MAGNA CARTA

A COMMENTARY ON THE GREAT CHARTER OF KING JOHN

WITH AN

HISTORICAL INTRODUCTION

BY

WILLIAM SHARP McKECHNIE

M.A., LL.B., D.PHIL.

LECTURER ON CONSTITUTIONAL LAW AND HISTORY IN THE UNIVERSITY OF GLASGOW
AUTHOR OF 'THE STATE AND THE INDIVIDUAL; AN INTRODUCTION TO POLITICAL SCIENCE'

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TO THE

MEMORY OF MY FATHER

WILLIAM McKECHNIE, M.D.

BORN 1ST APRIL, 1814

DIED 2ND SEPTEMBER, 1887

PREFACE

No Commentary upon Magna Carta has hitherto been written from the standpoint of modern research. No serious attempt has yet been made to supersede, or even adequately to supplement, the works of Coke and Richard Thomson, published respectively in 1642 and 1829, and now hopelessly out of date. This lack of enterprise may be due in part to a natural reluctance to undertake so laborious a task, but seems also to suggest tacit acquiescence in the opinion of Bishop Stubbs that no separate commentary is required, since "the whole of the constitutional history of England is little more than a commentary on Magna Carta." Yet, for that very reason the Great Charter is surely worthy to be made the subject of special and detailed study, since few documents can compete with it in the variety and interest of its contents, in the vividness of its historical setting, or in the influence it has exercised on the struggle for constitutional liberty. That this conspicuous gap in our historical and legal literature should have remained so long unfilled is the more remarkable in view of the great advance, amounting almost to a revolution, which has been effected since Coke and Thomson wrote. Within the last twenty years, in especial, a wealth of new material has been explored with notable results. Discoveries have been made, profoundly affecting our views of every branch of law, every organ of government, and every aspect of social and individual life in medieval England. Nothing, however, has hitherto been done towards applying to the systematic elucidation of Magna Carta the new stores of knowledge thus accumulated.

With this object in view, I have endeavoured, throughout several years of hard, but congenial work, to collect, sift, and arrange the mass of evidence, drawn from many scattered sources, capable of throwing light upon John's Great Charter. The results have now been condensed into the Commentary which fills two thirds of the present volume. This attempt to explain, point by point, the sixty-three chapters of Magna Carta, embracing, as these do,

every topic—legal, political, economic and social—in which John and his barons felt a vital interest, has involved an analysis in some detail of the whole public and private life of England during the thirteenth century. The Commentary is preceded by a Historical Introduction, which describes the events leading to the crisis of 1215, analyzes the grievances which stirred the barons to revolt, discusses the contents and characteristics of the Charter, traces its connection with the subsequent course of English history, and gives some account of previous editions and commentaries.

While reference has been made throughout to original sources where these were available, advantage has been freely taken of the labours of others. If a debt of gratitude requires to be here acknowledged to previous commentators, a far deeper debt is due to many scholars who have, within recent years, by their labours in various fields not directly connected with Magna Carta, incidentally thrown light on topics of which the Charter treats. Of Bishop Stubbs it is almost unnecessary to speak, since his works form the common starting-point of all historians and constitutional lawyers of the present generation. Readers versed in modern literature will readily trace the influence of Prof. Maitland, Mr. J. Horace Round, Sir Frederic Pollock, Mr. L. O. Pike, and Prof. Prothero; while the numerous other authorities laid under contribution are referred to in the foot-notes and the appended bibliography. Frequent reference has been made to two independent and scholarly histories of the reign of John which have recently appeared—Miss Norgate's *John Lackland*, and Sir James H. Ramsay's *Angevin Empire*. Of the older books dealing directly with the subject in hand, Sir William Blackstone's *Great Charter* has been found the best; while among modern works the *Chartes* of M. Charles Bémont is the most valuable. The inexhaustible stores of Madox's *History of the Exchequer* have also been freely drawn upon.

While these pages were passing through the press a brilliant essay by Mr. Edward Jenks appeared in the pages of *The Independent Review* for November 1904, whose title *The Myth of Magna Carta* indicates the unconventional and iconoclastic lines on which it proceeds. He argues with much force that the Charter was the product of the selfish action of the barons pressing their own interests, and not of any disinterested or national movement; that it was not, by any means, "a great landmark in history"; and that, instead of proving a material help in England's advance towards constitutional freedom, it was rather "a stumbling block in the path of

progress," being entirely feudal and reactionary in its intention and effects. Finally, for most of the popular misapprehensions concerning it, he holds Sir Edward Coke responsible. How far the present writer is in agreement with these opinions will appear from the following pages: but Mr. Jenks' position would seem to require modification in at least three respects: (1) A few of the provisions of John's Charter are by no means of a reactionary nature. (2) Coke cannot be credited with the initiation of all, or even most, of the popular fallacies which have come, in the course of centuries, to cluster so thickly round the Charter. (3) Mr. Jenks, perhaps, undervalues the importance of traditional interpretations which, even when based on insecure historical foundations, are shown in the sequel to have proved of supreme value in the battle of freedom.

I am indebted to four friends who have kindly read my proof sheets, to Mr. W. R. J. Gray, and Mr. Robert A. Moody, whose good offices in this direction are not now rendered for the first time, and to two of the members of my Honours Class of 1903-4, Mr. A. C. Black, Jun., and Mr. D. B. Mungo, all of whom have been zealous in help and fertile in suggestion.

KNIGHTSWOOD, ELDERSLIE,
RENFREWSHIRE, *6th February, 1905*

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HISTORICAL INTRODUCTION.

PART I.
EVENTS LEADING TO MAGNA CARTA.

The Great Charter is too often treated as the outcome of purely accidental causes. Students of its origin are sometimes content to explain it as a mere tangible product of the successful resistance called forth by the tyrannies of King John. That monarch's personal misdeeds, it is maintained, goaded into determined action a fierce unflinching opposition which never rested until it had achieved success; and the outcome of this success was the winning of the Great Charter of Liberties. The moving causes of events of such tremendous moment are thus sought in the characteristics and vices of one man. If John had never lived and sinned, so it would appear, the foundations of English freedom would never have been laid.

Such shallow views of history unnecessarily belittle the magnitude and inevitable nature of the sequence of causes and effects upon which great issues really depend. The compelling logic of events forces a way for its own fulfilment, independent of the caprices, aims and ambitions of individual men. The incidents of John's career are the occasions, not the causes, of the great national movement which laid the foundations of English liberties. The origin of Magna Carta lies too deep to be determined by any purely contingent or accidental phenomena. It is as unwise as it is unnecessary to suppose that the course of constitutional development in England was suddenly and violently wrested into a completely new channel, merely because of the incapacity or misdeeds of the temporary occupant of the throne. The source of the discontent fanned to flame by John's oppressions must be sought in earlier reigns. The genesis of the Charter cannot be understood apart from its historical antecedents, and these are inextricably bound up with the whole story how England grew to be a nation.

In expounding the origin of the Charter, it is necessary briefly to narrate how the scattered Anglo-Saxon and Danish tribes and territories, originally unconnected, were gradually welded together and grew into England; how

this fusion was made permanent by the growth of a strong form of centralized monarchical government which crushed out all attempts at local independence, and threatened to become the most absolute despotism in Europe; and how, finally, the Crown, because of the very plenitude of its power, challenged opposition and called into play forces which set limits to royal prerogatives and royal aggressions, and at the same time laid the foundations of the reign of law. A short survey of the early history of England forms a necessary preliminary to a right understanding of Magna Carta. Such a survey makes prominent two leading movements, one of which succeeds the other; namely, the establishment of a strong monarchy able to bring order out of anarchy, and the subsequent establishment of safeguards to prevent this source of order degenerating into an unrestrained tyranny, and so crushing out not merely anarchy but legitimate freedom as well. The later movement, in favour of liberty and the Great Charter, was the natural complement, and, in part, the consequence of the earlier movement in the direction of a strong government able to enforce peace. In historical sequence, order precedes freedom.

These two problems, each forming the counterpart of the other, necessarily arise in the history of every nation, and in every age; the problem of *order*, or how to found a central government strong enough to suppress anarchy, and the problem of *freedom*, or how to set limits to an autocracy threatening to overshadow individual liberty. Neither of these problems can ever be ignored, not even in the twentieth century; although to-day the accumulated political experience of ages has enabled modern nations, such at least as are sufficiently educated in self-government, to thrust them into the background, out of view. Deep political insight may still be acknowledged in Æsop's fable of Jupiter and the frogs. King Log proves as ineffective against foreign invasion as he is void of offence to domestic freedom; King Stork secures the triumph of his subjects in time of war, but devours them in time of peace. All nations in their early efforts to obtain an efficient government have to choose between these two types of ruler—between an executive, harmless but weak; and one powerful enough effectively to direct the business of government at home and abroad, but ready to turn the powers entrusted to him for the good of all, to his own selfish uses and the trampling out of his subjects' liberties.

On the whole, the miseries of the long centuries of Anglo-Saxon rule were mainly the outcome of the Crown's weakness; while, at the Norman

Conquest, England escaped from the mild sceptre of inefficiency, only to fall under the cruel sceptre of selfish strength. Yet the able kings of the new dynasty, powerful as they were, had to struggle in order to maintain their supremacy; for, although the conquered English races were incapable of concerted resistance against their Norman masters, the unruly alien barons fought vigorously to shake off the royal control.

During a century of Norman rule, constant warfare was waged between two great principles—the monarchic standing on the whole for order, seeking to crush anarchy, and the oligarchic or baronial, standing on the whole for liberty, protesting against the tyranny of autocratic power. Sometimes one of these was in the ascendant; sometimes the other. The history of medieval England is the swing of the pendulum between these two extremes.

The main plot, then, of early English history, centres round the attempt to found a strong monarchy, and yet to set limits to its strength. With this main plot subordinate plots are interwoven. Chief among these must be reckoned the necessity of defining the relations of the central to the local government, and the need of an acknowledged frontier between the domains of Church and State. On the other hand, all that interesting group of problems connected with the *ideal form* of government, much discussed in the days of Aristotle as in our own, is notably absent, never having been forced by the logic of events upon the mind of medieval Europe. Monarchy was apparently assumed as the only possible scheme of government; while the relative merits of aristocracy and democracy, or of the much-vaunted constitution known as “mixed,” were not canvassed, since these forms of constitution were not within the sphere of practical politics.

The student of history will do well to concentrate his attention at first on the main problem, while viewing the subsidiary ones in their relations to the central current.

I. William I. to Henry II.—Main Problem: the Monarchy.

The attention of the most casual student is arrested by the consideration of the difficulties which surrounded the English nation in its early struggles for bare existence. The great problem was, first, how to get itself into being, and thereafter how to guard against the forces of disintegration, which strove without rest to tear it to pieces again. The dawn of English history shows the beginning of that long slow process of consolidation in which unconscious reason played a deeper part than human will, whereby many discordant tribes and races, many independent provinces, were crushed together into something bearing a rude likeness to a united nation. Many forces converged in achieving this result. The coercion of strong tribes over their weaker neighbours, the pressure of outside foes, the growth of a body of law, and of public opinion, the influence of religion in the direction of peace, all helped to weld a chaos of incongruous and warring elements together.

It is notable that each of the three influences, destined ultimately to aid most materially in this process of unification, threatened at one time to have a contrary effect. Thus the rivalries of the smaller kingdoms tended at first towards a complete disruption, before Wessex succeeded in asserting an undisputed supremacy; the Christianizing of England partly by Celtic missionaries from the north and partly by emissaries from Rome threatened to split the country into two, until their mutual rivalries were stilled after the Synod of Whitby in 664; and one effect of the incursion of the Danes was to create an absolute barrier between the lands that lay on either side of Watling Street, before the whole country succumbed to the unifying pressure of Cnut and his sons.

The stern discipline of foreign conquest was required to make national unity possible; and, with the restoration of the old Wessex dynasty in the person of Edward Confessor, the forces of disintegration again made headway. England threatened once more to fall to pieces, but at the critical and appointed time the iron rule of the Normans came to complete what the Danes had begun half a century earlier. As the weakness of the Anglo-Saxon kings and the disruption of the country had gone hand in hand, so the process which, after the Conquest, made England one, was identical with

the process which established the throne of the new dynasty on a strong, enduring basis. The complete unification of England was the result of the Norman despotism.

Thereafter, the strength of its monarchy was what rendered England unique in medieval Europe. Three great kings in especial contributed, by their ability and indomitable power of will, to this result—William the Conqueror, Henry Beauclerk, and Henry Plantagenet. In a sense, the work of all three was the same, namely, to build up the central authority against the disintegrating effects of feudal anarchy; but the policy of each was necessarily modified by changing times and needs. The foundations of the whole were laid by the Conqueror, whose character and circumstances combined to afford him an opportunity unparalleled in history. The difficulties of his task, and the methods by which he carried it to a successful issue, are best understood in relation to the nature of the opposition he had to dread. Feudalism was the great current of the age—a tide formed by many converging streams, all flowing in the same direction, unreasoning like the blind powers of Nature, carrying away and submerging every obstacle in its path. In other parts of Europe—in Germany, France, and Italy, as in Scotland—the ablest monarchs found their thrones undermined by this feudal current. In England alone the monarchy made headway against the flood. William I. wisely refrained from any mad attempt to stay the torrent; but, while accepting it, he quietly subjected it to his own purposes. He carefully watched and modified the tendencies making for feudalism, which he found in England on his arrival, and he profoundly altered the feudal usages and rights which his followers transplanted from the Norman soil. The special expedients used by him for this purpose are well known, and are all closely connected with his crafty policy of balancing the Anglo-Saxon basis of his rule against the imported Norman superstructure, and of selecting at his own discretion such elements as suited him in either. He encouraged the adoption or intensification in England of feudalism, considered as a system of land tenure and as a system of social distinctions based on the possession of land; but he successfully endeavoured to check the evils of its unrestrained growth in its other equally important aspects, namely, as a system of local government seeking to be independent of the Crown, and as a system of jurisdiction. As a political system, it was always a subject of suspicion to William, for he

viewed it in the light of his double experience in Normandy as feudal lord and feudal vassal.

William's policy was one of balancing. His whole career in England was characteristically inaugurated by his care to support his claim to the throne on a double basis. Not content to depend merely on the right of conquest, he insisted on having his title confirmed by a body claiming to represent the old Witenagemot of England, and he further alleged that he had been formally named as successor by his kinsman, Edward Confessor, a nomination strengthened by the renunciation of Harold in his favour. Thus, to his Norman followers claiming to have set him by force of arms on his throne, William might point to the form of election by the Witan, while for his English subjects, claiming to have elected him, the presence of the foreign troops was an even more effective argument. Throughout his reign, his plan was to balance the old English laws and institutions against the new Norman ones, with himself as umpire over all. Thus he retained whatever suited him in Anglo-Saxon customs. Roger of Hoveden tells us how, in the fourth year of his reign, twelve of the subject English from each county—noble, wise, and learned in the laws—were summoned to recite on oath the old customs of the land.[1] He retained, too, the old popular moots or meetings of the shire and hundred as a counterpoise to the feudal jurisdictions; the fyrd or militia of all free men as a set-off to the feudal levy; and such of the incidents of the old Anglo-Saxon tenures of land as met his requirements.

Thus the subject English, with their customs and ancient institutions, were used as expedients for modifying the excesses of feudalism. William, however, did not shrink from innovations where these suited his purpose. The great earldoms into which England had been divided, even down to the Norman Conquest, were abolished. New earldoms were indeed created, but on an entirely different basis. Even the great officers, subsequently known as Earls Palatine, always few in number, never attained either to the extent of territory or to the independence of the Anglo-Saxon ealdormen. William was chary of creating even ordinary earls, and such as he did create soon became mere holders of empty titles of honour, while they found themselves ousted from all real power by the Norman *vicecomites* or sheriffs. No English earl was a "count" in the continental sense (that is, a real ruler of a "county"). Further, no earl was allowed to hold too large an estate within his titular shire; and William, while compelled to reward his

followers' services with great possessions, was careful that these should be split up in widely scattered districts of his Kingdom. Thus the great feudatories were prevented from consolidating their resources against the Crown.

Various ingenious devices were used for checking the feudal excesses so prevalent on the continent. Rights of private war, coinage, and castle-building, were jealously watched and circumscribed; while private jurisdictions, although tolerated as a necessary evil, were kept within bounds. The manor was in England the normal unit of seignorial jurisdiction, and higher courts of Honours were so exceptional as to be a negligible quantity. No feudal appeal lay from the manorial court of one magnate to that of his over-lord, while, in later reigns at least, appeals were encouraged to the *Curia Regis*. Almost at the close of William's reign a new encroachment upon the feudal spirit was accomplished, when the Conqueror on Salisbury Plain compelled all freeholders to take an oath of homage and fealty personally to the king.

The results of this policy have been well summarized as "a strong monarchy, a relatively weak baronage, and a homogeneous people."

During the reign of William II. (1087-1100) the constitution made no conspicuous advance. The foundations had been laid; but Rufus was more intent on his hunting and enjoyments, than on the deeper matters of statecraft. Some minor details of feudal organization were doubtless settled and defined in these thirteen years by the King's Treasurer, Ralph Flambard; but the extent to which he innovated on the practice of the elder William is matter of dispute. On the whole, the reign must be considered as a time of rest between two periods of advance.

Henry I. (1100-35) took up, with far-seeing statesman's eye and much vigour, the work of consolidation. His policy shows an advance upon that of his father. William had contented himself with controlling and curbing the main vices of feudalism, while he played off against it the English native institutions. Henry went further, and introduced within the *Curia Regis* itself a new class of men representing a new principle of government. The great offices of state, previously held by men of baronial rank, were now filled with creatures of Henry's own, men of humble birth, whose merit had raised them to his favour, and whose only title to power lay in his goodwill. The employment of this strictly professional class of administrators was one of the chief contributions made by Henry to the growth of the constitution.

His other great achievement was the organization of the Exchequer, primarily as a source of royal revenue, but soon found useful as a means of making his will felt in every corner of England. For this great work he was fortunate to secure in Roger, Bishop of Salisbury, the help of a man who combined genius with painstaking ability. At the Exchequer, as organized by the King and his minister, the sheriff of each county twice a year, at Easter and at Michaelmas, rendered account of every payment that had passed through his hands. His balance was adjusted before all the great officers of the King's household, who subjected his accounts to close scrutiny and criticism. Official records were drawn up, one of which—the famous Pipe Roll of 1130,—is extant at the present day. As the sums received by the sheriff affected every class of society in town and country, these half-yearly audits enabled the King's advisers to scrutinize the lives and conduct of every one of importance in the land. These half-yearly investigations were rendered more effective by the existence at the Exchequer of a great record of every landed estate in England. With this the sheriffs' returns could be checked and compared. Henry's Exchequer thus found one of its most powerful weapons in the great Domesday Survey, the most enduring proof of the statesmanship of the Conqueror, by whose orders and under whose direction it had been compiled.

The central scrutiny conducted within the two chambers of the Exchequer was supplemented by occasional inspections conducted in each county. The King's representatives, including among them usually some of the officers whose duty it was to preside over the half-yearly audit, visited, at intervals still irregular, the various shires. These Eyres, as they were called, were at first chiefly undertaken for financial purposes. The main object was to check, on the scene of their labours, the statements made at Westminster by the various sheriffs. From the first, such financial investigations necessarily involved the trial of pleas. Complaints of oppression at the hands of the local tyrant of the county were naturally made and determined on the spot; gradually, but not until a later reign, the judicial business became equally important with the financial, and ultimately even more important.

Henry at his death in 1135 seemed to have carried nearly to completion his congenial task of building a strong monarchy on the foundations laid by William I. Much of his work was, however, for a time undone, while all of it seemed in imminent danger of perishing for ever, because he left no male

heir of his body to succeed him on the throne. His daughter's claims were set aside by Stephen, the son of the Conqueror's daughter, and a cadet of the House of Blois, to whom Henry had played the indulgent uncle, and who repaid his benefactor's generosity by constituting himself his heir. From the first moment of his reign, Stephen proved unequal to the task of preserving the monarchy intact from the wild forces that beat around the throne. His failure is attributed by some to his personal characteristics, and by others to the defective nature of his title, combined with the presence of a rival in the field in the person of his cousin, Henry's daughter, the ex-Empress Matilda. The nineteen years of anarchy which nominally formed his reign did nothing—and worse than nothing—to continue the work of his great ancestors. The power of the Crown was humbled, and England was almost torn in fragments by the selfish claims of rival feudal magnates to local independence.

With the accession of Henry II. (1154) the tide quickly turned, and turned for good.

Of the numerous steps taken by Henry Plantagenet to complete the work of the earlier master-builders of the English monarchy, only a few need here be mentioned. Ascending the throne in early manhood, he brought with him a statesman's instinct peculiar to himself, together with the unconquerable energy common to his race. He rapidly overhauled every existing institution and every branch of administration. The permanent *Curia Regis* was not only restored to efficient working order, but was improved in each one of its many aspects—as the King's household, as a financial bureau, as the administrative centre of the entire kingdom, and as the special vehicle of royal justice. The Exchequer, which was indeed originally merely the *Curia* in its financial aspect, received the re-organization so urgently needed after the terrible strains to which it had been subjected amid the quarrels of Stephen and Matilda. The Pipe Rolls were revived and various minor reforms in financial matters effected. All local courts (both the old popular courts of hundred and county, and also the feudal jurisdictions) were brought under the more effective control of the central government by various expedients. Chief among these was the restoration of the system of Eyres with their travelling justices (a natural supplement to the restoration of the Exchequer), whose visits were now placed on a more regular and systematic basis. Equally important were the King's personal care in the selection of fit men for the duties of sheriff, the frequent punishments and

removal from office of offenders, and the rigid insistence upon efficient training and uprightness in all who enjoyed places of authority under the Crown. Henry was strong enough to employ more substantial men than the *novi homines* of his grandfather without suffering them to be less devoted to the interests of their Prince. Yet another expedient for controlling local courts was the calling up of cases to his own central feudal *Curia*, or before those benches of professional judges, the future King's Bench and Common Pleas, forming as yet merely committees of the *Curia* as a whole.

Closely connected with the control thus established over the local courts was the new system of procedure instituted by Henry. The chief feature was that each litigation must commence with an appropriate royal writ issued from the Chancery. Soon for each class of action was devised a special writ appropriate to itself, and the entire procedure came to be known as "the writ process"—an important system to which English jurisprudence owes both its form and the direction of its growth. Many reforms which at first sight seem connected merely with minute points of legal procedure were really fraught with immense purport to the subsequent development of English law and English liberties. A great future was reserved for certain expedients adopted by Henry for the settlement of disputes as to the possession or ownership of land, and also for certain expedients for reforming criminal justice instituted or systematized by a great ordinance, issued in 1166, known as the Assize of Clarendon.[2] A striking feature of Henry's policy was the bold manner in which he threw open the doors of his royal Courts of Law to all-comers, and provided there—always in return for hard cash, be it said—a better article in name of justice than could be procured elsewhere in England, or for that matter, elsewhere in Europe. Thus, not only was the Exchequer filled with fines and fees, but, insidiously and without the danger involved in a frontal attack, Henry sapped the strength of the great feudal magnates, and diverted the stream of litigants from the manorial courts to his own. The same policy had still another result in facilitating the growth of a body of common law, uniform throughout the length and breadth of England, and opposed to the varying usages of localities or even of individual baronial courts.

These reforms, besides influencing the current of events in England in numerous ways, both direct and indirect, all helped to strengthen the throne of Henry and his sons. Another class of reforms contributed greatly to the same result, namely, the reorganization of the army. This was effected in

various ways: partly by the revival and more strict enforcement of the obligations connected with the old Anglo-Saxon fyrd or militia, under the Assize of Arms in 1181, which compelled every freeman to maintain at his own expense weapons and warlike equipment suited to his station in life; partly by the ingenious method of increasing the amount of feudal service due from Crown tenants, based upon an investigation instituted by the Crown and upon the written replies returned by the barons, known to historians as "the *Cartae* of 1166"; and partly by the development (not, as is usually supposed, the *invention*) of the principle of scutage, a means whereby unwilling military service, limited as it was by annoying restrictions as to time and place, might be exchanged at the option of the Crown for money, with which a more flexible army of mercenaries might be hired.

By these expedients, along with many others, Henry raised the English monarchy, always in the ascendant since the Conquest, to the very zenith of its power, and left to his sons the entire machinery of government in perfect working order, combining high administrative efficiency with great strength. Full of bitter strifes and troubles as his reign of thirty-five years had been, nothing had interfered with the vigour and success of the policy whereby he tightened his hold on England. Neither the long bitter struggle with Becket and the Church, ending as it did in Henry's personal humiliation, nor the unnatural warfare with his sons, which involved the depths of personal suffering to the King and hastened his death in 1189, was allowed to interfere with his projects of reform in England.

The last twenty years of his life had been darkened for him, and proved troubled and anarchic in the extreme to his continental dominions; but in England profound peace reigned. The last serious revolt of the powers of feudal anarchy had been suppressed in 1173 with characteristic thoroughness and moderation. After that date, the English monarchy retained its supremacy almost without an effort.

II. William I. to Henry II.—Problem of Local Government.

It is necessary to leave for a time the English monarchy at its zenith, still enjoying in 1189 the powers and reputation gained for it by Henry of Anjou, and to retrace our steps, in order to consider two subsidiary problems, each of which requires separate treatment—the problem of local government, and that of the relations between Church and State. The failure of the Princes of the House of Wessex to devise adequate machinery for keeping the Danish and Anglian provinces in subjection to their will was one main source of the weakness of their monarchy. When Duke William solved this problem he took an enormous stride towards establishing his throne on a securer basis.

Every age has to face, in its own way, a group of difficulties essentially the same, although assuming such different names as Home Rule, Local Government, or Federation. Problems as to the proper nature of the local authority, the extent of the powers with which it may be safely entrusted, and its relation to the central government, require constantly to be solved. The difficulties involved, always great, were unspeakably greater in an age when practically no administrative machinery existed, and when rapid communication and serviceable roads were unknown. A lively sympathy is excited by a consideration of the almost insuperable difficulties that beset the path of King Edgar or King Ethelred, endeavouring to rule from Winchester the distant tribes of alien races inhabiting Northumbria, Mercia, and East Anglia. If such a king placed a weakling as ruler over any distant province, anarchy would result and his own authority might be endangered along with that of his inefficient representative. Yet, if he entrusted the rule of that province to too strong a man, he might find his suzerainty shaken off by a viceroy who had consolidated his position and then defied his king. Here, then, are the two horns of a dilemma, both of which are illustrated by the course of early English history. When Wessex had established some measure of authority over rival states, and was fast growing into England, the policy at first followed was simply to leave each province under its old native line of rulers, who now admitted a nominal dependence on the King who ruled at Winchester. The early West-Saxon Princes vacillated between two opposite lines of policy. Spasmodic attempts at centralization alternated

with the reverse policy of local autonomy. In the days when Dunstan united the spiritual duties of the See of Canterbury to the temporal duties of chief adviser to King Edgar, the problem of local government became urgent. Dunstan's scheme has sometimes been described as a federal or home-rule policy—as a frank surrender of the attempt to control exclusively from one centre the mixed populations of Northern and Midland England. His attempted solution was to loosen rather than to tighten further the bond; to entrust with wide powers and franchises the local viceroy or ealdorman in each district, and so to be content with a loose federal empire—a union of hearts rather than a centralized despotism founded on coercion. The dangers of such a system are the more obvious when it is remembered that each ealdorman commanded the troops of his own province.

Cnut's policy has been the subject of much discussion, and has sometimes apparently been misunderstood. The better opinion is that, with his Danish troops behind him, he felt strong enough to reverse Dunstan's tactics and to take a decisive step in the direction of centralization or unity. His provincial viceroys (jarls or earls, as they were now called, rather than by their old vague title of ealdormen), were appointed on an entirely new basis. England was to be mapped out into new administrative districts in the hope of obliterating the old tribal divisions. Each of these was to be placed under a viceroy having no hereditary or dynastic connection with the province he governed. In this way, Cnut sought to avert the process by which the country was slowly breaking up into a number of petty kingdoms.

If these viceroys were a source of strength to the powerful Cnut, they were a source of weakness to the saintly Confessor, who was forced to submit to the control of his provincial rulers, such as Godwin and Leofric, as each in turn gained the upper hand in the field or in the Witan. This process of disintegration continued until the coming of the Conqueror utterly changed the relations of the monarchy to every other factor in the national life.

Among the expedients adopted by the Norman Duke for reducing his feudatories in England into subjection to the Crown, one of the most important was the total abolition of the old provinces formerly governed by separate ealdormen or jarls. Leaving out of account the exceptional franchises, afterwards known as palatine earldoms, the real representative of the King in each group of counties was now the sheriff or *vicecomes*, not the earl. This Latin name of *vicecomes* is misleading, since the officer so-

called in no sense represented the earl or *comes*, but acted as the direct agent of the Crown. The name, "viceroy," more accurately describes his actual position and functions, since he was directly responsible to the Crown, and independent of the earl. The problem of local government, however, was not eradicated by the substitution of the sheriff for the earl as chief magistrate in the county; it only took a different form. The sheriffs themselves, when relieved from the earl's rivalry and control, tended to become too powerful. If they never dreamed of openly defying the royal power, they at least thwarted its exercise indirectly, appropriated to their private uses items of revenue, pushed their own interests, and punished their own enemies, while acting in the name of the King. The office threatened to become territorial and hereditary,[3] and its holders aimed at independence. New checks had to be devised to prevent this new local authority from again defying the central power. New safeguards were found, partly in the organization of the Exchequer and partly in the device of sending periodically on circuit itinerant justices, who took precedence of the sheriff, heard complaints against his misdeeds in his own county, and thus enabled the Crown to keep a watchful eye on its representatives. By such measures, Henry I. seemed almost to have solved these problems before his death; but his success was apparent rather than real.

The incompleteness of Henry's solution of the difficulty became evident under Stephen, when the leading noble of each locality tried, generally with success, to capture *both* offices for himself; great earls like Ralph of Chester and Geoffrey of Essex compelled the King not only to confirm them as sheriffs in their own titular counties, but also to confer on them exclusive right to act as justices therein.

With the accession of Henry II. the problem was, thanks to his energy and genius, more satisfactorily solved, or at least forced once more into the background. That great ruler was strong enough to prevent the growth of the hereditary principle as applied to offices either of the Household or of local magistrates. The sheriffs were frequently changed, not only by the drastic and unique measure known as the Inquest of Sheriffs, but systematically, and as a normal expedient of administration. For the time being, the local government was kept in proper subjection to the Crown; and gradually the problem solved itself. The power of the sheriffs tended in the thirteenth century to decrease, chiefly because they found important rivals not only in the itinerant judges, but also in two new officers first

heard of in the reign of Richard I., the forerunners of the modern Coroner and Justice of the Peace respectively. All fear that the sheriffs as administrative heads of districts would assert practical independence of the Crown was thus at an end. Yet each of them still remained a petty tyrant over the inhabitants of his own bailiwick. While the Crown was able and willing to avenge any direct neglect of its own interests, it was not always sufficiently alert to avenge wrongs inflicted upon its humble subjects. The problem of local government, then, was fast losing its pressing importance as regards the Crown, and taking a new form, namely, the necessity of protecting the weak from unjust fines and oppressions inflicted on them by local magistrates. The sheriff's local power was no longer a source of weakness to the monarch, but had become an effective part of the machinery which enabled the Crown to levy with impunity its always increasing taxation.

III. William I. to Henry II.—Problem of Church and State.

The national Church had been, from an early date, in tacit alliance with the Crown. The friendly aid of a long line of statesman-prelates from Dunstan downwards had given to the Anglo-Saxon monarchy much of the little strength it possessed. Before the Conquest the connection between Church and State had been exceedingly close, so much so that no one thought of drawing a sharp dividing line between. What afterwards became two separate entities, drifting more and more into active opposition, were at first merely two aspects of one whole—a whole which comprehended all classes of the people, considered both in their spiritual and their temporal relations. Change necessarily came with the Norman Conquest, when the English Church was brought into closer contact with Rome, and with the ecclesiastical ideals prevailing on the Continent. Yet no fundamental alteration resulted; the friendly relations which bound the English prelates to the English throne remained intact, while English churchmen continued to look to Canterbury, rather than to Rome, for guidance. The Church, in William the Conqueror's new realm, retained more of a national character than could be found in any other nation of Europe.

Gratitude to the Pope for his moral support in the work of the Conquest never modified William's determination to allow no unwarranted papal interference in his new domains. His letter, both outspoken and courteous, in reply to papal demands is still extant. "I refuse to do fealty nor will I, because neither have I promised it, nor do I find that my predecessors did it to your predecessors." Peter's pence he was willing to pay at the rate recognized by his Saxon predecessors; but all encroachments would be politely repelled.

In settling the country newly reduced to his domination, the Duke of Normandy found his most valuable adviser in a former Abbot of the Norman Abbey of Bec, whom he raised to be Primate of all England. No record has come down to us of any serious dispute between William and Lanfranc.

Substantially friendly relations between their successors in the offices of King and Archbishop remained, notwithstanding Anselm's condemnation of the evil deeds of Rufus. Anselm warmly supported that King's authority

over the Norman magnates, even while he resented his evil practices towards the Church. He contented himself with a dignified protest (made emphatic by a withdrawal of his presence from England) against the new exactions upon the English prelates, and against the long intervals during which vacancies remained unfilled. Returning at Rufus's death from a sort of honourable banishment at Rome, to aid Henry in maintaining order and gaining peaceable accession to the throne, Anselm found himself compelled by his conscience and the recent decrees of a Lateran Council, to enter on the great struggle of the investitures. Church and State were gradually disentangling themselves from each other; but in many respects the spiritual and temporal powers were still indissolubly locked together. In particular, every bishop was a vassal of the king, holder of a Crown barony, as well as a prelate of Holy Church. By whom, then, should a bishop be appointed, by the spiritual or by the temporal power? Could he without sin perform homage for the estates of his See? Who ought to invest him with ring and crozier, the symbols of his office as a shepherd of souls? Anselm adopted one view, Henry the other. A happy compromise, suggested by the King's statesmanship, healed the breach for the time being. The ring and crozier, as badges of spiritual authority, were to be conferred only by the Church, but each prelate must perform fealty to the King before receiving these symbols, and must do homage thereafter, but before he was actually anointed as bishop. Canonical election was nominally conceded by the King; but here again a practical check was devised for rendering this power innocuous. The members of the cathedral chapter were confirmed in the theoretic right to appoint whom they pleased, but such appointment must be made in the King's Court or Chapel, thus affording the powerful monarch full knowledge of the proceedings, and an opportunity of being present and of practically forcing the selection of his own candidate.

The Church gained much in power during Stephen's reign, and deserved the power it gained, since it remained the only stable centre of good government, while all other institutions crumbled around it. It was not unnatural that churchmen should advance new claims, and we find them adopting the watchword, afterwards so famous, "that the Church should be free," a vague phrase doubtless, destined to be embodied in Magna Carta. The extent of immunity thus claimed was never clearly defined, and this vagueness was probably intentional, since an elastic phrase might be expanded to keep pace with the ever-growing pretensions of the Church.

Churchmen made it clear, however, that they meant it to include at the least two principles—those rights afterwards known as “benefit of clergy,” and “canonical election” respectively.

Henry II.’s attempt to force a clear definition, embodied in the Constitutions of Clarendon in 1164, signally failed, chiefly through the miscarriage of his plans consequent on the murder of Becket. Yet the rights of the Church, although remaining theoretically unaltered from the days of Stephen, felt the pressure directed by Henry’s energetic arm against all claims of privilege. Rights, theoretically the same, shrank to smaller practical limits when measured against the strength of Henry as compared with the weakness of Stephen. Canonical election thus remained at the close of the reign of Henry II. the same farce it had been in the days of Henry I. The “election” lay with the chapter of the vacant See; but the king told them plainly whom to elect. The other rights of the Church as actually enjoyed at the close of the reign of Henry Plantagenet were not far different from what had been set down in the Constitutions of Clarendon, although these never received formal recognition by Canterbury or by Rome. So matters stood between Church and State when the throne of England was bequeathed by Henry to his sons. It remained for John’s rash provocation, followed by his quick and cowardly retreat, to compel a new definition of the frontier between the spiritual and the temporal powers.

IV. Richard I. and John.

Henry II. before his death had fulfilled the task of restoring order, to which destiny had called him. To effect this, he had brought to perfection machinery of government of rare excellence, and equally well adapted for purposes of taxation, of dispensing justice, and of general administration. Great as was the power for good of this new instrument in the hands of a wise and justice-loving king, it was equally powerful for evil in the hands of an arrogant and unjust, or even of a careless monarch. All the old enemies of the Crown had been crushed. Local government, as now systematized, formed a source of strength, not of weakness; while the Church, whose highest offices were now filled with officials trained in Henry's own Household and Exchequer (ecclesiastics in name only, differing widely from saintly monks like Anselm), still remained the fast friend of the Crown. The monarchy was strong enough to defy any one section of the nation, and no inclination was yet apparent among the estates of the realm to make common cause against the throne.

The very thoroughness with which the Crown had surmounted all its early difficulties, induced in Henry's successors, men born in the purple, an exaggerated feeling of security, and a tendency to overreach themselves by excessive arrogance. At the same time, the very abjectness of the various factors of the nation, now prostrate beneath the heel of the Crown, prepared them to sink their mutual suspicions and to form a tacit alliance in order to join issue with their common oppressor. Powers used moderately and on the whole for national ends by Henry, were abused for purely selfish ends by his sons in succession. Richard's heavy taxation and contemptuous indifference to English interests gradually reconciled men's minds to thoughts of change, and prepared the basis of a combined opposition to a power which threatened to grind all other powers to powder.

In no direction were these abuses felt so severely as in taxation. Financial machinery had been elaborated to perfection, and large additional sums could be squeezed from every class in the nation by an extra turn of the screw. Richard did not even require to incur the odium of this, since the ministers, who were his instruments, shielded him from the unpopularity of his measures, while he pursued his own good pleasure abroad in war and

tournament without even condescending to visit the subjects he oppressed. Twice only, for a few months in each case, did Richard visit England during a reign of ten years.

In his absence new methods of taxation were devised, and new classes of property subjected to it; in especial, personal effects—merchandise and other chattels—only once before (in 1187 for the Saladin tithe) placed under contribution, were now made a regular source of royal revenue. The isolated precedent of Henry's reign was gladly followed when an extraordinarily heavy burden had to be borne by the nation to produce the ransom exacted for Richard's release from prison. The very heartiness with which England made sacrifices to succour the Monarch in his hour of need, was turned against the tax-payers. Richard showed no gratitude; and, being devoid of all kindly interest in his subjects, he argued that what had been paid once might equally well be paid again. Thus he formed exaggerated notions of the revenue to be extracted from England. From abroad he sent demand after demand to his overworked justiciars for ever-increasing sums of money. The chief lessons of the reign are connected with this excessive taxation, and the consequent discontent which prepared the way for the new grouping of political forces under John.

Some minor lessons may be noted:

(1) In Richard's absence the odium for his exactions fell upon his ministers at home, who thus bore the burden meet for his own callous shoulders, while he enjoyed an undeserved popularity by reason of his bravery and achievements, exaggerated as these were by the halo of romance which surrounds a distant hero. Thus may be traced some dim foreshadowing of the doctrine of ministerial responsibility, although such analogies with modern politics must not be pushed too far.

(2) Throughout the reign, many parts of Henry's system, technical details of taxation and reforms in the administration of justice, were elaborated by Archbishop Hubert Walter. Principles closely connected with trial by jury on the one hand and with election and representation on the other were being quietly developed—destined to play an important rôle in other ages.

(3) Richard is sometimes said to have inaugurated the golden age of municipalities. Undoubtedly many charters still extant bear witness to the lavish hand with which he granted, on paper at least, franchises and privileges to the nascent towns. John Richard Green finds the true interest of the reign not in the King's Crusades and French wars, so much as in his

fostering care over the growth of municipal enterprise. The importance of the consequences of such a policy is not diminished by the fact that Richard acted from sordid motives—selling privileges, too often of a purely nominal character, as he sold everything else which would fetch a price.

The death of Richard on 6th April, 1199, brought with it at least one important change; England was no longer to be governed by an absentee. John, as impatient of control as he was incompetent, endeavoured to shake himself free from the restraints of powerful ministers, and determined to conduct the work of government in his own way. The result was an abrupt end to the progress made in the previous reign towards ministerial responsibility. The odium formerly exhausting itself on the justiciars of Richard was now expended on John. While, previously, men had sought redress in a change of minister, such vain expectations could no longer deceive. A new element of bitterness was added to injuries long resented, and the nobles who felt the pinch of heavy taxation were compelled to seek redress in an entirely new direction. All the forces of discontent played openly around the throne.

As is usual at the opening of a new reign, the discontented hoped that a change of sovereign would bring some relief. The excessive taxation of the late reign had been the result of exceptional circumstances. It was expected that the new King would revert to the less burdensome scale of his father's financial measures. Such hopes were quickly disappointed. John's needs proved as great as Richard's, and the money he obtained was used for purposes that appealed to no one but himself. The excessive exactions demanded both in money and in service, coupled with the unpopular uses to which these were put, form the keynote of the whole reign. They form also the background of Magna Carta.

The reign falls naturally into three periods; the years in which John waged a losing war with the King of France (1199-1206), the quarrel with the Pope (1206-13), the great struggle of John with the barons (1213-16).

The first seven years were for England comparatively uneventful, except in the gradual deepening of disgust with John and all his ways. The continental dominions were ripe for losing, and John precipitated the catastrophe by his injustice and dilatoriness. The ease with which Normandy was lost shows something more than the incapacity of the King as a ruler and leader—John Softsword as contemporary writers contemptuously call him. It shows that the feudal army of Normandy had

come to regard the English Sovereign as an alien monarch, and refused to fight in support of the rule of a foreigner. The unwillingness of the English nobles to succour John actively has also its significance. The descendants of the men who helped William I. to conquer England had now lost all interest in the land from which they came. They were now purely English landowners, and very different from the original Norman baronage whose interests, like their estates, had been equally divided on both sides of the Channel.

The death of Archbishop Hubert Walter in July, 1205, deprived King John of the services of the most experienced statesman in England. It did more, for it marked the termination of the long friendship between the English Crown and the National Church. Its immediate effect was to create a vacancy, the filling of which led to a bitter quarrel with Rome.

John failed, as usual, to recognize the merits of abler men, and saw in the death of his great Justiciar and Archbishop only the removal of an unwelcome restraint, and the opening to the Crown of a desirable piece of patronage. He prepared to strain to the utmost his rights in the election of a successor to the See of Canterbury, in favour of one of his own creatures, a certain John de Grey, already by royal influence Bishop of Norwich. Unexpected opposition to his will was offered by the canons of the Cathedral Church, who determined on a bold policy, namely, to turn their nominal right of canonical election into a reality, and to appoint their own nominee, without waiting either for the King's approval or the co-operation of the suffragan bishops of the Province, who, during the last three vacancies, had put forth a claim to participate in the election, and had invariably used their influence on behalf of the King's nominee. Reginald, the sub-prior, was secretly elected by the monks, and hurried abroad to obtain confirmation at Rome before the appointment was made public. Reginald's vanity prevented his keeping his pledge of secrecy, and a rumour reached the ear of John, who brought pressure to bear on the monks, now frightened at their own temerity, and secured de Grey's appointment in a second election. The Bishop of Norwich was actually enthroned at Canterbury, and invested by the King with the temporalities of the See. All parties now sent representatives to Rome. This somewhat petty squabble benefited none of the original disputants; for the astute Innocent III. was quick to see an opportunity for papal aggrandisement. Both elections were set aside by decree of the Papal Curia, and the emissaries of the various

parties were coerced or persuaded to appoint there and then in the Pope's presence the Pope's own nominee, a certain Cardinal, English-born, but hitherto little known in England, Stephen Langton by name, destined to play an important part in the future history of the land of his birth.

John refused to view this triumph of papal arrogance in the light of a compromise—the view diplomatically suggested by Innocent. The King, with the hot blood common to his race, and the bad judgment peculiar to himself, rushed headlong into a quarrel with Rome which he was incapable of carrying to a successful issue. The details of the struggle, the interdicts and excommunications hurled by the Pope, and John's measures of retaliation against the unfortunate English clergy, need not be discussed, since they do not directly affect the main plot which culminated at Runnymede.

John was not without some measure of sagacity of a selfish and short-sighted sort, but was completely devoid of far-seeing statecraft. One day he was to reap the fruits of this quarrel in bitter humiliation and in the defeat of his most cherished aims; but, for the moment, the breach with Rome seemed to lead to a triumph for the King. The papal encroachments furnished him with a suitable pretext for confiscating the property of the clergy. Thus his Exchequer was amply replenished, while he was able for a time to conciliate his most inveterate opponents, the Northern barons, by remitting during several years the hated burden of a scutage, which, in other periods of his reign, tended to become a yearly imposition. John had no intention, however, to forego his right to resume the practice of annual scutages whenever it suited him to do so. On the contrary, he executed a measure intended to make them more remunerative in the future. This was the great Inquest of Service ordered on 1st June, 1212.[4]

During these years, however, John temporarily relaxed the pressure on his feudal tenants. His doing so failed to gain back any of their goodwill, while he broadened the basis of future resistance by shifting his oppressions to the clergy and through them to the poor.

Some incidents of the autumn of 1212 require brief notice, as well from their own inherent interest as because they find an echo in the words of Magna Carta. Serious trouble had arisen with Wales. Llywelyn (who had married John's natural daughter Joan, and had consolidated his power under protection of the English King) now seized the occasion to cross the border, while John was preparing his schemes for a new continental expedition. The

King changed his plans, and prepared to lead his troops to Wales instead of France. A muster was summoned for September at Nottingham, and John went thither to meet them. Before tasting meat, as we are told in Roger of Wendover's graphic narrative, he hanged twenty-eight Welsh hostages, boys of noble family, whom he held as sureties that Llywelyn would keep the peace.[5]

Almost immediately thereafter, two messengers arrived simultaneously from Scotland and from Wales with unexpected tidings. John's daughter, Joan, and the King of Scots, each independently warned him that his English barons were prepared to revolt, under shelter of the Pope's absolution from their allegiance, and either to slay him or betray him to the Welsh. The King dared not afford them so good an opportunity. In a panic he disbanded the feudal levies; and, accompanied only by his mercenaries, moved slowly back to London.[6]

Two of the barons, Robert Fitz-Walter, afterwards the Marshal of the army which, later on, opposed John at Runnymede, and Eustace de Vesci, showed their knowledge of John's suspicions (if they did not justify them) by withdrawing secretly from his Court and taking to flight. The King caused them to be outlawed in their absence, and thereafter seized their estates and demolished their castles.[7]

These events of September, 1212, rudely shook John out of the false sense of security in which he had wrapped himself a few months earlier. In the Spring of the same year, he had still seemed to enjoy the full tide of prosperity; and he must have been a bold prophet who dared to foretell, as Peter of Wakefield did foretell, the speedy downfall of the King—a prophecy the main purport of which (although not the details), was actually accomplished.[8]

John's apparent security was deceptive; he had underestimated the powers arrayed against him. Before the end of that year he had realized, in a sudden flash of illumination, that the Pope was too strong for him, circumstanced as he then was. It may well be that, if John's throne had rested on a solid basis of his subjects' love, he might have defied with impunity the thunders of Rome; but, although he was still an unrestrained despot, his despotism now rested on a hollow foundation. His barons, particularly the eager spirits of the north, refrained from open rebellion merely until a fit opportunity should be offered them. The papal excommunication of a King relieved his subjects of their oaths of

allegiance, and this might render their deliberate revolt dangerous and perhaps fatal. At this critical juncture Innocent played his leading card, inviting the King of France to act as the executor of the sentence of excommunication against his brother King. John at once realized that the time had come to make his peace with Rome.

Perhaps we should admire the sudden inspiration which showed the King that his game had been played and lost, while we regret the humiliation of his surrender, and the former blindness which could not see a little way ahead.

On 13th May, 1213, John met Pandulf, the papal legate, and accepted unconditionally his demands, the same which he had refused contemptuously some months before. Full reparation was to be made to the Church. Stephen Langton was to be received as archbishop in all honour with his banished bishops, friends and kinsmen. All church property was to be restored, with compensation for damage done. One of the minor conditions of John's absolution was the restoration to Eustace de Vesci and Robert Fitz-Walter of the estates which they persuaded Innocent had been forfeited because of their loyalty to Rome.[9]

John's humiliation did not stop even here. Two days later he resigned the Crowns of England and Ireland, and received them again as the Pope's feudatory, promising to perform personal homage should occasion allow. Such was the price which the King was now ready to pay for the Pope's active alliance against his enemies at home and abroad, the former submission having merely bought off the excommunication. John hoped thus to disentangle himself from his growing difficulties, and so to be free to avenge himself on his baronial enemies. The surrender of the Crown was embodied in a formal legal document which bears to be made by John, "with the common council of our barons." Were these merely words of form? They may have been so when first used; yet two years later the envoys of the insurgent barons claimed at Rome that the credit (so they now represented it) for the whole transaction lay with them. Perhaps the barons did consent to the surrender, thinking that to make the Pope lord paramount of England would protect the inhabitants from the irresponsible tyranny of John; while John hoped (with better reason as events proved) that the Pope's friendship would increase his ability to work his evil will upon his enemies. In any case, no active opposition or protest seems to have been raised by any one at the time of the surrender. This step, so repugnant to

later writers, seems not to have been regarded by contemporaries as a disgrace. Matthew Paris, indeed, writing in the next generation, describes it as “a thing to be detested for all time”; but then events had ripened in Matthew’s day, and he was a keen politician rather than an impartial onlooker.[10]

Stephen Langton, now assured of a welcome to the high office into which he had been thrust against John’s will, landed at Dover and was received by the King at Winchester on 20th July, 1213. John swore on the Gospels to cherish and defend Holy Church, to restore the good laws of Edward, and to render to all men their rights, repeating practically the words of the coronation oath. In addition, he promised to make reparation for all property taken from the Church or churchmen. This oath, with its accompanying promise, was the condition on which he was to be absolved, provisionally by Langton, and more formally by a legate, to be sent from Rome specially for that purpose.

V. The Years of Crisis, 1213–15.

For a brief season after John had made his peace with Rome, he seemed to enjoy substantial fruits of his diplomacy. Once more the short-sighted character of his abilities was illustrated; a brief triumph led to a deeper fall. The King for the moment considered, with some show of reason, that he had regained the mastery of his enemies at home and abroad. Philip's threatened invasion had to be abandoned; the people renewed their allegiance on the removal of the papal sentence; the barons had to reconcile themselves as best they could, awaiting a better opportunity to rebel. If John had confined himself to home affairs, he might have postponed the final explosion: he could not, however, reconcile himself to the loss of the great continental heritage of his ancestors. His attempts to recover Normandy and Anjou, partly by force of arms and partly by a great coalition, led to new exactions and new murmurings, while they ended in complete failure, which left him, discredited and penniless, at the mercy of the malcontents at home.

His projected campaign in Poitou would require all the levies he could raise. More than once John demanded, and his barons refused, their feudal service. Many excuses were put forward. At first they declined to follow a King who had not yet been fully absolved. Yet when Archbishop Stephen, on 20th July, 1213, removed the papal censure from John at Winchester, after exacting promises of good government, the northern barons still refused. Their new plea was that the tenure on which they held their lands did not compel them to serve abroad. They added that they were already exhausted by expeditions within England.[11]

John took this as open defiance, and determined, with troops at his back (*per vim et arma*), to compel obedience.

Before his preparations were completed, an important assembly had met at St. Albans (on 4th August) to make sworn inquest as to the extent of damage done to churchmen during the years of John's quarrel with Rome. The meeting is notable, not merely because of the reason of its summons, but also because of its composition. It is the earliest national council in which the principle of representation received recognition (so far as our records go).[12] Four lawful men, with the reeve, from each village or manor

on the royal demesne, were present, but only, it must be remembered, in a very mean capacity—only to make a sworn inquest as to the amount of damage done. Such inquests by the humble representatives of the villages were quite common locally; the innovation lies in this, that their verdict was now given in a national assembly. Directions were issued in the King's name from the same meeting, commanding sheriffs, foresters, and others to observe the laws of Henry I. and to abstain from unjust exactions, as they valued their limbs and lives.[13]

On 25th August, after John had set out with his mercenaries to punish by force of arms the refusal of his northern magnates to follow him to the Continent, as he held them bound to do in terms of their feudal obligations, Stephen Langton held a meeting with the great men of the south. Many bishops, abbots, priors and deans, together with some lay magnates of the southern counties, met him at St. Paul's, London. The ostensible object of this assembly was to determine what use the Archbishop should make of his power to grant partial relaxation of the interdict still casting its blight over England—which could not be finally lifted until the legate arrived with fuller powers. If we may believe Roger of Wendover, more important business was transacted in the King's absence. Stephen reminded the magnates that John's absolution had been conditional on a promise of good government, and as a standard to guide them in judging what such government implied, he produced a copy of Henry I.'s Charter of Liberties. All present swore to "fight for those liberties, if it were needful, even unto death." The Archbishop promised his help, "and a confederacy being thus made between them, the conference was dissolved."[14]

Stephen Langton, however, desired a peaceable solution if possible, and three days later we find him, after a somewhat hurried journey, at Northampton, on the 28th of August, striving earnestly, and with success, to avert civil war between John and the recalcitrant Crown tenants in the north.

