty of using other measures; and seize the chattels of defaulters, for the King’s behoof. If the custodes performed their duties negligently they were to suffer amercement of their chattels.¹ Richard’s Assize of Measures was supplemented in 1199 by John’s Assize of Wine, which tried to regulate the price of wines of various qualities.² an attempt not repeated in Magna Carta.

The author who gives us the text of the ordinance of 1197, tells us that its terms were too stringent, and had to be relaxed in practice.³ This was done in 1201: the King’s justices seized cloth that was less than the legal width. They compromised, however, by accepting money “to the use of the King and to the damage of many”; thus Hoveden denounces what he regards as an unlawful bargain between justices and traders for evading the strict letter of the ordinance.

The justices, indeed, were often more intent on collecting fines for its breach than on enforcing the Assize. In 1203, two merchants of Worksop were amerced each in half a mark for selling wine contrary to the Assize, while the custodians of measures of the borough were mulcted in one mark for performing their duty negligently—an exact illustration of the words of the ordinance.¹ In the same year, a fine of one mark was imposed on certain merchants “for stretching cloth,” in order, presumably, to bring it to the legal width.² Merchants frequently paid heavy fines to escape the ordinance altogether.³

When the barons in 1215 insisted upon John enforcing his brother’s ordinance, they took a step in their own interests as buyers, and against the interests of the trade guilds as sellers. Although this provision was repeated in subsequent charters, evasion continued. One example may suffice: in the second year of Henry III.⁴ the citizens of London paid 40 marks that they might not be questioned for selling cloth less than two yards in width. Here is an illustration of the practice of the judges to which Hoveden had objected, and which Magna Carta had apparently failed to put down. Sometimes, however, Richard’s Assize of Measures⁵ and John’s Assize of Wine were enforced. In 1219, a Lincolnshire parson, with a liberal conception of his parochial duties, had to pay 40s. for wine sold extra Assisam.⁶ Parsons, apparently, might engage in trade, but only if they conformed to the usual regulations.

Edition: current; Page: [359]

CHAPTER THIRTY–SIX.

Nichil detur vel capiatur de cetero pro brevi inquisitionis de vita vel membris, sed gratis concedatur et non negetur.

Nothing in future shall be given or taken for a writ of inquisition of life or limbs, but freely it shall be granted, and never denied.

This chapter has an important bearing upon trial by combat, and none at all upon habeas corpus, to which it is often supposed to be closely related. The writ upon which emphasis is here laid had been invented by Henry II. to obviate the judicial duel, by allowing the accused to refer the question of guilt or innocence to the verdict of his neighbours.

I.: Trial by Combat prior to the Reign of John.

The crucial moment in judicial proceedings during the Middle Ages arrived, as has already been explained,¹ when the “test” or “trial” (*lex*), appointed by the court, was attempted by one or both of the litigants. The particular form of proof to which the warlike Norman barons were attached was the *duellum*, and it was only natural that such of the old Anglo-Saxon aristocracy as associated with them on terms of equality should adopt their prejudices. “Combat” became the normal mode of deciding pleas among the upper classes. From the first, however, it seems not to have been competent for property of less than 10s. in value,² and it soon came to be specially reserved for two classes of disputes—civil pleas instituted by writ of right, and criminal pleas following on “appeal.” The present chapter is concerned with the latter only.

An “appeal” in this connection was entirely different from the modern appeal from a lower to a higher court. It was a formal accusation of treason or felony made by a private individual on his own initiative, and was usually followed by judicial combat between the appellant and appellee, each of whom fought in person. Such a right was necessary in an age when the government had not yet assumed a general responsibility for bringing ordinary criminals to justice. The wronged person, not the magistrate, was the avenger of crime; and this explains several peculiarities—why, for example, when the accused had uttered “that hateful word craven,”¹ thus confessing himself vanquished and deserving a perjurer’s fate, the victorious accuser was entitled to his vengeance, even in face of a royal pardon. When Henry of Essex, constable and standard-bearer of Henry II., in 1163, had been worsted in the combat, the royal favour could not shield him, though the King’s connivance enabled him, by becoming a monk, and therefore dead in law, to escape actual death by hanging.² At an early date the procedure resembled even more closely a legalized private revenge: “the ancient usage was, so late as Henry IV.’s time, that all the relations of the slain should drag the appellee to the place of execution.”³

The evils of trial by combat are obvious. From the first it was dreaded by the traders of the boroughs, who paid heavily for charters of exemption. Their aversion spread to the higher classes, and was shared by Henry II. To that statesman, endowed with the instincts of a reformer, despising obsolete and irrational modes of procedure, and devoid of reverence for tradition, trial by combat was abhorrent. He would gladly have abolished it, but followed the more subtle policy of undermining its vitality. For this purpose, he used four expedients, which are of great interest, in respect that they throw light on the process by which trial by jury superseded trial by battle.⁴ (1) Every facility was afforded the parties to a civil suit to forego the *duellum* voluntarily. Henry placed at their disposal, as a substitute, a procedure which his ancestors had reserved for the service of the Crown. Litigants might refer their rival claims to the oath of a picked body of local neighbours: the old recognitors thus developed into the *jurata*. This course was possible, however, only where both parties consented, and it had many features in common with a modern arbitration. (2) In pleas relating to the title and possession of land, Henry went further, granting to the tenant the option of a peaceful settlement even when the demandant preferred battle. The *assisa*, like the *jurata*, applied only to civil pleas. (3) Attempts were made to discourage trial by combat in criminal pleas also, by discouraging private “appeal,” its natural prelude. The corporate voice of the accusing jury was made to supersede the individual complaint of the injured party. Only the near blood relation, or the liege lord, of a murdered man was allowed to prove the offender’s guilt by combat; while a woman’s right of appeal was kept within narrow limits.¹ (4) A wide field was still left for private appeal and battle; but Henry endeavoured to narrow it by a subtle device. In appeals of homicide, where the accusation was not made *bona fide*, but maliciously or without probable cause, the appellee was afforded a means of escaping the *duellum*: he might apply for the writ that forms the subject of this chapter.

II.: The Writ of Life and Limb.

The writ here referred to, better known to medieval England as the writ *de odio et atia*,² was intended to protect from duel men unjustly appealed of homicide. Many an appealed man was glad to purchase escape by assuming the habit and tonsure of a monk;³ but Henry desired to save innocent men from the risk of failure in the *duellum*, without this subterfuge. If the accused asserted that his appellant acted “out of spite and hate” (*de odio et atia*), he might purchase from the chancery a writ to refer this preliminary plea to the verdict of twelve recognitors. If his neighbours upheld the plea, further proceedings were quashed: the *duellum* was avoided.¹ A similar privilege was afterwards extended to those guilty of homicide in self-defence, or of homicide by misadventure.² Soon every man appealed of murder, whether guilty or not, alleged as matter of course that he had been accused maliciously, mere “words of common form.” Virtually, the main issue of guilt or innocence, not merely the preliminary pleas, came to be determined by the neighbours’ verdict,³ which was treated as final. No further proceedings were necessary: none were allowed. The *duellum* had been elbowed aside, although it was not abolished until 1819.⁴

III.: Subsidiary Uses of the Writ.

This inquest of life and limb has been claimed as the direct antecedent of the procedure which became so valuable a bulwark of the subject's liberty, under the name habeas corpus. This is a mistake; the modern writ of habeas corpus was developed out of an entirely different writ, which had for its original object the safe-keeping of the prisoner's body in gaol, not his liberation from unjust confinement.⁵

The opinion generally, though erroneously, held, is not without excuse; for the writ mentioned by Magna Carta was put to a subsidiary use, which bears superficial resemblance to that of the habeas corpus. Considerable delay might occur between the appellee's petition for the writ of inquisition and the verdict upon it. In the interval, the man accused of murder had no right to be released on bail, a privilege allowed to those suspected of less grave crimes. This was hard where the accused was the victim of malice, or guilty only of justifiable homicide. Prisoners, in such Edition: current; Page: [363] a plight, might purchase royal writs that would save them from languishing for months or years in gaol. The writ best suited for this purpose was that *de odio et atia*, since it was already applicable to presumably innocent appellees for another purpose.¹

As trial by combat became rapidly obsolete, the original purpose of the writ was forgotten, and its once subsidiary object became more prominent. Before Bracton's day, this change had taken place: the writ had come to be viewed primarily as an expedient for releasing upon bail homicides per infortunium or *se defendendo*. Bracton, in giving the form of the writ,² declares it to be iniquitous that innocent men should be long detained in prison: therefore, he tells us, an inquisition is wont to be made, at the request of sorrowful friends, whether the accusation is *bona fide* or has been brought *de odio et atia*. This pleasing picture of a king moved to pity by tearful friends of accused men scarcely applies to John, who listened only to suitors with long purses: the writs that liberated homicides had become a valuable source of revenue. Sheriffs were reprimanded for releasing prisoners on bail without the King's warrant, but, in spite of heavy amercements, they continued their irregularities. Thus, in 1207, Peter of Scudimore paid to the exchequer 10 marks for setting homicides free upon pledges, without warrant from the King.³ In that year, John repeated his orders, strictly forbidding manslaughterers to be set free upon bail until they had received judgment in presence of the King's justices.⁴

To John, then, the fees to be received for this writ, constituted its greatest merit; whereas the barons claimed, as mere matter of justice, that it should be issued free of charge to all who needed it. John's acceptance of their demands was repeated in all reissues, and apparently observed in practice. The procedure during the reign of Henry III. is described by Bracton in a passage already cited. After the writ *de odio* had been received, an inquest, he tells us, must Edition: current; Page: [364] be held speedily, and if the jury decided that the accusation had been made maliciously, or that the slaying had been in self-defence or by accident, the Crown was to be informed of this. Thereafter, from the chancery would be issued a second writ (known in later days as the writ *tradias in ballium*), directing the sheriff, on the accused finding twelve good sureties of the county, to "deliver him in bail to those twelve" till the arrival of the justices.

It should be noted that the provision granting gratuitous writs was not construed as forbidding payments made by an accused man for a special form of "trial." Prof. Maitland has shown how "occasionally a person pays money to the King that he may have an inquest, and it would seem that he might still buy the right to be tried by a body constituted in some particular way. He might pay to be tried by the jurors of two hundreds, or of three hundreds, and because of local enmities such a payment may sometimes have been expedient."¹ A certain Reginald, Adam's son, in 1222, offered one mark for a verdict of the three neighbouring counties (it was a Lincolnshire plea), as to whether the accusation was made because of "the ill-will and hate" which William de Ros, appellant's lord, bore to Reginald's father "vel per verum appellum."²

A long series of later statutes enforced or modified this procedure. These have been interpreted to imply frequent changes of policy, sometimes abolishing and sometimes reintroducing the writ and the procedure which followed it.³ This is a mistake; the various statutes wrought no radical change, but merely modified points of detail; sometimes seeking to prevent the release of the guilty on bail, and sometimes removing difficulties from the path of the innocent. Edition: current; Page: [365] The Statute of Westminster, I., for example, after a preamble, which animadverted on sheriffs impanelling juries favourable to the accused, provided that inquests "shall be taken by lawful men chosen by oath (of whom two at least shall be knights) which by no affinity with the prisoners nor otherwise are to be suspected."¹ The Statute of Gloucester, on the other hand, ordered the strict confinement, pending trial, of offenders whose guilt was apparent.² The Statute of Westminster, II., once more favoured prisoners, providing by chapter 12

for the punishment of false appellants or accusers, and by chapter 29 that “lest the parties appealed or indicted be kept long in prison, they shall have a writ of odio et atia, like as it is declared in Magna Carta and other Statutes.”³ The writ in question was in use in 1314.⁴ and seems never to have been expressly abolished, but to have sunk gradually into neglect, as appeals became obsolete and gaol deliveries were more frequently held.

IV.: Later History of Appeal and Battle.

The right of private accusation was restricted, not abolished, by Henry II. and his successors. It could not be denied to an injured man who was not suspected of abusing his right. Prosecutions by way of indictment and jury trial supplemented, without superseding, private prosecutions by way of appeal and battle. The danger of a second prosecution might hang over the head of an accused man after he had “stood his trial” and been honourably acquitted. It was unfair that he should be kept in such prolonged suspense; and, accordingly, the Statute of Gloucester provided that the right of appeal should lapse unless exercised within year and day of the commission of the offence.⁵ To obviate all Edition: current; Page: [366] risk of a double prosecution, it was necessary that the Crown should delay to prosecute until the year and day had expired. This rule was followed in 1482. Such immunity from arraignment for twelve months would have produced a worse evil, by facilitating the escape of criminals from justice. After experience of its pernicious effects, the rule was condemned by the act of parliament which instituted the Star Chamber.¹

This remedied the more recent evil, but revived the old injustice: the same statute enacted that acquittal should not bar appeal by the wife or nearest heir of a murdered man. Thus, once again, a man declared innocent by a jury might find himself exposed to a second prosecution. In 1817 the British public was startled to find that a long-forgotten procedure of the dark ages still formed part of the law of England. The body of a Warwickshire girl, Mary Ashford, was discovered in a pit of water under circumstances that suggested foul play. Suspicion fell on Abraham Thornton. After indictment and trial at Warwick Assizes on a charge of rape and murder, he was acquitted. The girl’s brother, William Ashford, not satisfied by what was apparently an honest verdict, tried to secure a second trial, and claimed the appeal of felony, which the judges did not refuse. Ashford’s attempt to revive this obsolete procedure was met by Thornton’s revival of its equally obsolete counterpart. Summoned before the judges of King’s Bench, he offered to defend himself by combat, throwing down as “wager of battle” a glove of approved antique pattern. Lord Ellenborough had to admit his legal right to defend himself against the appeal “by his body,” and Thornton successfully foiled the attempt to force him to a second trial, as Ashford, a mere stripling, declined the Edition: current; Page: [367] unequal contest with an antagonist of athletic build.¹ The unexpected revival of these legal curiosities led to their final suppression. In 1819 a Statute abolished proof by battle alike in criminal and in civil pleas: the right of appeal fell with it.²

CHAPTER THIRTY-SEVEN.

Si aliquis teneat de nobis per feodifirmam, vel per sokagium, vel per burgagium, et de alio terram teneat per servicium militare, nos non habebimus custodiam heredis nec terre sue que est de feodo alterius, occasione illius feodifirme, vel sokagii, vel burgagii; nec habebimus custodiam illius feodifirme, vel sokagii, vel burgagii, nisi ipsa feodifirma debeat servicium militare. Nos non habebimus custodiam heredis vel terre alicujus, quam tenet de alio per servicium militare, occasione alicujus parve serjanterie quam tenet de nobis per servicium reddendi nobis cultellos, vel sagittas, vel hujusmodi.

If anyone holds of us by fee-farm, by socage, or by burgage, and holds also land of another lord by knight’s service, we will not (by reason of that fee-farm, socage, or burgage,) have the wardship of the heir, or of such land of his as is of the fief of that other; nor shall we have wardship of that fee-farm, socage, or burgage, unless such fee-farm owes knight’s service. We will not by reason of any small³ serjeanty which anyone may hold of us by the service of rendering to us knives, arrows, or the like, have wardship of his heir or of the land which he holds of another lord by knight’s service.

In these provisions the Charter reverts to the subject of wardship, laying down three rules, which will be better understood when their sequence is altered, the second being taken first. (1) Ordinary wardship. The reason for claiming wardship from lands held in chivalry, namely, that a Edition: current; Page: [368] boy could not perform military service, did not apply to fee-farm, socage, or burgage. There was much looseness of usage, however; and of this John took advantage. The Charter stated the law explicitly; wardship was not due from any such holdings, except

in the anomalous case where lands in fee–farm expressly owed military service.¹ As petty serjeanties (although mentioned in the present chapter in a different connection) are not expressly said to share this exemption, it may be inferred that the barons admitted John’s wardship over them, as over great serjeanties. By Littleton’s time, the law had changed: petty serjeanties were then exempt.²

(2) Prerogative wardship. When the heir of a tenant–in–chivalry held military fiefs of different mesne lords, each of these lords enjoyed wardship over his own fief. This was fair to all parties: but, if the ward held one estate of the Crown, and another of a mesne lord, the King claimed wardship over both; and that, too, even when the Crown fief was of small value.³ Such rights were known as “prerogative wardship,” and, thus limited, were in 1215 perfectly legal, however inequitable they may now seem. (a) Fee–farm, socage, and burgage. John, however, pushed this right further, and exercised prerogative wardship over fiefs of mesne lords, not merely by occasion of Crown fiefs held in chivalry, but also by occasion of Crown fiefs held by any tenure. It was outrageous to claim prerogative wardship in respect of fee–farm, socage, or burgage lands, which were exempt even from ordinary wardship. John was made to promise amendment.⁴ (b) Small Serjeanties⁵ were in a different position. Magna Carta did not abolish the Crown’s rights of ordinary wardship over these, but forbade Edition: current; Page: [369] that this should form an excuse for prerogative wardship over the wider fiefs of other lords.¹

Prerogative wardship (even in the limited form admitted by Magna Carta) might involve a double hardship on the mesne lord. Suppose that the common tenant held lands from a mesne lord on condition of say, five knights’ service, as well as his Crown fief. The King seized both fiefs on his death, nominally as a compensation for the loss of military service, which the minor heir could not render. Yet, when a scutage ran, the King demanded from the mesne lord payments in proportion to his full quota without allowing for the fees of five knights taken from him by prerogative wardship. This is no imaginary case: the barons in 1258 complained of the practice and demanded redress.²

CHAPTER THIRTY–EIGHT.

Nullus ballivus ponat de cetero aliquem ad legem simplici loquela sua, sine testibus fidelibus ad hoc inductis.

Edition: current; Page: [370]

No bailiff for the future shall, upon his own unsupported complaint, put anyone to his “law,” without credible witnesses brought for this purpose.

The exact nature of the abuse here condemned has been much discussed by commentators. Bailiffs (the word is probably used here in its widest sense¹) were wont to abuse their authority: henceforth they shall put no man to his “lex” on their own initiative. The word *lex*, in its technical sense, applied to any form of judicial test, such as compurgation, ordeal, or combat, the precise meaning required in each particular case being determined by the context.² In the present chapter it seems to have this technical meaning of a judicial “proof” or “trial” of any sort:³ henceforward no bailiff should have power “simplici loquela sua”⁴ to put anyone to a “lex” of any kind. Authorities differ as to the exact nature of the irregularities which this clause was meant to suppress.

I.: Medieval Interpretations.

Ignorance of the exact Edition: current; Page: [371] nature of the abuse prohibited may well be excused at the present day, since it had become obscure within a century of the granting of the Charter. Some legal notes of the early fourteenth century, containing three alternative suggestions, have come down to us.¹

(1) The first interpretation discussed, and apparently dismissed, in these notes, was that Magna Carta by this prohibition wished to ensure that no one should serve on a jury (in *juratam*) unless he had been warned by a timely summons. This far–fetched suggestion is clearly erroneous.

(2) The next hypothesis raised is that the clause prevented the defendant on a writ of debt (or any similar writ) from winning his case by his unsupported oath, where compurgators ought to have sworn along with him. Exception was, in this view, taken to the bailiff treating favoured defendants in civil pleas with unfair leniency.

(3) A third opinion is stated and eulogized as a better one, namely, that the Charter prohibited bailiffs from showing

undue favour to plaintiffs in civil pleas. The defendant on a writ of debt (or the like) should not, in this interpretation of Magna Carta, be compelled to go to proof at all (that is, to make his “law”) unless the plaintiff had brought “suit” against him (that is, had raised a presumption that the claim was good, by production of preliminary witnesses or by some recognized equivalent).²

II.: Modern Interpretations.

If the chapter is read in a broad sense as prohibiting abuses of a generic kind, it is possible that more than one of its modern exponents may be substantially correct, in spite of apparent contradictions. (1) One theory would read the clause as forbidding magistrates to show undue favour to defendants of certain classes. Crown officials, under John, it is pointed out, favoured Jews against Christians with whom they went to law. The Edition: current; Page: [372] Hebrew defendant in a civil suit “might purge himself by his bare oath on the Pentateuch, whereas in a similar case a Christian, as the law then stood, might be required to wage his law twelve-handed—i.e. with eleven compurgators.”¹ Magna Carta, it has been suggested, struck at this preferential treatment of Jewish litigants, trebly hated as aliens, capitalists, and rejectors of Christ. If so, the attempt failed; for in 1275 a certain Hebrew, named Abraham, was allowed “to make his law single-handed on his Book of the Jewish Law” in face of the plaintiff’s protest that this was contrary to the custom of the realm.²

(2) On the other hand, the clause is sometimes made to prohibit undue favour shown to demandants in civil suits to the prejudice of defendants. A “suit” of witnesses (sectatores) had to be produced in court by the plaintiff before any “trial” (lex) could take place at all. Bailiffs were forbidden to allow, through slackness, favour, or bribery, this rule to be relaxed. This interpretation, which was adopted by the author of the *Mirror of Justices*, and by the writer of the notes appended to the *Year Book* already cited, found favour with Chief Justice Holt in 1700.³

(3) A closely allied explanation treats the clause not as forbidding undue favour towards one party to an action, but rather as preventing bailiffs from favouring themselves. When it suited them, the King’s officials were wont to dispense with the wholesome rule that demanded “suit” or its equivalent before a plea could be entertained. This practice was by no means confined to England, and has been discussed by Dr. Brunner.⁴

Edition: current; Page: [373]

(4) It is perhaps only another aspect of the same explanation to regard the clause as directed mainly against unfair treatment of accused men in criminal prosecutions. No one ought to be put to his “lex,” in the sense of “ordeal,” on mere grounds of vague suspicion or on the unsupported statement of a royal bailiff. After 1166, at least, the voice of an accusing jury of neighbours was a necessary preliminary, under normal circumstances, before any one could be put to the ordeal in England. Magna Carta confirmed this salutary rule: no bailiff should put any one to the ordeal except after formal indictment, due evidence of which was presented at the diet of proof.¹

III.: Nature of the grievance.

As already suggested, it seems not unlikely that two or more of these theories may require to be combined in order to furnish a complete explanation of the clause under discussion. Magna Carta may well have condemned alike the practice of compelling a man to defend a civil action unsupported by suit, and of sending him to the dreaded ordeal without indictment by his neighbours.

To the criminal aspect of the matter, the Assize of Clarendon (1166) seems to supply the key. Article 4 of that ordinance prescribes the procedure for trying robbers, thieves, and murderers: “the sheriff shall bring them before the justices; and with them they shall bring two law-worthy men of the hundred and of the village where they were apprehended, to bear the record of the county and of the hundred, as to why they had been apprehended; and, there, before the justices they shall make their law.” This “law” is elsewhere in the ordinance clearly Edition: current; Page: [374] identified with ordeal;¹ and the purport of the whole was that accused men could not be put to ordeal except in presence of two lawful men who had been present at the indictment and had come before the justices specially to bear witness thereof. In other words, the sheriff’s own report of the indictment “sine testibus fidelibus ad hoc inductis” was not sufficient. The “county” and the “hundred” which had heard the prisoner accused, must send representatives to bear record of the facts.²

The ordeal was a solemn affair, and every precaution must be taken against its abuse. Sheriffs or other royal bailiffs

must be present, as well as members of the accusing jury. Lords of feudal courts, claiming this franchise, required apparently royal warrant for its exercise.³ Practice, however, was loose: the King's justices would seem to have had a right to put suspects to the ordeal *ex officio* without the intervention of the accusing jury:⁴ sheriffs and others, with the Crown's approval or connivance, exercised a similar privilege. In condemning these practices, Magna Carta would appear to have been, to some extent, modifying previous usage.⁵ It was not enough thereafter that indictment should precede ordeal; members of the presenting jury, who had made the accusation at the first diet, must accompany the sheriff before the justices at the final diet, there to bear testimony both as to the nature of the crime and as to the fact of the indictment. Before anyone could be put "to his law," the sheriff's formal report must be corroborated by the testimony of representative jurors.

The Charter of 1216 repeated this provision without alteration. In 1217 a change occurred, which was undoubtedly a consequence of the virtual abolition of the ordeal by the Lateran Council in 1215. The framers of Henry's second reissue found leisure to adjust points of administrative detail. The simple reference to ordeal was inappropriate now that new forms of trial were taking its place. The justices, indeed, scarcely knew what test to substitute for ordeal. They seem sometimes to have resorted to compurgation and sometimes to battle; but the sworn verdict of neighbours was fast occupying the ground left vacant. The Charter of 1217, then, made it clear that the provisions applied in 1215 to ordeal were to be extended to other tests. The "ad legem" of John's Charter became in the new version "ad legem manifestam nec ad juramentum." A "manifest law" might well mean either ordeal or any other actual physical test such as "battle,"¹ while "juramentum" points to the sworn testimony of the jury, which was slowly taking the place of the discredited ordeal.²

CHAPTER THIRTY-NINE.

Nullus liber homo capiatur vel imprisonetur, aut disseisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruat, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terrae.

No freeman shall be taken or [and] imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or [and] by the law of the land.³

Edition: current; Page: [376]

This chapter occupies a prominent place in law-books, and is of considerable importance, although its value has sometimes been exaggerated.¹

I.: Its Main Object.

It has been usual to read it as a guarantee of trial by jury to all Englishmen; as absolutely prohibiting arbitrary commitment; and as solemnly undertaking to dispense to all and sundry an equal justice, full, free, and speedy.² The traditional interpretation has thus made it, in the widest terms, a promise of law and liberty and good government to every one.³ A careful analysis of the clause, read in connection with its historical genesis, suggests the need for modification of this view. It was in accord with the practical genius of the Charter that it should here direct its energies, not to the enunciation of vague platitudes, but to the reform of a specific abuse. Its object was to prohibit John from resorting to what is sometimes whimsically known in Scotland as "Jeddart justice."⁴ It Edition: current; Page: [377] forbade him for the future to place execution before judgment. Three aspects of this prohibition may be emphasized.

(1): Judgment must precede execution.

In some cases John proceeded, or threatened to proceed, by force of arms against recalcitrants as though assured of their guilt, without waiting for legal procedure.¹ Complaint was made of arrests and imprisonments suffered "without judgment" (*absque iudicio*); and these are the very words of the "unknown charter"—"Concedit Rex Johannes quod non capiet homines *absque iudicio*."² The Articles of the Barons and Magna Carta expand this phrase. *Absque iudicio* becomes *nisi per legale iudicium parium suorum vel per legem terrae*, thus guarding, not merely against execution without judgment, but also against John's subtler device for attacking his enemies by a travesty of judicial process. The Charter asks not only for a "judgment," but for a "judgment of peers" and "according to the law of the land." Two species of irregularities were condemned by these words; and these will be explained in the two following

subsections.

(2): Per iudicium parium:

every judgment must be delivered by the accused man's "equals."³ The need for "a judgment of peers" was recognized at an early date in England.⁴ It was not originally a class privilege of the aristocracy, but a right shared by all grades of free-holders; Edition: current; Page: [378] whatever their rank, they could not be tried by their inferiors.¹ In this respect English custom did not differ from the procedure prescribed by feudal usage on the Continent of Europe.² Two applications of this general principle had, however, special interest for the framers of Magna Carta: the "peers" of a Crown tenant were his fellow Crown tenants, who would normally deliver judgment in the Curia Regis; while the "peers" of the tenant of a mesne lord were the other suitors of the Court Baron of the manor. In either case, judgments were given per pares curiae. John, resorting wholesale to practices used sparingly in earlier reigns, had set these rules at defiance. His political and personal enemies were exiled, or deprived of their estates, by the judgment of a tribunal composed entirely of Crown nominees. Magna Carta promised a return to the ancient practice.

The varied meanings conveyed by the word "peers" to a medieval mind, together with the nature of iudicium parium, may be further illustrated by the special rules applicable to four exceptional classes of individuals:—(a) Jews of England and Normandy enjoyed under John's Charter of 10th April, 1201, the right to be judged by men of their own race; for them a iudicium parium was a judgment of Jews.³ (b) A foreign merchant, by later statutes, obtained the right to a jury of the "half tongue" (de medietate linguae), composed partly of aliens of his own country.⁴ (c) The peers of a Welshman seem, in some disputes with the Crown, to have been men drawn from the marches: such at least is the plausible interpretation of the phrase "in Edition: current; Page: [379] marchia per iudicium parium suorum," occurring in later chapters of Magna Carta, and granting to the Welsh redress of wrongful disseisins.¹ (d) A Lord Marcher occupied a peculiar position, enjoying rights denied to barons whose estates lay in more settled parts of England. In 1281 the Earl of Gloucester, accused by Edward I. of a breach of allegiance, claimed to be judged, not by the whole body of Crown tenants, but by such as were, like himself, lords marchers.² These illustrations show that a "trial by peers" had a wider and less stereotyped meaning in the Middle Ages than it has at the present day.³

(3): Per legem terrae.

No freeman could be punished except "in accordance with the law of the land." The precise meaning of these often-quoted words ought, perhaps, still to be regarded as an open question. Two meanings are possible: one, narrow and technical; the other, of a loose and popular bearing. The more technical has already been explained.⁴ Thus interpreted, the words of John's Charter promised a threefold security to all the freemen of England. Their persons and property were protected from the King's arbitrary will by the rule that execution should be preceded by a judgment—by a judgment of peers—by a judgment according to the appropriate time-honoured "test," battle, compurgation, or ordeal.⁵

Edition: current; Page: [380]

Much weight, however, must be allowed to the arguments of those who contend for interpreting "lex terrae" more in accordance with the vague and somewhat meaningless "law of the land" of popular speech at the present day. The phrase, they argue, was not confined to methods of procedure, but referred to the entire tone and substance of the law.¹ Advocates of both theories can point to other parts of Magna Carta where "lex" is used in the sense they claim for it in the present passage; for its purport was, in 1215, ambiguous. In chapters 18, 36, and 38, it refers primarily to procedure, whereas chapters 9, 45, 52, 56, and 59 suggest a broader interpretation.

Magna Carta is undoubtedly a loosely drawn document, and it is always possible that both meanings were in the minds of the framers. If so, the older, more technical signification was gradually forgotten, and "the law of the land" became the vague and somewhat meaningless phrase of the popular speech of to-day. It was only natural that this change of emphasis should be reflected in subsequent statutes reaffirming, expanding, or explaining Magna Carta. An important series of these, passed in the reigns of Edward III. and Richard II., shows how the per legem terrae of 1215 was read in the fourteenth century as equivalent to "by due process of law," and how the Great Charter was interpreted as prohibiting the trial of men for their lives and limbs before the King's Council on mere informal and irresponsible suggestions, sometimes made loosely or from malicious and interested motives.²

The Act of 1352, for example, after reciting this provision of Magna Carta, insisted on the “indictment or presentment of good and lawful people of the same neighbourhood where such deeds be done.” Coke,¹ founding apparently on these fourteenth-century statutes, makes “per legem terrae” equivalent to “by due process of law” and that again to “by indictment or presentment of good and lawful men,” thus finding the grand jury enshrined in Magna Carta. The framers of the Petition of Right² read the same words as a prohibition, not only of imprisonment “without any cause showed” but also of proceedings under martial law, thus interpreting the aims of King John’s opponents in the light of the misdeeds of King Charles.

Anachronisms such as these must be avoided. Whatever may have been the exact grievances that bulked most largely in the barons’ minds in 1215, their main contention was obvious. John was no longer to take the law into his own hands: the deliberate judgment of a competent court of law must precede any punitive measures to be taken by the King against freemen of his realm.

(4): The meaning of “vel.”

The peculiar use of the word “vel” introduced an unfortunate element of ambiguity. No proceedings were to take place “without lawful judgment of peers or by the law of the land”—“or” thus occurring where “and” might naturally be expected. Authorities on medieval Latin are agreed, however, that “vel” is sometimes equivalent to *et*.³ Comparison with the Edition: current; Page: [382] terms of chapter 52 and with those of the corresponding Article of the Barons places the matter almost beyond doubt. The 25th of the Articles of the Barons had provided that all men disseised by Henry or Richard should “have right without delay by judgment of their peers in the king’s court,” giving no hint of any possible alternative to *judicium parium*. Chapter 52 of the Charter, in supplementing the present chapter, describes the evils complained of in both chapters as acts of disseisin or outlawry by the King “sine legale *judicio parium suorum*,” leaving no room for ambiguity.

II.: The Scope of the Protection afforded.

The object of the barons was to protect themselves and their friends against the King, not to set forth a scientific system of jurisprudence: the *judicium parium* was interposed as a barrier against measures instituted by the King, not against appeals of private individuals. Pleas following upon accusations by the injured party were held in 1471 not to fall within the words of Magna Carta.¹ This was a serious limitation; but as against the Crown the scope of the protection afforded by the Great Charter was very wide indeed. Care was taken that the three-fold safeguard should cover every form of abuse likely to be practised by John.²

(1): Capiatur vel imprisonetur.

These words are followed in the text by a string of other verbs, each of which is introduced by “aut” (“aut disseisiatur,” etc.). The contrast between “vel” and “aut” strengthens the suggestion that “vel” is used in this chapter conjunctively. The meaning would then be that no one could be arrested and imprisoned (that is, no one could be detained as a prisoner) without trial. If “vel,” on the other hand, were to be read disjunctively while the two words it connects were literally Edition: current; Page: [383] interpreted and enforced, orderly government would be at an end.¹ Arrest normally precedes judgment, although judgment must precede permanent imprisonment following on arrest.

(2): Aut disseisiatur.

Avarice was a frequent motive of John’s oppressions: the machinery of justice was an engine for transferring land and money to his treasury. Crown-tenants frequently found their estates appropriated by the Crown as escheats. That this was a grievance to which the barons attached supreme importance is shown in many ways: by the care taken in the 25th Article of the Barons and in chapter 52 of the Charter to provide procedure for restoring “disseised”² estates, and by the terms of writs issued by John after the treaty at Runnymede, for the immediate restoration of “lands, castles, and franchises from which we have caused any one to be disseised injuste et sine *judicio*.”³

Later versions of Magna Carta (beginning with that of 1217) are careful to define the objects to be protected from

disseisin: “free tenements, franchises, and free customs.”⁴ (a) *Liberum tenementum*. “Free” tenements were freeholds as opposed to the villenagium that passed into the modern copyhold. None of the possessions thus protected were more highly valued by the barons than their feudal strongholds.⁵ Castles claimed by great lords as their own property are mentioned in many writs of the period, while chapter 52 of Magna Carta gives them a prominent place Edition: current; Page: [384] among the “disseisins” to be restored. (b) “Libertates” covered feudal jurisdictions, immunities, and privileges of various sorts, of too intangible a nature to be appropriately described as “holdings.” (c) *Consuetudines* had two meanings, a broad general one and a narrower financial one.¹ As the Charter of 1217 uses a proprietary pronoun (no freeman shall be disseised of his free customs), it probably refers to such rights as those of levying tolls and tallages. These vested interests were of the nature of monopolies; and Coke, in treating this passage as a text on which to preach the doctrine that monopolies have always been illegal in England, aims wide of his mark. Commenting on the words “de libertatibus,” he declares that generally all monopolies are against this Great Charter, because they are against the liberty and freedom of the subject and against the law of the land.”² In this error he has been assiduously followed.³

(3): Aut utlagetur, aut exuletur, aut aliquo modo destruat.

The declaration of outlawry, which could only be made in the county court, was a necessary preliminary to the forfeiture of the outlaw’s lands and goods. The expedient recommended itself peculiarly to John’s genius; it was his policy to terrify those with whom he had quarrelled, until they fled the country; to summon them three times before the county court, knowing that they dared not face his corrupt and servile officers; and finally to have them formally outlawed and their property seized. Such had been the fate of Robert Fitz Walter and Eustace de Vesci, in the autumn of 1212.⁴ The outlawed man was outside the pale of society; anyone might slay him at pleasure; in the grim phrase of the day, he bore “a wolf’s head” (*caput lupinum*), and might be hunted like a noxious beast. A reward of two marks was offered for each outlaw’s head brought to Westminster. This sum was paid Edition: current; Page: [385] in 1196 for the head of William of Elleford.¹ The word “exiled” explains itself; and commentators have very properly noted the care taken to widen the scope of the clause by the use of the words “or in any other way destroyed.”²

(4): “Nec super eum ibimus, nec super eum mittemus.”

These words have been frequently misinterpreted. Read in the light of historical incidents of the immediately preceding years, they leave no room for ambiguity. Their object was to prevent John from substituting violence for legal process: he must never again attack *per vim et arma* men unjudged and uncondemned.

The meaning is plain. Yet Coke, following his vicious method of assuming the existence, in Magna Carta, of a warrant for every legal principle of his own day, misled generations of commentators. He maintained that John promised to refrain from raising, in his own courts, actions in which he was personally interested. In elaborating this error, he drew a distinction between the court of King’s Bench, otherwise known as *coram rege*, because the King was in theory present, and other courts to which he had “sent” a writ delegating authority. *Ibimus*, he seems to think, applied in the former case; *mittemus* in the latter. To quote his words, “No man shall be condemned at the King’s suit, either before the King in his bench, where the pleas are *coram rege* (and so are the words, *nec super eum ibimus*, to be understood) nor before any other commissioner, or judge whatsoever (and so are the words, *nec super eum mittemus*, to be understood), but by the judgment of his peers, that is, equals, or according to the law of the land.”³ Coke is in error; it was the use of brute force, Edition: current; Page: [386] not merely one particular form of legal process, which John in these words renounced.

III.: What Classes enjoyed the Protection of *Judicium Parium*?

No “freeman” was to be molested in any of the ways specified; but how far in the social scale did this description descend? Coke claims villeins as free for purposes of this chapter and of chapter 1, while rejecting them for the purposes of chapter 20.¹ Their right to the status of freeman has already been disallowed, and any possible ambiguity as to the present chapter is removed by the words of the revised version of 1217. Chapter 35 of that reissue, with the object of making its meaning clearer, inserts after “disseisiatur” the words (already discussed) “de libero tenemento suo vel libertatibus vel liberis consuetudinibus suis.” Mr. Prothero suggests that this addition implies an advance on the privileges secured in 1215:—“It is worth while to notice that the words in which these liberties are stated in § 35 of the Charter of 1217 are considerably fuller and clearer than the corresponding declaration in the Charter of 1215.”² It is safer to infer that no change was here intended, but merely the removal of ambiguity. If there is a change, it is

rather a contraction than an extension, making it clear that only “free” tenements are protected, and excluding the property of villeins and even villenagium belonging to freemen.³ It was made plain beyond reasonable doubt that no villein should have lot or part in rights hailed by generations of commentators as the national heritage of all Englishmen.⁴

IV.: Reactionary Side of these Provisions.