His line of argument is worthy of especial note. The King, he urged, must not levy war on his subjects before he had obtained a legal judgment against them. The substance of this advice should be compared with the terms of chapter 39 of Magna Carta. John resented the interference of Stephen in lay matters, and continued his march to Nottingham; but threats of fresh excommunications caused him at length to consent to substitute legal

process for violence, and to appoint a day for the trial of the defaulters before the *Curia Regis*—a trial which never took place.[15]

John apparently continued his journey as far north as Durham, but returned to meet the new papal legate Nicholas, to whom he performed the promised homage and repeated the formal act of surrender in St. Paul's on 3rd October.[16] Having thus completed his alliance with the Pope, he was confident of worsting his enemies in France and England. As most, if not all, of the great magnates were against him, he saw that it would be well to strengthen his position by support of the class beneath them in the feudal scheme of society. Perhaps it was this that led John to broaden the basis of the national assembly. The great Council which met at Oxford on 15th November, 1213, was made notable by the presence, in addition to the Crown tenants, of representatives of the various counties. The sheriffs, in the words of the King's writs, were to cause to assemble all knights already summoned (that is, the Crown tenants) and four discreet men of each county "*ad loquendum nobiscum de negotiis regni nostri*." Miss Norgate[17] lays stress on the fact that these writs were issued after the death of the great Justiciar Geoffrey Fitz-Peter, and before any successor had been appointed. John, she argues, acted on his own initiative, and is thus entitled to the credit of being the first statesman to introduce representatives of the counties into the national assembly. The importance of this precedent need not be obscured by the selfish nature of the motives to which it was due. Knights who were tenants of mesne lords (Miss Norgate says "yeomen") were invited to act as a counterpoise to the barons. This innovation anticipated the line of progress afterwards followed by de Montfort and Edward I. Compared with it, the often-praised provisions of chapter 14 of Magna Carta must be regarded as antiquated and even reactionary.

In the early spring of 1214, John considered his home troubles ended, and that he was now free to use against France the coalition formed by his diplomacy. He went abroad early in February, leaving Peter des Roches, the unpopular Bishop of Winchester, to keep the peace as Justiciar, and to guard his interests, in concert with the papal legate. Although deserted by the northern barons, John relied partly on his mercenaries, but chiefly on the Emperor Otto and his other powerful allies. Fortune, always fickle, favoured him at first, only to ruin all his schemes more completely in the end. The crash came on Sunday, 27th July, 1214, when the King of France triumphed over the allies at the decisive battle of Bouvines. Three months

later, John was compelled to sign a five years' truce with Philip, abandoning all pretensions to recover his continental dominions.

He had left enemies at home more dangerous than those who conquered him at Bouvines—enemies who had been watching with trembling eagerness the vicissitudes of his fortunes abroad. His earlier successes struck dismay into the malcontents in England, apprehensive of the probable sequel to his triumphant return home. They waited with anxiety, but not in idleness, the culmination of his campaign, wisely refraining from open rebellion until news reached them of his failure or success. Meanwhile, they quietly organized their programme of reform and their measures of resistance. John's strenuous endeavours to exact money and service, while failing to fill his Exchequer as he hoped, had ripened dormant hostility into an active confederacy organized for resistance. When England learned the result of the battle, the barons felt that the moment for action had arrived.

Even while abroad, John had not relaxed his efforts to wring exactions from England. Without consent or warning, he had imposed a scutage at the unprecedented rate of three marks on the knight's fee. Writs for its collection had been issued on 26th May, 1214, an exception being indeed allowed for tenants personally present in the King's army in Poitou. The northern barons, who had already refused to serve in person, now refused likewise to pay the scutage. This repudiation was couched in words particularly bold and sweeping; they denied liability to follow the King not merely to Poitou, but to any part of the Continent.[18]

When John returned, in the middle of October, 1214, he found himself confronted with a crisis unique in English history. During his absence, the opponents of his misrule had drawn together, formulated their grievances, and matured their plans. The embarrassments on the Continent which weakened the King, heartened the opposition. The northern barons took the lead. Their cup of wrath, which had long been filling, overflowed when the scutage of three marks was imposed. Within a fortnight of his landing, John held an interview with the malcontents at Bury St. Edmunds (on 4th November, 1214).[19] No compromise was arrived at. John pressed for payment of the scutage, and the barons refused.

It seems probable that, after John's retiral, a conference of a more private nature was held at which, under cloak of attending the Abbey for prayer, a conspiracy against John was sworn. Roger of Wendover gives a graphic

account of what happened. The magnates came together "as if for prayers; but there was something else in the matter, for after they had held much secret discourse, there was brought forth in their midst the charter of King Henry I., which the same barons had received in London ... from Archbishop Stephen of Canterbury."[20] A solemn oath was taken to withdraw their fealty (a threat actually carried into effect on 5th May of the following year), and to wage war on the King, unless he granted their liberties; and a date—soon after Christmas—was fixed for making their formal demands. Meanwhile they separated to prepare for war. The King also realized that a resort to arms was imminent. While endeavouring to collect mercenaries, he tried unsuccessfully to sow dissension among his opponents. In especial, he hoped to buy off the hostility of the Church by a separate charter which he issued on 21st November. This professes to be granted "of the common consent of our barons." Its object was to gratify the Church by turning canonical election from a sham into a reality. The election of prelates, great and small, should henceforward be really free in all cathedral and conventual churches and monasteries, saving to the Crown the right of wardship during vacancies. John promised never to deny or delay his consent to an election, and conferred powers on the electors, if he should do so, to proceed without him. The King was bitterly disappointed in his hope that by this bribe he would bring over the national Church from the barons' side to his own.

John was probably well aware of what took place at St. Edmunds after he had left, and he also knew that the close of the year was the time fixed for the making of demands. He held what must have been an anxious Christmas at Worcester (always a favourite resting-place of this King), but tarried only for a day, hastening to the Temple, London, where the proximity of the Tower would give him a feeling of security. There, on 6th January, 1215, a deputation from the insurgents met him without disguising that their demands were backed by force. These demands, they told him, included the confirmation of the laws of King Edward, with the liberties set forth in Henry's Charter.

On the advice of the Archbishop and the Marshal, who acted as mediators, John asked a truce till Easter, which was granted in return for the promise that he would then give reasonable satisfaction. The Archbishop, the Marshal, and the Bishop of Ely were named as the King's securities.

On 15th January, John re-issued the Charter to the Church, and demanded a renewal of homage from all his subjects. The sheriffs in each county were instructed to administer the oath in a specially stringent form; all Englishmen must now swear to "stand by him against all men." Meanwhile emissaries were dispatched by both sides to Rome. Eustace de Vesci, as spokesman of the malcontents, asked Innocent, as overlord of England, to compel John to restore the ancient liberties, and claimed consideration on the ground that John's surrender to the Pope had been made under pressure put on the King by them—all to no effect. John thought to propitiate the Pope by taking the cross, a politic measure (the date of which is given by one authority as 2nd February, and by another as 4th March), which would also serve to protect him against personal violence, and which afforded him, as is well illustrated by several chapters of Magna Carta, a fertile excuse for delay in remedying abuses. In April, the northern barons, convinced that the moment for action had arrived, met in arms at Stamford, and after Easter (when the truce had expired) marched southward to Brackley, in Northampton. There they were met, on 27th April, by the Archbishop and the Marshal, as emissaries from the King, who demanded what they wanted. They received in reply, and took back with them to John, a certain schedule, which consisted for the most part of ancient laws and customs of the realm, with an added threat that if the King did not immediately adhibit his seal the rebels would constrain him by seizing his castles, lands, and goods.[21]

This schedule may be regarded as a rough draft of the document more fully drawn out six weeks later, commonly known as the Articles of the Barons.[22]

John's answer, when he read these demands, was emphatic. "Why do not the barons, with these unjust exactions, ask my kingdom?" Then furious, he declared with an oath that he would never grant them such liberties, whereby he would make himself a slave.[23]

On 5th May the barons formally renounced allegiance[24] and chose as commander, Robert Fitz-Walter, who styled himself piously and grandiloquently, "Marshal of the army of God and Holy Church."

The insurgents, still shivering on the brink of civil war, delayed to march southwards. Much would depend on the attitude of London, with its wealth and central position; and John bade high for the support of its citizens. On 9th May a new charter[25] was granted to the Londoners, who now received

a long-coveted privilege, the right to elect their mayor annually and to remove him at the year's end. This marked the culmination of a long series of progressive grants in their favour. Previously the mayor had held office for life, and Henry Fitz-Aylwin, the earliest holder of the office (appointed perhaps in 1191), had died in 1213.

Apparently no price was paid for this charter; but John doubtless expected in return the grateful support of the Londoners, exactly as he had expected the support of churchmen when he twice granted a charter in their favour. In both instances he was disappointed. Next day he made, probably as a measure of delay, an offer of arbitration to the barons. In the full tide of military preparations, he issued a writ in these words: "Know that we have conceded to our barons who are against us that we shall not take or disseise them or their men, nor go against them *per vim vel per arma*, unless by the law of our land, or by the judgment of their peers *in curia nostra*, until consideration shall have been made by four whom we shall choose on our part and four whom they shall choose on their part, and the lord Pope who shall be oversman over them"—words worthy of careful comparison with those used in chapter 39 of Magna Carta. The offer could not be taken seriously, since it left the decision of every vital issue virtually to the Pope, whom the barons distrusted.[26]

Another royal writ, of two days later date, shows a rapid change of policy, doubtless due to the contemptuous rejection of arbitration. On 12th May, John ordered the sheriffs to do precisely what he had offered not to do. They were told to take violent measures against the rebels without waiting for a "judgment of peers" or other formality. Lands, goods, and chattels of the King's enemies were to be seized and applied to his benefit.[27]

The barons, rejecting all offers, marched by Northampton, Bedford, and Ware, towards the capital. London, in spite of the charter received eight days earlier, boldly threw in its lot with the insurgents, to whom it opened its gates on 17th May.[28] The example of London was quickly followed by other towns and by many hesitating nobles. The confederates felt strong enough to issue letters to all who still adhered to the King, bidding them forsake him on pain of forfeiture.

John found himself, for the moment, without power of effective resistance; and, probably with the view of gaining time rather than of committing himself irretrievably to any abatement of his prerogatives,

agreed to meet his opponents. As a preliminary to this, on 8th June he issued a safe-conduct for the barons' representatives to meet him at Staines within the three days following. This was apparently too short notice, as on 10th June, John, now at Windsor, granted an extension of the time and safe-conduct till Monday, 15th June. William the Marshal and other envoys were dispatched from Windsor to the barons in London with what was practically a message of surrender. The barons were told that John "would freely accede to the laws and liberties which they asked," if they would appoint a place and day for a meeting. The intermediaries, in the words of Roger of Wendover,[29] "without guile carried back to the barons the message which had been guilefully imposed on them"—implying that John meant to make no promises, except such as were insincere. Yet the barons, *immenso fluctuantes gaudio*, fixed as the time of meeting the last day of the extended truce, Monday, 15th June, at a certain meadow between Staines and Windsor, known as Runnymede.

VI. Runnymede, and after.

On 15th June the King and the Barons met. On the side of the insurgents appeared a great host; on the monarch's, merely a small band of magnates, loyal to the person of the King, but only half-hearted, at the best, in his support. Their names may be read in the preamble to the Charter: the chief among them, Stephen Langton, still nominally neutral, was known to be in full sympathy with the rebels.

Dr. Stubbs,[30] maintaining that the whole baronage of England was implicated in these stirring events, gives a masterly analysis of its more conspicuous members into four great groups: (1) the Northumbrani or Norenses of the chroniclers, names famous in the northern counties, who had been the first to raise the standard of open revolt, and retained the lead throughout; (2) the other nobles from all parts of England, who had shown themselves ready from an early date to co-operate with the Northerners —"the great baronial families that had been wise enough to cast away the feudal aspirations of their forefathers, and the rising houses which had sprung from the ministerial nobility"; (3) the moderate party who, ready to worship the rising sun, deserted John after London had joined the rebels, including even the King's half-brother (the Earl of Salisbury), the loyal Marshal, Hubert de Burgh, and other ministers of the Crown, whose names may be read in the preamble to the Charter; and (4) the tools of John's misgovernment, mostly men of foreign birth, tied to John by motives of interest as well as by personal loyalty, since their differences with the baronial leaders lay too deep for reconciliation, most of whom are branded by name in Magna Carta as for ever incapable of holding office in the realm. These men of desperate fortunes alone remained whole-hearted on John's side when the crisis came.[31]

When the conference began, the fourth group was not near John, being otherwise occupied in the command of castle garrisons or of troops actually in the field; the third group, a small one, was with him; and the first and second groups were, in their imposing strength, arrayed against him.

Unfortunately, the vagueness of contemporary accounts prevents us from reproducing with certainty the progress of negotiations on that eventful 15th of June and the few days following. Some inferences, however, may be

drawn from the words of the completed Charter itself and from those of several closely related documents. One of these, the Articles of the Barons, [32] is sometimes supposed to be identical in its terms with the Schedule which had been already presented to the King's emissaries, at Brackley, on the 27th of April.[33] It is more probable, however, that during the seven eventful weeks which had since elapsed, the original demands had been somewhat modified. It is not unlikely that the interval had been employed in making the terms of the suggested agreement more full and specific. The Schedule of April was probably only a rough draft of the Articles as we know them, and these formed in their turn the new draft on which the completed Charter was based. Articles and Charter are alike authenticated with the impress of the King's great seal, an indisputable proof that the terms of each of them actually received his official consent.

This fact affords a strong presumption that an interval must have elapsed between the King's acceptance of the first and the final completion of the second; since it would have been absurd to seal what was practically a draft at the same time as the principal instrument. The probability of such an interval must not be lost sight of in any attempt to reconstruct in chronological sequence the stages of the negotiations at Runnymede.

A few undoubted facts form a starting-point on which inferences may be based. John's headquarters were fixed at Windsor from Monday, 15th June, to the afternoon of Tuesday the 23rd. On each of these nine days (with the possible exception of the 16th and 17th) he visited Runnymede to confer with the barons.[34]

Two crucial stages in these negotiations were clearly reached on Monday the 15th (the date borne by Magna Carta itself) and on Friday the 19th (the day on which John in more than one writ stated that peace had been concluded). What happened exactly on each of these two days is, however, to some extent, matter of conjecture. It is here maintained, with some confidence, that on Monday the substance of the barons' demands was provisionally accepted and that the Articles were then sealed; while on Friday this arrangement was finally confirmed and Magna Carta itself, in several duplicates, was sealed.

To justify these inferences, a more detailed examination of the evidence available will be necessary. The earliest meeting between John and the baronial leaders, all authorities are agreed, took place on Monday, 15th June, probably in the early morning. The barons undoubtedly came to the

conference provided with an accurate list of those grievances which they were determined to have redressed. On the previous 27th of April the rebels had sent a written Schedule to the King, along with a demand that he should signify his acceptance by affixing his seal;[35] they are not likely to have been less fully prepared on 15th June.

John, on his part, would naturally try a policy of evasions and delays; and, when these were clearly useless, would then endeavour to secure modifications of the terms offered. These tactics met with no success. His opponents demanded a plain acceptance of their plainly expressed demands. Before nightfall, John, overawed by their firmness and by the numbers of the armed force behind them, was constrained to surrender. Leaving minor points of detail to be subsequently adjusted, he provisionally accepted the substance of the long list of reforms put before him by the barons, on the understanding that they would renew their allegiance and give him some security that they would keep the peace. In proof of this bargain, the heads of the agreement were rapidly engrossed on parchment to the number of forty-nine, and the great seal was impressed on the wax of the label, where it may still be seen.[36]

The parchment containing these Articles of the Barons may have been the identical Schedule actually prepared by the rebel leaders previous to the meeting; but, more probably, it was written out at Runnymede during the conference on the 15th (or between two conferences on that day) by one of the clerks of the royal Chancery. This is more in keeping with its heading (written in the same hand, and apparently at the same time as the body of the deed), *Ista sunt capitula quae barones petunt et dominus rex concedit*.

Likely enough, it followed closely the words of the baronial Schedule; but it may have contained some slight modifications in favour of the Crown. One such, at least, was inserted, apparently as an afterthought (on the intervention of the King perhaps, or one of his friends); articles 45 and 46, as originally conceived, have been subsequently connected by a rude bracket, and a qualifying proviso added which practically bestowed on the Archbishop the powers of an arbitrator to determine whether both articles should be altered in favour of the Crown or no.[37] The entire document is in a running hand, and appears to have been rapidly though carefully written. Its engrossment upon parchment with a quill pen must have occupied several hours; but a diligent copyist would not find it beyond his powers to complete the task in one day.

Tuesday, Wednesday and Thursday were consumed in further negotiations as to matters of detail; in reducing the heads of agreement already accepted to the more binding form of a feudal charter; and in engrossing several copies for greater security. Everything was, however, ready for a final settlement on Friday the 19th. At the conference held on that day the conclusion of the final concord probably included several steps; among others, the nomination by the opposition, with the King's tacit acquiescence, of twenty-five barons to act as Executors under chapter 61,[38] the solemn sealing and delivery of several original copies of the Great Charter in its final form, the taking of an oath by all parties to abide by its provisions, and the issue of the first batch of writs of instructions to the sheriffs.

Blackstone[39] thinks that the barons on that day renewed their oaths of fealty and homage. It is more probable that, until John had actually carried out the more pressing reforms promised in Magna Carta, they refused formally to swear allegiance, undertaking, however, in the hearing of the two archbishops and other prelates, that they would keep the peace and furnish security to that effect in any form that John might name, except only by delivery of their castles or of hostages.[40]

The statement that Friday, 19th June, was the day on which peace was finally concluded rests on unmistakable evidence. On 21st June, John wrote from Windsor to William of Cantilupe, one of his captains, instructing him not to enforce payment of any unpaid balances of "tenseries"[41] demanded since the preceding Friday, "on which day peace was made between the King and his barons."[42]

It has been taken for granted by many historians that the peace was finally concluded, and the Great Charter actually sealed and issued on the 15th, not on the 19th.[43] The fact that all four copies of Magna Carta still extant bear this date seems to have been regarded as absolutely conclusive on this point. Experts in diplomatics, however, have long been aware that elaborate charters and other documents, which occupied a considerable time in preparation, usually bore the date, not of their actual execution, but of the day on which were concluded the transactions of which they form the record. Legal instruments were thus commonly ante-dated (as it would be reckoned according to modern legal practice). Thus it is far from safe to infer from Magna Carta's mention of its own date that the great seal was actually adhibited on the 15th June.

Such presumption as exists points the other way. The Great Charter is a lengthy and elaborate document, and it is barely possible that any one of the four originals known to us could have been engrossed (to say nothing of the adjustment of the substance and form) within one day. Not only is it much longer than the Articles on which it is founded; but even the most casual comparison will convince any unbiassed mind of the slower rate of engrossment of the Charter. All four copies show marks of great deliberation, while those at Lincoln and Salisbury in particular are exquisite models of leisurely and elaborate penmanship. The highly finished initial letters of the first line and other ornamental features may be instructively compared with the plain, business-like, rapid hand of the Articles. How many additional copies now lost were once in existence bearing the same date, it is impossible to say; but each of those still extant may well have occupied four days in the writing.[44]

A comparison between the two documents shows few changes of importance in the tenor.[45]

The one outstanding addition is the insertion, in an emphatic form, both at the beginning and at the end of the Charter, of a general declaration in favour of the freedom and rights of the Church. The inference seems to be that a new influence was brought to bear, between the preparation of the draft and that of the Charter. It was the Archbishop of Canterbury and his friends who thus converted the original baronial manifesto into something more nearly resembling a declaration of rights for the nation at large. One or two minor alterations seem slightly to benefit the Crown,[46] while several others, rightly viewed, suggest an influence at work unfavourable to the towns and trading classes.[47]

In addition to the various originals of the Charter issued under the great seal, chapter 62 provides that authenticated copies should be made and certified as correct by “Letters Testimonial,” under the seals of the two archbishops with the legate and the bishops. This was done, but the exact date of their issue is unknown.[48]

The same Friday which thus saw the completion of negotiations saw also the issue of the first batch of letters of instructions to the various sheriffs, telling them that a firm peace had been concluded, by God’s grace, between John and the barons and freemen of the kingdom, as they might hear and see by the Charter which had been made, and which was to be published throughout the district, and firmly observed. Each sheriff was further

commanded to cause all in his bailiwick to make oath according to the form of the Charter to the twenty-five barons or their attorneys, and further, to see to the appointment of twelve knights of the county in full County Court, in order that they might declare upon oath all evil customs requiring to be reformed, as well of sheriffs as of their servants, foresters, and others.[49] This was held to apply chiefly to the redress of forest grievances.

Apparently, four days elapsed before similar letters, accompanied by copies of the Charter, could be sent to every sheriff. During the same few days, several writs (some of which have already been mentioned) were dispatched to military commanders with orders to stop hostilities. A few writs, dated mostly 25th June, show that some obnoxious sheriffs had been removed to make way for better men. Hubert de Burgh, a moderate though loyal adherent, and a man generally respected, was appointed Justiciar in room of the hated Peter des Roches. On 27th June, another writ directed the sheriffs and the elected knights to punish, by forfeiture of lands and chattels, all those who refused to swear to the twenty-five Executors within a fortnight. All these various instructions may be regarded as forming part of the settlement of the 19th of June, and were dispatched with the greatest rapidity possible.

Even after the settlement arrived at on Friday, some minor points of dispute remained. The barons refused to be satisfied without substantial security that the reforms and restorations agreed on would be carried out by the King; they demanded that both the city of London and the Tower of London should be left completely under their control as pledges of John's good faith, until 15th August, or longer, if the reforms had not then been completed. John obtained a slight modification of these demands; he surrendered the city of London to his opponents, as they asked; but placed the Tower in the neutral custody of the Archbishop of Canterbury. These conditions were embodied in a supplementary treaty, which describes itself as *Conventio facta inter Regem Angliae et barones ejusdem regni*.[50] If the barons distrusted John, he was equally distrustful of them, demanding the security they had promised for fulfilment of their part of the original compact. He now asked a formal charter in his favour that they would observe the peace and their oaths of homage, which they point-blank refused to grant. The King appealed to the prelates without effect. The archbishops, with several suffragans, however, put a formal protest on record of the barons' promise and subsequent refusal to keep it.[51]

The two archbishops and their brother prelates entered a second protest of a different nature. They seem to have become alarmed by the drastic measures adopted or likely to be adopted, founded on the verdicts of the twelve knights elected in each county to carry into effect the various clauses of the Great Charter directed against abuses of the Forest laws. Apparently, it was feared that reforms of a sweeping nature would result, and practically abolish the royal forests altogether. Accordingly, they placed their protest formally on record—acting undoubtedly in the interests of the Crown, feeling that as mediators they were bound in some measure to see fairplay. They objected to a strained construction of the words of the Charter, holding that the articles in question ought to be understood as limited; all customs necessary for the preservation of the forests should remain in force. [52]

The provisions referred to were, as is now well known, chapters 47, 48, and 53 of Magna Carta itself, and not, as Roger of Wendover states, a separate Forest Charter.[53] That writer was led into this unfortunate error by confusing the charter granted by King John with its re-issue by his son in 1217, when provisions for the reform of the forest law *were* framed into a separate supplementary charter. From Roger's time onwards, the charters of Henry III. were reproduced in all texts and treatises, in place of the real charter actually granted by John. Sir William Blackstone was the first commentator to discover this grievous error, and he clearly emphasized the grave differences between the terms granted by John and those of his son, showing in particular that the former king granted no separate Forest Charter at all.[54]

Before the conferences at Runnymede came to an end, confidence in the good intentions of the twenty-five Executors, drawn it must be remembered entirely from the section of the baronage most extreme in their views and most unfriendly to John, seems to have been completely lost. If we may believe Matthew Paris,[55] a second body or committee of thirty-eight barons was nominated, representing other and more moderate sections of the baronage, to act as a check on the otherwise all-powerful oligarchy of twenty-five despots. If this second committee was ever really appointed, no details have been preserved as to the date of its selection, or as to the exact powers entrusted to it.

If the rebel leaders expected to arrive at a permanent settlement of their disputes when they came to meet the King on the morning of the 15th day

of June, it must have been evident to all before the 23rd, that John only made the bargain in order to gain time and strength to break it. Three weeks, indeed, before John granted Magna Carta, he had begun his preparations for its repudiation. In a letter of 29th May, addressed to the Pope, there may still be read his own explanation of the causes of quarrel, and how he urged, with the low cunning peculiar to him, that the hostility of the rebels prevented the fulfilment of his vow of crusade. In conclusion, he expressed his willingness to abide by the Pope's decision on all matters at issue.

John, then, at Runnymede was merely waiting for two events which would put him in a position to throw off the mask—the favourable answer he confidently expected from the Pope, and the arrival of foreign troops. Meanwhile, delay was doubly in his favour; since the combination formed against him was certain, in a short time, to break up. It was, in the happy phrase of Dr. Stubbs,[56] a mere "coalition," not an "organic union"—a coalition, too, in momentary danger of dissolving into its original factors. The barons were without sufficient sinews of war to carry a protracted struggle to a successful issue. Very soon, both sides to the treaty of peace were preparing for war. The northern barons, anticipating the King in direct breach of the compact, began to fortify their castles. John, in equally bad faith, wrote for foreign allies, whilst he anxiously awaited the Pope's answer to his appeal.

Langton and the bishops still struggled to restore harmony. The 16th July was fixed for a new conference. John did not attend; but it was probably at this Council that in his absence a papal bull was read conferring upon a commission of three—the Bishop of Winchester, the Abbot of Reading, and the legate Pandulf—full powers to excommunicate all "disturbers of the King and Kingdom." No names were mentioned, but these powers might clearly be used against Langton and his friends. The execution of this sentence was delayed, in the groundless hope of a compromise, till the middle of September, when two of the commissioners, Pandulf and Peter of Winchester, demanded that the Archbishop should publish it; and, on his refusal, they forthwith, in terms of their papal authority, suspended him from his office. Stephen left for Rome, and his absence at a critical juncture proved a national misfortune. The insurgents lost in him, not only their bond of union, but also a wholesome restraint. His absence must be reckoned among the causes of the royalist reaction soon to take place. After

his departure, a papal bull arrived (in the end of September) dated 24th August. This is an important document in which Innocent, in the plainest terms, annuls and abrogates the Charter, after adopting all the facts and reproducing all the arguments furnished by the King. Beginning with a full description of John's wickedness and repentance, his surrender of England and Ireland, his acceptance of the Cross, his quarrel with the barons; it goes on to describe Magna Carta as the result of a conspiracy, and concludes, "We utterly reprobate and condemn any agreement of this kind, forbidding, under ban of our anathema, the aforesaid king to presume to observe it, and the barons and their accomplices to exact its performance, declaring void and entirely abolishing both the Charter itself and the obligations and safeguards made, either for its enforcement or in accordance with it, so that they shall have no validity at any time whatsoever."[57]

A supplementary bull, of one day's later date, reminded the barons that the suzerainty of England belonged to Rome, and that therefore nothing could be done in the kingdom without papal consent.[58] Thereafter, at a Lateran Council, Innocent formally excommunicated the English barons who had persecuted "John, King of England, crusader and vassal of the Church of Rome, by endeavouring to take from him his kingdom, a fief of the Holy See."[59]

Meanwhile, the points in dispute had been submitted to the rude arbitrament of civil war, in which the first notable success fell to King John in the capture, by assault, of Rochester Castle on 30th November. The barons had already made overtures to Louis, the French King's son, to whom they promised as a reward for his help, yet not perhaps with entire sincerity, the crown of England. Towards the end of November, some seven thousand French troops arrived in London, where they spent the winter—a winter consumed by John in marching from place to place meeting, on the whole, with success, especially in the east of England. John's best ally was the Pope, who had no intention of allowing a French Prince to usurp the throne of one who was now his humble vassal. Gualo was dispatched from Rome to Philip, King of France, forbidding his son's invasion, and asking rather protection and assistance for John as a papal vassal. Philip, anxious to meet the force of the Pope's arguments with some title to intervene, of more weight than the invitation of a group of rebels, replied by an ingenious string of fictions. He endeavoured to find defects in John's title as King of England, and to argue that therefore John was not *in titulo* to grant to the

Pope the rights of an overlord. Among other arguments it was urged that John had been convicted of treason while Richard was King, and that this sentence involved forfeiture by the traitor of all rights of succession to the Crown. Thus the Pope's claim of intervention was invalid, while Prince Louis justified his own interference by some imagined right which he ingeniously argued had passed to him through the mother of his wife.

John had not relied solely on papal protection. A great fleet, collected at Dover to block Louis with his smaller vessels in Calais harbour, was wrecked on 18th May, 1216. The channel thus cleared of English ships, the French Prince, setting sail on the night of the 20th May, landed next morning without opposition. John, reduced to dependence on mercenaries, did not dare oppose his landing. Gualo, now in England, on 28th May excommunicated Louis by name, and laid London under interdict. Such thunderbolts had now lost their blasting power by frequent repetition, and produced no effect whatever. On 2nd June, Louis entered London amid acclamations, and marched against John at Winchester, which he reached on 14th June, after John had fled. Ten days later, the ancient capital of Wessex with its castles surrendered. Next day, the French Prince attacked Dover, whose brave defender, Hubert de Burgh, after some months of stubborn resistance, obtained a truce, on 14th October, in order that the garrison might communicate with the King. Before Hubert's messengers could reach him, John was dying. During these months, when the verdict of war was going against him in the south, he had been acting in the north strenuously, and not without success. The issue still trembled in the balance. A royalist reaction had begun. The insolence of the French troops caused desertions from the barons.

On 10th October John, after being feasted to excess by the loyal burghers of Lynn, fell into an illness from which he never really recovered. Nine days later, worn out by his wars, and by excitement and chagrin, at this critical juncture when fortune might have taken any sudden turn, he died at Newark Castle, in the early hours of the morning of 19th October, 1216. His death saved the situation, rendering a compromise possible. Almost immediately, there took place an entirely new grouping of political forces inside and outside of England. A silent compromise was effected, all parties returning gradually to their natural allegiance to the son of John, on the understanding that the Charter in its main features should be accepted as the basis of his government. Prince Louis was soon discarded. Rome also fell

into line; the death of Innocent, on 16th June, 1216, had been equally opportune with the death of John, four months later, removing an obstacle from the path of peace. Gualo, in the name of Innocent's successor, consented to the re-issue of the Charter by the advisers of the young King Henry.

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1. R. Hoveden, *Chronica*, II. 218.

2. The details of these reforms are fully discussed *infra* under the head of "Royal Justice and Feudal Justice," and some of their ultimate effects under the head of "Trial by Jury."

3. In one county, Westmoreland, the office did become hereditary.

4. See Round, *Commune of London*, 273. This measure is discussed *infra* pp. 91-2.

5. R. Wendover, III. 239.

6. W. Coventry, II. 207; R. Wendover, III. 239.

7. From their possible connection with the wording of the famous chapter 39 of Magna Carta, it may be worth while to quote the exact words in which Ralph de Coggeshall, *Chronicon Anglicanum*, p. 165, describes this event, which he places (probably wrongly) in the year 1213.—"Rex Eustachium de Vesci et Robertum filium Walteri, in comitatibus tertio requisitos, cum eorum fautoribus utlaghiari fecit, castra eorum subvertit, praedia occupavit."

8. See Miss Norgate, *John Lackland*, 170, and authorities there cited.

9. *Ibid.*, 292–3.

10. The late Cardinal Manning in an article in the *Contemporary Review* for December, 1875 (since published in book form), on the Pope and Magna Carta, insists, probably with reason, that contemporary opinion saw nothing disgraceful in the surrender, rather the reverse.

11. R. Coggeshall, p. 167.

12. Stubbs, *Const. Hist.*, I. 566.

13. R. Wendover, III. 261-2.

14. Roger of Wendover, III. 263-6. Blackstone (*Great Charter*, Introduction, p. vi.), makes the apposite comment that it seems unlikely that the discovery by the Archbishop of a charter probably already well known "should be a matter of such novelty and triumph."

15. R. Wendover, III. 262-3.

16. The charter recording this act may be read in *New Rymer*, I. 115. It was sealed not in perishable wax, but in solid gold.

17. *John Lackland*, 195.

18. See W. Coventry, II. 217, *dicentes se propter terras quas in Anglia tenent non debere regem extra regnum sequi nec ipsum euntem scutagio juvare*. The legality of this contention is discussed *infra*, pp. 83-6.

19. See Miss Norgate, *John Lackland*, p. 221.

20. R. Wendover, III. 293.

21. R. Wendover, III. 298.

22. Is it not possible that the so-called "unknown charter of Liberties" (see *infra* under Part V. and Appendix) was the very schedule mentioned by Wendover? It was drawn up in the form of a charter, so as to be ready for the immediate imprint of the seal they demanded.

23. R. Wendover, III. 298.

24. Blackstone, *Great Charter*, p. xiii., citing the *Annals of Dunstable* (p. 43), says they were absolved at Wallingford by a Canon of Durham.

25. The Charter appears *Rot. Chart.*, p. 207. *Cf.* under chapter 13 *infra*, where the rights of the Londoners are discussed.

26. The writ is given in *Rot. Pat.*, 1. 141, and also in *New Rymer*, I. 128.

27. For writ, see *Rot. Claus.*, 204.

28. Some authorities give 24th May as the date. It must have been the 17th; since *New Rymer*, p. 121, under the date of 18th May, prints a writ of John, informing Rowland Blaot of the surrender of London to the barons. This was followed on 20th May (*N.R.*, p. 121) by another royal writ, ordering all bailiffs and other faithful, to molest the Londoners in every way possible.

29. III. 301.

30. *Const. Hist.*, I. 581-3.

31. The individual names may be read in Stubbs, *Ibid.*; and readers in search of biographical knowledge are referred to Bémont, *Chartes*, 39–40, and for fuller, though less reliable information, to Thomson, *Magna Charta*, 270–322.

32. See Appendix.

33. See *supra*, p. 40.

34. So far there can be no doubt. Either on the *Close Rolls* or on the *Patent Rolls* (q.v.) copies of one or more writs are preserved dated from Windsor on each of these days, and also one or more dated from Runnymede on 15th, 18th, 19th, 20th, 21st, 22nd, and 23rd June.

35. R. Wendover, III. 298.

36. In the British Museum. See *infra* under Part V.

37. Cf. Blackstone, *Great Charter*, xvii.: "subjoined in a more hasty hand, ... as if added at the instance of the King’s commissioners upon more mature deliberation."

38. See *infra* under that chapter.

39. *Great Charter*, p. xxiv.

40. See Protest of Archbishops *infra*, p. 52.

41. Mr. Round explains this word in a learned appendix (*Geoffrey de Mandeville*, p. 414) to mean "blackmail," *i.e.* "money extorted under pretence of protection or defence."

42. See *Rot. Claus.*, p. 225 (17 John membrane 31). The evidence of this writ does not stand alone. In another writ on the same membrane of the *Close Rolls*, dated 19th June, John informs his half-brother, the Earl of Salisbury, that he has concluded peace, and instructs him to restore certain lands and castles immediately, as this had been made a condition of peace. See also the writ to Stephen Harengod *infra*, p. 49.

43. Blackstone, however (*Great Charter*, xv.), speaks of a "conference which lasted for several days, and did not come to a conclusion till Friday, the 19th June."

44. Miss Norgate, *John Lackland*, p. 234, acquiesces in the view generally received, fixing Monday as the day on which the final concord was arrived at, but she relies for evidence on a more than doubtful interpretation of what is undoubtedly an error in the copy of a writ by King John appearing on the *Patent Rolls*. This writ, which as copied in the *Rolls* bears to be dated 18th June (erroneously as will immediately be shown), is addressed to Stephen Harengod (in terms closely resembling those of the writ already cited from the *Close Rolls* addressed to William of Cantilupe), announcing *inter alia* that terms of peace had been agreed upon "last Friday." Miss Norgate contends with reason that there must be a mistake somewhere, since on the Friday preceding the 18th, negotiations had not even begun. She is confident that "the 'die Veneris' which occurs three times in the writ is in each case an unquestionable, though unaccountable, error for 'die Lunae.'" Yet, it is unlikely that a scribe writing three days after so momentous an event could have mistaken the day of the week. It is infinitely more probable that in writing xxiij. he formed the second "x" so carelessly that it was mistaken by the enrolling clerk for a "v." The correct

date is thus the 23rd, and the reference is to Friday the 19th. This presumption becomes a certainty by comparison with the words of the writ to William of Cantilupe, dated the 21st (of the existence of which Miss Norgate was probably not aware).

45. Blackstone, *Great Charter*, xviii., has given a careful analysis of the points of difference.

46. *E.g.* chapters 48 and 52. For alterations directed against the trading classes, see chapters 12, 13, 35, and 41 *infra*.

47. Miss Norgate, *John Lackland*, 233, takes a different view, holding that the influence of Stephen Langton dates from an earlier period. The original articles "are obviously not the composition of the barons mustered under Robert Fitz-Walter," who could never have risen to "the lofty conception embodied in the Charter—the conception of a contract between King and people which should secure equal rights to every class and every individual in the nation." The correctness of this estimate is discussed *infra*.

48. No specimen of these Letters Testimonial is known to exist, but a copy is preserved on folio 234 of the *Red Book of the Exchequer*. See Appendix.

49. See *Rot. Pat.*, I. 180, and *Select Charters*, 306–7.

50. *New Rymer*, I. 133. See Appendix. It is undated, but must be later than the letters to sheriffs concerning election of twelve knights, to which it alludes.

51. *Rot. Pat.*, p. 181. As we have to depend for our knowledge of this important protest on one copy, engrossed on the back of a membrane of an official roll (No. 18 of John's 17th year), it is possible to doubt its genuineness; but it is unlikely to be purely a forgery.

52. See *Rot. Pat.* and *New Rymer*, I. 134.

53. See R. Wendover, III. 302-318.

54. *Great Charter*, p. xxi.

55. *Chron. Maj.*, II. 605-6.

56. Stubbs, *Const. Hist.*, II. 3.

57. The original bull with the seal of Innocent still attached is preserved in the British Museum (Cotton, Cleopatra E 1), and is carefully printed by Bémont, *Chartes des Libertés Anglaises*, p. 41. It may also be read *inter alia* in Rymer and in Blackstone.

58. The text is given by Rymer.

59. See Rymer, and Bémont, *Chartes*, xxv.

PART II.
FEUDAL GRIEVANCES AND MAGNA CARTA.

I. The Immediate Causes of the Crisis.

Many attempts have been made to explain why the storm, long brewing, broke at last in 1214, and culminated precisely in June of the following year. Sir William Blackstone[60] shows how carefully historians have sought for some one specific feature or event, occurring in these years, of such moment as by itself to account for the rebellion crowned for the moment with success at Runnymede. Thus Matthew Paris, he tells us, attributes the whole movement to the sudden discovery of Henry I.'s charter, long forgotten as he supposes, while other chroniclers agree in assigning John's inordinate debauchery as the cause of the civil dissensions, dwelling on his personal misdeeds, real and imaginary. "Sordida foedatur foedante Johanne, gehenna."[61] Blackstone himself suggests a third event, the appointment as Regent in John's absence of the hated alien and upstart, Peter des Roches, and his misconduct in that office.

There is absolutely no necessity to seek in such trivial causes the explanation of a great movement, really inevitable, the antecedents of which were deeply rooted in the past. The very success of Henry Plantagenet in performing the great task of restoring order in England, for effecting which special powers had been allowed to him, made the continuance of these powers to his successors unnecessary. From the day of Henry's death, if not earlier, forces were at work which only required to be combined in order to control the licence of the Crown. When the battle of order had been finally won—the complete overthrow of the rebellion of 1173 may be taken as a crucial date in this connection—the battle of liberty had, almost necessarily, to be begun. The clamant problem of the hour was no longer how to prop up the weakness of the Crown; but rather how to place restrictions on its unbridled strength.

We need not wonder that the crisis came at last, but rather why it was so long delayed. Events, however, were not ripe for rebellion before John's accession, and a favourable occasion did not occur previous to 1215. The doctrine of momentum accounts in politics for the long continuance of old institutions in a condition even of unstable equilibrium; an entirely rotten system of government may remain for ages until at the destined moment comes the final shock. John conferred a great boon on future generations,

when by his arrogance and by his misfortunes he combined against him all classes and interests in the community.

The chief factor in the coalition which ultimately triumphed over John was undoubtedly the baronial party led by those strenuous nobles of the north, who were, beyond doubt, goaded into active opposition by their own personal and class wrongs, not by any altruistic promptings to sacrifice themselves for the common good. Their complaints, too, as they appear reflected in the imperishable record of Magna Carta, are mainly grounded on breaches of the technical rules of feudal usage, not upon the broad basis of constitutional principle.

The feudal grievances most bitterly resented may be ranged under one or other of two heads—increase in the weight of feudal obligations and infringement, of feudal jurisdictions. The Crown, while it exacted from its tenants the fullest measure of services legally exigible, interfered persistently at the same time with those rights and privileges which had originally balanced the obligations. The barons were compelled to give more, while they received less.

With the first group of baronial grievances posterity can sympathize in a whole-hearted way, since the increase of feudal obligations inflicted undoubted hardships on the Crown tenants, while the redress of these involved no real danger to constitutional progress. One and all of the grievances included in this first group could be condemned (as they were condemned by various chapters of Magna Carta) without unduly reducing the efficiency of the monarchy which still formed under John, as it had done under William I., the sole source of security against the dangers of feudal anarchy. Posterity, however, cannot equally sympathize with the efforts of the barons to redress their second class of wrongs. However great may have been the immediate hardships inflicted on members of the aristocracy by the suppression of their feudal courts, lovers of constitutional progress can only rejoice that all efforts to restore them failed. Those clauses of Magna Carta which aimed at reversing the great currents flowing towards royal justice, and away from private baronial justice, produced no permanent effect, and posterity has had reason to rejoice in their failure.

Each group of feudal grievances—those connected with the increase of feudal obligations, and those connected with the curtailment of feudal immunities—requires special and detailed treatment.[62] To each class a double interest attaches, since the resentment aroused by both formed so

vital an element in the spread of that spirit of determined resistance to King John, which led to the winning of Magna Carta, and since, further, an intimate knowledge of the exact nature of these grievances throws a flood of light on many otherwise obscure clauses of the Great Charter, and enables us to estimate how far the promised remedies were ultimately carried into practice in later reigns.

The grievances of the barons, many and varied as they were, were not, however, the only wrongs calling for redress. It is probable that the baronial party, if they had acted in isolation from the other estates of the realm, would have failed in 1215 as they had already failed in 1173. If the Crown had retained the active sympathy of Church and common people, John might have successfully defied the baronage as his father had done before him. He had, on the contrary, alienated from the monarchy all estates and interests, and had broadened the basis of opposition to the throne by ill-treating the mercantile classes and the peasantry who, from the reign of William I. to that of Henry II., had remained the fast, if humble, friends of the Crown. The order-loving tradesmen of the towns had been previously willing to purchase protection from Henry at the price of heavy, even crushing taxation; but when John continued to exact the price, and yet failed to furnish good government in return, his hold on the nation was completely lost. So far from protecting the humble from oppression, he was himself the chief central oppressor, and he let loose, besides, his foreign officers and favourites as petty local oppressors in all the numerous offices of sheriff, castellan, and bailiff. Far from using the perfected machinery of Exchequer, Curia, and local administration in the interests of good government, John valued them merely as instruments of extortion and outrage—as ministers to his lust and greed.

The lower orders were by no means exempt from the increased taxation which proved so galling to the feudal tenants. When John, during his quarrel with Rome, repaid each new anathema of the Pope by fresh acts of spoliation against the national Church, the sufferings of the clergy were shared by the poor. In confiscating the goods of the monasteries, he destroyed the chief provision for poor-relief known to the thirteenth century. The alienation of the affections of the great masses of lower-class Englishmen thus effected was never wholly undone, even by the reconciliation of John with the Pope. Notwithstanding the completeness and even abjectness of John’s surrender to Rome, he took no special pains to

reinstate himself in the good graces of the Church at home. Innocent, secure at the Lateran, had issued his thunderbolts; and John's counter-strokes had fallen, not on him, but on the English clergy—from the prelate to the parish priest, from the abbot to the humblest monk. The measures taken, in 1213 and afterwards, to make good to these victims some part of the heavy losses sustained, were quite inadequate. The interests of the Church universal were often widely different from those of the national Church, and such diversity was never more clearly marked than in the last years of the reign of John.

After 1213, John's alliance with Rome brought new dangers in its train. The united action of two tyrants, each claiming supreme powers, lay and spiritual respectively, threatened to exterminate the freedom of the English nation and the English Church. "The country saw that the submission of John to Innocent placed its liberty, temporally and spiritually, at his mercy; and immediately demanded safeguards."[63]

This union of tyrants naturally led to another union which checkmated it, for the baronial opposition allied itself with the ecclesiastical opposition. The urgency of their common need thus brought prelates and barons into line—for the moment. The necessary leader was found in Stephen Langton, who succeeded in preventing the somewhat divergent interests of the two estates from leading them in opposite directions.

All things were thus ripe for rebellion, and even for *united* rebellion; an opportunity only was required. Such an opportunity came in a tempting form in 1214; for the King had then lost prestige and power by his failure in the wars with France. He had lost the confidence of his subjects by his quarrel with Rome, and he failed to regain it by his reconciliation. He had lost the friendship of the national Church. His unpopularity and vacillating nature had been thoroughly demonstrated. Finally he had himself, in 1191, when plotting against his absent brother Richard, successfully attacked and ousted the Regent Longchamp from office, thus furnishing an example of rebellion, and of successfully concerted action against the central government.

The result was that, when the barons—the wildest spirits of the northern counties taking always the lead—began active operations at a juncture of John's fortunes most favourable to their aspirations, not only had they no opposition to dread from churchman or merchant, from yeoman or peasant, but they might count on the sympathy of all and the active co-operation of many. Further, John's policy of misrule had combined against him two

interests usually opposed to each other, the party of progress and the party of reaction. The influence of each of these may be clearly read in the various chapters of Magna Carta.

The progressive party consisted mainly of the heads of the more recently created baronial houses, men trained in the administrative methods of Henry II., who desired merely that the system of government they knew should be properly enforced and carried out to its logical conclusions. They demanded chiefly that the King should conduct the business of the Exchequer and Curia according to the rules laid down by Henry II. Routine and order under the new system were what this party desired, and not a return to the unruly days of Stephen. Many of the innovations of the great Angevin had now been loyally and finally accepted by all classes of the nation; and these accordingly found a permanent resting-place in the provisions of the Great Charter. In temporary co-operation with this party, the usually rival party of reaction was willing to act for the moment against the common enemy. There still existed in John's reign magnates of the old feudal school, who hoped to wrest from the weakened hand of the King some measure of feudal independence. They had indeed accepted such reforms as suited them, but still bitterly opposed many others. In particular, they resisted the encroachments of the royal courts of law which were gradually superseding their private jurisdictions. For the moment, John's crafty policy, so well devised to gain immediate ends, and so unwise in the light of subsequent history, combined these two streams, usually ready to thwart each other, into a united opposition to his throne. Attacked at the same moment by the votaries of traditional usage and by the votaries of reform, by the barons, the trading classes, and the clergy, no course was left him but to surrender at discretion. The movement which culminated at Runnymede may thus best be understood as the resultant of a number of different but converging forces, some of which were progressive and some reactionary.

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60. *The Great Charter*, p. vii.

61. Several of the most often-repeated charges of personal wrongs inflicted by King John upon the wives and daughters of his barons have been in recent years refuted. See Miss Norgate, *John Lackland*, p. 289.

62. See *infra* the two sections (II. and III.) immediately following.

63. Stubbs, *Select Charters*, 270.

II. The Crown and Feudal Obligations.

Among the many evils calling loudly for redress in England at the commencement of the thirteenth century, none spoke with more insistent voice than those connected with feudal abuses. The objection of the northern barons to pay the scutage demanded on 26th May, 1214, was the spark that fired the mine. The most prominent feature of the Charter is the solicitude everywhere displayed to define the exact extent of feudal services and dues, and to prevent these from being arbitrarily increased. A somewhat detailed knowledge of feudalism and feudal obligations forms a necessary preliminary to any exact study of Magna Carta.

The precise relations of the Norman Conquest to the growth of feudalism in England are complicated, and have formed the subject of much controversy. The view now generally accepted, and with reason, is that the policy of William the Conqueror accelerated the process in one direction, but retarded it in another. Feudalism, regarded as a system of government, had its worst tendencies checked, if not eradicated, by the great upheaval that followed the coming of Duke William; feudalism, considered as a system of land tenure, and as a social system, was, on the contrary, formulated and developed. It is mainly as a system of land tenure that it falls here to be considered. Originally, the relationship between lord and tenant, dependent upon the double ownership of land (of which each was, in a different sense, the proprietor), implied obligations on both sides. The lord gave protection, while the tenant owed services of various sorts. It so happened, however, that, with the changes wrought by time, the legal obligations of the lord ceased to be of much importance, while those of the vassal became more and more burdensome. The tenant's obligations varied in kind and in extent with the nature of the tenure. It is difficult to frame an exact list of the various tenures formerly recognized as distinct in English law: partly because the classical authors of different epochs, from Bracton to Blackstone, contradict each other; and partly because of the obscurity of the process by which these tenures were gradually differentiated. The word "tenure" originally meant "a holding" of any sort. Sir William Blackstone, [64] after explaining the dependent nature of all real property in England, thus proceeds: "The thing holden is therefore styled a *tenement*, the

possessors thereof *tenants*, and the manner of their possession a *tenure*." Tenure thus comes to mean the conditions on which a tenant holds real estate under his lord, and the number of tenures varies with the number of accepted types.

The ancient classification differs materially from that in use at the present day. The modern English lawyer (unless of an antiquarian turn of mind) concerns himself only with three tenures: freehold (now practically identical with socage), copyhold and leasehold. The two last-mentioned may be rapidly dismissed, as they were of little importance in the eyes of Littleton, or of Coke: leasehold embraces only temporary interests, such as those of a tenant-at-will or for a limited term of years; while copyhold is the modern form of tenure into which the old unfree villeinage has slowly ripened. The ancient writers were, on the contrary, chiefly concerned with holdings both permanent and free (as opposed to leaseholds on the one hand and villeinage on the other). Of such free tenures seven at least may be distinguished in the thirteenth century, all of which have now come to be represented by the same one of the three recognized modern tenures, namely, freehold or socage. The free holdings existing in medieval England may be ranged under the following heads, viz.: knight's service, free socage, fee-farm, frankalmoin, grand serjeanty, petty serjeanty, and burgage.

(1) *Knight's Service.* Medieval feudalism had many aspects; it was almost as essentially an engine of war as it was a system of land-holding. The normal return for which an estate was granted consisted of the service in the field of a specific number of knights. Thus the normal feudal holding was known as knight's service, or tenure in chivalry—the conditions of which must be constantly kept in view, since by these rules the relations between John and his recalcitrant vassals fell to be determined. When finally abolished at the Restoration, there fell with knight's service, it is not too much to say, the feudal system of land tenure in England. "Tenure by barony" is sometimes spoken of as a separate species, but may be more correctly viewed as a variety of tenure in chivalry.[65]

(2) *Free Socage.* The early history of socage, with its division into ordinary and privileged, is involved in obscurities which do not require to be unravelled for the purpose at present on hand. The services which had to be returned for both varieties were not military but agricultural, and their exact nature, and amount varied considerably. Although not so honourable

as chivalry, free socage was less burdensome in respect that two of the most irksome of the feudal incidents, wardship and marriage, did not apply. When knight's service was abolished those who had previously held their lands by it, whether under the Crown or under a mesne lord, were henceforward to hold in free socage, which thus came to be the normal holding throughout England after the Restoration.[66]

(3) *Fee-farm* was the name applied to lands held in return for services which were neither military nor agricultural, but consisted only of an annual payment in money. The "farm" thus indicates the rent paid, which apparently might vary without limit, although it was long maintained that a fee-farm rent must amount at least to one quarter of the annual value. This error seems to have been founded on a misconstruction of the Statute of Gloucester.[67] Some authorities[68] reject the claims of fee-farm to rank as a tenure separate from socage; although chapter 37 of Magna Carta seems to recognize the distinction.

(4) *Frankalmoin* is the tenure by which pious founders granted lands to the uses of a religious house. It was also the tenure on which the great majority of glebe lands throughout England were held by the village priests, the parsons of parish churches. The grant was usually declared to have been made *in liberam eleemosinam* or "free alms" (that is, as a free gift for which no *temporal* services were to be rendered).[69] In Scots charters the return formally stipulated was *preces et lacrymae* (the prayers and tears of the holy men of the foundation for the soul of the founder).

(5) *Grand serjeanty* was a highly honourable tenure sharing the distinctions and the burdensome incidents of knight's service, but distinct in this, that the tenant, in place of ordinary military duties, performed some specific office in the field, such as carrying the King's banner or lance, or else acted as his constable or marshal or other household officer in the palace, or performed some important service at the coronation.[70]

An often-quoted example of a serjeanty is that of Sir John Dymoke and his family, who have acted as the Sovereign's champions at successive coronations from Richard II. to Queen Victoria, ready to defend the Monarch's title to the throne, if questioned, by battle in the ancient form.

Grand serjeanties were liable to wardship and marriage, as well as to relief, but not, as a rule, to payment of scutage.[71] William Aguilon, we are told by Madox,[72] "was charged at the Exchequer with several escuages. But when it was found by Inquest of twelve Knights of Surrey that he did

not hold his lands in that county by military tenure, but by serjeanty of finding a Cook at the King's coronation to dress victuals in the King's kitchen, he was acquitted of the escuages."

(6) *Petty serjeanty* may be described in the words of Littleton as "where a man holds his lands of our lord the king to yield to him yearly a bow or sword, or a dagger or a knife ... or to yield such other small things belonging to war."[73]

The grant of lands on such privileged tenures was frequently made in early days on account of the special favour entertained by the King for the original grantee, due, it might be, to the memory of some great service rendered at a critical juncture to the King's person or interests. A few illustrative examples may be cited from the spirited description of a scholar whose accuracy can be relied upon. Serjeanties, as Miss Bateson tells us, "were neither always military nor always agricultural, but might approach very closely the service of knights or the service of farmers.... The serjeanty of holding the King's head when he made a rough passage across the Channel, of pulling a rope when his vessel landed, of counting his chessmen on Christmas Day, of bringing fuel to his castle, of doing his carpentry, of finding his potherbs, of forging his irons for his ploughs, of tending his garden, of nursing the hounds gored and injured in the hunt, of serving as veterinary to his sick falcons, such and many other might be the ceremonial or menial services due from a given serjeanty."[74]

In the days before legal definition had done its work, it must often have been difficult to say on which side of the line separating Petty Serjeanties from Grand Serjeanties any particular holding fell. Gradually, however, important and practical distinctions were established, making it necessary that the boundary should be defined with accuracy. In particular, the rule was established that Petty Serjeanties, while liable for relief, were exempt altogether from the burdensome incidents of wardship and marriage, which Grand Serjeanties shared with lands held by ordinary Barony or Knight's service.[75] Thus the way was prepared for the practical identification of the Petty Serjeanties with ordinary socage at a later date.

(7) *Burgage*, confined exclusively to lands within free boroughs, is mentioned as a separate tenure by Littleton,[76] and his authority receives support from the words of chapter 37 of Magna Carta. Our highest modern authorities,[77] however, consider that it never acquired sufficiently distinct characteristics to warrant its acknowledgment as such. They treat it rather as

a special variety of socage, used where the tenants were the members of a corporation. If their opinion must be accepted for England, it follows that, from common antecedents, entirely different results have developed in Scotland and in England respectively. While, north of the Tweed, several of the well-established English tenures have failed to make good their right to separate recognition, burgage has established itself beyond a doubt. Even the levelling process consummated by the Conveyancing (Scotland) Act of 1874 has not entirely abolished its separate existence.

The explanation of such differences between English and Scottish usage easily suggests itself. When feudalism first took root, the various shades of distinction in the conditions of holding were exceedingly numerous, and merged into one another by imperceptible degrees. The work of definition came later, was essentially artificial in its nature, and assumed different forms in different lands.[78]

These tenures, originally six or seven (according as we exclude or include burgage), have yielded to the unifying pressure of many centuries. Frankalmoin and Grand Serjeanty still exist, but rather as ghosts than realities; the others have all been swallowed up in socage, which has thus become practically identical with "free-hold."[79] This triumph of socage is the result of a long process. Fee-farm, burgage, and petty serjeanty, always possessing many features in common, were gradually assimilated in almost all respects, while a statute (12 Charles II. c. 24) transformed tenure in chivalry also into socage. The once humble socage has thus risen high, and now embraces most of the land of England.[80]

The interest of historians naturally centres round tenure by knight's service, which is the very kernel of the feudal system. Lack of definition in the middle ages was a fruitful source of quarrel. For a century and more after the Norman Conquest, the exact amount and nature of the military services due by a tenant to his lord were left vague and undetermined. The early Norman Kings had gradually superseded the old Anglo-Saxon Crown tenants by new ones of Norman or French extraction, without formulating any code of regulations for the future. The whole of England had thus been carved into a number of estates—the larger known as honours or baronies, and the smaller as manors. Each Crown tenant (with two exceptions, of which the Conqueror's favourite foundation of Battle Abbey was one) held his lands on condition of furnishing a certain number of fully armed and mounted soldiers, always ready to obey the King's summons in the event of

war. High authorities differ as to when and by whom the amount of each vassal's service was fixed. The common view (promulgated by Prof. Freeman[81] with his usual vehemence), attributes the allocation of specific service to Ranulf Flambard, the unscrupulous tool of William Rufus. Mr. J. H. Round[82] has recently urged convincing reasons in support of the older view which attributes it to William I. Two facts, apparently, are certain: that within half a century from the Conquest each military tenant was burdened with a definite amount of knight's service; and, further, that no formal record of the amount of such service was made at the time. There were, as yet, no written charters, and thus the possibility of disputes remained. Probably such grants would be made in full *Curia*, and the only record of the conditions would lie in the memory of the Court itself.

Long before the date of Magna Carta, the various obligations had been grouped into three classes, which may be arranged according to their relative importance, as *services*, *incidents*, and *aids*. Under each of these three heads, disputes continually arose between the lord who exacted and the vassal who rendered them.[83]

The very essence of the feudal relation between the King as overlord and the Crown tenant as vassal consisted in the liability of the latter to render "suit and service," that is, to follow his lord's banner in time of war, and to attend his court in time of peace. It will be more convenient, however, to reserve full consideration of these services until the comparatively uncomplicated obligations known as incidents and aids have been first discussed.

I. *Feudal Incidents.* In addition to "suit and service," the lord reaped, at the expense of his tenants, a number of casual profits, which thus formed irregular supplements to his revenue. These profits, accruing, not annually, but on the occurrence of exceptional events, came to be known as "feudal incidents." They were gradually defined with more or less accuracy, and their number may be given as six, viz.:

Reliefs, Escheats, Wardships, Marriages, Primer seisins, and Fines for Alienation.[84]

(*a*) *Relief* is easily explained. The fee, or *feudum*, or hereditary feudal estate, seems to have been the result of a gradual evolution from the old *beneficium* (or estate held merely for one lifetime), and that again from the older *precarium* (or estate held only during the will of the overlord). Grants of land, originally subject to revocation by the lord, had gradually attained

fixity of tenure throughout the life of the original grantee; and, later on, they became transmissible to his descendants. The hereditary principle at last completely triumphed; the Capitulary of Kiersey (A.D. 877) is said to be the first authoritative recognition of the heir's absolute right to succeed. The process was a gradual one, and it would seem that even after the Norman Conquest, this rule of hereditary descent was not established beyond possibility of dispute.[85] This right of the heir to succeed always remained subject to one condition, namely, the payment of a sum of money known as "relief." This was theoretically an acknowledgment that the new tenant's right to ownership was incomplete, until recognized by his superior—a reminiscence of the earlier *precarium* from which the *feudum* had developed.

Relief, then, is the sum payable to a feudal overlord by an heir for recognition of his title to succeed the last tenant in possession. The amount remained long undefined, and the lord frequently asked exorbitant sums.[86]

(*b*) *Escheat*, it has been said, "signifies the return of an estate to a lord, either on failure of issue from the tenant or upon account of such tenant's felony."[87] This lucid description conveys a good general conception of escheat; but it is inaccurate in at least two respects. It does not exhaust the occasions on which escheat occurs, and it errs in speaking of "the return" of an estate to a lord, when, more accurately, that estate had never left him, but always remained his property, subject only to a burden, which was now removed. In theory, the feudal grant of lands was always conditional; and when the condition was broken, the grant fell, and the lord found himself, automatically as it were, once more the absolute unburdened proprietor, as he had been before the grant was made. Thereafter, he held the land in demesne, unless he chose to make a new grant to another tenant. The word "escheat" was applied indifferently to the lord's right to such reversions, and to the actual lands which had thus reverted. In warlike and unsettled times the right was a valuable one, for whole families might become rapidly extinct. When the last tenant left no heir, it was obvious that the original grant had exhausted itself. Similarly, when a landholder was convicted of felony, his blood became, in the phrase of a later day, attainted, and no one could succeed to any estate through him. If a man failed in the ordeal of water provided by the Assize of Clarendon in 1166 for those accused of heinous crimes, his estates also escheated to his lord. It is true that a complication arose when it was of treason that the tenant had been

convicted. In that case the king, as the injured party, had prior rights which excluded those of the lord. The lands of traitors were forfeited to the Crown. Even in the case of felony the king had a limited right to the lands during a period which was strictly defined by Magna Carta.[88]

The tenant's felony and failure of issue were the two main grounds of escheat, but not the only ones; the goods of fugitives from justice and of those who had been formally outlawed also escheated, and Glanvill adds another case,[89] namely, female wards guilty of unchastity (an offence which spoiled the king's market). Failure to obey a summons to the feudal levy in time of war might also be made a ground of forfeiture.[90]

Escheat was thus a peculiarly valuable right both to the Crown and to mesne lords. Its effect was simply this: one link in the feudal chain was struck out, and the links on either side were fitted together. If the defaulter was a Crown tenant, all his former sub-tenants, whether freeholders or villeins, moved up one rung in the feudal ladder and held henceforward directly of the king, who enjoyed the entire complexus of legal rights previously enjoyed by the defaulter in addition to those previously enjoyed by himself: rents, crops, timber, casual profits, and advowsons of churches falling vacant; jurisdictions and the profits of jurisdictions; services of villeins; reliefs, wardships, and marriages of freeholders as these became exigible.

The Crown, however, while taking everything the defaulter might have taken before default, must take nothing more—so at least Magna Carta[91] provides. The rights and status of innocent sub-tenants must not be prejudiced by the misdeeds of their defaulting mesne lord.

(*c*) *Wardships* are described in the *Dialogus de Scaccario* as "escheats along with the heir" (*escaeta cum herede*).[92] This expression does not occur elsewhere, but it would be impossible to find any description of wardship which throws more light on its nature and consequences. When the heir of a deceased tenant was unfitted to bear arms by reason of his tender years, the lands were practically, during his minority, without an effective owner. The lord accordingly treated them as temporarily escheated. During the interval of nonage, the lord entered into possession, drew the revenues, and applied them to his own purposes, subject only to the obligation of maintaining and training the heir in a manner suited to his station in life. Frequently, considerable sums were thus spent. The *Pipe Roll* of the seventeenth year of Henry II. shows how out of a total revenue of

£50 6s. 8d. from the Honour of “Belveeir,” £18 5s. had been expended on the children of the late tenant.[93] Wardship came to an end with the full age of the ward, that is, in the case of a military tenant, on the completion of his twenty-first year, “in that of a holder in socage on the completion of the fifteenth, and in the case of a burgess when the boy can count money, measure cloth, and so forth.”[94] Wardship of females normally ended at the age of fourteen, "because that a woman of such age may have a husband able to do knight’s service."[95]

All the remunerative consequences flowing from escheat flowed also from wardship—rents, casual profits, advowsons, services of villeins, and reliefs. Unlike escheats, however, the right of the Crown here was only temporary, and Magna Carta sought[96] to provide that the implied conditions should be respected by the Crown’s bailiffs or nominees. The lands must not be wasted or exhausted, but restored to the young owner when he came of age in as good condition as they had been at the commencement of the wardship.

One important aspect of this right ought to be specially emphasized. The Crown’s wardship affected bishoprics as well as lay baronies, extending over the temporalities of a See between the death of one prelate and the instalment of his successor. Thus, it was to the king’s interest to place obstacles in the way of all appointments to vacant sees, since the longer the delay, the longer the Exchequer drew the revenues and casual profits.[97]

This right was carefully reserved to the Crown, even in the very comprehensive charter in which John granted freedom of election, dated 21st November, 1214.[98]

(*d*) *Marriage* as a feudal incident belonging to the lord is difficult to define generally, since its meaning changed. Originally it seems to have implied little more than the right of a lord to forbid an heiress, holding a fief under him, to marry a personal enemy, or some one otherwise unsuitable. Such veto was only reasonable, since the husband of the heiress would become the owner of the fee and the tenant of the lord. This negative right had almost necessarily a positive side; the claim to concur in the choice of a husband gradually expanded into an absolute right of the lord to dispose by sale or otherwise of the lands and person of his female ward. The prize might go as a bribe to any unscrupulous gentleman of fortune who placed his sword at the King’s disposal, or it might be made the subject of auction to the highest bidder. The lady passed as a mere adjunct to her own estates,

and ceased, strictly speaking, to have any voice in choosing a partner for life. She might protect herself indeed against an obnoxious husband by outbidding her various suitors. Large sums were frequently paid for leave to marry a specified individual or to remain single.

This right seems, at some uncertain date, to have been extended from females to males, and instances of sums thus paid occur in the *Pipe Rolls*. It is difficult at first sight to imagine how the Crown found a market for such wares as male wards; but probably wealthy fathers were ready to purchase desirable husbands for their daughters. Thus in 1206 a certain Henry of Redeman paid forty marks for the hand and lands of the heir of Roger of Hedon, "*ad opus filiae suae*,"[99] while Thomas Basset secured a prize in the person of the young heir of Walerand, Earl of Warwick, to the use of any one of his daughters.[100] This extension to male heirs is usually explained to have been founded on a strained construction of chapter 6 of Magna Carta, but the beginnings of the practice can be traced much earlier than 1215.[101] The lords' right to sell their wards was recognized and defined by the Statute of Merton, chapter 6. The attempts made to remedy some of the most serious abuses of the practice may be read in Magna Carta.[102]

Mr. Hallam[103] considers that "the rights, or feudal incidents, of wardship and marriage were nearly peculiar to England and Normandy," and that the French kings[104] never "turned this attribute of sovereignty into a means of revenue."

(*e*) *Primer Seisin*, which is usually regarded as a separate incident, and figures as such in Blackstone's list, is perhaps better understood, not as an incident at all, but rather as a special procedure—effective and summary—whereby the Crown could enforce the four incidents already described. It was an exclusive prerogative of the Crown, denied to mesne lords.[105] When a Crown tenant died, the King's officers had the right to enter upon immediate possession, and to exclude the heir, who could not touch his father's lands without specific permission from the Crown. He had first to prove his title by inquest, to give security for any balance of relief and other debts unpaid, and to perform homage.[106] It will be readily seen what a strong strategic position all this assured to the King in any disputes with the heir of a dead vassal. If the Exchequer had doubtful claims against the deceased, its officials could satisfy themselves before admitting the heir to possession. If the heir showed any tendency to evade payment of feudal incidents, the Crown could checkmate his moves. If the succession was

disputed, the King might favour the claimant who pleased or paid him most; or, under colour of the dispute, refuse to disgorge the estate altogether—holding it in custody analogous to wardship, and meanwhile drawing the profits. If the son and heir happened to be from home when his father died, he would probably experience great difficulty, when he returned, in forcing the Crown to restore the estates. Such was the experience of William Fitz-Odo on returning from Scotland in 1201 to claim his father's carucate of land in Bamborough.[107] Primer seisin was thus not so much a separate incident, as a right peculiar to the Crown to take summary measures for the satisfaction of all incidents or other claims against a deceased tenant or his heir. Magna Carta admitted this prerogative whilst guarding against its abuse.[108]

(*f*) *Fines for alienation* occupy a place by themselves. Unlike other incidents already discussed, they became exigible not on the tenant's death, but on his wishing to part with his estate to another during his own lifetime, either as a gift or in return for a price. How far could he effect this without consent of his lord? This was, for many centuries, a subject of frequent and heated disputes, often settled by compromises, in which the tenant paid a fine to the lord for permission to sell. Such fines are payable at the present day in Scotland (under the name of "compositions") from feus granted prior to 1874; and, where no sum has been mentioned in the Feu Charter, the law of Scotland defines the amount exigible as one year's rent. John's Magna Carta contains no provisions on this subject. Disputes, long and bitter, took place later in the thirteenth century; but their history is irrelevant to the present inquiry.[109]

II. *Feudal Aids.* The feudal tenant, in addition to fulfilling all the essentials of the feudal relation and also all the burdensome incidents already enumerated, was expected to come to the aid of his lord in any special crisis or emergency. The help thus rendered was by no means reckoned as a payment to account of the other obligations, which had also to be paid in full. The additional sums thus given were technically known as "aids." At first, the occasions on which these might be demanded were varied and undefined. Gradually, however, they were limited to three. Glanvill,[110] indeed, mentions only two, namely, the knighting of the overlord's eldest son, and the marriage of his eldest daughter; but he intends these, perhaps, merely as illustrations rather than as forming an exhaustive list. Before the beginning of the thirteenth century the recognized aids were

clearly three—the ransoming of the king and the two already mentioned. This understanding was embodied in Magna Carta.[111]

A tradition has been handed down from an early date, that these aids were in reality voluntary offerings made by the tenant as a mark of affection, and forming no part of his legal obligations.[112]

This plainly became, however, a legal fiction, as regarded the aids acknowledged by customary law; the tenant dared not refuse to pay the recognized three. As regarded any further payments, it was by no means a fiction. When the Crown desired to exact contributions for any other reason, it required to obtain the consent of the *commune concilium*. This, for example, was done by Henry III. before taking an aid on the marriage of his eldest sister. The importance of the necessity for such consent can hardly be exaggerated in its bearing on the origin of the rights of Parliament.

The Great Charter, while confirming the tacit compromise arrived at by custom, whereby only the three aids might be taken without consent of the baronage, left the *amount* of such aids undefined, contenting itself with the extremely vague provision that they should be "reasonable." Examples of such payments, both before and after the Charter, are readily found in the Exchequer Rolls. Thus, in the fourteenth year of Henry II., that king took one mark per knight's fee on marrying his daughter Maud to the Duke of Saxony. Henry III. took 20s. and Edward I. 40s. for a similar purpose. For Richard's ransom, 20s. had been exacted from each knight's fee (save those owned by men actually serving in the field); and Henry III. took 40s. in his thirty-eighth year at the knighting of his son. Probably there existed, at an early date, some understanding as to the limits within which "reasonableness" should be reckoned, but the amount was never stated in black and white before the third year of Edward I. The Statute of Westminster I.[113] fixed the "reasonable" aid payable, not to the Crown but, to mesne lords at 20s. per knight's fee, and 20s. for every estate in socage of £20 annual value. This rate, it will be observed, is one-fifth of the knight's relief.[114] The Crown, in thus enforcing "reason" on mesne lords, seems never to have intended that the same limit should hamper its own dealings with Crown tenants, but continued to exact larger sums whenever it thought fit.[115]

Thus £2 per fee was taken in 1346 at the knighting of the Black Prince. A Statute of Edward III.[116] at last extended to the Crown the same measure of "reasonableness" as had been applied three-quarters of a century earlier to

mesne lords. The last instances of the exaction of aids in England occur as late as the reign of James I., who, in 1609, demanded one for the knighting of the ill-fated Prince Henry, and in 1613 another for the marriage of his daughter Elizabeth to the Prince of Orange.

III. *Suit and Service.* This phrase expresses the essential obligations inherent in the very nature of the feudal relation. It may be expanded (as regards tenure in chivalry) into the duty of attendance at the lord's court, whether it met for administrative or judicial purposes, or for reasons of mere display, and the further duty of military service under that lord's banner in the field. Suit, or attendance at court, had ceased to be an urgent question before the reign of John. Indeed, the barons, far from objecting to be present there, were gradually approaching the modern conception, which regards it as a privilege rather than a burden to attend the *commune concilium*—the embryo Parliament—of the King. They urged, in especial, that only in a full feudal court, at which each great Crown tenant had a right to appear, could any one of their number be judged in a plea involving loss of lands or of personal status.[117]

It was far otherwise with the duties of military service, which were rendered every year more unwillingly, partly because of the increased frequency of warlike expeditions, partly because of the greater cost of campaigning in distant lands like Poitou, partly because the English barons were completely out of sympathy with John's foreign policy and with him. We have seen that the want of definition and looseness of practice in the reign of William the Conqueror left to future ages a legacy fertile in disputes. William I. and his barons lived in the present; and the present did not urgently call for definition. Therefore, the exact duration of the military service to be rendered, and the exact conditions (if any) on which exemption could be claimed, were left originally quite vague. Such carelessness is easily explained. Both Crown and barons hoped that by leaving matters undefined, they would be able to alter them to their own advantage. This policy was sure to lead to bitter quarrels in the future, but circumstances delayed their outbreak. The magnates at first readily followed William to the field wherever he went, since their interests were identical with his, while warfare was their normal occupation.

The exact amount of military service was gradually fixed by custom, and both sides acquiesced in reckoning the return due (*servitium debitum*) for each knight's fee or *scutum* as the service of one fully armed horseman

during forty days. There were still, however, innumerable minor points on which disputes might arise, and these remained even in 1215. Indeed, although several chapters of the Great Charter attempted to settle certain of these disputed points, others were left as bones of contention to subsequent reigns: for example, the exact equipment of a knight; the liability to serve for more than forty days on receiving pay for the extra time; what extent of exemption (if any) might be claimed by churchmen holding baronies on the ground that they could not fight in person; how far a tenant might compromise for actual service by tendering money; whether attendance and money might not both be refused, if the King did not lead his forces in person; and whether service was equally due from all estates for foreign wars as for home ones.[118]

Such difficulties were increased, as time went on, rather than removed. The Conqueror's followers had possessed, like their lord, estates on both sides of the Channel: his wars were theirs. Before John's reign, these simple relations had become complicated by two considerations. By forfeitures and the division of inheritances between sons of one father, holders of English fiefs and holders of Norman fiefs had become distinct; the English barons had in 1213 nothing at stake in the Crown's selfish schemes of aggrandisement or defence. The England of John Lackland, like the England of William of Orange, objected to be entangled in foreign wars in the interests of foreign possessions of the King. On the other hand, the gradual expansion of the dominions of the wearers of the English Crown increased the number of their wars with the number of their interests, and increased, too, the trouble and expense of each expedition. The small wars with Wales and Scotland formed a sufficient drain on the resources of English magnates without their being summoned in intermediate years to fight in Maine or Gascony. The greater number of campaigns might well be reckoned a breach of the spirit of the original agreement.

Were the barons bound to follow John in a forlorn attempt, of which they disapproved, to recover his lost fiefs from the French Crown? Or were they bound to support him only in his legitimate schemes as King of England? Or were they, by way of compromise, liable for services in the identical possessions held by William the Conqueror at the date when their ancestors first got their fiefs—that is, for wars in England and Normandy alone? Tenderness for legal subtleties or strict logic could hardly be expected from the malcontents of the northern counties, smarting under a dumb sense of

wrong. Despising all nice definition, they declared roundly in 1213 that they owed no service whatsoever out of England.[119] This extreme claim put them clearly in the wrong, since John had many precedents to the contrary ready to lay before them. When the King, on his return from his unfortunate expedition in 1214, demanded a scutage from all who had not followed him to Poitou, the malcontents declared that they had no obligation either to follow him out of the kingdom, or to pay a scutage in lieu thereof.[120] Pope Innocent was probably correct in condemning this contention as founded neither on English law nor on feudal custom.[121] There is some ground for believing that a compromise was mooted on the basis that the barons should agree to serve in Normandy and Brittany, as well as in England, on being exempted from fighting elsewhere abroad.[122]

A definite understanding on this vital question was never arrived at—not even on paper, since chapter 16 of Magna Carta contented itself with the bald provision that existing services were not to be increased (without defining what these were). This was merely to shelve the difficulty: the dispute went on under varying forms and led to a violent clashing of wills in the unseemly wrangle between Edward I. and his Constable and Marshal, dramatized in a classic passage by Walter of Hemingburgh.[123] Strangely enough, the *Confirmatio Cartarum* of 1297, which was, in part, the outcome of this later quarrel, omits (like Magna Carta itself)[124] all reference to foreign service. The total omission from both charters of all mention of the chief cause of dispute is noteworthy. It must be remembered, however, that the question of liability to serve abroad had practically resolved itself into that of liability to scutage, and that chapters 12 and 14 of the Charter of 1215 provided an adequate check on the levy of all scutages; but this is a subject of crucial importance, which requires separate and detailed treatment.

IV. *Scutage.* The Crown did not always insist on actual personal service, but was frequently willing to accept a commutation in the form of a money payment. This subject of scutage is one of the most vexed of questions; all received opinions of yesterday having to-day been thrown into the melting pot. Serious attempts constructively to restate the whole subject have hardly been made; and no conclusions have yet received general acceptance.

Three modifications, however, of the theories of Stubbs and Freeman, once universally accepted, seem likely to be soon established: (1) that "scutage" is an ambiguous term with a vague general meaning as well as a

narrow technical meaning; (2) that the importance of the changes introduced by Henry II. in 1156 and 1159 has been much exaggerated; and (3) that at a later time, probably during John's reign, scutage changed its character. It ceased to be normally a commutation of service, since it was not infrequently exacted by the Crown in *addition* to military service actually performed. Each of these propositions requires explanation.

"Scutagium," or "shield-money," often means, it is true, a specific sum of so much per knight's fee (normally twenty shillings) accepted by the King in lieu of the personal service in his army due by his tenants *in capite*. Thus it is, as Dr. Stubbs explains, "an honourable commutation for personal service";[125] but it is also loosely used[126] to denote any exaction whatsoever assessed on a feudal basis (that is, taken exclusively from holders of fiefs) irrespective of the occasion of its levy. Thus, money taken in name of one of the three feudal *aids* is sometimes described as a scutage; and other instances might be cited.

Again, learned opinion tends towards the belief that Henry II. made no radical or startling alteration. Professor Freeman, Dr. Stubbs, and their adherents familiarized a bygone generation of historians with the view that one of Henry's most important reforms was to allow his Crown tenants at their discretion to substitute payments in money for the old obligation of personal service in the field—this option being granted to ecclesiastics in 1156, and to lay barons in 1159. Such a theory had *a priori* much to recommend it. A measure of this nature, while giving volume and elasticity to the resources of the Crown, was calculated subtly to undermine the basis of the feudal tie; but Henry, farseeing statesman as he was, could not discard the ideals of his own generation. No evidence that he made any sweeping change is forthcoming. His grandfather, Henry I., is shown by the evidence of extant charters to have accepted money in place of the services of knights *when it suited him* (notably from church fiefs in 1109),[127] and there is no evidence (direct or indirect) to show that the grandson accepted such commutation *when it did not suit him*. The conclusions formulated, with his usual energy, by Mr. J. Horace Round, lie implicitly in the examples from the *Pipe Rolls* stored in the great work of Madox. From these it would appear that the procedure of the Exchequer of the great Angevin and his two sons might be explained in some such propositions as these:

(*a*) The option to convert service into scutage lay with the Crown, and not with the tenants, either individually or as a body. When the King summoned his feudal army no baron could (as Professor Freeman would have us believe) simply stay away under obligation of paying a small fixed sum to the Exchequer. On the contrary, Henry and his sons jealously preserved the right to insist on *personal* service whenever it suited them; even efficient substitutes were not always accepted, much less money payments.

(*b*) If the individual wished to stay at home he required to make a special bargain to pay such fine as the King agreed to accept—and sometimes he had to send a substitute in addition. The *Pipe Rolls* show many such payments by stay-at-homes *ne transfretent* or *pro remanendo ab exercitu*. Thus, in the twelfth year of John's reign a Crown tenant paid a fine "that he might send two knights to serve for him in the army of Ireland."[128]

Sometimes, indeed, Henry II. might announce that payments at a certain rate would be accepted generally in lieu of service, but this was when it suited him, not when it suited his military tenants. In this connection twenty shillings per fee became recognized as a usual, though by no means a necessary, rate.

(*c*) In the ordinary case, if the tenant in chivalry neither went in person nor obtained leave from the Crown to stay away, he was in evil plight. Defaulters were "*in mercy*"; they sometimes forfeited their entire estates to the Crown,[129] and might be glad to accept such terms of pardon as a gracious King condescended to hold out to them. Sometimes, it is true, quite small amercements were inflicted; the Abbot of Pershore in 1196 escaped with an amercement of 40s.[130] Such leniency, however, was exceptional, and the result of special royal clemency.

The right to determine the amount of amercements to be taken lay within the province of the Barons of the Exchequer, who also judged whether or not lands had escheated by default.

Henry II. seems to have levied money in name of scutage only when actually at war—on seven occasions in all during a reign of thirty-five years; and only once at a rate exceeding 20s., if we may trust Mr. Round,[131] and that when he was putting forth a special effort against Toulouse. Richard I., with all his rapaciousness, levied, apparently, only four scutages during ten years, and the rate of 20s. was never exceeded even in the King's

hour of urgent need,—in 1194, when the arrears of his ransom had to be paid and preparations simultaneously made for war in Normandy.

At John's accession, then, three rules might be regarded as having all the prescriptive force of a long unbroken tradition, namely, (1) that scutage was a reserve for extraordinary emergencies, not a normal yearly burden; (2) that the recognized maximum was 20s. per knight's fee, while a lower rate (13s.4d. and even 10s.) had occasionally been accepted; and (3) that the payment of scutage to the King at a rate previously fixed by him acted as a complete discharge of all obligations due for that occasion.

If it can be proved that John, almost from his accession, deliberately altered all three of these well-established rules, and that too in the teeth of the keen opposition of a high-spirited baronage whose members felt that their pride and prestige as well as their money-bags were attacked, a distinct step is taken towards understanding the crisis of 1215. Such knowledge would explain why a storm, long brewing, burst in John's reign, neither sooner nor later; and even why some of the disreputable stories told by the chroniclers and accepted by Blackstone and others, found inventors and willing believers.

It is here maintained that John did make changes in all three directions; and, further, that the incidence of this increase in feudal burdens was rendered even more unendurable by two considerations:—because at his accession there remained unpaid (particularly from the fiefs of the northern knights) large arrears of the scutages imposed in his brother's reign,[132] and because in June, 1212, John drew the feudal chain tight by a drastic and galling measure. In that month he instituted a strict inquest into the amount of feudal service exigible from every estate in England, to prevent any dues escaping his wide net, and to revive all services and payments that had lapsed or were in danger of lapsing.

That he made the first two changes becomes a certainty from a glance at the table of scutages actually extorted during his reign, as these are here copied from a list compiled by a writer of authority who has no special theory to support,[133] viz.:

First scutage of reign—	1198-9—	2	marks per knight's fee.
Second " "	1200-1	2	" "

Third	"	"	1201-2	2	"	"
Fourth	"	"	1202-3	2	"	"
Fifth	"	"	1203-4	2	"	"
Sixth	"	"	1204-5	2	"	"
Seventh	"	"	1205-6	20s.		"
Eighth	"	"	1209-10	2	marks	"
Ninth	"	"	1210-11	2	"	"
Tenth	"	"	1210-11	20s.		"
Eleventh	"	"	1213-14	3	marks	"

It will be seen that, in the very first year of his reign, John took a scutage, and that, too, at a rate above the established normal, at two marks per *scutum* (only once equalled, thirty years before, and then under special circumstances). Even one such exaction must have made the already sulky Crown tenants look askance.

Next year John wisely allowed them breathing space; then without a break in each of the third, fourth, fifth, sixth and seventh years of his reign, scutages were extorted in quick succession at the high rate of two marks. If John meant to establish this as a new normal rate, he did so not without some show of reason, since that would exactly pay the wages of a knight at 8d. *per diem* (the rate then current), for a period of forty days (the exact term recognized by public opinion as the maximum of compulsory feudal service).

Fines, in addition to this scutage of two marks, were apparently exacted from those who had not made the necessary compromise for personal service in due time.[134]

These scutages were collected with increasing difficulty, and arrears gradually accumulated; but the spirit of opposition increased even more

rapidly. In 1206, apparently, the breaking point was almost reached.[135] Accordingly, in that year, some slight relaxation was allowed—the annual scutage was reduced from two marks to 20s. John's needs, however, were as great as ever, and would prevent all further concessions in future years, unless something untoward happened. Something untoward *did* happen in the summer of 1207, when John quarrelled with the Pope. This event came in time, not as John thought to *prevent*, but, as the sequel proved, merely to *postpone*, the crisis of the quarrel with the baronage. John had, for the time being, the whole of the confiscated property of the clergy in his clutches. The day of reckoning for this luxury was still far distant, and the King could meanwhile enjoy a full exchequer without goading his Crown tenants to rebellion. For three years no scutage was imposed. In 1209, however, financial needs again closed in on John, and a new scutage of two marks was levied; followed in the next year actually by two scutages, the first of two marks against Wales, and the second of 20s. against Scotland. John never knew when to stop. These three levies, amounting to a total of five-and-a-half marks per fee within two years, strained the tension almost to breaking point.

During the two financial years immediately following (Michaelmas, 1211, to Michaelmas, 1213) no scutage was imposed. John, however, although he thus a second time relaxed the tension, had no intention to do so for long. On the contrary, he determined to ascertain if scutages could not be made to yield more in the future. By writs, dated 1st June, 1212, he instituted a great Inquest throughout the land. Commissioners were appointed to take sworn verdicts of local juries as to the amount of liability due by each Crown vassal. Mr. Round[136] considers that previous writers have unaccountably ignored the importance of this measure, "an Inquest worthy to be named in future by historians in conjunction with those of 1086 and 1166,"[137] and describes it as an effort "to revive rights of the Crown alleged to have lapsed." It is possible that John, by this Inquest of 1212, sought also (unsuccessfully, as the sequel proved) to do what Henry had done successfully in 1166—that is, to increase the amount of knights' fees on which each Crown tenant's scutage was assessed by adding to the previous total the number of knights recently enfeoffed.

John clearly intended by this Inquest, the returns to which were due on the 25th June, 1212, to prepare the necessary machinery for wringing the

uttermost penny out of the next scutage when occasion for one again arose. That occasion came in 1214.

Up to this date, even John had not dared to exact a rate of more than two marks per knight's fee; but the weight of his constant scutages had been increased by the fact that he sometimes exacted personal services in addition, and that he inflicted crushing fines upon those who neither went nor arranged beforehand terms of composition with the King.[138]

Thus gradually and insidiously throughout the entire reign of John, the stream of feudal obligations by many different channels steadily rose until the barons feared that nothing of their property would be saved from the torrent. The normal rate of scutage had been raised, the frequency of its imposition had been increased, the conditions of foreign service had become more burdensome, and the objects of foreign expeditions more unpopular; while attempts were sometimes made to exact both service and scutage in the same year. The limit of the barons' endurance was reached when, on 26th May, 1214, John, already discredited by his unsuccessful expeditions in Poitou, soon to be followed by the utter overthrow of his allies at Bouvines, issued writs for a scutage at the unheard-of rate of three marks, grounded doubtless on the inquest of 1212 and unusually far-reaching in the subjects which it embraced.[139]

Then the final crash came; this writ was like a call to arms—a call not to follow the King's banner, but to fight against him.

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64. *Commentaries*, II. 59.

65. See Pollock and Maitland, *History of English Law*, I. 218.

66. See Statute 12 Charles II. c. 24.

67. See Pollock and Maitland, I. 274, n.

68. Pollock and Maitland, I. 218.

69. Littleton, II. viii. s. 133.

70. Littleton, II. viii. s. 153.

71. Littleton, II. viii. s. 158.

72. *History of Exchequer*, I. 650, citing *Pipe Roll* of 18 Henry III.

73. See Littleton, II. ix. s. 159. With this may be compared the definition given in chapter 37 of Magna Carta, where John speaks of land thus held by a vassal as “quam tenet de nobis per servitium reddendi nobis cultellos, vel sagittas vel hujusmodi.”

74. *Mediaeval England*, pp. 249-250. A similar tenure still exists in Scotland under the name of "blench"—a tenure wherein the reddendo is elusory, viz., the annual rendering of such small things as an arrow or a penny or a peppercorn, “if asked only” (*si petatur tantum*).

75. Littleton, II. viii. s. 158.

76. *Ibid.*, II. x. s. 162.

77. Pollock and Maitland, I. 218.

78. Littleton and Coke seem almost to countenance two additional tenures, viz., tenure by scutage or escuage, and tenure by Castle-guard. Pollock and Maitland consider both as alternative names for knight’s service. (See I. 251 and I. 257.) The latter is discussed *infra* under c. 29 of Magna Carta.

79. Jenks, *Modern Land Law*, p. 14.

80. It has been well described by Pollock and Maitland (I. 294) as “the great residuary tenure.” In Scotland the “residuary tenure” is not socage but “feu” (resembling the English fee-farm). Holdings in feu are still familiar to Scots lawyers. They are originated by a formal charter, followed by registration (the modern equivalent of infeftment or feudal investiture), thus preserving an unbroken connection with the feudal conveyancing of the Middle Ages.

81. *Norman Conquest*, V. 377; *Hist. of William Rufus*, 335–7.

82. *Feudal England*, p. 228 *et seq.*

83. All three forms of feudal obligation—service, incidents, and aids—have long been obsolete in England. The statute 12 Charles II. c. 24 swept away the feudal *incidents* along with the feudal system; centuries before, *scutages* in lieu of military *service* had become obsolete in the transition from the system of feudal finance to that of national finance, effected by the Crown in the thirteenth and fourteenth centuries. Feudal *aids* were also long obsolete, although James I., in desperate straits for money, had attempted to revive two of them. In France the feudal system, with all its burdensome obligations, remained in full vigour until it was abolished in one night by the famous decree of the National Assembly of 4th August, 1790. In Scotland, the feudal system of land tenure still exists, and certain of its incidents (*e.g.* reliefs and compositions or fines for alienation) are exacted at the present day.

84. Blackstone, *Commentaries*, II. 63, however arranges these in a different order, and mentions as a seventh incident "aids," which are here reserved for separate treatment.

85. See Pollock and Maitland, I. 296.

86. See *infra*, under c.2, for the steps in the gradual process whereby this evil was redressed.

87. R. Thomson, *Magna Charta*, p. 236.

88. *Infra*, c. 32.

89. VII. 17.

90. Madox, I. 663.

91. See *infra*, c. 43.

92. See Hughes' edition, p. 133.

93. See *Dialogus*, p. 222 (citing *Pipe Roll*, p. 27).

94. Glanvill, VII. c. 9. In socage and burgage tenures no incident of wardship was recognized; the guardianship went to the relations of the

ward, and not to his feudal lord. Somewhat complicated, but exceedingly equitable, rules applied to socage. The maternal kindred had the custody, if the lands came from the father's side; the paternal kindred, if from the mother's side (Glanvill, VII. c. 11). In plain language, the boy and his property were entrusted to those who had no interest in his death.

95. Littleton, II. iv. s. 103.

96. See under c. 5.

97. What these were may be read in the *Pipe Rolls*, *e.g.*, in that of 14 Henry II., when the Bishopric of Lincoln was vacant.

98. See *Statutes of the Realm, Ch. of Liberties*, p. 5, and *Sel. Charters*, p. 288: "Salva nobis et haeredibus nostris custodia ecclesiarum et monasteriorum vacantium quae ad nos pertinent." Contrast the terms of Stephen's Oxford Charter; *Sel. Charters*, pp. 120-1.

99. *Rotuli de oblatis et finibus*, p. 354.

100. *Rot. Claus.*, pp. 37, 55.

101. Pollock and Maitland, I. 305.

102. See *infra*, under chapters 6, 7, and 8.

103. *Middle Ages*, II. 429.

104. p. 437.

105. The Bishop of Durham enjoyed it, so it seems to be stated in a charter extorted from him in 1303 by the men of his fief (see Lapsley, *Pal. of Durham*, p. 133). But this forms no real exception; since the Bishop, as an Earl Palatine, enjoyed exceptionally the *regalia* of a king.

106. See Pollock and Maitland, I. 292. It appears from statute of Marlborough, c. 16, that *primer seisin* extended over lands held by serjeanty as well as by knight's service.

107. *Rotuli de oblatis*, p. 114.

108. Sir Edward Coke (*Coke upon Littleton*, 77 A) is the original source of much confusion as to the nature of primer seisin, which he seems to have considered as a second and additional relief exacted by the Crown amounting to the whole rent of the first year. The Popes, he further held (equally erroneously), were only imitating this practice when they exacted one year's rent from every newly granted benefice under the name of "first fruits." These errors have been widely followed (*e.g.* Thomson, *Magna Charta*, p. 416, Taswell Langmead, *Const. Hist.*, p. 50).

109. See Taswell Langmead, *Const. Hist.*, pp. 51-2; also Pollock and Maitland, II. 326. *Cf.*, however, c. 39 of the re-issue of Magna Carta in 1217.

110. IX. c. 8.

111. See *infra*, under chapter 12.

112. Thus, the Abingdon version of the *Anglo-Saxon Chronicle* (II. 113) speaks of "auxilium quod barones michi dederunt"; while Bracton says (Book II. c. 16, s. 8): "Auxilia fiunt de gratia et non de jure; cum dependeant ex gratia tenentium, et non ad voluntatem dominorum."

113. 3 Edward I. c. 36.

114. Fixed at 100s. by c. 2 of Magna Carta.

115. One entry in the *Memoranda Roll* of 42 Henry III. (cited Madox I. 615) seems at first sight to contradict this. It seems in that year to be admitted that the Crown could not exact more than 20s. of aid per knight's fee; but in 1258 the baronial opposition would be strong in the Exchequer as elsewhere.

116. 25 Ed. III. stat. 5, c. 11.

117. See *infra*, under chapter 39.

118. Some of these questions might be answered in particular cases by the terms of special charters. Thus the *Hundred Rolls* (1279) relate how Hugh de Plesens held the Manor of Hedington, and was liable for one knight's fee when scutage ran; that he must go with the King and serve him for forty days at his own expense, and thereafter at the expense of the King. *Rot. Hund.*, II. p. 710; cf. for *France, Etablissements de St. Louis*, I. c. 65.

119. See R. Coggeshall, p. 167; the barons argued *non in hoc ei obnoxios esse secundum munia terrarum suarum*.

120. W. Coventry, II. 217.

121. See his letter dated 1st April, 1215, in *New Rymer*, I. 128, ordering the barons to pay the scutage of Poitou.

122. The evidence for this is chiefly inferential, but would be greatly strengthened if we could establish the genuineness of the charter discussed by Mr. J. H. Round, Mr. Prothero, and Mr. Hubert Hall in *Eng. Hist. Rev.*, VIII. 288, and IX. 117 and 326. See the document in Appendix.

123. *Chronicon*, II. 121.

124. See, however, *infra* under c. 16.

125. Stubbs, *Const. Hist.*, I. 632.

126. As was long ago pointed out by Madox, I. 619.

127. See Round, *Feudal England*, p. 268.

128. Madox, I. 658.

129. See *Pipe Roll* of 12 John, cited in Madox, I. 663.

130. See *Pipe Roll* of Richard I., cited *ibid.*

131. *Feudal England*, 277 *seq.*

132. Miss Norgate, *John Lackland*, p. 122.

133. Miss Norgate, *John Lackland*, p. 123 note, correcting Swereford's lists in the *Red Book of Exchequer*.

134. See (for year 1201) Ramsay, *Angevin Empire*, p. 390, and authorities there cited.

135. Cf. Miss Norgate, *John Lackland*, p. 125.

136. *Commune of London*, pp. 273-4.

137. Two historians, however, who have recently given valuable and independent accounts of the reign of John, say little of its value. Sir James Ramsay (*Angevin Empire*, p. 432) treats it briefly, and Miss Norgate (*John Lackland*, p. 163) barely notices it.

138. Miss Norgate (*John Lackland*, p. 123) describes the exactions supplementing the scutages: "These scutages were independent of the fines paid by the barons who did not accompany the King on his first return to Normandy in 1199, of the money taken from the host as a substitute for its service in 1201, of the equipment and payment of the 'decimated' knights in 1205, and the fines claimed from all the tenants-in-chivalry after the dismissal of the host in the same year, as well as of actual services which many of those who had paid the scutage rendered in the campaigns of 1202-4 and 1206."

139. See Miss Norgate, *John Lackland*, 210, and cf. *supra*, p. 37.

III. Royal Justice and Feudal Justice.

A well-known aphorism of legal text-books, couched in language unusually figurative, declares the King to be "the sole fountain of justice." Correct as it is to apply this metaphor to the present state of the constitution, it would be an anachronism and a blunder to transport it into the thirteenth century. In John's reign there still were—as there had been for centuries—not one, but many competing jurisdictions. It was by no means a foregone conclusion that the King's Courts were the proper tribunals to which a wronged individual must repair to seek redress. On the contrary, the great bulk of the rural population, the villeins, had no *locus standi* except in the court of the manor to which they belonged; while the doors of the royal Courts had been closed against the ordinary freeman previous to the reign of Henry II. Royal justice was still the exception, not the rule. Each man must seek redress, in the ordinary case, in his own locality. To dispense justice to the nation at large was no part of the normal business of a medieval King.

I. *Rival Systems of Law Courts.* In the thirteenth century, there existed not one source of justice, but many. Rival courts, eagerly competing to extend their own sphere of usefulness and to increase their own fees, existed in a bewildering multitude. Putting aside for the moment the Courts Christian, the Borough Courts, the Forest Courts, and all exceptional or peculiar tribunals, there existed three great rival systems of jurisdiction which may be named in the order in which they became in turn prominent in England.

(1) *Local or District Courts.* Justice was originally a local product, and administered in rude tribunals, which partook more or less of a popular character. Each shire had its council or assembly for hearing pleas, known as a "shire-moot" in Anglo-Saxon days, and usually as a "*comitatus*" after the Norman Conquest; while each of the smaller districts subdividing the shire, and forming units of administration for purposes of taxation, defence, justice, and police, had a moot or council of its own, serving as a court of law, to which the inhabitants of the various villages brought their pleas in the first instance. These smaller districts were known as hundreds in the south, and as wapentakes (a name of Danish derivation) in the north.

The theory generally received is that all freemen were originally suitors in the courts of the shire and the hundred, and that the whole body of those present, the ordinary peasant ("ceorl") equally with the man of noble blood ("eorl"), took an active part in the proceedings, pronouncing (or, at least, concurring in) the judgments or dooms there declared; but that, as time progressed, the majority of the Anglo-Saxon ceorls sank to the half-servile position of villeins—men tied for life to the soil of the manor, and passing, like property, from father to son. These villeins, although still subjected to the burden of attendance, and to some of the other duties of their former free estate, were deprived of all those rights which had once formed the counterpart of the obligations. Another school of historians, it is true, denies that the mass of the population, even in very early times, ever enjoyed the right to any active share in the dispensation of justice. It is unnecessary here to attempt a solution of these and many other intricate problems surrounding the composition and functions of the courts of shire and hundred; or to discuss the still more vexed question how far the small assembly of the villagers of each township is worthy to be reckoned a formal court of law. It is sufficient to emphasize the importance of the existence from early times of a complete network of courts, each dispensing justice for the people of its own district.

(2) *Feudal Courts.* Centuries before the Norman Conquest, this system of popular or district justice found itself confronted with a rival scheme of jurisdictions—the innumerable private courts belonging to the feudal lords of the various estates into which the whole of England had been divided. This new system of private tribunals (known indifferently as feudal courts, manorial courts, seignorial courts, or heritable jurisdictions) slowly but surely, such is the orthodox view generally, although not universally accepted, gained on the older system of popular courts of shire, hundred, and wapentake.[140]

Practically every holder of land in England came to be also the holder of a court for the inhabitants of that land. The double meaning of the word "*dominus*" illustrates the double position of the man who was thus both owner and lord.[141] In the struggle between two schemes of justice, the tribunals of the feudal magnates easily triumphed, but never absolutely abolished their rivals. The earlier popular courts still lived on; but the system of district justice which had once embraced the whole of England was completely honeycombed by the growth of the feudal courts. As each

once-free village passed under the domination of a lord, and gradually became a manor or embryo-manor, the village-moot (with such rudimentary authority as it may originally have possessed) gave way before a new manorial court endowed with much wider powers and with more effective sanction for enforcing them. Further, as complete hundreds fell under the control of specially powerful magnates, the entire courts of these hundreds were replaced by or transformed into feudal courts; franchises thus took the place of many of the old popular moots. Still, the older system retained possession of part of the disputed ground, thanks to the protection given it in its hour of need by the Crown. A great majority of the hundreds never bowed to the exclusive domination of any one lord, and the courts of the shires were jealously guarded by the Norman Kings against the encroachment of even the most powerful of barons. It is true that they only escaped subjection to a local landowner in order to fall under the more powerful domination of the Crown. Yet the mere fact that they continued in existence acted at least as a check on the growth of the rival system of seignorial tribunals.

Although it was the policy of the Norman Kings to prevent their barons from gaining excessive powers of jurisdiction, it was by no means their policy to oppose these jurisdictions altogether. On the contrary, the Conqueror and his sons were glad that order should be enforced and justice administered, even in a rough-and-ready manner, in those districts of England whither the Crown's arm was not long enough to reach, and where the popular courts were likely to prove inefficient. Thus, the old system and the new existed side by side; it was to the interest of the central government to play off the one against the other.

In later days (but not till long after Magna Carta) each manorial tribunal split into three distinct courts, according to the class of pleas it was called upon to try. Later writers distinguish absolutely from each other, the Court Baron, settling civil disputes between the freeholders of the manor; the Court Customary, deciding non-criminal cases among the villeins; and the Court Leet, a petty criminal court enforcing order and punishing small offences. The powers of these courts might vary, and in many districts the jurisdiction over misdemeanours belonged not to the steward of the lord of the manor, but to the sheriff in his half-yearly Circuits or "Tourns" through the county. In the imperfectly feudalized districts the Tourn of the sheriff, as

the representative of the Crown, performed the same functions as the Court Leet performed within the territories of a franchise.

(3) *Royal Courts.* Originally, the King's Court had been merely one feudal court among other feudal courts—differing in degree rather than in kind from those of the great earls or barons. The King, as a feudal lord, dispensed justice among his feudal tenants (whether barons and freemen or only servile dependents), just as any baron or freeman dispensed justice among *his* tenants, bond or free. No one dreamed, in the time of the Norman Kings, that the *Curia Regis* would or could undertake the enormous labour of dispensing justice for the whole nation (or even of supervising the courts which did dispense it). Each individual must, on the contrary, look for the redress of wrongs either to the court of the people of his own district, or to the court of his lord. Royal justice for all (in the modern sense) was simply impossible. The monarchy had no machinery at command for effecting this. The task was a gigantic one, which no Anglo-Saxon King, which not even William I., could possibly have undertaken. No attempt in this direction was made by the Crown until the reign of Henry II., who was placed in a position of unprecedented power, partly by circumstances, but chiefly by his great abilities. Even he, born reformer as he was, would never have increased so greatly the labours of government, if he had not clearly seen how enormously the change would enhance both the security of his throne and the revenue of his exchequer.

In normal circumstances, then, prior to the Angevin period, the King's Court was merely a tribunal for transacting the king's own business, or for holding pleas between the Crown's own immediate tenants. Even from an early date, however, the business of the monarch, from the mere fact that he was lord paramount, was necessarily wider than the business of any mesne lord. In a dim way, too, it must have been apparent from the first, that offences against the established order were offences also against the king, and that, therefore, to redress these was the king's business competent in the King's Courts. Further, the Sovereign's prerogative quickly waxed strong, and enabled him to give effect to his wishes in this as in other matters. The Crown asserted a right (while admitting no corresponding duty) to investigate any pleas of special importance, whether civil or criminal. Still, up to the Norman Conquest, and thereafter under William and his sons, royal justice had made no deliberate attempt to become national justice, or

to supersede feudal justice. Each kept to its recognized province. The struggle between the two began only with the reforms of Henry II.[142]

Thus the three great systems of jurisdiction, popular justice, feudal justice, and royal justice (each depending on a different principle) succeeded each other, on the whole, in the order in which they are here named. Yet the sequence is in some ways logical rather than chronological. No absolute line can be drawn, showing where the supremacy of one principle ended and that of the next began. For centuries, all three co-existed, and struggled for the mastery. The germs of manorial jurisdiction may have been present from an early date. Shire-courts and hundred courts alike were continually in danger of falling under the domination of powerful local magnates. Yet the shire-courts were successful in maintaining till the last (thanks to royal favour) their independence of the manorial jurisdictions and their lords; while only a proportion of the hundred courts fell into bondage.

The royal courts, again, exercised an important jurisdiction from the very foundation of the monarchy; and the king in person, or by deputy, from an early date, withdrew special causes from the County Courts, and also interfered with manorial franchises. Finally, the Courts Baron were never abolished, but only silently undermined by the policy of Henry II. and his successors, until they gradually sank into decrepitude without really ceasing to exist.

With these caveats, however, the three systems may be regarded, in some measure, as following one another in the order named:—popular justice, feudal justice, royal justice.

II. *Legal Procedure.* The procedure adopted in litigation in Anglo-Saxon and Norman times was similar in essentials in all three classes of tribunals, and differed materially from the practice of courts of law at the present day. Some knowledge of the more glaring contrasts between ancient and modern procedure may here be profitably discussed, not only on account of the interest inherent in the subject, but also because it will conduce to an understanding of several otherwise obscure provisions of Magna Carta.

Avoiding technical language, and eliminating special procedure peculiar to any one court or country, the principal stages in a normal litigation in a modern court of law may be given briefly as follows:

(1) On the complaint of the party aggrieved—the plaintiff—a summons, or writ, is issued by an officer of the court. Proceedings are opened by the

command addressed to the defendant to appear in court and answer what is alleged against him.

(2) Each party lodges written statements of his facts and pleas—that is, of the circumstances of the case as they appear to him (or such of them as he hopes to bring evidence to prove)—on which he founds his claim or his defence, and of the legal principles he intends to deduce from these circumstances. When these statements of facts and pleas have been revised and adjusted, the complete data are now before the court; each party has finally stated what he considers essential to his case.

(3) Proof is, in due course, led; that is, each party is afforded an opportunity of proving such facts as he has alleged (and as require proof through the denial of his opponent). This he may do by documents, witnesses, or otherwise. Each party has the further privilege of shaking his opponent's evidence by cross-examination.

(4) The next important stage is the debate, the main object of which is to establish by legal arguments the pleas founded on; to deduce the legal consequences inherent in the facts which have been proved.

(5) Finally, the judge gives his decision. He has to determine, after weighing the evidence led by either party, what facts have really been established, and how far the various pleas of plaintiff and defendant respectively are implied in these facts. A considerable amount of thought and reasoning of such a kind as can be successfully performed only by a highly trained legal mind is thus necessary before the final decree or sentence can be pronounced by a judge in a modern court of law.

A trial in Anglo-Saxon and early Norman times stands in notable contrast to all this in almost every essential of its stages and procedure, and even more radically in the spirit which pervades the whole. Thus, the proceedings, from first to last, were purely oral, there being no original writ or summons, no written pleadings, and no record kept of the decision except in the memories of those present. The functions of "the judges" were entirely different, and demanded no previous professional or legal training, since they were not required either to weigh a mass of evidence or to determine the bearing of subtle legal arguments, but merely to see fairplay, and to decide, according to simple rules, well established by centuries of custom, by what test the allegations of plaintiff and defendant were respectively to stand or fall. Finally, the arrangement of the stages of the litigation was entirely different. It is with something of a shock that the

modern lawyer learns that in civil and criminal causes alike "judgment" invariably preceded "trial." Reflection will soon convince him that each of these words had in the Middle Ages a meaning different from what it bears to-day. These ancient meanings can be best understood by following the stages of the old procedure.