To insist that in all cases a judgment of feudal peers, either in King’s Court or in Court Baron, should take the place of a judgment by the King’s professional judges, was to reverse one of the outstanding features of the policy of Henry II. In Edition: current; Page: [387] this respect, the present chapter may be read in connection with chapter 34. The barons, indeed, were not strict logicians, and probably thought it prudent to claim more than they intended to enforce. Yet, a danger lurked in these provisions; the clause was a reactionary one, tending to restore feudal privileges and feudal usage, inimical alike to the Crown and to the growth of popular liberties.¹ John promised that feudal justice should be dispensed in his feudal court; and, if this promise had been kept, the result would have been to check the development of the small committees destined to become at no distant date the Courts of King’s Bench and Common Pleas, and to revive the fast-waning jurisdictions of the manorial courts on the one hand and of the commune concilium on the other.²

V.: Genesis of this Chapter.

The interpretation here given is emphasized by comparison with certain earlier documents and events. The reigns of Richard and John furnish abundant examples of the abuses complained of. In 1191, Prince John, as leader of the opposition against his brother’s Chancellor, William Longchamp, concluded a treaty that protected himself and his allies from the very evils which John subsequently committed against his own barons. Longchamp conceded in Richard’s name that bishops and abbots, earls, barons, “vavassors” and free-tenants, should not be disseised of lands and chattels at the will of the King’s justices or ministers, but only by judgment of the King’s court according to the lawful customs and assizes, or by the King’s command.³

Edition: current; Page: [388]

Now, the main subject of the arbitration, ending in this treaty, was the custody of certain castles and estates. After the right to occupy each separate castle in dispute had been carefully determined, provision was then made, in the general words cited above, against this arrangement being disturbed without a judgment of the curia regis. Disseisin, and particularly disseisin of castles, was thus in 1191, as in 1215, a topic of special prominence.

Early in 1213, the King had attempted to take vengeance upon his opponents in a manner they are not likely to have forgotten, two years later at Runnymede. John, resenting the attitude of the northern barons who had refused alike to accompany him to Poitou and to pay scutage, determined to take the law into his own hands. Without summoning his opponents before a commune concilium, without even a trial and sentence by one of his Benches, he set out with an army to punish them. He had gone as far north as Northampton when, on 28th August, 1213, Stephen Langton persuaded him to defer forcible proceedings until he had obtained a legal sentence in a formal Curia.¹ That John again threatened recourse to violent methods may be inferred from the letter patent issued in May, 1215, when both sides were armed for war. He proposed arbitration, and promised a truce until the arbitrators had given their award. The words of this promise are notable; since, not only do they illustrate the procedure of August, 1213, but they agree closely with the clause of Magna Carta under discussion. The words are:—“Know that we have conceded to our barons who are against us, that we shall not take or disseise them or their men, nor shall we go against them per vim vel per arma, unless by the law of our kingdom, or by the judgment of their peers in curia nostra.”² Magna Carta repeats this concession in more general terms, substituting “freemen” for the “barons” of the writ—an alteration which necessitated the omission from the Charter of the concluding words of the writ, “in curia nostra”; because the peers of ordinary Edition: current; Page: [389] freemen would be found among the freeholders in the Court Baron.¹

VI.: Later History of “Judgment of Peers.”

The claim made by the barons at Runnymede was re-asserted on subsequent occasions. The phrase “judicium parium” which, probably in consequence of its use in Magna Carta, sprang into “sudden and extraordinary prominence”² was destined to have a long and distinguished career. Mr. Harcourt³ thinks that “it was the obscurity of

the chapter when reissued, the fact that it might mean so many things, which supplied the congenial soil wherein the principle of trial of peers was able to expand and grow to maturity,” when “the Charter as a whole became the Bible of the constitution.”

(1): The baronial contention.

The earls and barons, throughout the reign of John’s unhappy son, attempted to place a broad interpretation on the privilege secured to them by this chapter—claiming that all pleas, civil and criminal (such at least as were raised against them at the instance of the Crown) should be tried by their fellow earls and barons, and not by professional judges of lower rank. William de Braose in 1208 had declared himself ready to satisfy John “secundum iudicium curiae suae et baronum parium meorum.”⁴

(2): The royal contention.

The Crown, on the other hand, while not openly infringing the Charter, tried to narrow its scope. Judges appointed to determine pleas coram rege, no matter what their original status might be, became (so the Crown argued) by such appointment, the peers of any baron or earl. This doctrine was enunciated in 1233 when Peter des Roches denounced Richard, Earl Marshal, as a traitor, in a meeting (colloquium) of crown-tenants held at Gloucester on 14th August of that year. Thereafter, “absque iudicio curiae suae et parium suorum,” as Matthew Paris carefully relates,⁵ Henry treated Earl Richard and his friends as outlaws, and bestowed their lands on his own Poitevin favourites. An attempt was made, at a subsequent meeting held on 9th October, to have these proceedings reversed on the ground, already stated, that they had taken place absque iudicio parium suorum.

The sequel makes clear a point left vague in Matthew’s narrative: there had been a judgment previous to the seizure, but only a judgment of Crown officials coram rege, not of earls and barons in commune concilium. The justiciar defended the action of the government by a striking argument: “there were no peers in England, such as were in the kingdom of France,” and, therefore, John might employ his justices to condemn all ranks of traitors.¹ Bishop Peter was here seeking to evade the provisions of Magna Carta without openly defying them, and his line of argument was that the King’s professional judges, however lowly born, were the peers of an English earl or baron.² Neither the royal view nor the baronial view entirely prevailed. A distinction, however, must be drawn between criminal and civil pleas.

(3): Criminal pleas.

Offenders of the rank of barons partially made good their claim to a trial by equals; while ordinary freemen failed. A further distinction is thus necessary. (a) Crown tenants. The conflicting views held by King and baronage here resulted in a compromise. In criminal pleas, the Crown was obliged to recede from the high ground taken by Peter des Roches in 1233. Unwillingly, and with an attempt to disguise the fact of surrender by confusing the issue, Bracton in theory and Henry III. in practice admitted part of the barons' demand, namely, "that in cases of alleged treason and felony, when Edition: current; Page: [391] forfeiture or escheat was involved, they should be judged only by earls and barons."¹ Bracton does not admit that the King's justices were not "peers" of barons; but deduces their disability from the narrower consideration that the King, through his officials, ought not to be judge in his own behalf, since his interests in escheats might bias his judgment. This explains why "privilege of peers" has never extended to misdemeanours, since these involved no forfeiture to the Crown.

The *judicium parium* was secured to earls and barons in later reigns by bringing the case before the entire body of earls and barons in *commune concilium*. What the barons got at first was "judgment" by peers. The actual "trial" was the "battle," the fellow-peers acting as umpires and enforcing fair play.² Although new modes of procedure came to prevail, the Court of Peers continued its control, and the judgment of peers gradually passed into the modern trial by peers.³ The subject has been further complicated by the growth of the modern conception of a "peerage," embracing various grades of "nobles." In essentials, however, the rights of a baron accused of crime have remained unchanged from the days of Henry III. to our own. The privilege of "trial by peers" still extends to treason and felony, and is still excluded from misdemeanours. When competent, it still takes place before a "Court of Peers"—namely, the House of Lords, if Parliament is in session, and the Court of the Lord High Steward, if not. Under these limitations the privilege of a peer has been for centuries a reality in England for earls and barons, and also for members of those other ranks of the modern "peerage" unknown in 1215—dukes, marquesses, and viscounts.⁴

Edition: current; Page: [392]

(b) For tenants of a mesne lord no similar privilege has been established, even in a restricted form. In charges of felony, as in those of misdemeanour, all freemen outside the peerage are tried, and have been tried for many centuries past, in the ordinary courts of law. There is no privileged treatment for knight or landed gentleman: private feudal courts never recovered from the wounds inflicted by Henry II. The clauses of Magna Carta which sought to revive them were rendered nugatory by legal fictions or simply by neglect.

(4): Civil pleas.

Various attempts were made by the barons to make good a claim to *judicium parium* in civil cases.¹ The chief anxiety, perhaps, of the men of 1215 was to save their estates and castles from disseisin consequent on such pleas. Yet the barons' efforts in this direction were unsuccessful. The House of Lords (except in cases involving the dignity or status of a peer) has never claimed to act as a court of first instance in civil cases to which a peer was a party. Noble and commoner here are on a level. No "peer of the realm" has, for many centuries, asked to plead before a special court of peers in any ordinary non-criminal litigation, whether affecting real or personal estate.

VII.: Erroneous Interpretations.

The tendency to vagueness and exaggeration has already been discussed. Two mistakes of unusual persistence require detailed notice.

(1): The identification of *judicium parium* with trial by jury.

The words of the present chapter form the main, if not the sole, ground on which this traditional error has been based.² The mistake probably owes its origin to a tendency of later generations to explain what was unfamiliar in the Great Charter by what was familiar in their own experience. They found nothing in their own day to correspond with the *judicium parium* of 1215; and nothing in Magna Carta (unless it were this clause) to correspond Edition: current; Page: [393] with trial by jury: therefore they identified the two.¹ Mr. Reeves, Dr. Gneist, and other writers long ago exposed this error, but the most conclusive refutations are those given by Prof. Maitland and Mr. Pike. The arguments of these writers are of a somewhat technical nature;² but their importance is far-reaching. They seem to be mainly

three: —

(a) The criminal petty jury cannot be intended in this chapter, since it had not been invented in 1215:³ to introduce trial by jury into John's Great Charter is an unpardonable anachronism. (b) The barons would have repudiated trial by jury if they had known it. They desired (here as in chapter 21) that questions affecting them should be "judged" before fellow barons, and in the normal case, by the duellum. They would have scorned to submit to the verdict of "twelve good men" of their own locality. Their inferiors must have no voice in determining their guilt or innocence. This sentiment was shared by the tenants of mesne lords. (c) Judgment and verdict were essentially different. The function of a petty jury (after it had been invented) was to answer a specific question. The insurgent barons demanded more than this: they asked a decision on the whole case.⁴ The "peers" who judged presided over the proceedings from beginning to end, appointing the proof they deemed appropriate, sitting as umpires while its fulfilment was essayed, and giving a final decision as to success or failure therein.

Edition: current; Page: [394]

(2): Magna Carta and arbitrary commitment.

A second erroneous theory has still to be discussed. The Petition of Right, as already stated, treats Magna Carta as prohibiting the Crown from making arrests without a warrant showing the cause of detention; and the earlier commentators further interpreted it as making all acts of arbitrary imprisonment by the Crown absolutely illegal. Hallam, for example, declares that "It cannot be too frequently repeated that no power of arbitrary detention has ever been known to our constitution since the charter obtained at Runnymede."¹ Yet every King of England from John Lackland to Charles Stewart claimed and exercised the prerogative of summarily committing to gaol any man suspected of evil designs against Crown or Commonwealth. Even the famous protest of the judges of Queen Elizabeth, asserting the existence of legal limits to the royal prerogative of commitment, proves the lawfulness of the general practice to which it makes exceptions. Such rights inherent in the Crown were never seriously challenged until the struggle between Charles I. and his parliaments had fairly begun. Then only was it suggested that Magna Carta was intended to prohibit arbitrary commitments at the command of the Crown. Such was the argument deliberately put forth in 1627 during the proceedings known sometimes as Darnell's case and sometimes as the case of the Five Knights. Heath, the Attorney-General, easily repelled this contention: "the law hath ever allowed this latitude to the King, or his privy council, which are his representative body, in extraordinary cases to restrain the persons of such freemen as for reasons of state they find necessary for a time, without for this present expressing the causes thereof."² The parliamentary leaders, however, too grimly in earnest to be deterred by logic, were far from abandoning their error because Heath had exposed it. They embodied it, on the contrary, in the Petition of Right, which condemned the Crown's practice of imprisoning political offenders "without any cause showed" (other than per speciale mandatum Edition: current; Page: [395] regis), as contrary to the tenor of Magna Carta—an effective contention as a political expedient, but unsound in law.

CHAPTER FORTY.

Nulli vendemus, nulli negabimus, aut differemus, rectum aut justiciam.

To no one will we sell, to no one will we refuse or delay, right or justice.

This chapter, like the preceding, has had much read into it that would have astonished its framers: application of modern standards to ancient practice has resulted in complete misapprehension. The sums customarily received by John, as by his predecessors, at every stage of legal procedure, were not always the wages of deliberate injustice. Many such payments were not bribes to an unjust judge, but merely expedients for hastening the law's delays, or to ensure a fair hearing for a good plea, or to obtain some unusual but not unfair expedient, such as a peculiarly potent writ or the hearing of a case in the exchequer, which would ordinarily have been tried elsewhere. If the royal courts charged higher rates than the feudal courts, they supplied a better article. When Henry of Anjou threw open the doors of his court to all freemen who chose to pay for writs, he found a ready market. These writs differed widely in price. Some from an early date were issued whenever applied for (writs de cursu) and at a fixed sum: others were granted only as marks of favour or after a bargain had been struck. Specially quick or cogent procedure had to be specially paid for.

It would thus appear that the system of John was not open to the unqualified and violent condemnation which it

usually receives. Hallam's language is too sweeping when he says: "A law which enacts that justice shall neither be sold, denied, nor delayed, stamps with infamy that government under which it had become necessary."¹ In Edition: current; Page: [396] the twentieth century, as in the thirteenth, justice cannot be had for nothing; and the would-be litigant with a good claim but a slender purse will be well advised to acquiesce in a small loss rather than incur certainty of losing as much again in extra-judicial outlays, and risk of losing many times more in the judicial expenses of a protracted litigation. The lack of "free justice" is a reproach which the men of to-day cannot with good grace fling at the administration of John.

As the evils complained of are often exaggerated, so also are the reforms promised by this chapter of Magna Carta. John is usually held to have agreed to the abolition of payments of every sort for judicial writs and other fees of court. Justice, unlike other valuable commodities, was, it would appear, to be obtained for nothing—an ideal never yet attained in any civilized community.

Those who framed this chapter desired to secure a more reasonable measure of reform: abuses of the system were to be redressed.¹ Unfortunately, it was not easy to define abuses—to determine where legitimate payments stopped and illegitimate ones began. Prohibitive prices ought not to be charged for writs de cursu; but was the Crown to have no right to issue writs of grace on its own terms? Plaintiffs who had any special reason for haste frequently paid to have their suits heard quickly: was that an abuse?²

Whatever the intention may have been, the practical effect of the clause was not to secure the abolition of the Edition: current; Page: [397] sale of writs. The practice under Henry III. has been described by our highest authority:—"Apparently there were some writs which could be had for nothing; for others a mark or a half-mark would be charged, while, at least during Henry's early years, there were others which were only to be had at high prices. We may find creditors promising the King a quarter or a third of the debts that they hope to recover. Some distinction seems to have been taken between necessities and luxuries. A royal writ was a necessary for one who was claiming freehold; it was a luxury for the creditor exacting a debt, for the local courts were open to him and he could proceed there without writ. Elaborate glosses overlaid the King's promise that he would sell justice to none, for a line between the price of justice and those mere court fees, which are demanded even in our own day, is not easily drawn. That the poor should have their writs for nothing, was an accepted maxim."¹

Probably the practice before and after 1215 showed few material differences. Some of the more glaring abuses were checked: that was all.² Parliament in subsequent reigns had frequently to petition against the sale of justice in alleged breach of Magna Carta.³ The King usually returned a politic answer, but never surrendered his right to exact large sums for writs of grace. Richard II., for example, replied: "Our lord the King does not intend to divest himself of so great an advantage, which has been continually in use in Chancery as well before as after the making of the said charter, in the time of all his noble progenitors who have been kings of England."⁴

It is evident that Magna Carta did not put down the practice of charging heavy fees for writs. Yet this chapter, Edition: current; Page: [398] although so frequently misunderstood and exaggerated, is still of considerable importance. It marks, for one thing, a stage in the process by which the King's courts outdistanced all rivals. In certain provinces, at least, royal justice was left in undisputed possession. In these the grievance was not that there was too much royal justice, but that it was sometimes delayed or denied. Here, then, even in the moment of John's bitter humiliation we find evidence of the triumph of the policy inaugurated by his father.

It is not to such considerations, however, that this chapter owes the prominence usually given to it in legal treatises; but rather to the fact that it has been interpreted as a universal guarantee of impartial justice to high and low; and because, when so interpreted, it has become in the hands of patriots in many ages a powerful weapon in the cause of constitutional freedom. Viewing it in this light, Coke throws aside his crabbed learning and concludes with what is rather a rhapsody than a lawyer's commentary: "as the gold-finer will not out of the dust, threads, or shreds of gold, let pass the least crumb, in respect of the excellency of the metal; so ought not the learned reader to pass any syllable of this law, in respect of the excellency of the matter."¹

CHAPTER FORTY-ONE.

Omnes mercatores habeant saluum et securum exire de Anglia, et venire in Angliam, et morari et ire per Angliam, tam per terram quam per aquam, ad emendum et vendendum, sine omnibus malis toltis, per antiquas et rectas consuetudines, preterquam in tempore gwerre, et si sint de terra contra nos gwerrina; et si tales inueniantur in terra

nostra in principio gwerre, attachientur sine dampno corporum et rerum, donec sciatur a nobis vel capitali justiciario nostro quomodo mercatores terre nostre tractentur, Edition: current; Page: [399] qui tunc invenientur in terra contra nos gwerrina; et si nostri salvi sint ibi, alii salvi sint in terra nostra.

All merchants shall have safe and secure exit from England, and entry to England, with the right to tarry there and to move about as well by land as by water, for buying and selling by the ancient and right customs, quit from all evil tolls, except (in time of war) such merchants as are of the land at war with us. And if such are found in our land at the beginning of the war, they shall be detained, without injury to their bodies or goods, until information be received by us, or by our chief justiciar, how the merchants of our land found in the land at war with us are treated; and if our men are safe there, the others shall be safe in our land.

Merchants and merchandise had suffered from John's greed. The control of commerce was reserved for the King's personal supervision: no binding rule of law or traditional usage trammelled him in his dealings with foreign merchants, who were dependent on royal favour, not on the law of the land, for the privilege of trading and even for personal safety. No alien could enter England or leave it, nor take up his abode in any town, nor move from place to place, nor buy and sell, without paying heavy tolls to the King. This royal prerogative proved a profitable one.¹

John increased the frequency and amount of such exactions, to the detriment alike of foreign traders and their customers. Magna Carta, therefore, sought to restrain this branch of prerogative, forbidding him to exact excessive tolls for removing obstacles of his own creating. This benefited merchants by securing to them certain privileges, which may perhaps be analysed into three: safe-conduct, Edition: current; Page: [400] that is protection of their persons and goods from violence; liberty to buy and sell in time of peace; and a confirmation of the ancient stereotyped rates of "customs."

So far, the general purport of the enactment is undoubted; but discussions have arisen on several important points, such as the nationality of the traders in whose favour it was conceived; the exact nature of the "evil tolls" abolished; the motives for the rules enforced; and the relations between denizens and foreign traders.

I.: Magna Carta favours alien Merchants.

The better opinion would seem to be that this chapter applied to foreign traders from friendly states. Attempts have been made, indeed, to argue that denizens were to benefit equally with strangers: such was the purport of a learned discourse delivered in the House of Commons by William Hakewill, Barrister of Lincoln's Inn, in 1610, during the debate on John Bate's case.¹ His main argument was that certain statutes of Edward III.² in seeking to confirm and expand the provisions of Magna Carta, did clearly embrace denizens as well as aliens. Yet the framers of an Act in the fourteenth century may well have misunderstood the tenor of John's Charter, or may have deliberately altered it.

Intrinsic and extrinsic evidences combine to create a strong presumption that here Magna Carta referred chiefly, perhaps exclusively, to merchants of foreign lands.³ Denizens trading in England did not require those "safe conducts" which form the chief concession in this chapter. Their rights of buying and selling were already protected in another way; for independent traders were unknown, all merchants being banded into guilds in the various towns whose privileges ("omnes libertates et liberas consuetudines") were guaranteed in a previous part of the Great Charter.⁴ Alien merchants, however, required protection, Edition: current; Page: [401] since they had, strictly speaking, no status in the eye of the law, and held their privileges from the King.¹ The policy of Henry II. and his sons was to favour merchant strangers, but to exact in return the highest dues possible, restrained only by an enlightened self-interest which stopped short at the point where trade would languish by becoming unprofitable. The exchequer and patent rolls afford illustrations of how individual traders or families made private bargains with the Crown for trading privileges. In 1181, Henry obtained two falcons for granting leave to export corn to Norway. In 1197, a certain Hugo Oisel owed 400 marks for licence to trade in England and Richard's other lands, in time of war as well as peace.²

At the commencement of John's reign, traders resident in England collectively obtained confirmation of their privileges. That King issued letters patent to the Mayor of London, to the magistrates of many smaller towns, and to the sheriffs of the southern counties of England, directing them, in terms closely resembling those of Magna Carta, to allow to all merchants, of whatsoever land, safe coming and going, with their wares.³

These arrangements were temporary. John did not intend that any general grant should prevent him from exacting further payments from individuals as occasion offered. For example, Nicolas the Dane promised a hawk each time he

entered England, that he might come and go and trade “free of all customs which pertain to the King.”⁴ Such customary dues, at the usual rates, were not abolished by the Charter, but only the arbitrary additional payments for which there was no warrant.

On this point, then, Magna Carta contained no innovations, and the same is true of its provision for reprisals against traders from lands where English merchants were ill-treated. On the outbreak of war, the Charter directs Edition: current; Page: [402] that merchants of the enemy’s nation should be detained until the King ascertained how his own subjects were treated in the enemy’s territory. This is declaratory of previous practice, of which an illustration may be found in the terms of a writ of August, 1214, which directed the bailiffs of Southampton to detain all Flemings and their goods pending further instructions.¹ There were thus precedents for those rules for foreign traders, which have aroused the admiration of Montesquieu.²

II.: Customs and Tolls.

“Consuetudines” is in this passage used in its narrower, financial sense, relating to those duties on imports and exports still called “customs” at the present day, and to various local dues as well. “Tolls,” when not stigmatized as “evil tolls” would seem to be practically synonymous with these customs. The Crown had at first taken whatever it thought fit. Practice soon established rules as to the normal rates considered fair in various circumstances. When a ship-load of foreign wine arrived, the normal toll was “one cask from a cargo of ten up to twenty casks, and two casks from a cargo of twenty or more.”³ From other merchandise a share was claimed of a fifteenth or sometimes a tenth of the whole. Such tolls, if originally a species of ransom, had in John’s day come to be regarded as a legitimate branch of royal revenue. Any arbitrary increase, however, was condemned by public opinion, and ultimately by Magna Carta as a “mala tolta.”

The King was not the only one who exacted tolls. Every town in England, and many feudal magnates, by prescriptive usage or royal grant, levied payments on goods bought Edition: current; Page: [403] or sold at fairs and markets, or that entered the city gates, or were unloaded at river wharves, or traversed certain roads. The ambition of every borough was to increase its own franchises at the expense of its neighbours. The free customs of Bristol, for example, meant not only that the men of that city should have freedom from tolls inflicted by others, but that they should have the right to inflict tolls upon those others. A whole network of such customs and restrictions impeded the free exchange of commodities in every part of England. Magna Carta had no intention of sweeping these away, so far as they were “just and ancient”; and it is probable that the prohibition against arbitrary increase of tolls was directed only against the Crown.

III.: The Motives prompting these Provisions.

It has been not unusual to credit the framers of Magna Carta with a policy of quite a modern flavour; they are made free-traders and credited with a knowledge of economic principles far in advance of their contemporaries. This is a misconception: Englishmen in the thirteenth century had formulated no far-reaching theories of the rights of the consumer, or the policy of the open door. The home traders were not consenting parties to this chapter, and would have bitterly resented any attempt to place foreigners on an equal footing with the protected guilds of the English boroughs. The barons acted on their own initiative and from purely selfish motives. Rich nobles, lay and ecclesiastic, desired that nothing should prevent the foreign merchants from importing wines and rich apparel that England could not produce. John, indeed, as a consumer of continental luxuries, partially shared their views, but his selfish policy threatened to strangle foreign trade by increasing the burdens attached to it, until it ceased to be remunerative. The barons, therefore, in their own interests, not in those of foreign merchants, still less in those of native traders, demanded that the customs duties should remain at their old fixed rates. In adopting this attitude, they showed their selfish indifference to the equally selfish claims of English traders, who desired a monopoly for Edition: current; Page: [404] themselves. Every favour shown to foreign merchants was an injury done to the guilds of the chartered boroughs. This chapter thus shows a lack of gratitude on the barons’ part for the great service rendered by their allies, the citizens of London. John, on the other hand, would have little reluctance in punishing the men of his capital who, with the ink scarce dry on their new municipal charter, had not scrupled to desert his cause.¹ It must have been with grim pleasure that, on 21st July, 1215, in strict conformity with the tenor of Magna Carta, he addressed a writ to King Philip inviting reprisals upon London merchants in France in certain contingencies.²

In the reissue of 1216 the privileges conferred on merchant strangers were confined to such as had not been “publicly

prohibited beforehand.” This was a material alteration, the effect of which was to restore to the King full discretionary authority over foreign trade, since he had only to issue a general proclamation, and then to accept fines for granting exemption from its operation.

IV.: English Boroughs and Merchant Strangers.

The quarrel between home and alien traders underwent many vicissitudes during succeeding centuries, the Crown taking now one side, and now the other, as its pecuniary interests happened to dictate for the moment. No glimmerings of the doctrine of free trade can be traced: the merchants of each town, banded in their guilds, directed their endeavours towards securing rights of exclusive trading for themselves. It is true that the men of London were scarcely more jealous of the citizens of Rouen or Paris than of those of York or Lincoln; their ambition was to inflict restrictions upon all rivals alike.

English traders were not yet merchant shippers and therefore did not prevent foreigners from undertaking the Edition: current; Page: [405] carrying trade between England and the Continent. Flanders bought English wool and sent back woven fabrics to rival which English looms could not aspire. Londoners, however, resold these goods at a profit and resented any attempt of aliens to encroach on their retail monopoly by coming into touch with English magnates or other consumers. Foreigners must be kept “at the wharf-head.”

The *Liber Custumarum*, a compilation of the early thirteenth century, lays down minute rules for the regulation of foreign traders in London. The merchant stranger had to take up his abode in the house of a citizen. He was prohibited from purchasing articles in process of manufacture. He could buy only from those who had the freedom of the city, and could not re-sell within the borough walls. He was allowed to sell only to burgesses of London, except on three specified days of the week. Such were a few of the rules which the Londoners enforced on all traders within their gates. The King, however, intermittently encouraged foreigners. Under the fostering protection of Henry III., Lombards and Provençals settled in considerable numbers in the capital; and, with connivance of the King, infringed these rules. When the Londoners complained, Henry refused relief. Their loyalty thus shaken, they sided with the King’s opponents in the Barons’ War, and when the royalist cause triumphed at Evesham, the Capital shared in the punishment meted out to the Crown’s opponents. Prince Edward in 1266 was nominated protector of foreign merchants. At the accession of that Prince, London bought itself back into favour, and an attempt was made to define what tolls might be taken by the Crown. In 1275, in Edward’s first parliament, a tariff was fixed by “the prelates, magnates, and communities at the request of the merchants” on most of what then formed the staple exports of England: half a mark on every sack of wool, half a mark on every three hundred wool-fells (that is untanned skins with the fleeces on), and one mark on every load of leather.

These were subsequently called *magna et antiqua custuma*. The settlement of 1275 was by no means final. Edition: current; Page: [406] New disputes arose; and in 1285 Edward I. confiscated the liberties of London, suppressed what he characterized as abuses, and favoured the aliens. In 1298 the franchises of the capital were restored, and very soon the abuses complained of began anew. Edward retorted in 1303 by a special ordinance known as the *Carta Mercatoria* in favour of their foreign rivals, by the terms of which the provisions of the present chapter of *Magna Carta* became at last a reality. This new charter, which was the result of a bargain struck between the Crown and the alien traders, conferred various privileges and exemptions in return for an increase of fifty per cent. of duty, known henceforth as *parva et nova custuma*. Edward I. made several attempts to exact the higher rates from denizens as well as strangers; but in this he failed. In 1309 a Petition of Parliament was presented against the exaction of the “new customs,” declaring them to be in contravention of *Magna Carta*.

In 1311 a temporary community of economic and political interests resulted in an alliance between the English merchants and the English baronage, whose combined efforts forced the “Ordinances” upon Edward II., compelling him for a time to reverse his father’s policy of favouring foreigners at the expense of native merchants. It is unnecessary to follow the checkered fortunes of these Ordinances, frequently enforced and as frequently abolished, according as the fortunes of the barons or of Edward II. were for the moment in the ascendant. During the reign of Edward III. the deep-rooted quarrel between home and alien merchants continued; and many changes of policy were adopted by the Crown. The statute of 1328, which abolished the “staples beyond the sea and on this side,” provided “that all merchant strangers and privy may go and come with their merchandises into England, after the tenor of the Great Charter.”¹ Seven years later, this was confirmed by an act which placed strangers and denizens on an exact equality in all branches of trade, both wholesale and retail, under the express declaration that no privileged rights of chartered boroughs should be allowed to interfere Edition: current; Page: [407] with its enforcement.¹ While this

statute merely repeated and applied the general doctrine of the present chapter of Magna Carta, it directly infringed the provisions of chapter 13.² Such sweeping regulations were in advance of their age and could not be carried out without revolutionizing the medieval scheme of trade and commerce, which depended on merchant guilds, town charters and local monopolies. The influence of the English boroughs and their political allies was strong enough to make the strict enforcement of such legislation impossible; and later statutes, bowing to the inevitable, restored the privileges of the boroughs, while continuing to enunciate an empty general doctrine of free trade to foreigners.³ The English boroughs, to which Parliament in the reign of Richard II. thus restored their franchises and monopolies, were able effectually to exclude foreign competition, in certain trades at least, from within their walls, for four centuries, until the Statute of 1835 ushered in the modern era of free trade.⁴

CHAPTER FORTY-TWO.

Liceat unicuique de cetero exire de regno nostro, et redire, salvo et secure, per terram et per aquam, salva fide nostra, nisi tempore gwerre per aliquod breve tempus, propter communem utilitatem regni, exceptis imprisonatis et utlagatis secundum legem regni, et gente de terra contra nos gwerrina, et mercatoribus de quibus fiat sicut predictum est.

It shall be lawful in future for any one (excepting always those imprisoned or outlawed in accordance with the law of the kingdom, and natives of any country at war with us, and Edition: current; Page: [408] merchants, who shall be treated as is above provided) to leave our kingdom and to return, safe and secure by land and water, except for a short period in time of war, on grounds of public policy—reserving always the allegiance due to us.

The terms of this permission for free intercourse between England and foreign lands are peculiarly wide, the exceptions being reasonable and necessary. Prisoners obviously could not leave our shores, nor outlaws return to them: the case of merchants from hostile states had already been provided for in a liberal spirit; while the temporary restriction of intercourse with the enemy on the outbreak of hostilities was eminently reasonable.

Although the provision is thus general in its scope, it was peculiarly welcome to the clergy, as enabling them without a royal permit to proceed to Rome, there to prosecute their appeals or press their claims for preferment. Thus considered, it contains a virtual repeal of article 4 of the Constitutions of Clarendon of 1166, which forbade archbishops, bishops, and parsons (personæ) of the kingdom to leave England without the King's licence. The grant of freedom of intercourse in 1215 opened a door for the Church to encroach on the royal prerogative; and for that reason it was omitted from the reissue of 1216, never to be replaced. A boon was thus withdrawn from all classes from fear that it might be abused by the ecclesiastics. Henry III. took advantage of the omission in order to restrain the movements of clergy and laity alike. Those who left the country without licence had frequently to pay fines.¹

The stringency with which the prerogative was at first enforced tended afterwards to relax. The King preserved the right, but only exercised it by means of proclamations over particular classes or on special occasions, the inference Edition: current; Page: [409] being that all not actually prohibited were free to come and go as they pleased. Thus, in 1352 Edward III. had it proclaimed throughout every county of England that no earl, baron, knight, man of religion, archer, or labourer, should depart the realm under pain of arrest and imprisonment.¹ The fact that Edward found it necessary to issue such an ordinance, autocratic and abhorrent to modern ideals as its terms now appear, points to a decrease of royal power, as compared with that exercised by Henry II., John, or Henry III. A further curtailment of prerogative may be inferred from the terms of a Statute of Richard II.,² which, in confirming the King's power to prohibit free egress from England, does so, subject to wide exceptions. Under its provisions the Crown might prohibit the embarkation of all manner of people, as well clerks as others, under pain of forfeiture of all their goods, "except only the lords and other great men of the realm, and true and notable merchants, and the King's soldiers," who were apparently in 1381 free to leave without the King's licence, although earls and barons had been prohibited in 1352. Even if this statute confers on magnates, merchants, and soldiers, freedom to go abroad without royal licence (which is doubtful), the powers of veto reserved to the Crown were still, to modern ideas, excessive. The Act remained in force until 1606, when it was repealed under somewhat peculiar circumstances. After the union of the Crowns, King James, anxious to draw the bond closer, persuaded his first English parliament to abrogate a number of old laws inimical to Scottish interests. It was in this connection that the Act of Richard II. was declared (in words, however, not limited to Scotland) to be "from henceforth utterly repealed."³ Coke stoutly maintains that this repeal left intact the Crown's ancient prerogative, not founded upon statute but on the common law, of which power the already-cited Proclamation of Edward III. had been merely an emanation. He seems almost, therefore, to argue that the King in the seventeenth century retained authority which Edition: current; Page: [410] extended precisely over those classes mentioned in the ordinance of 1352.

In any view, this prerogative has never been completely abolished: yet the onus has been shifted. While, under John or Henry III., the subject required, before embarking, to obtain a licence from the Crown, under later Kings he was free to leave until actually prohibited by a royal writ. Coke¹ speaks of the form originally used for this purpose, a form so ancient in his day as to be already obsolete, known as *Breve de securitate invenianda quod se non divertet ad partes externas sine licentia regis*. This was superseded by the simpler writ *Ne exeat regno* which is still in use.² The sphere of this writ was restricted and altered: it ceased to be an engine of royal tyranny and was never issued except as part of the process of a litigation pending in the Court of Chancery. Regarded with suspicion by the courts of common law, it was for centuries the special instrument which prevented parties to a suit in equity from withdrawing to foreign lands. Some uncertainty exists as to the proper province of these writs since the Judicature Acts have merged the Court of Chancery in the High Court of Justice.³ The perfect freedom to leave the shores of England and return at pleasure, accorded by John's Magna Carta, but immediately withdrawn as impracticable for that age, has thus in the course of centuries been fully realized.⁴

Two phrases, occurring in this chapter, call for comment: (1) *Salva fide nostra*. This short-lived clause of Magna Carta very properly provided that mere absence from England should absolve no one from allegiance to his King. The old doctrine of nationality was stringent: *nemo potest exuere patriam*. Everyone born in the land owed allegiance to its King—and this tie continued unbroken until severed by death. A breach of allegiance, which was Edition: current; Page: [411] consequent thus on the mere accident of birth, might expose the offender to the inhuman horrors inflicted upon traitors.

A series of statutes, culminating in the Naturalization Act of 1870, have entirely abrogated this ancient doctrine. A native of Great Britain is now free to become the subject of any foreign state; and the mere fact of his doing so, deliberately and with all necessary formalities, denudes him of his British nationality, severs the tie of allegiance, and frees him from the operation of the law of treason. The words "*salva fide nostra*" no longer apply.

(2) *Propter communem utilitatem regni*. The Charter, in placing restriction on the right of free egress in time of war, declared that such restriction was to be imposed for the common good of the kingdom, thereby enunciating what is regarded as a modern doctrine: John was to take action, not for his own selfish ends, but only *pro bono publico*.

CHAPTER FORTY-THREE.

Si quis tenuerit de aliqua escaeta, sicut de honore Wallingfordie, Notingeham, Bolonie, Lancastrie vel de aliis escaetis, que sunt in manu nostra, et sunt baronie, et obierit, heres ejus non det aliud relevium, nec faciat nobis aliud servicium quam faceret baroni si baronia illa esset in manu baronis; et nos eodem modo eam tenebimus quo baro eam tenuit.

If anyone holding of some escheat (such as the honour of Wallingford, Nottingham, Boulogne, Lancaster, or of other escheats which are in our hands and are baronies) shall die, his heir shall give no other relief, and perform no other service to us than he would have done to the baron, if that barony had been in the baron's hand; and we shall hold it in the same manner in which the baron held it.

This chapter reaffirms a distinction recognized by Henry II. but ignored by John. Crown-tenants were divided into two classes, according as their holdings had been originally granted by the Crown, or by some mesne lord whose barony had subsequently escheated. The latter class received preferential Edition: current; Page: [412] treatment from Henry II. for reasons to be immediately explained. A mesne lord had no right to appropriate the holdings of sub-tenants of a tenant who had incurred escheat; but the Crown did not submit to this just restriction. The King treated all sub-tenancies as wiped out by the mere fact that their lord's fief had escheated to the Crown.

Henry II. mitigated in practice the full severity of this theory, confirming as of grace, or from motives of policy, or in return for money, claims which he refused to admit as matter of right. The tenants of escheated baronies were accepted as tenants in capite of the Crown.¹ Not only so; but Henry did not allow them to be prejudicially affected by the change. The King would only take from them those services and feudal dues which they had been wont to render to the lord of the barony previous to its escheat. This just and lenient policy explains the origin of the division of royal tenants into two classes; tenants who held of Henry *ut de corona*, and tenants who held of him *ut de escaeta, ut de honore, or ut de baronia* (phrases used synonymously).² In respect of such obligations as were heavier for ordinary Crown tenants than for tenants of mesne lords, holders of Crown fiefs *ut de escaeta* were placed on the more favoured footing. Two illustrations may be given. While tenants *ut de corona* under Henry had to pay large and arbitrary reliefs,

those ut de escaeta paid no more than 100s. per knight's fee.³ Nor was their Edition: current; Page: [413] obligation of "suit" to be increased: "the tenants of any honour or manor which had come by escheat to the Crown, were not suitors of the Curia Regis, but of the court of the honour or manor which had so escheated."¹

John ignored this distinction, extending to tenants ut de escaeta the more stringent rules applicable to tenants ut de corona. Magna Carta reaffirmed the distinction; and, not content with enunciating a general principle, made two particular applications of it: neither reliefs nor services of former tenants of baronies were to be augmented by reason of the fact that such baronies had escheated to the Crown.² Henry III.'s Charter of 1217 emphasized a third application of the general rule, declaring that he would not, by reason of an escheated barony, claim escheat or custody over the sub-tenants of that barony.³ To understand this concession, it must be remembered that under Henry III. sub-tenants of baronies were still liable to have their titles reduced through the escheat of their lord; while sub-tenants of those who were themselves sub-tenants were not exposed to a similar mischance. Here also, the position of Edition: current; Page: [414] Crown fiefs ut de escaeta was to be assimilated to that of fiefs of mesne lords, and differentiated from that of Crown fiefs ut de corona. Sub-tenancies of escheated baronies were not to be wiped out, but to subsist, and the Crown (or its grantee) would take the escheat, subject to all liabilities to, and rights of, sub-tenants.