(1) The initial difficulty was to obtain the presence of the defendant in court, since there existed a strange reluctance either to compel his attendance or to allow judgment to pass against him by default. No initial writ was issued commanding him to appear; almost endless delays were allowed.

(2) When both parties had been, after many adjournments, actually brought face to face before the court, the statements alike of the claim and of the defence were made verbally and in set *formulae*, the slightest slip or stumble in the words of which involved complete failure. This is merely one illustration of the tremendously formal and technical nature of early legal procedure common to all half-developed systems of jurisprudence.

(3) Before the plaintiff could put the defendant finally on his defence, he required to show some preliminary presumption of the probability or *bona fides* of his case. This he usually did by producing two friends ready to substantiate his claim, known sometimes as his "suit" (Latin *secta*), or his "fore-witnesses." Their evidence was not weighed against the "proof" afterwards led by the defendant; its object was merely to warrant the Court in demanding "proof" from the latter at all.[143]

(4) Then came the judgment—the chief or "medial" judgment, so called to distinguish it from the less important final judgment or decree which came at a later stage. This medial judgment or "doom," to use the Anglo-Saxon word, partook in no respect of the nature of the judgment of a modern tribunal. It came *before* the proof or trial, not after it. It consisted indeed in decreeing whether or no, on the strength of the previous procedure, the defendant should be put to his proof at all; and if so, *what* "proof" should be demanded.

Now, the exact test to be appointed by the court varied somewhat, according to circumstances, but long-established custom had laid down with some exactitude a rule applicable to every case likely to occur; and, further, the possible modes of proof were limited to some four or five at the outside. In Anglo-Saxon times, these were mainly compurgation, ordeal, witnesses (whose functions were, however, widely different from those of

witnesses in modern law), and charters. The Norman Conquest introduced for the new-comers, a form of proof previously unknown in England—"trial by combat"—which tended, for the upper classes at least, to supersede all earlier methods of procedure. The “proof,” of whatever kind it might be, thus appointed by the “judges” for the defendant’s performance was technically known as a “law” (Latin *lex*) in the sense of a “test” or “trial” or “task,” according to his success or failure in which his case should stand or fall.[144]

It will be apparent that to pronounce a “judgment” in this sense was a simple affair, a mere formality in the ordinary case, where room for dubiety could hardly be admitted; and thus it was possible for “judgment” to be delivered by all the members of a feudal court, or even by all the suitors present at a meeting of the hundred or shire-moot.

(5) The crucial stage, this “trial” which thus came after “judgment,” consisted in one party (usually the defendant) essaying, on the day appointed, to satisfy the court as to the truth of his allegations by performing the task or “law” which had been set or “doomed” to him. When this consisted in the production of a charter, or of “transaction witnesses” (that is, the testimony of those officials appointed in each market-town to certify the conclusion of such bargains as the sale of cattle), it commends itself readily to the modern understanding and approval. More frequently, however, it took the form of “an oath with oath-helpers,” the plaintiff bringing with him eleven or twelve of his trusty friends or dependents to swear after him the words of a long and cumbrous oath, under the risk of being punished as perjurers for any slip in the formula. This was known also as compurgation. Sometimes the decision was referred to the intervention of Providence by appealing to the ordeal of the red-hot iron or the more-dreaded ordeal of water. After the Norman Conquest, the trial in all litigations between men of high rank, took the form of *duellum* or legally regulated combat between the parties. The defendant gained his case if he caused the plaintiff to own himself worsted by uttering the word “craven.” He gained his case equally if he only held out till nightfall (when the combat terminated) against the plaintiff’s attempts to force him to utter that fateful word.[145]

The battle was fought out before the “judges,” who, in the case of an earl or baron, were the other earls and barons assembled as his peers in the

King's court; and, in the case of the tenant of a mesne lord, were the other freeholders of the same manor.

The ancient "trial" (the importance of which is increased by the fact that it continued long after 1215, and may be traced in several clauses of Magna Carta)[146] was thus something entirely different from the modern "trial." It may be said without exaggeration that there was no "trial" at all in the current meaning of the word—no balancing of the testimony of one set of witnesses against another, no open proof and cross-examination, no debate on the legal principles involved. The ancient "trial" was merely a formal test, which was, except in the case of battle, entirely one-sided. The phrase "burden of proof" was inapplicable. The litigant to whom "a law" was appointed had the "privilege of proof" rather than the "burden of proof," and he usually won his case—especially in compurgation, and even in ordeal if he had arranged matters properly with the priest who presided.[147]

(6) The whole was concluded by the final "judgment," or decree, which practically took the form of a sentence passed on the vanquished. The judges could scarcely be said to decide the case, since this had already been practically decided by the success or failure of the party on whom the proof had been laid. Those who gave sentence were "judges" merely in the sense of umpires who saw fairplay to both players, according to the acknowledged rules of the desperate game.[148]

In one sense, the final (as opposed to the medial) "judgment" was determined by the parties themselves, or by one of them; in another and higher sense the facts at issue were left to Providence; a miracle, if necessary, would attest the just claim of the innocent man. Those who delivered the final doom, had a purely formal task to perform, and had little in common with the "judges" of a modern court.[149]

The essentials of this procedure were the same in the Norman as in the Anglo-Saxon period, and that in all three classes of tribunals—popular courts, manorial courts, and royal courts.

Two innovations the Norman Kings did make; they introduced trial by combat (already sufficiently discussed), and likewise the continental method of obtaining information on sworn testimony. Among the prerogatives of the Norman Dukes one of the most valuable was the right to compel the sworn evidence of reliable men of any district—men specially picked for the purpose, and put on oath before answering the questions

asked of them, thus endangering their eternal welfare in the event of falsehood, and laying themselves open to temporal penalties for perjury.

This procedure was known as *inquisitio* (or the seeking of information) when regarded from the point of view of the government making the inquiry, and as *recognitio* (or the giving of information) from the point of view of those supplying it. This extremely simple and practical device was flexible and capable of extension to endless new uses in the deft hands of the Norman Kings in England. William the Conqueror employed it in collecting the laws and customs of the conquered people, and, later on, in compiling Domesday Book; while his successors made it the instrument of various experiments in the science of taxation. It has a double claim to the interest of the constitutional historian, because it was one of the influences which helped to mould our Parliamentary institutions; and because several of the new uses to which it came to be put had a close connection with the origin of trial by jury. The recognitors, indeed, were simply local jurors in a rude or elementary form.[150]

III. *Reforms of Henry II. in Law Courts and Legal Procedure.* It was reserved for Henry of Anjou to inaugurate an entirely new era in the relations of the three classes of courts. He was the first king deliberately to plan the overthrow of the feudal jurisdictions by insidiously undermining them, if not yet by open attack. He was the first king to reduce the old district courts so thoroughly under the control of royal officials as to turn them practically into royal courts. He was the first king also to throw open the doors of his own courts of law to all-comers, to all freemen, that is to say, for the despised villein had for centuries still to seek redress in the court of that very lord of the manor who was too often his oppressor.

In brief, then, Henry's policy was twofold: to convert the County Courts practically into Royal Courts, since in them royal officials now dispensed royal justice according to the same rules as prevailed at the King's own *Curia*; and to reduce all manorial or private courts to insignificance by diverting pleas to his own *Curia*, and leaving the rival tribunals to die gradually from inanition. Both branches of this policy met ultimately with complete success, although the event hung in the balance until long after his death. The barons, though partially deceived by the gradual and insidious nature of Henry's reforms, did what they could to thwart him; but the current of events was against them and with the Crown. Royal justice steadily encroached upon feudal justice. One of the last stands made by the

barons has left its traces plainly written in several chapters of Magna Carta. [151]

These contain what seem, at first sight, to be merely trivial alterations of technical points of court procedure; but inextricably bound up with them are principles of wide political and constitutional importance. Henry's policy was to disguise radical reforms until they looked like small changes of procedure; it follows that the framers of Magna Carta, while appearing merely to seek the reversal of these trivial points, were really seeking to return to the totally different conditions which had prevailed prior to the reforms of Henry.

A short account of the main outlines of that monarch's new system of procedure forms a necessary preliminary to a complete comprehension of these important chapters of Magna Carta. Such an account falls naturally into two divisions.

(1) *Criminal Justice.* (*a*) By his Assizes of Clarendon and Northampton Henry strictly reserved all important crimes for the exclusive consideration of his own judges either on circuit or at his court; and he demanded entry for these judges into franchises, however powerful, for that purpose. In this part of his policy, the King was completely successful; heinous crimes were, in the beginning of the thirteenth century, admitted on all hands to be "pleas of the Crown" (that is, cases exclusively reserved for the royal jurisdiction); and Magna Carta made no attempt to reverse this part of the Crown's policy. The change was accepted as inevitable. All that was attempted in 1215 was to obtain a promise that these functions, now surrendered to the Crown forever, should be discharged by the Crown's officials in a proper manner.[152]

(*b*) Henry's usual good sense, in this matter stimulated by some notable miscarriages of justice, led him to question the equity of the procedure usually adopted in criminal pleas, namely, by "appeal" or formal accusation by the injured party, or his nearest surviving relative. He substituted, whenever possible, communal accusation for individual accusation; that is, the duty of proclaiming (or indicting) the suspected criminals of each district before the King's Justices was no longer left to private initiative, but was laid on a body of neighbours specially selected for that purpose—the predecessors of the Grand Jury of later days. This new procedure, it is true, supplemented rather than superseded the older procedure; yet it marked a

distinct advance. Appeals were discouraged and exact rules laid down restricting the right of accusation to certain cases and individuals.[153]

(*c*) A necessary complement of the discouragement of appeals was the discouragement of “trial by combat” also, since that formed the natural sequel. An ingenious device was invented and gradually extended to an increasing number of cases; an accused individual might apply for a writ known as *de odio et atia*, and thus avoid the *duellum* altogether by having his guilt or innocence determined by what was practically a jury of neighbours.[154]

(2) *Civil Justice.* Henry’s innovations under this head were equally important.

(*a*) An unflinching rule was established that no case could be brought before the royal court until a writ had been obtained from chancery. This had to be paid for, sometimes at a fixed rate, and sometimes at whatever sum the Crown demanded. The whole procedure in the royal courts, which followed the issuing of such a writ, came to be known as “the writ process.” Once it was issued, all proceedings in other courts must stop. One special form of writ (known as *praecipe*), in particular, became a royal instrument for removing before the King’s own *Curia* cases pending in the manorial courts of mesne lords. To do this was to enrich the King at the expense of some baron or other freeman, by bringing to the Exchequer fees which otherwise would be paid to the owner of the private court. This was plainly "to cause a freeman to lose his court"—an abuse specially struck at by chapter 34 of the Great Charter.

(*b*) The mass of new business attracted to the King’s Courts made it necessary to increase, the staff of judges and to distribute the work among them. A natural division was that ordinary pleas (or common pleas) should be tried before one set of judges, and royal pleas (or pleas of the Crown) before another. This distinction is recognized in many separate chapters.[155] Thus two groups of judges were formed, each of which was at first rather a committee of the larger *Curia* as a whole than an independent tribunal; but, in later years, the two rapidly developed into entirely separate courts—the Court of Common Pleas (at first known as the Bench, that is, the ordinary Bench), and the Court of King’s Bench (that is, the royal Bench, known also at first as the court *Coram Rege*, since it was always supposed to be held in the King’s presence).

(*c*) Special procedure for determining pleas of disputed titles to land or rights of possession was also invented by Henry to take the place of the ancient method of trial by battle. These Assizes, as they were called, are fully discussed elsewhere.[156] The Grand Assize was looked on with suspicion by the barons as a procedure competent only before the royal courts, and therefore closely bound up with the King's other devices for substituting his own jurisdiction for that of the private courts. The petty assizes, on the contrary, met with a ready acceptance, and the barons in 1215, far from objecting to their continuance, demanded that they should be held in regular sessions four times a year in each county of England.

These were the chief innovations which enabled Henry, while instituting many reforms urgently required and gladly welcomed by the mass of his subjects, at the same time to effect a revolution in the relations of royal justice to feudal justice. As time went on, new royal writs and remedies were being continually devised to meet new types of cases; and litigants flocked more and more readily to the King's Courts, leaving the seignorial courts empty of business and of fees. Nor was this the only grievance of the barons. When one of their own number was amerced or accused of any offence involving loss of liberty or lands, he might be compelled by the Crown, under Henry and his sons, to submit to have the amercement assessed or the criminal proceedings conducted by one of the new Benches (by a tribunal composed of some four or five of the King's officials), in place of the time-honoured judgment of his peers assembled in the *Commune Concilium* (the predecessor of the modern Parliament).

Can we wonder that the barons objected to be amerced and judged by their inferiors?[157] Can we wonder that they resented the complete though gradual supersession of their own profitable jurisdictions by the royal courts?[158] or that they looked with suspicion on every new legal development of the royal justice? Can we wonder that, when they seemed to have King John for the moment in their power, they demanded redress of this group of grievances, as well as of those connected with arbitrary increase of feudal burdens?

The cause for wonder rather is that their demands in this respect were not more sweeping and more drastic. It was one thing for their fathers to have endured the encroachments of so strong a King as Henry II.—far too wise a statesman to show clearly whither his innovations were ultimately tending, and (some lapses notwithstanding) a just ruler on the whole, using his

increased prerogatives with moderation and for national ends. It was quite another thing to endure the same encroachments (or worse) from an unpopular King like John, discredited and in their power, who had neither disguised his arrogance nor made good use of his prerogatives. Royal justice, as dispensed by John, was in every way inferior to royal justice as dispensed under his father's vigilant eye. Yet the exasperated barons, in the hour of their triumph, actually accepted, and accepted cordially, one half of royal justice; while they sought to abolish only the other half. The chapters bearing on the question of jurisdiction may thus be arranged in two groups, some reactionary, and some favourable to Henry's reforms. On the one hand, no lord of a manor shall be robbed of his court by the King evoking before the royal courts pleas between two freeholders of the lord's manor; [159] no freeman shall be judged or condemned by the King's officials, but only before the full body of his peers (that is, of his fellow earls and barons, if he be an earl or baron, and of his fellow tenants of the manor, if he holds of a mesne lord);[160] earls and barons must be amerced only by their equals. [161] On the other hand, in prescribing remedies for various abuses connected with numerous branches of legal procedure recently introduced into the royal courts, the barons accepted by implication this new procedure itself and the royal encroachments implied therein. For example, the Crown's right to hold "Common Pleas" was impliedly admitted, when the barons asked and obtained a promise that these should be tried in some certain place (that is, at Westminster).[162] Yet these very pleas, ordinary ones in which the Crown had no special interest, as opposed to Pleas of the Crown in which it had, must have included many cases which, prior to Henry II.'s reforms, would not have been tried in a royal court. Again, in regulating the various Petty Assizes, chapters 18 and 19 admit the Crown's right to hold them. Such Assizes must be taken henceforth four times a year. Here, as in chapter 40, the ground of complaint is not that there is too much of royal justice, but rather that there is too little of it; it is henceforth to be neither delayed nor denied. Further, the encroachments made by Henry II. in 1166 on the rights of private franchises in the matter of criminal jurisdiction are homologated by acquiescence in the King's definition of "Pleas of the Crown" implied in chapter 24.

These, then, are the two clearly contrasted groups into which the innovations made by Henry and his sons, within the province of justice, naturally fell as viewed by John's opponents in 1215: some of them had

now come to be warmly welcomed, and these, it was insisted, must be continued by the Crown; while some of them still excited as bitter opposition as ever, and these, it was insisted, must be utterly swept away.

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140. This account of the relations of the two sets of courts would receive the support of recent writers, such as Maitland and Round, as well as of the older generation, such as Stubbs and Freeman. Mr. Frederic Seebohm may be mentioned as perhaps the most weighty upholder of the opposite view, which regards the manorial courts as of equally early or earlier origin than those of hundred and shire.

141. Cf. “landlord.”

142. The various stages in the gradual process, extending from the reign of Henry I. to that of Edward I., by which royal justice insidiously encroached on feudal justice, may be studied in Professor Maitland’s admirably lucid account prefaced to *Sel. Pleas in Manorial Courts*, pp. liii. seq. See also Pollock and Maitland, I. 181-2.

143. Sometimes no fore-witnesses were required; for example, to choose an obvious case, where the claim was for the restoration of stolen cattle, which had been traced by “hue and cry” to defendant’s house or byre. The presumption of guilt was here so strong as to render corroborative evidence unnecessary. The plaintiff’s unsupported oath was thus sufficient to put the defendant on his “trial.” On the other hand, in the absence alike of presumption and of witnesses swearing in support of plaintiff’s oath, the defendant escaped without any “trial” at all.

144. See *infra* under chapters 38 and 39, where the meaning of *lex* is discussed.

145. Details may be studied in Dr. George Neilson’s *Trial by Combat*.

146. See *infra*, chapters 38 and 39.

147. Ordeal and compurgation and other forms of *lex* are further discussed *infra*, under chapters 38 and 39.

148. Cf. Thayer, *Evidence*, p. 8. “The conception of the trial was that of a proceeding between the parties, carried on publicly, under forms which the community oversaw.”

149. These stages of procedure are all fully illustrated by the actual words of recorded cases of the thirteenth century. Two of these, both from the reign of John, one decided by battle, the other by ordeal, may here be cited. (1) "Hereward, the son of William, appeals Walter, the son of Hugh, of assaulting him, in the King's peace, and wounding him in the arm with an iron fork, and giving him another wound on the head; and this he offers to prove on his body as the Court shall appoint. And Walter defends all of it by his body. And it is testified by the coroners and by the whole county that the same Hereward showed his wounds at the proper time, and has made sufficient suit. Therefore it is decreed that there should be "battle."... Let them come armed, a fortnight from St. Swithin's day, at Leicester." *Sel. Pleas of Crown* (Selden Society), p. 18. (2) "Walter Trenchebof was said to have handed to Inger of Faldingthorpe the knife with which he killed Guy Foliot, and is suspected of it. Let him purge himself by water that he did not consent to it. He has failed and is hanged." *Ibid.*, p. 75.

150. The relation of "recognition" to trial by jury is fully discussed, *infra*, Part III., section 7.

151. *E.g.* 34 and 39.

152. See *infra*, under chapters 24 and 45.

153. See *infra*, under chapter 54.

154. See *infra*, under chapter 36.

155. See *infra*, under chapters 17 and 24.

156. See *infra*, under chapter 18.

157. See *infra*, under chapters 21 and 39.

158. See *infra*, under chapter 34.

159. c. 34

160. c. 39.

161. c. 21.

162. c. 17.

PART III.
MAGNA CARTA: ITS FORM AND CONTENTS.

I. Its Prototypes: Earlier Charters.

However wide and scattered were the sources from which the substance of the Great Charter was derived, its descent, on its formal side, can readily be traced, through an unbroken line of antecedents, back to a very early date. Magna Carta is directly descended from the Charter of Liberties of Henry I., and that, again, was a written supplement to the vows taken by that monarch at his coronation, couched in similar terms to those invariably sworn at their anointing by the Anglo-Saxon kings of England, from Edgar to Edward Confessor.

The ties which thus connect King John's promises of good government with the promises to the same effect made at their coronation by the princes of the old dynasty of Wessex are by no means of an accidental nature. Not only is identity of substance, in part at least, maintained throughout; but the promises were the outcome of an essential feature of the old English constitution—a feature so deeply rooted that it survived the shock of the Norman Conquest. This feature, so fundamental and so productive of great issues, was the elective or quasi-elective nature of the monarchy. During the Anglo-Saxon era, two rival principles, the elective and the hereditary, struggled for the mastery in determining the succession to the Crown. In an unsettled state of society, nations cannot allow the sceptre to pass into the hands of an infant or a weakling. When a king died, leaving a son of tender age, and survived by a brother of acknowledged ability and mature powers, it was only natural that the latter should, in the interests of peace and order, be preferred to the throne. In such cases, the strict principle of primogeniture was not followed. The magnates of the kingdom, the so-called Witan, claimed the right to choose a fitting successor; yet in so doing they usually paid as great regard to the claims of kindred as circumstances permitted. The exact relations between the elective and the hereditary principles were never laid down with absolute precision. Indeed, the want of definition in all constitutional questions was characteristic of the age—a truth not sufficiently apprehended by writers of the school of Kemble and Freeman. The practice usually followed by the Witenagemot was to select as the new ruler some kinsman of the late king standing in close relationship to him, and at the same time competent for the high post. The

king-elect thus appointed had, before his title was complete, to undergo a further ceremony: he required to be solemnly anointed by the representative of the spiritual power, and this gave to the Church an important share in deciding who should be king. At an early date—exactly how early is not known, but certainly not later than the days of Edgar—it became the invariable practice for the officiating archbishop to exact an oath of good government from the king-elect before his final coronation. The precise terms of this oath became stereotyped; and, as administered by Dunstan to King Ethelred, they are still extant.[163]

It may be briefly analyzed into three promises—peace to God's Church and people; repression of violence in men of every rank; justice and mercy in all judgments. Such was the famous tripartite oath taken, after celebration of mass, over the most sacred relics laid on the high altar, in presence of Church and people, by the kings of the old Anglo-Saxon race. When William I., anxious in all things to fortify the legality of his title, took the oath in this solemn form, he created a precedent of tremendous importance, although he may have regarded it at the moment as an empty formality.[164]

This step was doubly important: as a link with the past, as a precedent for the future. A bridge was thus thrown across the social and political gulf of the Norman Conquest, preserving the continuity of the monarchy and of the basis on which it was founded. The elective character of the kingship, the need for coronation by the Church, and (the natural supplement of both) this tripartite oath containing promises of good government, valuable though vague, were all preserved.

This was of vital moment, because limits were thereby placed, in theory at least, on prerogatives that threatened in practice to become absolute. Undoubtedly the power of the Norman kings was very great, and might almost be described as irresponsible despotism, tempered by the fear of rebellion. Three forces indeed acted as curbs: the practical necessity for consulting the Curia Regis (or assembly of crown vassals) before any vital step was taken; the restraining influence of the national Church, backed by the spiritual powers of Rome; and the growth, in a vague form, it is true, of a body of public opinion confined as yet to the upper classes.

All these elements counted for something, but failed to restrain sufficiently even an average king; while they were powerless against a strong ruler like William I. The only moment at which the Crown might be taken at a clear disadvantage was during the interregnum which followed

the death of the last occupant of the throne. Two or more rival heirs might aspire to the high position, and would be eager to make promises in return for support. Thus, William Rufus, at his father's death, anxious to prevent his elder brother, Duke Robert, from making good his claim to the English throne, succeeded chiefly through the friendship of Lanfranc. To gain this, he was compelled to make promises of good government, and to follow his father's precedent by taking the oath in the ancient form, in which it had been administered by Dunstan to Ethelred. In the same reign began the practice of supplementing verbal promises by sealed charters, which in some respects must be regarded simply as the old coronation oath confirmed, expanded, and reduced to writing. No such charter was indeed issued either by Rufus or by his father when they were crowned; but the younger William, at a critical period later in his reign, seems to have granted a short Charter of Liberties, the exact contents of which have not come down to us. At the death of Rufus, his younger brother, Henry I., found himself hard pressed in the competition for the English Crown by Duke Robert (the Conqueror's eldest son). By a treaty made at Caen in 1091, Duke Robert and Rufus had agreed that each should constitute the other his heir. Thus Henry was, in a sense, a usurper, and this circumstance made it necessary for him to bid high for influential support.[165] It is to this doubtful title, coupled with the knowledge of widespread disaffection, that Englishmen owe the origin of the first Charter of Liberties that has come down to us.[166]

This charter was the price paid by Henry for the support he required in his candidature for the Crown. In granting it he admitted, in a sense, the contractual basis of his kingship. In discussing its tone and general tenor there is ample room for differences of opinion. Dr. Stubbs[167] maintains that Henry thereby "definitely commits himself to the duties of a national King." Writers of almost equal authority somewhat modify this view, holding that, although circumstances forced Henry to pose as the leader of the entire nation, yet nothing of this could be traced in the charter, the basis of which seems to have been feudal rather than national.[168]

This view is strengthened by analysis of the actual provisions of the charter. While important and definite concessions were made to the Church and to the Crown-tenants, those to the people at large were few and vague —so vague as to be of little practical use. The Church, it was declared, "should be free," a wide phrase to which these particulars were added,

namely, that the wardship of sees during vacancies should not be sold or hired out, and that no sums should be demanded in name of reliefs from the lands or tenants of a see when a death occurred. The "baronage" (to use a convenient anachronism for "the Crown-tenants considered collectively") received redress of their worst grievances in regard to reliefs and other feudal obligations. In this respect Henry's charter anticipated and even went beyond some of the reforms of 1215.[169]

It is true that the mass of the people may have indirectly benefited by many of these provisions; but when we look for measures of a directly popular character, only three can be found, namely, promises to enforce peace in the land, to take away evil customs, and to observe the laws of Edward Confessor as amended by William I. This is too slender a basis on which to found a claim to take rank as a "national king," even if Henry had any intention of keeping his promises. It is now notorious that not a single promise remained unbroken.[170]

From another point of view the charter is a criticism on the administration of Rufus (and to some extent also of the Conqueror), combined with a promise of amendment. Henry thus posed as a reformer, and forswore the evil customs of his father and brother. The great value of the charter, however, lies in this, that it is the first formal acceptance (published under seal and in proper legal shape) of the old law of Anglo-Saxon England by a ruler of the new alien dynasty; yet in this Henry was only completing what his father had begun. These considerations help to account for the almost exaggerated importance attached to Henry's charter during the reign of John.

If all efforts made to defeat Henry's succession failed, the succession of his daughter Matilda was disputed triumphantly. Stephen, taking advantage of his cousin's absence and of her personal unpopularity, made a rapid descent on England with the spasmodic energy which characterized him, and successfully snatched the Crown. Trained in English ways on English soil, he was quickly on the spot and very popular. These features in his favour, however, did not render his position entirely secure as against the daughter and heiress of so strong a King as Henry I., to whom, indeed, Stephen himself, with all the magnates of England, had already thrice sworn allegiance. He was only one of two competitors for the Crown, with chances nearly equal. From the moment of the old King's death, "the Norman barons treated the succession as an open question." In these words

of Bishop Stubbs,[171] Mr. J. H. Round finds[172] the keynote of the reign. Stephen was never secure on his throne, and had to make indiscriminate promises first to obtain, and afterwards to retain, his position. He was thus prepared to bid much higher for support than Henry had felt compelled to do. Adherents had to be gained painfully, one by one, by the grant of special favours to every individual whose support was worth the buying.

Bargains were struck with the Londoners, with Stephen's brother Henry of Blois (Bishop of Winchester), with the Keepers of the King's Treasure, with the Archbishop of Canterbury, and with the Justiciar (Bishop Roger of Salisbury). The support of the two last mentioned carried with it the support of the Church and of the administrative staff of the late king, but was only gained by wide concessions. Thus Stephen, like William of Orange, five centuries later, agreed to become "king upon conditions." A Charter of Liberties and a solemn oath securing "the liberty of the Church"—a vague phrase, it is true, but none the less dangerous on that account—together formed the price of Stephen's consecration; and this price was not perhaps too high when we remember that "election was a matter of opinion, coronation a matter of fact"—a solemn sacrament that could hardly be undone.[173]

Even this important ceremony, however, left Stephen's throne a tottering one; he was compelled to buy the adherence of powerful magnates by lavish concessions of land and franchises; and various charters in favour of individual nobles still exist as witnesses to such bribes. The process by which he built up a title to the Crown seems to have culminated in the Easter of 1136, when he secured the support of Matilda's half-brother Robert, Earl of Gloucester, whose lead was quickly followed by other influential nobles. All of these new adherents, however, performed homage to the King under an important reservation, namely, that their future loyalty would be strictly conditional on the treatment extended to them by Stephen. That unfortunate monarch accordingly, by tolerating such conditional allegiance, was compelled to acknowledge the inherent weakness of his position even in the moment of his nominal triumph.[174]

These important transactions took place apparently at Oxford,[175] and at the same time the King issued his second or Oxford Charter, which embodied and expanded the contents of earlier charters and oaths. This Oxford Charter, the date of which has been proved to be early in April,[176] is noteworthy alike for the circumstances in which it was granted, placing as it

did the copestone on the gradual process by which Stephen was “elected” king, and also for its contents, which combined the earlier oath to the Church and the vague, unsatisfactory earlier charter to the people, with the new conditions extorted by Earl Robert and his followers.

The opening words, in which Stephen describes himself as “King of the English,” may be read as a laboured attempt to set forth a valid title to the throne. All reference to predecessors is carefully avoided, and the usurper declares himself to be king "by appointment of the clergy and people, by consecration of the archbishop and papal legate, and by the Pope’s confirmation."[177]

Perhaps its chief provisions are those in favour of the Church, supplementing a vague declaration that the Church should be “free” by specific promises that the bishops should have exclusive jurisdiction and power over churchmen and their goods, along with the sole right to superintend their distribution after death. Here was a clear confirmation of the right of the Courts Christian to a monopoly of all pleas affecting the clergy or their property. It is the first distinct enunciation in England of the principle afterwards known as "benefit of clergy"—and that, too, in a form more sweeping than was ever afterwards repeated. Stephen also explicitly renounced all rights inherent in the Crown to wardship over Church lands during vacancies—a surrender never dreamed of by either Henry I. or Henry II.

Grants to the people at large followed. A general clause promising peace and justice was again supplemented by specific concessions of more practical value, namely, a promise to extirpate all exactions, unjust practices, and “miskennings” by sheriffs and others, and to observe good, ancient, and just customs in respect of murder-fines, pleas, and other causes.

Strangely enough, there is only one provision specially benefiting feudal magnates, the King’s disclaimer of all tracts of land afforested since the time of the two Williams. The omission of further feudal concessions must not be attributed either to Stephen’s strength, or to any spirit of moderation or self-sacrifice in the magnates. Each baron of sufficient importance had already extorted a special charter in his own favour, more emphatic and binding from its personal nature, and accordingly more valued than a mere general provision in favour of all and sundry. Such private grants generally

included a confirmation of the grantee's right to maintain his own feudal stronghold, thus placing him in a position of practical independence.

It is instructive to compare these wide promises of Stephen with the meagre words of the charter granted by Henry of Anjou at or soon after his Coronation.[178] Henry II. carefully omits all mention of Stephen and his charters, not, as is sometimes supposed, because he did not wish to acknowledge the existence of a usurper, but because of that usurper's lavish grants to the Church. Henry had no intention either to confirm "benefit of clergy" in so sweeping a form as Stephen had done, or to renounce wardship over the lands of vacant sees.

To the Church, as to the barons, Henry Plantagenet confirms only what his grandfather had already conceded. Even when compared with the standard set by the charter of Henry I., that of the younger Henry is shorter and less explicit, and therefore weaker and more liable to be set aside—features which justified Stephen Langton in his preference for the older document. If Henry II. granted a short and grudging charter, neither of his sons, at their respective coronations, granted any charter at all. Reasons for the omission readily suggest themselves; the Crown had grown strong enough to dispense with this unwelcome formality, partly because of the absence of rival competitors for the throne, and partly because of the perfection to which the machinery of government had been brought. The utmost which the Church could extract from Richard and John as the price of their consecration was the renewal of the three vague promises contained in the words of the oath, now taken as a pure formality. The omission to grant charters was merely one symptom of the diseases of the body politic consequent on the overweening power of the Crown, and proves how urgent was the need of some such re-assertion of the nation's liberties as came in 1215.

John, at least, was not to be allowed to shake himself free from the obligations of his oath, or from the promise to confirm the ancient laws and customs of the land therein contained. Stephen Langton, before absolving him from the effects of his quarrel with Rome, compelled him to renew the terms of the coronation oath.[179]

Nor was this all; from a meeting held at St. Albans on 4th August, 1213, writs were issued in the King's name to the various sheriffs, bidding them observe the laws of Henry I. and abstain from unjust exactions.[180] Three weeks later (on 25th August), the production of a stray copy of Henry's

charter is said, by Roger of Wendover, to have made a startling impression on all present,[181] and the same charter was a second time produced at Bury St. Edmunds, on 4th November, 1214, and was accepted by the malcontents as a model which, modified and enlarged, might serve as a basis for the redress of the grievances of the reign.[182]

It is thus both excusable and necessary to place much stress on this sequence of coronation oaths and charters, as contributing both to the form and to the substance of the Magna Carta of John. Yet the tendency to take too narrow a view of the antecedents of the Great Charter must be carefully guarded against. Many ingredients went to the making of it. Numerous reforms of Henry II., whether embodied or not in one or more of the ordinances or assizes that have come down to us, must be reckoned among their number, equally with those constitutional documents which happen to be couched in the form peculiar to charters granted under the king's great seal. It is also necessary to remember the special grants made by successive kings of England to the Church, to London and other cities, and to individual prelates and barons. In a sense, the whole previous history of England went to the making of Magna Carta. The sequence of coronation oaths and charters is only one line of descent; the Great Charter of John can trace its origin through many other lines of distinguished ancestors.

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163. The words have come down to us in two versions: one Anglo-Saxon and the other Latin. The former is preserved in *Memorials of St. Dunstan* (Rolls Series), p. 355, where it is translated by Dr. Stubbs:—

"In the name of the Holy Trinity I promise three things to the Christian people and my subjects: first, that God's church and all Christian people of my dominions hold true peace; the second is that I forbid robbery and all unrighteous things to all orders; and third, that I promise and enjoin in all dooms, justice and mercy, that the gracious and merciful God of his everlasting mercy may forgive us all, who liveth and reigneth." The name of the King is not mentioned, and may have been either Edward or Ethelred, but is usually identified with the latter. See Kemble, *Saxons in England*, II. 35.

164. Two independent authorities, both writing from the English point of view, Florence of Worcester, and the author of the Worcester version of the

Chronicle, agree that the Conqueror took the oath; the Norman authorities neither contradict nor confirm this. "William of Poitiers and Guy are silent about the oath." Freeman, *Norman Conquest*, III. 561, note.

165. Stubbs, *Const. Hist.*, I. 328-9, and authorities there cited.

166. See Appendix.

167. *Const. Hist.*, I. 331.

168. See Prothero, *Simon de Montfort*, 16: "That charter had been mainly of a feudal character; it contained no provision for, and scarcely even hinted at, a constitutional form of government."

169. Details are reserved for consideration under the feudal clauses of the Great Charter.

170. See Round, *Feudal England*, 227, and Pollock and Maitland, I. 306.

171. Stubbs, *Const. Hist.*, I. 345.

172. Round, *Geoffrey de Mandeville*, p. 1.

173. Round, *Geoffrey de Mandeville*, p. 6. Mr. Round, *ibid.*, p. 438, explains that the reason of the omission from this earlier charter of Stephen (unlike the more lengthy and important one which followed four months later) of all mention of the Church was that Stephen, at the time of granting, supplemented it by the verbal promise recorded by William of Malmesbury, *de libertate reddenda ecclesiae et conservanda*.

174. The whole incident is so remarkable that it seems well to cite the exact words of William of Malmesbury, II. 541: "*Itaque homagium regi fecit sub conditione quadam, scilicet quamdiu ille dignitatem suam integre custodiret et sibi pacta servaret*."

175. Round, *Geoffrey*, 22.

176. Round, *Geoffrey*, 23–4.

177. Stephen was not justified in this last assumption. See Round, *Geoffrey*, 9.

178. The charter of Henry II. is given in Bémont, *Chartes*, 13, and in *Select Charters*, 135. It seems worth while to mention in this connection a notable mistake of a writer whose usual accuracy is envied by his brother historians. Mr. J. H. Round (*Engl. Hist. Rev.*, VIII. 292) declares that "the royal power had increased so steadily that Henry II. and his sons had been able to abstain from issuing charters, and had merely taken the old tripartite oath."

179. See *supra*, p. 32, and Round, *Eng. Hist. Rev.*, VIII. 292.

180. *Supra*, p. 34.

181. *Supra*, p. 35.

182. *Supra*, p. 38.

II. Magna Carta: its Form and Juridical Nature.

Much ingenuity has been expended, without adequate return, in the effort to discover which particular category of modern jurisprudence most exactly describes the Great Charter of John. Is it an enacted law, or a treaty; the royal answer to a petition; or a declaration of rights? Is it a simple pact, bargain, or agreement between contracting parties? Or is it a combination of two or more of these? Something has been said in favour of almost every possible view, perhaps more to the bewilderment than to the enlightenment of students of history uninterested in legal subtleties.

The claim of Magna Carta to rank as a formal act of legislation has been supported on the ground that it was promulgated in what was practically a *commune concilium*. King John, it is maintained, met in a national assembly all the estates of his realm who were then endowed with political rights, and these concurred with him in the granting of Magna Carta. The consent of all who claimed a share in the making or repealing of laws—archbishops, bishops, abbots, earls, and crown-tenants, great and small—entitles the Charter to rank as a regular statute.

Against this view, however, technical informalities may be urged. Both the composition of the Council and the procedure adopted there, were irregular. No formal writs of summons had been issued, and, therefore, the meeting was never properly constituted; many individuals with the right and duty of attendance had no opportunity to be present. Further, the whole proceedings were tumultuary; the barons assembled in military array and compelled the consent of John by turbulence and show of force. On these grounds, modern jurisprudence, if appealed to, would reject the claim of the Charter to be enrolled as an ordinary statute.

On the other hand, it may be argued that Magna Carta, while something less than a law, is also something more. A law made by the king in one national assembly might be repealed by the king in another; whereas the Great Charter was intended by the barons to be unchangeable. It was granted to them and their heirs for ever; and, in return, a price had been paid, namely, the renewal of their allegiance—a fundamental condition of John's continued possession of the throne.[183]

Magna Carta has also been frequently described as a treaty. Such is the verdict of Dr. Stubbs.[184] "The Great Charter, although drawn up in the form of a royal grant, was really a treaty between the King and his subjects.... It is the collective people who really form the other high contracting party in the great capitulation."[185] This view receives some support from certain words contained in chapter 63 of the Charter itself: "*Juratum est autem tam ex parte nostra quam ex parte baronum, quod haec omnia supradicta bona fide et sine malo ingenio observabuntur*."

It is not sufficient to urge against this theory, as is sometimes done, that the concord was entered into in bad faith by one or by both of the contracting parties. It is quite true that the compromise it contained was accepted merely as a cloak under which to prepare for war; yet jurisprudence, in treating of formal documents granted under seal, pays no attention to sincerity or insincerity, but looks merely to the formal expression of consent.

Interesting questions might also be raised as to how far it is correct to extend to treaties the legal rule which declares void or voidable all compacts and agreements induced by force or fear. In a sense, every treaty which ends a great war would fall under such condemnation, since the vanquished nation always bows to *force majeure*. Such claims as the Great Charter may have to rank as a treaty are not, therefore, necessarily weakened by John's subsequent contention that when granting it he was not a free agent.

There is, however, a more radical objection. A treaty is a public act between two contracting powers, who must, to meet the requirements of modern jurisprudence, be independent States or their accredited agents; while John and his opponents were merely fragments of one nation or State, torn asunder by mutual fears and jealousies.

Some authorities discard alike the theory of legislation and the treaty theory to make way for a third, namely, that Magna Carta is merely a contract, pact, or private agreement. M. Emile Boutmy is of this opinion. "Le caractère de cet acte est aisé à définir.[186] Ce n'est pas précisément un traité, puisqu'il n'y a pas ici deux souverainetés légitimes ni deux nations en présence; ce n'est pas non plus une loi; elle serait entachée d'irrégularité et de violence; c'est un compromis ou un pacte."[187]

Thus considered, the proudest act of the national drama would take its place in the comparatively humble legal category which includes such

transactions as the hire of a waggon or the sale of a load of corn. There are, however, fatal objections to this theory also. It is difficult to see how the plea of "force," if sufficient (as M. Boutmy urges) to render null the enactment of a public law, would not be even more effective in reducing a private agreement. If Magna Carta has no other basis than the declared consent of the contracting parties, it seems safer to describe it as a public treaty than as a private or civil pact devoid of political significance.

Other theories also are possible; as, for example, that the Great Charter is of the nature of a Declaration of Rights, such as have played so prominent a part in the political history of France and of the United States; while a recent American writer on English constitutional development seems almost to regard it as a code, creating a formal constitution for England—in a rude and embryonic form, it is true. "If a constitution has for its chief object the prevention of encroachments and the harmonizing of governmental institutions, Magna Carta answers to that description, at least in part."[188]

It would be easy to find examples of attempts to compromise between these competing theories, by combining two or more of them. Thus, a high English authority declares that "the Great Charter is partly a declaration of rights, partly a treaty between Crown and people."[189]

The essential nature of what took place at Runnymede, in June, 1215, is plain, when stripped of legal subtleties. A bargain was struck between the King and the rebel magnates, the purport of which was that the latter should renew their oaths of fealty and homage, and give security that they would keep these oaths, while John, in return, granted "to the freemen of England and their heirs for ever" the liberties enumerated in sixty-three chapters. No one thought of asking whether the transaction thus concluded was a "treaty" or a private "contract."

The terms of this bargain, however, had to be drawn up in proper legal form, so as to bear record for all time to the exact nature of the provisions therein contained, and also to the authenticity of John's consent thereto. It was, therefore, reduced to writing, and the resulting document was naturally couched in the form invariably used for all irrevocable grants intended to descend from father to son, namely, a feudal charter, authenticated by the addition of a seal—just as in the case of a grant of land, and with many of the clauses appropriate to such a grant.[190]

John grants to the freemen of England and their heirs certain specified rights and liberties, as though these were merely so many hides or acres of

land. *Concessimus etiam omnibus liberis hominibus regni nostri, pro nobis et haeredibus nostris in perpetuum, omnes libertates subscriptas, habendas et tenendas, eis et haeredibus suis, de nobis et haeredibus nostris.*[191] The legal effect of such a grant is hard to determine; and insuperable difficulties beset any attempt to expound its legal consequences in terms of modern law.[192] In truth, the form and substance of Magna Carta are badly mated. Its substance consists of a number of legal enactments and political and civil rights; its form is borrowed from the feudal lawyer's book of styles for conferring a title to landed estate.[193]

The results of this inquiry seem then to be completely negative. It is useless to describe phenomena of the thirteenth century in modern phraseology which would have been unintelligible to contemporaries. Medieval lawyers experienced great difficulties in trying to express the actual facts of their day in terms of such categories of the Roman jurisprudence as had survived the fall of Rome and Roman civilization. There is no one of the ancient or modern categories which can be applied with confidence to the Great Charter or to the transaction of which it is the record. Magna Carta may perhaps be described as a treaty or a contract which enacts or proclaims a number of rules and customs as binding in England, and reduces them to writing in the unsuitable form of a feudal charter granted by King John to the freemen of England and their heirs.

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183. The *quid pro quo* received by the King was merely the promise of *conditionel* homage, dependent (as we learn from chapter 63) on his observance of the conditions of the Charter. This arrangement may be compared with the agreement made between Stephen and the Earl of Gloucester in 1136 (see *supra*, p. 120), and it bears some points of analogy with the procedure adopted by the framers of the Bill of Rights, who inserted a list of conditions in the Act of Parliament which formed the title of William and Mary to the throne of England.

184. *Const. Hist.*, I. 569.

185. Mr. Prothero is of the same opinion (*Simon de Montfort*, 15). It was "in reality a treaty of peace, an engagement made after a defeat between the vanquished and his victors."

186. Here we differ from him.

187. *Études de droit constitutionnel*, 41.

188. Prof. Jesse Macy, *English Constitution*, 162.

189. Sir William R. Anson, *Law of the Constitution*, I. 14.

190. In strict legal theory the complete investiture of the grantee required that "charter" should be followed by "infeftment" or delivery (real or constructive) of the subject of the grant. In the case of such intangible things as political rights and liberties, the actual parchment on which the Charter was written would be the most natural symbol to deliver to the grantees.

191. See chapter 1. The grant which thus purports to be perpetually binding on John's heirs, was in practice treated as purely personal to John, and requiring confirmation by his son. Yet this also was in strict accordance with feudal theory, which required the heir to complete his title to his deceased father's real estate by obtaining a Charter of Confirmation from his lord, for which he had to pay "relief." The liberties of the freemen were only a new species of real estate.

192. Prof. Maitland, *Township and Borough*, p. 76, explains some of the absurdities involved: "Have you ever pondered the form, the scheme, the main idea of Magna Charta? If so, your reverence for that sacred text will hardly have prevented you from using in the privacy of your own minds some such words as 'inept' or 'childish.' King John makes a grant to the men of England and their heirs. The men of England and their heirs are to hold certain liberties of that prince and his heirs for ever. Imagine yourself imprisoned without the lawful judgment of your peers, and striving to prove while you languish in gaol that you are heir to one of the original grantees. Nowadays it is only at a rhetorical moment that Englishmen 'inherit' their liberties, their constitution, their public law. When sober, they do nothing of the kind. But, whatever may have 'quivered on the lip' of Cardinal Langton and the prelates and barons at Runnymead, the speech that came was the speech of feoffment. Law, if it is to endure, must be inherited. If all Englishmen have liberties, every Englishman has something, some thing,

that he can transmit to his heir. Public law cannot free itself from the forms, the individualistic forms of private law."

193. Pollock and Maitland, I. 150, emphasize this disparity. “In form a donation, a grant of franchises freely made by the king, in reality a treaty extorted from him by the confederate estates of the realm, ... it is also a long and miscellaneous code of laws.” Cf. also *Ibid.*, I. 658.

III. Magna Carta: its Contents and Characteristics.

The confirmation of the rights enumerated in the sixty-three chapters of the Charter represented the price paid by John for the renewed allegiance of the rebels. These rights are fully discussed, one by one, in the second part of the present volume: a brief description of their more prominent characteristics, when viewed as a collective whole, is, therefore, all that is here required.

In the attempt to analyze the leading provisions, various principles of classification have been adopted. Three of these stand out prominently: the various chapters may be arranged according to the functions of the central government which they were intended to limit; according to their own nature as progressive, reactionary, or merely declaratory; and, finally, according to the classes of the community which reaped the greatest benefit.

I. *Provisions classified according to the various prerogatives of the Crown which they affect.*

Dr. Gneist[194] adopts this principle of division, and arranges the chapters of Magna Carta into five groups according as they place legal limitations (1) on the feudal military power of the Crown, (2) on its judicial power, (3) on its police power, (4) on its financial power, or (5) furnish a legal sanction for the enforcement of the whole. In spite of Dr. Gneist's high authority, it is doubtful whether an analysis of Magna Carta upon these somewhat arbitrary lines throws much light on its main objects or results. Such a division, if convenient for some purposes, seems artificial and unreal, since it is founded on distinctions which were not clearly formulated in the thirteenth century. The adoption of such a principle of classification with reference to a period when the various functions of the executive were still blended together indiscriminately is somewhat of an anachronism.[195]

II. *Provisions classified according as they are of a progressive, reactionary, or declaratory nature.*

Among the many questions pressing for answer, none seem more natural than those which inquire into the relations between the promises made in the Charter and the system of government actually at work under Henry of

Anjou and his sons; or the relations between these promises and the still older laws of Edward Confessor.

The view generally entertained is that the provisions of Magna Carta are chiefly, if not exclusively, of a declaratory nature. The Great Charter has for many centuries been described as an attempt to confirm and define existing customs rather than to change them. In the words of Blackstone,[196] writing in 1759, “It is agreed by all our historians that the Great Charter of King John was for the most part compiled from the ancient customs of the realm, or the laws of King Edward the Confessor, by which they usually mean the common law, which was established under our Saxon princes, before the rigours of feudal tenures and other hardships were imported from the continent.” Substantially the same doctrine has been enunciated only the other day, by our highest authority. "On the whole, the charter contains little that is absolutely new. It is restorative. John in these last years has been breaking the law; therefore the law must be defined and set in writing.[197] This view seems, on the whole, a correct one; the insurgents in 1215 professed to be demanding nothing new, but merely a return to the good laws of Edward Confessor, as supplemented by the promises contained in the charter of Henry I. An unbroken thread runs back from Magna Carta to the laws and customs of Anglo-Saxon England and the old coronation oaths of Ethelred and Edgar. Yet the Great Charter contained much that was unknown to the days of the Confessor and had no place in the promises of Henry I. In many points of detail the Charter must look for its antecedents rather to the administrative changes introduced by Henry II. than to the old customary law that prevailed before the Conquest.

Thus it is not sufficient to describe Magna Carta merely as a declaratory enactment; it is necessary to distinguish between the different sources of what it declared. A fourfold division may be suggested. (1) Magna Carta embodied and handed down to future ages some of the usages of the old customary law of Anglo-Saxon England, unchanged by the Conqueror or his successors, now confirmed and purified from abuses. (2) In defining feudal incidents and services, it confirmed many rules of the feudal law brought into England by the Normans subsequently to 1066. (3) It also embodied many provisions of which William I. and even Henry I. knew no more than did the Anglo-Saxon kings—innovations introduced for his own purposes by Henry of Anjou, but, after half a century of experience, now accepted loyally even by the most bitter opponents of the Crown. In the

words of Mr. Prothero, “We find ... the judicial and administrative system established by Henry II. preserved almost intact in Magna Carta, though its abuse was carefully guarded against.”[198] Finally, (4) in some few points, the Charter actually aimed at going farther than Henry II., great reformer as he was, had intended to go. Thus, to mention only two particulars, the Petty Assizes are to be taken in every county four times a year, while sheriffs and other local magistrates are entirely prohibited from holding pleas of the Crown.

There are two further reasons why we cannot be content with an explanation which dismisses Magna Carta with the bald statement that its provisions are merely of a declaratory nature. History has proved the universal truth of the theory that a purely declaratory enactment is impossible; since the mere lapse of time, by producing an altered historical context, necessarily changes the purport of any Statute when re-enacted in a later age. Even if words identically the same are repeated, the new circumstances read into them a new meaning. Such is the case even when the framers of these re-enactments are completely sincere, which, often, they are not. It is no unusual device for innovators to render their reforms more palatable by presenting them disguised as returns to the past. Magna Carta affords many illustrations of this. Its clauses, even where they profess to be merely confirmatory of the *status quo*, in reality alter existing custom.

Further, it is of vital importance to bear in mind the exact nature of the provisions confirmed or declared. A re-statement of some of the more recent reforms of Henry II. (or of those of Archbishop Hubert Walter, following in his footsteps) leads logically to progress rather than to mere stability; while the professed confirmation of Anglo-Saxon usages or of ancient feudal customs, fast disappearing under the new *régime*, implies retrogression rather than standing still. Chapters 34 and 39 of Magna Carta, for example, are of this latter kind. They really demand a return to the system in vogue prior to the innovations of Henry II. when they declare in favour of feudal jurisdictions. Thus, some of the provisions of the Great Charter which, at a casual glance, appear to be correctly described as declaratory, are, in reality, innovations; while others tend towards reaction.

III. *Provisions classified according to the estates of the community in whose favour they were conceived.*

This third principle of arrangement would stand condemned as completely misleading, if it were necessary to accept as true, in any literal

sense, the assertions so frequently made concerning the absolute equality of all classes and interests before the law—as that law was embodied in Magna Carta. Here, then, we are face to face with a fundamental question of immense importance: Does the Great Charter really, as the orthodox traditional view so vehemently asserts, protect the rights of the whole mass of humble Englishmen equally with those of the proudest noble? Is it really a great bulwark of the constitutional liberties of the nation, considered as a nation, in any broad sense of that word? Or is it rather, in the main, a series of concessions to feudal selfishness wrung from the King by a handful of powerful aristocrats? On such questions, learned opinion is sharply divided, although an overwhelming majority of authorities range themselves on the popular side, from Coke (who assumes in every page of his *Second Institute* that the rights won in 1215 were as valuable for the villein as for the baron) down to writers of the present day. Lord Chatham in one of his great orations[199] insisted that the barons who wrested the Charter from John established claims to the gratitude of posterity because they "did not confine it to themselves alone, but delivered it as a common blessing to the whole people"; and Sir Edward Creasy,[200] in citing Chatham's words with approval, caps them with more ecstatic words of his own, declaring that one effect of the Charter was "to give and to guarantee full protection for property and person to every human being that breathes English air." Lord Chatham indeed spoke with the unrestrained enthusiasm of an orator; yet staid lawyers and historians like Blackstone and Hallam seem to vie with him in similar expressions. "An equal distribution of civil rights to all classes of freemen forms the peculiar beauty of the charter"; so we are told by Hallam.[201] Bishop Stubbs unequivocally enunciated the same doctrine. "Clause by clause the rights of the commons are provided for as well as the rights of the nobles.... This proves, if any proof were wanted, that the demands of the barons were no selfish exactions of privilege for themselves."[202]

Dr. Gneist is of the same opinion. "Magna Carta was a pledge of reconciliation between all classes. Its existence and ratification maintained for centuries the notion of fundamental rights as applicable to all classes in the consciousness that no liberties would be upheld by the superior classes for any length of time, without guarantees of personal liberties for the humble also."[203]

"The rights which the barons claimed for themselves," says John Richard Green,[204] before proceeding to enumerate them, "they claimed for the nation at large." The testimony of a very recent writer, Dr. Hannis Taylor, [205] may close this series. "As all three orders participated equally in its fruits, the great act at Runnymede was in the fullest sense of the term a national act, and not a mere act of the baronage on behalf of their own special privileges." It would be easy to add to this "cloud of witnesses," but enough has been said to prove that it has been a common boast of Englishmen, for many centuries, that the provisions of the Great Charter were intended to secure, and did secure, the liberties of every class and individual of the nation, not merely those of the feudal magnates on whose initiative the quarrel was raised.

It must not be forgotten, however, that the truth of historical questions does not depend on the counting of votes, or the weight of authority; nor that a vigorous minority has always protested on the other side. "It has been lately the fashion," Hallam confesses, "to depreciate the value of Magna Charta, as if it had sprung from the private ambition of a few selfish barons, and redressed only some feudal abuses."[206] It is not safe to accept, without a careful consideration of the evidence, the opinions cited even from such high authorities. "Equality" is essentially a modern ideal: in 1215, the various estates of the realm may have set out on the journey which was ultimately to lead them to this conception, but they had not yet reached their goal. For many centuries after the thirteenth, class legislation maintained its prominent place on the Statute Rolls, and the interests of the various classes were by no means always identical.

Two different parts of the Charter have a bearing on this question; namely, chapter 1, which explains to whom the rights were granted, and chapter 61, which declares by whom they were to be enforced. John's words clearly tell us that the liberties were confirmed "to all freemen of my kingdom and their heirs for ever." This opens up the crucial question—who were *freemen* in 1215?

The enthusiasm, natural and even laudable in its proper place, although fatal to historical accuracy in its results, which seeks to enhance the merits of Magna Carta by exalting its provisions and extending their scope as widely as possible, has led commentators to stretch the meaning of "freeman" to its utmost limits. The word has even been treated as embracing the entire population of England, including not only churchmen,

merchants, and yeomen, but even villeins as well. There are reasons, however, for believing that it should be understood in a sense much more restricted, although the subject is darkened by the vagueness of the word, and by the difficulty of determining whether it bears any technical signification or not. “Homo,” in medieval law-Latin, has a peculiar meaning, and was originally used as synonymous with "baro"—all feudal vassals, whether of the Crown or of mesne lords, being described as “men” or “barons.” The word was sometimes indeed more loosely used, as may have been the case in chapter 1. Yet Magna Carta is a feudal charter, and the presumption is in favour of the technical feudal meaning of the word—a presumption certainly not weakened by the addition of an adjective confining it to the “free.” This qualifying word certainly excluded villeins, and possibly also the great burgess class, or many of them. There is a passage in the *Dialogus de Scaccario* (dating from the close of the reign of Henry II.), in which Richard Fitz-Nigel reckons even the richest burgesses and traders as not fully free. He discusses the legal position of any knight (*miles*) or other freeman (*liber homo*) losing his status by engaging in commerce in order to make money.[207] This does not prove that rich townsmen were ranked with the *villani* of the rural districts; but it does raise a serious doubt whether in the strict legal language of feudal charters the words *liberi homines* would be interpreted by contemporary lawyers as including the trading classes. Such doubts are strengthened by a narrow scrutiny of those passages of the Charter in which the term occurs. In chapter 34 the *liber homo* is, apparently, assumed to be a landowner with a private manorial jurisdiction of which he may be deprived. In other words, he is the holder of a freehold estate of some extent—a great barony or, at the least, a manor. In this part of the Charter the “freeman” is clearly a county gentleman.

Is the “freeman” of chapter 1 something different? The question must be considered an open one; but much might be said in favour of the opinion that “freeman” as used in the Charter is synonymous with “freeholder”; and that therefore only a limited class could, as grantees or the heirs of such, make good a *legal* claim to share in the liberties secured by Magna Carta. [208]

To the question, who had authority to enforce its provisions, the Great Charter has likewise a clear answer, namely, a select band or quasi-committee of twenty-five barons. Although the Mayor of London was

chosen among their number, it is clear that no strong support for any democratic interpretation of Magna Carta can be founded on the choice of executors; since these formed a distinctly aristocratic body. Yet this tendency to vest power exclusively in an oligarchy composed of the heads of great families may have been counteracted, so it is possible to contend, by the invitation extended by the same chapter to the *communa totius terrae* to assist the twenty-five Executors against the King in the event of his breaking faith. Unfortunately, the extreme vagueness of the phrase makes it rash in a high degree to build conclusions on such foundations. It is possible to interpret the words *communa totius terrae* as applying merely to "the community of freeholders of the land," or even to "the community of barons of the land," as well as to "the community of all the estates (including churchmen, merchants, and commons) of the land," as is usually done on no authority save conjecture. Every body of men was known in the thirteenth century as a *communa*; a word of exceedingly loose connotation.

So far, our investigations by no means prove that the equality of all classes, or the equal participation by all in the privileges of the Charter, was an ideal, consciously or unconsciously, held by the leaders of the revolt against King John. Magna Carta itself contains evidences which point the other way, namely, to the existence of class legislation. At the beginning and end of the Charter, clauses are carefully inserted to secure to the Church its "freedom" and privileges; churchmen, in their special interests, must be safeguarded, whoever else may suffer. "Benefit of clergy," thus secured, implies the very opposite of "equality before the law." Other interests also receive separate and privileged treatment. Many, perhaps most, of the chapters have no value except to landowners; a few affect tradesmen and townsmen exclusively, while chapters 20 to 22 adopt distinct sets of rules for the amercement of the ordinary freeman, the churchman, and the earl or baron respectively—an anticipation, almost, of the later division into the three estates of the realm—commons, clergy, and lords temporal. A careful distinction is occasionally made (for example, in chapter 20) between the freeman and the villein, and the latter (as will be proved later on) was carefully excluded from many of the benefits conferred on others by Magna Carta. In this connection, it is interesting to consider how each separate class would have been affected if John's promises had been loyally kept.

(1) *The Feudal Aristocracy.* Even a casual glance at the clauses of the Great Charter shows how prominently abuses of feudal rights and

obligations bulked in the eyes of its promoters. Provisions of this type must be considered chiefly as concessions to the feudal aristocracy—although it is true that the relief primarily intended for them indirectly benefited other classes as well.

(2) *Churchmen.* The position of the Church is easily understood when we neglect the privileges enjoyed by its great men *quâ* barons rather than *quâ* prelates. The special Church clauses found no place whatsoever in the Articles of the Barons, but bear every appearance of having been tacked on as an after-thought, due probably to the influence of Stephen Langton.[209] Further, they are mainly confirmatory of the separate Charter already twice granted within the few preceding months. The National Church indeed, with all its patriotism, had been careful to secure its own selfish advantage before the political crisis arrived.

(3) *Tenants of Mesne Lords.* When raising troops with the object of compelling John to grant Magna Carta by parade of armed might, the barons were perforce obliged to rely on the loyal support of their own freeholders. It was essential that the knights and others who held under them should be ready to fight for their mesne lords rather than for the King their lord paramount. It was thus absolutely necessary that these under-tenants should receive some recognition of their claims in the provisions of the final settlement. Concessions conceived in their favour are contained in two clauses (couched apparently in no specially generous spirit), namely, chapters 15 and 60. The former limits the number of occasions on which aids might be extorted from sub-tenants by their mesne lords to the same three as were recognized in the case of the Crown. Less than this the barons could scarcely have granted. Chapter 60 provides generally, in vague words, that all the customs and liberties which John agrees to observe towards his vassals shall be also observed by mesne lords, whether prelates or laymen, towards their sub-vassals. This provision has met with a chorus of applause from modern writers. Prof. Prothero declares[210] that "the sub-tenant was in all cases as scrupulously protected as the tenant-in-chief." Dr. Hannis Taylor[211] is even more enthusiastic. "Animated by a broad spirit of generous patriotism, the barons stipulated in the treaty that every limitation imposed for their protection upon the feudal rights of the king should also be imposed upon their rights as mesne lords in favour of the under-tenants who held of them."[212] It must, however, be remembered that a vague general clause affords less protection than a definite specific privilege; and

that in a rude age such a general declaration of principle might readily be infringed when occasion arose. The barons were compelled to do something, or to pretend to do something, for their under-tenants. Apparently they did as little as they, with safety or decency, could.

(4) Something was also done for the *merchant and trading classes*, but, when we subtract what has been read into the Charter by democratic enthusiasts of later ages, not so much as might reasonably be expected in a truly national document. The existing privileges of the great city of London were confirmed, without specification, in the Articles of the Barons; and some slight reforms in favour of its citizens (not too definitely worded) were then added. An attentive examination seems to suggest, however, that these privileges were carefully refined away when the Articles were reduced to their final form in Magna Carta. The right to tallage London and other towns was carefully reserved to the Crown, while the rights of free trading granted to foreigners were clearly inconsistent with the policy of monopoly and protection dear to the hearts of the Londoners. A mere confirmation to the citizens of existing customs, already bought and paid for at a great price, seems but a poor return for the support given by them to the movement of insurrection at a critical moment when John was bidding high on the opposite side, and when their adherence was sufficient to turn the scale. The marvel is that so little was done for them.[213]

(5) The relation of the *villein* to the benefits of the Charter has been hotly discussed. Coke claims for him, in regard to the important provisions of chapter 39 at least, that he must be regarded as a *liber homo*, and therefore as a full participant in all the advantages of the clause.[214] This contention is not well founded. Even admitting the relativity of the word *liber* in the thirteenth century, and admitting also that the villein performed some of the duties, if he enjoyed none of the rights of the free-born, still the formal description *liber homo*, when used in a feudal charter, cannot be stretched to cover those useful manorial chattels that had no recognized place in the feudal scheme of society or in the political constitution of England, however necessary they might be in the scheme of the particular manor to the soil of which they were attached.

Even if we exclude the villein from the general benefits of the grant, it may be, and has been, maintained that some few privileges were insured to him in his own name. One clause at least is specially framed for his protection. The villein, so it is provided in chapter 21, must not be so

cruelly amerced as to leave him utterly destitute; his plough and its equipment must be saved to him. Such concessions, however, are quite consistent with a denial of all *political* rights, and even of all *civil* rights, as these are understood in a modern age. The Crown and the magnates, so it may be urged, were only consulting their own interests when they left the villein the means to carry on his farming operations, and so to pay off the balance of his debts in the future. The closeness of his bond to the lord of his manor made it impossible to crush the one without slightly injuring the other. The villein was protected, not as the acknowledged subject of legal rights, but because he formed a valuable asset of his lord. This attitude is illustrated by a somewhat peculiar expression used in chapter 4, which prohibited injury to the estate of a ward by "waste of men or things." For a guardian to raise a villein to the status of a freeman was to benefit the enfranchised peasant at the expense of his young master.[215]

Other clauses both of John's Charter and of the various re-issues show scrupulous care to avoid infringing the rights of property enjoyed by manorial lords over their villeins. The King could not amerce other people's villeins harshly, although those on his own farms might be amerced at his discretion. Chapter 16, while carefully prohibiting any arbitrary increase of service from freehold property, leaves by inference all villein holdings unprotected. Then the "farms" or rents of ancient demesne might be arbitrarily raised by the Crown,[216] and tallages might be arbitrarily taken (measures likely to press hardly on the villein class). The villein was deliberately left exposed to the worst forms of purveyance, from which chapters 28 and 30 rescued his betters. The horses and implements of the *villanus* were still at the mercy of the Crown's purveyors. The re-issue of 1217 confirms this view; while demesne waggons were protected, those of villeins were left exposed.[217] Again, the chapter which takes the place of the famous chapter 39 of 1215[218] makes it clear that lands held in villeinage are not to be protected from arbitrary disseisin or dispossession. The villein was left by the common law merely a tenant-at-will—subject to arbitrary ejectment by his lord—whatever meagre measure of protection he might obtain under the "custom of the manor" as interpreted by the court of the lord who oppressed him.

Even if it were possible to neglect the significance of any one of these somewhat trivial points, when all of them are placed side by side their meaning is clear. If the bulk of the English peasantry were protected at all

by Magna Carta that was merely because they formed valuable assets of their lords. The Charter viewed them as "villeins regardant"—as chattels attached to a manor, not as members of an English commonwealth.[219]

The general conclusion to be derived from this survey is that, while much praise may be due to the baronial leaders for their comparatively liberal interest in the rights of others, they are scarcely entitled to the excessive laudation they have sometimes received. The rude beginnings of many features which have since come into prominence in English institutions (such as the conceptions of patriotism and nationality and the principles of equality before the law and the tender regard for the rights of the humble) may possibly be found in the germ in some parts of the completed Charter; but the Articles of the Barons were what their name implies, a baronial manifesto, seeking chiefly to redress the private grievances of the promoters, and mainly selfish in motive.

Yet, when all deductions have been made (and it has seemed necessary to do this with emphasis in order to redress the false balance created by the exaggerations of enthusiasts), the Great Charter still stands out as a prominent landmark in the sequence of events which have led, in an unbroken chain, to the consolidation of the English nation, and to the establishment of a free and constitutional form of polity upon a basis so enduring that, after more than eight centuries of growth, it still retains the vigour and the buoyancy of youth.

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194. *Hist. Engl. Const.*, Chapter XVIII.

195. Dr. Gneist indeed almost confesses this, when, in discussing the limitations of the financial power, he feels constrained to say that many of these are “already comprised in the provisions touching the feudal power.”

196. *Great Charter*, vii.

197. Pollock and Maitland, I. 151.

198. *Simon de Montfort*, 17.

199. House of Lords, 9th January, 1770.

200. *History of English Constitution*, 151.

201. *Middle Ages*, II. 447.

202. *Const. Hist.*, I. 570-1.

203. Gneist, *Hist. of Engl. Parl.* (trans. by A. H. Keane), 103. Cf. his *Const. Hist.* (trans. by P. A. Ashworth), 253. "A separate right for nobles, citizens, and peasants, was no longer possible."

204. *Short History of the English People*, 124.

205. *English Constitution*, I. 380.

206. *Middle Ages*, II. 447. See, *e.g.* Robert Brady, *A Full and Clear Answer* (1683).

207. *Dialogus*, II. xiii. c.

208. In addition to its appearance in the two places mentioned in the text, the word "freeman" appears in five other chapters, namely 15, 20, 27, 30, and 39. The three last instances throw no light on the meaning of the word, since the context of each would be satisfied either with a broader or with a narrower interpretation. It is different, however, with chapter 15, where the freemen are necessarily the feudal tenants of a mesne lord—that is, freeholders; and with chapter 20, where, in the matter of amercement, the freeman is distinctly contrasted with the *villanus*. Further, where men of servile birth are clearly meant, they are described generally as *probi homines* (*e.g.* in chapters 20, 29, and 48), and in one place, chapter 26, as *legales homines*. Chapter 44 mentions *homines* without any qualification. It seems safe to infer that the Great Charter never spoke of "freemen" when it meant to include the ordinary peasantry or villagers. In chapter 39 of the re-issue of 1217, *liber homo* is clearly used as synonymous with "freeholder."

209. Cf. *supra*, p. 50.

210. *S. de Montfort*, 17.

211. *English Constitution*, I. 383.

212. Bishop Stubbs, Preface to *W. Coventry*, II. lxxii., represents the barons, in their fervour for abstract law, as actually supporting their own vassals against themselves: "the barons of Runnymede guard the people against themselves as well as against the common tyrant."

213. For details, see *infra* under cc. 12, 13, 35, and 41. It is instructive to compare these chapters with the corresponding provisions of the Articles of the Barons (viz. articles 32, 12, and 31). The alterations (though slight) seem to show that some new influence affecting only the later document was inimical to the towns.

214. See Coke, *Second Institute*, p. 45, "for they are free against all men, saving against their lord."

215. Cf. under c. 4 *infra*.

216. See under c. 25 *infra*.

217. See chapter 26 of 1217.

218. See chapter 35 of 1217.

219. Dr. Stubbs takes an entirely different view. While admitting that there is "so little notice of the villeins in the charter," he explains the omission apparently on two distinct grounds, (1) that they had fewer grievances to redress than members of other classes, and (2) that they participated in all the grants from which they were not specially excluded. "It was not that they had no spokesman, but that they were free from the more pressing grievances, and benefited from every general provision." Preface to *W. Coventry*, II., lxxiii.

IV. Magna Carta: an Estimate of its Value.

No evidence survives to show that the men of John's reign placed any excessive or exaggerated importance on the Great Charter; but, without a break since then, the estimate of its worth steadily increased until it came to be regarded almost as a fetish among English lawyers and historians. No estimate of its value can be too high, and no words too emphatic or glowing to satisfy its votaries. In many a time of national crisis, Magna Carta has been confidently appealed to as a fundamental law too sacred to be altered —as a talisman containing some magic spell, capable of averting national calamity.

Are these estimates of its value justified by facts, or are they gross exaggerations? Did it really create an epoch in English history? If so, wherein did its importance exactly lie?

The numerous factors which contributed towards the worth of Magna Carta may be distinguished as of two kinds, intrinsic and extrinsic. (1) Its intrinsic value depends on the nature of its own provisions. The reforms demanded by the barons and granted by this Charter were just and moderate. The avoidance of all extremes tended towards a permanent settlement, since moderation both gains and keeps adherents. Its aims were practical as well as moderate; the language in which they were framed, clear and straightforward. A high authority has described the Charter as "an intensely practical document."[220] This *practicality* is an essentially English characteristic, and strikes the key-note of almost every great movement for reform which has held a permanent place in English history. Closely connected with this feature is another—the essentially *legal* nature of the whole. As Magna Carta was rarely absent from the minds of subsequent opponents of despotism, a practical and legal direction was thus given to the efforts of Englishmen in many ages.[221] Therein lies another English characteristic. While democratic enthusiasts in France and America have often sought to found their rights and liberties on a lofty but unstable basis of philosophical theory embodied in Declarations of Rights; Englishmen have occupied lower but surer ground, aiming at practical remedies for actual wrongs, rather than enunciating theoretical platitudes with no realities to correspond.

Another intrinsic merit of the Charter was that it made definite what had been vague before. Definition is a valuable protection for the weak against the strong; whereas vagueness increases the powers of the tyrant who can interpret while he enforces the law. Misty rights were now reduced to a tangible form, and could no longer be broken with so great impunity. Magna Carta contained no crude innovations, and confirmed many principles whose value was enhanced by their antiquity. King John, in recognising parts of the old Anglo-Saxon customary law, put himself in touch with national traditions and the past history of the nation.

Further, the nature of the provisions bears witness to the broad basis on which the settlement was intended to be built. The Charter, notwithstanding the prominence given to redress of feudal grievances, redressed other grievances as well. In this, the influence of the Church and notably of its Primate, can be traced. Some little attention was given to the rights of the under-tenants also, and even to those of the merchants, while the villein and the alien were not left entirely unprotected. Thus the settlement contained in the Charter had a broad basis in the affection of all classes.

(2) Part of the value of Magna Carta may be traced to extrinsic causes; to the circumstances which gave it birth—to its vivid historical setting. The importance of each one of its provisions is emphasized by the object-lessons which accompanied its inauguration. The whole of Christendom was amazed by the spectacle of the King of a great nation obliged to surrender at discretion to his own subjects, and that, too, after he had scornfully rejected all suggestions of a compromise. The fact that John was compelled to accept the Charter meant a loss of royal prestige, and also great encouragement to future rebels. What once had happened, might happen again; and the humiliation of the King was stamped as a powerful image on the minds of future generations.

Such considerations almost justify enthusiasts, who hold that the granting of Magna Carta was the turning-point in English history. Henceforward it was more difficult for the king to invade the rights of others. Where previously the vagueness of the law lent itself to evasion, its clear re-statement and ratification in 1215 pinned down the king to a definite issue. He could no longer plead that he sinned in ignorance; he must either keep the law, or openly defy it—no middle course was possible.

When all this has been said, it may still be doubted whether the belief of enthusiasts in the excessive importance of Magna Carta has been fully

justified. Many other triumphs, almost equally important, have been won in the cause of liberty, and under circumstances almost equally notable; and many statutes have been passed embodying these. Why then should Magna Carta be invariably extolled as the palladium of English liberties? Is not, when all is said, the extreme merit attributed to it mainly of a sentimental or imaginative nature? Such questions must be answered partly in the affirmative. Much of its value *does* depend on sentiment. Yet all government is, in a sense, founded upon sentiment—sometimes affection, sometimes fear. Psychological considerations are all-powerful in the practical affairs of life. Intangible and even unreal phenomena have played an important part in the history of every nation. The tie that binds the British colonies at the present day to the Mother Country is largely one of sentiment; yet the troopers from Canada and New Zealand who responded to the call of Britain in her hour of need produced practical results of an obvious nature. The element of sentiment in politics can never be ignored.

It is no disparagement to Magna Carta, then, to confess that part of its power has been read into it by later generations, and lies in the halo, almost of romance, which has gradually gathered round it in the course of centuries. It became a battle cry for future ages, a banner, a rallying point, a stimulus to the imagination. For a king, thereafter, openly to infringe the promises contained in the Great Charter, was to challenge the bitterness of public opinion—to put himself palpably in the wrong. For an aggrieved man, however humble, to base his rights upon its terms was to enlist the warm sympathy of all. Time and again, from the Barons' War against Henry III. to the days of John Hampden and Oliver Cromwell, the possibility of appealing to the words of Magna Carta has afforded a practical ground for opposition; an easily intelligible principle to fight for; a fortified position to hold against the enemies of the national freedom. The exact way in which this particular document—dry as its details at first sight may seem—has, when considered as a whole, fired the popular imagination, is difficult to determine. Such a task lies rather within the sphere of the student of psychology than of the student of history, as usually conceived. However difficult it may be to explain this phenomenon, there is no doubt of its existence. The importance of the Great Charter, originally flowing both from the intrinsic and from the extrinsic features already described, has greatly increased, as traditions, associations, and aspirations have clustered more thickly round it. These have augmented in each succeeding age the

reverence in which it has been held, and have made ever more secure its hold upon the popular imagination.

Thus Magna Carta, in addition to its legal value, has a political value of an equally emphatic kind. Apart from and beyond the salutary effect of the many useful laws it contained, its moral influence has contributed to a marked advance of the national spirit, and therefore of the national liberties. A few of the aspects of this advance deserve to be emphasized. The King, by granting the Charter in solemn form, admitted that he was not an absolute ruler—admitted that he had a master over him in the laws which he had often violated, but which he now swore to obey. Magna Carta has thus been truly said to enunciate and inaugurate "the reign of law" or "the rule of law" in the phrase made famous by Professor Dicey.[222]

It marks also the commencement of a new grouping of political forces in England; indeed without such a rearrangement the winning of the Charter would have been impossible. Throughout the reign of Richard I. the old tacit understanding between the king and the lower classes had been endangered by the heavy drain of taxation; but the actual break-up of the old alliance only came in the crisis of John's reign. Henceforward can be traced a gradual change in the balance of parties in the commonwealth. No longer are Crown and people united, in the name of law and order, against the baronage, standing for feudal disintegration. The mass of humble freemen and the Church are for the moment in league with the barons, in the name of law and order, against the Crown, recently become the chief law-breaker.

The possibility of the existence of such an alliance, even on a temporary basis, involved the adoption by its chief members of a new baronial policy. Hitherto each great baron had aimed at his own independence or aggrandisement, striving on the one hand to gain new franchises for himself, or to widen the scope of those he already had, and on the other to weaken the king and to keep him outside these franchises. This policy, which succeeded both in France and in Scotland, had before John's reign already failed signally in England, and the English barons now, on the whole, came to admit the hopelessness of renewing the struggle for feudal independence. They substituted for this ideal of an earlier age a more progressive policy. The king, whose interference they could no longer hope completely to shake off, must at least be taught to interfere justly and according to rule; he must walk only by law and custom, not by the caprices

of his evil heart. The barons sought henceforward, to control the royal power they could not exclude; they desired some determining share in the national councils, if they could no longer hope to create little nations of their own within the four corners of their fiefs. Magna Carta was the fruit of this new policy.

It has been often repeated, and with truth, that the Great Charter marks also a stage in the growth of national unity or nationality. Here, however, it is necessary to guard against exaggeration. It is merely one movement in a process, rather than a final achievement. We must somewhat discount, while still agreeing in the main with, statements which declare the Charter to be "the first documentary proof of the existence of a united English nation"; or with the often-quoted words of Dr. Stubbs, that "The Great Charter is the first great public act of the nation, after it has realised its own identity."[223]

A united English nation, whether conscious or unconscious of its identity, cannot be said to have existed in 1215, except under several qualifications. The conception of "nationality," in the modern sense, is of comparatively recent origin, and requires that the lower as well as the higher classes should be comprehended within its bounds. Further, the coalition which wrested the Charter from the royal tyrant was essentially of a temporary nature, and quickly fell to pieces again. Even while the alliance continued, the interests of the various classes, as has been already shown, were far from identical. Political rights were treated as the monopoly of the few (as is evidenced by the retrograde provisions of chapter 14 for the composition of the *Commune concilium*); and civil rights were far from universally distributed. The leaders of the "national" movement certainly gave no *political* rights to the despised villeins, who comprised more than three quarters of the entire population of England; while their *civil* rights were almost completely ignored in the provisions of the Charter.

Magna Carta undoubtedly marked one step, an important step, in the process by which England became a nation; but that step was neither the first nor yet the final one.

V. Magna Carta. Its defects.

The great weakness of the Charter lay in this, that no adequate sanction was attached to it, in order to ensure the enforcement of its provisions. The only expedient suggested for compelling the King to keep his promises was of a nature at once clumsy and revolutionary, and entirely worthless considered as a working scheme of government. Indeed, it was devised not

so much to prevent the King from breaking faith as to punish him when he had done so. In other words, no proper constitutional machinery was invented to turn the legal theories of Magna Carta into practical realities. In its absence, we find what has sometimes been described as "a right of legalized rebellion" conferred on an executive committee of twenty-five of the King's enemies.

This is the chief defect, but not the only one. Many minor faults and omissions may be traced to a similar root. All the great constitutional principles are in reality conspicuously absent. The importance of a council or embryo parliament, constituted on truly national lines (of which some glimmerings can be traced in 1213); the right of such a body to influence the King's policy in normal times as well as in times of crisis; the doctrine of ministerial responsibility (already dimly foreshadowed in the reign of Richard); the need of distinguishing the various functions of government, legislative, judicial, and administrative—all these cardinal principles are completely ignored by the Charter. Not one of its many clauses affords evidence that the statesmen of the day had any conception, even of a rudimentary nature, of the principles of political science.

Only five of the sixty-three chapters can be said to bear directly on the subject of constitutional (as opposed to purely legal) machinery, and most of these do so only incidentally, namely, chapters 14, 21, 39, 61, and 62.

The *Commune Concilium* is indeed mentioned; and its composition and mode of summons are clearly defined in chapter 14. But it must be remembered that this chapter appears as a mere afterthought,—as an appendix to chapter 12; its incidental nature is proved by the fact that it has no counterpart in the Articles of the Barons. The rebel magnates were vitally interested in the narrow question of scutage, not in the wide possibilities involved in the existence of a national council. The *Commune Concilium* was dragged into the Charter, not on its own merits, but merely as a convenient method of preventing the arbitrary increase of feudal exactions. That this was so, is further proved by the fact that both parties were content to omit all mention of the Council from the re-issue of 1217, when an alternative way of checking the arbitrary increase of scutage had been devised.

If the framers of John's Magna Carta had possessed any grasp of constitutional principles, they would gladly have seized the opportunity afforded them by the mention, however incidentally, of the Common

Council, in chapters 12 and 14, in order to define most carefully the powers which they claimed for it. On the contrary, no list of its functions is drawn up; nor do the words of the Charter contain anything to suggest that it exercised any powers other than that of consenting to scutages and aids. Not a word is said of any right inherent in the Council to a share in legislation, to control or even to advise the Executive, or to concur in choosing the great ministers of the Crown. Neither deliberative, administrative, nor legislative powers are secured to it, while its control over taxation is strictly limited to the right to veto scutages and aids—that is say, it only extends over that very narrow class of exactions which affected the military tenants of the Crown. It is true that chapters 21 and 39 may possibly be read confirming the *judicial* power of the Council in a certain limited group of cases. Earls and barons are not to be amerced except by their peers (*per pares suos*), and the natural place for these "equals" of a Crown vassal to assemble for this purpose would be the *Commune Concilium*. This, however, is merely matter of inference; chapter 21 makes no mention of the Council; and it is equally possible that its requirements would be met by the presence among the officials of the Exchequer of a few Crown tenants.[224] Similar reasoning applies to the provisions of chapter 39 (protecting the persons and property of freemen, by insisting on the necessity of a "trial by peers") so far as they affect earls and barons.

It is clear that the leaders of the opposition in 1215 did not consider the constitutional powers of a national Parliament the best safeguard of the rights and liberties theoretically guaranteed by the Charter. Only one practical or constitutional expedient seems to have occurred to them, namely, that embodied in chapter 61. Twenty-five barons were to be appointed by their fellow-barons to act as Executors of the Charter; but their functions were apparently only to be called into play in the event of King John or his officers breaking any of the provisions of the Charter. If this occurred, intimation might be made to a smaller sub-committee of four, chosen from the twenty-five, and these four would straightway ask the King to redress the grievance complained of. If this was not done within forty days, John granted to the Committee of twenty-five, assisted by "the whole community of the realm," the right practically to make war upon him. He conferred on them in the most explicit terms full power "to distrain and distress us in all possible ways, by seizing our castles, lands, possessions,

and in any other way they can, until the grievances are redressed according to their pleasure."

Such a provision can hardly be described as constitutional, since it is rather the negation of all constitutional principles—nothing more nor less than legalized rebellion. Provision is made not for the orderly conduct of government, but rather to provide an organization for making war upon the king in certain abnormal circumstances which are defined. Such a scheme was clearly impracticable, and the fact that it recommended itself as a possible expedient to the barons speaks eloquently of their complete ignorance of the most elementary principles of the science of government. Civil war levied on a warrant granted beforehand by the king is treated as a constitutional expedient for the redress of particular grievances as they arise.[225]

The same inability to devise practical remedies for specific evils may be traced in several minor clauses of the Charter.[226] When John promised in chapter 16 that no one should be compelled to do greater service than had been formerly due from any holding, no attempt was made, in case of dispute, to provide constitutional machinery to define what such service actually was; while chapter 45, providing that only men who knew the law, and meant to keep it, should be made justiciars, sheriffs or bailiffs, laid down no criterion of fitness, and contained no suggestion of any way in which so laudable an ambition might be realized.

Thoughtful and statesmanlike as were the provisions of Magna Carta, and wide as was the ground they covered, many important omissions can be pointed out. Some crucial questions seem not to have been foreseen, and others, for example the liability to foreign service, were deliberately shelved[227]—thus leaving room for future misunderstandings. The praise, justly earned, by its framers for the care and precision with which they defined a long list of the more crying abuses, must be qualified in view of the failure to provide procedure to prevent their recurrence. Men had not yet learned the force of the maxim, so closely identified with all later reform movements in England, that a right is valueless without an appropriate remedy to enforce it.[228]

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220. Prof. F. W. Maitland, *Social England*, I., 409.

221. Cf. Gneist, *Const. Hist.*, Chapter XVIII.: “By Magna Carta English history irrevocably took the direction of securing constitutional liberty by administrative law.”

222. A. V. Dicey, *Law of the Constitution*, Part II.

223. *Const. Hist.*, I. 571. Cf. *Ibid.*, I. 583, “The act of the united nation, the church, the barons, and the commons, for the first time thoroughly at one.” Who were “the commons” in 1215? The question is a difficult one to answer. Cf. also Mr. Prothero, *Simon de Montfort*, 18, “The spirit of nationality of which the chief portion of Magna Carta was at once the product and the seal.”

224. This is the view of Mr. L. O. Pike, *House of Lords*, 204.

225. Details of this scheme, and a fuller discussion of its defects will be found *infra* under chapter 61.

226. Magna Carta has been described, in words already quoted with approval, as “an intensely practical document,” Professor Maitland, *Social England*, I. 409; but this requires some qualification. If it was practical in preferring the condemnation of definite practical grievances to the enunciation of philosophical principles, it was unpractical in omitting to provide machinery for giving effect to its provisions.

227. Except in so far as affected by cc. 12 and 16.

228. Mr. Prothero estimates much more highly the constitutional value of Magna Carta: "The constitutional struggles of the following half-century would to a great extent have been anticipated had it retained its original form."—*Simon de Montfort*, 14.

VI. Magna Carta: Value of Traditional Interpretations.

The Great Charter has formed a favourite theme for orators and politicians in all periods of English history, partly because of its intrinsic merit, partly because of the dramatic background of its historical setting, but chiefly because it has been, from the time of its inception down to the present day, a rallying cry and a protecting bulwark in every crisis which threatened to endanger the national liberties.

The uses to which it has been put, and the interpretations which have been read into it, are so numerous and so varied, that they would require a separate treatise to do them justice. Not only was Magna Carta, as will be shown in some detail in a later section, frequently reissued and confirmed, but its provisions have been asserted and re-asserted time after time, in Parliament, in the courts of justice, and in institutional works on jurisprudence. Its influence has thus been threefold; and any attempt to explain its bearing on the subsequent history of English liberties would require to distinguish between these three separate and equally important aspects. (1) It has supplied a powerful instrument in the hands of politicians, especially of the leaders of the House of Commons in the seventeenth century, when waging the battle of constitutional freedom against the Stewart dynasty. (2) Its legal aspect has been as important as its political one, since it has been cited in innumerable litigations before the various courts of law. In the course of legal debate and of judicial opinions, it has been the subject of many and conflicting interpretations, some of them accurate and some erroneous. (3) Finally, it has been discussed in many commentaries either exclusively devoted to its elucidation or else treating of it incidentally in the course of general expositions of the law of England.

An exhaustive search throughout the seven centuries which separate us from 1215 for instances in which Magna Carta has appeared in the arena of politics, on the judicial bench, or in legal treatises would prove a gigantic task, but could hardly fail to illustrate the inestimable services it has rendered to English liberties.

In the light of the important part which Magna Carta has thus played throughout many centuries of English history, it need not excite wonder that

the estimation in which it was held, high as that was from a very early period, has gradually increased, until it has overstepped all due bounds, and has become utterly exaggerated and distorted. While some sympathy may be felt for such extravagant admiration, not unnatural in the circumstances, it is clearly the duty of the commentator to correct false impressions. It is well to point out that no document of human origin can be really worthy of the excessive eulogy of which the Great Charter has been made the subject; unfortunately, it has more frequently been described in terms of inflated rhetoric than of sober methodical analysis.[229]

Nor has this tendency to unthinking adulation been entirely confined to popular writers; judges and institutional authors, even Sir Edward Coke himself, have too often lost the faculty of critical and exact scholarship when confronted with the virtues of the Great Charter. There is scarcely one great principle of the English constitution of the present day, or indeed of any constitution in any day, calculated to secure national liberties, or otherwise to win the esteem of mankind, which has not been read by commentators into the provisions of Magna Carta. In particular, the political leaders of the seventeenth and eighteenth centuries discovered among its chapters every important reform which they desired to introduce into England, thereby disguising the revolutionary nature of many of their projects by dressing them in the garb of the past.

Many instances of the constitutional principles and institutions, with the origin of which successive commentators have erroneously credited the Great Charter, will be expounded under the appropriate chapters of the sequel. It will be sufficient in the meantime to enumerate trial by jury; the right of every prisoner to obtain a writ of Habeas Corpus; the abolition of all arbitrary imprisonment at the king's command; the complete prohibition of monopolies; the enunciation of a close and indissoluble tie between taxation and representation; equality of all and sundry before the law; a matured conception of nationality, embracing high and low, freeman and villein alike: all these, and more, have been discovered in various clauses of the Great Charter.[230]

If these tendencies to excessive and sometimes ignorant praise have been unfortunate from one point of view, they have been most fortunate from another. The legal and political aspects must be sharply contrasted. On the one hand, the vague and inaccurate words used in speaking of the Charter even by great lawyers, such as Coke (not necessarily equally great as

historians, living as they did in an age when the science of history was unknown), have not only obscured the bearing of many chapters, but have done a distinct injury to the study of the development of English law. On the other hand, as the mistakes made in commenting on the Charter have been almost entirely due to a laudable desire to extend as widely as possible its provisions in favour of individual and national liberties, and to magnify generally its importance; the service these very errors have done to the cause of constitutional progress is measureless. If political bias has coloured the interpretation placed on many of the most famous clauses, the ensuing benefit has accrued not to any one narrow party or faction, not to any separate class or interest, but rather to the entire body politic and to the cause of national progress in its widest and best developments.

Thus the historian of Magna Carta, while bound to correct estimates now seen to be erroneous in the light of modern research, cannot afford to despise or under-estimate the value of traditional interpretations. The meanings which have been read into it by the learned men of later ages, and which have been acquiesced in by public opinion of the day, have had an equally potent effect whether they were historically well founded or ill founded. The stigma of being banned by the Great Charter was usually too great a burden for any institution or line of policy to bear. If the belief prevailed that an abuse complained of was really prohibited by Magna Carta, the most arbitrary king had difficulty in finding judges who would declare it legal, or trustworthy ministers who would persevere in enforcing it. The prevalence of such a belief was the main point; whether it was well or ill founded was, for political purposes, quite immaterial. The greatness of Magna Carta lies not so much in what it was to its framers in 1215, as in what it afterwards became to the political leaders, to the judges and lawyers, and to the entire mass of the men of England in later ages.

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229. Extravagant estimates of its value will readily occur to anyone acquainted with the literature of the subject. For example, Sir James Mackintosh (*History of England*, I. 218, edn. of 1853) declares that we are "bound to speak with reverential gratitude of the authors of the Great Charter. To have produced it, to have preserved it, to have matured it, constitute the immortal claim of England upon the esteem of mankind. Her

Bacons and Shakespeares, her Miltons and Newtons, etc., etc." Such uncritical eulogy contributes nothing to the understanding of Magna Carta.

230. Edmund Burke (*Works*, II. 53, edn. of 1837, Boston) credits Magna Carta with creating the House of Commons! "Magna Charta, if it did not give us originally the House of Commons, gave us at least a House of Commons of weight and consequence." As will be shown in the sequel, chapter 14 of the Great Charter (the only one bearing on the subject) is in reality of a reactionary nature, confining the right of attendance at the *commune concilium* to the freeholders of the Crown and departing from the precedent of two years earlier, which introduced representatives of each county.

VII. Magna Carta. Its traditional relation to Trial by Jury.

One persistent error, universally adopted for many centuries, and even now hard to dispel, is that the Great Charter granted or guaranteed trial by jury.[231] This belief, however, which has endured so long and played so prominent a part in political theory, is now held by all competent authorities to be entirely unfounded. Not one of the three forms of a modern jury trial had taken definite shape in 1215, although the root principle from which all three subsequently grew had been in constant use since the Norman Conquest. Henry II., indeed, had done much towards developing existing tendencies in the direction of all three of its forms, namely, of the grand jury, the petty criminal jury, and the jury of civil pleas.

Magna Carta, embodying as it does many of the innovations of Henry of Anjou, necessarily contains indications of the existence of these tendencies. Yet, as these occur incidentally in various provisions of unconnected chapters, and as they cannot readily be recognized, on account of the technical language in which they are usually couched and the apparently trivial points of legal procedure to which they relate, it seems well to preface the separate consideration of each of them under its appropriate chapter, by a short account of their mutual relations. This will conduce to a clear understanding alike of trial by jury and of the Great Charter itself.

Jury trial in each of the three forms in which it is known to modern English law is able to trace an unbroken pedigree (though by three distinct lines of descent) from the same ancestor, namely, from that principle known as *recognitio* or *inquisitio*, which was introduced into England by the Normans, and was simply the practice whereby the Crown obtained information on local affairs from the sworn testimony of local men. While thus postulating a foreign origin for this "palladium of English liberties," we are afforded consolation by the remembrance of a fact which some modern authorities are too much inclined to neglect, namely, that the soil was prepared by Anglo-Saxon labour for its planting.[232]

The old English institution of the frithborh—the practice of binding together little groups of neighbours for preservation of the peace—and the custom of sending representatives of the villages to the Hundred Courts, had alike accustomed the natives to corporate action and formed in some

sort precedents for what their Norman masters compelled them to do, namely, to give their evidence on local matters jointly and on oath. Further, one form of the jury—the jury of accusation—is clearly foreshadowed (in spite of the complete breach of continuity in the intervening period) by the directions given to the twelve senior thegns of each Wapentake by a well-known law of Ethelred. Yet the credit of establishing the jury system as a fundamental institution in England is undoubtedly due to the Norman and Angevin kings, although they acted in their own interests and not in those of their oppressed subjects, and although they had no clear vision of the ultimate consequences of what they did. The uses to which the *Inquisitio* was put by William and his sons in framing *Domesday Book*, collecting information about existing laws, and dispensing justice, have already been discussed.[233]

It was reserved for Henry II. to start the institution on a further career of development; he it was who thus laid the foundations of the modern jury system. Strangely enough, he did this not merely in one of its forms, but in all three of them.

(1) In re-organizing machinery for the suppression and punishment of crime by the Assizes of Clarendon and Northampton, he established the general principle that criminal trials should (in the normal case) begin with formal indictment of the accused by a representative body of neighbours sworn to speak the truth.[234] This was merely a systematic enforcement of one of the many forms of *inquisitio* already in use; from that date onwards the practice so established has been followed in England. Criminal prosecution cannot be begun on mere suspicion or irresponsible complaints. The jury of accusation (or presentment) may be said to have been instituted in 1166, and has continued in use ever since, passing by an unbroken course of development into the grand jury of the present day.[235]

(2) By insisting that the ordeal was the only adequate test of an accused man's guilt or innocence, Henry unconsciously prepared the way for a second form of jury. When the fourth Lateran Council in the very year of Magna Carta forbade priests to countenance ordeal by their presence or blessing, a death-blow was really dealt to that form of procedure or "test," since it depended for its authority on superstition. A canon of the Church had thus suddenly struck away the pivot on which Henry had made his entire criminal system to revolve. Some substitute required urgently to be devised. It was to supply this that the petty jury (or its rude antecedent)

came into existence. The man who had been publicly accused as *presumably* guilty by the voice of his neighbours, was asked if he was willing to stand or fall by a further and final reference to the oath of a second jury of neighbours. This second verdict, then, was the new "test" or "law" substituted, if the accused man agreed, for his old right of proving himself innocent by the ordeal. By obscure steps, on which those best entitled to speak with authority are not yet agreed, this jury, giving a second and final verdict, gradually developed into the criminal jury of twelve, the petty jury of to-day, the characteristics of which are well known and which has had so important an influence on the development of constitutional liberties in England, and even, it is said, on the national character.

Another expedient of Henry's invention must have aided the movement in the direction of the criminal jury, namely, the writ *de odio et atia* by applying for which a man "appealed" or accused of a crime might substitute what was practically a jury's verdict for the "battle" which had previously, in the normal case, followed "appeal" as a matter of course.[236]

(3) The Civil Jury owes its origin to quite a different set of reforms, though inaugurated by the same reformer. Among the evil legacies left to Henry II. from Stephen's reign, not the least troublesome were the numerous claims advanced by rival magnates to the various estates and franchises which had been bestowed with equally lavish hands, but on different persons, by Matilda and Stephen. Henry realized the urgent need of giving his realm rest by protecting vested interests and by introducing a more rational expedient than trial by combat for deciding between rival claimants to landed estates. Here again he had recourse to a new development of "inquisition." In such cases an option was given to the defendant (the man in possession, the man with a vested interest which deserved protection), to refer the question at issue to the verdict of local recognitors, twelve knights or freeholders in this case, and therefore men of some position. The name "Assize" was, for reasons to be immediately explained, applied alike to the procedure itself and to the twelve neighbours who gave the verdict.

This new expedient, perhaps because it was looked on with suspicion as an innovation of a violent and revolutionary nature, was applied at first only to a few special cases, namely, to certain disputes as to vested interests in land. It was used to settle claims of ultimate title—the out-and-out ownership of the land—and then it was known as the Grand Assize; it was

also used to settle a few well-defined groups of pleas of disputed possession, and then it was known as a Petty Assize (of which there were, however, three distinct and well-known varieties).[237]

In these cases, the defendant could escape “battle” and compel the plaintiff, even against his will, to submit his claim to the verdict of the recognitors. This new-fangled privilege of the defendant had no basis in the ancient custom of the land, but depended solely on royal prerogative. The king, by a high-handed act of power, thus favoured the defendant, by depriving the claimant of that remedy which was his right by feudal law, namely, the resort to the legal duel. It was because the new procedure was thus founded on a royal Ordinance, that the name “Assize” was applied to it. The *assisa* was a remedy strictly confined to four groups of pleas.

By consent of *both* parties, however, disputes of almost every description might be similarly determined; being referred (under supervision of the king’s judges) to the verdict of local recognitors, usually twelve in number, who were then known as a *jurata* (not an *assisa*, the two being strictly opposed to each other). While the *assisa* was narrowly confined to a few types of cases, the *jurata*, since it favoured neither party, was a flexible remedy capable of indefinite expansion, and thus soon became the more popular and the more important of the two. Yet the ancient *assisa* and the ancient *jurata*, always closely connected, and resembling each other in most essential features, can both claim to be ancestors of the modern civil "jury,"—the name of the more popular institution having survived. Magna Carta, in providing for the frequent holding of the three Petty Assizes, marked a stage in the development of the Civil Jury; while, in enforcing the criminal procedure of Henry Plantagenet, and guarding it from abuse, the Charter had also a vital bearing on the genesis of the Grand Jury and the Petty Jury alike.

These scattered and incidental references to tendencies still vague and indefinite must not, however, be misread as a reference to the definite procedure into which at a later date they coalesced: Magna Carta does not promise “trial by jury” to anyone.

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231. The source of this error was the identification of the *judicium parium* of chapter 39 with jury trial. This mistake is fully refuted *infra* under that chapter.

232. The theory now generally accepted that the origin of trial by jury must be sought in procedure introduced by the Norman Dukes and not in any form of popular Anglo-Saxon institutions is ably maintained by Pollock and Maitland, I. 119, and by the late Professor J. B. Thayer, *Evidence*, p. 7. Undoubtedly their conclusions are in the main correct; but in their natural desire to remove misconceptions, they are possibly guilty of some slight exaggeration. Trial by jury may have had more than one root, and a full appreciation of the value of the Norman contribution need not lead to the total neglect of the Anglo-Saxon one. Accepted conclusions in this respect might profitably be supplemented by the opinions of Dr. Hannis Taylor, *English Constitution*, I. 308 and I. 323.

233. See *supra*, pp. 105-6.

234. See Pollock and Maitland, I. 131. It was part of Henry's policy to substitute indictment by a representative jury for the older appeal by the wronged individual or his surviving relatives. The older procedure, however, was not completely abolished though looked upon with disfavour. Its continuance and also its unpopularity may both be traced in chapter 54 of Magna Carta. See *infra*.

235. Chapter 38 of Magna Carta, according to a plausible interpretation of an admittedly obscure passage, seems to insist on the necessity of such an accusation by the jury:—"*non ... sine testibus fidelibus ad hoc inductis*."

236. For fuller details see *infra* under chapter 36, and *supra* p. 108.

237. These three Petty Assizes are mentioned by name in c. 18 of the Great Charter, and under that heading the entire subject is more fully discussed. See *infra*.

PART IV.
HISTORICAL SEQUEL TO MAGNA CARTA.

I. Re-issues and Confirmations of the Great Charter.

While King John had accepted the reforms contained in Magna Carta unwillingly and insincerely, the advisers of his son accepted them in good faith. Three re-issues of the Charter were granted in 1216, in 1217, and in 1225, and these were followed by many confirmations, a full account of which would involve a complete political and legal history of England. The scheme of this Historical Introduction is restricted to the narration of such facts as have a direct bearing on the genesis and contents of the Charter of John. Yet no account of Magna Carta would be complete without some notice of the more important alterations contained in these three re-issues.

On 28th October, 1216, Henry of Winchester, was crowned at Gloucester before a small assemblage.[238] The young King took the usual oath as directed by the Bishop of Bath, and he also performed homage to the Pope's representative Gualo, for the King of England was now the vassal of Rome. At a Council held at Bristol, on 11th November, William Marshal, Earl of Pembroke, was appointed *Rector regis et regni*; and, next day, the Charter was re-issued in the King's name. This was a step of extreme importance, marking the acceptance by those in power for the time being of the programme of the baronial opposition.

The Charter in its new form was really a manifesto issued by the moderate men who rallied round the throne of the young King; it may be viewed in two aspects, as a declaration by the Regent and his co-adjutors of the policy on which they accepted office, and as a bid for the support of the barons who still adhered to the faction of the French prince. Its issue was, indeed, dictated by the crucial situation created by the presence in England of Prince Louis of France supported by a foreign army and by a large faction of the English barons who had sworn homage to him as their king. It was, therefore, framed in terms likely to conciliate such of the opposition as were still open to conciliation. Yet the new Charter could not be a verbatim re-issue of the old one. Vital alterations were required by the altered circumstances.[239] It was no longer the expression of a reluctant consent by the government of the day to the demands of its enemies, but rather a set of rules deliberately accepted by that government for its own guidance. The chief tyrant against whom the original provisions had been directed was

now dead, and certain forms of tyranny, it was confidently hoped, had died with him. Restraints now placed on the Crown's prerogatives would only hamper the free action of the men who framed them, not of their political opponents. The new beneficent government must not suffer for the sins of the old evil one. The Regent, while willing to do much for the cause of conciliation, could not afford to paralyze his own efficiency at a time when foreign invaders were in possession of one-half of England, from which it would require a supreme effort to dislodge them. In especial, the Crown, in its urgent need for money wherewith to pay the wages of its mercenaries, must suffer no unnecessary restraints upon its powers of taxation. The existing civil war made it imperative that the government should retain a free hand in exacting feudal services and in levying scutages. Moderate-minded men would readily acquiesce in the wisdom of this policy; while it was useless to modify it in the hope of conciliating the extreme party who had thrown in their lot irretrievably with Prince Louis.

The Charter of 1216 is, therefore, notable for its omissions. The chief among these may be arranged under five groups.[240] (1) Restraints placed in 1215 on the taxing power of the Crown now disappeared. The chapters which forbade the king to increase the "farms" or fixed rents of the counties and hundreds, those which defined the king's relations with the Jews, and those which restricted the lucrative rights derived from the rigorous enforcement of the forest laws, were discarded. An even more important omission was that of the clause which abolished the Crown's rights to increase feudal contributions arbitrarily without consent of the Common Council.

(2) One clause specially valued by the national Church was also omitted. John's grant of liberty of election by the canons of the chapters was quietly ignored; although the vague declaration that the Church "should be free" was allowed to remain.

(3) A great number of provisions of purely temporary interest naturally disappeared, among them those providing for the disbandment of mercenary troops and the dismissal from office of obnoxious individuals. Of more importance was the omission of all reference to the device adopted for enforcing the original Charter by means of the baronial committee of twenty-five Executors.

(4) A number of minor omissions of a miscellaneous nature may be grouped together; for example, chapter 27, providing that the chattels of

every freeman who died intestate should be divided under the supervision of the Church; chapter 41, granting freedom to leave the kingdom, and return, without the king's consent; chapter 45, by which the Crown restricted itself in the choice of justiciars and other officers; and the latter half of chapter 47, relating to the banks of rivers and their guardians.[241]

(5) These various alterations implied, incidentally rather than deliberately, the omission of all mention of such constitutional machinery as had found a place in the words of John's Great Charter. The twenty-five Executors fell with the other temporary provisions; while chapter 14, which defined the composition and mode of summons of the *Commune Concilium*, was omitted as a matter of course, along with chapter 12, to which it had merely formed a supplement. It was apparently thought unnecessary to make any mention of the Council, and this attitude may be explained partly on the ground that the framers of the new deed took for granted its continued existence in the future as in the past, and partly by the consideration that its vital importance as a constitutional safeguard had not yet been realized. Chapter 14 of 1215, to which much importance is invariably attached by modern writers, probably held quite a subordinate place in the minds of its framers and was abandoned altogether in 1216, never to be replaced.[242]

However natural may be the explanation, the fact is no less notable that the only clauses of the original Charter which partook of a constitutional character entirely disappeared from all of its re-issues. Magna Carta as granted by Henry is purely concerned with matters which lie within the sphere of private law, and contains no attempt to devise machinery of government or to construct constitutional safeguards for the protection of national liberties. The circumstances of the King's minority, perhaps, implied a constitutional check on the monarchy in the necessary existence of guardians, but when Henry III. attained majority, Magna Carta, deprived of its original sanctions, would, with the disappearance of the Regency, tend to become an empty record of royal promises. The entire machinery of government remained exclusively monarchic; the king, once out of leading-strings, would be restrained only by his own sense of honour and by the fear of armed resistance—by moral forces neither legal nor constitutional. The logical outcome, under the ripening process of time, was the Barons' War.

The importance of the omissions is considerably minimized, however, by two considerations. (*a*) Many of the original provisions were merely

declaratory, and their omission in 1216 by no means implied that they were then abolished. The common law remained what it had been previously, although it was not considered necessary to specify those particular parts of it in black and white. In particular, throughout the entire reign of Henry, the *Commune Concilium* frequently met, and was always, in practice, consulted before a levy was made of any scutage or aid. (*b*) It is clearly stated in the new charter that the advisability of replacing these omitted clauses was reserved for further consideration at some more opportune occasion. In the so-called "respiting clause" (chapter 42) six topics were specially named as thus reserved because of their "grave and doubtful" import: the levying of scutages and aids, the debts of the Jews, the liberty of going from and returning to England, the forest laws, the "farms" of counties, and the customs relating to banks of rivers and their guardians. This respiting clause amounts to a definite engagement by the King to take into serious consideration at some future time (probably as soon as peace had been restored) how far it would be possible to re-insert the omitted provisions in a new charter. This promise was partially fulfilled a year later.[243]

A practical difficulty confronted the advisers of the young King as to the execution of the Charter. No instance of a Regency had occurred since seals came into general use; and, therefore, neither law nor custom afforded precedents for the execution of documents during a king's minority. The seal of a king, like that of any ordinary magnate, was personal to him, and not available for his heir. The custom indeed was to destroy the matrix when a death occurred, and thus to prevent its being put to improper uses. John's great seal could no longer be used,[244] and the advisers of Henry III. shrank from the responsibility of making a new one for the infant monarch. Yet no charter would be binding unless executed with all the recognized formalities. In these circumstances it was resolved to authenticate the new Charter by impressing on it the seals of the papal legate and of the Regent. Henry was made to explain that, in the absence of a seal of his own, the Charter had been sealed with the seals of Cardinal Gualo and of William Marshal, Earl of Pembroke, "*rectoris nostri et regni nostri*."