The Crown seems not to have strictly observed this rule in practice. Article 12 of the Petition of the Barons in 1258¹ complained that Henry had granted charters conferring rights not his to give (*aliena jura*), but which he claimed as escheats. An act of the first year of Edward III. narrated how the Crown had confiscated, from purchasers, tenements held of the Crown "as of honours," thus treating them "as though they had been holden in chief of the King, as of the Crown." Redress was promised by the statute:² but irregularities continued throughout the earlier Tudor reigns; and the first Parliament of Edward VI. passed an act to protect purchasers of lands appertaining to honours escheated to the Crown.³

CHAPTER FORTY-FOUR.

Homines qui manent extra forestam non veniant de cetero coram justiciariis nostris de foresta per communes summoniciones, nisi sint in placito, vel plegii alicujus vel aliquorum, qui attachiati sint pro foresta.

Men who dwell without the forest need not henceforth come before our justiciars of the forest upon a general summons, except those who are impleaded, or who have become sureties for any person or persons attached for forest offences.

These provisions were intended to redress one of many abuses connected with the oppressive forest laws.

I.: The Royal Forests.

The word "forest" had acquired an exact technical meaning, and was applied to certain Edition: current; Page: [415] wide districts, scattered irregularly throughout England, reserved to the Crown for purposes of sport. Here the wild boar and deer of various species found shelter, in which they were protected by the severe regulations of the "Forest Law." It was the prevalence of this code which marked off the districts known as royal forests from all that lay extra forestam; and this made an accurate definition possible. A "forest" was a district where this law prevailed to the exclusion of the common law which ruled outside. The forests with their inhabitants had been omitted from the process by which the rest of England had been assimilated under a uniform *lex terrae*: this was the root from which many evils grew.

From this definition of a forest as a legal, not a physical, entity, it follows that the word is far from synonymous with terms such as "wood" or "covert," implying merely natural characteristics. A forest was not necessarily covered with trees throughout the whole or even the greater part of its extent. Miles of moorland and heath and undulating downs might be included, and even fertile valleys, with ploughed fields and villages nestling among them. The same forest, indeed, might contain many woods, some of them on royal demesne and some the property of private owners. Within the imaginary line the King's power was supreme, and he used it frankly for the preservation of beasts of the chase. The men who happened to dwell there were subject to a law, in the expressive words of Dr. Stubbs, "cruel to man and beast." If accused of forest offences, they had no protection from the common law of England any more than from the law of a foreign land. It was something, however, that even in these high places of prerogative, customary rules grew up, obtained authoritative recognition, and hardened into laws which set some limits to royal caprice. Before John's

time the forest code, as set forth in the Assize of Woodstock, had taken its place as a definite system of law, distinct from common law and canon law alike.¹

Edition: current; Page: [416]

II.: Origin of the Forests.

Before the Norman Conquest the Kings of England do not seem to have laid claim to any exclusive prerogative in this respect. The only ordinance of Canute on the subject, admitted to be authentic, enacted merely that every man should have his own hunting, while the King should have his.¹ The rights of the Crown, however, were strengthened by the events of 1066, and by the hardening of feudal theory which followed. All unoccupied waste lands became royal property; and these were the natural resorts of the larger sorts of game. The King established a claim to an exclusive right to hunt the more important species of animals *ferae naturae*, known as “beasts of the forest”—embracing the red deer (harts and hinds), the fallow deer (bucks and does), the roe deer of both sexes, and the wild boar, with, exceptionally in one forest, the ordinary hare.² Henry I. formulated the forest law, and it was probably due to him that “forest” acquired its technical meaning. With the special meaning came the express claim to a monopoly of hunting, together with supreme and exclusive jurisdiction. The disorders of Stephen’s reign lowered the Crown’s authority, and Henry II. found the forests much curtailed. He had no intention to acquiesce in this, but it was not till 1184 that he attempted, by the Assize of Woodstock, to formulate the rules of the forest law. In this sphere, as in so many others, Henry II. built on foundations laid by his grandfather. John’s attitude to the forest laws was not consistent. The monk of Barnwall relates how, in 1212, John allowed some relaxation in the severity of the forest code.³ More characteristic of his normal attitude was the order issued on 28th June, 1209, that hedges should be burned and ditches levelled, so that, while men starved, the beasts might fatten upon the crops and fruits.⁴

Edition: current; Page: [417]

III.: Forest officials.

The local magistrates who administered the rest of England were excluded from the forests by a separate set of officials. At the head of this special organization was placed, in early times, the Forest Justiciar (called the chief forester in chapter 16 of the *Carta de Foresta*), whose duties were divided in the year 1238, after which there were two provinces separated by the river Trent.¹ His appointment was permanent, and his duties, which continued between the eyes, were administrative rather than judicial. He had discretionary authority to release trespassers imprisoned for offences against the forest law.² Under his general supervision each forest, or group of forests, was governed by a separate warden, aided by a number of petty officials known as foresters, whose duties were analogous to those of a modern gamekeeper, but with magisterial powers in addition. Wardens were of two classes—“the one appointed by letters patent under the great seal, holding office during the King’s pleasure; the other hereditary wardens.”³ There was situated in or near each forest of any extent a royal residence which, in the Middle Ages, naturally took the form of a stronghold. It was convenient that the office of warden should be combined with that of constable of this neighbouring castle.⁴ “The wardens were the executive officers of the King in his forests. Writs relating to the administration of forest business, as well as to the delivery of presents of venison and wood, were in general addressed to them.”⁵

The office was one of authority and profit, usually paid in kind rather than by a salary. The warden often held Edition: current; Page: [418] a fief by a tenure connected with the service, and enjoyed rights and perquisites always of a valuable nature, though varying with each forest. These were sufficient to provide him with an income adequate to his position, and to allow him to find the wages of his under-keepers, who ought thus to have been paid officials. Such was the theory; as matter of fact, the foresters, instead of receiving wages, paid large sums to the warden, and recouped themselves by extortions from the dwellers in their bailiwicks.¹ These unpaid foresters were expressively said to “live upon the country.” They may be classified in various ways, as, into riding and walking foresters, or into foresters nominated by the wardens, and foresters in fee. These last had vested interests which the Forest Charter was careful to respect; as, where chapter 14 reserved to them the right to take “chiminage,” or way-leave, denied to other types of foresters. They might still enjoy, but not abuse, the “vested rights” reserved to them.²

With these professional gamekeepers there co-operated, in later times at least, several groups of unpaid magistrates appointed from the knights and freeholders of the district. Of these honorary officials, whose original function was to supply supplementary machinery for protecting the rights of the Crown, but whose position as county gentleman,

with a stake in the district, led them also to act to some extent as arbitrators between the King and outside parties, there were three recognized kinds. (a) Towards the close of the twelfth century officers known as verderers (usually four for each forest) become prominent. They appear in the Carta de Foresta of 1217, but had not been mentioned in the Assize of Woodstock of 1184. It is probable that the office was devised in the interval as a check on the warden's power; just as the office of coroner had been instituted in the reign of Richard as a drag on the sheriff. In other important respects the duties of the verderers within the forests resembled those of coroners within the rest of the county. They were not royal employees, but local landowners whose unpaid magisterial services were required Edition: current; Page: [419] only on special occasions. They were responsible directly to the King, not to the warden; and were appointed in the county court, their "election" taking place in accordance with the terms of the writ "de viredario eligendo." They attended the forest courts and swanimotes, and it appears from chapter 16 of Henry's forest charter that it was their duty to bring before the Justices in Eyre lists of all offenders indicted in the lower courts. These "rolls of attachment" were certified by their seals.¹ (b) The Regarders were twelve knights appointed in each forest county to make tours of inspection every third year, finding answers to a series of questions known as the "Chapters of the Regard." In this way they reviewed the Crown's interests alike in "the venison and the vert" (the technical names for game and growing timber respectively), and reported upon all encroachments: upon hawks and falcons, bows and arrows, greyhounds and mastiffs (with special reference to "expedition" or cutting of their claws),² and generally upon everything owned by private individuals likely to harm the beasts of the forest.³ (c) The Agistors are mentioned in the same clause of the Assize of Woodstock which mentions the Regarders. Four knights were appointed to protect the King's interests in all matters connected with the pasturing of swine or cattle within the royal woods. For thirty days at Michaelmas, pigs were turned loose to feed on acorns and beech mast, on payment by their owners of a small fixed sum per head. The four knights were required to take note of sums thus due, known as "pannage," and to collect them at Martinmas.⁴

Edition: current; Page: [420]

Mention ought, perhaps, to be made of the private foresters also, whom owners of woods within the forests were obliged to appoint. These "wood wards," as they were sometimes called, while paid for by the owner of the wood, were expected to protect the King's interests. In particular, they must prevent trees from being destroyed or wasted: these formed shelter for the game.

IV.: Forest Courts.

The judicial side of the forest system was developed in a manner equally elaborate. Three sets of tribunals must be distinguished: (1) The Court of Attachments (or "view of attachments") was a petty tribunal, the chief duty of which was the taking of evidence to be laid in due course before a higher court. Exceptionally, however, it had power to inflict fines for small trespasses against the "vert"—namely, for acts of waste not exceeding the value of fourpence. It met once in every forty days,¹ which seems in practice to have been interpreted as once every six weeks, the meetings being always held on the same day of the week.² (2) Courts of Inquisitions. When a serious trespass was discovered, a special court was, in early days, immediately summoned. The foresters and verderers conducted the inquiry, but it was their right and duty to assemble the men of the neighbouring townships to help them. In strictness, all inhabitants might be compelled to attend. In practice, it was sufficient if four men and the reeve represented each of the four adjoining villages. Whenever a "beast" was found dead in the forest, twenty men had thus to assemble, to the neglect of their own affairs. In one district at least (Somerton) the definition of beasts of the chase extended to the ordinary hare; and we read³ how four townships sat in solemn judgment, and found "that the said hare died of murrain, and that they know of nothing else except misadventure," and how, this verdict not giving satisfaction, the townships were fined on the pretext that they were not fully represented. The real offence was their failure to disclose the culprit. Some alleviation of the Edition: current; Page: [421] burden was effected when, at some date posterior to 1215, special inquisitions were superseded by one general inquisition, held at regular intervals (usually every six weeks), to cover all trespasses committed during the interval. These courts of inquiry (whether special or general) only "kept" pleas without "trying" them—that is to say, they received and recorded accusations, while judgment was reserved for the justices. (3) Courts of the forest justices in eyre. As the smaller courts, in the normal case, received verdicts and reports, without punishing the offences reported, it is evident that the whole system ultimately depended on the justices. Their eyres, however, were held at wide intervals—apparently once every seven years during the reign of Henry III. A full attendance of forest officials and of the public was summoned to meet them. The evidence, stored up as a result of the work of the smaller courts, supplemented by the Rolls of the Regard, was laid before the justices, who summarily judged "pleas of the vert," and "of the venison." These eyres came to be known as "Courts of Justice Seat," but not until long after the reign of John. No juries were present; the justices punished offenders already

convicted by juries at a lower court.

In addition, there should be mentioned two other kinds of assemblies which performed duties administrative rather than judicial, as these terms are now understood. (4) The regard, held once every three years—not by Crown officials, but by what was practically a jury of local knights—has already been referred to. These tours of inspection, sometime known as visitationes nemorum,¹ and sometimes even as “views of expedition,” were of great practical importance. The resulting report was placed before the justices of eyre as evidence of forest trespasses. (5) Three times every year, meetings, known from an early date as “Swanimotes,” were held to regulate the pasturing of swine and cattle within the royal woods. A fortnight before Michaelmas, the agistors met the foresters and verderers to provide for the agisting of the King’s woods, a process that lasted Edition: current; Page: [422] for thirty days—fifteen before and fifteen after Michaelmas. At Martinmas the agistors collected the pannage in presence of the same officials. A third meeting was held in June to make arrangements for excluding cattle from the King’s woods when the deer were fawning, but at this the presence of the agistors were not required.¹

The Carta de Foresta applies to these assemblies, and to none other, the name “Swanimotes”—a word whose correct use has been the subject of much discussion. Its authoritative appearance in 1217 affords strong evidence of the original sense which it bore. In later days, however, it was more loosely used, being applied to inquisitions and also to courts of attachment. This has led to much confusion, while its derivation has also been the subject of discussion. Bishop Stubbs derived it from “swain,” on the supposition that courts so called were resorted to by swains or country people. As matter of fact (whatever doctrine may be correct philologically), these assemblies were connected, not with “swains,” but with “swine.” The peasantry were specially exempted; whereas all three meetings sought to regulate the entry or exclusion of pigs from the woods.

V.: Chases, Parks, and Warrens.

Forests were necessarily royal monopolies and must on this and other grounds be distinguished from three things with which they are apt to be confused. (1) A “chase” was a district, once a royal forest, which had, without any formal act of disafforestation, been granted by the King to a private individual. The result was to transfer the monopoly of hunting to the grantee, while modifying the nature of the rights transferred. The full force of the forest laws was abated, although the extent and direction of this diminution was nowhere strictly defined, but varied from chase to chase. Such provisions of the forest law as continued to be binding were no longer enforced by royal officials and royal courts, but by those of the magnate, who obtained a franchise over Edition: current; Page: [423] the chase and the royal beasts it contained.¹ (2) A “park” was any piece of ground enclosed with a paling, or hedge, whether with the object of protecting wild beasts or otherwise, and the right to effect this was quite independent of royal grant. If the owner of a manor in the near neighbourhood of a royal forest wished to keep deer of his own, which he might kill at pleasure, whether for sport or for food, without infringing the forest laws, he had to stock an enclosure with beasts legally his own, and to keep them under conditions which made confusion with the King’s deer impossible.² In 1234 the barons asserted their right to keep private gaols for poachers taken in their parks (in parcis et vivariis suis), but the King refused to allow this.³ (3) A “warren,” which might belong either to the King or to any private owner, carried with it exclusive rights of hunting within its bounds all wild animals, except those technically defined as “beasts of the forest.”⁴ In practice it chiefly embraced hares and foxes.⁵ Neither parks nor warrens were protected by the forest law, but by that part of the common law which related to theft and trespass. This was, however, vigorously administered, passing gradually into the modern Game Laws.⁶ Dr. Stubbs held, apparently, too narrow a conception of warren, when he read it in its modern sense of “a rabbit warren.”⁷ It was a tract of land wherein exclusive rights of hunting lesser game (together with rabbits and other vermin) were preserved to its owner. The King might, and did, have his warrens and warreners, just as any subject might; and these royal warreners might inflict cruel injustice on the common people;⁸ but their power was less than that of foresters, as they were dependent on the common law. The forest code did not apply even to royal warrens.⁹

Edition: current; Page: [424]

VI.: Forest Rights and Forest Grievances.

It is not difficult to understand the store which the Kings of England set upon their forests. They prized them not merely as a pleasure ground, but also as a source of revenue. Fines and amercements, individually small, but amounting to a large sum in the aggregate, flowed into the Exchequer. Great as were the pleasure and the profit to the

King, the burden and loss inflicted upon the people were greater out of all proportion. Not only were the interests of forest-dwellers sacrificed to the royal hunting, not only were legal fines rendered trebly burdensome by the galling and wasteful manner of their collection; but the men who paid them were victims of illegal exactions in addition. These grievances may be considered under seven heads:—

(1): The extent of the forests.

The Crown constantly strove to extend the boundaries; the people to contract them. The Conqueror and Rufus each “afforested” wide tracts of land, of which the New Forest is only one example. In the Charter of 1100, Henry bluntly declared:—“I retain in my hand, by the common consent of my barons, my forests as my father had them.” This consent of the magnates would suggest that the barons were allowed some share in royal rights of hunting, which led them here to make common cause with the Crown. Henry, as matter of fact, retained not only the forests of his father but those of Rufus, and created new ones of his own.¹ Stephen, while retaining the forests of the two Williams, renounced those added by Henry I. Under Henry II., afforestation began anew.² The words of the Great Charter leave no doubt that Henry of Anjou had extended the boundaries of Stephen’s forests; and that both Richard and John Edition: current; Page: [425] carried the process further, bringing within the circle of the cruel law, not only waste and moor, but also “woods” belonging to private owners. These royal encroachments were the more oppressive, occurring in an age when population was increasing and seeking outlet in the reclamation of waste places on the debateable land that surrounded the forests. The vagueness of the frontier aggravated this grievance, as it was often difficult for the honest reclamer of barren land to know when he was committing a trespass for which he might be punished by a crushing fine.¹

(2): The monopoly of hunting.

The Crown also made the law more stringent. The Crown’s insistence on a strict monopoly may not seem an important grievance, but it was one likely to exasperate the sport-loving nobles. John, in 1207, admitted that his barons still retained some share in the hunting of royal beasts.² These rights were formally recognized and defined in 1217. Chapter 11 of the Carta de foresta allowed each magnate when passing through a forest to take one or two beasts at sight of the foresters, or, if these officials could not be found, then after blowing a horn to show that nothing underhand was being done.

(3): Interference with rights of property.

Freeholders whose lands lay in districts which the King was successful in afforesting, retained their freeholds, but their proprietary rights lost half their value. They could not root out trees, to clear their own lands for cultivation; for that was to commit an assart. They could not plough up waste land or pasture (even outside the covert) and turn it into arable, nor build a mill, nor take marl or lime from pits, nor make fishponds, nor enclose any space with hedge or paling; for these acts of ownership were purprestures or encroachments on the King’s rights. They could not destroy a tree or Edition: current; Page: [426] lop off branches (except under stringent conditions), without being guilty of waste.¹ They could not agist their woods until a fortnight after Michaelmas, when the agisting of the King’s demesnes was over (thus reserving for him the best market and “pannage dues”).² Heavy tolls were, under the name of “chiminage,” taken from carts and sumpter-horses passing through the woods. The Great Charter endeavoured to strike at the abuse of these Crown rights by providing machinery for the abolition of “evil customs.” The Carta de foresta entered more into detail. Not only were past trespasses of all three kinds—wastes, purprestures, and assarts—to be condoned, but the law was altered for the future. The long list of purprestures was curtailed: it was made lawful for a man to make (on his own freehold in the forest) mills, ponds, lime pits, ditches, and arable lands, provided these were not placed within the covert and did not infringe on any neighbour’s rights.³ He might also keep eyries for breeding falcons and other birds of prey, and take honey found on his own ground—rights previously denied.⁴

(4): Interference with the pursuits of the poor.

If the rich suffered injury in their property, the poor suffered in a more pungent way: stern laws prevented them from supplying three of their primary needs; food, firewood, and building materials. On no account could they kill deer; while difficulties surrounded the taking of timber from the woods.⁵ It is true that even the Assize of Woodstock

allowed them the privilege of “estovers” (that is of cutting firewood), but only under stringent rules. All waste was prohibited; and “waste” was a wide word covering, not merely wanton destruction, but all sales or gifts of logs; while nothing could be taken except at sight of the forester, Edition: current; Page: [427] whose consent would not be procured for nothing. This may be illustrated from a period sixty years later than John’s reign: Hugh of Stratford, who paid two and a half marks of yearly rent to the Warden for his post, recouped himself by taking “from the township of Denshanger for every virgate of land one quarter of wheat in return for their having paling for their corn and for collecting dead wood for their fuel in the demesne wood of the lord king; and from the same town he took from every house a goose and a hen in every year.”¹ A sum might be taken for every load of sticks; the men of Somerset complained that “from the poor they take, from every man who carries wood upon his back, sixpence.”² Dwellers within or near the forests were prohibited from keeping dogs, unless their value for other pursuits, as well as for hunting, was destroyed by the removal of three claws of the forefoot.³ Nor could they keep bows or arrows, so necessary for their protection amid the dangers that beset the inhabitants of lonely districts throughout the Middle Ages.⁴ No tanner or bleacher of hides could reside in forest districts, unless within a borough.⁵

(5): Attendance at forest courts.

At every inquisition, representatives from neighbouring townships must be present, while the entire population were compelled to meet the justices on their forest eyes. Henry II. enforced this duty upon those outside the boundaries as well as on those within. The Assize of Woodstock admits no exemption for earl or baron, for knight or freeholder, nor even (according to one version) for archbishop or bishop. The double duty of doing suit at county courts and forest courts meant double loss of time, and double risk of amercement. This 11th Article of the Assize was repealed by chapter 44 of Magna Carta, which restricted the obligation to denizens of the forests, a concession confirmed in 1217.⁶

Edition: current; Page: [428]

(6): Fines and punishments.

Frequent exactions ground down the dwellers in royal forests to abject poverty. If they failed to attend one of the numerous inquisitions or to disclose the guilty poacher, they paid a fine. If they gave false information; sold or gave away timber; kept grey hounds or mastiffs, which had not been “lawed,” they paid a fine.¹ If a bow or arrow were found in their keeping; if they committed any one of the numerous forms of waste or trespass, they paid a fine.

The Northampton Eyre Roll of 1209 illustrates how a township might suffer severely for no fault of their own. “The head of a hart recently dead was found in the wood of Henry Dawney at Maidford by the King’s foresters. And the forester of the aforesaid Henry is dead. And because nothing can be ascertained of that hart, it is ordered that the whole of the aforesaid town of Maidford be seized into the King’s hand, on the ground that the said Henry can certify nothing of that hart.”² There was a strong inducement to find someone guilty.

In certain cases Henry II. would not accept a fine, but inflicted mutilation upon violators of the King’s monopoly. It was often better to kill a fellow-man than a boar or stag. Article 1 of the Assize of Woodstock announced that the full rigour of the laws would be enforced, as under Henry I., while article 12 laid down more definitely that sureties would only be accepted twice. For the third offence nothing would suffice save the body of the offender. John’s Magna Carta made no regulation on this head; but chapter 10 of the Carta de foresta in 1217 conceded that no one should henceforth lose life or limb for such offences. The culprit should lie in prison for year and day, and thereafter find sureties for his good behaviour, or be banished the realm.

(7): Arbitrary government and illegal exactions.

If the laws of Henry’s code were stringent and the legal payments Edition: current; Page: [429] onerous, it was a worse evil that the law could be defied by Crown officials, and that payments of a perfectly illegal nature might be freely exacted. Within the forest bounds, the peasantry lived in daily fear of the discretionary authority of officials, whose most unreasonable wishes they dared not oppose. Sometimes a local tyrant established a veritable reign of terror. This happened in the forest of Riddlington under Peter de Neville, as the records of the Rutland Eyre, held in 1269, disclose. One item, taken almost at random from the long list of his evil deeds, will suffice: “The same Peter imprisoned Peter, the son of Constantine of Liddington, for two days and two nights at Allextun, and bound him with

iron chains on suspicion of having taken a certain rabbit in Eastwood; and the same Peter the son of Constantine, gave two pence to the men of the aforesaid Peter of Neville, who had charge of him, to permit him to sit upon a certain bench in the gaol of the same Peter, which is full of water at the bottom.”¹ Other examples are only too abundant. In 1225, Norman Samson, a petty official of the forest of Huntingdon, put men to the torture without cause, and only released them from their torments in return for heavy bribes. If such things could happen after the Charters of 1215 and 1217, it is not likely that foresters were more merciful before. John was always too indifferent or too busy to redress such wrongs. The only guarantee against their recurrence was that honest officials should be selected. Chapter 45 of Magna Carta, which tried to effect this, was withdrawn in 1216.

Some good must have resulted from chapter 16 of the Forest Charter, which forbade wardens to hold pleas of the forest. This prevented wardens from being judges in their own cause; but their arbitrary acts continued to be plentiful under Henry III., as has been already shown. Sixty years after Magna Carta, the men of Somerset complained that “foresters come with horses at harvest time and collect every kind of corn in sheaves within the bounds of the forest and outside near the forest, and then they make their ale from that collection, and those who do not Edition: current; Page: [430] come there to drink and do not give money at their will, are sorely punished at their pleas for dead wood, although the King has no demesne; nor does anyone dare to brew when the foresters brew, nor to sell ale so long as the foresters have any kind of ale to sell; and this every forester does year by year to the great grievance of the country.”¹ Each one of these abuses had been forbidden by chapter 7 of the Carta de foresta, which had prohibited the making of “scotale” and the collection of corn, lambs, and pigs. Such rules were easier to enunciate than enforce.

VII.: Later History of Forests and Forest Laws.

The Forest Charter signally failed to secure a pure administration of the law; but two ameliorating processes were at work. The long struggle to define the boundaries ended, in the reign of Edward II., in the defeat of the King, who consented to the frontier being drawn to suit the barons.² Within these restricted limits, time and the progress of civilization softened the severity of the forest code, many customs becoming obsolete.³ Charles I. made an ill-judged attempt to revive some of the Crown’s long-forgotten rights. Justice-seats were held by the Earl of Holland, accompanied by amercements and attempts to extend the forest bounds.⁴ The result was a drastic act of the Long Parliament, limiting them to their old extents.⁵ This statute, however, abolished neither the forests, the forest laws, nor the forest courts. After the Restoration a Justice-seat actually took place pro forma before the Earl of Oxford. Blackstone declares this to be the last ever held,⁶ although the offices of justice and warden of the forests were not abolished till 1817.⁷ The forests, much curtailed in extent, are still Crown property, now administered in the interests of the public by Edition: current; Page: [431] Commissioners of Woods and Forests.¹ The operation of the common law is, of course, no longer excluded from their confines, the old antithesis between forest law and the law of England being a thing of the past.²

CHAPTER FORTY-FIVE.

Nos non faciemus justiciarios, constabularios, vicecomites vel ballivos, nisi de talibus qui sciant legem regni et eam bene velint observare.

We will appoint as justices, constables, sheriffs, or bailiffs only such as know the law of the realm and mean to observe it well.

The object of this plainly worded clause was to prevent the appointment of unsuitable men to responsible posts under the Crown. The list of officers is a comprehensive one—justices, sheriffs, constables and bailiffs—embracing all royal ministers and agents, both of the central and of the local government, from the chief justiciar down to the humblest serjeant.³ This clause was directed in particular against John’s foreign favourites such as the Poitevin Bishop of Winchester, Peter des Roches, who had wielded the authority of chief justiciar in 1214 when the King was abroad,⁴ or such as Engelard de Cigogné, stigmatized by name in a later part of Magna Carta.⁵ Such men had no interests at stake in England, and little love for its customs and free traditions. In future John must choose a different type of servants, avoiding all such unscrupulous men, whether Englishmen or foreigners, as were ready to break the law in their master’s interests or their own. But what class were to fill their places?

Bishop Stubbs credits the framers of the Charter Edition: current; Page: [432] with an intention to secure the appointment of men well versed in legal science: “on this principle the steward of a court-leet must be a learned steward.”¹ The clause of Magna Carta, however, refers to royal nominees, not to the officers appointed by mesne

lords to preside over their feudal courts. The barons appointed their own stewards and bailiffs, and had no wish to hamper their own freedom of choice; but only that of the King. Further, the barons did not desire that John should employ men steeped in legal lore, but plain Englishmen with a rough-and-ready knowledge of insular usage, who would avoid arbitrary acts condemned by the law. The barons at Runnymede desired precisely what the council of St. Albans had desired on 4th August, 1213, when it issued formal writs to sheriffs and foresters to observe the laws of Henry I. and abstain from unjust exactions;² and these laws of Henry were but the laws of Edward Confessor (or, in reality, of Canute) slightly amended.

The attitude of John's barons was the same as that of Henry's barons, when the latter declared, in 1234, in emphatic terms, that they did not wish the laws of England to be changed.³ They were far from desiring to be governed by ministers deeply versed in the science and literature of jurisprudence, since these would necessarily have been churchmen and civilians.

This well-meaning provision of Magna Carta disappeared in 1216 (without any comment in the so-called "respite clause"). Even if it had remained intact, it would not have effected much, in the absence of adequate machinery to ensure its enforcement. In promising the appointment of such ministers as knew the law and meant to keep it, John remained sole judge of the men appointed and their intentions. The clause indicated no standard of fitness, no neutral arbitrator to decide between fit and unfit,⁴ and no Edition: current; Page: [433] sanction to enforce compliance on an unwilling King. Half a century later, the Provisions of Oxford gave proof of some advance in political theory. They contained an expedient, crude enough it is true, for constraining royal officials to keep the law: forms of an oath of office to be taken by castellans and ministers of all grades were carefully provided.¹ Even this was only a first step towards settling a problem not completely solved until the modern doctrine of ministerial responsibility was firmly established.²

CHAPTER FORTY-SIX.

Omnes barones qui fundaverunt abbatias, unde habent cartas regum Anglie, vel antiquam tenuram, habeant earum custodiam cum vacaverint, sicut habere debent.

All barons who have founded abbeys, concerning which they hold charters from the kings of England, or of which they have long-continued possession, shall have the wardship of them, when vacant, as they ought to have.

Religious houses of various orders (abbeys, priories, and convents), which had increased rapidly in number since the reign of Henry I., fell naturally into two classes, according as they had been founded by the King or by private individuals. The King or the great baron, in bestowing lands on a religious foundation, reserved, either expressly or by implication, valuable rights of property: of these the control over the election of the abbot or prior, together with the wardship of the fief during vacancies, were the most important. King John, while by his charter to the clergy he renounced control over election of bishops, reserved his rights of wardship; and the barons insisted that the proprietary rights of mesne lords who had founded religious houses, should also be respected. John, however, Edition: current; Page: [434] wherever he had any plausible pretext, usurped the wardship over private foundations. It would appear, from the terms of a later chapter,¹ that in 1215 the Crown actually held in ward certain abbeys founded by mesne lords. The present chapter looks to the future, forbidding new usurpations of this nature.

In reissues of the Charter verbal changes occur, but it is not clear that they imply changes of substance. In 1216 the words "and as it has been above declared" were added, implying that the rights of mesne lords were to be restricted by the rules previously laid down in chapter 5, as to wardship—rules particularly applied to the lands of bishoprics and religious houses in 1216 by a clause which had no parallel in John's Charter.² In 1217 three other small changes tend to define and perhaps to widen the scope of the clause. The "barons who have founded abbeys" become "the patrons of abbeys"; royal "charters" become more explicitly "charters of advowson"; "ancient tenure" is expanded into "ancient tenure or possession."³ These alterations seem to indicate an effort towards greater verbal accuracy, and do not involve any change of principle. It should, perhaps, be noted, however, that the words "patroni" and "de advocacione," occurring in 1217, contain a tacit assertion of lay patronage of which there was no hint in 1215; but it would not be safe to conclude from this alone that there had been any change of attitude on the question of canonical election.

The object of this chapter was to define the relations between the King and the barons as to wardship, not those between the lay and ecclesiastical authorities as to rights of appointment. It seems to have made little difference, if

any, in practice: Henry III. never observed in its fullness the doctrine here enunciated, but claimed wardship over abbeys and priories founded by earls and barons on their own fiefs.⁴ On the closely allied question of lay patronage, Edition: current; Page: [435] not directly raised in any version of Magna Carta, Henry's practice seems not to have differed from his father's. John interfered freely between abbeys and their founders. On 16th August, 1200, he granted to William Marshal the privilege of bestowing the pastoral staff of Nuthlegh Abbey, which lay within that earl's fief; this shows that he forbade appointments without royal licence.¹ The barons in 1258 protested against similar conduct on the part of Henry III.²

CHAPTER FORTY–SEVEN.

Omnes foreste que afforestate sunt tempore nostro, statim deafforestentur; et ita fiat de ripariis que per nos tempore nostro posite sunt in defenso.

All forests that have been made such in our time shall forthwith be disafforested; and a similar course shall be followed with regard to river–banks that have been placed “in defence” by us in our time.

An analogy may be traced between the prerogatives of hunting and of falconry here brought together. William the Conqueror claimed wide and ill–defined rights to “afforest” whole districts at his discretion; and for protecting his preferential rights of fowling, whole rivers might be placed “in defence.” The parallel must not be pushed too far. River–banks were preserved only for such limited period as was covered by the King's express command; and, although wardens were appointed to guard them,³ the Crown never established such absolute control over the banks of rivers as it did within districts declared “afforested.”

The provision of the present chapter, defining what riverbanks might be “defended,” disappeared, together with the Edition: current; Page: [436] relative clause of chapter 48 (“ripariis et earum custodibus”), from the reissue of 1216; but, in the “respite” clause there was promised further deliberation, which resulted in its replacement in chapter 20 of the final version of Magna Carta.¹

More attention is usually paid to the bearing of the present chapter upon the limits of the forests. John, if he had created no new forests, had extended the boundaries of the old ones. All such encroachments are to be immediately given up. This summary redress should be contrasted with the more judicial procedure appointed by chapter 53 for determining encroachments made by Henry II. and Richard. A somewhat similar distinction is also to be found in the corresponding provisions of the Forest Charter of 1217 (chapters 1 and 3); but the line is there differently drawn. Chapter 1 of the Carta de foresta extends the summary methods of redress to the disafforesting of all forests created by Richard as well as those created by John. The terms of the later document are also more detailed. Both seem to be directed against encroachments on the rights of landowners, affording no protection to the poor. While they deny the Crown's right to afforest private woods “to the damage of any one” (that is, of barons or freeholders owning them), they admit the legality of past acts, whether of Henry, of Richard, or of John, in afforesting Crown lands, subject always to a saving clause in favour of freeholders in right of common of pasturage.²

Even if Henry III. had cordially co–operated with his barons to disafforest all tracts of ground afforested by Henry II. and his sons, difficulties of definition would still have made the task tedious. As it was, struggles to settle boundaries embittered the relations between Crown and Parliament, until the very close of Edward Plantagenet's reign. Only the leading steps in the slow process by which the opposition triumphed need here be mentioned.

Edition: current; Page: [437]

After the issue of Carta de foresta on 6th November, 1217,¹ machinery was set in motion, in obedience to its terms, to ascertain the old boundaries and disafforest recent additions. The work of redress continued for some years, suffering no interruption from the issue of the new royal seal at Michaelmas, 1218.² In face of many difficulties, only slow progress was possible. More strenuous efforts followed the reissue of the Charters on 11th February, 1225;³ for, five days later, justices were appointed to make new perambulations, which resulted in the disafforestation of wide tracts. Henry considered himself, and with some reason, unjustly treated by these justices, or by the local juries on whose verdicts they had relied. After he had proclaimed himself of age in January, 1227, he challenged their findings; and this has been misinterpreted as an attempt to annul the Forest Charter.⁴

Some of the knights who had perambulated the forests were persuaded or coerced into acknowledging that they had made mistakes; and, after further inquiry, Henry restored the wider bounds. His reactionary measures went on for two

years; but thereafter the frontiers were fixed, in spite of many complaints, until strong pressure compelled Edward I. to reopen the whole question. Perambulations in 1277 and 1279 produced apparently no results. Renewed complaints were followed by new perambulations in 1299–1300, the reports of which were laid before a Parliament at Lincoln on 25th January, 1301. The King on 14th February confirmed the Forest Charter, and agreed to the reduced boundaries as defined by the most recent inquests. Edward had acted under constraint: on this plea he subsequently obtained from Pope Clement V. a bull, dated 29th December, 1305, revoking all concessions made at Lincoln.⁵ The Crown seemed thus to triumph once more; but the barons refused to accept defeat, forcing upon Edward II. the acceptance of the narrower bounds as defined at his father's Edition: current; Page: [438] Parliament in 1301. This settlement was confirmed by statute in the first year of Edward III.¹ and that King failed in all attempts to escape from its provisions. Thus the authoritative pronouncement made in 1301 by the Parliament of Lincoln furnished the basis on which the protracted controversy was finally determined.²

The further history of the forest boundaries may be told in a few sentences. No changes were made until the sixteenth century. When Henry VIII. afforested the districts surrounding Hampton Court in 1540, he did so by consent of Parliament, and on condition of compensating all who suffered damage. The same course was followed by Charles I. in creating the Forest of Richmond in 1634. Finally, as a result of attempts of the Stewarts to revive obsolete rights, a statute of the Long Parliament, reciting the Act of 1327, "ordained that the old perambulation of the forest in the time of King Edward the First should be thenceforth holden in like form as it was then ridden and bounded."³

CHAPTER FORTY-EIGHT.

*Omnes male consuetudines de forestis et warennis, et de forestariis et warennariis, vicecomitibus et eorum ministris, ripariis et earum custodibus, statim inquirantur in quolibet comitatu per duodecim milites juratos de eodem comitatu, qui debent eligi per probos homines ejusdem comitatus, et infra quadraginta dies post inquisitionem factam, penitus, ita quod numquam revocentur, deleantur per eosdem, ita quod nos hoc sciamus prius, vel justiciarius noster, si in Anglia non fuerimus.*⁴

All evil customs connected with forests and warrens, foresters and warreners, sheriffs and their officers, river-banks and their Edition: current; Page: [439] wardens, shall immediately be inquired into in each county by twelve sworn knights of the same county chosen by the honest men of the same county, and shall, within forty days of the said inquest, be utterly abolished, so as never to be restored, provided always that we previously have intimation thereof, or our justiciar, if we should not be in England.

This chapter is mainly, though not exclusively, a forest one. It provides in a sweeping and drastic manner for the abolition of "evil customs," three groups of which are specially emphasized: (a) those connected with forests and warrens (presumably royal warrens only), or with their officials; (b) those connected with sheriffs and their subordinates; and (c) those connected with river-banks and their guardians. The word "customs" is obviously here used in its wider sense, embracing all usages and procedure, whether specially connected with pecuniary exactions or not.¹ The word "evil" is not defined, but machinery is provided for arriving at a definition. In each county a local jury of twelve knights was to be immediately chosen by "the good people" of that county, and these twelve received a mandate to hold a comprehensive inquest into "evil customs": practices condemned by them were to be abolished within forty days of the inquiry, "so that they shall never be restored."

At the end of the chapter appears a proviso that, before actual abolition, notice must be sent to the King, or, in his absence, to his justiciar. Although such intimation was necessary, both on grounds of policy and of ordinary courtesy, this clause is written (apparently as an afterthought) at the foot of two of the copies of the Great Charter.