The issue of the new Charter was not immediately successful in bringing the civil war to an end; but a stream of waverers flowed from Louis to Henry, influenced partly by the success of the national faction in the field and partly by the moderate policy of the government typified by the re-issue of the Charter. On 19th May, 1217, the royalists gained a decisive victory at

the battle known as the “Fair of Lincoln”; and, on 24th August following, Hubert de Burgh, the Justiciar, destroyed the fleet on which Louis depended. The French prince was compelled to sue for peace. Although negotiations were somewhat protracted, the resulting Treaty of Lambeth bears date the 11th September, 1217, the day on which they opened.[245] Several interviews took place at Lambeth between 11th and 13th September, and these were followed by a general conference at Merton, commencing on the 23rd, at which Gualo, Louis, the Regent, and many English nobles were present.[246] Some difference of opinion exists as to the exact stages of these negotiations,[247] and it seems best to treat as one whole the settlement ultimately arranged. “The treaty of Lambeth is, in practical importance, scarcely inferior to the charter itself.”[248] It marked the final acceptance by the advisers of the Crown of the substance of Magna Carta as the permanent basis of government for England in time of peace, not merely as a provisional expedient in time of war. Its terms were equally honourable to both parties: to the Regent and his supporters, because of the moderation they displayed; and to Louis who, while renouncing all claim to the English Crown, did so only on condition of a full pardon to his allies, combined with the guarantee of their cause, so far at least as that was embodied in the Charter. Ten thousand marks were paid to Louis, nominally as indemnity for his expenses; but he had in return to restore the Exchequer Rolls, the charters of the Jews (that is the rolls on which copies of their starrs or mortgages had been registered),[249] the Charters of Liberties granted by John at Runnymede, and all other national archives in his possession. Sir William Blackstone thinks it probable that, under this clause of the treaty, the original of the Articles of the Barons was handed over, and deposited among the other archives of the Archbishop of Canterbury at Lambeth Palace where it remained until the middle of the seventeenth century.[250] One condition of this general pacification was of supreme importance—the promise given by the Regent and the papal legate to grant a new and revised Charter. This promise was fulfilled some six weeks later, a Charter of Liberties and a separate Forest Charter being issued on the 6th November, 1217.[251]

The issue of these two Charters put the copestone to the general pacification of the kingdom. After the wide-spread havoc wrought by two years of civil war, the moment had come for a definite and final declaration by the Regent of his policy for ruling an England once more at peace. Not

only was he bound in honour to this course by the Treaty of Lambeth, but the opportunity was a good one for fulfilling the promise made in chapter 42 of the Charter of 1216. Accordingly the respiting clause of that document now disappeared altogether, and some new clauses took its place. The matters reserved for further discussion as "*gravia et dubitabilia*" had now been reconsidered and were either finally abandoned, or else accepted with more or less radical alterations. The results of these deliberations are to be found in a number of additions to the Charter of Liberties of 1217, the most important of which are chapters 44 and 46, and in the terms of a Forest Charter now granted for the first time.

Chapter 46 is a "saving clause," reserving to archbishops, bishops, abbots, priors, templars, hospitallers, earls, barons, and all other persons, cleric and lay, the liberties and free customs which they previously had. The vagueness of this provision (a mere reference to the undefined and misty past) deprived it of all practical value. The other addition was of much greater importance.

Chapter 44 directed that scutages should be taken in the future as they had been wont to be taken in the time of Henry II. Now, the rates of scutage and the procedure for levying it in that reign had been quite specific, and could still be read among the Rolls of the Exchequer recently recovered from Prince Louis. It was thus easy to define the various innovations of John's reign, those well-hated additional burdens which had furnished the chief motive for the civil war, and which Henry III. was now made to promise should be utterly swept away. This general condemnation probably included the increased frequency of John's exactions, the assessment of scutages on the new basis provided by the Inquest of 1212, the levy of both scutage and service cumulatively, and, above all, the exaction of the high rate of three marks per knight's fee. The essence of the demands pressed on the government by the baronial leaders in 1217 must undoubtedly have been the return to the normal maximum rate of 20s. per knight's fee. Henry II., we have seen, sometimes took less, but only on one occasion took more. [252] This provision, it should be needless to say, did not preclude the barons individually or collectively from volunteering to contribute at a higher rate; and the necessity of such abnormal contributions would naturally be determined at meetings of the *Commune Concilium*.

The substitution of this definite stipulation of a return to the well-known usage of Henry II. in place of the discarded chapters 12 and 14 of John's

Charter (which made "common consent" necessary for *all* scutages, whatever the rate) was a natural compromise; and the barons in agreeing to it were probably quite justified in thinking, from their own medieval point of view, that they were neither submitting to any unfair abridgments of their rights, nor yet countenancing any reactionary measures hurtful to the growth of constitutional liberty.[253] Yet when this alteration is viewed by modern eyes in the light cast by the intervening centuries of constitutional progress, and when it is remembered that the new clause formed the chief part of the concessions made in 1217 to baronial claims, the conclusion inevitably suggests itself that the new agreement is the proof of retrograde tendencies successfully at work. All mention of the *Commune Concilium*—that predecessor of the modern Parliament, that germ of all that has made England famous in the realm of constitutional laws and liberties—disappears, apparently without protest or regret. If the control of taxation by a national assembly, if the conception of representation, if the indissoluble connection of these two principles with each other, ever really found a place in Magna Carta, they were contemptuously ejected from it in 1216, and failed to find a champion in 1217 to demand their restoration.

A modern statesman, with any knowledge of the value of constitutional principles, would have gladly seized the occasion of the revision of the terms of the Charter, to assert and define the functions and rights of the Great Council with precision and with emphasis. He would not lightly have thrown away the acknowledgment implied in chapters 12 and 14 of 1215—in the germ, at least—of the right of a national council to exercise a legal control over the levying of taxes. The magnates on both sides in 1217 were content, however, to abandon to their fate all abstract principles of constitutional development, provided they could protect their lands and purses from an immediate increase of taxation. Far-reaching problems of the composition and privileges of Parliament were unhesitatingly surrendered, as soon as another method of defence against arbitrary increase of scutage was suggested. The barons were selling, not indeed their birthright, but their best means of gaining new rights from the Crown, for "a mess of pottage."

Such considerations, however, must not be pressed too far. It should not be forgotten that no one seriously thought in 1217, any more than in 1216, of dispensing with future meetings of the feudal tenants in *Commune Concilium*. Great Councils indeed continued to meet with increasing

frequency throughout the reign of Henry III., and the consent of the magnates therein assembled was habitually asked to scutages even at a lower rate than that which had been normal in Henry II.'s reign. Sometimes such consent was given unconditionally; sometimes in return for a new confirmation of the cherished Charters; sometimes, even, it was met by an absolute refusal—the first distinct instance of which seems to have occurred in January, 1242.[254]

Another set of provisions which the respiting clause of 1216 had promised to reconsider was amply restored in the terms of a separate Forest Charter. This took the place not only of certain chapters of the original grant of 1215 omitted in 1216, but also of chapters 36 and 38 of the grant of 1216. Nothing was, however, done to restore other important omissions, namely, those relating to the Jews, to intestate succession, to free ingress to and egress from England. On the other hand, additional provisions, not promised in the respiting clause, were directed against various abuses of the Crown's feudal and other prerogatives.[255]

So far the Charter of 1217, with its restorations and additions, may be regarded as a politic effort to secure the support of the barons by satisfying their reasonable demands; but it may also be viewed in three other aspects: (1) as containing provisions for suppressing the anarchy still prevalent in several districts, a legacy from the civil war; (2) as amending some few details of the original grant which the experience of two years had shown to be defective or objectionable; and (3) as making a first attempt to solve certain problems of government which had come quite recently to the foreground, but which were not successfully grappled with until three-quarters of a century later, when the legislative genius of Edward Plantagenet was brought to bear upon them.

Among the chapters restoring order, the most important, with the exception of those recasting the machinery of administration, was that which ordered the destruction of the "adulterine" castles,[256] that is, the private strongholds built by barons without the licence of the Crown. These remained in 1217, as they had remained in 1154, a result of past civil war, and a menace to peace and good government in the future. It was the aim of every efficient ruler to abolish all fortified castles—practically impregnable in the thirteenth century when artillery was unknown—except those of the King, and to see that the royal castles were under command of "constables"[257] of approved loyalty. John had placed his own strongholds

under creatures of his own, who, after his death, refused to give them up to his son's Regent. The attempt to dislodge these soldiers of fortune, two years later, led to new disturbances in which the famous Falkes de Breauté played a leading part.[258] The destruction of "adulterine" castles and the resumption of royal ones were both necessary accompaniments of any real pacification.

The re-issue of 1217 may also be regarded as bearing some analogy to a modern amending Statute. Experience, for example, had suggested the desirability of several alterations in the procedure for holding petty assizes. Many objections had been taken to the dispatch of Justices, with commissions to hold assizes in the various counties, so frequently as four times every year. It was now agreed to reduce these circuits from once a quarter to once a year—a concession to those who felt the burden of too frequent attendance.[259] Although the king's Justices were still to enjoy the co-operation of knights from each county, it was no longer specially mentioned that these knights should be *elected*. All pleas of darrein presentment were removed from the jurisdiction of the Justices on circuit, and reserved for the consideration of "the Bench," presumably now settled at Westminster.[260] The two other assizes (novel disseisin and mort d'ancestor) were still left to the king's Justices in the respective counties where the lands lay, but difficult points of law were reserved for "the Bench."[261] The inferiority of the Justices of Assize to the Courts at Westminster was thus made clear.

The same natural reluctance of those who owed suit to the local courts, to neglect their own affairs in order to perform public duties, which led to the demand for less frequent visits of the Justices of Assize, led also to an emphatic restatement of the old customary rules as to attendance at County Courts. Ordinary sessions were not to be held more frequently than once a month, nor was the sheriff to make his Tourn, or local circuit, throughout the various hundreds of his county more frequently than twice a year, namely at Easter and Michaelmas: and only at Michaelmas was he to hold view of frankpledge—one of the most important functions performed by him in the course of his circuit.[262] It was a more distinct concession to the feudal anti-centralizing spirit, that this royal view of frankpledge—for the sheriff acted as the king's deputy—was prohibited from infringing any freeman's franchises, whether such franchises had existed under Henry II. or had been subsequently acquired.[263]

Two questions, destined to become of supreme importance in the future, have also left traces on this re-issue of the Charter:—on chapters 39 and 43 respectively. The former treats of the vexed question of a feudal tenant's right to dispose of parts of his holding by gift or sale. There were two different methods of effecting this—by way of subinfeudation or by way of substitution: the tenant might create a new link in the feudal chain by granting part of his lands to a third party, who became his vassal as a result of the new grant; or he might endeavour to make the donee the direct vassal of his overlord, *quoad* the land he had newly acquired. There was here a direct conflict of interest between overlord and tenant, which extended to both ways of conveying land. Freedom to sell it or give it away was clearly an advantage to the tenant; while the lord objected to a transaction which might thrust on him new vassals he did not desire, or might divide between two or more vassals the obligations formerly incumbent on one, making the incidence of feudal burdens uncertain and their enforcement more difficult. Chapter 39 contained a compromise. The tenant might part with a portion of his holding, provided the balance he reserved was sufficient to ensure full performance by himself of the obligations due to the lord. The original vassal thus remained primarily liable for the whole of the feudal obligations (whatever right of relief he might have against his donees or sub-tenants), and must reserve in his own hands sufficient lands out of the proceeds of which to fulfil them. The final solution of the problem, here temporarily disposed of, was contained in the Statute commonly known as *Quia Emptores*,[264] which allowed the tenant to dispose of parts of his estate by way of substitution, while forbidding subinfeudation entirely.

Chapter 43 marks the growing hostility against the accumulation by the monasteries of wealth in the form of landed estates, and begins the series of legislative measures which culminated in the Statute of Mortmain.[265] The times were not ripe in 1217 for a final solution of this problem, and the charter of that year contented itself with an attempt to remedy one of the subsidiary abuses of the system merely, and not to abolish the main evil. An ingenious expedient had been devised by lawyers to enable tenants to cheat their lords out of some of the lawful feudal incidents. Religious houses formed one species of corporation, and all corporations made bad tenants, since, as they never died, the lord of the fief was deprived of the possibility of a wardship, relief, or escheat falling to him. This was a hardship; but it was not unfair, provided that the transaction which made the abbey or

monastery owner of the subjects was a *bona fide* one. Sometimes, however, more or less collusive agreements were made between a lay free-holder and a religious house whereby a new link was inserted in the feudal chain to the prejudice of the freeholder's lord. The freeholder bestowed his lands on a particular house, which took his place as the new tenant of the lord and then subinfeudated the same subjects to the original tenant, who thus got his lands back again, but now became tenant of the church, not of his former lord. The lord was thus left with a corporation for his tenant and lost all the profitable incidents, which would, under the new arrangement, accrue to the church when the freeholder died. Such expedients were prohibited, under pain of forfeiture, by chapter 43 of the re-issue of 1217; and this prohibition was interpreted very liberally by the lords in their own favour.[266]

These were the main alterations made in 1217 in the tenor of the Great Charter.[267] This re-issue is of great importance, since it represents practically the final form taken by the Charter, only two changes being made in subsequent issues.[268] On the 22nd February, 1218, copies of the Great Charter in this new form were sent to the sheriffs to be published and enforced. In the writs accompanying them, the special attention directed to the clause against unlicensed castles shows the importance attached to their demolition.[269]

The Regent and the ministers of the Crown seem to have felt increasingly the inconvenience of conducting the government without a great seal of the King. There was a natural reluctance to accept grants authenticated merely by substitutes for it, since these might not be treated as binding on the monarch when he came of age. The Regent at last agreed to the engraving of a great seal for Henry, but not without misgivings. To prevent it being used by unscrupulous ministers to validate lavish grants to their own favourites to the impoverishment of the Crown, the Council, on the advice of the Regent, issued a proclamation that no charter or other deed implying perpetuity should be granted under the new seal during the King's minority —a saving clause of which Henry was destined to make a startling use. This proclamation was probably issued soon after Michaelmas 1218.[270]

On 14th May, 1219, England lost a trusted ruler through the death of the aged Regent, whose loyalty, firmness, and moderation had contributed so much to repair the breaches made in the body politic by John's evil deeds, and the consequent civil war. After the good Earl of Pembroke's death, the Bishop of Winchester and Hubert de Burgh contended for the chief place in

Henry's councils, with alternating success, but neither of them succeeded to the title of *Rector regis et regni*.[271] A few years later, the young King seems to have grown impatient under the restraints of a minority, and the Roman Curia was ready to bid for his goodwill by humouring him. In 1223 Honorius III., by letter dated 13th April, declared Henry (then only in his sixteenth year) to be of full age as regarded most of the duties of a king.[272]

The terms of this papal letter may have suggested to some of Henry's councillors the possibility of renouncing the Charters on the ground that they had been granted to the prejudice of the King before he had been declared of full age. One of his flatterers, William Briwere by name, at a "colloquium" held in January, 1223, advised him to repudiate the two Charters when requested by Stephen Langton to confirm them. Briwere's bold words are reported by Matthew Paris.[273] "*Libertates quas petitis, quia violenter extortae fuerunt, non debent de jure observari.*" This doctrine of repudiation moved the primate to anger, and Henry, still accustomed to leading-strings, gave way, swearing to observe the terms of both charters. An element of truth, however, underlay Briwere's advice, and the whole incident probably showed to the more far-seeing friends of liberty the necessity of a new and *voluntary* confirmation of the Charters by the King. An opportunity for securing this occurred next year, when Henry at Christmas, 1224, demanded one-fifteenth of all his subjects' moveables. He was met by a firm request that he should, in return for so large a grant, renew Magna Carta. The result was the re-issue on 11th February, 1225, of both Charters each of which was, as a matter of course, fortified by the impression of the great seal recently made. The importance of the whole transaction was enhanced by the declaration made by Honorius III. only two years previously, that Henry was of full age to act for himself. The new forest Charter was practically identical with that issued in 1217; while the only alterations in the tenor of the Charter of Liberties were the result of a laudable determination to place on record the circumstances in which it had been granted. In the new preamble Henry stated that he conceded it "*spontanea et bona voluntate nostra*" and all reference to the consent of his magnates was omitted, although a great number of names appear as witnesses at the close of the Charter. These alterations were intended to emphasize the fact that no pressure had been brought to bear on him, and thus to meet future objections such as William Briwere had suggested in

1223, namely, that the confirmation of the Charter had been extorted by force.[274]

The "consideration" also clearly appears in the concluding portion of the Charter, where it is stated that in return for the foregoing gift of liberties along with those granted in the Forest Charter, the archbishops, bishops, abbots, priors, earls, barons, knights, free tenants, and all others of the realm had given a fifteenth part of their moveables to the King.

The prominence given to this feature brings the transaction embodied in the re-issue of 1225 (as compared with the original grant of 1215) one step nearer the legal category of "private bargain." It is, in one aspect, simply a contract of purchase and sale. Another important new clause follows—founded probably on a precedent taken from chapter 61 of the Charter of King John: Henry is made significantly to declare "And we have granted to them for us and our heirs, that neither we nor our heirs shall procure any thing whereby the liberties in this charter shall be infringed or broken; and if any thing shall be procured by any person contrary to these premises, it shall be held of no validity or effect." This provision was clearly directed against future papal dispensations or abrogations, such as that which King John had obtained from Innocent in 1215. The clause, however, was diplomatically made quite general in its terms.[275]

One original copy of this third re-issue of the Great Charter is preserved at Durham with the great seal in green wax still perfect, though the parchment has been "defaced and obliterated by the unfortunate accident of overturning a bottle of ink."[276] A second is to be found at Lacock Abbey, in Wiltshire. The accompanying Forest Charter is also preserved at Durham.[277]

This third re-issue brings the story of the genesis of the Great Charter to an end. It marked the final form assumed by Magna Carta; the identical words were then used which afterwards became stereotyped and were confirmed, time after time, without further modification. It is this Charter of 1225 which is always referred to in the ordinary editions of the Statutes, in the courts of law, in parliament, and in a long series of classical law books beginning with the second *Institute* of Sir Edward Coke.[278]

Although the Charter, thus, in 1225 took the permanent place it has since retained among the fundamental laws of England, it was not yet secure from attacks. Two years later the actions of Henry raised strong suspicions that he would gladly annul it, if he dared.

The young King, in spite of the Pope's bull declaring him of full age in 1223, had in reality only passed from one set of guardians to another; he had long chafed under the domination of the able but unscrupulous Peter des Roches, Bishop of Winchester, when in the beginning of 1227 he suddenly rebelled. Acting probably under the advice of Hubert de Burgh, who wished to return to power, Henry determined to shake off the control of Bishop Peter. At a Council held at Oxford in January, 1227, Henry, though not yet twenty, declared himself of full age;[279] and soon thereafter showed what use he intended to make of his newly acquired freedom. Making an unexpected application of the proclamation issued by the Regent, William Marshal, in 1218, that the great seal should not, during the minority, be used to authenticate any grants in perpetuity of royal demesne lands or other rights of the Crown, Henry now interpreted this to imply the nullity of all charters whatsoever which had been issued under the great seal since his accession. He even tentatively applied this startling doctrine to the Forest Charter.

Henry's new policy seems to have been endorsed by the magnates present, and on 21st January, 1227, he issued by their "common counsel" a series of "letters close" directing that all recipients of Crown charters must apply for their renewal—a ceremony requiring, of course, to be handsomely paid for. On 9th February a second series of "letters close" was issued, resulting in the extension of many forests to their old boundaries once more. [280]

Fears, apparently unfounded, that the Great Charter was in danger, seem to have been rife. If Henry really entertained any intention of setting aside Magna Carta, it is fortunate that the attack upon it, suggested to the King by William Briwere in January, 1223, was not seriously attempted until four years later. The delay was of supreme importance, since there had intervened the third re-issue of the Charter containing the declaration that the King had acted voluntarily, and fortified by the facts that Honorius had previously declared him of full age for such purposes, and that he had accepted a price for the confirmation of the Charter. Henry could not now repudiate the papal dispensation which he had gladly accepted and acted upon four years earlier. In this way the re-issue of both charters in 1225 had gone far to secure the national liberties. Henry shrank from any open infringement of the Great Charter; and, although he was partially successful in restoring the forests to their old wider boundaries, thus undoing many

reforms of his minority, he proceeded without violating the letter of the Forest Charter. Henceforward, Henry's attitude towards the charters was a settled one, and easily understood. He confirmed them with a light heart whenever he could obtain money in return, and thereafter acted as though they did not exist.

Henceforth history is concerned not with re-issues but with confirmations of the Great Charter. Of these the number is considerable, beginning with that granted at Westminster on 28th January, 1237;[281] but it forms no part of the scheme of this Historical Introduction to describe these in detail.[282] One of them, the so-called *Confirmatio Cartarum* of 5th November, 1297, is specially important, not because it is a confirmation, but because it is something more. It contains new clauses which impose restrictions on the taxing power of the Crown; and these, to some extent, take the places of those chapters (12 and 14) of the original grant of John, which had been omitted in all intervening re-issues and confirmations.

A Statute of 1369 (42 Edward III. c. 1), requires special notice, since it commands that "the Great Charter and the Charter of the Forest be holden and kept in all points, and if any statute be made to the contrary that shall be holden for none." Parliament in 1369 thus sought to deprive future Parliaments of the power to effect any alterations upon the terms of Magna Carta. Yet, if Parliament in that year had the power to add anything by a new legislative enactment to the ancient binding force of the Great Charter, it follows that succeeding Parliaments, in possession of equal powers, might readily undo by a second statute what the earlier statute had sought to effect. If Parliament had power to alter the sacred terms of Magna Carta itself, it had equal power to alter the less sacred statute of 1369 which declared it unalterable. The terms of that statute, however, are interesting as perhaps the earliest example on record of the illogical theory (frequently reiterated in later years) that the English Parliament might use its present legislative supremacy in such a manner as to limit the legislative supremacy of other Parliaments in the future.

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238. See *Annals of Waverley*, p. 286, and Stubbs, *Const. Hist.*, II. 18.

239. The cause for wonder is rather how few changes required to be made. "It is, however, by no means the least curious feature of the history,

that so few changes were needed to transform a treaty won at the point of the sword into a manifesto of peace and sound government." Stubbs, *Const. Hist.*, II. 21.

240. This classification takes no account of such alterations as seem to be merely verbal or inserted to remove ambiguities, *e.g.* upon chapters 22, 28, and 30 of the original Charter.

241. These alterations show traces of some influence at work hostile to the national Church. Not only is the promise of canonical election withdrawn, but the omissions of the clauses regulating intestate succession and guaranteeing freedom to leave the kingdom (a privilege highly valued by the clergy) seem to prejudice the interests of English churchmen. Now the papal legate was an active supporter of the re-issue of this Charter in 1216; whereas Rome, in the crisis of June, 1215, had been bitterly opposed to the original grant of Magna Carta. The inference is that Rome did not protest against these omissions to the prejudice of the English Church. Why was this? The explanation probably lies in the divergence of the interests of the national Church from those of the Church universal. Canonical election, for example, was nothing to Rome; successive Popes made provision for their favourites more readily in England by bringing pressure to bear on the King than on the monks of the various chapters. Henry III. habitually acted on the omission; creating wide-felt discontent by filling the English sees partly with his own foreign favourites, and partly with ecclesiastics nominated by the Roman Curia. The King and the Pope thus entered into a tacit partnership for their mutual benefit at the expense of the English national Church.

242. It is notable that it failed to find a place in the Charter of 1225, which was paid for by the nation at the price of one-fifteenth of moveables.

243. Dr. Stubbs propounds the theory that this re-issue of 1216 represents a compromise whereby the central government, in return for increased taxing powers, allowed to the feudal magnates increased rights of jurisdiction. He gives, however, no reasons for this belief, either in *Select Charters*, p. 339, or in his *Constitutional History*, II. 27. It is abundantly clear that the Crown reserved a free hand for itself in taxation, but there seems no evidence to support the other part of the theory, namely, that

feudal justice gained new ground against royal justice in 1216 which had not been already gained in 1215.

244. It is unnecessary to invent any special catastrophe to account for the disappearance of John's seal. Blackstone (*Great Charter*, xxix.) says, "King John's great seal having been lost in passing the washes of Lincolnshire."

245. Compare what is said of the negotiations at Runnymede, and the date of John's Magna Carta, *supra*, p. 48.

246. Blackstone, *Great Charter*, xxxiv.

247. *Ibid.*

248. Stubbs, *Const. Hist.*, II. 25.

249. See *infra* under chapter 9.

250. *Great Charter*, xxxix., and *cf. infra*, p. 201.

251. The Forest Charter, preserved in the archives of Durham Cathedral, bears this date, and that, in itself, affords some presumption that the Charter of Liberties (undated) to which it forms a supplement was executed at the same time. M. Bémont accepts this date; see his *Chartes*, xxviii., and authorities there cited. Blackstone, *Great Charter*, xxxix., gives the probable date as 23rd September. Dr. Stubbs, always catholic in his sympathies, gives both dates, 23rd September in *Sel. Charters*, 344, and 6th November in *Const. Hist.*, II. 26. This Charter of Liberties of 1217, originally found among the archives of Gloucester Abbey and now in the Bodleian Library at Oxford, still bears the impression of two seals—that of Gualo in yellow wax, and that of the Regent in green. See Blackstone, *Great Charter*, p. xxxv. The existence of the separate Forest Charter was only surmised by Blackstone, *Ibid.*, p. xlii.; but shortly after he wrote, an original of it was found among the archives of Durham Cathedral. For an account of this and of its discovery, see Thomson, *Magna Charta*, pp. 443-5.

252. See *supra*, p. 88.

253. Mr. Hubert Hall (*Eng. Hist. Rev.*, IX. 344) takes a different view, however, considering that a reduction of scutages to the old rate of the reign of Henry II. was impossible; he speaks of "the astounding and futile concession in c. 44 of the charter of 1217." The clause is surely neither astounding nor futile if we regard it as a promise by Henry III. that he would not exact more than 20s. per knight's fee *without consent*, and if we further note that it was the practice of his reign to ask such consent from the *Commune Concilium* for scutages even of a lower rate. A levy of 10s., for example, was granted by a Council in 1221. See Stubbs, *Const. Hist.*, II. 33.

254. Prothero, *S. de Montfort*, 67.

255. See cc. 7, 26, and 38 of 1217. Blackstone (*Great Charter*, xxvii.) further considers that c. 35 of 1217 contains "more ample provision against unlawful disseisins"; and this opinion of a great lawyer is shared by a distinguished historian. Mr. Prothero (*Simon de Montfort*, 17 n.), finds that the words of the re-issue "are considerably fuller and clearer than the corresponding declaration in the charter of 1215." It will be shown, however, *infra* under chapter 39, that one object of the alteration was to make it clear that holdings of villeins were excluded from the projection of the *judicium parium*; and that other alterations in the Charter of 1217 (*e.g.* chapter 16) are carefully drawn with a similar object.

256. C. 47 of 1217.

257. See *infra* under cc. 24 and 45.

258. Stubbs, *Const. Hist.*, II. 32.

259. C. 13 of 1217.

260. C. 15 of 1217.

261. C. 14 of 1217.

262. C. 42 of 1217.

263. *Ibid.* This seems to imply that all the aggressions since Henry's reign, had not been on one side. The barons, in obtaining a promise to respect "franchises" acquired since 1189, tacitly admitted that they had been recently encroaching on royal prerogatives. By the Statute of Gloucester and the subsequent *quo warranto* procedure Edward I. made a partially successful effort to redress the balance.

264. 18 Edward I., also known as Westminster III.

265. 7 Edward I., also known as the Statute *de religiosis*.

266. See Pollock and Maitland, I. 314.

267. Minor variations are discussed under their appropriate chapters *infra*. A full list is given by Blackstone, *Great Charter*, xxxvi.

268. *Cf.* Stubbs, *Const. Hist.*, II. 27. "This re-issue presents the Great Charter in its final form."

269. The terms of these writs are preserved in *Rot. Claus.*, I. 377.

270. Stubbs, *Const. Hist.*, II. 30. The *Annals of Waverley*, p. 290, speak of a re-issue of the charters about this date; but this probably results from confusion with what happened a year earlier. See Stubbs, *Ibid.*

271. Stubbs, *Const. Hist.*, II. 31.

272. Stubbs, *Const. Hist.*, II. 32, and authorities there cited.

273. *Chronica Majora*, III. 76.

274. Dr. Stubbs thinks that in thus avoiding one danger, a greater danger was incurred. "It must be acknowledged that Hubert, in trying to bind the royal conscience, forsook the normal and primitive form of legislative enactment, and opened a claim on the king's part to legislate by sovereign authority without counsel or consent." (*Const. Hist.*, II. 37.) This seems to exaggerate the importance of an isolated precedent, the circumstances of which were unique. The confirmation was something far apart from an ordinary "legislative enactment."

275. A few minor alterations, such as the omission of the clause against unlicensed castles (now unnecessary) and some verbal changes need not be mentioned. A list of these is given by Blackstone, *Great Charter*, l.

276. See Blackstone, *Ibid.*, xlvii. to l.

277. *Ibid.*

278. One slight exception should be noted. In one point of detail a change had occurred since 1225; the rate of relief payable from a barony had been reduced from £100 to 100 marks. See *infra* under chapter 2.

279. A bull of Gregory IX., dated 13th April, 1227, confirmed Henry in this declaration that his minority was ended. See Blackstone, *Great Charter*, li., and Stubbs, *Const. Hist.*, II. 39.

280. See *Rot. Claus.*, II. 169, and Stubbs, *Const. Hist.*, II. 40, where it is suggested that "the declaration seems merely to have been a contrivance for raising money." This is not quite accurate. Mr. G. J. Turner, in his introduction to *Select Pleas of the Forest*, pp. xcix. to cii., gives a full and convincing account of Henry's procedure and motives. "The king neither repudiated the Charter of the Forest nor annulled the perambulations which had been made in his infancy. He merely corrected them after due inquiry."

281. Blackstone, *Great Charter*, 68–9; Stubbs, *Sel. Charters*, 365–6.

282. The more important among them are enumerated by Coke in his second *Institute*, p. 1. Further details are given by Blackstone, *Great Charter*, lii.; Thomson, *Magna Charta*, 437–446; and in Bémont, *Chartes*, pp. xxx. to liii.

II. Magna Carta and the Reforms of Edward I.

The Great Charter, alike from its excellences and from its defects, exercised a potent influence on the trend of events throughout the two succeeding reigns. It is hardly too much to say that the failure of Magna Carta to provide adequate machinery for its own enforcement is responsible for the spirit of unrest and for the protracted struggles and civil war which made up the troubled reign of Henry III.; while the difference of attitude assumed by Henry and by his son Edward respectively towards the scheme of reform it embodied explains the fundamental difference between the two reigns—why the former was so full of conflicts and distress, while the latter was so prosperous and progressive. To trace the history of these reigns in detail lies outside the scope of this Historical Introduction. It seems necessary, however, to emphasize such outstanding events as have an obvious and close connection with the Great Charter, and also to outline the policy of Edward, which led ultimately to the triumph of its underlying principles.

The fundamental difference between the reigns of Henry III. and Edward I. lies in this, that while Henry, in spite of numerous nominal confirmations of Magna Carta, never loyally accepted the settlement it contained, Edward, on the contrary, acquiesced in the main provisions of the Great Charter, under many subtle modifications it is true, yet honestly on the whole, and with a sincere intention to carry them into practice.

At the same time, the attitude even of Henry III. towards Magna Carta indicates a distinct advance upon that of his father. It was much that the advisers of John's infant heir solemnly accepted, on behalf of the Crown, the provisions of the Charter, and strove to enforce them during the minority; and it was even more that Henry, on attaining majority, confirmed the arrangement thus arrived at, freely and on his own initiative, and found himself thereafter unable openly to repudiate the bargain he had made. Yet the settlement of the dissensions between Crown and baronage was still nominal rather than real. In the absence of proper constitutional machinery, the king was merely bound by bonds of parchment which he could break at pleasure. The victory of the friends of liberty proved a hollow one, since unsupported promises count for little in the great struggles fought for

national liberties. Even the crude constitutional devices of the Charter of 1215 entirely disappeared from its confirmations; and, in the absence of all sanctions for its enforcement, the Charter became an empty expression of good intentions. If a quarrel arose, no constitutional expedient existed to reconcile the disputants—nothing to obviate a final recourse to the arbitrament of civil war. Thus, part of the blame for the recurring and devastating struggles of the reign of Henry III. must be attributed to the defects of the Great Charter.

The whole interest of the reign indeed lies in the various attempts made to evolve adequate machinery for enforcing the liberties contained in Magna Carta. Experiments of many kinds were tried in the hope of turning theory into practice. The system of government outlined in the Provisions of Oxford of 1258, for example, reproduced the defects of the crude scheme contained in chapter 61 of the Great Charter, and added new defects of its own. It sought to keep the king in the paths of good government by the coercion of a body of his enemies. This baronial committee was not designed to enter into friendly co-operation with Henry in the normal work of government, but rather to supersede entirely his right to exercise certain of the royal prerogatives. No glimmering was yet apparent of the true solution afterwards adopted with success. It was not yet realized that the best way to control the Crown was through the agency of its own ministers, and not by means of a hostile opposition organized for rebellion—that the correct policy was to make it difficult for the king to rule except through regular ministers, and to secure that all such ministers should be men in whom the *Commune Concilium* reposed confidence and over whom it exercised control.

It is true that Simon de Montfort may have had some vague conception of the real constitutional remedy for the evils of the reign; but his ideals were overruled in 1258 by the more extreme section of the baronial party. Earl Simon indeed had one opportunity of putting his theories into practice. During the brief interval between the battle of Lewes, which made him supreme for the moment, and the battle of Evesham, which ended his career, he enjoyed an unfettered control over the movement of reform; and some authorities find in the provisional scheme of government, by means of which he attempted to realize his political ideals in the closing months of 1264, traces of the true constitutional expedient afterward successfully adopted as a solution of the problem. In one respect, undoubtedly, the Earl

of Leicester did influence the development of the English constitution; he furnished the first precedent for a national Parliament, which reflected interests wider than those of the Crown tenants and the free-holders, when he invited representatives of the boroughs to take their places by the side of the representatives of the counties in the national council summoned to meet in January, 1265. His schemes of government, however, were not fated to be realized by him in a permanent form. The utter overthrow of his faction followed his decisive defeat and death at Evesham on 4th August, 1265.

The personal humiliation of Simon de Montfort, however, in reality assured the ultimate triumph of the cause he had made his own. Prince Edward, from the moment of his brilliant victory at Evesham, was not only supreme over his father's enemies, but henceforth he was supreme also within his father's councils. He found himself in a position at once to realize some of his most important political ideals; and from the very moment of his victory, he adopted as his own, with some modification, it is true, the main constitutional conceptions of his uncle Earl Simon, who had been his friend and teacher before he became his deadliest enemy.

Edward Plantagenet, alike when acting as the chief adviser of his aged father and after he had succeeded him on the throne, not only accepted the main provisions of the Great Charter,[283] but adopted also, along with them, a new scheme of government which formed their necessary counterpart. To Edward is due the first dim conception of "parliamentary government," to this extent at least, that the king, as head of the executive government, should take a national council into partnership with him in the work of national administration. His political ideals were the natural result of the experience obtained during the later years of his father's reign; and he endeavoured to embody in his scheme of government the best parts of the various experiments in which that reign abounded. His policy, although founded on that of his uncle Simon de Montfort, was profoundly modified by his own individual genius. The very fact of the adoption of Earl Simon's ideals by the heir to the throne entirely altered their chances of success. All such schemes had been foredoomed to failure so long as they merely emanated from an opposition leader however powerful; but their triumph was speedily assured now that they were accepted as a programme of reform by the monarch himself. Henceforth the new political ideals, summed up in the conception of a national Parliament, were to be fostered

by the Crown's active support, not merely thrust upon the monarchy from without.

Under the protection of Edward I.—the last of the four great master-builders of the constitution—the *Commune Concilium* of the Angevin kings (itself a more developed form of the Curia Regis of the Conqueror and his sons) grew into the English Parliament. This implied no sudden dramatic change, but a long slow process of adjustment, under the guiding hand of Edward.

The main features of his scheme may be briefly summarized: Edward's conception of his position as a national king achieving national ends, the funds necessary for effecting which ought to be contributed by the nation, naturally led him to devise a system of taxation which would fill the Exchequer while avoiding unnecessary friction with the tax-payer. His problem was to keep his treasury full in the way most convenient to the Crown, and at the same time to reduce to a minimum the discontent and inconvenience felt by the nation at large under the burden. In broadening the basis of taxation, he was led to broaden the basis of Parliament; and thus he advanced from the feudal conception of a *Commune Concilium*, attended only by Crown tenants, to the nobler ideal of a national Parliament containing representatives of every community and every class in England. The composition of the great council was altered; the principle of representation known for centuries before the Conquest in English local government, now found a home, and, as it proved, a permanent home, in the English Parliament. It was obvious that Parliament, whose composition was thus altered, must meet more frequently than of old. Edward elevated the national council from its ancient position of a mere occasional assembly reserved for special emergencies, to a normal and honoured place in the scheme of government. Henceforth, frequent sessions of parliament became a matter of course.

The powers of this assembly also widened almost automatically, with the widening of its composition. Taxation was its original function, since that was the primary purpose (so the best authorities maintain in spite of some adverse criticism) for which the representatives of the counties and the boroughs had been called to it. Legislation, or the right to veto legislation, was soon added—although at first the new-comers had only a humble share in this. The functions of hearing grievances and of proffering advice had, even in the days of the Conqueror, belonged to such of the great magnates

as were able to make their voices heard in the Curia Regis; and similar rights were gradually extended to the humbler members of the augmented assembly. The representatives of counties and of towns retained rights of free discussion even after Parliament had split into two separate Houses. These rights, fortified by command of the purse strings, tended to increase, until they secured for the Commons some measure of control over the executive functions of the king. This parliamentary control varied in extent and effectiveness with the weakness of the king, with his need of money, and with the political situation of the hour.

The new position and powers of Parliament logically involved a corresponding alteration in the position and powers of the smaller but more permanent council or *Concilium Ordinarium* (the future Privy Council). This had long been increasing in power, in prestige, and in independence, a process quickened by the minority of Henry III. The Council was now strengthened by the support of a powerful Parliament, usually acting in alliance with the leaders of the baronial opposition. The members of the Council were generally recruited from Parliament, and their appointment as king's ministers and members of the Curia was strongly influenced by the proceedings in the larger assembly.

The Council thus became neutral ground on which the conflicting interests of king and baronage might be discussed and compromised. Wild schemes like that of chapter 61 of Magna Carta or like that typified in the Committee appointed by the Mad Parliament in 1258, were now unnecessary. The king's own ministers, backed by Parliament, became an adequate means of enforcing the constitutional restraints embodied in royal Charters. The problem was thus, for the time being, solved. A proper sanction had been devised, fit to change royal promises into realities.

To sum up, Edward's aim of ruling as a national king implied the frequent assembling of a central parliament composed of individuals fitted to act as links between the Crown and the various classes of the English nation whom he expected to contribute to the national Exchequer. It implied also that the national business should be conducted by ministers likely to command the confidence of that parliament.[284] Thus, Edward's policy dimly foreshadowed some of the most fundamental principles of modern constitutional government—parliament, representation, ministerial responsibility. Edward Plantagenet was, of course, far from realizing the full meaning of these conceptions, and if he had realized it, he would have

been most unwilling to accept them; yet he was unconsciously helping forward the cause of constitutional progress.

This temporary solution, during the reign of Edward I., of an ever-recurring problem of government has been viewed in two different aspects. It is sometimes regarded simply as the result of the pressure of events—as a natural phenomenon evolved, subject to natural laws, to meet the needs of the age. By other writers it is attributed to the wisdom and conscious action of King Edward. The two views are perhaps not so inconsistent as they at first sight seem, since great men work in harmony with the spirit of their times, and appear to control events which they only interpret and express. The bargain made at Runnymede between the English monarch and the English nation found its necessary counterpart and sanction, before the close of the thirteenth century, in the conception of a king ruling through responsible ministers and in harmony with a national Parliament. Edward Plantagenet was merely the instrument by whose agency the new conception was for a time partially realized. Yet, he merits the gratitude of posterity for his share in the elaboration of a working scheme of government, which took the place of the clumsy expedients designed as constitutional sanctions by the barons in 1215. He supplied the logical complement of the theories vainly enunciated in John's Great Charter, thus changing empty expressions of good intentions into accomplished facts. The ultimate triumph of the principles underlying Magna Carta was assured through the constitutional machinery devised by Edward Plantagenet.

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283. The best proof of this will be found in a comparison of Magna Carta with the Statute of Marlborough, and the chief statutes of Edward's reign, notably that of Westminster I.

284. The doctrine that the *Commune Concilium* should have some voice in the appointment of the Ministers of the Crown had indeed been acted upon on several occasions even in the reign of Henry III. See Stubbs, *Const. Hist.*, II. 41.

PART V.

MAGNA CARTA: ORIGINAL VERSIONS, PRINTED EDITIONS, AND COMMENTARIES.

I. Manuscripts of Magna Carta and Relative Documents.

The barons who had forced the Great Charter on King John were determined that its contents should be widely known and permanently preserved. It was not sufficient that the great seal should be formally impressed upon one parchment. Those who compelled John to submit were not content even with the execution of its terms in duplicate or in triplicate, but insisted that the great seal should be appended to many copies all of practically identical terms and of equal authority. These were to be distributed throughout the land, and to be preserved in important strongholds and among the archives of the chapters of cathedral churches.

I. *The extant original versions.* Of the many copies of the Charter authenticated under John's great seal, four have escaped the destroying hand of time, and may still be examined by members of the public after nearly seven centuries have passed. These four records are:

(1) *The British Museum Magna Carta, number one*—formally cited as "Cotton, Charters XIII. 31A." The recent history of this document is well known. It was found among the archives of Dover Castle in the seventeenth century; and not improbably it may have lain there for centuries before, possibly from a date not much later than that of its original execution; for the castle of Dover, like the Tower of London, was a natural place for the preservation of documents of national value. There it was discovered by Sir Edward Dering while warden of the castle, and by him it was presented to Sir Robert Cotton, accompanied by a letter dated 10th May, 1630.[285] It still forms an item in the collection preserved in the British Museum, which bears the name of the famous antiquary.

In the great fire of 23rd October, 1731, which attacked the Cottonian Library, this valuable Charter was seriously damaged and rendered in parts illegible, while the yellow wax of the seal was partially melted. It is possible that this accident has added somewhat to the prestige of this particular copy of Magna Carta, which, like the three others still extant, is written continuously, though with many contractions, in a neat, running, Norman hand. A special characteristic of this version is that some omissions seem to have been made in the body of the deed and to have been supplied at the foot of the parchment. These are five in number.[286] It is possible to

regard them as corrections of clerical omissions due to carelessness or hurry in engrossing the deed; but the fact that one of the additions is distinctly in the King's favour raises a strong presumption that they embodied additions made as afterthoughts to what had been originally dictated to the engrossing clerk, and that they were inserted at the King's suggestion before he would adhibit the great seal.

The importance of this document was recognized at a comparatively early date, and a facsimile prepared by John Pine, a well-known engraver of the day, some eighteen months after the great fire. The engraving bears a certificate dated 9th May, 1733, narrating that the copy is founded on the original, which had been shrivelled up by the heat; but that where two holes had been burned, the obliterated words had been replaced from the other version (to be immediately described), also preserved in the Cottonian collection.

(2) *The British Museum Magna Carta, number two*—formally cited as "Cotton, Augustus, II. 106." The early history of this document is unknown, but sometime in the seventeenth century it came into the possession of Mr. Humphrey Wyems, and by him it was presented to Sir Robert Cotton on 1st January, 1628–9. Unlike the other Cottonian copy, this one is happily in an excellent state of preservation; but there is no trace left of any seal.[287] Three of the five addenda inserted at the foot of the copy previously described are found in a similar position here; but the substance of the two others is included in the body of the deed. On the left-hand margin, titles intended to be descriptive of several chapters occur in a later hand.[288] Thus for the preservation of two original copies of the national charter of liberties the nation is indebted to Sir Robert Cotton, but for whose antiquarian zeal they might both have been lost. Apparently, however, a story told by several authors[289] as to the humiliating fate which threatened the original Magna Carta must be rejected. Sir Robert, it is said, discovered "the palladium of English liberties" in the hands of his tailor at the critical moment when the scissors were about to transform it into shapes for a suit of clothes. This is undoubtedly a fable, since both manuscripts of Magna Carta in the Cottonian collection are otherwise accounted for.

(3) *The Lincoln Magna Carta.* This copy is under the custody of the Dean and Chapter of the Cathedral, where it has undoubtedly lain for many centuries. It has been suggested that Bishop Hugh of Lincoln, canonized by the Roman Church, whose name appears in the list of magnates consenting

to John's grant, may have brought it with him from Runnymede on his return to Lincoln. The word "Lincolnia" is endorsed in a later hand in two places at the back of the document on folds of the parchment. It has no corrections or additions inserted at the foot, but embodies in their proper places all those which occurred in the versions already discussed. Further, it is executed with more flourishes and in a more finished manner than these, and the inference is that it took longer to engross. The Record Commissioners in preparing the *Statutes of the Realm* considered this version as of superior authority to any of the others and have accordingly chosen it as the copy for their engraving of Magna Carta published in 1810 in that valuable work, and also in the first volume of their edition of Rymer's *Foedera* in 1816.[290]

(4) *The Salisbury Magna Carta*—preserved in the archives of the Cathedral there. The early history of this manuscript has not been traced, but its existence was known at the close of the seventeenth century.[291] Sir William Blackstone, in April, 1759,[292] instituted a search for it, but without success—his inquiries being met with the statement that it had been lost some thirty years before, during the execution of repairs in the Cathedral library. As its disappearance had really taken place during the tenure of the see by Gilbert Burnet, whose antiquarian interests were well known, his political adversaries accused him of appropriating it—an undoubted calumny, yet one to which some colour was lent by facts to be hereafter explained. The document had not been re-discovered in 1800 when the royal commission published its report of the result of its inquiries for national records.[293] Two sub-commissioners visited Salisbury in 1806 in search of it, but obtained no satisfaction. It seems, however, to have been re-discovered within the next few years, since it is mentioned in a book published in 1814,[294] and it is now exhibited to the public by order of the Dean and Chapter of Salisbury Cathedral. It resembles the Lincoln copy both in its beautiful leisurely writing and also in the absence of additions at the bottom of the parchment.[295]

II. *Comparison of the Originals.* Prior to the publication of Sir William Blackstone's great work, extraordinary confusion seems to have prevailed concerning the various Charters of Liberties. Not only was John's Magna Carta confused with the various re-issues by Henry; but these latter were known only from an official copy of the Charter of 1225 contained in the confirming statute of the twenty-eighth year of the reign of Edward I.,

known as an "Inspeximus," because of the opening word of the King's declaration that he had seen the document of which he gave a copy. Neither Madox[296] nor Brady[297] was aware of the existence of any one of the four originals; and no mention is made of them in the first edition of Rymer's *Foedera*, which appeared in 1704. Mr. Tyrrell indeed seems to have known of the second original copy in the British Museum and also of the Salisbury version.[298] Mr. Care[299] showed no clear knowledge of the various manuscripts, though he mentioned the existence of several. Even Sir William Blackstone in 1759 collated only the two Cottonian copies, since he failed to find that of Salisbury, and was unaware of the existence of the Lincoln manuscript.[300]

As these four versions are practically identical in their substance—the variations being merely in the use of contractions or in other verbal changes of a trivial character—no important question seems to be involved in the discussion as to whether any one of them has greater value than the others. The Record Commissioners considered that the Lincoln copy was the first to be completed (and therefore that it possessed special authority), because, unlike the two Cottonian copies, it contained no insertions at the foot of the instrument. Yet it seems more plausible to argue that this very immunity from clerical errors, or from additions made after engrossment, proves that it was of later and less hurried execution than the others, and therefore of less authority, if any distinction is permissible. Mr. Thomson has much ground for his contention in speaking of the fire-marked version in the British Museum that "the same circumstances may probably be a proof of its superior antiquity, as having been the first which was actually drawn into form and sealed on Runnymede, the original whence all the most perfect copies were taken."[301]

In all printed texts of Magna Carta, the contents are divided into a preamble and sixty-three chapters, and each chapter is numbered and treated in a separate paragraph by itself. There is no warrant for this in any one of the four originals, all of which run straight on from beginning to end, like other feudal charters, and contain no numbers or other indication where one provision ends and another begins. Strictly speaking, Magna Carta has thus no chapters: these are a modern invention, made for convenience of reference.

III. *The Articles of the Barons.* Of hardly inferior historical interest to these four original copies of the Great Charter is the parchment which

contains the heads of the agreement made between John and the rebels on 15th June, 1215, from which the Charter was afterwards expanded. The parchment containing these heads, known as the Articles of the Barons, is now in the British Museum, cited officially as "Donation MSS. 4838." The seven centuries which have passed over it have left surprisingly few traces; it is quite legible throughout, and still bears the impression of John's great seal in brown wax. It is probable that this document may have passed with other English records into the hands of Prince Louis during the civil war which followed close on the transaction at Runnymede; that it was handed over to the Regent William Marshal in terms of the Treaty of Lambeth concluded in September, 1217; and that thereafter it was deposited in Lambeth Palace, where it remained until the middle of the seventeenth century. Archbishop Laud seems to have been aware of its historical interest, as he placed it among the more precious documents in his keeping. When threatened with impeachment by the Long Parliament, he thought it prudent to set his papers in order; and on 18th December, 1640, he dispatched for that purpose to his episcopal palace, his friend Dr. John Warner, Bishop of Rochester.

There was indeed no time to lose; a few hours later, Laud was committed to the custody of Black-Rod, and an official messenger was sent by the House of Lords to seal up his papers. Bishop Warner had, however, escaped with the Articles of the Barons before this messenger arrived; he kept it till he died, and at his death it passed to one of his executors named Lee, and from him to his son Colonel Lee, who presented it to Gilbert Burnet, afterwards Bishop of Salisbury and author of the famous *History of His Own Time*. When the Salisbury Magna Carta disappeared, Burnet was suspected of appropriating it to his own uses. The grounds which gave some apparent weight to the misrepresentations of his political opponents were that special facilities had been granted to him to search public records in the prosecution of his historical labours, and that as matter of fact he actually had in his possession—quite lawfully, as we now know—the Articles of the Barons, which was confused by the carelessness of early historians with Magna Carta itself. The calumny was so widely spread that Burnet thought it necessary formally to refute it, explaining that he had received the Articles as a gift from Colonel Lee. "So it is now in my hands, and it came very fairly to me."

Bishop Burnet left it as a legacy to his son Sir Thomas Burnet; and on his death it passed to his executor David Mitchell, whose permission to print it Blackstone obtained in 1759. Shortly thereafter it was purchased from Mr. Mitchell's daughter by another great historian, Philip, second Earl of Stanhope, and by him it was presented to the British Museum in 1769. It is now exhibited to the public along with the two Cottonian copies of Magna Carta. The Record Commissioners have reproduced it in facsimile in *Statutes of the Realm* in 1810, and also in the *New Rymer* in 1816.[302]

The document begins with this headline: "*Ista sunt Capitula quae Barones petunt et dominus Rex concedit.*" Then the articles follow in 49 paragraphs of varying length, separate, but unnumbered, each new chapter (unlike the chapters of Magna Carta, which run straight on as befits its character as a charter) beginning a new line. The numbers which invariably appear in all printed editions have no warrant in the original.

A blank space sufficient for two lines of writing occurs between paragraphs 48 and 49, indicating perhaps that the last chapter, which contains the revolutionary provision for the appointment of the twenty-five Executors, had been added as an after-thought. Chapters 45 and 46 are connected by a rude bracket, and a clause is added in the same hand as the rest, but more rapidly, modifying the provisions of both in the King's favour. This, at least, is clearly an after-thought.[303]

IV. *The so-called "unknown Charter of Liberties."* Among the French archives there is preserved the copy of what purports to be a charter granted by King John, but irregular in its form. This document is preserved among the *Archives du Royaume* in the *Section Historique* and numbered J. 655.[304] A copy of this copy was discovered at the Record Office in London by Mr. J. Horace Round in 1893, previous to which date it seems to have been practically unknown to English historians, although it had been printed by a French writer thirty years earlier.[305] Mr. Round communicated his discovery of this "unknown charter of liberties" to the *English Historical Review*, in the pages of which there ensued a discussion as to its nature and validity, inaugurated by him. Three theories were suggested: (*a*) Mr. Round maintained that the document was a copy, in a mangled form perhaps, of a charter actually granted in the year 1213 by King John to the northern barons, containing concessions which they had agreed to accept in satisfaction of their claims.[306] (*b*) Mr. Prothero preferred to view it, not as an actually executed charter, given and accepted in settlement of the various

claims in dispute, but rather as an abortive proposal made by the King early in 1215 and rejected by the barons.[307] (*c*) Mr. Hubert Hall dismissed the document as a forgery, and described it as "a coronation charter attributed to John by a French scribe in the second decade of the thirteenth century"—probably between November, 1216, and March, 1217, when King Philip desired to prove that John had committed perjury by breaking his promises, and had thereby forfeited his right to the Crown of England.[308]

Mr. Hall describes the method of procedure adopted by the compiler of this supposed forgery. Placing in front of him copies of Henry I.'s Charter of Liberties and of Henry III.'s charters issued in 1216-17, he proceeded to select from these sources whatever suited his purpose, and thereafter "either by design or carelessness, or ignorance of English forms, he altered the wording of both his originals so as to produce the effect of a paraphrase interspersed with archaisms." This extremely ingenious theory is not entirely convincing. Not to insist on the number of unproved inferences on which it is based, it seems to have one grave defect—it ignores the absurdity of attempting to obtain credence for such a clumsy composition, especially when it was well known that John had never granted a coronation charter at all. Even if a skilful forger could have utilized the document as the basis for a completed charter, this would still have required the impress of John's great seal to give it validity. Such an imposture could not be seriously intended to impose on any one.

A fourth theory may be suggested very tentatively, namely, that the document in question is a copy of the actual schedule drawn up by the barons previous to 27th April, 1215. That such a schedule existed we know from the express declaration of Roger of Wendover,[309] who informs us that it was sent to the King with the demand that his seal should be forthwith placed to it, under threat of civil war. From this, it is safe to infer that the schedule, as it left the barons' hands, was ready for execution; but lack of experience in drawing up Crown charters would prevent them from producing an entirely regular instrument. They would assuredly take as their model the charter of Henry I., which had helped to give definiteness of aim to all their efforts. It would be necessary, however, to bring this up to date, by additions which we might *a priori* expect to resemble the provisions afterwards adopted with more elaboration in the agreement made at Runnymede. This schedule, then, rapidly thrown together, would be likely to contain many of the characteristics actually discovered by Mr. Hall

in the document under discussion. Such an identification of the "unknown Charter of Liberties" with the schedule of 27th April, 1215, would explain all the features emphasized by Mr. Hall—the archaisms, the erroneous style, and the employment, first of the third person singular, and then of the first person singular, instead of using throughout the first person plural invariably used by John. It would also explain why the first half of the parchment on which the "unknown charter" is written, contains a copy of Henry I.'s charter, and why the two possess so many features in common.

It would clearly be inadvisable to found any conclusions upon the terms of a document, the nature and authenticity of which form the subject of so many rival theories; but even if further investigation proves it to be a forgery, a forgery of contemporary date may throw light on otherwise obscure passages in genuine charters. One or two instances of this will be found in the sequel.

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285. This letter is also preserved in the British Museum, and cited as "Cotton, Julius, C. III. Fol. 191."

286. These are carefully noted among the variations described by the editors of the Charters of Liberties forming Part I. of the first volume of the *Statutes of the Realm*. These addenda are (1) at the end of c. 48, "*per eosdem, ita quod nos hoc sciamus prius, vel justiciarius noster, si in Anglia non fuerimus*," providing that the King should receive intimation of all forest practices branded as "evil" before they are abrogated; (2) two small additions, near the beginning of c. 53, (a), "*et eodem modo de justicia exhibenda*," and (b) "*vel remansuris forestis*"; (3) in c. 56, these four words, "*in Anglia vel in Wallia*"; and (4) in c. 61 the words "*in perpetuum*" after "*gaudere*." In the 2nd British Museum MS. three of these addenda appear at the foot, viz. (1), (2*a*) and (2*b*); but the words of (3) and (4) are incorporated in the body of that MS.

287. "The fold and label are now cut off, though it is said once to have had slits in it for two seals, for which it is almost impossible to account; but Dr. Thomas Smith, in his Preface to the *Cottonian Catalogue*, Oxford, 1695, folio, states that they were those of the barons" (Thomson, *Magna Charta*, 425).

288. Reproductions of this copy are sold at the British Museum at 2s. 6d. each.

289. See Isaac D'Israeli, *Curiosities of Literature*, I. 18, and Thomson, *Magna Charta*, 424.

290. The engraving was executed to their order by James Basire.

291. See James Tyrrell, *History of England*, Vol. II. 821 (1697-1704).

292. Blackstone, *Great Charter*, p. xvii.

293. See *Report* (1800), p. 341, containing the Return by the Chapter Clerk of the Cathedral Church of Salisbury, dated 15th May, 1800.

294. Dodsworth, *Historical Account of the Cathedral*, 202.

295. It is unnecessary to treat in detail of the copies of the charter not authenticated by John's Great Seal, though some of these are of great value as secondary authorities. The four most important are (*a*) a copy appearing in the Register of Gloucester Abbey, (*b*) the Harleian MSS., British Museum No. 746 (which also contains the names of the twenty-five Executors in a hand probably of the reign of Edward I.), (*c*) in the Red Book of the Exchequer. There is also (*d*) an early French version, printed in D'Achery, *Spicilegium*, Vol. XII. p. 573, together with the writ of 27th September addressed to the Sheriff of Hampshire. See Blackstone, *Great Charter*, p. xviii., and Thomson, *Magna Charta*, pp. 428-430.

296. Thomas Madox, *Firma Burgi* (1726). On p. 45, Madox refers only to the *Inspeximus* of Edward I.

297. Robert Brady, *Complete History of England*, p. 126 of Appendix to Vol. I. (1685), takes his text of the Charter from Matthew Paris, "compared with the manuscript found in Bennet College Library."

298. James Tyrrell, *History of England* (1697-1704). In p. 9 of Appendix to Vol. II. p. 821, Tyrrell prints a text of John's Charter founded on that of M. Paris, collated with those two originals.

299. Henry Care, *English Liberties in the Freeborn subjects' inheritance; containing Magna Charta*, etc. (1719), p. 5. The first edition, with a somewhat different title, is dated 1691.

300. Strangely enough, Sir Thomas Duffus Hardy, so recently as 1837, in publishing his *Rotuli Chartarum* (Introduction, p. ii. note 5) declared that no original of John's Charter existed. Many copies, he knew, had been "made and deposited, for the sake of perpetuation, in all the principal religious houses in the kingdom. However, notwithstanding all the care taken by multiplication of copies, it is singular that no contemporary copy of King John's Magna Carta has yet been found." The Lincoln MS. he dismissed as "certainly not of so early a date," while he confuses the only one of the British Museum MSS. known to him with the Articles of the Barons. He further reasserts the fallacy, so clearly exposed by Blackstone eighty years earlier, that John had issued a separate *Carta de Foresta*.

301. Thomson, *Magna Charta*, 422.

302. Reproductions of it, as well as of the second Cottonian version of the Charter, are sold by the authorities of the British Museum at the price of 2s. 6d.

303. *Cf. supra*, p. 47, and Blackstone, *Great Charter*, xvii.

304. See the account given by Mr. Hubert Hall, *English Historical Review*, IX. 326.

305. Alexandre Teulet, *Layettes du Trésor*, I. p. 423 (1863).

306. *Engl. Hist. Rev.*, VIII. 288-294.

307. *Ibid.*, IX. 117-121.

308. *Ibid.*, IX. 326-335.

309. R. Wendover, III. 298, and *cf. supra*, p. 40.

II. Previous Editions and Commentaries.

Every general history of England and almost every book which has ever appeared on English law has had something to say by way of commentary on Magna Carta. It is perhaps for this very reason that exceedingly few treatises have been devoted exclusively to its elucidation. While edition after edition of the text of the Charter, or of its re-issues, have appeared, few of these have been accompanied by explanations however brief. The paucity of attempts to explain the meaning of the Charter is almost more remarkable than the frequency with which the text has been reproduced. Magna Carta is a document often printed, but seldom explained.

I. *Printed Editions of the Text of Magna Carta.* Previous to 1759 even the best informed writers on English history laboured under much confusion in regard to the various charters of liberties. Few of them seem to have been aware that fundamental differences existed between the original charter granted by John and the re-issues of Henry III. Much of the blame for this confusion must be borne by Roger of Wendover, who, in his account of the transactions at Runnymede, incorporated, in place of John's Charter, the text of the two charters granted by Henry.[310]

The early historians were content to rely either on this version or on that contained in the *Inspeximus* of Edward I. Thus, in all early printed collections of statutes, the text which professes to represent the original Charter follows in reality the words of Henry's third re-issue. The very earliest printed edition of Magna Carta seems to have been that published on 9th October, 1499, by Richard Pynson, the King's printer,[311] and a contemporary of Wynkyn de Worde. This was not, of course, John's Charter, but followed Edward's *Inspeximus* of Henry's Charter of 1225.

Since the middle of the eighteenth century, many editions of the text of John's Great Charter have been published, either alone or along with the text of the various re-issues of the reign of Henry III.; but it seems unnecessary to mention more than four of these.

(1) In 1759 appeared Sir William Blackstone's scholarly work entitled *The Great Charter and The Charter of the Forest*, containing accurate texts of all the important issues of the Charters of Liberties carefully prepared from the original manuscripts so far as these were known to him.[312]

(2) In some respects the Record Commissioners have improved even on Blackstone's work in their edition of the *Statutes of the Realm*, published in 1810. A special section of the volume is devoted to Charters of Liberties, where not only the grants of John and Henry III., but also the charters which led up to them, and their subsequent confirmations, have received exhaustive treatment.

(3) A carefully revised text, *Magna Carta regis Johannis*, was published by Dr. Stubbs in 1868; and the various charters are also to be found, arranged in chronological order, in his well-known volume, first published in 1870, entitled *Select Charters and other illustrations of English Constitutional History*, a convenient collection easily accessible to all students of law and history.

(4) For the continuous study of the sequence of charters, the best book of reference is *Chartes de Libertés Anglaises* by M. Charles Bémont published in 1892, in the pages of which the various editions of John's and Henry's charters will be found in a form convenient for comparison with each other, and with previous and succeeding documents.

II. *Commentaries and Treatises.* It is doubtful whether any good purpose would be served by the preparation of a list of all the books which contain casual references to Magna Carta or to its provisions; and it is clear that the task would be an extremely burdensome one. There is no difficulty, however, in naming the few treatises of outstanding merit which have been exclusively or mainly devoted to the exposition of the Great Charter. Of these only nine require special mention.

(1) The mysterious medieval lawbook known as the *Mirror of Justices* contains a chapter upon Magna Carta which has some claims to rank as a commentary, although it represents the opinions of a political pamphleteer rather than those of an unbiassed judge. The date of this treatise is still the subject of dispute. It has been usual to place it not earlier than the years 1307-27, mainly because it makes mention of "Edward II." Prof. Maitland, however, dates it earlier, maintaining on general grounds that it was "written very soon after 1285, and probably before 1290."[313] He explains the reference to "Edward II." as applying to the monarch now generally known in England as Edward I., but sometimes in his own reign known as Edward II., to distinguish him from an earlier Edward, still enshrined in the popular imagination, namely, Edward Confessor. Mr. Maitland is not

disposed to treat this work of an unknown author too seriously, and warns students against "his ignorance, political bias, and deliberate lies."[314]

(2) Dismissing the *Mirror*, then, as a dangerous and possibly disingenuous guide, the earliest serious commentary known to exist is that of Sir Edward Coke, formerly Lord Chief Justice. This elaborate treatise, forming the second of Coke's four *Institutes*, was published in 1642 under direction of the Long Parliament, the House of Commons having given the order on 12th May, 1641.[315]

Although this commentary, like everything written by Coke, was long accepted as a work of great value, its method is in reality entirely uncritical and unhistorical. The great lawyer reads into Magna Carta the entire body of the common law of the seventeenth century of which he was admittedly a master. He seems almost unconscious of the great changes accomplished by the experience and vicissitudes of the four eventful centuries which had elapsed since the Charter had been originally granted. The various clauses of Magna Carta are thus merely occasions for expounding the law as it stood, not at the beginning of the thirteenth century, but in his own day. In the skilful hands of Sir Edward, the Great Charter is made to attack the abuses of James or Charles, rather than those of John or Henry, which its framers had in view. In expounding the *judicium parium*, for example, he carefully explains many minute details of procedure before the Court of the Lord High Steward, and describes elaborately the nature of the warrants to be issued prior to the arrest of any one by the Crown; while, in the clause of Henry's Charter which secures an open door to foreign merchants in England "unless publicly prohibited," he discovers a declaration that Parliament shall have the sole power to issue such prohibitions, forgetful that the regulation of trade was an exclusive prerogative of the Crown with which Parliament had no right to interfere for many centuries subsequent to the reign of Henry III.

(3) In 1680 Mr. Edward Cooke, barrister, published a small volume entitled *Magna Charta made in the ninth year of King Henry III. and confirmed by King Edward I. in the twenty-eighth year of his reign*. This contained a translation of Henry's Magna Carta with short explanatory notes founded mainly on the commentary of Sir Edward Coke. In his Preface, Mr. Cooke declared that his object was to make the Great Charter more accessible to the public at large, since, as he said, "I am confident, scarce one of a hundred of the common people, know what it is."

(4) Sir William Blackstone's *Introduction* to his edition of the charters, published in 1759, as already mentioned, contains valuable information as to the documents he edits; but he explicitly disclaims all intention of writing a Commentary. He is careful to state "that it is not in his present intention, nor (he fears) within the reach of his abilities, to give a full and explanatory comment on the matters contained in these charters."[316]

(5) The Hon. Daines Barrington published in 1766 his *Observations upon the Statutes from Magna Charta to 21 James I.* This book contains some notes on the Charter also founded chiefly upon Coke's *Second Institute*; his original contributions are not of outstanding value.

(6) In 1772 Prof. Francis Stoughton Sullivan gave to the public his course of lectures previously delivered in the University of Dublin under the title *An Historical Treatise on the Feudal Law, with a Commentary on Magna Charta*. The author's own words give a sufficiently accurate conception of its scope and value: "I shall therefore proceed briefly to speak to *Magna Charta*, and in so doing shall omit almost all that relates to the feudal tenures, which makes the greatest part of it, and confine myself to that which is now law."[317]

(7) Mr. John Reeves' invaluable *History of English Law*, the first edition of which appeared in 1783-84, marked the commencement of a new epoch in the scientific study of the genesis of English law. Treating incidentally of Magna Carta, he shows wonderful insight into the real purport of many of its provisions, but the state of historical knowledge when he wrote rendered many serious errors inevitable.

(8) In 1829, Mr. Richard Thomson published an elaborate edition of the charters combined with a commentary which contains much useful information, but makes no serious attempt to supplement the unhistorical explanations of Sir Edward Coke by the results of more recent investigations in the provinces of law and history. His work is a storehouse of information which must, however, be used with caution.

(9) In many respects, the most valuable contribution yet made to the elucidation of the Great Charter is that contained in M. Charles Bémont's preface to his *Chartes des Libertés Anglaises*, published in 1892. Although he has subjected himself to the severe restraints imposed by the slender size of his volume and by a rigid desire to state only facts of an undisputed nature, leaving theories strictly alone; he has, nevertheless, done much to help forward the study of the charters. In particular he has performed an

important service by insisting upon the close mutual connection between the various Charters of Liberties, from that of Henry I. down to the confirmations of Edward I., and of subsequent kings. It is doubtful, however, whether by this very insistence upon the gradual process of development which may be traced in this long series, he does not lay himself open to the misconception that he takes too narrow a view of the scope and relations of the Charter. Magna Carta's points of contact with the past and future history of English liberties and English laws and institutions must not be narrowed down to those occurring in one straight line. Its antecedents must not be looked for exclusively among documents couched in the form of charters, nor its results merely in their subsequent confirmations. It is impossible to understand it aright, except in close relation to all the varied aspects of the national life and the national development. Every Act appearing on the Statute Rolls is, in a sense, an Act amending Magna Carta; while such enactments as the Statute of Marlborough and the Statute of Westminster I. have as intimate a connection with John's Great Charter as the *Confirmatio Cartarum* or the *Articuli super Cartas* have. This is a truth which M. Bémont undoubtedly recognizes, though the scheme of his book led him rather to emphasize another and, at first sight, contradictory aspect of his subject. His object was not to explain the numerous ways in which the Charters of Liberties are entwined with the whole of English history, but merely to furnish a basis for the accurate study of one of their most important features. His book is indispensable, but is not intended to form, in any sense, a commentary on Magna Carta.

It would thus appear that only two serious attempts have been made to produce treatises forming, explicitly and exclusively, commentaries on the Great Charter, namely the *Second Institute* of Coke and the laborious and useful work of Mr. Richard Thomson. Since Mr. Thomson's *Magna Charta* appeared, three-quarters of a century have passed, marking an enormous advance in historical and legal science; yet the results of modern research, so capable of throwing light on the subject-matter of the Great Charter, have never been systematically brought to bear upon it. Dr. Stubbs, from whom such a work would have been especially welcome, contented himself with giving a paraphrase or abstract of the Charter, rendering into English equivalents as literally as possible the actual words of his Latin text—a cautious course, which cannot lead his disciples astray, but leaves them to

the guidance of their own ignorance rather than of his knowledge. The reason given by Dr. Stubbs for keeping silence is rather the excess than the absence of information. “The whole of the constitutional history of England,” he tells us, “is little more than a commentary on Magna Carta.”[318] It is for this reason, presumably, that he refrains from all explanations and confines himself to an abstract of its main provisions. While thus many invaluable hints may be obtained from the pages of the three volumes of his history, and from his other works, Dr. Stubbs has not in any of his published writings contributed anything of the nature of a direct commentary upon John’s Great Charter. In this policy, he has been followed by the members of the great modern school of English historians of which he is the founder.[319]

Many valuable hints may be obtained from other writers such as Dr. Gneist, Sir Edward Creasy, Mr. Taswell Langmead, Dr. Hannis Taylor, Miss Norgate, and Sir James Ramsay,[320] but their efforts to explain the meaning of the Great Charter take the form of disconnected notes, rather than of exhaustive commentaries.[321]

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310. R. Wendover, III. 302-318.

311. This date is given by Bémont, *Chartes*, lxxi., but Robert Watt in his *Bibliotheca Britannica*, Thomson, *Magna Charta*, 450, and Lowndes, *Bibliographer’s Manual*, 1449, all give the date of the earliest edition as 1514. Bémont, lxxi., and Thomson, 450–460, Watt, and Lowndes furnish details of the various editions of Pynson, Redman, Berthelet, Tottel, Marshe, and Wight, from 1499 to 1618. All of these are now superseded by the *Statutes of the Realm*, published by the Record Commission in 1810.

312. The substance of this admirable edition, now unhappily scarce, has been reproduced in the same author’s *Tracts* (1762).

313. See *The Mirror of Justices* (edited for the Selden Society by Prof. Maitland), *Introd.*, xxiii. to xxiv.

314. *Ibid.*, xxxvii. *Cf.* xlviii.

315. See *Dictionary of National Biography*, XI. 243.

316. Introduction, p. ii.

317. See p. 375 of the work cited.

318. See *Const. Hist.*, I. 572, and cf. *Select Charters*, 296.

319. One of the most brilliant members of that school, Mr. Prothero, whose power of rendering difficult subjects both lucid and interesting would specially have qualified him for the task of explaining Magna Carta, declines the task partly upon the ground that it would be impossible "to throw any new light on a subject exhausted by the ablest writers."—*S. de Montfort*, p. 14.

320. The works of these and other authors are mentioned in the Appendix.

321. It is unnecessary to do more than mention *A Historical Treatise on Magna Charta* by Mr. Boyd C. Barrington, of the Philadelphia Bar (1899), of which the author says (p. ii.): “No claim is made for originality, but solely for research, which has been exhaustive in every line I can pursue.” It is dismissed by his distinguished fellow-countryman, Dr. Gross (*Sources and Literature of English History*, p. 348), as “of little value.”

TEXT, TRANSLATION, AND COMMENTARY.

MAGNA CARTA.

PREAMBLE.[322]

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 senescalli Pictavie, Hugonis de Nevilla, Mathei filii Hereberti, Thome Basset, Alani Basset, Philippi de Albiniaco, 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, looking to God and for the salvation of our soul, 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][323] 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 men,[324] William Marshall, 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 of Albini, Robert of Ropesle, John Marshall, John Fitz Hugh, and others, our liegemen.

The Great Charter of John opens, in the form common to all royal charters of the period, with a greeting from the sovereign to his magnates, his officials, and his 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 those counsellors whom he names. Three features of this preamble call for comment.

I. *The King's Title.* Some points of interest are suggested by the form of the royal style adopted by John, which is connected by an unbroken thread of development with that of William I. on the one hand, and of His Majesty, Edward VII., on the other. John's assumption of the royal plural "*Sciatis Nos*" reads, in the light of subsequent history, as a tribute to his arrogance rather than to his greatness, when compared with the humbler first person singular consistently used by his more distinguished father. In this particular, however, Richard, not John, had been the innovator on the usage of Henry II.[325] For a further alteration in the royal style John was alone responsible. To the titles borne by his father and brother, John invariably added that of "lord of Ireland," a reminiscence of his youth. 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 Hibernie*." This title of his younger days was not unnaturally retained by him after he had outlived all 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 at their widest stretch, extending without a break, other than the waters of the Channel, from the Cheviots to the Pyrenees. These lands were held by John, as by his father, under a variety of titles and conditions. Anjou, the original home and fief of the hot-blooded Plantagenet race, still carried with it only the modest rank of count. In addition to this paternal title, 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. These three great fiefs were held by Henry and his sons under the king of France as their lord paramount. Long before 1215, John's bad fortune or incompetence had lost to him these wide continental dominions except the most distant of them all, his mother's dowry of Aquitaine. His ancestral domains of Anjou and Normandy had been irretrievably lost, but he still retained their empty titles; and in this his

son Henry III. followed him, grasping the shadow long after the substance had fled. Entries relating to Gascony frequently appear on the Rolls of Parliament of Edward I.; and the kings of England were styled dukes of Aquitaine, dukes of Guienne, or dukes of Gascony (the three descriptions being used indifferently) until Edward III. merged all these titles in a wider one, when he claimed the throne of France.

England alone, of John's possessions, real and nominal, was held by the higher style of "*Rex*," implying strictly sovereign rule, independent of any overlord, and retained by John in 1215 in spite of his recent acceptance of Innocent III. as feudal overlord. Of Ireland, John was still content to describe himself, as formerly, "lord," not king. The exact meaning of the word "*Dominus*" in medieval charters, particularly in those of Stephen, has been made the subject of much learned controversy; which has not yet resulted in a consensus of opinion as to the technical meaning, if any, borne by the word.[326] "*Dominus*," indeed, seems to have been loosely used wherever something of substance or of ceremonial was lacking from the full sovereignty implied in the more specific name of king. In this connection much stress was laid on the solemn sacrament of coronation, implying among other things formal consecration by the church.[327]

John's connection with England, then, is expressed in two simple words, "*Rex Anglie*," no explanation being vouchsafed of how he had acquired this title. Such vindication, indeed, was not called for, as this was no coronation charter, John having already reigned for fifteen years without any serious rival—the claims of Arthur, the son of his elder brother Geoffrey, never having been taken seriously in England.[328] The simple words, "*Dei gratia rex Anglie*," may be contrasted with the detailed titles set out in the coronation charters of Henry I. and Stephen respectively. Henry I. in 1100 had emphasized his relationship to preceding kings, describing himself as "*Filius Willelmi regis post obitum fratris sui Willelmi, Dei gracia rex Anglorum*";[329] while Stephen in April, 1136, in his second and more deliberate charter, used an entirely different formula, "*Dei gracia assensu cleri et populi in regem Anglie electus, et a Willelmo Cantuarensi archiepiscopo et sancte Romane ecclesie legato consecratus, et ab Innocentio sancte Romane sedis pontifice postmodum confirmatus*,"[330] the laboured nature of which betrays the consciousness of weakness.

Thus Henry I. and Stephen each laid stress on the strong points of his title and ignored its defects. These two claims of kingship express, in a crude

form, two rival theories of the title to the English Crown—(1) hereditary succession, and (2) election. Neither of these is an accurate reflection of the full theory and practice of the twelfth century, which blended both principles in proportions not easy to define with accuracy. Professor Freeman has pushed to excess the supposed right of the Witenagemot to elect the king, and has transferred wholesale to the Norman *Curia* (which, in some respects, took its place) all the powers enjoyed by its forerunner. A recent German writer, Dr. Oskar Rössler,[331] has gone equally far in the opposite direction, flatly denying that the Normans ever admitted the elective element at all. The theory now usually held is a mean between these extremes, namely that the Norman *Curia* (or the chief magnates who usually composed it) had a limited right of selecting among the sons, brothers, or near relations of the last king, the individual best suited to succeed him. 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 (usually represented by the archbishop of Canterbury), of a claim to give or withhold the consecrating oil which accompanied the church's blessing. Without this no *dominus* could be recognized as *rex*. On this theory the descriptions of their own titles given by Henry I. and Stephen were alike incomplete: each ignored the facts which did not suit him. John, on the contrary, secure in possession, condescends on no particulars, but contents himself with the terse assertion of the fact of his kingship: "*Johannes, dei gratia, Rex Anglie*."

II. *The Names of the Consenting Nobles.* It was natural that the Charter should place formally on record the assent of those counsellors who attended John when he made terms with his enemies, of those magnates who remained in at least nominal allegiance, and were therefore capable of acting as the mediators by whose good offices peace was for a time restored.[332] The leading men in England during this crisis may be arranged in three groups: (1) the leaders of the great host openly 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 ready to take the field; and (3) moderate men, mostly 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.[333] The men, here made consenters to John's grant of Magna Carta,

are again referred to, though not by name, in chapter 63, in the character of witnesses.

III. *The Reasons of the Grant.* The preamble contains also a statement of what purport to be John's reasons for conceding the Charter. These are quaintly paraphrased by Coke:[334] "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 which they had solemnly renounced. This "consideration" was not stated in the charter, but the fact was known to all.[335]

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322. The division of Magna Carta into a preamble and sixty-three chapters is a modern device, for convenience of reference, for which there is no warrant in the Charter itself. Cf. *supra*, 200. 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 one (cf. *supra*, 197) 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*, 123-9. The text is taken from that issued by the Trustees of the British Museum founded on the Cottonian version No. 2. Cf. *supra*, 196.

323. The sentence is concluded in chapter one (see *infra*)—the usual division, here followed, being a purely arbitrary one.

324. 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.

325. Coke (*Second Institute*, pp. 1-2) is here in error; he makes John the innovator.

326. Various theories will be found in Round's *Geoffrey de Mandeville*, 70; Dr. Rüssler's *Matilde*, 291–4; and Ramsay's *Foundations of England*, II. 403.

327. Cf. *supra*, p. 119.

328. Geoffrey's daughter Eleanor was in 1215, a prisoner in Corfe Castle. See *infra*, c. 59.

329. See Appendix.

330. See Appendix.

331. *Matilde*, *passim*.

332. 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*," while Ralph of Coggeshall (p. 172) narrates how "by the intervention of the Archbishop of Canterbury, with a few of his bishops and some barons, a kind of peace was made." Cf. *Annals of Dunstable*, III. 43. The neutrality of the prelates is proved by other evidence. (*a*) C. 62 gave them authority to certify by letters testimonial the correctness of copies of the Charter. (*b*) 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. (*c*) The Tower of London was placed in the custody of the archbishop as a neutral man whom both sides could trust. (*d*) Copies are preserved of two protests on different subjects by the prelates in favour of the king. See Appendix.

333. Cf. *supra*, 43–4, and for biographical information see authorities there cited.

334. *Second Institute*, 1, n.

335. Cf. *supra*, 41.

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.[336] Concessimus eciam omnibus liberis hominibus regni nostri, pro nobis et heredibus nostris in perpetuum, omnes libertates subscriptas, 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 here places side by side, bracketed equal as it were, (*a*) a general confirmation of the privileges of the English national church, and (*b*) a declaration that the various civil rights to be afterwards specified in detail 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, of which no mention whatever had been made in the

Articles of the Barons, receive here a prior place.[337] A twofold division thus suggests itself.

I. *The rights of the National Church.* A general promise that the English church should be free was accompanied by a special confirmation of the separate charter recently granted guaranteeing freedom of canonical election. (1) *Quod Anglicana ecclesia libera sit.* This emphatic, if vague declaration, which has no counterpart in the Articles of the Barons, is repeated twice in Magna Carta, each time in a prominent position, at the beginning and the end respectively. If the work of the barons showed no special tenderness for churchmen's privileges, Stephen Langton and his bishops were careful to have that defect remedied in the formal document by which John expressed his final consent. In extorting this promise of a "free" English church, the prelates seem to have been satisfied that they need ask for nothing more; the other particulars in which the Charter differs from its draft show no trace of clerical bias. The phrase used, indeed, was deplorably vague and elastic; it scarcely needed stretching to cover the widest encroachments of clerical arrogance. Yet the formula was by no means a new one; Henry I. and Stephen had successively confirmed the claim of holy church to its freedom.[338]

Henry II. was careful to avoid making any such promises: his whole reign was an effort, not unsuccessful in spite of the terrible disadvantage at which he was placed by the murder of Becket, to deprive the church of what her leaders considered her legitimate "freedom." John in 1215, however, 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.[339] 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 qualifies the phrase by words which illustrate if they do not limit its application. God's holy church was to be free "*so that* I shall neither sell nor let to farm, nor on the death of archbishop, bishop, or abbot, accept anything from the demesne of the church or from its tenants, until his successor has entered into possession."[340] This suggests a somewhat narrow interpretation of the church's freedom—exemption mainly from the

iniquities of Rufus. Stephen's charter, on the contrary, explains or 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."[341]

"Freedom of the church" had thus come in 1136 to include "benefit of clergy" in a specially sweeping form, and much besides.[342] 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 primarily as an attempt to arrive at definite conclusions on 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. If it still implied "benefit of clergy" that phrase was now read in a more restricted sense, while wardship over vacant sees was expressly reserved to the Crown by John. Chapter 18 of Magna Carta accepted, apparently with the approval of all classes, the principle that questions of church patronage (assizes of darrein presentment)[343] 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.[344]

In later reigns the pretensions of the church to privileged treatment were gradually 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 which benefited in the end from the vagueness of the words in which Magna Carta declared *quod Anglicana ecclesia libera sit*.[345]

(2) *Canonical election.* A separate charter to the national church had been granted on 21st November, 1214, and re-issued on 15th January, 1215.[346] 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. Now, *in words*, this was no new concession, but merely a confirmation of the

Concordat arrived at long before between Henry I. and archbishop Anselm as a solution of the rival claims of Church and State in the election of bishops and abbots.[347] The essence of that arrangement had been to vest solely in the canons of the chapter of the vacant diocese the nominal right to appoint the new bishop, subject, however, to the actual election taking place in the royal court or chapel—so that the king, being present, might endeavour to prevent the appointment of any churchman he objected to. The result had not been what Anselm and the papal court expected; Henry I. and his successors strenuously used or abused the influence thus reserved to them: none but royal favourites were ever appointed, and the nominally free canonical election became a sham. Churchmen had long desired to remedy this: Langton saw his opportunity, and on 21st November, 1214, secured from King John, so far as mere words could secure anything, that the right of election by the canons of the chapter should henceforth be transformed from a pretence into a reality. The bishops present at Runnymede used their influence to have a distinct confirmation of this recent concession inserted in the very forefront of Magna Carta.

Their forethought was insufficient permanently to prevent royal influence from bending canonical election to its will. Henry III., indeed, in his reissues was made to repeat the phrase *quod Anglicana ecclesia libera sit*, but omitted all reference alike to canonical election and to the charters of 21st November, 1214, and 15th January, 1215. Later in his reign, he took advantage of this, with the Pope's connivance or support, to reduce again the rights of cathedral chapters in the appointment of bishops to the sinecure they had been before.

It is true that Henry III. was prone, alike by nature and from policy, to lean on the papal arm, and that the *Curia* at Rome rather than the *Curia Regis* for a time dominated the appointment to vacant sees. Henry and Innocent IV. indeed formed a tacit alliance for dividing all fat livings among their respective creatures, king's men or pope's men, who had little interest in England or its welfare. Edward I., impatient of foreign dictation as he was, had to submit to a partial continuance of "provisions" for hangers-on of the papacy in his insular domains; but the national church had little to gain. The canons elected the nominee of king or pope, as each was, for the moment, in the ascendant.[348]

An interesting, if purely academic, question might be raised as to how far the rights guaranteed by Magna Carta to the English church were meant to

imply freedom from papal as well as from royal interference. It is clear that the movement which culminated in the charter of 21st November, 1214, originated in England, not at Rome; and apparently Nicholas, the papal legate at that date, opposed the endeavours of Stephen Langton to obtain it. The archbishop indeed looked upon the legate as the chief obstacle to the reform by the king of the grievances of the national church.[349] In spite of Magna Carta, then, the independence of the national church retrograded, rather than advanced, during the long alliance between Henry III. and the successive occupants of the papal throne.[350]

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. This takes here the form of a general enacting clause, leaving details to be specified in 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 political and civil liberties of a mighty nation; and the vexed question as to what classes of Englishmen were intended, under the description of "freemen," to participate in these rights.[351]

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 the freemen. John may have favoured this omission as strengthening his contention that the Great Charter had been sealed by him under compulsion. In the third re-issue of Henry III. (1225) this defect was remedied—the words "*spontanea et bona voluntate nostra*" being used in its preamble.[352] Some importance seems to have been attributed to this addition, which formed the essence of a concession bought by the surrender of one-fifteenth of the moveable property of all estates of the realm.

336. Some editions of the Charter place here the division between c. 1 and c. 2.

337. Cf. *supra*, p. 50.

338. See these charters in Appendix.

339. It is perhaps worthy of note that while the charters of Henry I. and Stephen spoke only of "holy church," John speaks of the "English church." This change suggests a growth of patriotism among the prelates, led by Stephen Langton.

340. Cf. *supra*, 117.

341. Cf. Pollock and Maitland, I. 74.

342. Cf. *supra*, 120–1.

343. For explanation see *infra*, c. 18.

344. On the other hand c. 22, which lays down special rules for the amercement of beneficed clerks, to that extent confirmed class privileges of the clergy.

345. 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 vague, 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 assuredly would not have satisfied Henry I., as a legitimate interpretation of the words as used by him in his Charter of Liberties.

346. Cf. *supra*, p. 39. 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.

347. Cf. *supra*, p. 22.

348. Cf *supra*, p. 167.

349. See Miss Norgate, *John Lackland*, p. 208, and authorities there cited.

350. 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."

351. See *supra*, pp. 128-9 and 141-2. 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.

352. Cf. *supra*, p. 181.

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 of full 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.

All preliminaries concluded, the Charter at once 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 formulae, such as were necessary in a regular Charter.

I. *Assessment of Beliefs.* Each "incident" had its own special possibilities of abuse, and the Great Charter deals with each of these in turn. The present chapter defines the reliefs to be henceforth paid to John.[353] The vagueness of the sums at first was a natural corollary of the early doubts as to whether the hereditary principle was absolutely binding or not. The heir with title not yet recognized was keen to come to terms. The lord took as much as he could grind from the inexperience or timidity of the youthful heir; the heir tried to profit from the good nature or temporary embarrassments of the lord. All was vague; and such vagueness favoured the strongest or most wily.

A process of definition, however, was early at work; and progressed, though slowly. Public opinion set limits of variation, to go beyond which was considered unreasonable or even indecent. Some conception of a "reasonable relief" was evolved. Yet the criterion varied: the Crown might defy rules binding on others. Henry I., indeed, when bidding against duke Robert in 1099 for the throne showed himself willing, in words if not in practice, to accept the limits set by contemporary opinion. His Charter of Liberties promised that all reliefs should be *justa et legitima*—an elastic phrase no doubt, and one in after days liberally interpreted by the exchequer officials in their royal master's favour. By the end of the twelfth century, when Glanvill wrote, the exact sums which could be taken by mesne lords had been fixed; although the Crown remained free to exact higher rates. *Baroniae capitales*, he tells us, were charged relief, not at a fixed rate, but at sums which varied *juxta voluntatem et misericordiam domini regis*.[354]

Every year, however, made for definition; and custom pointed with increasing authority towards 100s. per knight's fee, and £100 for a barony. Two entries on the Pipe Roll of 10 Richard I. amusingly illustrate the unsettled practice. A sum of £100 is described as a "reasonable relief" for a barony, and immediately this entry is stultified by a second entry of a considerable additional payment by way of "fine" to induce the king to accept the sum his own roll had just declared "reasonable."[355] 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.[356]

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." Here it is, then, duly set forth and defined in chapter 2 of Magna Carta 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 held a "barony," he protested that he held only

five knight's fees, and got off with the payment of £25.[357] The relief of a barony was subsequently reduced from £100 to 100 marks. The date of this change, if we may rely on Madox,[358] lies between the twenty-first and thirty-fifth years of Edward I.[359]

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," a contribution to the private purse of the Queen Consort, and collected by an official specially representing her at the exchequer.[360]

The Charter deals only with tenure by knight's service; nothing is said of other tenures. The explanation of the omission may possibly be different in the cases of socage and of serjeanty respectively.[361] (*a*) *Socage.* The barons were not so vitally interested in socage, that being, in the normal case, the tenure of humbler men.[362] 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, however, acted on a different view; large sums were frequently extorted by Henry III. By the reign of Edward I., however, the practice of the exchequer was to limit itself to one year's rent (a sufficiently severe exaction)[363] for serjeanties, which thus fell into line with socage.[364]

II. *Units of Assessment.* Some explanation is required of the three groups into which crown estates were thus divided—knight's fees, barons' baronies, and earls' baronies.

(1) *Feodum militis integrum.* The origin of the knight's fee is obscured by a network of conflicting theories. A thread of connection is sometimes traced between it and the mysterious five-hide unit of Anglo-Saxon times; other authorities would ascribe its introduction into England to a definite act of some great personage—either William the Conqueror, according to Selden, who founds on a well-known but untrustworthy passage in Ordericus Vitalis, or Ranulf Flambard, according to Freeman, Stubbs, and Gneist. It seems probable that the Normans, here as elsewhere, pursued their policy of avoiding an open rupture with the past, and that the Conqueror adapted as far as possible the existing system of land tenure to his own needs. There is little doubt, in light of the 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* thus became a measure of military service, and of feudal assessment; *servitium unius militis* was a well-known legal unit. But a difficult problem arises when it is asked what definite equation, if any, existed between land and service. Three answers have been given: (*a*) A definite ratio exists between amount of service and extent of ground. In other words, the knight's fee contains a fixed area of land; every five hides sent one warrior, thus preserving the old Anglo-Saxon unit.[365] (*b*) The ratio lies not between service and extent, but between service and value. An estate of £20 annual rental sends one knight to the king's wars; the normal knight's fee contains 20 librates of land.[366] (*c*) Other authorities deny that any proportion exists at all: William the Conqueror exacted from each of his grantees precisely as much or as little knight's service as he saw fit.

Is it not possible to reconcile these divergent conclusions? Undoubtedly the Conqueror held himself bound by no fixed rules, but made exceptions where he pleased: some favoured foundations were exempt from all service whatsoever.[367] Yet, if he distributed estates at his own free will, he did not necessarily distribute them irrationally or at random. He demanded service of knights in round numbers, 5 or 10 or 20, as he saw cause, and in normal cases he was guided by some loose sense of proportion. Where there was no reason either for preferential treatment or for special severity, service would be roughly proportionate either to the area or to the value. This rule was William's servant, not his master, and was made to yield to many exceptions, which would amply account for the existence in later days of knight's fees varying from 2 hides to 14 hides, instead of the normal 5.[368] Each such fee, whatever its acreage or its rental, owed the service of one knight, and paid relief at 100s.

(2) *Baronia integra.* The word "barony" cannot be easily defined, on account of the many changes it has undergone.[369] 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 thus identical with "crown tenants"—a considerable body at first; but a new distinction soon arose between the great men and the smaller men among their number (between *barones majores* and *barones minores*). The latter were usually

called knights (*milites*), while “baron” was reserved for the holder of an “honour.”[370] For determining what constituted an “honour,” however, it was impossible to lay down any absolute criterion. Mere size was not sufficient: a magnate once classed as a full “baron” might successfully claim to be only a “knight,” thus lightening some of his feudal burdens, for example this one of “reliefs.” Chapter 14 of Magna Carta helped to stereotype the division, since it stipulated that each *major baro* should receive an individual writ of summons to the Council, leaving the *barones minores* to be convened collectively through the sheriff. As the one point of certainty, where everything else was vague, these writs came to possess an exaggerated importance, and it was finally held (at a date long subsequent to Magna Carta) that the mere receipt of a special summons, if acted upon, made the recipient a baron, and entitled his heirs, in all time coming, to succeed him in what was fast hardening into a recognized title of dignity. The “barons” in 1215 knew nothing of all this; they desired merely to have the reliefs due by them taxed at a fixed rate. Each “barony” should pay £100, a sum afterwards reduced to 100 marks.

Relief was thereafter a fixed sum, while the size of the barony varied in each case. As the same holds true of the knight’s fee, it is doubly ridiculous to attempt to discover an equation between the knight’s fee and the barony founded upon the ratio of the sums payable. Coke, however, was guilty of this absurdity.[371]

(3) *Baronia comitis integra.* A peculiar phrase is used in the text, an "earl’s barony" appearing where “earldom” might be expected.[372] The reason is that “earldom” originally implied the holding of an office and not the ownership of land, whereas relief was payable for the earl’s lands or “honour,” not for his office. The Charter, therefore, uses words well fitted to make its meaning clear. The earl (or *comes*) was the successor of the ealdorman as local governor of a county or group of counties. His title was official, not tenurial, or even, in early times, necessarily hereditary.

Some of the ideas most intimately connected with a modern earldom were signally inappropriate to the Norman earls. At the present day an earldom is one of several “steps in the peerage,” a conception that did not then exist. At the present day it carries with it a seat in the House of Lords, whereas no instance is recorded until long after the Norman Conquest of any earl or other great man demanding as a right to be present in the king’s council: the custom of summoning all crown tenants became stereotyped

only in the reign of Henry II. and was not formally recognized previous to chapter 14 of Magna Carta. At the present day, again, the hereditary principle is the chief feature of an earldom, whereas William did not admit that the office necessarily passed from father to son.[373]

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 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 justice administered in 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 landowner might. For purposes of taxation the whole of his lands, whether in his own county or elsewhere, were reckoned as one unit, here described as *baronia comitis integra*, the relief on which was taxed at one hundred pounds.

Very gradually in after ages, the conception of an earldom suffered change. The official character gave way before the idea of tenure, and later on the modern conception was formulated of a hereditary dignity conferring specific 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 aliene one of his two earldoms—described by him as the *comitatus* of Lincoln.[374] 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, were closely united in their later history.

III. *Liability of Church Property to "Relief."* The Great Charter of John, unlike the Charter 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.[375]

It was not then unnatural that, when a prelate died, the Crown should demand "relief" from his successor, in the same way as from the heir of a dead lay baron. Such demands, when made by William Rufus and his minister Flambard, met with bitter opposition. The Crown in consequence, unwilling to forego any of 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 the exchequer.[376]

In revenge for such extortions from church lands and tenants, the historians of the day, all necessarily recruited from the clerical class, have heartily recommended Rufus and Flambard to the opprobrium of posterity. Anselm compelled Henry I. to promise amendment in his coronation Charter, which undertook to exact nothing during vacancies either from the demesne of the church or from its tenants.[377] 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.

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353. Cf. *supra*, p. 73.

354. Glanvill's words (IX. c. 4) are unfortunately 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*," which were left subject to reliefs at 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 evidence from other sources makes it probable that even smaller crown holdings should for this purpose be classed under his *capitales baroniae*, and not with knights' fees held from mesne lords. Two passages from the *Dialogus de Scaccario* (II. x. E. p. 135 and II. xxiv. p. 155) clearly support the distinction between all crown tenants (small as well as great) on the one hand, and tenants of mesne lords on the other: only the latter had their reliefs fixed, while the former were at the king's discretion. (The second passage shows how the exchequer officials held the onus of proof to lie on the heir to a crown fief to show that he was worthy to succeed his father, and suggests rich gifts to the king as the best form of proof.) Madox (I. 315-6) cites from the Pipe

Rolls large sums exacted by the crown. Usually the number of knights' fees paid for is not specified, but in one case a relief of £300 was paid for six fees—that is, at the rate of £50 per fee, or exactly ten times what a mesne lord could have exacted. (See Pipe Roll, 24 Henry II., cited by Madox, *ibid.*) 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 also of this opinion. Pollock and Maitland (I. 289), however, maintain the opposite view—namely, that the limitation to 100s. per knight's fee was binding on the crown as well as on mesne lords.

355. Madox, I. 316.

356. Madox, I. 317.

357. *Ibid.*, I. 318.

358. *Ibid.*, I. 321.

359. The first of the long series of charters and confirmations which contains it seems to be the *Inspeximus* of 10th October, 1297, which in all probability merely recognized officially a rule long demanded as simple justice by the barons and public opinion. (See Madox, I. 318, Pollock and Maitland, I. 289, and Bémont, *Chartes*, p. 47.)

360. See note by editors of *Dialogus*, p. 238. The Petition of the Barons in 1258 (*Sel. Charters*, 382) protested against this, and the practice was discontinued.

361. Cf. *supra*, pp. 66-9.

362. It is possible to argue that the custom as to socage was already too well settled to require any confirmation. Glanvill (IX. c. 4) stated the relief for socage at one year's annual value. It is not absolutely clear, however, whether this restriction applied to the crown. Further, no custom, however well established, was sufficiently safe against John's greed, to make confirmation unnecessary.

363. 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."

364. Cf. *supra*, p. 69.

365. C. Pearson, *Hist. of Engl.*, I. 375, note 2.

366. J. H. Round, *Feudal England*, 295.

367. *E.g.* Gloucester and Battle Abbeys: see Round, *ibid.*, 299.

368. See Round, *Feudal England*, 294, and Pollock and Maitland, I. 235.

369. 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." An exact definition is, perhaps, impossible: the term was first applied in early days without any technical meaning; in later days each "honour" had separately established its position by prescriptive usage. See also Pike, *House of Lords*, pp. 88-9, on the difficulty of defining "an entire barony."

370. This change was not complete in 1215, but Magna Carta, when it uses "*barones*" alone, seems to refer to "*barones majores*" only (see cc. 2, 21, 61). In c. 14, "*barones majores*" are contrasted with "*barones minores*."

371. See Coke on *Littleton*, II. iv. s. 112, and *ibid. Second Institute*, p. 7. Founding on the later practice of the exchequer, which exacted one hundred marks of relief from a barony, and one hundred shillings from a knight's fee, he assumed the false equation "1 barony = 13⅓ knight's fees." If he had

known of the earlier practice, which followed the rule of John's Charter, he might have jumped to another equation, equally false, namely that "1 barony = 20 knight's fees." There is, in reality, no fixed proportion between the two, either as to extent or value.

372. In the *Inspeximus* of Edward I., however, the word *comitatus* (earldom) displaces the *baronia comitis* of the text. See *Statutes of Realm*, I. 114.

373. See Pike, *House of Lords*, 57.

374. 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, according to context, either his titular connection with the shire, his estates, his share of the profits of justice, or his rank in the peerage.

375. This was specially affirmed in 1164 by article 11 of the Constitutions of Clarendon, which stipulated that each prelate should hold his lands *sicut baroniam*, merely a restatement of existing law.

376. *Sicut per barones meos disposui.* The writ is given in Heming's *Cartulary*, I. 79-80, and reprinted by Round, *Feudal England*, 309.

377. See Appendix.

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 out his livery," with the demand for a large relief by the exchequer which had already appropriated all his available revenue. The same event, namely, the ancestor's death, was thus made the excuse for two distinct feudal incidents.[378]

Such double extortion had long been forbidden to mesne lords; Magna Carta was merely 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 constituted the binding tie of lord and vassal between them, prevented the king from challenging the vassal's right, and bound him to "warrant" the title against all rival claimants. This expedient was actually adopted in the revised Charter of 1216.[379]

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 incidentally illustrates the theory underlying wardship. The essence of tenure in chivalry was the grant of land in return for military services. Only a knight was capable of bearing arms; hence it was that 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 prevented this, providing that the lands of a minor should remain in wardship, although he was made a knight.[380] Incidentally, the same Charter of Henry declared twenty-one years to be the period at which a military tenant came of age, a point on which John's Charter had been 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.[381]

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378. 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*." Mr. Taswell-Langmead (*Engl. Const. Hist.*, p. 51, n.) states the amount at half a year's profits. He cites no authorities for this, and is probably in error. The *Dialogus*, II. x. E., p. 135, forbids relief to be taken, when wardship had been exercised *per aliquot annos*.

379. See chapter 3 of 1216, which stipulates that no lord shall have wardship of an heir "*antequam homagium ejus ceperit*." Cf. Coke, *Second Institute*, p. 10.

380. Coke, *ibid.*, p. 12, makes a subtle, and apparently unwarranted, distinction to 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 the word used is "*remaneat*," and lands cannot "remain" in wardship if they were not in it before. Such reasoning is puerile.

381. See *Coke on Littleton*, Book II. c. iv. s. 112; and cf. *infra*, cc. 37 and 43 for the "prerogative wardship" of the Crown.

CHAPTER FOUR.

Custos terre hujusmodi heredis qui infra etatem fuerit, non capiat de terra heredis nisi racionabiles exitus, et racionabiles consuetudines, et racionabilia 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 to us for the issues, or to him to whom we shall assign them; and if we have given or sold the wardship of any such land to someone 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,[382] a much hated feudal incident, which undoubtedly afforded openings 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 writers[383] consider it an innovation devised by William Rufus and Flambard, without precedent in the Conqueror’s reign. The chief argument for this mistaken view is that Henry I., in promising redress of several admitted inventions of Rufus, promised also to reform wardship. This may show that wardship was abused, but does not prove it an innovation.

The Charter of Henry committed him undoubtedly to drastic remedies, which would have amounted to the virtual abolition of wardship altogether. Chapter 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).[384] This was only one of the many insincere promises which the "lion of justice" never kept, and probably never meant to keep. Wardship continued to be exacted from 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.[385] The barons in 1215 made no attempt to alter this, or 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 Arthur at his uncle's hands was unfounded, John was by no means the guardian to inspire confidence in the widowed mother of a young Crown tenant whose estates the king might covet for himself. 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*.[386] It is easy to understand how thoroughly this feudal incident must have been detested in England and Normandy, all the more so if, as Hallam contends, it was not recognized as a feudal due in other parts of Europe.[387]

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, together with all profit to be derived from it, to a private individual, either some royal favourite or the bidder of the highest price. Commentators of a later date[388] apply the word "committee" to the former type of guardian, reserving "grantee" for the latter. This distinction, which is mentioned by Glanvill,[389] obtains recognition in this passage of the Charter. Neither was likely to have the interests of the minor at heart. Both

would extort the maximum of revenue, the one for the king, the other for himself. 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 found too often a wilderness of impoverished lands and empty barns.

The remedies proposed by Magna Carta were too timid and half-hearted; yet something was effected. It was unnecessary to repeat the recognized rule that the minor must receive, out of the revenues of the land, 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).[390] It is easy to understand waste of goods; but what is "waste of men"? An answer may be found in the words of the so-called “unknown Charter of Liberties,”[391] which binds guardians to hand over the land to the heir “*sine venditione nemorum et sine redemptione hominum*.” Clearly, to enfranchise villeins was one method of “wasting men.” The young heir, when he came to the enjoyment of his estates, must not find his praedial serfs emancipated.[392] The words of the “unknown Charter” may be used to illustrate the text, even if it be a forgery, since a consensus of opinion holds it to be either contemporary or of slightly later date.[393]

(2) *The punishment of wasteful guardians.* The Charter provides a distinct but appropriate form of 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 forfeit the guardianship, thus losing a valuable asset for which he had probably paid a high price, sufficient punishment, perhaps, without the exaction of damages.

Subsequent statutes did not, however, take so lenient a view. While the Statute of Westminster[394] merely repeated the words of Magna Carta, the Statute of Gloucester[395] 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. chapter 13 enacted that the king's Escheators (officers who first became prominent towards the close of the reign of Henry III., and who acted in the normal case as guardians of Crown wards), when 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.[396]

(3) *Provision against a 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, accordingly, promised to supersede the keeper guilty of waste by appointing as guardians two of the most trustworthy of the 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," already referred to, proposed a more drastic remedy. Whenever the Crown's right to a wardship opened, the lands were to be entrusted to four knights of the fief without waiting until damage had been done. This suggestion, if carried out, would have protected the king's wards, without injury to the legitimate pecuniary interests of the Crown.

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382. The nature of wardship is more fully explained *supra*, pp. 75-7.

383. *E.g.* Mr. Taswell-Langmead, *Engl. Const. History*, p. 51, n.

384. "This, it would seem, was the old English rule"; see Ramsay, *Foundations of England*, II. 230.

385. It is a common error to suppose that this Assize restores wardship to the lord.

386. See *Pipe Roll*, 29 Henry II., cited Madox, I. 483.

387. Cf. *supra*, p. 78.

388. *E.g.* Coke, *Second Institute*, p. 13.

389. VII. c. 10.

390. II. folio 87.

391. See Appendix.

392. 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.). For a definition of "villein" see *infra* c. 20.

393. Cf. *supra*, pp. 202-5.

394. 3 Edward I. c. 21.

395. 6 Edward I. c. 5.

396. 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 such triple damages, or indeed any damages at all, if the king had previously taken amends himself. Coke further maintains that even after waste had been committed, 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." There seems, however, to be no authority for such statements.

CHAPTER FIVE.

Custos autem, quamdiu custodiam terre habuerit, sustentet domos, parcos, vivaria, stagna, molendina, et cetera ad terram illam pertinencia, 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 racionabiliter poterunt sustinere.

> The guardian, moreover, so long as he has the wardship of the land, shall keep up the houses, parks, places for live-stock,[397] fishponds, 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 implements of husbandry, 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 purely negative provisions of chapter 4. It was not sufficient to prohibit acts of waste; the guardian must see that the estates were kept 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 houses, "parks" (a term explained under chapter 47), fishponds, mills, and the other usual items of the equipment of a medieval manor. All outlays required for these purposes formed, in modern language, a first charge on the revenues of the estate, to be deducted before the balance was appropriated by the "grantee," or paid to the exchequer by the "committee." It was the guardian's duty, moreover, to restore the whole to the heir in as good condition as the produce of the land might reasonably permit. Henry's Charters directed that the guardian should redeliver the land stocked with ploughs "and with all other appointments in at least as good condition as he received it."[398]

Magna Carta did not attempt to abolish wardship, which continued in full force for many centuries, with only a few of its worst abuses somewhat curtailed. The whole subject was regulated in 1549 by the 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*."[399] This ordinance was confirmed at the Restoration by the Statute 12 Charles II. c. 24.