John lost no time in instituting machinery for effecting this part of the reforms. On the very day on which terms of peace were concluded at Runnymede, namely, on 19th June, 1215, he began the issue of writs to sheriffs, warreners, and river bailiffs. Within a few days every one of these had been certified of the settlement arrived at, and had received commands to have twelve knights chosen in the first county court to make sworn inquest into evil customs.²

Edition: current; Page: [440]

The knights appointed seem to have taken a liberal view of their functions, claiming to share with the sheriffs the exercise of the whole executive authority of the county. Some warrant for these pretensions may be found in the terms of a second series of writs issued in the King's name on 27th June and following days. These were addressed to the sheriff and the twelve knights jointly, commanding them to make instant seizure of all who refused to take, as

required in the previous writs, the oath of obedience to the twenty-five executors of the Charter.¹ The revolutionary committee of the central government had thus, in each county, local agents in the twelve knights whose original duties had been to see evil customs abolished.

The hatred to the forest laws is well illustrated by the iconoclastic spirit in which these knights set about the remedy of abuses. Moderate-minded men began to fear that sweeping changes would abolish the royal forests. Accordingly, the leading prelates issued a written protest that this chapter must be understood by both parties “as limited,” and “that all those customs shall remain, without which the forests cannot be preserved.”² What effect, if any, this protest had, is not known. The country was soon plunged in civil war, during the continuance of which neither side had leisure for the reform of abuses. In 1216 the subject was “respite” for future consideration, and in 1217 an attempt was made to specify in detail the evil customs to be abolished. The dangerous experiment of leaving the definition to local juries in each district was not repeated.

Edition: current; Page: [441]

CHAPTER FORTY-NINE.

Omnes obsides et cartas statim reddemus que liberate fuerunt nobis ab Anglicis in securitatem pacis vel fidelis servicii.

We will immediately restore all hostages and charters delivered to us by Englishmen, as sureties of the peace or of faithful service.

A feature of John's system of government was the constant demand for hostages as guarantees of his subjects' loyalty. Such an expedient was, indeed, naturally resorted to in the Middle Ages upon special occasions, as, for example, to secure the observance of a recent treaty, or where the leaders of a rebellion, newly suppressed, had been spared on condition of future good behaviour. Thus the Conqueror, in 1067, during a forced absence from England, took with him Edgar Atheling and the Earls Morkere and Edwin. Such cases were, however, exceptional, until John resorted to such a policy, not merely in face of danger, but as a constant and normal practice in times of peace.

John lived in his native England like a conqueror in the midst of a hostile race, keeping sons and daughters in his clutches to answer for their parents' attempts at revolt. This ingenious but unfair practice accords well with what we know of John's character and general policy. It was a measure of almost devilish cunning for obtaining his immediate ends, but likely to recoil on himself whenever a critical state of his fortunes arrived. Its efficacy lay in this, that it forced the hand of discontented magnates, compelling them to decide, upon the instant, between the desperate expedient of open rebellion and delivery of their children to an unscrupulous enemy, thus renouncing, perhaps for ever, the possibility of resistance or revenge, thereafter to be purchased at too dear a price—the life of the hostage. By thus paralyzing his enemies one by one, John hoped to render disaffection innocuous.¹

Edition: current; Page: [442]

The history of the reign shows of what excessive practical importance this question of hostages had become. Thus, in 1201, John seized the castles of certain of his barons; and one of them, William of Albini, only saved his stronghold of Belvoir by handing over his son as a hostage.¹ In the same year, the men of York offended the King by omitting to meet him in procession when he visited their city, and by their failure to provide for the billeting of his archers. John, as usual, demanded hostages, but ultimately allowed the citizens to escape on payment of £100, to buy goodwill.²

Hardly a year passed without similar instances; but, apparently, it was not until 1208 that the practice was enforced wholesale. In that year, the King's abject fear of the effects of the Pope's absolution of his barons from their allegiance, led to his demand that every leading man in England should hand over his sons, nephews, or other blood relations to the King's messengers.³

The danger of failure to comply with such demands is illustrated by the fate of Maud of Saint-Valery, wife of William de Braose, who refused point-blank to hand over her grandchildren to a King who, she was unwise enough to say, “had murdered his captive nephew.”⁴ Two years later John, after failing to extort enormous sums in name of fines, caused her, with her eldest son, to be starved to death, a fate to which her own imprudence had doubtless contributed.⁵ John's drastic methods of treating his hostages may also be illustrated from the chronicles of his reign, for example, from the fate of the youths he brought from Wales in June, 1211. When he heard of the Welsh rebellion

of the following year, he ordered his levies to meet him at Nottingham. At the muster, early in September, John found awaiting him a great concourse, who were treated to Edition: current; Page: [443] an object lesson which long might haunt their dreams. His passion at white heat, John incontinently hanged eight—and—twenty defenceless boys of the noblest blood of Wales.¹ This ghastly spectacle could not have been forgotten, when later in the same month the King, in the throes of sudden panic, fled to London; and, secure in the fastnesses of the Tower, demanded hostages wholesale from all the nobles whose fidelity he doubted. Eustace de Vesci and Robert fitz Walter preferred to seek safety in flight.² The others, with the Nottingham horror fresh in their memories, were constrained to hand over sons and daughters to the tender mercies of John, cunning and cruel by nature, and rendered doubly treacherous by suspicion intensified by fear.

The defects of this policy, in the long run, may be read in the events which preceded Magna Carta. When John's hold on the hostages was relaxed, because of the campaign of 1214, ending as it did in discomfiture, the disaffected were afforded their long—desired opportunity, and were stimulated to rapid action by the thought that such a chance might never occur again. John, on his return, held comparatively few hostages, and the northern barons saw that they must act, if at all, before their children were once more in the tyrant's clutches.

Even in June, 1215, however, John had still a few hostages, and this chapter demands the immediate restoration of those of English birth (the Welsh receiving separate treatment), together with the charters which John held as additional security. This provision of Magna Carta was immediately carried out. Letters were dispatched to the custodians of royal hostages, ordering an immediate release.³ The practice of taking hostages, however, by no means ended with the granting of the Great Charter. Before a year had run, some of the insurgent nobles, repenting of their boldness, succeeded in making terms with John by the payment of large sums of money and the delivery of their sons and daughters in security for their Edition: current; Page: [444] future loyalty. Simon fitz Walter, for example, thus gave up his daughter Matilda.¹

CHAPTER FIFTY.

Nos amovebimus penitus de balliis parentes Gerardi de Athyes, quod de cetero nullam habeant balliam in Anglia; Engelardum de Cygony, Petrum et Gionem et Andream, de Cancellis, Gionem de Cygony, Galfridum de Martigny et fratres ejus, Philippum Marci et fratres ejus, et Galfridum nepotem ejus, et totam sequelam eorundem.

We will entirely remove from their bailiwicks, the relations of Gerard of Athée (so that in future they shall have no bailiwick in England); namely, Engelard of Cigogné, Peter, Guy, and Andrew of Chanceaux, Guy of Cigogné, Geoffrey of Martigny with his brothers, Philip Mark with his brothers and his nephew Geoffrey, and the whole brood of the same.

Chapter 45 sought to secure the appointment of suitable men to posts of trust under the Crown; the present chapter definitely excludes from bailiwicks (a comprehensive term embracing all grades of local magistracies) one particular group of royal favourites. This clause was omitted from future reissues, along with chapter 45.

The Charter does not explain the reasons that had rendered these men obnoxious; but the testimony of contemporary Plea Rolls and Pipe Rolls amply supplies the omission. Each one of them can be shown to have held places of profit under the Crown as sheriffs of counties, forest wardens, and commanders of royal garrisons. They formed a group of kinsmen who, after John had lost his French dominions, preferred to follow their royal master to England. The three villages of Athée, Cigogné, and Chanceaux lie close together in Touraine, in the modern department of Indre—et—Loire, not far from the cities of Tours and Loches. The group of men here named all came Edition: current; Page: [445] from this district. "They were neither courtiers nor politicians, but soldiers of experience, whom the barons feared with good cause."¹

The career of Engelard de Cigogné may be taken as typical of the rest. He was a nephew of Gerard of Athée, whom he succeeded, in 1209, as sheriff of Gloucester and Hereford, an office he held until about the time of Magna Carta. The Plea Roll of the Gloucestershire Eyre of 1221 covers the period of his shrievalty, and contains a striking and detailed picture of his misdeeds and extortions.² He accounted for the *firma burgi* of Bristol,³ which seems to imply interference with its chartered liberties. He also held pleas of the Crown for Gloucestershire,⁴ in violation of the ordinance of 1194 forbidding any sheriff to act as justiciar in his own county.⁵ Several entries tell of barrels of wine which he took as "prise" from ships entering the port of Bristol, and thereafter sold to the King. For example, the exchequer officials allowed him to deduct from the *firma*, the sum of 60s., in respect of four tuns of red wine, as

certified by the King's writ.⁶ Engelard guarded a rich treasure for the King at Bristol, probably as constable of the castle there, sums being paid to him ad pondum in thesauro regis.⁷ On one occasion he was entrusted with more than 10,000 marks of the King's money.⁸ Hostages, as well as bullion, were placed under his care; a writ dated 18th December, 1214, directed him to liberate three noble Welshmen whom it mentioned by name.⁹

In the civil war to which the treaty of peace sealed at Runnymede was a prelude, Engelard, then constable of Windsor Castle and warden of the adjacent forest of Odiham, proved active in John's service. He successfully defended Windsor from the French faction, making vigorous sorties until relieved by the King.¹ He requisitioned supplies to meet the royal needs; and a plea was brought against him so long afterwards as 1232, in connection with twelve hogsheads of wine thus taken.² He acted as sheriff of Surrey under William Marshal, but was suspended from this office in 1218, in consequence of a dispute with Earl Warenne.³ He remained warden of the castle and forests for twenty years after the accession of Henry III.⁴ and his long services were rewarded with grants of land: in the county of Oxford he held the manor of Benzinton, with four hundreds and a half, during the King's good pleasure;⁵ while his son Oliver received the lucrative post of guardian over the lands and heirs of Henry de Berkley.⁶

In 1221, however, acting in consort with Falkes de Bréauté, Philip Mark, and other castellans, Engelard supported earl William of Aumâle in his resistance to the demands of Henry's ministers, that all royal castles should be restored to the King. Notwithstanding the secrecy with which he sent men to the earl at Biham castle,⁷ he fell under suspicion of treason, and found hostages that he would hold the castle of Windsor for the King.⁸ In 1236, he was relieved of some of his offices, but not of all, for in 1254 he was two years in arrears with the firma of the manor of Odiham.⁹ In that year, apparently, he died; for the patent roll contains a writ granting him permission to make his will, and an entry in 1255 relates how "for good service done to the King by Engelard of Cigogné in his lifetime, the King granted to his executors that they should be quit of all accounts to be rendered by them at the exchequer, and of all averages of accounts, and of all debts and imposts."¹⁰ Engelard thus died, as he had lived, the Edition: current; Page: [447] trusted servant and favourite of kings. His career illustrates how the very same men who had incurred odium as partisans of John became, when the civil war was over, instruments of his son's misgovernment.¹

CHAPTER FIFTY-ONE.

Et statim post pacis reformationem amovebimus de regno omnes alienigenas milites, balistarios, servientes, stipendiarios, qui venerint cum equis et armis ad nocumentum regni.

As soon as peace is restored, we will banish from the kingdom all foreign-born knights, cross-bowmen, serjeants, and mercenary soldiers, who have come with horses and arms to the kingdom's hurt.

John here binds himself to disband his foreign troops, the agents of his tyrannies. These men, who had garrisoned royal castles, are to be banished "as soon as peace is restored," an indication that a state of virtual war was recognized. This promise was partially fulfilled: on 23rd June writs were issued for disbandment of the mercenaries.² The renewal of the civil war, however, was followed by enrolment of new bands of foreigners, whose presence was one of the main causes of the rebellion of 1224, after the suppression of which most of them were again banished with their ringleader, Falkes de Bréauté.

The words used to describe these soldiers are comprehensive. Stipendiarii embraced mercenaries of every kind: balistarii were cross-bowmen. This weapon, imported into England as a result of the crusades, quickly superseded the Edition: current; Page: [448] earlier short bow, but had, in turn, to succumb to the long bow, which was apparently derived from Wales by Edward I., who gained by means of it many battles against the Scotch and Welsh, and made possible the later triumphs of the Black Prince and Henry V.

CHAPTER FIFTY-TWO.

Si quis fuerit disseisitus vel elongatus per nos sine legali iudicio parium suorum, de terris, castellis, libertatibus, vel jure suo, statim ea ei restituemus; et si contentio super hoc orta fuerit, tunc inde fiat per iudicium viginti quinque baronum, de quibus fit mencio inferius in securitate pacis: de omnibus autem illis de quibus aliquis disseisitus fuerit vel elongatus sine legali iudicio parium suorum, per Henricum regem patrem nostrum vel per Ricardum regem fratrem nostrum, que in manu nostra habemus, vel que alii tenent que nos oporteat warrantizare, respectum habebimus usque ad communem terminum cruce signatorum; exceptis illis de quibus placitum motum fuit vel inquisicio facta per

preceptum nostrum, ante suscepcionem crucis nostre: cum autem redierimus de peregrinatione nostra, vel si forte remanserimus a peregrinatione nostra, statim inde plenam justiciam exhibebimus.

If any one has been dispossessed or removed¹ by us, without the legal judgment of his peers, from his lands, castles, franchises, or from his right, we will immediately restore them to him; and if a dispute arise over this, then let it be decided by the five-and-twenty barons of whom mention is made below in the clause for securing the peace.² Moreover, for all those possessions, from which any one has, without the lawful judgment of his peers, been disseised or removed, by our father, King Henry, or by our brother, King Richard, and which we retain in our hand (or which are possessed by others, to whom we are bound to warrant them) we shall have respite until the usual term of crusaders; excepting those things about which a plea has been Edition: current; Page: [449] raised, or an inquest made by our order, before our taking of the cross; but as soon as we return from our expedition (or if perchance we desist from the expedition) we will immediately grant full justice therein.

Chapter 39, in so far as it relates to illegal disseisins, is here supplemented: remedy is provided for everyone dispossessed by the Crown “sine legali iudicio parium suorum.” Yet, a distinction is drawn between wrongs inflicted by John himself (where summary methods are to rule) and by his predecessors (where less precipitate procedure must take its course).

The Articles of the Barons had recognized the same distinction, while providing somewhat different treatment. Those disseised by Henry or Richard were to get redress “according to the judgment of their peers in the King’s court”; those disseised by John, “according to the judgment of the twenty-five barons.” Both cases were, in the Articles, qualified by a stipulation which calls for comment. John had taken the crusader’s vow a few months before, and now claimed the usual three years’ “respite” from all legal proceedings. The barons, viewing John’s vow as a notorious perjury, rejected his claim. The Articles referred the question to arbitration. The prelates, whose iudicium on this point was declared to be final (“appellatione remota”), and who were bound to give an early decision (“ad certum diem”), might not unreasonably have been suspected of partiality, since “taking the cross” was not a step to be belittled by churchmen. Yet they seem to have acted in a spirit of not unfair compromise, if the clause as it finally appeared in John’s Magna Carta may be taken as giving the substance of their award.

In cases where John himself had been the disseisor, the twenty-five executors might decide forthwith. Respite was allowed, however, in respect of disseisins of Henry and Richard (except where legal proceedings were already pending).¹ The Charter says nothing of the procedure at the close of the three years; but there was probably no Edition: current; Page: [450] intention to depart from the terms of the Articles in this respect, namely, “judgment of peers in the King’s court.”

John had good reason to consider as unfair the mode here appointed for deciding disputes as to the other class of disseisins, namely, those effected by him: many delicate points would be referred to the summary decision of a baronial committee, sure to be composed of his most bitter enemies—the very men, perhaps, who claimed to have been dispossessed. If the “judgment of the twenty-five” meant for the barons “the judgment of peers,” it meant for the King the judgment of inferiors and enemies.¹

CHAPTER FIFTY-THREE.

Eundem autem respectum habebimus, et eodem modo de iusticia exhibenda de forestis deafforestandis vel remansuris forestis, quas Henricus pater noster vel Ricardus frater noster afforestaverunt, et de custodiis terrarum que sunt de alieno feodo, cujusmodi custodias hucusque habuimus occasione feodi quod aliquis de nobis tenuit per servicium militare, et de abbaciis que fundate fuerint in feodo alterius quam nostro, in quibus dominus feodi dixerit se jus habere; et cum redierimus, vel si remanserimus a peregrinatione nostra, super hiis conquerentibus plenam justiciam statim exhibebimus.²

We shall have, moreover, the same respite and in the same manner in rendering justice concerning the disafforestation or retention of those forests which Henry our father and Richard our brother afforested, and concerning the wardship of lands which are of the fief of another (namely, such wardships as we have hitherto had by reason of a fief which anyone held of us by knight’s service), and concerning abbeyes founded on other fiefs than our own, in which the lord of the fee claims to have Edition: current; Page: [451] right; and when we have returned, or if we desist from our expedition, we will immediately grant full justice to all who complain of such things.

This chapter makes an addition to the Articles of the Barons, extending to three additional kinds of abuses, the respite

provided in chapter 52 for redressing acts of illegal disseisin. The “close time” secured to John in virtue of his crusader’s vow is to cover (a) inquiries into boundaries of forests alleged to have been extended by his father or his brother; (b) wardships over lands usurped by illegal extensions of prerogative wardship; and (c) abbeys founded by mesne lords but seized by John during vacancies.¹

CHAPTER FIFTY–FOUR.

Nullus capiatur nec imprisonetur propter appellum femine de morte alterius quam viri sui.

No one shall be arrested or imprisoned upon the appeal of a woman, for the death of any other than her husband.

The object of this chapter was to find a remedy for what the barons evidently considered an unfair advantage enjoyed by women appellants, who were allowed to appoint some champion to act for them in the duellum, while the accused man had to fight for himself. The connection between appeal and battle, and the distinction between battle following on appeal and battle on a writ of right, have already been explained.² In civil pleas, neither party could fight in person: champions were essential, although hired champions were condemned.³ In criminal pleas, the parties must fight in their own persons. This distinction is not so illogical as it seems at first sight, for the appellant himself, in the one case, and the champion who fought for Edition: current; Page: [452] him, in the other, were both supposed to be eye–witnesses of the facts.¹

In a case of homicide, no private accuser would be heard unless he alleged that he had seen the accused actually do the deed. The stringency of this rule was, however, modified by legal fictions. The near relation, or the feudal lord, of the slain man, was treated as constructively present at his slaying. This, at least, is the most plausible interpretation of Glanvill’s words: “No one is admissible to prove the accusation unless he be allied in blood to the deceased or be connected with him by the tie of homage or lordship, so that he can speak of the death upon testimony of his own sight.”²

The rule which required an appellant to offer proof by his own body was also relaxed in certain cases; women, men over sixty, and those with broken bones or who had lost a limb, an ear, a nose, or an eye, might fight by proxy.³ The privilege accorded to women was looked on with disfavour: accordingly, the man accused by a woman might, in Glanvill’s words, elect either “to abide by the woman’s proof or to purge himself by the ordeal.”⁴ This option was freely used; an appellee in 1201 was allowed to go to the ordeal of water.⁵ while two years later when the widow of a murdered man offered to prove her accusation “as the court shall consider,” the accused “elected to bear the iron.”⁶ After the virtual abolition of ordeal in 1215, appeals by women were usually determined per patriam: such is the doctrine of Bracton,⁷ whose authority is borne out by recorded cases. Thus in 1221, a man accused by a woman of her husband’s murder offered fifteen marks for a verdict of the jurors.⁸

Edition: current; Page: [453]

A woman’s right of accusation (even when thus safeguarded from abuse) was restricted to two occasions, the murder of her husband and the rape of her own person. Magna Carta mentions only one of these two grounds of appeal; but silence on the subject of assault need not be interpreted as indicating any intention to deprive women of their rights in such cases.¹

The present chapter of the Great Charter confines itself to appeals of murder, declaring that no woman has the right to institute proceedings in this way for the death of father, son, or friend, but only for that of her husband. Hard as this rule may seem, the barons here made no change on existing law. Glanvill does not recognize a woman’s appeal save for the death of her husband:²—“A woman is heard in this suit accusing anyone of her husband’s death, if she speak as being an eye–witness to the fact, because husband and wife are one flesh”—another example of constructive presence.³

There seems to be no authority for Coke’s hasty inference, that previous to 1215 a woman had an appeal for the death of any of her “ancestors”:⁴ this chapter was purely declaratory. Yet its provisions were by no means gallant. The barons were more careful to guard themselves against risk than to champion the cause of women.⁵

Edition: current; Page: [454]

CHAPTER FIFTY-FIVE.

Omnes fines qui injuste et contra legem terre facti sunt nobiscum, et omnia amerciamenta facta injuste et contra legem terre, omnino condonentur, vel fiat inde per iudicium viginti quinque baronum de quibus fit mencio inferius in securitate pacis, vel per iudicium majoris partis eorundem, una cum predicto Stephano Cantuariensi archiepiscopo, si interesse poterit, et aliis quos secum ad hoc vocare voluerit: et si interesse non poterit, nichilominus procedat negocium sine eo, ita quod, si aliquis vel aliqui de predictis viginti quinque baronibus fuerint in simili querela, amoveantur quantum ad hoc iudicium, et alii loco eorum per residuos de eisdem viginti quinque, tantum ad hoc faciendum electi et jurati substituantur.

All fines made with us unjustly and against the law of the land, and all amercements imposed unjustly and against the law of the land, shall be entirely remitted, or else it shall be done concerning them according to the decision of the five-and-twenty barons of whom mention is made below in the clause for securing the peace, or according to the judgment of the majority of the same, along with the aforesaid Stephen, archbishop of Canterbury, if he can be present, and such others as he may wish to bring with him for this purpose, and if he cannot be present the business shall nevertheless proceed without him, provided always that if any one or more of the aforesaid five-and-twenty barons are in a similar suit, they shall be removed as far as concerns this particular judgment, others being substituted in their places after having been selected by the rest of the same five-and-twenty for this purpose only, and after having been sworn.

The thirty-seventh of the Articles, forming the draft of this chapter, refers specially to fines exacted by John from widows for the peaceful enjoyment of their own and their husband's estates ("pro dotibus, maritagiiis, et hereditatibus"): it forms thus a natural supplement to chapter 7. The earlier chapter had confirmed widows in their rights for the future; this one remits fines unjustly taken in the past. It is probable that the Articles of the Barons did not intend to limit their own operation to this one group Edition: current; Page: [455] of unjust fines; and they mention amercements without qualification. In any view, the terms of Magna Carta were broadened out to embrace illegal fines and amercements of every sort.¹

The distinction between fines and amercements has been explained in a former chapter.² The system of arbitrary fines culminated in the reign of John, whose talents were well suited to the development of its ingenious and mean details. Dr. Stubbs describes the product of John's labours as "the system of fines which was elaborated into that minute and grotesque instrument of torture which all the historians of the reign have dwelt on in great detail,"³ and Hallam has a passage which has become classical:—"The Bishop of Winchester paid a tun of good wine for not reminding the King (John) to give a girdle to the countess of Albemarle; and Robert de Vaux five best palfreys, that the same King might hold his peace about Henry Pinel's wife. Another paid four marks for leave to eat (pro licentia comedendi)."⁴

Unique procedure was provided by the present chapter for deciding disputes as to the legality of fines and amercements. Authority to decide was vested in a board of arbitrators to consist of thirteen or more of the twenty-five executors, together with Stephen Langton and such others as he chose to summon. No mention is made of the maximum number whom the primate might nominate, and there is no attempt to define their powers relative to the other members, a somewhat unbusinesslike omission, but one which testifies to the confidence placed in Langton by those who approved its terms. Care is taken to prevent members of the twenty-five from sitting in judgment on suits arising from circumstances resembling their own.

Edition: current; Page: [456]

This chapter, like others addressed to special needs of John's reign, found no echo in future charters.

CHAPTER FIFTY-SIX.

Si nos disseisivimus vel elongavimus Walenses de terris vel libertatibus vel rebus aliis, sine legali iudicio parium suorum, in Anglia vel in Wallia,¹ 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.

If we have disseised or removed Welshmen from lands or liberties, or other things, without the legal judgment of their peers in England or in Wales, they shall be immediately restored to them; and if a dispute arise over this, then let it be

decided in the marches by the judgment of their peers; for tenements in England according to the law of England, for tenements in Wales according to the law of Wales, and for tenements in the marches according to the law of the marches. Welshmen shall do the same to us and ours.

Three chapters, redressing wrongs suffered by Welshmen, testify to the importance attached by the barons to the Welsh alliance. Restoration is to be made (a) of illegal disseisins effected by John (chapter 56); (b) of those effected by Henry II. and Richard I. (chapter 57); and (c) of hostages and charters delivered to John as pledges of peace (chapter 58).

This chapter does for Welshmen dispossessed by John what chapter 52 did for Englishmen, but substitutes “in marchia per iudicium parium suorum” for the “per iudicium viginti quinque baronum” of the earlier chapter. The “venue” was thus fixed in the marchland for all Welshmen’s cases, although different kinds of law were to be applied according to the situation of the property in Edition: current; Page: [457] dispute. This indication of the existence of three distinct bodies of law, one for England, another for Wales, and a third for the marches, shows that the unifying task of the common law had not yet been completed. Interesting questions of a nature analogous to those treated by the branch of modern jurisprudence known as International Private Law must constantly have arisen.

All three classes of alleged disseisins (whatever the law involved) were to be decided by a *iudicium parium*; but the “peers” of a Welshman were not defined—a vital omission.¹

CHAPTER FIFTY–SEVEN.

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 crucesignatorum, 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 peregrinacione nostra, statim eis inde plenam iusticiam exhibebimus, secundum leges Walensium et partes predictas.

Further, for all those possessions from which any Welshman has, without the lawful judgment of his peers, been disseised or removed by King Henry our father, or King Richard our brother, and which we retain in our hand (or which are possessed by others, to whom we are bound to warrant them) we shall have respite until the usual term of crusaders; excepting those things about which a plea has been raised or an inquest made by our order before we took the cross; but as soon as we return, (or if perchance we desist from our expedition), we will immediately grant full justice in accordance with the laws of the Welsh and in relation to the foresaid regions.

The provisions for Welshmen unjustly dispossessed by Henry or Richard are identical with those made in the Edition: current; Page: [458] latter part of chapter 52 for Englishmen, except for the last words, “in accordance with the laws of the Welsh in relation to the foresaid districts”: no machinery is here specified for declaring or applying these laws.

The Articles of the Barons had, however, mentioned the procedure to be adopted; and a comparison of articles 25 and 44 with this chapter suggests the antithesis between “per iudicium parium suorum in curia regis” for Englishmen, and “in marchia per iudicium parium suorum” for Welshmen.

CHAPTER FIFTY–EIGHT.

Nos reddemus filium Llewelini statim, et omnes obsides de Wallia, et cartas que nobis liberate fuerunt in securitatem pacis.

We will immediately give up the son of Llywelyn and all the hostages of Wales, and the charters delivered to us as security for the peace.

The treatment of hostages in general and Welsh hostages in particular has already been illustrated.¹ The patent and close rolls show a constant coming and going of these living pledges of the peace. A writ of 18th December, 1214, for example, bade Engelard of Cigogné restore three Welsh nobles to Llywelyn.² Since then, new hostages, including Llywelyn’s son, had been handed over; and charters also had been pledged.

The Articles of the Barons had treated this question as an open one, referring it to the arbitration of Stephen Langton and others he might nominate. The point had apparently been decided in favour of the Welsh before the Charter was engrossed in its final form.³ John is now Edition: current; Page: [459] made to promise an immediate surrender of hostages and charters.

The Welsh prince must have breathed more freely when this was fulfilled. Soon, with a light heart, his son by his side, he renewed hostilities. Gualo, on 11th November, 1216, laid interdict on the whole of Wales for holding with the barons.¹ By the treaty of Lambeth, Louis was to send a copy of the peace to Llywelyn and the other Welsh princes.²

CHAPTER FIFTY-NINE.

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.

We will do towards Alexander, King of Scots, concerning the return of his sisters and his hostages, and concerning his franchises, and his right, in the same manner as we shall do towards our other barons of England, unless it ought to be otherwise according to the charters which we hold from William his father, formerly King of Scots; and this shall be according to the judgment of his peers in our court.

The barons welcomed allies whether from Wales or Scotland; and this chapter was dictated by a desire to conciliate Alexander. John was forced to promise to restore to the King of Scots his sisters and other hostages, together with his franchises and his “right.”

Opinions have been, and still are, sharply divided as to whether, or in what degree, Scotland was subject to feudal overlordship. David I. and his successors, Kings of Scotland, had been wont to do fealty and homage to the Kings of England; but this fact has received different interpretations. Such homage, it is argued, was performed in respect of certain English baronies which happened to belong by hereditary right to the Kings of Scotland, Edition: current; Page: [460] namely, the earldom of Huntingdon, and the counties of Northumberland, Cumberland, and Westmoreland. The terms of homage did not indicate for what fiefs it was sworn—whether for the English earldoms alone, or for the country north of Tweed as well.

The position of the Kings of Scots remained ambiguous, until William the Lion was placed at a terrible disadvantage by his capture at Alnwick in 1174. To gain release, he ratified the Treaty of Falaise on 8th December, of that year, by which he agreed to hold his territories as fiefs of the English Crown. All his tenants in Scotland were to take oath to Henry; while hostages were surrendered, along with the castles of Berwick, Roxburgh, Jedburgh, Edinburgh, and Stirling.¹

Henry’s diplomacy was undone by his successor. Richard, preparing for his crusade of 1190, sold recklessly every right that would fetch a price: William bought back the independence of his kingdom; but this restoration of the relations that prevailed previous to 1174, involved a restoration of the old ambiguities. When Richard died, William despatched ambassadors to England, pressing claims upon the northern counties, promising to support John’s title in return for their admission, and adding threats.² John avoided committing himself until his position in England was assured; thereafter he commanded William to do homage unconditionally. The Scots King disregarded the first summons, but yielded to a second, yet “reserving always his own right.”³ The saving clause left everything vague as before.

In April, 1209, the King of Scots incurred John’s displeasure. William’s only son, Alexander, was demanded as a hostage, or alternatively three border castles must be delivered up. After a refusal, the old King gave in on Edition: current; Page: [461] 7th August, 1209.¹ Alexander did homage on behalf of his father “for the aforesaid castles and other lands which he held,” and found sureties for the payment of 15,000 marks. William’s daughters, Margaret and Isabel, became wards of John, who had the right to bestow them in marriage.² There seems to have been an understanding that one of them should wed John’s eldest son.³ Margaret and Isabel, though virtually prisoners in Corfe Castle, were honourably treated there. The Close Rolls contain orders for supplying them with articles of comfort and luxury. Thus on 6th July, 1213, John instructed the Mayor of Winchester to despatch in haste, for the use of his niece Eleanor and of the two Scots princesses, robes of dark green (tunics and super-tunics) with capes of cambric and fur of miniver, together with twenty-three yards of good linen cloth, with light shoes for summer wear, “and the Mayor is to come himself with all the above articles to Corfe, there to receive the money for the cost of the

same.”⁴

Meanwhile, events in Scotland had favoured English pretensions. In 1212, Cuthred, a claimant for the Scottish throne, endeavoured to dethrone King William. English succour was asked and paid for by a treaty sealed at Norham on 7th February, 1212, by which William granted to John the right to marry the young Alexander, then fourteen years of age, “sicut hominem suum ligium,” to whomsoever he would, at any time within the next six years, but always “without disparagement.”⁵ William pledged himself and his son to keep faith and allegiance to John’s son, Henry, “as their liege lord” against all mortals.⁶ William had saved his Crown, but Scotland was sinking into the position Edition: current; Page: [462] of a vassal state. On 28th October, 1213, Innocent III. ordered the King of Scotland and his son to show fealty and devotion to King John.¹

William the Lion died at Stirling on 4th December, 1214, and Alexander’s peaceful succession was facilitated by the knowledge that he had the support of John. Such was the position of affairs when John was brought to bay at Runnymede. The barons were willing to bid for the alliance of Alexander; yet it was unnecessary to bid high. John was made to promise to restore Alexander’s sisters and other hostages unconditionally, but words were used which committed him on none of the disputed points.² Franchises and “right” were to be restored only in so far as accorded with William’s “charters,” as interpreted by the judgment of the English barons in the court of the English King.

The allusion in the text to the Scottish King as one among “our other barons of England” need not be pressed against Alexander, any more than similar expressions should be pressed against John, whose position as Duke of Normandy and Aquitaine in no way made England a fief of the French Crown or prevented him becoming a vassal of Rome. In questions affecting his feudal position in France, John’s peers were the dukes and counts of that country; and similarly those who had a right to sit in judgment as Alexander’s peers over his claims to English fiefs were the English earls and barons. Such a tribunal was not likely to give decisions favourable to Scots pretensions, at the expense of England.³

Alexander, though no party to the treaty at Runnymede, Edition: current; Page: [463] was willing to profit by it: on 7th July, 1215, he despatched the Bishop of St. Andrews and five laymen to John “concerning our business which we have against you to be transacted in your court.”¹ Nothing came of this; and Alexander invaded England in order to push his claims. John swore his usual oath, “by God’s teeth,” that he would “chase the little red-haired fox-cub from his hiding-places.”²

By the treaty of Lambeth (12th September, 1217), Louis and Henry were each to send a copy of the peace to Alexander that he might be included in its terms on his restoring castles, lands, and prisoners, taken by him in the war.³ On 23rd September, they joined in urging him to restore Carlisle, and Alexander, anxious to preserve his English honour of Huntingdon, was constrained to yield.⁴ The deeper question at issue between England and Scotland was still unsolved when the relations entered on a new phase, as a consequence of the attempts at annexation made by Edward I., “the hammer of the Scots.”

CHAPTER SIXTY.

Omnes autem istas consuetudines predictas et libertates quas nos concessimus in regno nostro tenendas quantum ad nos pertinet erga nostros, omnes de regno nostro, tam clerici quam laici, observent quantum ad se pertinet erga suos.

Moreover, all these aforesaid customs and liberties, the observance of which we have granted in our kingdom as far as pertains to us towards our men, shall be observed by all of our kingdom, as well clergy as laymen, as far as pertains to them towards their men.

It would have been as impolitic as it was obviously unfair for the barons, in their capacity of mesne lords, to inflict upon their own tenants those very exactions which they compelled the King to abjure as against themselves. Accordingly, the benefit of the “customs and liberties” Edition: current; Page: [464] conceded by John to his feudal tenants was—in a somewhat perfunctory manner, it is true—extended to the feudal tenants of all other magnates, whether cleric or lay. Although the reference to “customs and liberties” was quite general in its terms, it seems natural to infer that feudal grievances were chiefly meant, since the view of society indicated is feudal rather than national.¹

These considerations suggest that too liberal a view has sometimes been taken of the scope of this chapter. Coke treated it as affecting not merely freeholders, but the whole mass of the people:—“This is the chief felicity of a kingdom, when good laws are reciprocally of prince and people (as is here undertaken) duly observed.”² In this view,

he has had many followers; and the present chapter has received undue emphasis as supporting a democratic interpretation of Magna Carta.³ It has been referred to as “the only clause which affects the whole body of the people.”⁴ The better view is that its provisions were confined to feudal sub-tenants.

Even authors who interpret the chapter in this restricted application are still prone to exaggerate its importance. (1) The clause is sometimes regarded as springing directly from the barons’ own initiative: Dr. Stubbs, contrasting it with Henry I.’s Charter of Liberties, holds that it was “adopted by the lords themselves.”⁵ Such praise is unmerited; the barons inserted it because they had need of allies. (2) On the other hand, credit for the clause, equally unwarranted, has been sometimes bestowed on John. Dr. Robert Henry says that “this article, which was highly reasonable, was probably inserted at the desire of the King.”⁶

The substance of this chapter appears in the reissues of Edition: current; Page: [465] 1217 and 1225; but its force there is possibly somewhat impaired by the addition of a new clause reserving to archbishops, bishops, abbots, priors, templars, hospitallers, earls, barons, and all other persons as well ecclesiastical as secular, all the franchises and free customs they previously had¹—a “saving clause” that might be turned to various uses.

CHAPTER SIXTY-ONE.

Cum autem pro Deo, et ad emendacionem regni nostri, et ad melius sopiendam discordiam inter nos et barones nostros ortam, hec omnia predicta concesserimus, volentes ea integra et firma stabilitate in perpetuum² gaudere, facimus et concedimus eis securitatem subscriptam; videlicet quod barones eligant viginti quinque barones de regno quos voluerint, qui debeant pro totis viribus suis observare, tenere, et facere observari, pacem et libertates quas eis concessimus, et hac presenti carta nostra confirmavimus, ita scilicet quod, si nos, vel justiciarius noster, vel ballivi nostri, vel aliquis de ministris nostris, in aliquo erga aliquem deliquerimus, vel aliquem articulorum pacis aut securitatis transgressi fuerimus, et delictum ostensum fuerit quatuor baronibus de predictis viginti quinque baronibus, illi quatuor barones accedant ad nos vel ad justiciarum nostrum, si fuerimus extra regnum, proponentes nobis excessum, petent ut excessum illum sine dilacione faciamus emendari. Et si nos excessum non emendaverimus, vel, si fuerimus extra regnum justiciarius noster non emendaverit, infra tempus quadraginta dierum computandum a tempore quo monstratum fuerit nobis vel justiciario nostro si extra regnum fuerimus, predicti quatuor barones referant causam illam ad residuos de illis viginti quinque baronibus, et illi viginti quinque barones cum communa tocius terre distringent et gravabunt nos modis omnibus quibus poterunt, Edition: current; Page: [466] scilicet per capcionem castrorum, terrarum, possessionum, et aliis modis quibus poterunt, donec fuerit emendatum secundum arbitrium eorum, salva persona nostra et regine nostre et liberorum nostrorum; et cum fuerit emendatum intendunt nobis sicut prius fecerunt. Et quicumque voluerit de terra juret quod ad predicta omnia exequenda parebit mandatis predictorum viginti quinque baronum, et quod gravabit nos pro posse suo cum ipsis, et nos publice et libere damus licenciam jurandi cuilibet qui jurare voluerit, et nulli umquam jurare prohibebimus. Omnes autem illos de terra qui per se et sponte sua noluerint jurare viginti quinque baronibus, de distringendo et gravando nos cum eis, faciemus jurare eosdem de mandato nostro, sicut predictum est. Et si aliquis de viginti quinque baronibus decesserit, vel a terra recesserit, vel aliquo alio modo impeditus fuerit, quominus ista predicta possent exequi, qui residui fuerint de predictis viginti quinque baronibus eligant alium loco ipsius, pro arbitrio suo, qui simili modo erit juratus quo et ceteri. In omnibus autem que istis viginti quinque baronibus committuntur exequenda, si forte ipsi viginti quinque presentes fuerint, et inter se super re aliqua discordaverint, vel aliqui ex eis summoniti nolint vel nequeant interesse, ratum habeatur et firmum quod major pars eorum qui presentes fuerint providerit, vel preceperit, ac si omnes viginti quinque in hoc consensissent; et predicti viginti quinque jurent quod omnia antedicta fideliter observabunt, et pro toto posse suo facient observari. Et nos nichil impetrabimus ab aliquo, per nos nec per alium, per quod aliqua istarum concessionum et libertatum revocetur vel minuatur; et, si aliquid tale impetratum fuerit, irritum sit et inane et nunquam eo utemur per nos nec per alium.

Since, moreover, for God and the amendment of our kingdom and for the better allaying of the quarrel that has arisen between us and our barons, we have granted all these concessions, desirous that they should enjoy them in complete and firm endurance for ever, we give and grant to them the under-written security, namely, that the barons choose five-and-twenty barons of the kingdom, whomsoever they will, who shall be bound with all their might, to observe and hold, and cause to be observed, the peace Edition: current; Page: [467] and liberties we have granted and confirmed to them by this ou present Charter, so that if we, or our justiciar, or our bailiffs or any one of our officers, shall in anything be at fault toward anyone, or shall have broken any one of the articles of the peace or of this security, and the offence be notified to four barons of the foresaid five-and-twenty, the said four barons shall repair to us (or our justiciar, if we are out of the realm) and, laying the transgression before us, petition to have that

transgression redressed without delay. And if we shall not have corrected the transgression (or, in the event of our being out of the realm, if our justiciar shall not have corrected it) within forty days, reckoning from the time it has been intimated to us (or to our justiciar, if we should be out of the realm), the four barons aforesaid shall refer that matter to the rest of the five-and-twenty barons, and those five-and-twenty barons shall, together with the community of the whole land, distraint and distress us in all possible ways, namely, by seizing our castles, lands, possessions, and in any other way they can, until redress has been obtained as they deem fit, saving harmless our own person, and the persons of our queen and children; and when redress has been obtained, they shall resume their old relations towards us. And let whoever in the country desires it, swear to obey the orders of the said five-and-twenty barons for the execution of all the aforesaid matters, and along with them, to molest us to the utmost of his power; and we publicly and freely grant leave to every one who wishes to swear, and we shall never forbid anyone to swear. All those, moreover, in the land who of themselves and of their own accord are unwilling to swear to the twenty-five to help them in constraining and molesting us, we shall by our command compel the same to swear to the effect foresaid. And if any one of the five-and-twenty barons shall have died or departed from the land, or be incapacitated in any other manner which would prevent the foresaid provisions being carried out, those of the said twenty-five barons who are left shall choose another in his place according to their own judgment, and he shall be sworn in the same way as the others. Further, in all matters, the execution of which is intrusted to these twenty-five barons, if perchance these twenty-five are present and disagree about anything, or if some of them, after being summoned, are unwilling or unable to be present, that which the majority of those present ordain or command shall be held as fixed and established, exactly as if the whole twenty-five had concurred in this; and the said twenty-five shall swear that they will faithfully observe all that is aforesaid, and cause it to be observed with all their might. And we shall procure nothing from anyone, directly or indirectly, whereby any part of these concessions and liberties might be revoked or diminished; and if any such thing has been procured, let it be void and null, and we shall never use it personally or by another.

Edition: current; Page: [468]

This important chapter stands by itself, providing machinery for enforcing all that precedes it. It thus forms what modern jurisprudence would describe as the “sanction” of the whole, but what was known in the current phrase of its own day as “the form of security” (*forma securitatis ad observandum pacem et libertates*).¹ It contains the only executive clause of the Charter, the sole constitutional machinery.²

I.: The “Security” or legal Sanction.

The procedure devised for enforcing the Charter was crude: John conferred upon twenty-five of his enemies a legal right to organize rebellion, whenever in their opinion he had broken any one of the provisions of Magna Carta. Violence might be legally used against him, until he redressed their alleged grievances “to their own satisfaction” (*secundum arbitrium eorum*). If it had been possible to put so violent an expedient into practice, the “sovereignty,” or supreme power in England, would have been split into two. John would have held the sceptre only until his opponents declared that he had broken the Charter, when, by his own previously-granted mandate, it would pass to the twenty-five barons forming what has been variously styled a “Committee of Remonstrance and Constraint” or a “Committee of Rebellion.”³

The procedure for redressing grievances is described in some detail; the wronged party must make known his case to four barons of the twenty-five, who would then make it known to the King, and ask redress. If John refused or Edition: current; Page: [469] unduly delayed, compulsion might be used. On the matter of undue delay, the Articles of the Barons said “within a reasonable time to be determined in the Charter.” The Charter did determine this, naming forty days. Compulsion might take any form, except violence against the person of the King, or of his wife or children.

II.: Minor details.

Although the whole expedient seems chimerical to the modern mind, the opposition leaders in 1215 evidently thought they had devised a practicable scheme of government. This is shown by the care with which they elaborated the procedure.

(1): Appointment of the twenty-five executors.

The members of the committee were to be, in the first instance, “elected” by the “barons.” Vacancies were to be filled by the method now known as “co-optation”: the committee, once appointed, would form a close corporation; no one uncongenial to the majority could gain admission—an arrangement with a thoroughly oligarchic flavour. The provision for supplying vacancies caused by death proves that the scheme was not to be temporary.

Writs, issued to the sheriffs on 19th June, command the enforcement of the oath to the twenty-five barons, but do not mention them by name. Matthew Paris supplies the omission, and though he does not disclose the source of his information, it is unlikely that so comprehensive a list could be entirely a work of the imagination.¹ They occur in the following order, the earls of Hertford, Aumâle, Gloucester, Winchester, Hereford, Norfolk, and Oxford, William Marshall the younger, Robert fitz Walter the elder, Gilbert de Clare, Eustace de Vesci, Hugh Bigod, William of Mowbray, William Hardell (Mayor of London), William de Lanvalei, Robert de Ros, John de Lacy (Constable of Chester), Richard de Perci, John fitz Robert, William Mallet, Geoffrey de Say, Roger de Mumbezou, William of Huntingfield, Richard de Muntfitchet, and William of Albini.² There are here no churchmen and Edition: current; Page: [470] no members of the moderate party whose names appear in the preamble. All except two, or at most three, were declared enemies of John.¹ It was an oligarchy of disaffected Crown tenants, whose baronial homogeneity was only broken by the presence of the Mayor of London. Such a committee was not likely to use its powers to further other interests than its own.

(2): A majority to form a quorum.

Driven by necessity the barons devised, or stumbled upon, a peculiarly modern expedient. Unanimity would be difficult to obtain. It was provided, accordingly, that the will of the majority of those present should prevail. It would be inaccurate to say, in modern phraseology, that thirteen formed a quorum, since the quorum varied with the number of those present. No provision was made for summoning or constituting this committee, and room was thus left for packed meetings: one faction, hurriedly convened, might usurp the rights of the whole body. The precedent tentatively introduced, for allowing a majority to act for the whole, was followed only timidly and at intervals. Still, its appearance in John’s Charter marks a stage in the advance of the principle of modern politics which substitutes the “counting of heads for the breaking of them.”²

(3): The sub-committee of four.

Four of the twenty-five executors were to act as intermediaries between aggrieved individuals and the King. Such a position involved discretionary powers; for, if the four refused to endorse the justice of any complaint, John also would be in safety to refuse.³

Edition: current; Page: [471]

(4): Local agents of the twenty-five executors.

In each county the twelve knights, whose original function was to preside at inquiries into “evil customs,” came to act as local representatives of the revolutionary committee, being armed with power to constrain the sheriff to carry out the provisions of Magna Carta, very much as the twenty-five were authorized to constrain the King. In particular, these knights were charged with enforcement of the oath of obedience to the revolutionary committee, and with confiscating the property of all who refused.¹

(5): The part to be played by the public.

John authorized his subjects to side against him, if he should violate the Charter: his general mandate was granted to the twenty-five “cum communa totius terræ,” while licence was “freely and publicly” bestowed on everyone so disposed, to swear obedience to the executors. Two aspects of this provision require attention: (a) Its relation to allegiance and treason. John solemnly authorized his subjects, in certain circumstances, to transfer their allegiance from himself to the committee of his foes. If they refused, he agreed to their compulsion; and on 27th June, 1215, writs were actually issued instructing the seizure of the lands and goods of all who would not swear to obey the twenty-five.² (b) *Communa totius terræ*. The “community of the whole land” was thus to afford active help in subjecting the King to the reign of law; and the phrase has been pressed into the service of democracy by enthusiasts,

who seek to magnify modern conceptions by finding their roots in the past. Few words of medieval Latin offer a more tempting field to enquirers than this *communa*, which, with its English and French equivalents, holds the key to many problems of constitutional origins. The appearance in *Magna Carta* of a body described as a “commune,” in conjunction with an oath of obedience to a revolutionary committee, suggests comparison with the form of civic constitution known in that age as “the sworn commune.”³ The “communa” referred to in chapter 61 Edition: current; Page: [472] was something widely different: to the barons at Runnymede it may have meant either the entire body of feudal tenants or only the magnates; but medieval analogies make it impossible that the word could embrace the free peasantry, still less the villeins of England. The occurrence of such a word is far from proving that the Charter rests on any broad or popular basis.

III.: Relations to Contemporary Theory.

Clumsy and impracticable as the whole scheme appears to modern eyes, it was quite in accord with medieval theory. The conception of a relation founded upon contract between lord and vassal lies at the root of feudalism. If either party glaringly broke the terms of the compact, the other was justified in repudiating the relationship, but he must observe due formalities. *Diffidatio*, intimated to his lord, must precede any attempt of the vassal to redress his wrongs by force. The barons at Runnymede, having complied with this preliminary, had for the moment ceased to owe fealty to John. In reserving power to appoint an Executive Committee (even if this be regarded as implying a right of legalized rebellion), as a condition precedent to a renewal of allegiance, they moved in the direction of legal restraint as opposed to revolutionary violence. The right here recognized by John, likely as it might be to lead to hostilities, was in theory and intention an honest effort to obviate war by recourse to the nearest approximation to constitutional action then available. It was, further, an attempt to substitute united action of the body of feudal tenants (*communa totius terræ*) for the individual vassal’s right of private judgment, claimed and sometimes exercised in that age, on the European continent, and actually confirmed in 1222 by Andreas II. of Hungary by his *Bulla Aurea*.¹

The expedient contained in this chapter is a logical deduction from the vassal’s right of defiance as a prelude to private war against a lord who has wronged him. It was no innovation, but something found by the barons in feudal law.² Foreign parallels have been found for it, not only in Edition: current; Page: [473] the more anarchic procedure of the Hungarian *Bulla Aurea*, but also in the institutions of Aragon and elsewhere.¹ When the baronial leaders in 1263 performed *diffidatio*, they echoed the words of this chapter, “*salva persona regis, reginae et liberorum suorum.*”²

This chapter has been acclaimed as embodying for the first time the idea that formed “the true corner stone of the English Constitution,”³ namely, the right to compel an erring King to bow to a body of law that lies outside his will. There is much to be said for this view. It is quite consistent, however, to combine an appreciation of the value of this conception, with an admission of the defective and clumsy nature of the machinery by which a first attempt was made to realize it.⁴

IV.: Modern Criticism.

Until the last twenty–five years or so, commentators were wont to credit the framers of *Magna Carta* with anticipating most of the cardinal principles of the modern Constitution. In combating such exaggerations, it would not be unnatural to lay emphasis on the extent to which the machinery of this chapter is condemned by the standards of the nineteenth century. Yet it is well to steer a middle course, neither praising the men of 1215, nor blaming them for failing to achieve the impossible.

The faults of the scheme, whether viewed from the side of modern theory or of modern practice, are obvious. It was a violent measure, full of immediate dangers, and calculated to exercise a baneful influence on constitutional development in the future. The fact that *Magna Carta* provided no better sanction for its own enforcement than the right of legalized rebellion, has already been discussed as its cardinal defect.⁵ It is instructive to note a few of its other defects in detail.

(1) The scheme challenged hostility by its want of Edition: current; Page: [474] moderation. On every vexed political question of the day, John’s authority would have been superseded by that of twenty–five of the most hostile faction of the baronage. If the King thought himself aggrieved in anything, he would require to plead his cause before a tribunal in which his opponents sat as judges.¹ The scheme was thus repugnant to loyal Englishmen, who cherished a respect for the monarchy. No King would submit tamely to remain a sovereign, whose “sovereignty” existed on sufferance of

his enemies. The powers thus conferred in 1215 were more sweeping than those conferred on a similar committee in 1258, and yet the Parliament which appointed the latter has been branded as “the Mad Parliament,” because of the violence of its measures.

(2) Rebellion, even where morally justified, is necessarily illegal; to attempt to map out for it a legitimate sphere of action is to attempt the logically impossible. The barons had failed to rise to the true conception of a limited monarchy; their scheme recognized a King still absolute in some matters, but in others powerless and abject. The powers of the twenty-five, a body which received no proper organization, were those of aggression rather than of administration. Viewed in this modern light, the claims of the barons to constructive statesmanship rank low.

(3) The powers of the revolutionary committee, excessive though ill-defined, backed by the sworn obedience of all classes of the nation, would tend completely to paralyze the King. The nominal sovereign, nervous under this sword of Damocles, would lose all power of initiative, while the committee, powerful to reduce him to impotence, would be powerless to goad him into action or to act in his stead. The revolutionary committee had been planned as a drag on a bad executive, not as a good executive to take its place.

(4) Even as a drag, the efficiency of the committee would have been neutralized in either of two contingencies: if the barons composing it disagreed among themselves, or, if the Edition: current; Page: [475] King refused to surrender. Not a step to restrain the King could legally be taken, until he had received formal intimation followed by an interval of forty days, during which he might complete his preparation for war without fear of interruption.

(5) If the scheme of the barons seems ill-suited to the needs of the hour of its conception, it was fraught with even greater dangers to the future development of the English constitution. The problem it sought to solve was one of no transient or unimportant nature: the barons sought the best method of turning royal promises into laws which succeeding Kings must obey. In attempting this, Magna Carta moved along lines that were radically wrong;¹ which, if not departed from in time, would have rendered any enduring progress impossible. The statesmanship which, while leaving one King on the throne, subjected him to the dictation of “five-and-twenty over-kings” was crude and ill-advised. It is true that the party of reform, throughout the long reign of Henry III., clung to the same erroneous solution; but they met with no success. After half a century of unrest, a settlement seemed as far distant as before. The dangers of schemes like those of 1215, 1244, and 1258 are clearly seen in contrast with the more tactful efforts of Edward I. towards a true solution, along lines leading in due time to complete success.

The true policy for the barons was to use the King’s own administrative machinery and the King’s own servants to control the King. The principle was slowly established that the sovereign could perform no single act of prerogative except through the agency of a particular officer or organ of the royal household; while very gradually the doctrine of ministerial responsibility grew up, compelling each officer of the Crown to obey not only the law of the land, but also the Commune Concilium, fast changing into the modern Parliament. The credit of starting the constitution on its right line of development is in great measure due to Edward I.²

Edition: current; Page: [476]

V.: Failure of the Scheme.

Almost before John’s Charter had been engrossed and sealed, the futility of its “sanction” was recognized. Each side grew suspicious and demanded new “sanctions” not contained in the Charter.

(1): Quis custodiet ipsos custodes?

Magna Carta, assuming apparently that perfect trust could be placed in the revolutionary committee, provided no machinery for controlling them, no guarantee that they would observe the Charter. The futility of this complacency was soon manifest. One tyrant had brought distress on the whole nation; and now he was to be superseded by five-and-twenty. Who was to restrain the new tyrants? A second committee was nominated, partly to assist and partly to control the twenty-five. Matthew Paris¹ describes it as composed of thirty-eight “Obsecutores et Observatores,” including the Earl Marshal, Hubert de Burgh, the earls of Arundel and Warenne, and other prominent members of the moderate party, not unfriendly to the King. Dr. Stubbs dismisses their relations to the executors with the remark that they “swore to obey the orders of the twenty-five.”² Miss Norgate takes what seems to be a better view, in emphasizing, as the chief reason for their appointment, the duty of compelling “both the King and the twenty-five to

deal justly with one another.”³ The thirty–eight were required to constrain the twenty–five, as the twenty–five constrained the King.⁴

(2): Suspicions of the barons’ good faith.

There is evidence that the King was distrustful of the barons’ good faith, and desired on his part some “sanction” that they would not again renounce allegiance. The barons’ promise to grant John security, and the written protest against their breach of faith, made by Langton and other prelates at John’s request, have already been described.⁵

Edition: current; Page: [477]

(3): Suspicions of John’s good faith.

The barons, on their part, soon came to the conclusion that the Committee, in spite of all its powers, formed an inadequate sanction against John. They demanded further “security.” The city of London was placed in their hands, and the Tower of London in the neutral custody of the primate, as pledges of John’s good faith, until 15th August or longer if need were. Those terms were reduced to writing in a document entitled “*Conventio facta inter Regem Angliae et barones ejusdem regni*,” which thus supplied a new “form of security,” supplementing, if not superseding, that contained in chapter 61.¹

(4): Precautions against papal intervention.

The Articles of the Barons afford evidence of the framers’ suspicions that John would apply to Rome for release from his bargain. They demanded that the English prelates and the papal legate should become the King’s sureties, that he would not invite the Pope to invalidate the Charter. If Pandulf, as the Pope’s accredited agent, had put seal to such a document, he would have seriously embarrassed his august master.

Two important alterations in the completed Charter were effected, however, whether at John’s instance, or at that of Pandulf, or of the English prelates, is matter of conjecture. All mention of Innocent by name was omitted, the clause being made quite general in its terms: John promised to procure a dispensation “from no one”; while the question of sureties was ignored. Innocent was left free to support John’s policy of repudiation.²

Edition: current; Page: [478]

CHAPTER SIXTY–TWO.

Et omnes malas voluntates, indignaciones, et rancores ortos inter nos et homines nostros, clericos et laicos, a tempore discordie, plene omnibus remisimus et condonavimus. Preterea omnes transgressiones factas occasione ejusdem discordie, a Pascha anno regni nostri sextodecimo usque ad pacem reformatam, plene remisimus omnibus, clericis et laicis, et quantum ad nos pertinet plene condonavimus. Et insuper fecimus eis fieri litteras testimoniales patentes domini Stephani Cantuariensis archiepiscopi, domini Henrici Dublinensis archiepiscopi, et episcoporum predictorum, et magistri Pandulfi, super securitate ista et concessionibus prefatis.

And all the ill–will, hatreds, and bitterness that have arisen between us and our men, clergy and lay, from the date of the quarrel, we have completely remitted and pardoned to everyone. Moreover, all trespasses occasioned by the said quarrel, from Easter in the sixteenth year of our reign till the restoration of peace, we have fully remitted to all, both clergy and laymen, and completely forgiven, as far as pertains to us. And, on this head, we have caused to be made for them letters testimonial patent of the lord Stephen, archbishop of Canterbury, of the lord Henry, archbishop of Dublin, of the bishops aforesaid, and of Master Pandulf as touching this security and the concessions aforesaid.

The clauses that follow the *forma securitatis* are of a formal nature. The present chapter, after making a well–meant declaration that bygones should be bygones, so that peace and goodwill should everywhere prevail—a pious aspiration doomed to speedy disillusion—proceeds to authorize the prelates to issue, under their seals, certified copies of the Great Charter. Such letters were actually issued, and their terms are preserved in the Red Book of the Exchequer.¹

CHAPTER SIXTY–THREE.

Quare volumus et firmiter precipimus quod Anglicana ecclesia libera sit et quod homines in regno nostro habeant et teneant omnes prefatas libertates, jura, et concessionones, bene et in pace, libere et quiete, plene et integre sibi et heredibus suis, de nobis et heredibus nostris, in omnibus rebus et locis, in perpetuum, sicut predictum est. Juratum est autem tam ex parte nostra quam ex parte baronum, quod hec omnia supradicta bona fide et sine malo ingenio observabuntur. Testibus supradictis et multis aliis. Data per manum nostram in prato quod vocatur Ronimede, inter Windlesoram et Stanes, quinto decimo die Junii, anno regni nostri decimo septimo.

Wherefore it is our will, and we firmly enjoin, that the English Church be free, and that the men in our kingdom have and hold all the aforesaid liberties, rights, and concessions, well and peaceably, freely and quietly, fully and wholly, for themselves and their heirs, of us and our heirs, in all respects and in all places for ever, as is aforesaid. An oath, moreover, has been taken, as well on our part as on the part of the barons, that all these conditions aforesaid shall be kept in good faith and without evil intent. Given under our hand—the above–named and many others being witnesses—in the meadow which is called Runnymede, between Windsor and Staines, on the fifteenth day of June, in the seventeenth year of our reign.

This last of the sixty–three chapters into which Magna Carta has been divided by modern commentators, contains little that calls for remark. Beginning with a repetition of the declarations made in chapter one that the English Edition: current; Page: [480] church should be free (omitting, however, any second reference to canonical election) and that homines in regno nostro should have and hold all of the aforesaid liberties, rights and concessions, it records that both parties had taken oath to observe its contents in good faith.¹ The magnates named in the preamble were thereafter, along with many others unnamed, referred to collectively as witnesses. The Charter concludes with a declaration that it has been “given by our hand,” and the place and date are specified. The actual “giving” by John’s hand was effected by impress of his great seal.²

Edition: current; Page: [481]Edition: current; Page: [519] Edition: current; Page: [521]

Endnotes

1

The division of Magna Carta into a preamble and sixty–three chapters is a modern device for which there is no warrant in the Charter. Cf. *supra*, 170. No title or heading precedes the substance of the deed in any one of the four known originals, but on the back of the Lincoln MS. (cf. *supra*, 167) these words are endorsed; “Concordia inter Regem Johannem et Barones pro concessione libertatum ecclesie et regni Anglie.” The form of the document is discussed *supra*, 104–9. The text is taken from that issued by the Trustees of the British Museum founded on Cottonian version No. 2. Cf. *supra*, 166.

1

The sentence is concluded in chapter one (see *infra*)—the usual division, here followed, being a purely arbitrary one.

2

The phrase “nobiles viri” was not used here in any technical sense; the modern conception of a distinct class of “noblemen” did not take shape until long after 1215. Cf. what is said of “peerage” under cc. 14 and 39.

1

Coke (Second Institute, pp. 1–2) errs in attributing the change to John.

2

Aquitaine included Poitou and Gascony with the four dependent counties of Angoulême, La Marche, Limoges and Perigord. See Norgate, *Minority*, 132.

[3](#)

See Giry, *Manuel de diplomatique*, 798.

[4](#)

Henry VIII. was the first to call himself “King of Ireland”—a singular proof “of the success of Henry’s policy.” Gairdner, *Lollardy*, ii. 473.

[1](#)

Cf. *supra*, p. 95. See Orpen, *Ireland*, I. 300 and II. 31, where it is pointed out that William Marshal refused to support his King against his “lord.” For other theories, see Round’s *Mandeville*, 70; Rössler’s *Matilde*, 291–4 and 424; Ramsay’s *Foundations*, II. 403; Davis, *England under Normans*, 170.

[2](#)

Stubbs, *Early English History*, p. 122, seems to be in error here.

[3](#)

See Charter in Appendix.

[4](#)

Matilde, *passim*.

[1](#)

See, however, Chadwick, *Anglo–Saxon Institutions*, p. 355 ff.

[2](#)

Dr. Stubbs, *Const. Hist.*, I. 582, gives the motive of thus naming them as “the hope of binding the persons whom it includes to the continued support of the hard–won liberties.” Those named were all moderate men. M. Paris (*Chron. Maj.*, II. 589) describes them as “quasi ex parte regis.” Cf. *Annals of Dunstable*, III. 43. The neutrality of the prelates is proved by other evidence. (1) C. 62 gave them authority to certify by letters testimonial the correctness of copies of the Charter. (2) The 25th of the Articles of the Barons left to their decision whether John should enjoy a crusader’s privileges; while c. 55 gave Langton a special place in determining what fines were unjust. (3) The Tower of London was placed in the custody of the archbishop. (4) Copies are preserved of two protests by the prelates in favour of the King. See Appendix.

[3](#)

Cf. *supra*, 36; for biographical information see authorities there cited.

[1](#)

Second Institute, 1 n.

[2](#)

Cf. *supra*, 40.

[3](#)

Some editions place here the division between c. 1 and c.

[1](#)

Cf. *supra*, p. 39.

1

See their Charters in Appendix.

2

See Makower, *Const. Hist. of the Church*, 26, 315.

1

Cf. *supra*, p. 97.

2

Cf. Pollock and Maitland, I. 74.

3

Cf. *supra*, pp. 102–3.

4

For explanation see *infra*, c. 18.

1

Mr. J. H. Round (*Geoffrey de Mandeville*, 3), speaking of Stephen's "oath" to restore the church her "liberty," describes this as "a phrase the meaning of which is well known." If "well" known, it was known chiefly as something which baffled definition, because churchmen and laymen could never agree as to its contents, while it tended also to vary from reign to reign. Mr. Round attempts no definition. Sir James Ramsay (*Angevin Empire*, p. 475), writing of the phrase as used in John's Charter, is less prudent. "It would relieve the clergy of all lay control, and of all liability to contribute to the needs of the State beyond the occasional scutages due from the higher clergy for their knights' fees." This definition would not have satisfied John.

2

Cf. *supra*, p. 33. The text will be found in *Statutes of the Realm*, I. 5, and in *New Rymer*, I. 126–7. It was confirmed by Innocent on 30th March, 1215. See Potthast, *Regesta pontificum romanorum*, No. 4963.

3

Cf. *supra*, p. 141.

4

Cf. Prothero, *Simon de Montfort*, p. 152. "The English church was indeed less independent of the king in 1258 than in 1215, and far less independent of the Pope than in the days of Becket."

1

See *supra*, pp. 104 and 114. For the meaning of "freeman" and Coke's inclusion of villeins under that term for some purposes but not for others, see *infra*, cc. 20 and 39.

2

Cf. *supra*, 154, where the bearing of these words is discussed.

1

Cf. *supra*, p. 59.

[2](#)

At an early date, in the midland counties, the thegn with more than six “manors” paid £8 of relief to the King; the thegn with six or fewer paid three marks to the sheriff. See Domesday Book, I. 280, b (Derby and Notts). Contrast *Ibid.*, I. 56, where, however, relief seems to be confused with heriot.

[1](#)

Glanvill’s words (IX. c. 4) are ambiguous. He distinguishes three cases: (a) the normal knight’s fee, from which 100s. was due as relief (whether this extends to fees of Crown–tenants does not appear); (b) socage lands, from which one year’s rent might be taken; and (c) “capitales baroniae” were left subject to the King’s discretion. Now “barony” was a loose word: baronies, like barons, might be small or great (cf. *infra*, c. 14); all Crown fiefs being “baronies” in one sense, but only certain larger “honours” being so reckoned in another. Glanvill leaves this vital point undetermined, but *Dialogus de Scaccario* (II. x. E. p. 135 and II. xxiv. p. 155) supports the distinction between Crown–tenants and tenants of mesne lords: only the latter had their reliefs fixed. Madox (I. 315–6) cites from Pipe Rolls large sums exacted by the Crown: in one case £300 was paid for six fees—or ten times what a mesne lord could have exacted. (Pipe Roll, 24 Henry II.) There is further evidence to the same effect: where a barony had escheated to the Crown, reliefs of the former under–tenants would in future be payable directly to the Crown; but it was the practice of Henry II. (confirmed by c. 43 of Magna Carta, q.v.) to charge, in such cases, only the lower rates exigible prior to the escheat. A similar rule applied to under–tenants of baronies in wardship; see the case of the knights of the see of Lincoln in the hands of a royal warden in Pipe Roll, 14 Henry II. cited by Madox, *ibid.*). It would thus appear that all holders of Crown fiefs (not merely barones majores) were in Glanvill’s day still liable to arbitrary extortions in name of reliefs. The editors of the *Dialogus* (p. 223) are of this opinion. Pollock and Maitland (I. 289) maintain the opposite—that the limitation to 100s. was binding on the Crown as well as on mesne lords.

[1](#)

Madox, I. 316.

[2](#)

Ibid., I. 317.

[3](#)

Ibid., I. 318.

[4](#)

Ibid., I. 321.

[5](#)

Apparently its first appearance is in the *Inspeximus* of 10th October, 1297. See Madox, 318; Pollock and Maitland, I. 289; Bémont, *Chartes*, p. 47.

[6](#)

See note by editors of *Dialogus*, p. 238; Poole, *Exchequer*, 16, 170. The barons in 1258 (*Sel. Charters*, 382) protested against this, and the practice was discontinued.

[7](#)

Cf. *supra*, pp. 54–6.

[1](#)

It is possible to argue that the custom as to socage was already too well settled to require confirmation: Glanvill (IX. c. 4) stated the relief for socage at one year’s value. It is not clear, however, whether this restriction applied to the Crown. Further, no custom, however well established, was safe against John’s greed.

2

See Littleton, Tenures, II. viii. s. 154, and Madox, I. 321, who cites the case of a certain Henry, son of William le Moigne, who was fined in £18 for the relief of lands worth £18 a year held “by the serjeanty of the King’s Lardinary.”

3

Cf. supra, p. 57. See Round, King’s Serjeanties, p. 33.

4

Engl. Soc. in Eleventh Century, pp. 42–48.

1

Engl. Soc. in Eleventh Century, pp. 49–50.

2

See Pollock and Maitland, I. 262, and authorities there cited. “An honour or barony is thus regarded as a mass of lands which from of old have been held by a single title.” See also Pike, House of Lords, pp. 88–9.

3

This change was not complete in 1215, but Magna Carta, when it uses “barones” alone, seems to refer to “barones majores” (see cc. 2, 21, 61). Cf. infra under c. 14.

1

Dialogus, II. xxiv.

2

New Rymer, I. 107.

3

Madox, I. 216 ff. As the Exchequer, from the time of Edward I., exacted 100 marks from a barony and 100s. from a knight’s fee, the false equation of extent “1 barony = 13½ knights’ fees” was deduced. Coke (On Littleton, IV. s. 112, and Second Inst., 7) is sometimes credited with originating this error, but it appears in *Modus tenendi Parliamentum* (Sel. Chart., 503). To suit the proportion given in John’s Charter the equation would need to be “1 barony = 20 fees.” There is, of course, no fixed equation; baronies might be of any size; we read of land held “in baronagio per servitium feodi unius militis” (Northumberland Eyre Roll, 7 Ed. I.; Surtees Soc., 88, p. 327).

4

In the *Inspeximus* of Edward I., however, *comitatus* (earldom) displaces the *baronia comitis* of the text. See *Statutes of Realm*, I. 114.

5

See Pike, House of Lords, 57.

1

See Pike, House of Lords, 63. This term *comitatus* was a word of many meanings. Originally designating the “county” or “the county court,” it came to mean also the office of the earl who ruled the county, and later on it might indicate either his titular connection with the shire, his estates, his share of the profits of justice, or his rank in the peerage.

2

This was affirmed in 1164 by Article 11 of the Constitutions of Clarendon, which stipulated that each prelate should hold his lands *sicut baroniam*.

[1](#)

Sicut per barones meos disposui. The writ is given in Heming's *Cartulary*, I. 79–80, and reprinted by Round, *Feudal England*, 309.

[2](#)

See *supra*, p. 98.

[1](#)

Where there had already been a wardship, the relief was thus the price paid by the heir in order to escape from the heavy hand of the King, and was therefore known as “*ousterlemain*.” Taswell–Langmead (*Engl. Const. Hist.*, 51 n.) states the amount at half a year's profits. He cites no authorities, and is probably in error. *Dialogus*, II. x. E. p. 135, forbids relief to be taken, when wardship had been exercised *per aliquot annos*.

[2](#)

See chapter 3 of 1216, which stipulates that no lord shall have wardship “*antequam homagium ejus ceperit*.” See Coke, *Second Institute*, 10. Cf. Adams, *Origin*, 204, on “homage as a recognition of title.”

[3](#)

Coke, *Ibid.*, p. 12, makes a subtle and unwarranted distinction depend on whether the minor was made a knight before or after his ancestor's death. The proviso, he argues, does not apply to the former case, because lands cannot “remain” in wardship if they were not in it before.

[1](#)

See Coke on Littleton, Book II. c. iv. s. 112; and cf. *infra*, cc. 37 and 43 for the “prerogative wardship” of the Crown.

[1](#)

The nature of wardship is more fully explained *supra*, pp. 61–2.

[2](#)

E.g. Taswell–Langmead, *Eng. Const. Hist.*, p. 51 n.

[3](#)

“This, it would seem, was the old English rule;” see Ramsay, *Foundations of England*, II. 230.

[4](#)

It is a common error to suppose that this Assize restores wardship to the lord.

[1](#)

See Pipe Roll, 29 Henry II., cited Madox, I. 483.

[2](#)

E.g. Coke, *Second Institute*, p. 13.

[3](#)

VII. c. 10.

4

Orpen, Ireland, II. 203.

1

II. folio 87.

2

See Appendix.

3

Another way of “wasting” villeins was by tallaging them excessively. (For meaning of tallage cf. *infra*, c. 12.) Thus Bracton’s Note Book reveals how one guardian *destruxit villanos per tallagia* (v. case 485); how another exiled or destroyed villeins to the value of 300 marks (case 574); how a third destroyed two rich villeins so that they became poor and beggars and exiles (case 632). Cf. also case 691. Daines Barrington, writing towards the middle of the eighteenth century, went too far when he inferred from this passage “that the villeins who held by servile tenure were considered as so many negroes on a sugar plantation” (Observations, p. 7).

1

Edward I. c. 21.

2

Edward I. c. 5.

3

Coke, Second Institute, p. 13, enunciates a doctrine at variance with this statute, holding that the heir who suffered damage could not, on coming of age, obtain triple damages, or indeed any damages at all, if the King had previously taken amends himself. Coke further maintains that even after waste, the person of the heir was left in the power of the unjust guardian, explaining that when the Charter took away the office “this is understood of the land, and not of the body.”

1

This term is explained, c. 47. *infra*.

2

It is difficult to distinguish between *vivarium* and *stagnum*. By Coke, in the Statutes at large, *vivarium* is translated “warren”; but that word has its Latin form in *warrena*. Westminster II. (c. 4) speaks of *stagnum molendinæ* (a millpond). Statute of Merton (c. 11) refers to poachers taken in *parcis et vivariis*.

3

Discussed *infra*, under c. 20.

4

Cf. Blackstone, Great Charter, lxxviii.

1

Cf. *infra*, under c. 18.

2

See R. S. Gardiner, Documents, p. 207.

[3](#)

See *infra*, under c. 37, for prerogative wardship.

[4](#)

Article 11: see Select Charters, 139.

[1](#)

Cited by editors of the *Dialogus*, p. 223.

[2](#)

Cf. under c. 43 *infra*.

[3](#)

C. 46 of Magna Carta (see *infra*) confirmed barons, who had founded abbeys, in their rights of wardship over them during vacancies.

[4](#)

See *supra*, 26–3.

[5](#)

Cited Madox, I. 565.

[1](#)

See *Rotuli de Oblatis et Finibus*, p. 37, and Pipe Roll, 2 John, cited by Madox, I. 515.

[2](#)

Pipe Roll, 4 John, cited by Madox, I. 324.

[3](#)

See *infra*, c. 59.

[4](#)

20 Henry III. c. 6.

[1](#)

Tenures, II. iv. s. 109.

[2](#)

See Petition of the Barons (Sel. Charters, 383). Gradually the conception of disparagement expanded, partly from the natural development of legal principles and partly from the increased power of the nobility. Coke commenting on Littleton (Section 107) mentions four kinds of disparagements: (1) *propter vitium animi*, e.g. lunatics; (2) *propter vitium sanguinis*, villeins, burgesses, sons of attainted persons, bastards, aliens; (3) *propter vitium corporis*, as those who had lost a limb or were diseased or impotent; and (4) *propter jacturam privilegii*, or such a marriage as would involve loss of “benefit of clergy.” The last clause had no connection with the law as it stood in 1215. Marriage with a widow or widower was deemed by the Church in later days an act of bigamy, and involved loss of benefit of clergy, until this was remedied by the Statute 1 Edward VI. c. 12 (sect. 16).

[3](#)

II. folio 88.

[4](#)

For further information on the age at which marriage could be tendered to a ward, and the penalties for refusing, see Thomson *Magna Carta*, pp. 170–171.

[1](#)

Cf. *supra*, 63–5.

[1](#)

See Pollock and Maitland, II. 422–3. The ceremony at the church door, when resorted to, was no longer an opportunity of giving material proof of affection to a bride, but a means of cheating her out of what the law considered her legitimate provision, by substituting something of less value.

[2](#)

Pollock and Maitland, II. 419.

[1](#)

See Pollock and Maitland, II. 15, 16. *Liberum maritagium*, considered as a tenure, has various peculiarities. The lady's husband became the feudal tenant of her father. The issue of the marriage were heirs to the lands and would hold them as tenants of the heir of the donor. For three generations, however, neither service nor homage was due. After the third transmission, the land ceased to be “free”; the peculiar tenure came to an end; the new owner was subject to all the usual burdens.

[2](#)

Second Institute, p. 16.

[3](#)

See *supra*, p. 214.

[4](#)

Observations, pp. 8–10.

[5](#)

E.g. Thomson, *Magna Carta*, p. 172. Dr. Stubbs has his own reading of *maritagium*, namely, “the right of bestowing in marriage a feudal dependant.” See Glossary to *Sel. Charters*, p. 545. The word may sometimes bear this meaning, but not in *Magna Carta*.

[6](#)

See his *History of English Law*, I. 121 (3rd ed.).

[1](#)

Cf. *Ibid.*, I. 242, where Reeves rightly points out that Coke is mistaken, although he fails to notice the distinction drawn, in the passage criticized, between the Crown and mesne lords.

[2](#)

See Coke, Second Institute, p. 16.

1

See Glossary to Select Charters, p. 539: “firewood; originally provision or stuff generally.”

2

Several instances of the wider use may be given. Bracton (III. folio 137) explains that, pending the trial of a man accused of felony, his lands and chattels were set aside by the sheriff; meanwhile the imprisoned man and his family received “reasonable estovers.” (Cf. *infra*, c. 32.) The Statute of Gloucester (6 Edward I. c. 4) mentions incidentally one method of stipulating for a return from property alienated, viz., estovers of meat or clothes. Blackstone, again (Commentaries, I. 441), applies the name estovers to the alimony made to a divorced woman “for her support out of the husband’s estate.” Sometimes the word was more restricted. Coke (Second Institute, p. 17) says, “when estovers are restrained to woods, it signifieth housebote, hedgebote, and ploughbote,”—that is, timber for repairing houses, hedges, and ploughs. Apparently it had an even more restricted scope when used to describe the right of those who dwelt in the King’s forest, viz., to take dead timber as firewood. (Cf. *infra*, c. 44.)

3

Second Institute, p. 17.

4

There seems no reason to restrict her estovers to a right over “commons,” in the sense of pastures and woods held “in common” by her late husband and the villeins of his manor. Some such meaning, indeed, attaches to the phrase “dower of estovers” met with in later reigns, e.g. in Year Book of 2 Edward II. (Selden Society), p. 58, where it was held that such a right (claimed as a permanent part of dower) did not belong to a widow.

1

See Pipe Roll of 16 John, cited Madox, I. 491.

2

See Pipe Roll of 6 John, cited Madox, I. 488.

3

See Pipe Roll of 6 John, cited Madox, I. 488.

4

New Rymer, I. 91.

1

See New Rymer, I. 92.

2

See Coke, Second Institute, 18.

1

See *supra*, pp. 73–6.

2

The *Dialogus de Scaccario*, II. xiv., half a century earlier, laid down rules even more favourable to the debtor in two respects: (1) the order in which moveables should be sold was prescribed; and (2) certain chattels were absolutely reserved to the debtor, e.g. food prepared for use; and, in the case of a knight, his horse with its equipment.

1

51 Henry III. stat. 4 (among “statutes of uncertain date” in Statutes of Realm, I. 197).

2

See *Dialogus de Scaccario*, II. xiv.

3

Cf., however, the rule as to amercements in c. 20.

4

28 Edward I. c. 12. Cf. Statute of Marlborough, 52 Henry III. c. 15.

5

Henry’s reissues make two small additions explaining certain points of detail: (1) the words “et ipse debitor paratus sit inde satisfacere” precede the clause giving sureties exemption; and (2) the sureties are declared liable to distraint when the chief debtor can pay, but will not.

1

The words “de quocumque teneat” include Crown–tenants and under–tenants, and suggest that only freeholders were protected by this clause.

2

Catallum and lucrum were the technical words for “principal” and “interest.” See Round, *Ancient Charters* (Pipe Roll Society, Vol. X.), No. 51, and John’s Charter to the Jews, *Rot. Chart.*, p. 93.

3

See Pollock and Maitland, I. 452, and Round’s *Ancient Charters*, notes to Charter No. 51.

4

The Crown was sometimes called in to enable a debtor, overwhelmed by the accumulation of interest, to come to a settlement with his creditors. In 1199 Geoffrey de Neville gave a palfrey to the King to have his aid “in making a moderate fine with those Jews to whom he was indebted.” See *Rotuli de Finibus*, p. 40. Ought we to view John’s intervention as an attempt to arrange a reasonable composition with unreasonable usurers, or was it simply a conspiracy to cheat Geoffrey’s creditors?

1

20 Henry III. c. 5.

2

Statutes of Realm, I. 221.

1

Cf. *Cap. de Judaeis* (Sel. Ch. 262).

2

Cf. J. M. Rigg, *Sel. Pleas of the Jewish Exchequer*, p. xix.

3

Sel. Charters, 262.

1

See John's Charter to the Jews of 10th April, 1201, in *Rotuli Chartarum*, p. 93.

2

See Pollock and Maitland, I. 453 n.

3

Rigg, *Op. cit.*, xx.

4

See *Rot. Chart.*, I. 93. Complaints brought by Christians against Jews were to be judged "per pares Judei," a phrase which Harcourt, *Steward*, 228, interprets as equivalent to "the justices or custodes of the Jews," but see *infra* under c. 39.

1

Rot. Pat., I. p. 33, and *New Rymer*, I. 89. The date is 29th July, 1203.

2

See Rigg, *ibid.*, xxiv.

3

See *Miss Norgate*, *John Lackland*, p. 231.

1

Statutes of Realm, I. 221.

1

Folio 386b.

1

See *supra*, p. 65.

1

"Extraordinary aids" here mean all aids other than the three normal ones.

2

Miss Norgate, *Minority*, 15, thinks the innovation so undoubted as to justify Innocent's Bull annulling the Great Charter. Cf. *Adams*, *Origin*, 276 n.: "a demand in regard to scutage which custom did not warrant." Cf. *ibid.*, 221-2, and *supra*, 71.

3

See *supra*, p. 148.

1

Miss Norgate, *Minority*, p. 194.

[2](#)

See *supra*, p. 35.

[3](#)

See Article 23 (which became c. 33), Article 31 (c. 41), and Article 32 (cc. 12 and 13), and cf. *supra*, p. 117. Whether Article 12 (c. 35) was more a benefit to, than a restraint upon, traders seems doubtful.

[4](#)

See, however, Ballard (*British Borough Charters*, lxxx. ff.) who seems to make the two things shade into each other.

[5](#)

Bracton, I. 288, holds that aids of this sort are personal not predial, for they look to persons not fiefs. *Auxilium burgorum* was sometimes a technical term, meaning sums paid by boroughs in lieu of ‘Danegeld. See Round, *Eng. Hist. Rev.*, XVIII. 309. In our text, however, “aids” must be more broadly interpreted.

[1](#)

This statement, for which evidence is given *infra*, is not always admitted. Taswell–Langmead, *Eng. Const. Hist.*, p. 107, says: “The city of London can never have been regarded as a demesne of the Crown.” For lists of prelates and barons paying tallage see Ludwig Riess, *Historische Zeitschrift*, Vol. 14, N.S. pp. 21 ff. (1904).

[2](#)

I. 712, citing Mem. Roll 39 Henry III.

[1](#)

Rot. Claus., I. 64.

[2](#)

Willelmi Articuli Londoniis Retractati, in Liebermann, *Gesetze*, I. 490, c. 5.

[3](#)

Eng. Hist. Rev., XVII. 726.

[4](#)

Ibid., XIX. 702; Origin, 358 ff.

[1](#)

See *supra*, p. 236.

[2](#)

Lords’ Report on the Dignity of a Peer, I. 65.

[3](#)

In 1168, when Henry II. took an aid for the marriage of his daughter, London contributed £617 16s. 8d., which might afford a precedent for a “reasonable” aid. See Pipe Roll, 14 Henry II., cited Madox, I. 585.

[1](#)

Cf. however, Davis, *England under Normans*, 380.

2

It might be argued that the last clause of chapter 13, extending to all towns a confirmation of liberties and customs, was intended to embrace this provision as to aids. If so, the draftsman has expressed himself clumsily.

3

See Stubbs, *Const. Hist.*, II. 548. "Of the scope of this enactment there can be no doubt; it must have been intended to cover every species of tax not authorised by parliament, and . . . it seems to have had the effect of abolishing the royal prerogative of tallaging demesne."

1

E.g. Taswell–Langmead, *Engl. Const. Hist.*, 106. Dr. Stubbs, *Const. Hist.*, I. 573, considers that these words "admit the right of the nation to ordain taxation."

1

See *infra*, under c. 25.

2

Even when an honour escheated, its tenants "were not suitors of the Curia Regis." See *Report on Dignity of a Peer*, I. 60.

1

Firma is explained *infra*, c. 25.

2

Stubbs, *Const. Hist.*, I. 439. Round, *Commune*, 220, is in substantial agreement. Miss Bateson, however, thinks "there has been a tendency unduly to minimise the measure of administrative unity in the twelfth-century shire of London." See evidence produced by her, *Engl. Hist. Rev.*, XVII. 480–510.

1

Geoffrey de Mandeville, 356.

2

William of Malmesbury, II. 576.

3

See e.g. Miss Norgate, *Angevin Kings*, II. 471.

4

Geoffrey, 367.

1

Commune of London, 222.

1

Commune of London, 224.

2

Select Charters, p. 252.

3

Luchaire, *Communes Françaises*, p. 97, defines it as “seigneurie collective populaire.”

1

Miss Bateson, *Engl. Hist. Rev.*, XVII. 508.

2

E.g. removal of obstacles in Thames and Medway. Cf. *infra*, c. 33.

3

Supra, p. 236.

4

John Lackland, 228. From this date the list of mayors shows frequent, sometimes annual, changes. Serlo, the mercer, was mayor in May, 1215, when London opened its gates to the insurgents, while William Hardell had succeeded him before 2nd June, 1216.

1

See text of Charter in *Sel. Chart.*, 315.

2

The meaning of both words is discussed *infra*, c. 39.

3

See *supra*, p. 236. M. Petit-Dutaillis (*Studies Supplementary*, 102) doubts whether the citizens in 1215 had any wish to become a Commune, and holds that their desire was to escape burdensome exactions, no matter what these might be called. Prof. Adams (*Origin*, 367) maintains, in reply, that the only practicable method of effecting this exemption was to obtain recognition as a Commune.

4

Ibid., 361.

1

Rot. Pat., 303–4.

2

See Norgate, *Minority*, 186, and authorities there cited.

3

See *supra*, p. 145.

4

Cf. Pollock and Maitland, I. 447–8.

1

Cf. *infra*, c. 41.

2

On the whole subject of the *commune concilium*, cf. *supra*, 129–131 and 149.

1

E.g. Anson, *Law and Custom of the Constitution* (1st ed.), I. 14, declares that one of the two cardinal principles of the Charter is “that representation is a condition precedent to taxation.” This has been altered in later editions.

2

Prof. Adams (*Origin*, 276 n.) perhaps goes too far towards the opposite extreme in holding this chapter “an unnecessary addition to the Articles of the Barons and quite without importance.” Contrast Round as cited *infra*, p. 251.

1

This is illustrated by comparison with the phrases in which Henry and his sons expressed “the common consent”: e.g. (1) the Assize of Clarendon in 1166 (*Select Charters*, 143) bears to have been ordained by Henry II. “*de consilio omnium baronum suorum*”; (2) John’s Charter to Innocent in 1213 declares that he acted “*communi consilio baronum nostrorum*” (*Select Charters*, 285); (3) Matthew Paris makes Earl Richard complain to Henry III. in 1255 that the Apulian business had been entered on “*sine consilio suo et assensu barnagii*” (*Chron. Maj.*, V. 520).

2

Cf. Round (*Peerage and Pedigree*, 349 ff.), who speaks of this as creating “a harsh and artificial division of society.” Its composition was stereotyped, and Mr. Round rejects alike the theory of Stubbs (*Const. Hist.*, I. 566) that the Council was being gradually extended, and that of Freeman (*Norman Conquest*, V. 419) that it was suffering contraction. Cf. also Adams, *Origin*, 226 n., and the authorities there collected.

3

See Ramsay, *Angevin Empire*, p. 54, and authorities there cited.

1

See L. O. Pike, *House of Lords*, 92, “There is no trace of any desire on the part of the barons to be summoned to the King’s great Council as a privilege and an honour before the reign of John.” Cf. also *Report on the Dignity of a Peer*, I. 389.

2

Peerage and Pedigree, 355–6.

3

See Prof. Medley, *Eng. Const. Hist.*, 123.

4

Dialogus de Scaccario, II. x. D., “*baronias scilicet majores seu minores.*”

5

Cf. *supra*, c. 2. Prof. Vinogradoff, *Law Quart. Rev.* XXI. 255, shows that “baronia” long remained a technical term for the body of freemen holding from the king, both great and small.

1

Op. cit., 353. Cf. also his King's Serjeanties, 36; Commune of London; 252–3.

[2](#)

Eng. Const. Hist., 123. "The smaller tenants-in-chief would thankfully regard the general summons as an intimation to stay away."

[3](#)

Eng. Const., I. 466.

[4](#)

See Const. Hist., I. 666. "Whether or no the fourteenth Article of the Great Charter intended to provide for a representation of the minor tenants-in-chief by a body of knights elected in the county court," etc.

[1](#)

The writs of 7th November, 1213, are commonly regarded as introducing the representative principle into the national assembly, and in this view the barons' scheme embodied in Magna Carta has been considered as reactionary by comparison. Cf. Anson, Law and Custom, I. 44: "The provisions of 1215 described an assembly which was already passing away." There are difficulties, however, connected with the interpretation of those writs; and recent authorities are inclined to point to 1264, rather than to 1213, as the beginning of the systematic application of representation to Parliament. See Adams, Origin, 317, 340. Cf. also supra, 29–30.

[1](#)

Cf. Report on Dignity of a Peer, I. 63.

[2](#)

Cf. Stubbs, Const. Hist., I. 607: "Absence, like silence, on such occasions implies consent."

[1](#)

See Pipe Roll of 5 Henry III., cited Madox, I. 675.

[2](#)

For the beginnings of the modern doctrine of the rights of majorities see infra under c. 61.

[3](#)

See Prothero, Simon de Montfort, 67, and authorities there mentioned.

[4](#)

See M. Paris, Chron. Maj., V. 520. Note, however, that the version of the Charter given in his own history contains no such requirement. The barons in 1255 may have had access to the version of 1215.

[1](#)

The chapter is, therefore, on the one hand, a supplement of cc. 12 and 14; on the other, a particular application of the principle enunciated in c. 60, which extended to sub-tenants benefits secured to Crown-tenants by previous chapters.

[2](#)

The exemptions enjoyed by them are explained under c. 43.

[3](#)

By strict feudal theory the King had no right to interfere between the barons and their sub-tenants. (1) The need for royal writs was thus a usurpation. (2) Those writs were “only letters of request,” not binding on sub-tenants. See Adams, *Origin*, 230–2.

1

Bracton’s Note-book, No. 1146, cited Pollock and Maitland, I. 331.

2

In theory, in Henry II.’s reign at least, a royal writ was not required in the normal case. See *Dialogus*, II. viii., and the editors’ comment (p. 191): “Normally the levying of money under any pretext from a landowner gave him a right to make a similar levy on his under-tenants.” As regards scutage, a distinction was recognized. The lord who actually paid scutage might collect it from his sub-tenants without a licence; but, if he served in person, he could recover none of his expenses except by royal writ. See *ibid.*, and cf. Madox, I. 675. It is necessary, however, to avoid confusion between two types of writ, (a) that which merely authorized contributions, e.g., *de scutagio habendo*; (b) that which commanded the sheriff to give his active help. In later practice, the sheriff often collected scutage from the sub-tenants and paid it directly to the Crown. Pollock and Maitland, I. 249–253.

1

Cf. Pollock and Maitland, I. 331: “The clause expunged from the Charter seems practically to have fixed the law.”

2

Close Rolls, I. 306, cited Pollock and Maitland, I. 331.

1

Patent Rolls, 5 John, cited Madox, I. 615.

2

Close Rolls, 7 John, cited Madox, I. 616.

3

See Glanvill, IX. 8.

4

See Round, *Commune of London*, 130.

5

See Madox, I. 617, citing Patent Rolls, 18 Henry III. Various other examples are given by Pollock and Maitland, I. 331, e.g. “the earl of Salisbury, to enable him to stock his land.”

6

Supra, p. 257, and cf. Pollock and Maitland, I. 331.

7

See Madox, I. 677.

1

See the authorities cited *supra*, p. 68, n. 3, and 69, n. 1.

2

In the so-called “unknown Charter of Liberties” (see Appendix) John concedes to his men “ne eant in exercitu extra Angliam nisi in Normanniam et in Brittaniam,” a not unfair compromise, which may possibly represent the sense in which the present chapter was interpreted by the barons. See, however, Adams, *Origin*, 232, who takes a different view.

[1](#)

Walter of Hemingburgh, II. 121. Cf., on the whole subject of foreign service, *supra*, 67–76.

[2](#)

Supra, 59–69.

[1](#)

Cf. J. F. Stephen, *Hist. of Crim. Law*, I. 88–9.

[1](#)

Jurisprudence and Ethics, 209. Sometimes, however, another “fixed place” was substituted. The Court of Common Pleas sat once at York under Edward III. and once at Hertford under Elizabeth. See Maitland, *Select Pleas of the Crown*, xiii. The statute 2 Edward III. c. 11 enacted that it should not be removed to any new place without due notice.

[2](#)

See Prof. Maitland, *Select Pleas of the Crown*, xiii.–xvi.

[3](#)

See Pollock, *Expansion of Common Law*, 63 n. Cf. Holdsworth, I. 75.

[1](#)

Cf. *supra*, 90.

[1](#)

Author of *Gesta Regis Henrici*, I. 207.

[2](#)

Bigelow, *Proceure*, 89; Stubbs, *Gesta Regis Henrici*, I. lxxi.

[3](#)

House of Lords, 32. See also Poole, *Exchequer*, 180, and Adams, *Origin*, 136 ff.

[1](#)

See Prof. Maitland, *Sel. Pl. Crown*, xiii.–xvi.; see also in Pipe Roll, 7 John (cited Madox, I. 791) how money was paid that a plea pending before the *Justiciarii de banco* might be heard *coram rege*. This entry proves the existence in 1205 of the *de banco* as distinct from the *coram rege*.

[2](#)

See Maitland, *ibid.*

[3](#)

Cf. Poole, *Exchequer*, 183, who insists, however, that “it said nothing about a distinct court.”

4

For attempts to evade this prohibition on the ground of the special character of particular pleas, see Bracton's Note-book, Nos. 1213 and 1220.

1

See Maitland, *Sel. Pl. Crown*, xviii.

2

See *Placitorum Abbreviatio* (p. 105), 21 Henry III., cited Pike, *House of Lords*, p. 41 Cf. also Bracton's Note-book, pleas Nos. 1213 and 1220.

3

Poole, *Exchequer*, 183.

4

28 Edward I. c. 5.

5

For stages in this genesis in 1234, 1236, and 1317, see Poole, *Exchequer*, 183.

1

Stubbs, *Const. Hist.*, II. 281 n.

2

See 28 Edward I. c. 4. Many previous attempts had been made to keep common pleas out of the Exchequer, e.g. the writs of 56 Henry III. and 5 Edward I. (cited Madox, II. 73–4), and the so-called statute of Rhuddlan (12 Edward I.), see *Statutes of Realm*, I. 70.

3

Thus Madox (II. 73–4) holds that c. 17 relates to the Exchequer; so does Mr. Bigelow (*History of Procedure*, 130–1), who explains the grievance as a difficulty of getting speedy justice at the Exchequer, because the barons refused to sit after their fiscal business had been finished. This seems to be an error: the Barons of Exchequer made no difficulty about hearing pleas: quite the contrary. Plaintiffs were equally eager to purchase the writs which they were keen to sell: it was only defendants (debtors) who objected to the rapid and stringent procedure for enforcing payment adopted by this efficient court. The sheriffs and others waiting to render accounts before the Exchequer also protested against the congestion of business produced at the Exchequer by the eagerness of litigants who pressed there for justice. See Madox, II. 73. Plaintiffs had no reason to complain.

1

The fiction of "Crown debtors" is well known: plaintiffs obtained a hearing in the exchequer for their common pleas by alleging that they wished to recover debts due to them "in order to enable them to answer the debts they owed to the king." See Madox, II. 192.

1

"Comitatus" indicates both the county where the lands lay and the court of that county. It was originally the sphere of influence of a comes or earl. Cf. *supra*, c. 2.

2

See *supra*, c. 17.

1

See W. S. Holdsworth (History of English Law, p. 115), who cites 1397 as the date of the final abolition of Eyres.

2

This was in 1233: see Pollock and Maitland, I. 181.

3

Blackstone, Commentaries, III. 58, assigns 1176 (the assize of Northampton), as the date of their institution.

1

See statute 3 and 4 William IV. c. 27, §§ 36–7. The last actual case of a Grand Assize occurred in *Davies v. Loundes*, in 1835 and 1838 (1 Bing. N.C. 597, and 5 Bing. N.C. 161).

2

The name “Assize” is sometimes a source of confusion, because of its various meanings. (1) Originally, it denoted a session or meeting of any sort. (2) It came to be reserved for sessions of the King’s Council. (3) It was applied to any Ordinance enacted in such a session, e.g. Assize of Clarendon. (4) It was extended to every institution or procedure established by royal ordinance, but (5) more particularly applied to the procedures known as Grand Assize and Petty Assizes. (6) Finally, it denotes at the present day a “session” of these Justices of Assize, thus combining something of its earliest meaning with something of its latest. In certain contexts, it has other meanings still, e.g. (7) an assessment or financial burden imposed at a “session.”

3

See Neilson, Trial by Combat, 33–6, and authorities there cited.

4

Cf. *supra*, p. 85, for the place of “combat” in legal procedure; and p. 89, for Henry’s policy in discouraging it. For the later history of trial by battle, see *infra*, under c. 36.

1

See Glanvill, II. 7.

2

Sel. Chart., 259. The Assize of Northampton in 1176 (*ibid.* 152) had given them jurisdiction over estates of half a knight’s fee or less, but nothing was there said of the mode of proof.

1

Glanvill, XII. 25.

2

See *infra*, under c. 34.

3

In the matter of actual date, the received opinion is that the “novel disseisin” procedure dates from 1166, and the Grand Assize came later. Round (Athenaeum for 28th Jany., 1899) suggests 1179. The evolution of the various writs was, however, a slow process, and steps in the chain are wanting. Under Geoffrey Plantagenet in Normandy various writs shade off into one another. See Haskins, *Amer. Hist. Rev.*, VIII. 613 ff. In any view, the logical sequence seems to be that given in the text.

1

In Normandy the corresponding period was “since the last harvest.” See Maitland, *Equity*, 323.

2

At so late a date as 1267 it was found necessary to recognize by statute the right of the heir, who had come of age, to oust his guardian from his lands by an assize of mort d’ancestor. See Statute of Marlborough, c. 16.

1

Such was the law as late as 1285. Westminster II. c. 5 explains that, when any one had wrongfully presented to a vacant church, the real patron could not recover his advowson except by writ of right “quod habet terminari per duellum vel per magnam assisam.”

2

A Lateran Council in 1179 authorized the diocesan bishop to appoint after three months’ vacancy. Hence there was additional need of haste.

3

The relations of the assizes to the ancient inquisitio and to the modern jury are discussed *supra*, pp. 134–8.

1

Thus two successive chapters of Magna Carta emphasize two divergent tendencies: c. 17 had demanded that “common pleas” should all be held at Westminster, while c. 18 demands that “assizes” should not be taken there. In both cases, the object was to consult the convenience of litigants.

2

See Bracton’s *Note-book*, No. 1478; cited Coke (*Second Institute*, proem). If this assize had presented points of special difficulty it might have been held at Westminster without violating Magna Carta, as amended in 1217.

3

13 Edward I. c. 30. Stephen, *History of Criminal Law*, 105–7, gives further details.

1

Cf. Assize of Northampton, c. 4.

2

Cf. *infra*, c. 48, where twelve sworn knights are to be chosen per probos homines ejusdem comitatus. Cf. also *Forma Procependi* of 1194 (*Sel. Charters*, 255).

3

See, e.g. Stubbs, preface to R. Hoveden, IV. xcvi.; Blackstone, *Great Charter*, xxxvi.; Medley, *Eng. Const. Hist.*, 130.

4

Blackstone, *ibid.*, points out these changes in the charter of 1217: “the leaving indefinite the number of the knights and the justices of assize, the abolishing of the election of the former, and the reducing the times of taking assizes to once in every year.”

1

On the whole subject, see an admirable article by G. J. Turner, *Encycl. Laws of Engl.*, III. 76 ff.

[2](#)

See *Middle Ages*, II. 464.

[1](#)

Cf. Coke, *First Institute*, 293b: “As the power of justices of assizes by many Acts of Parliament and other commissions increased, so these justices itinerant by little and little vanished away.”

[2](#)

On whole subject see Stubbs, *Sel. Chart.*, 141–3; Stephen, *Hist. Crim. Law*, I. 79–111; Holdsworth, I. 116–123. Contrast, however, Turner, *op. cit.*, III. 76 ff.

[3](#)

For the exception where lands were under £5 in annual value, see *supra*, p. 273.

[1](#)

G. J. Turner, *ibid.*, p. 79.

[2](#)

27 Edward I. c. 3. For early history of gaol delivery, see Pollock and Maitland, II. 642.

[3](#)

13 Edward I. c. 39; see Stephen, *Hist. Criminal Law*, p. 106.

[4](#)

Edward III. c. 2. *Ibid.*, 110.

[5](#)

It is unnecessary to do more than notice the exceptional “commissions of trailbaston,” supposed to date from the Statute of Rageman (1276), conferring special powers for the suppression of powerful wrongdoers. These were soon superseded by the commissions of oyer and terminer.

[6](#)

Mr. Turner (*ibid.*, p. 79) suggests, however, that a separate commission was not needed, as “all justices of assize and gaol delivery were in the commission of the peace within the precincts of the court.” In his view the justices received three distinct commissions, not five.

[1](#)

Subsequent practice did not conform to this rule. One novel disseisin, or one mort d’ancestor, might be held by itself; and complaint was made in 1258 that the sheriffs proclaimed in the market places that all knights and freeholders must assemble for such an inquest, and when they came not, amerced them at will (*pro voluntate sua*). See *Petition of Barons*, c. 19 (*Sel. Charters*, 385).

[2](#)

Subsequent legislation vacillated between two policies, actuated at times by a desire to restrain the discretionary powers of the justices; and at others by experience of the hardships inflicted upon litigants by inflexible rules. The Statute of Westminster II. (13 Edward I. c. 30) confirmed the power of the justices to reserve cases of mort d’ancestor for decision by the bench, and *per contra* allowed assizes of *darrein presentment* to be taken “in their own counties.” 6

Richard II. c. 5 curtailed the discretionary powers, directing that justices assigned to take assizes and deliver gaols should hold sessions in the county towns in which the shire courts were wont to be held. 11 Richard II. c. 11 once more relaxed this rule, alleging that it had resulted in the inconvenience of suitors. Authority was given to the chancellor, with the advice of the justices, to determine in what places assizes might be held.

1

See Charter of Henry I. c. 8, which, however, condemns the whole practice among the other innovations of the Conqueror and Rufus.

2

See *Dialogus de Scaccario*, II. xvi.

3

Cf. Pollock and Maitland, II. 511–4. There were, however, exceptions, e.g. Henry II. would not accept money payments for certain forest offences: mutilation was inflicted. See *Assize of Woodstock*, c. 1, and contrast *Forest Charter of 1217*, c. 10.

4

Cf. Pollock and Maitland (II. 512), who describe Henry's promise as "a return to the old Anglo-Saxon system of pre-appointed wites." In order to avoid confusion, no mention has been made in the account given above of a classification of amercements into three degrees, which increases the obscurity surrounding their origin. The *Dialogus de Scaccario*, II. xvi., tells how (1) for grave crimes, the culprit's life and limbs were at the King's mercy, as well as his property; (2) for less important offences, his lands were forfeited, but his person was safe; while (3) for minor faults, his personal effects only were at the King's disposal. In the last case, the offender was "in misericordia regis de pecunia sua." Thus to be "in mercy" did not always mean the same thing. Further, a villein or dependent freeman on a manor might fall into the "mercy" of his lord, as well as of the King. The records of manorial courts are full of amercements for petty transgressions of customs of the manor.

1

"Very likely there was no clause in Magna Carta more grateful to the mass of the people than that about amercements." Maitland, *Gloucester Pleas*, xxxiv.

2

Even Coke (*Second Institute*, p. 27) has to confess that for purposes of this chapter he must abandon the attempt made elsewhere (*ibid.*, p. 4 and p. 45) to bring villeins into the class of freemen.

3

Adams, *Origin*, 257, thinks the addition made it clear that villeins could not amerce the liber homo; but were not the four *legiores homines* of each village described in *Assize of Clarendon*, villeins? Harcourt, *Steward*, 221 n., insists that the clause does not secure "trial by peers" in the feudal sense, for the jury of neighbours need not be "peers of a tenure."

1

Harcourt, *Engl. Hist. Rev.*, XXII. 733–4. See also *Dial. de Scac.*, p. 207 n.; Maitland, *Gloucester Pleas*, xxxiv. Amercements apparently might also be provisionally fixed by the justices of the bench or the barons of exchequer, who might (where arrears were still unpaid) reduce their figures of previous years.

2

Harcourt, *ibid.*

3

Madox, I. 527.

[4](#)

See, however, on whole subject, Harcourt, *ibid.*

[5](#)

Reeves, *History of English Law*, I. 248 (Third Edition) says: “Upon this chapter was afterwards framed the writ de moderata misericordia, for giving remedy to a party who was excessively amerced.”

[1](#)

Cf. Professor James Tait, *Engl. Hist. Rev.* XXXVII., 720 ff., who thinks that any attempt to exempt merchant “wares” from amercement was inconsistent with the right to distrain goods for debt, as illustrated by many cases given by Gross, *Sel. Cases in Merchant Law* (Selden Society), *passim*.

[2](#)

Rotuli Chartarum, 51.

[3](#)

See *Select Charters*, 108.

[4](#)

See Birch, *Historical Charters of London*, p. 5.

[5](#)

Ibid., p. 11.

[6](#)

See *English Village Community*, *passim*.

[1](#)

See *Engl. Hist. Rev.*, XXXVII. 724, where Mr. Tait argues “for a broader and less concrete interpretation of the term . . . than has hitherto been put upon it.” The villein was not to be ruined by impounding his seed-corn or growing crops any more than by depriving him of his plough or plough team. See also A. F. Pollard, *Engl. Hist. Rev.*, XXXVIII. 117, and cf. waynagium in c. 5, *supra*. The *Mirror of Justices*, p. 169, has a gloss on this passage, in which it is the villein’s “gaigneur” that is saved to him, and this is apparently identified with the villenagium held by him. Mr. Tait’s view has been adopted here; but the word has sometimes a more restricted meaning, e.g. in Hoveden, iv. 48, where 100 acres of land are reckoned to the “waynage” of each plough.

[1](#)

The view here taken of the motive for protecting villeins is strengthened by the use of the peculiar phrase, “vastum hominum” in chapter 4 (q.v.). Thomson, *Magna Charta*, p. 202, seems completely to have misunderstood this 16th chapter of the reissue of 1217, construing the four interpolated words in a sense the Latin will not bear, viz.: “A villein, although he belonged to another.”

[2](#)

Notably by Professor Vinogradoff in his *Villeinage in England*, *passim*.

[3](#)

The gulf which separated villein from freeman in this matter is shown by the Pipe Roll of 16 Henry II. (cited Madox,

I. 545); *Herbertus Faber debet j marcam pro falso clamore quem fecit ut liber cum sit rusticus*. A villein might be amerced for merely claiming to be free. It is difficult to reconcile any theory of the villein's freedom with the doctrine of Glanvill, V. c. 5, who denies to everyone who had been once a villein the right to "wage his law," even after emancipation, where any third party's interests might thereby be prejudiced. R. Hoveden, iv. 46, speaking of the carucage of 1198, explains that for perjury a villein forfeited his best ox to his lord (not to the King).

1

C. 55, which supplements this chapter, cancels ameracements unjustly inflicted in the past.

2

IX. 8.

3

III. folio 116b.

4

3 Edward I. c. 6.

5

See II. 208–9.

6

Prof. Tait's conclusions (*op. cit.*) have here been accepted with some hesitation. "Contentement," he urges, "is not a compound from tenement." He admits, however, following Godefroy, that in one instance the word does mean "tenement." He does not notice the striking analogy between the use of "contentement" in this chapter and that of "tenement" in c. 11 *supra*; nor does he discuss the evidence of the contemporary *Histoire de Guillaume le Maréchal*, where the word appears seven times with various meanings, e.g. capacity, manner of being, conduct, and equipment. M. Paul Meyer has collected these in his index. Mr. Tait goes too far when he asserts that to make freehold liable to amercement shows "a complete misconception of that form of punishment," p. 726. There were three degrees of amercement; and only for the mildest of the three was the forfeit limited to the culprit's personal estate (*de pecunia*). See *supra*, p. 286, n. Again, a man might be forced to sell his freehold to meet a heavy pecuniary mulct. Under Henry's Charter, in its final form, no ecclesiastic could be amerced except in accordance with his "tenement," which suggests an analogy with the saving of a freeman's "contentement" in the present passage.

1

See II. 208–9.

2

See *Madox, ibid.*

1

III. folio 116b.

1

A valuable volume of evidence has been collected by Harcourt, *Eng. Hist. Rev.* XXII. 733 ff.; though his conclusions are mainly negative. See also his *Steward*, ff. 289.

2

Harcourt, *ibid.*, 736. Pike, *House of Lords*, 256–7, shows how barons were assessed sometimes—(a) before the

barons of exchequer; or (b) before the full King's Council; or (c) at a later date, even before the justices of Common Pleas. They were never assessed, however, before the justices on circuit.

[3](#)

See Pike, House of Lords, 255.

[1](#)

Bracton, f. 116b.

[2](#)

Madox, I. 535–8.

[1](#)

See Madox, *ibid.*, and also Pike, House of Lords, 257. Mr. Pike, p. 255, rightly says that what was originally a privilege had become a burden.

[2](#)

See Pike, *ibid.*

[3](#)

Madox, *Baronia Anglica*, 106, seems to view these sums as fixing a minimum, not a maximum. "If a baron was to be amerced for a small trespass, his amercement was wont to be 100s. at the least; he might be amerced at more, not at less. This, I think, was the meaning of the term *amerciater ut baro*." He adds that a commoner for a similar trespass would get off with 10s., 20s., or 40s.

[1](#)

Stubbs, *Sel. Chart.*, 345, by a curious oversight reads "contenementum," in the issue of 1217, for which there seems to be no authority.

[2](#)

The word "villa," used at first as synonymous with "manor," came to be freely applied not only to all villages, but also to chartered towns. Even London was described as a villa in formal writs. "Homo," though often loosely used, was the word naturally applied to a feudal tenant. The version given by Coke (*Second Institute*, p. 30) reads "liber homo," which is also the reading of one MS. of the *Inspeximus* of 1297 (25 Edward I.). See *Statutes of the Realm*, I. 114.

[1](#)

See *Rot. Claus.*, 19 Henry III., cited by Moore, *History and Law of Fisheries*, p. 8.

[2](#)

The Hundred Rolls illustrate the manner of its incidence; e.g. *Omnes tenentes de Spaldinge debent ad reparacionem pontis illius, quilibet pro rata porcionis terrae suae contribuere, ita quod quaelibet acra erit par alterius*. *Rot. Hund.*, I. 468.

[1](#)

See *Rot. Claus.*, 19 Henry III., cited in Moore, *History and Law of Fisheries*, p. 8.

[2](#)

See Moore, *ibid.*, 8–16. Two links in the chain of evidence are worthy of emphasis: (a) Writs of 13th November and

1st December, 1234, order repair of bridges for the transit of the King “along with his birds.” (b) A writ of 28th October, 1283, contains a licence to the Earl of Hereford “during the present winter season to ‘revaye’ and take river–fowl throughout the rivers Lowe and Frome which are in defence.”

3

I.e. c. 47 (q.v.).

1

R. Wendover, II. 49 (R.S.), “Ibi capturam avium per totam Angliam interdixit.”

2

Article 11 of the Barons had demanded that no villa should be amerced for failure to make illegal repairs, thus illustrating at once John’s policy, and the point of connection between this provision and the immediately preceding chapters which dealt with amercements.

3

It was, however, included among the subjects reserved for further consideration in “the respiting clause” (c. 42 of 1216) under the words “de ripariis et earum custodibus.” Cf. supra, 143.

1

Moore, *ibid.*, 9.

2

Moore, *ibid.*, 12.

3

The Mirror of Justices is cited as first suggesting this. See Moore, *ibid.*, 12–16. Coke, Second Institute, 30, misled by the Mirror, has misled others.

4

Cf. *infra*, under c. 33.

1

This was 13 Edward I., stat. 1, c. 47, cited Moore, *ibid.*, 173.

2

Ibid., p. 6.

3

Ibid., p. 16.

4

Lord Hale (Hargreaves, *Law Tracts*, p. 7) partly anticipated their conclusions, and he seems to have been followed by decisions of the New York Courts. See *Law Notes (New York)* for August, 1905.

1

Traces may be found in Glanvill, I. c. 1.

[1](#)

The triumph of royal justice over all rivals in the sphere of criminal law is thus symbolized by the extension of the phrase “pleas of the Crown,” which can be traced through a series of documents—e.g. (a) the laws of Cnut; (b) Glanvill, I. cc. 1, 2, and 3; (c) the Assizes of Clarendon and Northampton; (d) the ordinances of 1194; and (e) Magna Carta.

[2](#)

The Criminal Procedure (Scotland) Act, 1887 (50 and 51 Victoria, c. 35) gave him jurisdiction over three of them.

[1](#)

Cf. *infra*, 315–6, for details.

[2](#)

See *Forma procedendi*, cc. 20 and 21 (*Sel. Chart.*, 260).

[3](#)

Ibid., c. 21.

[4](#)

Ibid., c. 20.

[5](#)

The *Forma procedendi* is usually considered the earliest distinct reference to the office of coroner. Dr. Gross, however (*History of Office of Coroner*, 1892, and *Select Cases from Coroners’ Rolls*, 1896) claims to have found traces of their existence at a much earlier date. Maitland remained unconvinced (*Eng. Hist. Rev.*, VIII. 758, and *Pollock and Maitland*, I. 519).

[1](#)

This inference is drawn from Article 14 of the Barons.

[2](#)

This inference is drawn from c. 24 of Magna Carta.

[3](#)

See Maitland, *Gloucester Pleas*, xx.

[1](#)

Ibid., p. x.

[2](#)

See Coke, *Second Institute*, 30, and authorities there cited.

[3](#)

For explanation of these terms, see *supra*, c. 18.

[4](#)

See *Middle Ages*, II. 482 n.

5

Cf. Stephen, *History of Criminal Law*, I. 83. The mistake made by Hallam and others may have been in part the result of their neglecting the important modification undergone by the phrase “pleas of the Crown” between 1215 and the present day.

6

E.g. 13 Edward I. c. 13, and 1 Edward III., stat. 2, c. 17.

1

1 Edward IV. c. 2.

2

Contrast Coke, *Second Institute*, 32, who seems to suggest that one effect of Magna Carta was to take from the sheriff a jurisdiction over thefts previously enjoyed by him.

3

Dr. Stubbs, *Const. Hist.*, I. 650, thinks that the Charter indicated a tendency towards judicial absolutism, only curbed by the growth of trial by jury. Yet the barons had no intention to enhance the royal power. The attitude of the insurgents in 1215 suggests rather that the sheriffs had now become instruments of royal absolutism to a greater extent than the King’s justices themselves. Edward I., indeed, deftly turned this chapter to his own advantage, arguing that it cancelled all private jurisdiction over criminal pleas previously claimed by boroughs or individuals. See Coke, *Second Institute*, 31, and cases there cited.

4

Leet Jurisdiction, 340.

1

See *supra*, p. 28.

2

See *W. Coventry*, II. 214–5.

3

Abuses by sheriffs and other bailiffs continued to be rife after 1215 as before it. Many later statutes afford graphic illustrations of the oppressive conduct they sought to control. In 1275 Edward found it necessary to provide “that the sheriffs from henceforth shall not lodge with any person, with more than five or six horses; and that they shall not grieve religious men nor others, by often coming and lodging, neither at their houses nor at their manors.” See *Statute of Westminster*, c. 1, confirmed by 28 Edward I., stat. 3, c. 13.

4

Cf. *supra*, pp. 15–16.

1

See G. J. Turner, *Trans. R. Hist. Soc.*, XVIII. 272.

2

On this whole subject see the valuable remarks of Mr. Turner, *op. cit.*, p. 272.

1

These localities were independent of the ordinary executive authorities of the county; partial exemption from the sheriff's control was enjoyed also by (a) chartered boroughs and (b) holders of franchises. The same man might, of course, be both sheriff and castellan.

2

See H. B. Simpson, *Eng. Hist. Rev.*, X. 625, for authorities.

3

Evidence collected by Coke, *Second Institute*, 31, proves the identity. See also Round, *Ancient Charters*, No. 55, where Richard I. in 1159 speaks of "constabularia castelli Lincolniae."

1

See *Articuli super cartas*, 28 Edward I. c. 7.

2

Stubbs, *Const. Hist.*, II. 339.

3

See 5 Henry IV. c. 10. Coke, *Second Institute*, 30, relates, as an indication of the authority and pretensions of these constables, that they had seals of their own "with their portraiture on horseback."

4

See Stubbs, *Hoveden*, Pref. to Vol. IV. xcix.

1

See Bracton, f. 122b.

2

In 1197 Richard's Assize of Measures appointed six custodientes in each county and town. These were coroners over one class of offences, the use of false weights and measures. Cf. *infra*, under c. 35.

3

Statute of Westminster, I. c. 10.

4

Cf. Coke, *Second Institute*, 31, "In case when any man come to violent or untimely death, super visum corporis."

1

Mr. G. J. Turner, speaking of the minority of Henry III., thinks "the term 'bailiff' as applied to a county at this period meant 'sheriff.'" *Transactions*, p. 274.

1

These extra payments appear under various names, e.g. augmentum or incrementum in *Domesday Book* (cf. Ballard, *Domesday Inquest*, 75). The Pipe Roll for 1166 (p. 11) records 200 marks paid as gersuma for Norfolk and Suffolk. See evidence collected by Adams, *Origin*, 237 n. Huge sums were sometimes paid: Archbishop Geoffrey in 1194 purchased the shrievalty of York for £2000. Ramsay, *Angevin England*, 345.

2

Cf. Sir James Ramsay, *Angevin Empire*, 476, who describes this provision as “an impossible requirement.” Dr. Stubbs’ paraphrase is not entirely happy: “the fermes of the counties and other jurisdictions are not to be increased.” See *Const. Hist.*, I. 575.

[3](#)

See Turner, *Trans. R.H.S.*, XVIII. 289.

[1](#)

These are the words of the statute of 1330, cited below.

[2](#)

4 Edward III. c. 15; 14 Edward III. c. 9; 4 Henry IV. c. 5.

[3](#)

For this usage see Cnut, II. 18 (Liebermann, *Gesetze*, I. 321); *Leges Henrici*, 7 and 8 (*ibid.*, 553); Writ of Henry I. (*ibid.*, 524).

[1](#)

See *supra*, p. 150.

[2](#)

Bracton’s *Note–book*, Plea 1730.

[3](#)

Ibid., No. 513.

[4](#)

See Hearnshaw, *Leet Jurisdiction*, 79, 80, who reminds us, however (p. 147), that “even Magna Carta can be prescribed against.”

[1](#)

Cf. the use of the phrase “a liquid debt” in Scots law.

[1](#)

Cf. what is there said of the sheriff’s oppressions.

[2](#)

The subject is discussed by Pollock and Maitland, II. 312–353. See also Holdsworth, III. 418 ff.; Makower, *Const. Hist. Church*, 427 ff.

[3](#)

See Pollock and Maitland, II. 324.

[1](#)

Maitland, *Coll. Papers*, II. 139.

[2](#)

Holdsworth, III. 418 ff.

3

On 30th August, 1199 (New Rymer, I. 78) John confirmed the testament of Archbishop Hubert Walter; and on 22nd July, 1202 (ibid., I. 86), he granted permission to his mother, the dowager Queen Eleanor, to make a will.

1

Cf. “*tota pars sua de pecunia sua*” in Burton Abbey Surveys (cited by Round, *Engl. Hist. Rev.*, XX. 279); Bateson, *Borough Customs*, II. xcvi.

2

Glanvill, VII. 7.

1

See *Law Magazine*, Oct. 1905.

1

On whole subject, see Holdsworth, III. 418 ff.; Makower, *Const. Hist. Church*, 427 ff.

2

Pollock and Maitland, II. 354.

3

See Appendix and *supra*, p. 98. Also Bateson, *Borough Customs*, II. cxlii–iii. Cf. *Cnut*, II. cc. 70 and 78 (Liebermann, *Gesetze*, 357–365).

1

See Appendix and *supra*, p. 102.

2

Glanvill, VII. 16.

3

See Pollock and Maitland, II. 354. Examples are readily found: “When Archbishop Roger of York died in 1182, Henry II. enjoyed a windfall of £11,000, to say nothing of the spoons and saltcellars” (Pollock and Maitland, I. 504). Royal prerogatives in the twelfth century were elastic. Henry II. used them freely, but on the whole fairly. His sons stretched every doubtful claim to its utmost limits. The Crown was the legal heir of all Jews (cf. c. 10) and apparently of all Christian usurers as well, at least of such as died unrepentant (see Pollock and Maitland, II. 486), and the making of a will was a necessary condition of a usurer’s repentance. (See *Dialogus de Scaccario*, 224–5 nn.) The King, further, took the goods of all who died a felon’s death (cf. c. 32) and of men who committed suicide (itself a felony). Madox (I. 346) cites an entry from the Pipe Rolls of 1172, recording 60 marks due to the exchequer as the value of the chattels of an intestate; and, two years later, mention is made *de pecunia Gilleberti qui obiit intestatus*. There is nothing to show whether such men were, or were not, usurers. The Pope was another competitor for the personal estates of intestate clerks. In 1246 he issued an edict making this demand: even Henry III. (dependent and ally of Rome as he was) protested, and the edict was withdrawn. See Pollock and Maitland, II. 357.

1

F. 60.

2

Pollock and Maitland, II. 355. Cf. *supra*, p. 324.

1

See Blackstone, Commentaries, I. 287, for an often–quoted definition.

2

3 Edward I. c. 32.

3

Stubbs, Const. Hist., II. 339.

1

12 Charles II. c. 24, ss. 11–12.

2

13 Charles II. c. 8.

1

The Statute of Westminster I. (3 Edward I. c. 7) enacted “that no constable or castellan from henceforth take any prise or like thing of any other than of such as be of their own town or castle, and that it be paid or else agreement made within forty days, if it be not ancient prise due to the king, or the castle, or the lord of the castle,” and further (c. 32) that purveyors taking goods for the King’s use, or for a garrison, and appropriating the price received therefor from the exchequer, should be liable in double payment and to imprisonment during the King’s pleasure.

2

For details, see under cc. 30 and 31.

3

Hallam, Middle Ages, III. 221.

1

See *Rotuli de oblatiis et finibus*, 119.

2

See 3 Charles I. c. 1.

3

See the examples collected in Pollock and Maitland, I. 257. See also in *Rotuli de oblatiis et finibus*, 107, how in 1200 Ralph de Bradel offered John 40 marks and a palfrey to be relieved of “the custody of the work of the castle of Grimsby.”

1

Cf. *supra*, p. 57 n.

2

Adams, *Origin*, 238, contrasts the principle of this chapter with that of c. 12, where no option is allowed the vassal of offering service in lieu of scutage—a breach of strict feudal custom.

3

De feodo pro quo fecit servicium in exercitu. This variation in the charter of 1217 seems to have escaped Dr. Stubbs' attention. See *Select Charters*, 346.

1

The rate fixed by 13 Charles II. c. 8, for the hire of carts or carriages requisitioned by the King, was 6d. per mile. This hire included six oxen, or alternatively two horses and four oxen, to each vehicle.

2

See 3 Edward I. c. 32.

1

Cf. Sir James Ramsay, *Angevin Empire*, p. 476, who considers that chapters 28 and 30, in the branches of prerogative with which they respectively deal, "leave the king's personal right open."

2

See Coke, *Second Institute*, 36.

1

Pollock and Maitland, II. 500, consider that the present chapter had a distinct influence in accentuating this twofold classification of crimes.

2

Glanvill, VII. c. 17. Cf. Bracton, folio 129, for a graphic description of "waste," which included the destruction of gardens, the ploughing up of meadow land, and the uprooting of woods.

1

Is it possible that the origin of "year and waste" can be traced to the difficulty of agreeing on a definition of "real" and "personal" estate respectively? The Crown would claim everything it could as "chattels"—a year's crops and everything above the ground.

2

Second Institute, p. 36.

3

See Pollock and Maitland, I. 316. "The apocryphal statute *praerogativa regis* which may represent the practice of the earlier years of Edward I." Bracton (folio 129) while stating that the Crown claimed both, seems to doubt the legality of the claim.

4

Cf. c. 4.

1

Such at least is the most probable explanation of an entry on the Pipe Roll of 6 John (cited Madox, I. 488); although it is possible that Thomas only bought in "the year day and waste."

2

Magna Carta is peculiar in speaking of year and day, without any reference to waste. If it meant to abolish "waste" it

ought to have been more explicit. Later records speak of “annum et vastum,” e.g. the Memoranda Roll, 42 Henry III. (cited Madox, I. 315), relates how 60 marks were due as the price of the “year and waste” of a mill, the owner of which had been hanged.

3

Pipe Roll, 13 Henry III., cited Madox, I. 347. In Kent, lands held in gavelkind were exempt alike from the lord’s escheat and the King’s waste, according to the maxim, “The father to the bough, the son to the plough.” See, e.g. *praerogativa regis*, c. 16. See also Gloucester Pleas, 114, where apparently the King’s rights over half a hide were sold for 20s.

4

Madox, I. 344–8, cites from the Pipe Rolls many examples.

1

This case is cited by Madox, I. 347, from 18 Edward I.

2

Supra, p. 88.

3

See Bracton, II. folio 123, and folio 137.

1

Pipe Roll, 2 John, cited Madox, I. 348.

2

Cf. supra, c. 24.

3

3 Edward I. c. 12.

1

The Act 12 George III. c. 20, made standing mute equivalent to a plea of guilty. A later Act, 7 and 8 George IV. c. 28, made it equivalent to a plea of not guilty. See Stephen, *Hist. Crim. Law*, I. 298.

2

This fiction of corrupt blood was apparently based in part on a false derivation of the word “attainder.” See Oxford English Dictionary.

3

E.g. 54 George III. c. 145, and 3 and 4 William IV. c. 106, s. 10.

4

33 and 34 Victoria, c. 23.

1

The Oxford English Dictionary defines it as “a dam, weir, or barrier in a river, having an opening in it fitted with nets or other appliances for catching fish.” For weirs in Domesday Book, see Ballard, *D. Inquest*, 175–6.

1

Blackstone, Commentaries, IV. 424, declared that this chapter “prohibited for the future the grants of exclusive fisheries.” Cf. e.g. Thomson, Magna Charta, 214, and Norgate, John Lackland, 217. See also *Malcolmson v. O’Dea* (1862), 10 H. of L. Cas., 593, and *Neill v. Duke of Devonshire* (1882), 8 App. Ca. at p. 179,—cases cited in Moore, *History and Law of Fisheries*, p. 13, where the fallacy is exposed. For an unsuccessful attempt to extend the principle to Scotland, after the Act of Union, see an interesting review of the first edition of this work in *Jurid. Rev.* for March, 1905.

2

25 Edward III., stat. 3, c. 4.

1

12 Edward IV. c. 7. Apparently the earliest statute which refers to weirs as causing injury to fish was one passed in 1402, namely, 4 Henry IV. c. 11; see Moore, *Fisheries*, p. 175.

2

It seems to have been generally assumed that these charters conferred positive as well as negative privileges on the citizens, including rights of administration and jurisdiction over the waters of Thames. See Noorthouck, *New History of London* (1773), 36. Luffman, *Charters of London* (1793), 13, says of Richard’s grant in 1197: “By this charter the citizens became conservators of the river Thames.” This is an anachronism, but Patent Rolls of 33 Edward I., 5 Edward III., 8 Edward III., contain Commissions of Conservancy. See Moore, *op. cit.*, p. 176. In 1393 the statute of 17 Richard II. c. 9 granted authority to the Mayor of London to regulate weirs and generally to “conserve” the Thames from Staines downwards, and the Medway.

1

See *Rotuli Cartarum*, 11 Henry III.

2

The *Histoire des ducs*, 149, paraphrases this chapter thus: “Toutes hautes justices vauront—ils avoir en lor tierres.” Miss Norgate, *Minority*, 11, has not grasped the significance of this clause.

1

Glanvill, XII. 25. See *supra*, p. 89.

2

Brunner, *Schwurgerichte*, 78 ff.

3

The form of the writ is given in *Glanvill*, XII. 3.

1

Cf. Stubbs, *Const. Hist.*, I. 576.

2

Glanvill, I. 6, gives the form of a praecipe: Rex vicecomiti salutem, Praecipe A. quod sine dilatione reddat B. unam hidam terrae in villa illa, unde idem B. queritur quod praedictus A. ei deforceat: et nisi fecerit, summe eum per bonos summonitores quod sit ibi coram me vel Justiciariis meis in crastino post octabas clausi Paschae apud locum illum, ostensurus quare non fecerit. Et habeas ibi summonitores et hoc breve. Teste Ranulpho de Glanvilla apud Clarendon.

3

Brunner, Schwurgerichte, 411; Maitland, Col. Papers, II. 129.

4

Coke, Sec. Inst., 40, gives three varieties of praecipe: (a) praecipe quod reddat; (b) quod permittat; (c) quod faciat. The first group includes one variety of Writs of Right and the various Writs of Entry. Writs of Right, on their part, are of three kinds: (1) writ of right patent, (2) writ praecipe, (3) little writ of right, applicable to villeins on ancient demesne.

1

See Bigelow, Hist. of Procedure, 78. Glanvill, read between the lines, supports this view. Thus in I. c. 3, he speaks of the King's courts as normally dealing with "pleas of baronies"; in I. c. 5, he speaks of what he evidently considers an abnormal expansion of this jurisdiction to any plea anent a free tenement, if the Crown so desired.

2

See supra, under c. 18.

1

Pollock and Maitland, I. 151.

2

The version of 1216 speaks of a "free tenement," where that of 1215 spoke merely of a "tenement." The addition makes no change, since in no case could the King's courts try pleas affecting villeins of mesne lords. Perhaps the object is to make it clear that there was no interference with the King's rights over holdings of his own villeins.

1

In translating the reissue of 1225, the Statutes at Large expand the word "praecipe" into "praecipe in capite," for which there is no authority in any known text of Magna Carta, though it appears in Coke's version of Henry's charter (Sec. Inst., 38). Authorities differ as to what constitutes a praecipe in capite. Brunner, Schwurgerichte, sec. xx., declares it to be so called "because it begins with the word Praecipe"; yet all praecipos so begin, even Writs of Entry, which are certainly not condemned by Magna Carta. Coke (Sec. Inst., 38) seems (inconsistently with his own version of Magna Carta) to identify the praecipe in capite with a class of writs not prohibited in the Charter, namely, with those professing to deal with estates held directly under the Crown: no one ought to have it without taking oath "that the land is holden of the King in capite." He cites illustrations from the reign of Edward I. Adams (Origin, 104), speaks of an "in capite" clause inserted in praecipos to evade the prohibition of Magna Carta. See also Holdsworth, III. 10.

1

Such an attempt seems to have been made in 1207 by Walter de Lacy, Earl of Ulster, who set up in his Irish fief what is described as nova assisa, against which John protested. See Rot. Pat., I. 72, for writ dated 23rd May, 1207. In one case John acquiesced in grand assizes being held in feudal courts: on 4th May, 1201, he granted licence to Hubert Walter to hold them for his tenants in gavelkind. See New Rymer, I. 83.

2

See article 18 (Select Charters, 404). Cf. chapter 29 of the Petition of the Barons (Select Charters, 386), and Pollock and Maitland, I. 182: "The voice of the nation, or what made itself heard as such, no longer, as in 1215, demanded protection for the seignorial courts."

3

A partially successful attempt was made to revive feudal jurisdictions as late as the reign of Edward III. See Stubbs,

Const. Hist., II. 638–9.

1

See, e.g. Madox, I. 793.

2

Bracton, 404b.

3

Sec. Inst., 38.

4

Coll. Papers, II. 129.

1

See Brunner, Schwurgerichte, 406; Maitland, Coll. Papers, II. 129.

2

See Glanvill, XII. 7.

3

Sel. Chart., 386–7.

4

See Bracton's Note-book, plea 1215, where the writ in question is cited at length: it contains the sentence, "nec tollat alicui curiam suam ubi locum habere possit breve de recto."

1

Technical details are given by Pollock and Maitland, II. 63–7. The whole family of writs were known as "writs of entry sur disseisin"; and these were applied to still wider uses after 1267 on the authority of the Statute of Marlborough, as "writs of entry sur disseisin on the post." See also Maitland, Preface to Sel. Pleas in Manorial Courts, p. lv.

2

Cf. Pollock and Maitland, I. 151, and Sel. Pleas in Manorial Courts, already cited.

1

This word, unknown to Ducange, seems to be connected with the "hauberk" or coat-of-mail. It may mean thick cloth worn under a coat-of-mail.

2

R. Hoveden, IV. 33–4.

3

At a later date cloth of an alternative standard width was also legalized, viz., of one yard between the "lists." Hence arose the distinction between "broadcloth" (that is, cloth of two yards) and "streits" (that is, narrow cloth of one yard) (see Statute 1 Richard III. c. 8). The word "broadcloth" has, long since, changed its meaning, and now denotes material of superior quality, quite irrespective of width. See Oxford English Dictionary, under "Broadcloth."

1

Cf. *supra*, c. 20, for “amercements,” and *supra*, c. 24, for “custodes” of pleas (or coroners).

2

See R. Hoveden, IV. 100.

3

See Hoveden, IV. 172, and Stubbs, *Const. Hist.*, I. 616.

1

See Pipe Roll, 4 John, cited Madox, I. 566.

2

See *ibid.*

3

In 1203 the men of Worcester paid 100s. “ut possint emere et vendere pannos tinctos sicut solebant tempore Regis Henrici”; and the men of Bedford, Beverley, Norwich and other towns made similar payments. See Pipe Roll, 4 John, cited Madox, I. 468–9.

4

See Pipe Roll, cited Madox, I. 509.

5

Gloucester Pleas, No. 501.

6

Pipe Roll, 3 Henry III., cited Madox, I. 567.

1

See *supra*, pp. 84–6.

2

See *Leges Henrici primi*, c. 69, §§ 15–16.

1

See Bracton, folio 531.

2

See Jocelyn of Brakelond, 50–2.

3

Blackstone, *Commentaries*, IV. 316. Cf. Bateson, *Borough Customs*, I. 73, II. xxv., II. xxxiv.

4

Cf. *supra*, p. 88, and also p. 272.

1

See under c. 54.

2

In identifying the writ spoken of by Magna Carta as that “of life and limbs” with the well-known writ de odio et atia, most authorities rely on a passage in Bracton (viz., folio 123). There is still better evidence. The Statute of Westminster, II. c. 29, ordains: “Lest the parties appealed or indicted be kept long in prison, they shall have a writ de odio et atia like as it is declared in Magna Carta and other statutes.” Further, in 1231, twelve jurors who had given a verdict as to whether an appeal was false, were asked *quo warranto fecerunt sacramentum illud de vita et membris*, without the King’s licence. See Bracton’s Note-book, case 592.

3

Madox, I. 505, has collected instances.

1

Cf. Pollock and Maitland, II. 585–7, and Thayer, Evidence, 68.

2

Feudal courts adopted a similar procedure in malicious appeals (although the King objected to their doing so without royal licence). Inquests were held shortly after the abolition of ordeal (1215) in the court of the Abbot of St. Edmund. See Bracton’s Note-book, case 592.

3

See Pollock and Maitland, II. 586.

4

59 George III. c. 46.

5

The early history of habeas corpus is traced by Prof. Jenks, *Law Quarterly Review*, XVIII. 64. The writ de odio was obsolete prior to the invention of the habeas corpus.

1

Cf. Brunner, *Schwurgerichte*, 471.

2

See folio 123.

3

See Pipe Roll, 8 John, cited Madox, I. 566.

4

See Rot. Pat., I. 76; Madox, I. 494. The date is 8th Nov., 1207.

1

Gloucester Pleas, xli., where cases are cited.

2

See Bracton's Note-book, case 134, and cf. case 1548.

[3](#)

Stephen, *Hist. Crim. Law*, I. 241 (following Foster, *Crim. Cases*, 284–5), considers that it was abolished by 6 Edward I., stat. 1, c. 9. Coke, *Second Institute*, 42, thought it was abolished by 28 Edward III. c. 9 (which, however, seems not to refer to this at all), and restored by 42 Edward III. c. 1 (abolishing all statutes contrary to Magna Carta). Coke, *ibid.*, and Hale, *Pleas of the Crown*, II. 148, considered that the writ was not obsolete in their day. Cf. Pollock and Maitland, II. 587 n.

[1](#)

Edward I. c. 11.

[2](#)

6 Edward I., stat. 1, c. 9.

[3](#)

13 Edward I. cc. 12 and 29.

[4](#)

See *Rot. Parl.*, I. 323.

[5](#)

6 Edward I. c. 9. Appeals were extremely frequent towards the close of the Plantagenet period, especially in the days of “the Lords Appellant.” The proceedings on appeal sometimes took place before the Court of the Constable and Marshal and sometimes before Parliament. In neither case were they popular. One of the charges brought against Richard II. was that “in violation of Magna Carta” (that is, probably, of chapter 39) persons maliciously accused of treasonable words were tried before constable and marshal, and although “old and weak, maimed or infirm,” yet compelled to fight against appellants “young, strong, and hearty.” See *Rot. Parl.*, III. 420, cited Neilson, *Trial by Combat*, 193. On the other hand, Statute 1 Henry IV. c. 14, provided that no appeals should be held before Parliament, but certain appeals might come before constable and marshal. Cf. Harcourt, *Steward*, 369.

[1](#)

See 3 Henry VII. c. 1, s. 11: the injured party, with the right of appeal, was “oftentimes slow and also agreed with, and by the end of the year all is forgotten which is another occasion of murder.”

[1](#)

See *Ashford v. Thornton*, 1 B. and Ald., 405–461.

[2](#)

See 59 George III. c. 46.

[3](#)

Pollock and Maitland, I. 304, read “parva” as an untechnical word. Round, *Serjeanties*, 35–6, finds in this chapter the origin of the distinction between “grand” and “petty” serjeanties, and compares the distinction made in c. 14 between greater and lesser barons.

[1](#)

Cf. *supra*, pp. 55–7 and 61–2.

[2](#)

II. viii. s. 158.

[3](#)

Cf. Glanvill, VII. c. 10. “When any one holds of the King in capite the wardship over him belongs exclusively to the King, whether the heir has any other lords or not; because the King can have no equal, much less a superior.” Yet the King is not to have such wardship “because of burgage.”

[4](#)

Cf. Petition of Barons (1258), c. 2; Prov. of West. (1259), c. 12. Glanvill, VII. c. 10, had laid it down that burgage tenure could not give rise to prerogative wardship.

[5](#)

See *supra*, p. 56.

[1](#)

See Bracton, folio 87b. The Note-book, case 743, contains a good illustration. The motive for these restrictions was to prevent injustice to mesne lords. It was probably, however, an indirect consequence of Magna Carta that a similar rule came to be applied where no mesne lord was injuriously affected. In 1231 a certain Ralf of Bradeley died, who had held two separate freeholds of the Crown, (i) a small fee by petty serjeanty of twenty arrows a year, and (ii) land of considerable value held in socage. The Crown took possession of both estates, on the assumption that wardship over the petty serjeanty brought with it a right of wardship over the socage lands also (although these would have been exempt if they had stood alone). The King sold his rights for 300 marks. Ralf’s widow claimed the wardship of the socage lands, on the ground that these were of much greater value than those held by serjeanty. Her argument was upheld, and the 300 marks refunded to the disappointed purchaser. See Pipe Roll, 5 Henry III., cited Madox, I. 325–6.

[2](#)

See Petition of the Barons, Article 2 (Select Charters, 383). C. 53 of Magna Carta reverts to prerogative wardship, granting redress, although not summary redress, where John, or his father or brother, had illegally extended it by occasion of socage, etc. See also *supra*, p. 368. Round, *Eng. Hist. Rev.*, XXVIII. 156, cites from Cal. Inq. post mortem, III. 406–7, an interesting case of prerogative wardship decided against the Crown in 1301. Orpen, *Ireland*, II. 234, cites two Charters in which John renounces prerogative wardship. C. 43 *infra* (amended by c. 38 of 1217) guards against another abuse of prerogative wardship.

[1](#)

Cf. *supra*, c. 24. It possibly includes sheriffs and their officers. The same men, apparently, were described as King’s serjeants and sheriff’s serjeants; one Roll records fines for a man buried “sine visu servientum vicecomitis,” and for a robber hanged “sine visu servientis regis” (Pipe Roll, 31 Henry II). The word may also include the stewards who presided in manorial courts. If so, the unqualified “ballivus” of this passage should, perhaps, be contrasted with the “noster ballivus” of cc. 28 and 30. Coke, *Second Institute*, 44, following the doubtful *Mirror of Justices*, extends it to all King’s justices and ministers.

[2](#)

Dr. Stubbs (*Const. Hist.*, I. 576) translates “lex” in this passage by “compurgation or ordeal.” Pollock and Maitland (II. 604 n.) explain that the word “does not necessarily point to unilateral ordeal; it may well stand for trial by battle.” Thayer (*Evidence*, 199–200) extends it to embrace judicially appointed tests of every kind—battle, ordeal of fire or water, simple oath, oath with compurgators, charter, transaction witnesses, or sworn verdict. Bigelow (*Placita Anglo-Normanica*, 44) cites from Domesday Book cases where litigants offered proof *omni lege* or *omnibus legibus*, that is, in any way the court decided. Sometimes *lex* had a more restricted meaning; in the *Customs of Newcastle-on-Tyne* (Select Charters, 112) it seems to mean compurgation as opposed to combat. For its various meanings see also Harcourt, *Steward*, 232.

[3](#)

In c. 55 “lex” would seem to bear a meaning more akin to the broader conception of “law” in modern jurisprudence; while in c. 39 its denotation is subject of controversy.

4

Cf. the phrases “per simplex verbum suum” (Fordwick) and “per vocem suam simplicem” (Hereford) in Bateson, Borough Customs, I. 181. Cf. *ibid.*, II. xxxii.

1

These appear as an Appendix to the Year Book of 32–3 Edward I. (p. 516); but the handwriting is supposed to be of the reign of Edward II.

2

Cf. *supra*, p. 83. The necessity for such “suit” was not legally abolished until 1852 (by Statute 15 and 16 Victoria, c. 76, s. 55). In 1343 it had been decided that the “suit” must be in existence, but need not be produced in court; and that if they did appear they could not be examined. See Thayer, *Evidence*, 13–15.

1

See Rigg’s *Sel. Pleas Jewish Exch.*, xii., and cf. *supra*, c. 10.

2

Rigg, *ibid.*, 89, where the case is cited.

3

See *City of London v. Wood* (12 *Modern Reports*, 669). Holt held the clause of Magna Carta to mean that the plaintiff, unless he had witnesses, could not put a defendant to his oath. Pollock and Maitland, II. 604, seem to concur, to the extent at least of counting this as one of the abuses condemned by c. 38: “The rule which required a suit of witnesses had been regarded as a valuable rule; in 1215 the barons demanded that no exception to it should be allowed in favour of royal officers.”

4

See his *Schwurgerichte*, 199–200. Cf. *ibid.*, 178 and 409–74. For a similar practice in Galloway, see G. Neilson on “*Surdit de Sergaunt*,” *Scot. Antiq.*, XI. 155. The *Leges Quatuor Burgorum* would seem to guard against an evil of an opposite kind when (c. 76) they forbid the provost or bedells of a town (*prepositus vel precones*) to “bring witnesses to a claim against anyone,” but direct that the defendant shall acquit himself *per legem*. This peculiar law would seem to be entirely unknown to previous commentators on this difficult passage of Magna Carta.

1

This reading is supported by Pollock and Maitland, I. 130 n. There is no necessary inconsistency between the view here cited, and that already cited from *ibid.*, II. 604. The same clause of Magna Carta may have been aimed at irregularities of two kinds, in civil and criminal pleas respectively.

1

See Article 12 where “*eat ad aquam*” is contrasted with “*non habeat legem*” of Article 13 (*Select Charters*, 144).

2

The “*ad portandum recordationem comitatus et hundredi*” of the ordinance is exactly opposed to the “*simplex loquela sua*” of the Charter.

3

Thus in 1166 (the year of the Assize of Clarendon) the “Soca” of Alverton was amerced because of a man placed “ad aquam sine serviente” (Pipe Roll, 12 Henry II., p. 49). In 1185 the “villata” of Preston paid 5 marks for putting a man “ad aquam sine waranto” (Pipe Roll, 31 Henry II., cited Madox, I. 547). In the same year a certain Roger owed half a mark for being present at an ordeal “sine visu servientum regis”: and heavy fines were exacted from those who had put a man “injuste ad aquam” (ibid.).

4

See Miss Bateson, Eng. Hist. Rev., XVII. 712.

5

Miss Bateson (Borough Customs, II. xxxi.) speaks of the “right of accusation ‘ex officio’ which belonged to the King’s officers until Magna Carta, Art. 38, deprived them of it.”

1

See Thayer, Evidence, 37 n., for a case of 1291, where “ad legem manifestam” can only mean trial by combat. Cf. legem apparentem purgandus est in Glanvill, XIV. ff. 112–114.

2

Westminster I. (c. 12) described men refusing to put themselves on a jury’s verdict, “come ceaus qui refusent la commune ley de la terre.”

3

The usual English rendering has here been followed: Mr. Harcourt (Steward, 219) was possibly right in holding that “interpretation under the guise of translation is in this case an inevitable snare.” This does not, however, absolve the commentator from explaining the text. The Articles of the Barons (29) add “vi” (“nec rex eat vel mittat super eum vi” suggesting the fuller contemporary “per vim et arma”). This shows the inadequacy of the translation contained in the Statutes at Large, “nor will we pass upon him nor condemn him.” The Statutes of the Realm, I. 117, suggest “deal with him” as an alternative. Coke, as explained infra, originated the error which thus connected “going” and “sending” with legal process.

1

For a valuable discussion of alternative interpretations, see Adams, Origin, 256–274; also Pike, House of Lords, c. X. Mr. Harcourt’s learned discussions (Steward, cc. VII. and VIII.) are worthy of careful study, though they are more useful in suggesting difficulties than in finding solutions.

2

See, e.g. Coke, Second Institute, 55.

3

Thus Blackstone, Commentaries, IV. 424: “It protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers or the law of the land.” Hallam, Middle Ages, II. 448, speaking of cc. 39 and 40 together, says they “protect the personal liberty and property of all freemen by giving security from arbitrary imprisonment and arbitrary spoliation.” Creasy, Eng. Const., p. 151 n.: “The ultimate effect of this chapter was to give and to guarantee full protection for person and property to every human being that breathes English air.”

4

The same grim tradition applied to Lidford as to Jedburgh:

- “I oft have heard of Lydford law,
- How in the morn they hang and draw,

- And sit in judgment after.”

See Neilson, *Trial by Combat*, 131, and authorities there cited.

1

Mr. Bigelow considers that such cases were numerous. See *Procedure*, 155: “The practice of granting writs of execution without trial in the courts appears to have been common.”

2

See Appendix.

3

Mr. Harcourt (*Steward*, 218 ff.) has much to say on this phrase: for him a man’s “peers” need not be his equals in rank (p. 220); while “judgment” is a vague word embracing widely opposed procedures: e.g. (p. 248), “In common parlance of the time a resolution of the King in Council to make war on a subject was a *judicium*.” He further instances, as examples of legal processes accepted in 1215 as equivalent to “judgment,” the procedure for Crown debts under c. 9; outlawry under c. 42; the petty assizes under c. 19; and the special procedure in cc. 52, 56 and 59 (see *ibid.*, 220–3). Mr. Harcourt’s conclusions are not clearly formulated, and some of them appear to be not well founded.

4

The earliest known reference occurs in the *Leges Henrici* (c. 31): *Unusquisque per pares suos judicandus est et ejusdem provinciae*.

1

Cf. Pollock and Maitland, I. 152. As there was no “peerage” in England (cf. *supra*, p. 186) until long after John’s reign, it is obvious that the *judicium parium* of Magna Carta must be interpreted in a broader sense than any mere “privilege of a peer” at the present day. Freeholders holding of the same mesne lord were “peers of a tenure.”

2

See Stubbs, *Const. Hist.*, I. 578 n., for foreign examples of *judicium parium*.

3

“If a Christian bring a complaint against a Jew, let it be adjudged by his peers of the Jews.” See *Rot. Chartarum*, p. 93, and *supra*, p. 227 n. Harcourt, however (*ibid.*, 228), translates *pares Judei* as “justices or custodes of the Jews.”

4

See *Carta Mercatoria*, c. 8; 27 Edward III. stat. 2, c. 8; and 28 Edward III. c. 13; also Thayer, *Evidence*, p. 94.

1

See *infra*, cc. 56, 57, and 58. Under c. 59 the barons of England were called peers of the King of Scots.

2

See *Placitorum Abbrevatio*, p. 201, cited Pollock and Maitland, I. 393 n.

3

See also a passage in the Scots Acts of Parliament (I. 318) attributed to David: “No man shall be judged by his inferior who is not his peer; the earl shall be judged by the earl, the baron by the baron, the vavassor by the vavassor, the burgess by the burgess; but an inferior may be judged by a superior.”

4

See *supra*, p. 84, and cc. 18, 36, and 38.

5

See Thayer, *Evidence*, 200–1, for a discussion of the phrase “*lex terrae*.” See also Bigelow, *History of Procedure*, 155 n.: “The expression ‘*per legem terrae*’ simply required judicial proceedings, according to the nature of the case; the duel, ordeal, or compurgation, in criminal cases; the duel, witnesses, charters, or recognition in property cases.” The words occur at least twice in Glanvill, each time apparently with the technical meaning. In II. c. 19, the penalty for a false verdict includes forfeiture by jurors of their law (“*legem terrae amittentes*”); while in V. c. 5, a man born a villein, though freed by his lord, cannot, to the prejudice of any stranger, wage his law (“*ad aliquam legem terrae faciendam*”). The stress placed on the accused’s right to the time-honoured forms of *lex* is well illustrated by the difficulty of substituting jury trial for ordeal. It has already been shown that the right of “standing mute,” that is, virtually, of demanding ordeal, was only abolished in 1772. See *supra*, p. 342. Five and a half centuries were thus allowed to pass before the criminal law was bold enough, in defiance of a fundamental principle of Magna Carta, to deprive accused men of their “law.”

1

Mr. Harcourt (*Steward*, 220 ff.) has vehemently, and Prof. Adams (*Origin*, 266 ff.) judicially and moderately, maintained this view. Mr. Adams is influenced by his failure to discover any instance of “*per legem terrae*” in the technical sense, but “*per legem Angliae*” occurs in *Sel. Civil Pleas* (*Selden Society*), No. 104, where the reference is to ordeal of water.

2

It would seem, however, from the words of these statutes that for this purpose the provisions of chapters 36 and 38 were used to supplement those of the present chapter, if they were not confused with them. See 5 Edward III. c. 9; 25 Edward III. stat. 5, c. 4; 37 Edward III. c. 18; 38 Edward III. c. 3; 42 Edward III. c. 3; 17 Richard II. c. 6. See also Stubbs, *Const. Hist.*, II. 637–9, for the series of petitions beginning with 1351.

1

Second Institute, p. 46.

2

3 Charles I. c. 1.

3

Pollock and Maitland, I. 152 n., read the word as having both meanings in this passage. Cf. Gneist, *Engl. Const.*, chapter xviii. Mr. Pike, *House of Lords*, 170, takes a different view: “King John bound himself in such a manner as to show that judgment of peers was one thing, the law of the land another. The judgment of peers was . . . a very simple matter and well understood at the time. The law of the land included all legal proceedings, civil or criminal, other than the judgment of peers.” The present writer rejects this antithesis, because the two things may be, and indeed must be, combined. The “trial” by a law and the “judgment” by equals were complementary of each other. The peers appointed the test and decided whether it had been properly fulfilled. See also, on opposite sides, Harcourt, *Steward*, 219 ff., and Adams, *Origin*, 262.

1

See, e.g. Pike, *House of Lords*, 217, citing Littleton in *Year Book*, Easter, 10 Edward IV., No. 17, fo. 6.

2

This chapter applied only to abuses of criminal process: cf. c. 21 for amercements and civil process.

1

The wording of the 29th Article of the Barons, if not merely due to careless draftsmanship, seems, however, against this conjunctive interpretation. Cf. Adams, *Origin*, 262.

2

For this word cf. *supra*, c. 18.

3

See Rot. Claus., I. 215. Mr. Pike (*House of Lords*, p. 170) maintains, indeed, that the prevention of disseisins “sine iudicio” was the chief, if not the sole, object of the chapter under discussion: “The judgment of peers had reference chiefly to the right of landholders to their lands, or to some matters connected with feudal tenure and its incidents.” This goes too far: the barons by no means confined the safeguard afforded by the *judicium parium* to questions of land. Pollock and Maitland, I. 393, countenance a broader interpretation.

4

De libero tenemento suo vel libertatibus vel liberis consuetudinibus suis.

5

Cf. *supra*, p. 151.

1

Cf. *supra*, p. 246.

2

Second Institute, p. 47.

3

See, e.g. Creasy, *Hist. of Const.*, p. 151 n.: “Monopolies in general are against the enactments of the Great Charter.” See also Taswell–Langmead, *Eng. Const. Hist.*, 108.

4

See *supra*, p. 25.

1

See Pipe Rolls, 7 Richard I., cited by Madox, I. 201.

2

E.g. Coke, *Sec. Inst.*, 48. For the early history of outlawry and exile, see Liebermann, *Friedlosigkeit* (Brunner–Festschrift), and *Gesetze*, II. 413; A. Réville, *Abjuratio regni*, *Revue Hist.*, vol. 50 (1892). Harcourt (Steward, 221) characterises “*destruatur*” as a “colloquial expression” covering even amercements, if of excessive amounts.

3

See Second Institute, p. 46. John Reeves, *History of English Law*, I. 249 (third ed.), while condemning Coke, gives an even more strained interpretation of his own. Lingard, *History of England*, III. c. 1, deserves praise as the first commentator who took the correct view.

1

Second Institute, pp. 4, 27, and 45.

2

Simon de Montfort, 17 n. Cf. Blackstone, Great Charter, xxxvii., “the more ample provision against unlawful disseisins.”

[3](#)

Cf. Pollock and Maitland, I. 340 n.

[4](#)

Cf. supra, p. 118. Other verbal changes in the charter of 1217 show the same care to exclude the villeins. E.g. c. 16 leaves the King’s demesne villeins strictly “in his mercy,” that is, liable to amercement without any reservation.

[1](#)

Mr. G. H. Blakesley, Law Quarterly Review, V. 125, perhaps goes too far: “It may reasonably be suspected that cap. 39 also was directed merely to maintain the lord’s court against Crown encroachments.”

[2](#)

Mr. Pike, House of Lords, 170–4, shares this view of the reactionary nature of the clause, although he considers that the claim to *judicium parium* by a Crown tenant might be satisfied by the presence of one or more barons among the judges of the “Benches,” and did not necessarily involve a full *commune concilium*. *Ibid.*, p. 204. If the “judgment” of the full court was requisite (and, in spite of the high authority of Mr. Pike, there is much to be said for that contention), then the reactionary feudal tendency is even more prominent.

[3](#)

See R. Hoveden, III. 136.

[1](#)

Cf. supra, p. 29.

[2](#)

The writ is dated 10th May, 1215, and appears in New Rymer, I. 128.

[1](#)

Magna Carta also omits “per vim et arma.”

[2](#)

Cf. Harcourt, *ibid.*, 235.

[3](#)

Ibid., 236.

[4](#)

M. Paris, II. 524.

[5](#)

Ibid., III. 247–8.

[1](#)

M. Paris, Chron. Mag., III. 251–2.

2

Pollock and Maitland, I. 393, hesitate to condemn this argument. “The very title of the ‘barons’ of the Exchequer forbids us to treat this as mere insolence.” Dr. Stubbs has no such scruples: “The Bishop replied contemptuously, and with a perverse misrepresentation of the English law” (Const. Hist., II. 49). Elsewhere he makes him, not so much contemptuous, as ill-informed of the law—“ignorant blunder as it was” (II. 191). Yet Bishop Peter had presumably an intimate knowledge of the law he administered as justiciar in 1233. In the matter of amercements, at least, barons of exchequer acted as peers of earls and barons.

1

Pike, House of Lords, 173. See also Bracton, f. 119; Pollock and Maitland, I. 393.

2

“The trial, therefore—the ascertaining of the fact—was, though under the direction and control of the Court of Peers, by battle; but the judgment on the trial by battle was to be given by the peers.” Pike, House of Lords, 174.

3

Pike, *ibid.*, 174–9.

4

The privilege was extended to peeresses by 20 Henry VI. c. 9.

1

The Earl of Chester claimed it in 1236–7, and the Earl of Gloucester (as a lord marcher) in 1281. See Pollock and Maitland, I. 393 n. See, however, Harcourt, Steward, 291.

2

Cf. *supra*, pp. 134–5.

1

The erroneous identification of judgment of peers with trial by jury can be found far back in legal history. Pollock and Maitland, II. 622–3 n., trace it to within a century of Magna Carta. “This mistake is being made already in Edward I.’s day; Y. B. 30–1 Edward I., p. 531.” In spite of modern research the error dies hard. It appears, e.g., in Thomson, *Magna Charta*, 223; Taswell–Langmead, *Const. Hist.*, 110; Goldwin Smith, “The United Kingdom,” I. 127.

2

Pollock and Maitland, I. 152 n., and Pike, House of Lords, 169.

3

Cf. *supra*, p. 134.

4

Cf. Pike, *ibid.*, 169. “From the time when trial by jury first commenced, either in civil or in criminal cases, to this present end of the nineteenth century, no jury ever did or could give judgment on any matter whatsoever.” The difference between the ancient and modern conceptions of judgment, however, must not be lost sight of.

1

Const. Hist., I. 234.

2

See State Trials, III. p. 1, and S. R. Gardiner, History, VI. 214.

1

Middle Ages, II. 451.

1

Cf. Madox, I. 455: “By nulli vendemus were excluded the excessively high fines: by nulli negabimus, the stopping of suits or proceedings, and the denial of writs: by nulli differemus, such delays as were before wont to be occasioned by the counterfines of defendants (who sometimes would outbid the plaintiffs) or by the prince’s will.”

2

Fines for this purpose were frequent under Henry II. and his sons. Madox, I. 447, cites many examples. Thus in 1166 Ralph Fitz Simon paid two marks “for speeding his right.” The practice continued under Henry III. in spite of Magna Carta. Bracton’s Note–book cites a hard case (No. 743): Henry III. was claiming prerogative wardship where it was illegal under c. 37 of Magna Carta (q.v.). The court might have delayed hearing the mesne lord’s plea until the wardship was ended; but he paid five marks pro festinando iudicio suo. The fine was said to be given “willingly” (sponte). Did the use of this word make possible an evasion of c. 40 of the Charter?

1

Pollock and Maitland, I. 174. Cf. *ibid.*, II. 204, and authorities cited.

2

Madox, I. 455, says: “And this clause in the great Charters seems to have had its effect. For . . . the fines which were paid for writs and process of law were more moderate after the making of those great Charters than they used to be before.”

3

Instances are collected by Sir T. D. Hardy in *Rot. de oblatiis*, p. xxi. See also Stubbs, *Const. Hist.*, II. 636–7.

4

Rot. Parl., III. 116, cited Stubbs, *Const. Hist.*, II. 637.

1

Second Institute, 56.

1

So far all authorities are agreed, though a difference of opinion exists as to the source of these prerogatives. Thus (a) Stephen Dowell, *History of Taxation and Taxes in England*, I. 75, considers that the duties on imports and exports were in their origin of the nature of voluntary dues paid by foreign merchants in return for freedom of trade and royal protection; (b) Hubert Hall, *Customs Revenue of England*, I. 58–62, justly reckons this prerogative as merely one aspect of purveyance, that is, of the King’s right to take what he needed for himself and household. Under an autocrat, however, facts count for more than theories. The prerogative was measured by brute force: Kings took what they could with no jealous regard for the exact letter of the law, and left future ages to invent theories to justify or explain their conduct.

1

See State Trials, II. 407–475, and especially 455–6.

2

E.g. 2 Edward III. c. 9 and 14 Edward III., stat. 1, c. 21.

[3](#)

Two-thirds of the chapter is occupied in explaining that merchant strangers of unfriendly States are not to benefit from it. Mr. Hakewill was aware of this, but sought to evade the natural inference by subtleties which are not convincing.

[4](#)

See *supra*, under c. 13.

[1](#)

For the legal position of aliens, see Pollock and Maitland, I. 441–450.

[2](#)

See Pipe Rolls, 27 Henry II. and 8 Richard I., cited Madox, I. 467–8.

[3](#)

See Rot. Chart., 60 (5th April, 1200).

[4](#)

See Pipe Roll, 6 John, cited Madox, I. 469, where other illustrations will be found. Cf. also Rot. Pat., 170, 170b, 171, 172b.

[1](#)

In the same writ John bade them allow to depart freely all vessels of the land of the Emperor or of the King of Scotland after taking security that they would sail straight to their own countries, with none but their own crews. See Rot. Claus., I. 211, and cf. series of writs in I. 210.

[2](#)

See De l'Esprit des Lois, II. 12 (ed. of 1750, Edinburgh), "La grande chartre des Anglois défend de saisir et de confisquer en cas de guerre les marchandises des négociants étrangers, à moins que ce ne soit par représailles. Il est beau que la nation Angloise ait fait de cela un des articles de sa liberté!"

[3](#)

S. Dowell, Hist. of Taxation, I. 83, citing Madox, I. 525–9 (2nd ed. I. 765–770), and Liber Albus, I. 247–8.

[1](#)

See *supra*, 34–35.

[2](#)

See New Rymer, I. 135: "Know that we have ordered the mayor and sheriffs of London to allow merchants of your land to remove their goods and chattels from London, without hindrance to doing thence their will; and that if they do not, you may, if it please you, grieve and molest the men of that town (*illius villae*) in your power, without our reckoning it a breach of truce on your part."

[1](#)

2 Edward III. c. 9.

[1](#)

See 9 Edward III. c. 1, and cf. 25 Edward III., stat. 4, c. 7.

[2](#)

Cf. *supra*, pp. 247–8, where the inconsistency between the two parts of the Great Charter is pointed out. See also *supra*, p. 117.

[3](#)

See 2 Richard II., stat. 1, c. 1, and 11 Richard II. c. 7.

[4](#)

See 5 and 6 William IV. c. 76, s. 14.

[1](#)

E.g. Coke (Third Institute, p. 179) cites from Rot. finium of 6 Henry III. and Rot. Claus. of 7 Henry III. the following case: “Willielmus Marmion clericus projectus est ad regem Franciae sine licentia domini regis, et propterea finem fecit.” The practice had apparently been much the same prior to Magna Carta. E.g. Madox (I. 3) cites from Pipe Roll of 29 Henry II. how “Randulfus filius Walteri reddit compositum de XX marcis, quia exivit de terra Domini Regis.” See also Makower, *Const. Hist. of Eng. Church*, 239–240 and notes.

[1](#)

See Coke, *ibid.*, citing the Close Roll of 25 Edward III.

[2](#)

5 Richard II., stat. 1, c. 2.

[3](#)

4 James I. c. 1, s. 22.

[1](#)

Third Institute, p. 178.

[2](#)

Its origin is obscure. See Beames, *Brief view of the writ of Ne Excat*, *passim*.

[3](#)

See *Encyclopaedia of Laws of England*, IX. 79.

[4](#)

On the whole subject of these writs, see Stephen, *Commentaries*, II. 439–40 (ed. of 1899), and authorities there cited.

[1](#)

Royal clemency in this respect could not be relied on by the sub-tenants of small escheated fiefs (not reckoned as honours or baronies). This seems to be the opinion of Madox, *Baronia Anglica*, 199: “If a fee holden of the Crown in capite escheated to the King and was not an Honour or Barony, then such fee did not (that is to say, I think it did not) vest in the Crown in the same plight in which it was vested in the said tenant in capite.” Cf. also *ibid.*, 203.

[2](#)

See Madox, *Baronia Anglica*, 169–171; also Pollock and Maitland, I. 261, and authorities there cited.

[3](#)

See *Dialogus*, II. x. F, and *ibid.*, II. xxiv. The same rule applied to subtenants of baronies in wardship (which was analogous to temporary escheat): when the see of Lincoln was vacant in 1168, the heirs of sub-tenants paid to Henry only what they would have paid to the bishop; one giving £30 for six fees, and another 30 marks for four. See *Pipe Roll*, 14 Henry II., and cf. *supra*, c. 2. In the matter of scutage, also, a distinction was recognized: while tenants *ut de corona* might be compelled to serve in person without an option, Crown-tenants *ut de honore* (and, a fortiori, sub-tenants also) might claim exemption on tendering scutage. See case of Thomas of Inglethorpe in 12 Edward II., cited by Madox, *Baronia Anglica*, 169–171.

[1](#)

Report on the Dignity of a Peer, I. 60.

[2](#)

The need for this reference to relief is not, at first sight, obvious, since c. 2 of *Magna Carta*, by forbidding John to exact from Crown-tenants of either class the arbitrary sums taken by his father, would seem to have already secured them from abuse. Probably, however, c. 43 sought to prevent John from treating each tenant of the escheated barony as holder of a new barony of his own, and therefore liable to a baron's relief of £100 instead of the £25 he ought to pay for his five fees, or £50 for his ten fees, or as the case might be. The case of William Pantol (see *Pipe Roll*, 9 Henry III., cited Madox, I. 318) seems to illustrate this. He was debited with £100 of relief, but protested that he held nothing of the Crown save five knights' fees of the land which was of Robert of Belesme. This plea was upheld, and £75 of the amount debited was written off.

[3](#)

See c. 38 of 1217, and cf. the gloss given by Bracton (II. folio 87b) which makes the meaning somewhat less obscure. The Charter of 1217 contained a saving clause: "unless the holder of the escheated barony held directly of us elsewhere." Bracton added a second proviso, namely, unless the said sub-tenants (now Crown-tenants *ut de escaeta*) had been enfeoffed by the King himself.

[1](#)

See *Sel. Charters*, 384; but see Adams, *Origin*, 344 n.

[2](#)

See 1 Edward III., stat. 2, c. 13, *Statutes of Realm*, I. 256.

[3](#)

See 1 Edward VI., c. 4, *Statutes of Realm*, III. 9.

[1](#)

A convenient, short account of the forests, with their special laws, special officials, and special courts, will be found in W. S. Holdsworth's *History of English Law*, I. 340–352. For fuller information see *Dialogus de Scaccario*, I. xii.; John Manwood, *Book of the Forests* (1598); Coke, *Fourth Institute*, 289–317; Liebermann, *Constitutiones de Foresta* (1894); G. J. Turner, *Preface to Select Pleas of the Forest* (1901); and an article in the *Edinburgh Review* for April, 1902.

[1](#)

Select Charters, 156.

[2](#)

Select Pleas of the Forest, xiii.

[3](#)

See W. Coventry, II. 207, and Stubbs' Preface, lxxxvii.

[4](#)

R. Wendover, III. 227. This, however, is clearly a hostile account of the King's resumption of forest tracts illegally put under cultivation by way of purpresture.

[1](#)

See Select Pleas of the Forest, xiv. The permanent routine work performed by this functionary must not be confused with the intermittent duties of the Justices of Forest Eyres, although he was usually a member of the commission who went on circuit: e.g. chapter 16 of the Forest Charter speaks of the Chief Forester holding pleas of the forest.

[2](#)

Select Pleas, xv.

[3](#)

Turner, in Select Pleas, xvii.

[4](#)

Engelard de Cigogné, for example, whose name appears in chapter 50, occupied this double position. Chapter 16 of Carta de Foresta forbids castellans to determine pleas of the forests, thus strengthening the presumption that wardens were usually constables.

[5](#)

Select Pleas, xix.

[1](#)

Select Pleas, xxi.

[2](#)

The same chapter, however, fixed the rates of "chiminage."

[1](#)

For the earliest notice of verderers see Select Pleas of the Forest, xix. n. Their appointment in county court may indicate that they acted in some measure as a check on the professional foresters in the interests of the people generally, as well as a check on the warden in the interests of the King. Within the forest the warden, with the verderers and foresters, offered an exact parallel to the sheriff with the coroners and bailiffs (or serjeants) in other parts of a county.

[2](#)

See Carta de Foresta, c. 6.

[3](#)

After 1217, if not before, it was their duty to fix the number of foresters required, so that the inhabitants need not groan under a heavier burden than necessary.

[4](#)

In one document they were styled agistatores precii (Select Pleas, p. 1.), which suggests that fixing the rate was their

chief duty. “Agist” was a general term; it was apparently correct to speak of “agisting a wood,” of “agisting cattle,” and of “agisting the money due.”

[1](#)

Carta de Foresta, c. 8.

[2](#)

Select Pleas of the Forest, xxx.

[3](#)

Select Pleas of the Forest, p. 42.

[1](#)

Dialogus, I. xi. E.

[1](#)

It is stated in Carta de Foresta (1217) that only verderers and foresters need be present at the June moot, and the same officers, with the agistors, at the two others. The public were exempted.

[1](#)

Select Pleas of the Forest, cix. et seq.

[2](#)

Ibid., cxvii.

[3](#)

Statute of Merton, c. 11.

[4](#)

Select Pleas of the Forest, cxxiii.

[5](#)

Ibid., cxxviii.–cxxix. Wild cats should perhaps be added.

[6](#)

See W. S. Holdsworth, History of English Law, I. 346.

[7](#)

See Select Charters, 552.

[8](#)

Some of these Magna Carta sought to guard against. See c. 48.

[9](#)

Rights of hunting were conferred on subjects over territory not their own. Richard I. granted permission to Alan Basset to hunt foxes, hares, and wild cats throughout the realm. Round, Ancient Charters, No. 18.

[1](#)

This is implied in the terms of Stephen's Oxford Charter. An example of an act of afforestation by Henry is given in *Select Pleas*, 45, which shows how "a district could be afforested in a moment by the mere word of the monarch; it took centuries to free it from the royal dominion." See *Edinburgh Review*, vol. cxcv. (1902), p. 459. Even the *Forest Charter* (cc. 1 and 3) admitted the Crown's right to afforest woods on its own demesne—reserving, indeed, common of pasture to those with legal rights thereto.

[2](#)

The policy of Henry I., Stephen, and Henry II. respectively is well illustrated by the case of Waltham forest in Essex. See Round, *Geoffrey de Mandeville*, 377–8.

[1](#)

This group of grievances was partly remedied by chapters 47 and 53 of *Magna Carta*. The former provided for the summary disafforestation of all districts made forests by Richard and John, while the latter showed a more judicial spirit in the undoing of the similar work effected by their father. The *Carta de Foresta* of 1217 contained clauses which took the place of these somewhat crude provisions.

[2](#)

See *Rot. Claus.*, I. 85 (dated 11th June, 1207).

[1](#)

For detailed information as to wastes, purprestures, and assarts with their ascending scale of penalties, see *Select Pleas*, lxxxii.

[2](#)

See *Assize of Woodstock*, article 7.

[3](#)

See *Carta de Foresta*, c. 12.

[4](#)

Ibid., c. 13; another clause (c. 14) forbade ordinary foresters to exact chiminage, and fixed the rates payable to those with vested rights at two pennies for each cart per half-year, and one half-penny for each sumpter horse.

[5](#)

See *Assize of Woodstock*, article 3.

[1](#)

See *Select Pleas*, 123 (6 Edward I.).

[2](#)

Select Pleas, (127 (1278–9)). This was a heavy rate, the more remarkable in face of the provisions against "chiminage" in *Carta de Foresta*, c. 14.

[3](#)

Assize of Woodstock, article 14. Cf. *Carta de Foresta*, c. 6.

[4](#)

Ibid., article 2.

[5](#)

Ibid., article 15.

[6](#)

See Carta de Foresta, c. 2.

[1](#)

It had been the practice to exact an ox in reparation of such transgression, thus leaving the peasant without means of tilling his land. The Forest Charter (c. 6) limited the fine to 3s.

[2](#)

See Select Forest Pleas, p. 4.

[1](#)

Select Pleas, 50.

[1](#)

Select Pleas, 126.

[2](#)

See *infra*, under c. 47.

[3](#)

“Assisa et consuetudines forestae,” issued by Edward I. in 1278, although declaratory, may have done something towards curtailing discretionary authority. Statutes of Realm, I. 243; Bémont, Chartes, lxxv.

[4](#)

See S. R. Gardiner, *Hist. Engl.*, VII. 363, and VIII. 282.

[5](#)

16 Charles I. c. 16.

[6](#)

Commentaries, III. 72.

[7](#)

By 57 George III. c. 61.

[1](#)

In virtue of a series of Acts of which 14–15 Victoria c. 42 is the latest.

[2](#)

See Stephen, *Commentaries*, II. 465–6.

[3](#)

Constable and bailiff are discussed *supra*, c. 24, and shown to include forest magistrates, *supra*, c. 44.

[4](#)

See *supra*, p. 30, and cf. Blackstone, *Great Charter*, viii.

[5](#)

See c. 50.

[1](#)

Const. Hist., I. 578 n.

[2](#)

Cf. *supra*, p. 28.

[3](#)

“*Nolunt leges Anglie mutare que usitate sunt et approbate.*” See Statute of Merton, c. 9.

[4](#)

It would have been a notable anticipation of modern constitutional theory if the barons in 1215 had referred such questions to the decision of the *Commune Concilium* summoned as in c. 14 (q.v.).

[1](#)

See *Select Charters*, 388–391, and Madox, II. 149, with authorities there cited.

[2](#)

Prof. Adams seems to make too much of this chapter (Origin, 259–260). It is only a vague promise to employ honest officials: it confers no constitutional veto upon anyone. Had the function of defining fit ministers been conferred on the Common Council, it would have been a notable innovation.

[1](#)

See *infra*, c. 53.

[2](#)

Cf. *supra*, p. 212.

[3](#)

See Appendix for final form in charter of 1225.

[4](#)

See *Petition of Barons*, c. 11 (Sel. Chart., 384); Maitland, *Sel. Pleas Man. Courts*, lxxvii. For the practice in Normandy, see authorities cited by Adams, *Origin*, 246 n.

[1](#)

See *New Rymer*, I. 81. John had also interfered “in the time of the interdict” with what Robert fitz Walter considered his rights of patronage over Binham Priory (a cell of St. Albans). See J. H. Round, *Eng. Hist. Rev.*, XIX. 710–11.

[2](#)

Petition of Barons, c. 11 (Sel. Chart., 384).

3

Mention of these officers is made in c. 48. The phrase “in defence” is explained supra, pp. 301–3.

1

Cf. supra, p. 147.

2

G. J. Turner, *Select Pleas of Forest*, xciii., points out that although forests included open country as well as woods, yet *Carta de foresta* spoke only of “woods” in this connection.

1

Cf. supra, p. 146.

2

Cf. supra, p. 153, and see *Select Pleas*, xcv.

3

Cf. supra, p. 154.

4

Cf. *Select Pleas*, xcix.; and see also supra, p. 156.

5

See *Select Pleas*, cv. Mr. Turner’s account of Edward’s conduct may be compared with the estimate of M. Bémont, *Chartes*, xlvi.

1

1 Edward III., stat. 2, c. 1.

2

See *Select Pleas*, cvi. There was one exception. On 26th December, 1327, Edward III. had to submit to further disafforestations in Surrey.

3

16 Charles I. c. 16.

4

The last sixteen words, inclusive of “per eosdem,” appear at the foot of both of the Cottonian versions of *Magna Carta*. Cf. supra, p. 166.

1

Contrast the more restricted meaning of the same word in c. 41.

2

See *Rot. Pat.*, I. 180, cited also *Select Charters*, 306–7. Cf. supra, p. 42.

1

Cf. *infra*, c. 61.

2

Cf. *supra*, p. 43. The text is given Rot. Claus., 17 John, m. 27 d. and New Rymer, I. 134. It runs in name of the archbishops of Canterbury and Dublin, and the bishops of London, Winchester, Bath, Lincoln, Worcester and Coventry, comprising (with one exception) those mentioned in the preamble to Magna Carta. For text, see Appendix.

1

The only magnates not exposed to this dilemma were the prelates, whose celibacy cut them adrift from acknowledged family ties. They had no hostages to give, and were, further, in the normal case, exempt from fear of personal violence.

1

See R. Hoveden, IV. 161.

2

See Rotuli de Finibus, p. 119.

3

See R. Wendover, III. 224–5, and M. Paris, II. 523.

4

R. Wendover and Matthew Paris, *ibid.*

5

See authorities cited by Miss Norgate, John Lackland, p. 288.

1

Cf. *supra*, p. 25.

2

Cf. *supra*, p. 25.

3

See letter of 23rd June to Stephen Harengod in Appendix.

1

See Rotuli de Finibus, 571. The custody of hostages might be a desirable office; in 1199 Alan, the earl's son, offered three greyhounds for the custody of a hostage of Brittany, Rotuli de Finibus, p. 29.

1

G. J. Turner, Trans. R.H.S., XVIII. p. 254.

2

See Gloucester Pleas, edited by Maitland, *passim*.

3

Pipe Roll, 12 John, cited Madox, I. 333.

[4](#)

Pipe Roll, 12 John, cited Madox, II. 146.

[5](#)

Gloucester Pleas, xiii. ff.

[6](#)

Pipe Roll, 12 John, cited Madox, I. 766.

[7](#)

Ibid., I. 606.

[8](#)

Ibid., I. 384.

[9](#)

Rot. Pat., 16 John, m. 9 (I. 125), and New Rymer, I. 126.

[1](#)

See M. Paris, II. 665, who calls him “Ingelardus de Athie” and describes him as *vir in opere martis probatissimus*. Cf. Rot. Pat., 9 Henry III. m. 9.

[2](#)

See Bracton’s Note–book, No. 684.

[3](#)

See Rot. Pat., 2 Henry III. m. 7.

[4](#)

Ibid., 19 Henry III.

[5](#)

See Testa de Neville, p. 18, and *ibid.*, p. 120.

[6](#)

Rot. Pat., 9 Henry III. m. 6.

[7](#)

R. Wendover, IV. 66.

[8](#)

Annals of Dunstable, III. 68.

[9](#)

Mem. Roll, 28 Henry III., cited Madox, II. 201.

10

Mich. Communia, 29 Henry III., cited Madox, II. 229.

1

Some particulars respecting the other individuals named will be found in Thomson, *Magna Charta*, 244–5. Philip Mark was Constable of Nottingham (R. Wendover, III. 237), and Sheriff both before and after 1215 (see, e.g., Rot. Claus., I. 412), while Guy de Chanceaux in 1214 accounted for scutage of the honour of Gloucester (Madox, I. 639), and for the rent of the barony of William of Beauchamp (*ibid.*, I. 717). See also Petit–Dutaillis, Louis VIII., p. 116; Gloucester Pleas, *passim*; Turner, *op. cit. passim*.

2

See Rot. Pat., 17 John, m. 23 (New Rymer, I. 134).

1

The *elongatus* of the Charter replaces the *prolongatus* of the Articles.

2

The so-called “executive clause,” the “*forma securitatis ad observandum pacem*” of the Articles, which became chapter 61.

1

This “benefit of a crusader” was extended to John in three other sets of complaints, specified in c. 53 (q.v.).

1

This chapter embraced not merely estates retained in John’s possession, but also those granted out anew. If the former owner recovered these, the Crown was bound to make good the loss caused by the eviction. The case of Welshmen is specially treated in c. 56 (q.v.).

2

The words, “*et eodem modo, de justicia exhibenda,*” and “*vel remansuris forestis*” are written at the foot of both the Cottonian versions. Cf. *supra*, 195 n. They make clear, rather than add to, the meaning of the rest.

1

It thus supplements three previous chapters (a) c. 47; (b) c. 37; and (c) c. 46 respectively.

2

Cf. *supra*, c. 36.

3

Bracton, folio 151b, cites the case of a champion sentenced to mutilation of a foot because he confessed that he was paid to appear. Statute of Westminster, I. (c. 41), enacted that champions need not swear to personal knowledge. Neilson, *Trial by Combat*, 48–51.

1

The appellant “in all cases except murder, that is, secret homicide, made oath as a witness that he had seen and heard the deed.” Neilson, *Trial by Combat*, 48.

2

Glanvill, XIV. c. 3.

[3](#)

See Bracton, II. ff., 142b, 145b; also Neilson, Trial by Combat 47, and authorities there cited.

[4](#)

Glanvill, XIV. c. 3.

[5](#)

Sel. Pleas of the Crown, No. 1.

[6](#)

Ibid., No. 68. Cf. No. 119.

[7](#)

Bracton, folio 142b.

[8](#)

Select Pleas of the Crown, No. 130.

[1](#)

The Act 6 Richard II. c. 6, to prevent the woman's connivance, extended the right of appeal in such cases to a woman's husband, father, or other near relative; but denied the appellee's right to the option of defending himself by battle—thus proving no exception to the policy of discouraging the duellum wherever possible.

[2](#)

Glanvill, XIV. c. 3.

[3](#)

Fleta I. c. 33 seems to indicate the same doctrine when he speaks "de morte viri sui inter brachia sua interfecti," although laboured explanations are sometimes attempted, e.g. Coke, Second Institute, 93. Pollock and Maitland (I. 468 n.) dismiss the phrase *inter brachia sua* as "only a picturesque common form."

[4](#)

See Coke, Second Institute, p. 68, and contrast Pollock and Maitland, I. 468. John's justices rejected in 1202 a woman's claim to appeal for her father's death, and some ten years later two claims for the death of sons. See Select Pleas of the Crown, Nos. 32, 117, and 118; yet Gloucester Pleas (No. 482) records in 1221 a woman's appeal for a sister's death.

[5](#)

A peculiarity of wording should, perhaps, be noticed. It restricts explicitly not appeals, but "arrest and imprisonment" following on appeal.

[1](#)

In its expanded form the clause becomes a supplement also to cc. 20, 21, and 22 (which defined procedure at amercements), and to cc. 36 and 40 (which condemned John's practice of refusing writs and justice until heavy fines were offered).

[2](#)

See *supra*, c. 20.

[3](#)

See Preface to *W. Coventry*, II. lxix.

[4](#)

Middle Ages, II. 438. Hallam's examples are all drawn from *Madox*, I. 507–9. Of her illustrations of fines and amercements may be found under several of the foregoing chapters. Every man who began a plea and lost it, or abandoned it, was amerced.

[1](#)

The words “in Anglia vel in Wallia” are written at the foot of one of the Cottonian versions (cf. *supra*, 166 n.); but they appear in situ in the Articles of the Barons.

[1](#)

Cf. Harcourt's comment, “A bad piece of work this” (*Steward*, 220).

[1](#)

See *supra*, p. 441.

[2](#)

See *supra*, p. 445.

[3](#)

No. 45 of the Articles is connected by a rude bracket with No. 46 (relating to Scotland); and a saving clause, thus made applicable to both, is added with some appearance of haste: “nisi aliter esse debeat per cartas quas rex habet, per judicium archiepiscopi et aliorum quos secum vocare voluerit.” Cf. *supra*, p. 38. So far as related to Scotch affairs, the King's caveat found its way, in an altered form, into *Magna Carta*. See c. 59.

[1](#)

Annals of Waverley, sub anno 1216.

[2](#)

New Rymer, I. 148.

[1](#)

See *Ramsay, Angevin Empire*, 183–4. In the spring of 1185 Henry confirmed William's claim to Huntingdon, and the Scots King transferred it to his brother David; *ibid.*, 226 n.

[2](#)

See *Miss Norgate, John Lackland*, 66.

[3](#)

See *Stubbs, Const. Hist.*, I. 596 n., and *Norgate, John Lackland*, 73, 78. Cf. the words “salvo jure suo” with the “et jure suo” of *Magna Carta*.

[1](#)

New Rymer, I. 103, where “Northampton” is apparently a mistake for “Norham.” See *Ramsay, Angevin Empire*, 421

n.

[2](#)

Ramsay, *ibid.*, and authorities there cited.

[3](#)

Ramsay, *Angevin Empire*, 421, and authorities.

[4](#)

Rot. Claus., I. 144, and I. 157. This Eleanor was the sister of Prince Arthur. The fortunes of war had in 1202 placed both of them in John's hands. Arthur disappeared—murdered it was supposed; Eleanor remained a prisoner for life; the Scots princesses were virtually her fellow-prisoners for a time in Corfe Castle.

[5](#)

See *supra*, c. 6.

[6](#)

New Rymer, I. 104. See also W. Coventry, II. 206.

[1](#)

See New Rymer, I. 116.

[2](#)

Both ladies, however, remained prisoners after Henry III.'s accession. Peter de Maulay, constable of Corfe Castle, was, in that King's fifth year, credited with sums expended on their behalf. Rot. Claus., I. 466; see also I. 483. Both found permanent homes in England—Margaret as wife of Hubert de Burgh, Isabel as wife of Roger Bigod. See Ramsay, *Angevin Empire*, 421, and authorities there cited.

[3](#)

No. 46 of the Articles referred the question of Alexander's "right" to the judgment of Langton and his nominees, for which Magna Carta substituted "judgment of his peers in our court."

[1](#)

New Rymer, I. 135.

[2](#)

M. Paris, II. 642.

[3](#)

New Rymer, I. 148.

[4](#)

Rot. Pat., I. 93.

[1](#)

Harcourt, *Steward*, 221, treats this chapter as extending to manorial courts the principles regulating the *judicium parium* and amercements.

[2](#)

Second Institute, 77.

[3](#)

Cf. *supra*, p. 113.

[4](#)

Thomson, *Magna Carta*, 269, and authorities there cited.

[5](#)

Const. Hist., I. 570. Cf. *supra*, p. 117.

[6](#)

History of Great Britain, VI. 74 (1823). See also Henshall, *History of South Britain*, cited Thomson, *Magna Carta*, 268–9.

[1](#)

See c. 46 of 1217.

[2](#)

The words “in perpetuum” are written at the foot of one of the Cottonian versions. See *supra*, 166 n.

[1](#)

This phrase occurs in the 49th (and last) of the Articles, as the title of a clause separated from the others by a blank of the width of several lines of writing: “Haec est forma securitatis,” etc. The words are not used as a heading in the present chapter itself, but c. 52 refers to c. 61 as the clause “in securitate pacis,” and c. 62 refers to it as “super securitate ista.”

[2](#)

Histoire des ducs, 150, has a commentary on this chapter: “Over and above all this they desired that 25 barons should be chosen, and by the judgment of these 25 the King should govern them in all things, and through them redress all the wrongs that he should do to them, and they also, on the other hand, would through them redress all the wrongs that they should do to him. Also they further desired, along with all this, that the King should never have power to appoint a bailiff in his land except through the 25.” Cf. *supra*, p. 123 and p. 177.

[3](#)

Cf. S. R. Gardiner, *Short History of England*, 183: “a permanent organization for making war against the King.”

[1](#)

R. Wendover, from whom Paris borrows so freely, gives no list.

[2](#)

The list is from Matthew Paris, II. 604–5, as corrected by Blackstone, *Great Charter*, p. xx, after collation with a marginal note on the Harleian MS. of the charter (cf. *supra*, p. 168 n.). For biographical information, see Thomson, *Magna Carta*, 270–312.

[1](#)

These three were Earl Aumâle (a title sometimes exchanged for Earl of York, see Round, *Geoffrey de Mandeville*,

157 n.), William of Albin, and Geoffrey de Say (see Stubbs, *Const. Hist.*, I. 583).

2

This is not the earliest reference in English law to the binding power of a majority; Liebermann, *Gesetze*, II. 575, points to *Leges Henrici*, c. 5, s. 6 (*ibid.*, I. 549) as formulating the principle.

3

An alternative explanation is possible, namely, that the function of intermediary might be exercised by any four of the twenty-five. In that view, an aggrieved individual might place pressure on the King if he persuaded any four to support his claim.

1

Cf. *supra*, c. 48.

2

See Appendix.

3

It was fourteen years since London had extorted its “commune,” in this sense, from Prince John; cf. *supra*, c. 13.

1

Hantos, *Magna Carta*, 149, 198. Cf. Gneist, *Eng. Const.*, 251.

2

Adams, *Origin*, 181 ff.

1

Hantos, *op. cit.*, 150. Adams, *Origin*, 181 n., suggests a parallel from the kingdom of Jerusalem. Dr. Riess, *Historische Zeitschrift*, 1906, p. 170, compares also the Ephors of Sparta.

2

Liber de Antiquis Legibus, 53.

3

Adams, *Pol. Hist. Eng.*, II. 439.

4

Cf. Adams, *Origin*, 276 n.

5

See *supra*, p. 129.

1

Dr. Riess, *Historische Zeitschrift*, 1906, p. 170, thinks this goes too far. Cf., however, Adams, *Origin*, 179: John “was reduced to the function of executing the judgments of a court not his own.”

1

Cf. Adams, Origin, 179: “It was not finally to be the way of the constitution.”

2

Cf. supra, pp. 159–164, for a sketch of Edward’s policy.

1

Chron. Maj., II. 605–6.

2

Const. Hist., I. 583 n.

3

John Lackland, 236.

4

One version of the narrative of Matthew Paris is fuller than the other. “Isti omnes juraverunt quod obsequerentur mandato viginti quinque baronum” of the first becomes “Omnes isti juraverunt cogere si opus esset ipsos xxv. barones ut rectificarent regem. Et etiam cogere ipsum si mutato animo forte recalcitraret” in the second, II. 606 n.

5

See supra, p. 43, and Protest in Appendix.

1

See supra, p. 43. The text is given in Appendix. Thirteen of the twenty–five executors are mentioned by name as agreeing to this new treaty; cf. Wendover, III. 319. A third sanction appears in the garbled versions of the Charter given by Wendover (III. 317) and M. Paris (II. 603): the constables of the four royal castles of Northampton, Kenilworth, Nottingham, and Scarborough were to swear to hold these strongholds under orders of the twenty–five. This clause has not been found in any known copy of any issue of Magna Carta: cf. Luard’s Preface to M. Paris, II. xxxiii to xxxvi.

2

Cf. supra, p. 45.

1

See folio 234. Compare supra, p. 41: also R. L. Poole in Engl. Hist. Rev., XXVIII. 448 ff. The text, as reproduced by Bémont, Chartes, 35, runs as follows: “Omnibus Christi fidelibus ad quos presens scriptum pervenerit, Stephanus Dei gratia Cantuariensis archiepiscopus, tocius Anglie primas et sancte romane ecclesie cardinalis, Henricus, eadem gratia Dublinensis archiepiscopus, Willelmus Londoniensis, Petrus Wintoniensis, Joscelinus Bathoniensis et Glastoniensis, Hugo Lincolniensis, Walterus Wigorniensis, Willelmus Coventriensis et Benedictus Roffensis, divina miseracione episcopi, et magister Pandulfus domini pape subdiaconus et familiaris, salutem in Domino. Sciatis nos inspexisse cartam quam dominus noster Johannes illustris rex Anglie fecit comitibus, baronibus et liberis hominibus suis Anglie de libertate sancte ecclesie et libertatibus et liberis consuetudinibus suis eisdem ab eo concessis sub hac forma [Here follows the text of John’s Magna Carta] Et ne huic forme predictae aliquid possit addi vel ab eadem aliquid possit subtrahi vel minui, huic scripto sigilla nostra apposuimus.”

1

Cf. supra, p. 40.

2

There are no signatures to the document. The frequent references to “the signing of the Great Charter” are thus inaccurate, if “signing” is taken in its modern sense of “subscribing,” but may perhaps be justified by a reference to *signum* in its original meaning of “a seal.” To imprint a seal was, in a sense, “to sign.” Reasons have already been given for holding that Magna Carta, in spite of its mention of its own date as 15th June, was actually sealed on the 19th. See *supra*, pp. 48–9.