II. *Wardships over Vacant Sees.* The church had its own grievances, although these took a different form. The Constitutions of Clarendon[400] had stipulated that each great prelate should hold his Crown lands *sicut baroniam*; and this view ultimately prevailed. It followed that all appropriate feudal burdens affected church fiefs equally with lay fiefs. The lands which formed the temporalities of a see were, however, in a peculiar position, being the property, not of an individual, but of an undying corporation (to use the definite language of a later age). When one bishop or abbot died, a successor of suitable age and worth had at once to be appointed. A minority was thus impossible, and therefore, so it might be argued, wardships could never arise. Rufus objected to what he thought an unfair exemption from a recognized feudal incident. Flambard devised an ingenious substitute for ordinary wardships by keeping sees long vacant, and meantime taking the lands under the guardianship of the Crown. Such practices formed the original ground of quarrel between Anselm and Rufus. Henry I., while renouncing by his Charter 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 have paid to the bishop. The Pipe Roll of 14 Henry II.[401] records sums of £30 and £20 paid into the exchequer by two tenants of the vacant see of Lincoln for six and four knight's fees respectively.[402]

The practice of Henry of Anjou was followed by his sons. John was careful specially to reserve wardships over vacant sees even in that very accommodating charter, dated 21st November, 1214, which surrendered the right of canonical election to the national church. Stephen Langton had either failed to force John to relinquish wardships or else considered such a concession unnecessary now that the king renounced his right to veto church appointments, since wardships over church lands would become

unprofitable if elections were never unduly delayed. Whatever the reason, the charter of 1214 did nothing to guard against the abuse of wardships over church lands, and John's Great Charter was equally silent.[403] The omission was supplied in 1216, when it was directed that the provisions already made applicable to lay fiefs should extend also to vacant sees, with the added proviso that church wardships should never be sold. The charter of Henry III. thus reverted to the exact position defined by the charter of Henry I. The lands of vacant sees might be placed under a "committee," but never given to a "grantee," to use Coke's terms.

These provisions were further 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 the 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. This is a distinct confirmation of the king's right to "commit" church lands, although the prohibitions against selling them or farming them out remained still in force.

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397. *Vivarium* in strictness means a place for keeping live-stock, but probably included the animals also. By Coke, in the *Statutes at large*, and elsewhere, it is translated "warren"; but that word has its Latin form in *warrena*. Stubbs' Glossary to *Select Charters* (p. 551) renders it as "a fish pond," but *stagnum* has that meaning. The Statute Westminster II. (c. 47) speaks of *stagnum molendinæ* (a mill-pond). The Statute of Merton (c. 11) refers to poachers taken *in parcis et vivariis*; while Westminster I. (c. 1) forbids *ne courge en autri parks, ne pesche en autri vivers*, which suggests a change of connotation. Cf. *ibid.*, c. 20.

398. Blackstone, *Great Charter*, lxxviii. considers this "an indulgence to guardians, by only directing them to deliver up the land ... in as good condition as they found it, not in as good as it would bear." Sometimes, the heir after coming of age, could not recover his lands at all. The Statute of Marlborough (c. 16) gave such a ward a right to a *mort d'ancestor* (cf. *infra*, p. 325) against a mesne lord, but apparently not against the Crown. The Statute of Westminster I. (c. 48) narrates that heirs were often carried off bodily to prevent them raising actions against their guardians.

399. See S. R. Gardiner, *Documents*, p. 207.

400. Article 11: see *Select Charters*, 139.

401. Cited by the editors of the *Dialogus*, p. 223.

402. Cf. under c. 43 *infra*.

403. C. 46 (see *infra*) confirmed *barons*, who had founded abbeys, in their rights of wardship over them during vacancies.

CHAPTER SIX.

Heredes maritentur absque disparagacione, ita tamen quod, antequam contrahatur matrimonium, ostendatur propinquis 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.[404] John made a regular traffic in the sale of wards—young maids of fourteen and aged widows alike. No excuse would be accepted. The Pipe Roll of John's first year[405] records how the chattels of a certain Alice Bertram were taken from her and sold because she refused "to come to marry herself" at the summons of the king. Only two expedients were open to those who objected to mate for life 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. Only the cloister could afford them shelter; nowhere in the outer world were they safe. The other way of escape was to outbid objectionable suitors. This was not always possible, for John was predisposed to favour the suit of his foreign gentlemen of fortune, thus befriending his creatures while adding to the slender number of personally loyal tenants-*in-capite*. John's greed was insatiable, and brief entries in his Exchequer Rolls condense the story of many a tragedy. In the first year of his reign 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 for her, if she could show no reason to the contrary. It is satisfactory to learn that in this case the higher bribe was refused, and the lady escaped.[406]

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.[407]

Great stress was naturally placed on exemption from "disparagement"—that is, from forced marriage with one who was not an equal. When William of Scotland, by the treaty of 7th February, 1212, conferred on John the right to marry Prince Alexander to whom he would, the qualification was expressly stated, "but always without disparagement."[408] Such a proviso was understood where not expressed, and formed apparently the only restriction admitted by the Crown upon this prerogative. It is not surprising, then, to find it specially confirmed in Magna Carta. The Articles of the Barons had, indeed, demanded a further protection—namely, that a royal ward should only be married *with the consent* of the next of kin. In our text this is softened down to the mere intimation of an intended marriage. The opportunity was thus afforded of protesting against an unsuitable match. Insufficient as the provision was, it was entirely 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 Merton[409] gave two examples,—marriage to a villein or to a burgess. This was not an exhaustive list. Littleton, commenting on this statute,[410] 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 child-bearing." Plenty of room was left for forcing on a ward an objectionable husband or wife, who yet could not be proved to come within the law's definition of "disparagement." The barons argued in 1258 that an English heiress was disparaged if married to anyone not an Englishman by birth.[411]

Was it in the power of the far-seeing father of a prospective heiress by marrying her during his own life-time to render nugatory the Crown's right to nominate a husband? Not entirely; for the Charter of Henry I. (even when renouncing the more oppressive practice of Rufus) 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, and the presumption is that the existing law was to be maintained.

Bracton[412] explains that 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 reasons 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 any mesne lord.[413]

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404. See *supra*, 75–8.

405. Cited Madox, I. 565.

406. See *Rotuli de Oblatis et Finibus*, p. 37, and *Pipe Roll*, 2 John, cited by Madox, I. 515.

407. *Pipe Roll*, 4 John, cited by Madox, I. 324.

408. See *infra*, c. 59.

409. 20 Henry III. c. 6.

410. *Tenures*, II. iv. s. 109.

411. See Petition of Barons (*Sel. Charters*, 383). Gradually the conception of disparagement was expanded, partly from the natural development of legal principles and partly from the increased power the nobility obtained of enforcing their own definitions upon the king. Coke commenting on Littleton (Section 107) mentions four kinds of disparagements: (1) *propter vitium animi*, *e.g.* lunatics and others of unsound mind; (2) *propter vitium sanguinis*, villeins, burgesses, sons of attainted persons, bastards, aliens, or children of 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 possible connection with the law as it stood in the thirteenth century, but was founded on the fact that marriage with a widow or widower was deemed by the Church in later days

an act of bigamy, and therefore involved loss of the benefit of clergy, until this was remedied by the Statute 1 Edward VI. c. 12 (sect. 16).

412. II. *folio* 88.

413. For further information on the age at which marriage could be tendered to a ward, and the penalties for refusing, see Thomson, *Magna Charta*, pp. 170-1.

CHAPTER SEVEN.

Vidua post mortem mariti sui statim et sine difficultate habeat maritagium et hereditatem suam, nec aliquid det pro dote sua, vel pro maritagio 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 amount of forethought on the part of a Crown tenant, setting his house in order against his decease, could rescue his widow from the extremely unfortunate position into which his death would necessarily plunge her. He must leave her without adequate protection against the tyranny of the king, who might inflict terrible hardships by a harsh use of rights vested in him for the safeguard of the feudal incidents due to the Crown as overlord. Newly deprived of her natural protector, she was under the immediate necessity of conducting a series of delicate negotiations with a powerful opponent fortified by prerogatives wide and vague. She might indeed, if deprived of her "estovers," find herself for the moment in actual destitution, until she had made her bargain with the Crown; she had a right, indeed (under normal circumstances) to one-third of the lands of her late 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 to hers, and could seize everything by his prerogative of primer seisin.[414] 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 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 make adequate provision for his bride on the day he married her. Such a ceremony, indeed, formed a picturesque feature of the marriage rejoicings, taking place literally at the door of the church, as man and wife returned from the altar. The share of her husband's land 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 by which they arranged the extent of the provision to be given and accepted. 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 on the husband's part, and fixed the dower at one-third of all his lands.[415]

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 (*in vita sua*) 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 of her husband to defeat or lessen her dower by alienations granted without her consent during the subsistence of the marriage.[416] Magna Carta contains no warrant for such a proposition, although a later clause (chapter 11) secures the dower lands from attachment by the husband's creditors, whether Jews or others.

(2) *Maritagium.* It was customary for a land-owner to bestow some share of his property as a marriage portion upon his daughters, that they might not come to their husbands as empty-handed brides. The land so granted was usually relieved from all burdens of service and homage. It was hence known as *liberum maritagium*, which almost came to be recognized as a separate form of feudal tenure. Grants for this purpose could be made without the consent of the tenant's expectant heirs, although early English law absolutely prohibited alienation of lands for any other purpose without their consent. *Maritagium* was thus "a provision for a daughter—or perhaps some other near kinswoman—and her issue."[417] The husband of the lady was, during the marriage, treated as virtual owner for all practical purposes;

but on his death the widow had an indisputable title to lands brought with her "in free marriage."[418]

The obvious meaning, however, has not always been appreciated. Coke[419] 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 their enemy, the king, not upon themselves; and it is opposed to the law of an earlier reign, as expounded by Bracton.[420]

Daines Barrington[421] invents an imaginary rule of law in order to explain a supposed exception. An ordinary widow, he declares, could not in the normal case marry again before the expiry of a year after her first husband's death. Some widows, however, were specially privileged. *Maritagium* was a right conferred on widows of land-owners to cut short the period of mourning imposed on others. This is a complete inversion of the truth; the possession of land always restricted, instead of extending, freedom of marriage. Several later authorities follow Barrington's mistake.[422]

Such mistakes when made by recent writers are the more inexcusable in view of the clear explanation given a century ago by John Reeves,[423] 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, although exempt from homage until after the death of the third heir.[424]

(3) *Hereditas.* The first two words are thus readily understood: but what is *hereditas*? Is it simply another name for one of these, or is it something different? It is possibly used to denote estates acquired by the wife, not as a marriage portion, but in any other way, for example by the opening of a succession on the death of someone, her father or other relative, of whom she is the heir.

II. *The Widow's Share of Personal Estate.* The chapter of the Charter at present under discussion says nothing as to the widow's right to any portion of her deceased husband's goods and chattels. Chapter 26, however, confirms the existing law which secured to her, in the normal case, one third of her husband's personal estate, as will be more fully explained hereafter.

III. *Provision for the Widow's immediate Needs.* Many intricate questions might arise before it was possible to divide the land into aliquot portions and so "assign" the exact one-third due to her. Meanwhile, temporary

provision must be made for her support. This was of two kinds: (1) *Quarantine.* Magna Carta confirmed her right to remain in the family home for a space of forty days. This was known to later lawyers as the widow's quarantine.[425] The Charter of 1216 notes an exception to the general rule, on which John's Charter is silent: if the deceased husband's chief place of residence had been a castle, the widow could not stay there; feudal strongholds were not for women. In such cases, however, so the reissue of 1216 carefully provided, another residence must be immediately substituted. In later days, widows unlawfully deprived of their quarantine were provided with a remedy by means of a writ, known as "*de quarentina habenda*," directing the sheriff to take summary procedure to do her right.[426]

(2) *Estovers of Common.* The widow required something more than the protection of a roof; for, until her dower lands had been delivered to her, no portion of the produce of her late husband's manors could be strictly called her own. The estate was held "in common" between her and her husband's heir (or between her and the "guardian" of that heir's estates). It was only fair that, until her rights were ascertained, she 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 the widow of a Crown tenant in the right to *rationabile estoverium suum interim de communi*. Many explanations of the word *estovers* (generally used in the plural) might be cited: from Dr. Johnson, who defines it broadly as "necessaries allowed by law," to Dr. Stubbs, who narrows it to "firewood."[427] It was the right to use certain parts of the natural produce of land or other property for the supply of one's personal or domestic wants. Such rights varied in extent, however; from the general right to a full supply of all things necessary for the maintenance of life, down to the restricted right to take one kind of produce for one specific purpose only.[428]

It seems natural to infer that in this passage of Magna Carta the word bears its wider signification. Such was Coke's view,[429] 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.[430]

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414. Cf. *supra*, 78–9.

415. 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.

416. Pollock and Maitland, II. 419.

417. See Pollock and Maitland, II. 15-16.

418. *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 specially “free”; the peculiar tenure came to an end; and the new owner was subject to all the usual burdens of an ordinary tenant.

419. *Second Institute*, p. 16.

420. See *supra*, p. 253.

421. *Observations*, pp. 8-10.

422. *E.g.* Thomson, *Magna Charta*, 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.

423. See his *History of English Law*, I. 121 (3rd ed.).

424. 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.

425. The “unknown charter” (see Appendix) specified sixty days, but Magna Carta fixed the period at forty.

426. See Coke, *Second Institute*, p. 16.

427. See Glossary to *Select Charters*, p. 539: “firewood; originally provision or stuff generally.”

428. Several instances of the wider use of the word 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 until it was determined whether they were to become the king’s property by the conviction of the accused; meanwhile the imprisoned man and his family out of the revenue 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., to take the grantee bound to provide the grantor in estovers of meat or clothes. (“*A trouver estovers en vivre ou en vesture*”). Blackstone again (*Commentaries*, I. 441) applies the name *estovers* to the alimony or allowance made to a divorced woman "for her support out of the husband’s estate." Sometimes, however, the word was used in a more restricted sense. Coke (*Second Institute*, p. 17) says, "when *estovers* are restrained to woods, it signifieth housebote, hedgebote, and ploughbote,"—that is, such timber as was required 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 forests, viz., to take dead timber as firewood. (Cf. *infra*, c. 44.)

429. *Second Institute*, p. 17.

430. 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.

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.

> Let no widow 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 ladies, who were wise, were glad to escape with their children from John's clutches by agreeing to buy up all the Crown's oppressive rights for a lump sum. In the very year of Magna Carta, Margaret, the widow of Robert fitz Roger, paid £1000;[431] and a few years earlier Petronilla, Countess of Leicester, expended as much as 4000 marks.[432] Though the circumstances of each of these cases seem to have been peculiar, the Pipe Rolls contain numerous smaller sums; in 1206 Juliana, widow of John of Kilpec, accounts for 50 marks and a palfrey.[433] 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 whole system. In return, formal charters were usually obtained, a good example of which is one granted to Alice, countess of Warwick, dated 13th January, 1205,[434] containing many concessions; among others 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 the courts of the shire and of the hundred, and from payment of sheriff's aids during her widowhood. Another charter of 20th April, 1206, shows what a widow had to expect if she failed to make her bargain with the Crown. John granted to Richard Fleming, an alien as his name implies, and presumably one of his not too reputable mercenaries, the wardship of the lands of the deceased Richard Grenvill with the rights of marriage of the widow and children.[435]

Magna Carta sought to substitute a general rule of law for the provisions of these private charters purchased by individuals at ruinous expenditure. It contained no startling innovations, but only repeated at greater length the promises made (and never kept) by Henry I. in the relative part of clause 4 of his coronation charter. No widow was to be constrained to marry again against her will. This liberty must not be used, however, to the prejudice of the Crown's lawful rights. Although the widow need not marry as a second husband the man chosen by the king without her consent, neither could she marry without the king's consent the man of her own choice. Magna Carta specially 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; and if she broke her oath, she had to pay a fine, which was finally fixed at one year's value of her dower.[436]

431. See *Pipe Roll* of 16 John, cited Madox I. 491.

432. See *Pipe Roll* of 6 John, cited Madox I. 488.

433. See *Pipe Roll* of 6 John, cited Madox I. 488.

434. *New Rymer*, I. 91.

435. See *New Rymer*, I. 92.

436. See Coke, *Second Institute*, 18.

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 solucionem debiti; et si capitalis debitor defecerit in solucione 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.

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

The fact that John's subjects owed debts to his exchequer did not, of course, imply that they had borrowed money from the king. The sums entered as due in the Rolls of the Exchequer represented obligations which had been incurred in many different ways. What with feudal incidents and scutages, and indiscriminate fines, so heavy in amount that they could only be paid by instalments, a large proportion of Englishmen must have been permanently indebted to the Crown. At John's accession most of the northern barons still owed the scutages demanded 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.[437] It was, further, the Crown's practice wherever possible, to make its debtors find sureties for their debts, thus widening the circle of those liable to distraint, while the officers who enforced payment were guilty of irregularities, which became the cloaks of grave abuses.

Three equitable 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 ultimately of his means of livelihood, since the chattels left to him could not yield a permanent revenue.[438] The rule here laid down by Magna Carta has not found a place in modern systems of law, which usually leave the option with the creditor. (2) The estate (both real and personal) of the chief debtor had to be exhausted before proceedings could be instituted against his sureties. Magna Carta thus enunciated in English law a rule which 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 modern Scots law as the "benefit of discussion." (3) If these sureties had, after all, to pay the debt in whole or in 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 property the creditor held in security of that debt.

Even when the Crown's bailiffs obeyed Magna Carta by leaving land alone when chattels were available, they might still wantonly inflict terrible hardship upon debtors. Sometimes they seized goods valuable out of all proportion to the debt; and an Act of 1266[439] forbade this practice when the disproportion was "outrageous." Sometimes they attempted to extort prompt payment or to ruin their victim by selecting whatever chattel was most indispensable to him. Oxen were taken from the plough and allowed to die of starvation and 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.[440] John's charter has no such humane provision,[441] and the abuse continued. The Act of 1266, already cited, forbade officers to chase away the owner who came to feed his impounded cattle at his own expense. The *Articuli super cartas*[442] went

further; prohibiting the seizure of beasts of the plough altogether so long as other effects might be attached of sufficient value to satisfy the debt.[443]

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437. See *supra*, p. 89.

438. The *Dialogus de Scaccario*, II. xiv., had, half a century earlier, laid down rules even more favourable to the debtor in two respects: (*a*) the order in which moveables should be sold was prescribed; and (*b*) 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.

439. 51 Henry III., stat. 4 (among "statutes of uncertain date" in *Statutes of Realm*, I. 197).

440. See *Dialogus de Scaccario*, II. xiv.: "*Mobilia cujusque primo vendantur; bobus autem arantibus, per quos agricultura solet exerceri, quantum poterint parcant*" (p. 148).

441. Cf., however, the rule as to amercements in c. 20.

442. 28 Edward I. c. 12. See also Statute of Marlborough, 52 Henry III. c. 15.

443. Henry's reissues make two small additions explaining certain points of detail: (*a*) the words "*et ipse debitor paratus sit inde satisfacere*" precede the clause giving sureties exemption; and (*b*) the sureties are declared liable to distraint, not merely when the chief debtor has nothing, but also when he can pay, but will not, "*aut reddere nolit cum possit*."

CHAPTER TEN.

Si quis mutuo ceperit aliquid a Judeis, plus vel minus, et moriatur antequam illud solvatur, debitum non usuret 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;[444] and if the debt fall into our hands, we will not take anything except the principal sum[445] contained in the bond.

The taking of usury, denied by law to Christians, was carried on by Jews under great disadvantages and risks; and the rates of interest were proportionately high, ranging in normal cases from two to four pence per pound per week; that is, from 43⅓ to 86⅔ per cent. per annum.[446] 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.[447]

Magna Carta prevented this great injustice to the ward; but, in doing so, inflicted, according to modern standards, 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 during minorities was confirmed by the Statute of Merton,[448] which made it clear, however, that its provisions should not operate as a discharge of the principal sum or of the interest which had accrued before the ancestor's death. The Statute of Jewry, of uncertain date,[449] 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. Money-lending and the usury laws are subjects closely bound up with the repressive measures against the Jews.

I. *The History of the Jews in England.* The policy of the Crown towards those aliens of the Hebrew race who sought its protection varied at different times, and 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 extending from the formation of the alliance between Henry and Innocent IV. down to the ordinance of 1290, which banished in perpetuity all Jews from England. The details of this long story of hardship and oppression, tempered fitfully by royal clemency, which had always to be well paid for, can here be glanced at only in the barest outline. 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 second influx resulted from the persecution of Israelites on the Continent of Europe, consequent on the failure of the first Crusade. This new alien immigration seems to have excited mistrust in England, and led to the disarming of all Jews in 1181, a measure which left them at the mercy of the Christian rabble.

Accordingly, when a disturbance occurred at the coronation of Richard I., on 3rd September, 1189, owing to the imprudence of some officious Jews, a general massacre took place in London, while York and other towns were not slow to follow the example. The king was moved to anger, not so much by the sufferings of the Jews, as by the destruction of their bonds, since that indirectly injured the Crown; for the more the Jews had, the more could be extorted from them, and when the written bond had been burned, no evidence of the debt remained. Richard, returning from his 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 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, 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 only at stated intervals in the presence of special custodians, known as chirographers, who kept the keys. These custodians were usually four in number, two Christians and two Jews, chosen by juries specially summoned for that purpose by the sheriff of the county, and they were obliged to find sureties that they would faithfully perform their important functions. Only in their presence could loans be validly contracted between Jews and Christians; and it was their duty to see the terms of all such bargains reduced to writing in a regular prescribed form 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 all transactions were preserved, and all acquittances and assignments of debts, known from their Hebrew name as "starrs," had also to be carefully enrolled.[450] Minute and stringent rules, codified by Hubert Walter in the terms of a written commission, were issued to the judges when starting on their circuit in September, 1194.[451]

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 ascertained from a scrutiny of the contents of the *archae*. The king's officials were enabled to judge 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 the Jews by the king's constables ("*qui turres nostras custodierunt*").[452] In the dungeons of their strongholds horrible engines were at hand for enforcing obedience to their awards. Such jurisdiction, however, extended legitimately over trivial debts only.[453] All 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.[454] John, while despising the Jews, was not slow to realize that in them the Crown possessed an asset of great value. It was his policy to protect their wealth as a reservoir from which he might draw in time of need, contenting himself meanwhile with comparatively moderate sums. Thus, by a charter dated 10th April, 1201, he took 4000 marks in return for confirming their privileges; and he obtained a second payment of a similar amount after his rupture with Rome. The charter of 1201 was only a confirmation of rights already enjoyed by all English Jews in virtue of the liberal interpretation put upon the terms of an earlier charter which had been granted by Henry I. to a particular father in Israel with 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, while leaving them completely in the royal power, exempted them from all jurisdictions except those of the king and his castellans; while, if a Christian brought a complaint against a Jew, it was to be judged by the peers of that Jew.[455]

When a repetition of the massacre which had disgraced his brother's coronation threatened to take place in 1203, John promptly ordered the mayor and barons of London to suppress all such attempts. In terms contemptuous alike to the Londoners and to the Jews his writ declared that his promise of protection, "even though granted to a dog," must be held inviolate.[456] Protection was accorded to them, however, only that they might furnish a richer booty to the Crown, when the proper occasion arrived. Suddenly John issued orders for a wholesale arrest of the Jews throughout England. The most wealthy members of their community were brought together at Bristol, and, on 1st November, 1210, were compelled to give a reluctant consent to a general tallage at the enormous sum of 66,000 marks. Apparently this amount had been fixed as the result of an exaggerated estimate of the contents of the *archae*, and was more than they could afford to pay. The methods adopted by John's castellans to extort the arrears of the amount are well-known, especially in 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.[457]

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 the Jews, using the stones of their houses to fortify the city walls.[458] It is not to be wondered then that the same insurgents in forcing on King John the demands which 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 financial resource, 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, even of a contemptuous and intermittent kind; 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, without relaxing the rigour of those royal exactions which had previously been the price of protection. In 1253, a severe ordinance inflicted a long list of vexatious regulations on the Hebrews, almost converting their quarters in each great city into ghettos, like those of the Continent of Europe. This was merely the commencement of a series of oppressive measures, the natural 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 nobles and claimed to act as lords of Christian tenants, enjoying wardships, escheats, and advowsons, as any Christian baron might have done. The scope of this enquiry excludes any detailed account of the stages through which repressive legislation passed, until the lot of the Jews in England became intolerable. The Statute of Jewry, however,[459] 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, all these privileges were withdrawn, until the end came in 1290 with the issue of a decree of perpetual banishment by Edward I., who was compelled to sacrifice the

cherished right of keeping a royal preserve of Jews in deference to the culmination of national prejudice in a storm of unreasoning hate.

II. *Legal Position of the Jews.* All through these vicissitudes of fortune the legal status of the Jews had remained unchanged in all 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. All usury was looked on in the Middle Ages as immoral (although illegal only for Christians), while excessive interest was habitually exacted.

The feudal scheme of society had no place for Jews and afforded them no protection. Not only did they share the disabilities common to all aliens, but these were not in their case mitigated by the protection extended to other foreigners by their own sovereigns and by the Church. As exiles in a foreign land, exposed to the attacks of a hostile mob, they were forced to rely absolutely on the only power strong enough to protect them, the arm of the king. The Jews became the mere serfs, the 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,[460] "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 the fulfilment of the tacit understanding which 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.

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444. The words "*de quocumque teneat*" include both Crown tenants and under-tenants, and suggest that only freeholders were to receive protection from this clause.

445. *Catallum* and *lucrum* were the technical words used for "principal" and "interest" respectively in bonds and other formal documents. See, *e.g.* Round, *Ancient Charters* (Pipe Roll Society, Vol. X.) No. 51, and John's Charter to the Jews, *Rot. Chart.*, p. 93.

446. See Pollock and Maitland, I. 452, and Round's *Ancient Charters*, notes to Charter No. 51.

447. The Crown was sometimes called in to enable a creditor, 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?

448. 20 Henry III. c. 5.

449. *Statutes of Realm*, I. 221.

450. Cf. J. M. Rigg, *Sel. Pleas of the Jewish Exchequer*, p. xix.

451. See chapter 24 of the *Forma procedendi in placitis coronae regis*, cited in *Sel. Charters*, 262.

452. See John's Charter to the Jews of 10th April, 1201, in *Rotuli Chartarum*, p. 93.

453. See Pollock and Maitland, I. 453, n.

454. Rigg, *ibid.*, xx.

455. "*Judicata sit per pares Judei.*" See *Rot. Chart.*, I. 93.

456. *Rot. Pat.*, I. p. 33, and *New Rymer*, I. 89. The date is 29th July, 1203.

457. See Rigg, *Sel. Pleas of the Jewish Exchequer*, xxiv.

458. See Miss Morgate, *John Lackland*, p. 230.

459. *Statutes of Realm*, I. 221.

460. *Folio*, 386b.

CHAPTER ELEVEN.

Et si quis moriatur, et debitum debeat Judeis, uxor ejus habeat dotem suam, et nichil reddat de debito illo; et 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 the interest they claimed, the present one deprived them also in certain circumstances 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 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 in 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 citizens 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 exactly opposite reasons. It came indeed to be interpreted in a broad general sense by enthusiasts who, with the fully-developed British constitution before them, read the clause as enunciating the modern doctrine that the Crown can impose no financial burden whatsoever 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 of John's subjects; his feudal tenants, and the citizens of London respectively.

I. *Protection of Crown Tenants from arbitrary Exactions.* The pecuniary obligations of the barons may be arranged in two groups according as they depended on the king's own actions, or were determined by circumstances which lay beyond the royal control. Payments of the former type (such as reliefs and amercements), exigible only at fixed dates or on the occurrence of specific events, were treated of elsewhere in Magna Carta. The present chapter sought to prevent John from extorting additional payments either absolutely at his own discretion, or because of situations which he had purposely created as excuses for demanding money. The entire field of such arbitrary feudal dues was covered by the words "scutages" and "extraordinary aids,"[461] the use of which protected the barons from every

sort of compulsory payment which might be demanded by the king at his own discretion.

(1) *Scutage.* The development of the system described by this name has been traced in the Historical Introduction.[462] Used at first as an expedient for substituting, in the Crown's option, money payments for military service, it became, under John, a regular source of revenue, imposed almost every year on one pretext or another, while it was levied at an increased rate, and under conditions of a vexatious and burdensome nature. If any one cause contributed, more than the others, to the rebellion which culminated at Runnymede, it was John's method of imposing scutages. This chapter, then, attempted to strike at the common root from which many grievances grew. The Crown was no longer to be left sole judge of the occasions on which a scutage might be demanded. "The common consent (or counsel) of the realm" must first be obtained. If this provision had been carried into practice, it would have removed the supreme control of the system of scutages from the Crown which received the money, to the Crown tenants who paid it. This truly radical remedy included the remedy of all minor abuses as well, since the collective body of barons who could refuse payment unconditionally, might *a fortiori* make grants under such conditions as they chose. Henceforward it would lie with them to say, on each occasion, whether the old normal 20s. per knight's fee should be superseded by some other rate, either higher or lower. This provision was never enforced, being omitted altogether from the reissue of 1216, while the clause substituted for it in the Charter of 1217 took an entirely different form.[463]

(2) *Feudal aids.* It was recognized from an early date that in emergencies feudal vassals ought to contribute to their lord's support in proportion to the extent of their holdings. Such payments were known as aids, and were originally supposed to be free-will offerings.[464] By John's reign they had fallen into two groups—ordinary and extraordinary. The former, three in number, were only dealt with incidentally by the Charter.[465] It is with the "extraordinary" aids that this chapter specially occupies itself. These are placed in the same position as scutages: the Crown cannot exact either, "unless by common counsel of the realm."

II. *Protection of Citizens of London from arbitrary Exactions.* Some attempt was made to protect the men of London, as well as the Crown tenants, from John's demands for money. The insurgent leaders in this way

discharged part of their debt to an ally with special claims upon their gratitude.[466] The Articles of the Barons had contained several important provisions affecting the capital; and these were embodied in the Charter in slightly altered terms, which suggest some influence at work not altogether friendly to the citizens.[467] The present clause of the completed charter, for example, uses only one word, "*aids*," where the 32nd of the Articles of the Barons had referred to "tallages and aids." There is no evidence to show whether the omission had been deliberately planned, or was merely 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.

(1) "*Aid*" is the vaguer word, applicable to every payment which can be regarded as in any sense a free-will 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.

(2) "*Tallage*" was a tax levied at a feudal lord's arbitrary will upon more or less servile dependants, who had neither power nor right to refuse. The frequency of these exactions and the sums taken depended solely on the lord's caprice, restrained by no law, but only by such limits as an enlightened self-interest or regard for public opinion might dictate. Liability to arbitrary tallage was thus one of the chief marks of an unfree status, and was contrasted with the impositions levied on those freeholders who held by knight's service, by socage, or by frankalmoin. The owner of the smallest manor, like the owner of the greatest barony, might tallage his own villeins; and the king had a similar privilege over a wider field. His rights extended even over civic communities who held royal charters, since towns were theoretically on the royal demesne, and therefore liable to tallage. The great city of London, in spite of its growing wealth, its political importance, and its list of chartered privileges, still shared this liability.[468]

(3) *Comparison of tallage and aid.* The tallage, as a forced payment, thus differed fundamentally from the nominally free "aid," while two minor points of difference may also be noted. In arranging an aid the givers usually suggested the amount, though the king might reject the offer as insufficient; while the amount of a tallage, on the other hand, was arbitrarily

fixed by the Crown. Further, while the aid granted by a community was a joint offering which the citizens assessed and collected by their own officers, and for which they admitted a collective responsibility, the Crown itself allocated on whom it pleased the particular sums of tallage to be paid by each individual, no joint liability being admitted by those who had to pay. It was obviously to the advantage of a borough to forestall, by the present of 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 also more to the king's advantage than a tallage of equal amount. Not only was he saved the trouble, expense, and delay of the collection, but he obviated risk of loss through the insolvency of some of the individuals fixed upon.

A story told by Madox[469] brings out the contrast. A dispute had arisen between the king and the Londoners. 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 liability to tallage altogether, but were confronted with entries in Exchequer and Chancery Rolls which entirely contradicted their audacious contention. On the morrow the mayor and citizens acknowledged that they were talliable, and gave the king the sum he demanded.

(4) *Effects of the omission of the word "tallage" from Magna Carta.* As the two words appearing in the Articles of the Barons had well-recognized differences of meaning, it is unlikely that the omission of one of them from the Charter was regarded as a purely verbal change. John would readily enough dispense with the right to exact "aids" from the wealthy traders of his capital, if he still preserved his privilege of tallaging them at pleasure. The omission was perhaps deliberately made in deference to John's strong feeling on a point which did not personally affect the barons.[470] Another omission should be noted. The Articles had extended protection not only to Londoners, but also "to citizens of other places who thence have their liberties," meaning the towns whose chartered privileges had been modelled on those of the metropolis. Magna Carta completely ignored, in this connection, all towns except London.[471]

(5) *The nature of the protection afforded by Magna Carta.* The arrangement of the present chapter is peculiar. After treating fully of the abuses of Crown tenants, the case of the Londoners is thrown in carelessly in a few words: "In like manner it shall be done concerning aids from the citizens of London." Various interpretations of the words "*simili modo*" are

possible. High authorities suggest that the clause means no more than that aids taken from London, like ordinary aids taken from Crown tenants, must be "reasonable."[472] If this is so, a criterion of reasonableness different from that applicable to knights' fees became necessary; and this would have been hard to find.[473]

It is equally probable, however, that the intention was to render the same consent necessary to the validity of aids, asked from London, as had previously been stipulated in the case of scutages from tenants in chief. If this is so, then the method provided in chapter 14 for taking "the common counsel of the realm" was peculiarly ill-adapted to secure to the men of London any effective voice in taxing themselves. The necessity for the consent of an exclusively baronial assembly could not adequately protect the Londoners, whose essentially different interests were unrepresented.

Subsequent history casts no light on the original intention of this clause; no occasion of testing its meaning ever occurred, the entire chapter of which it forms part having been omitted from all subsequent issues of the Charter.

(6) *Later history of the Crown's right to tallage the towns.* Magna Carta, even in its original form, did not deprive the king of his right to tallage London, like any other part of his ancient demesne; and the Crown continued quite legally and almost without question to exercise this prerogative at intervals from 1215 until 1340. It has sometimes been maintained, indeed, that the *Confirmatio Cartarum* of 1297 was intended to abolish this prerogative, and it is true, that a document once considered as 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 quite unauthentic; while, if the *confirmatio* itself was intended to relieve the towns from tallages taken without their consent, it signally failed. Edward III. occasionally exacted tallages from London and other towns. His parliaments, however, sought to prohibit this, and succeeded, in 1340, in passing a statute which abolished, in words peculiarly wide and categorical, unparliamentary taxation of every kind whatsoever. This act, which is sometimes styled by modern writers "the real *statutum de tallagio non concedendo*," is held by Dr. Stubbs to have conclusively abolished *inter alia* the Crown's right of tallage.[474] This finally settled the law, but did not prevent the king from trying to break that law. In subsequent years Edward III. frequently disregarded the restriction thus 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 general doctrine of the nation's right to tax itself.[475] Yet the very idea of "taxation" in its abstract form, as opposed to specific tolls and tallages 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 those 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 consent of the realm" was made a requisite for three species of exactions at the most: for scutages and for extraordinary aids taken from the feudal tenants, and possibly also for aids taken from the city of London: that is all. Not a word is said of any other form of taxation or of other groups of taxpayers. The restriction thus benefits Crown tenants only, with the doubtful addition of the Londoners. (2) If under-tenants received by chapter 15 some protection against their mesne lords, they received none against the claims of the king. The Charter affected not national "taxation," but merely feudal dues. (3) The scant measure of protection afforded 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 and other exactions, tenants in frankalmoin (among them the wealthy Cistercian monks) to forced contributions from the wool and hides of their sheep, while the right of the Crown arbitrarily to raise the "farms" of all parts of its own demesnes was deliberately reserved.[476] (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 such prizes and custom dues as he thought fit 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 limited scope of this restriction on prerogative is further illustrated by the method provided for taking "the common consent." The assembly to be convened for that purpose was a narrow body, representative neither of the several ranks and classes of the community, nor of the separate national interests, nor yet of the various districts of England. On the contrary, its composition was extremely 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.[477]

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 national doctrine of self-taxation; it was primarily intended to protect Crown tenants from impositions levied by John, not *qua* sovereign but *qua* feudal lord. Such as it was, it was totally omitted, along with its corollary (chapter 14), in 1216. The provision substituted for both, in the Charter of 1217, referred only to scutages, saying nothing about aids, and cannot possibly be read as a general prohibition of all arbitrary taxation by the Crown.[478]

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461. "Extraordinary" is here applied to all aids other than the three normal ones which, falling due each on a definite occasion, come under the opposite group of fixed payments.

462. See *supra*, 86–93.

463. See *supra*, 172–3.

464. Cf. *supra*, 80–2.

465. These three aids were carefully specified, and a reasonable rate was stipulated for, but not defined. In this respect the treatment here accorded to

aids is less satisfactory than that of *reliefs* in chapter 2, which carefully defined the amount to be paid. It is probable that the framers of the present chapter relied on existing usage, which seems to have regarded the normal aid as one-fifth of the normal relief, *i.e.* as 20s. per knight's fee. An alternative explanation is also possible, that the same "common counsel" which had the right to veto extraordinary aids, was also expected to determine the reasonable amount of the ordinary aids.

466. See *supra*, p. 42.

467. See article 23 (which became c. 33), article 31 (c. 41), and article 32 (cc. 12 and 13), and cf. *supra*, pp. 140-1. Whether article 12 (c. 35) was more a benefit to, than a restraint upon, traders seems doubtful.

468. 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."

469. I. 712, citing Mem. Roll 39 Henry III.

470. Alternative explanations are possible, *e.g.* that the prelates, accustomed to tallage their own dependants, used their influence successfully to combat this innovation as "the thin end of the wedge."

471. It might possibly 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.

472. Such is the opinion expressed in the *Lords' Report on the Dignity of a Peer*, I. 65.

473. 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.

474. See *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."

475. *E.g.* Taswell-Langmead, *Engl. Const. Hist.*, 106, and Anson, *Law and Custom of the Const.*, I. 14. Dr. Stubbs, *Const. Hist.*, I. 573, considers that these words "admit the right of the nation to ordain taxation."

476. See *infra*, under c. 25.

477. Even when an honour escheated to the Crown, the tenants of that honour "were not suitors of the *Curia Regis*." See *Report on Dignity of a Peer*, I. 60.

478. Cf. *supra*, pp. 173-4 and *infra*, under c. 14.

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, et burgi, et ville, et portus, habeant omnes libertates et liberas consuetudines suas.

> And the citizens of London shall have all their 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 the liberties and customs of London would be a long one; and an account of how each of these grew up and was confirmed by the Crown need not be given here. The most cherished of the privileges enjoyed in John's day were the right to appoint a civic chief, who bore the name of mayor, and the right to choose sheriffs of their own who should collect the city's *firma*[479] (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 two privileges need be here attempted.

The chief feature of London before the Norman Conquest seems to have been lack of proper municipal organisation. 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."[480] 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 folkmoot, 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 also the city was treated as one whole. London, however, prior to the reign of Henry I. was far from possessing machinery adequate to the duties of a local government for the whole community.

The first step towards acquiring a municipal 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 grant gained certain valuable privileges and enjoyed them for a short time, 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 for this payment 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 whom they pleased as 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. Round[481] 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 all the already existing separate jurisdictions and franchises, perpetuating the old state of disunion, rather than creating a new principle of cohesion. He proves, further, that these benefits continued in force only for a few years after Stephen's accession. That king was coerced by the Earl of Essex into infringing the citizens' chartered rights; and London did not regain the ground thus lost until the reign of Richard I.

Henry II., indeed, granted a charter to the citizens in 1155, which is usually interpreted as a full confirmation of all the concessions of the earlier Henry.[482] Mr. Round has conclusively proved the error of this opinion.[483] 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 completely omitted: the citizens no longer elected their own sheriffs or their own justiciar; the reduction of the *firma* to £300 was not confirmed; and subsequent pipe rolls show that Henry doubled that amount, although the Londoners protested, arguing for the lower rate.

The next crisis came early in Richard's reign. Then it was that London first obtained its municipal constitution. Then also it regained and secured on a permanent basis the privileges precariously held for a few years under Henry I. and Stephen. The form in which the constitution came at last was borrowed from France, and was neither more nor less than the *Commune*, so well known on the Continent in the twelfth and thirteenth centuries. The commune of London was possibly modelled upon the commune of Rouen;

the chief cities of England and Normandy respectively must have had intimate relations. Mr. Round[484] has shown that these concessions were not, as has sometimes been supposed, voluntarily granted in 1189 by Richard I., but were extorted from his younger brother John, when that ambitious prince was bidding high for powerful allies to support his claim to act as Regent. London really got its first 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, successfully ousted him, with the help of the men of London. At the critical moment the metropolis had offered its support on conditions, which included the restoration of all the short-lived privileges conferred by the charter of Henry I., and, in addition, a municipal constitution of its own in the form of a commune 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,' like a French king or lord; and then London, for the first time, had a municipality of her own."[485]

For any accurate definition of a commune we look in vain to contemporary writers, who are usually carried away by their political bias. Richard of Devizes[486] 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 which 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 sub-vassals of its own.[487] Its chief institutions were a mayor and an elective council, generally composed of twenty-four members, some or all of whom were known as *échevins* or *skivini*, a word which in its modern form of "scavengers" has fallen on evil days, no longer denoting the city fathers, but

men who perform civic duties of a useful but less dignified nature. 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 their origin, were not necessarily democratic in their sympathies. Under the new constitution of London, the grievous taxation of Richard's reign was made to fall more heavily on the poor of London than on any other class. The commune thus set up in 1191, tolerated at first rather than encouraged by the Crown, formed thenceforth the municipal government of the capital; the citizens chose not only their own sheriffs, but also their own mayor, although the latter, when once appointed, held office for life.

When John became king, he granted three charters, ratifying the privileges of the capital in return for a *gersuma* (or slump payment) of 3000 marks.[488] All the franchises specified in the old charter of Henry I. were now 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.[489]

A fourth charter, dated 20th March, 1201, was merely of temporary interest; but a fifth, granted on 9th May, 1215, little more than a month previous to Magna Carta, is of great importance, and represents the bait thrown by John to the citizens in the hope of gaining their support in this new crisis, as he had previously gained it in the crisis of 1191. The fifth charter not merely confirmed to the citizens in explicit terms the right already enjoyed by them of electing a mayor for life, but allowed them to elect a new one every year. Miss Norgate does not exaggerate, when she describes this concession as "the crowning privilege of a fully constituted municipality, the right to elect their own mayor every year."[490] An annually elected magistrate would, undoubtedly, feel his dependence on the citizens more than one holding office for life; but it seems probable that the chief value of the grant lay in its confirmation by John as king, of the rights conceded by him fourteen years earlier as his brother's unauthorised representative, and enjoyed meanwhile on an insecure tenure. The charter of May, 1215, by officially recognizing the mayor, placed the commune over which he presided on a legal footing. The revolutionary civic constitution,

sworn to in 1191 was now confirmed. The citizens acted on the permission granted them of annually changing their chief magistrate: but in place of supporting the king who made the grant, they opened their gates to his enemies.[491]

Such then was the London whose privileges were confirmed by Magna Carta—a city which had slowly grown to greatness, obtaining after many struggles a complete municipal constitution in the form of a commune with annually elected mayor and council, as well as sheriffs of its own appointment, who excluded the Crown's financial officers not only from the district within its walls but from the whole of Middlesex. The Great Charter, avoiding details, confined itself to a general confirmation to the men of London of their ancient "liberties and free customs," two words[492] whose vagueness ought in this connection to receive a liberal interpretation.[493]

London, in this respect, was not to stand alone; a similar concession was explicitly made in favour of all other cities, boroughs, towns, and sea-ports. This was a mere confirmation, however, not to be read as conferring new privileges or exemptions, each borough being left to prove its own customs as best it might. In the reissues of Henry, the distinction of being mentioned by name was shared by these "barons of London," with "the barons of the Cinque ports," who from their wealth, their situation, and their fleet, were allies well worth conciliating. They played, indeed, a prominent part in the decisive naval victory gained by Hubert de Burgh on 24th August, 1217.[494]

Other portions of John's Great Charter which specially affected the 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. The Mayor of London, it should be added, was one of the executive committee of twenty-five, entrusted with wide powers to enforce the provisions of the Charter.[495]

Among the most cherished privileges claimed by the chartered boroughs were the rights to exact tolls and to place oppressive restrictions upon all rival traders not members of their guilds, foreigners and denizens alike. The confirmation of these privileges in this chapter has been held to contradict chapter 41, which grants protection and immunities to foreign merchants.[496] The inconsistency, however, should not be pushed too far, since the later chapter aimed at the abolition of "evil customs" inflicted by the king, not of those inflicted by the boroughs. At the same time, all favour shown to aliens

would be bitterly resented by their rivals, the 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 opposition to the vague confirmation of borough "liberties" wherever the two came into collision. [497]

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479. *Firma* is explained *infra*, c. 25.

480. Stubbs, *Const. Hist.*, I. 439. Cf. Round, *Commune of London*, 220, who is in substantial agreement. Miss Mary Bateson, however, thinks that "there has been a tendency unduly to minimise the measure of administrative unity in the twelfth-century shire of London." See the evidence produced by her, *Engl. Hist. Rev.*, XVII. 480-510.

481. *Geoffrey de Mandeville*, 356.

482. See *e.g.* Miss Norgate, *Angevin Kings*, II. 471.

483. *Geoffrey*, 367.

484. *Commune of London*, 222.

485. *Commune of London*, 224.

486. *Select Charters*, p. 252.

487. M. Luchaire, *Communes Françaises*, p. 97, defines it as "*seigneurie collective populaire*."

488. Miss Bateson, *Engl. Hist. Rev.*, XVII. 508.

489. *E.g.* the removal of obstacles to free navigation in Thames and Medway. Cf. *infra*, c. 33.

490. *John Lackland*, 228.

491. From this date the list of mayors shows frequent, sometimes annual, changes. Thus 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, when he headed the citizens who welcomed Louis to make London his headquarters.

492. Both words are discussed *infra*, c. 39.

493. The Charter mentions neither mayor nor commune, but probably by implication confirmed both. Prof. G. B. Adams finds such confirmation, not in c. 13, but in c. 12 (by its application of the word *auxilium* to London); and maintains that with the omission of this word from subsequent charters "London's legal right to a commune fell to the ground." *Engl. Hist. Rev.*, XIX. 706.

494. See *supra*, p. 170.

495. See *infra*, c. 61.

496. Cf. Pollock and Maitland, I. 447-8.

497. Cf. *infra*, c. 41.

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, by our letters under seal; 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 suitable machinery to give effect to the provision of chapter 12.[498]

As the earlier clause is frequently supposed to contain a general doctrine of *taxation*, so this one is often cited as enunciating a general doctrine of *parliamentary representation*; while the close connection between the two chapters is taken to indicate an equally close connection between the two conceptions supposed to underlie them, and is urged as evidence that the framers of Magna Carta had grasped the essentially modern principle that taxation and representation go together.[499] In this view, the barons at Runnymede deserve credit for anticipating some of the best features of the modern system of parliamentary government. The words of the text,

however, will scarcely bear so liberal an interpretation. Vital points of difference between the principles of Magna Carta and the modern doctrine of representation are revealed by a careful analysis.

Under chapter 12 scutages and extraordinary aids could only be levied "with common counsel of our kingdom," and now chapter 14, by formulating rules for convening the individuals whose consent was thus required, fixes authoritatively the composition of an assembly definitely charged with this specific function. The same Latin words which signify joint "consent" or counsel thus came to signify also a special institution, namely, that "Common Council" afterwards of such vital constitutional importance, continuing under a new name the old *curia regis* in several of its most important aspects, 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 when the attendance of the members was required. These writs must specify the time, place, and reason of assembling, giving formal notice at least forty days in advance. In these respects the writs issued were all to be the same; but in one vital particular a distinction was recognized. Each of the really powerful men of the realm—archbishops, bishops, abbots, earls, and "other greater barons"—must receive a separate writ, under the royal seal, addressed to him individually and directly, while the "smaller barons" were to be 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; while individual notice under the king's seal was given only to the more important magnates among them. The Common Council of the Charter was thus an assembly of military Crown tenants, and "the common consent of my kingdom" in John's mouth was synonymous with "the consent of my barons."[500]

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 extremely homogeneous; a feudal muster of Crown vassals. Some historians, indeed, in their anxiety to find distinguished pedigrees for their democratic ideals, have traced the origins of the leading features of the modern Parliament back to the Anglo-Saxon era; but such attempts are

hurtful to the best interests of history, while they do not in the least advance the cause of popular liberties.

It is unnecessary here to examine the various rival theories professing to explain the composition of the Anglo-Saxon Witenagemot, or to discuss the exact connection between that venerable institution and the *Curia Regis* of the Norman kings. As a 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, who might issue or withhold writs of summons very much as he pleased. 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 unfavourable criticism. This was in October, 1164, when a special council was summoned to Northampton to pass judgment upon various 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 archbishop, as holder of a barony, was wont to receive as matter of course, was deliberately withheld. Apparently contemporary opinion condemned this omission.[501] It is safe to infer, then, that as early as 1164, the method of issuing these writs had become uniform, but this constitutional understanding was not reduced to writing until embodied in Magna Carta. Thus it was in 1215 that the magnates of England formulated for the first time 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 merely as an expensive burden, incident, like so many other burdens, to the possession of land.[502]

III. *Position of the "Minor Barons."* In recognizing a distinction between two classes of Crown tenants, the Great Charter merely gave the weight of its authority to existing usage, as that had taken shape in the reign of Henry II. Crown tenants varied in power and position in proportion to the extent of their lands, from the great earl who owned the larger share of one or more counties, down to the small free-holder with only a few hides, or it might be acres, of land. A rough division was drawn somewhere in the midst; but the exact boundary was necessarily vague, and this vagueness was probably encouraged by the Crown, whose requirements might vary from time to

time.[503] Those Crown tenants on one side of this fluctuating line were known as *barones majores*, those on the other as *barones minores*. The distinction had been recognized as early as the days of Henry II.;[504] but Magna Carta helped to stereotype it, and contributed to the growing tendency to confine the word "baron" to the greater men.[505] It is unlikely that any "minor baron" who obeyed the general summons would enjoy equal authority with the magnates invited individually by writ; and it is difficult to say even whether he was sure of a welcome, and, if so, in what capacity. Three distinct theories at least have been advanced as to the position occupied by the "minor barons" in the Common Council. (1) The duty of attendance, burdensome to all, was specially burdensome to the poorer Crown tenants. It has accordingly 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.[506]

(2) Dr. Hannis Taylor holds an exactly opposite opinion, reading this chapter as the outcome of a desire to ensure the fuller attendance of the smaller men—as an attempt "to rouse the lesser baronage to the exercise of rights which had practically passed into desuetude."[507] Each of the *barones minores* was thus encouraged to attend for himself and his own interests. If such an attempt had really been made, and had succeeded in compelling the attendance of a large proportion of those who previously had almost made good their right to shirk the burden, the result would have been to leave no room whatever for the future introduction of the representative principle into the national council.

(3) A third theory, while agreeing that those summoned by general writ were intended to obey the summons, thinks that the smaller Crown tenants were called not exclusively each man for himself, but in a representative capacity. It is thus suggested that 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.[508]

The reasons for rejecting this third theory will be more conveniently discussed in connection with the doctrine of representation. It is perhaps unnecessary to decide between the two others; but 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 must have been 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 the established usage, and left with each "minor baron" the decision whether he should come or stay away. 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 the four best men of every village "represented" their fellows in the county court from a very 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 very definite relation which exists at the present day between the elected member of Parliament and the constituents he "represents." It is true that the difference may in some respects be one of degree rather than of kind, and it is further true that two years before the date of Magna Carta a tentative experiment had been tried in the direction of introducing representatives of the counties into the king's Council, thus taking the first step in a long process destined ultimately to lead without any absolute breach of continuity to the modern Parliament. But the Barons in June, 1215, showed no desire to follow the example set by John in November, 1213. The terms in which Magna Carta directs that all minor barons should be summoned are explicit, and may be profitably contrasted with the words used in the writ dated 7th November, 1213, addressed to the sheriff of Oxford, ordering him to compel, in addition to the barons and the knights already summoned (presumably *barones minores*), the attendance of *quatuor discretos homines de comitatu tuo* (presumably other than Crown tenants).[509]

So far from the words of Magna Carta showing any desire to confirm this precedent, they show a deliberate intention to ignore it, and to fall back on the more ancient practice. The members of the assembly which Magna Carta stipulated should be convened for the taking of "the common consent" were all of one type, drawn from the same section of the land-owning aristocracy, namely, military tenants-in-chief of the Crown. The barons, great and small, might be present, each man for himself; but the other tax-paying classes were completely ignored.[510] They were neither present nor yet represented. The barons in this, as in other matters, stood out for the old feudal order under which they had preserved a wide measure of independence from the Crown's control; whereas King John for selfish

reasons adopted the more enlightened policy of his father, and even, unconsciously it may be, anticipated some of the measures of his grandson, Edward Plantagenet. In brief, John was progressive, while his opponents were conservative. The present chapter must be added to the not inconsiderable list of those which attempted to bring about a feudal reaction.[511]

V. *Powers and Functions 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 by the Great Charter on behalf of the *commune concilium* to any right to be consulted in the making of laws or in the performance of administrative or judicial duties by the Crown. No effort was made towards formulating any doctrine of ministerial responsibility. This assembly, narrow and aristocratic in its composition, had only one right secured to it by Magna Carta—namely, a limited control over one form of taxation. Even here, as we have seen, no general or sweeping claim was put forward on its behalf. It had no right to a control of the national purse: the barons confined themselves to a selfish assertion of a right to protect 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," and would have given to this list a conspicuous place of honour.[512]

VI. *Rights of Majorities and Minorities.* The medieval conception of constitutional 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. Each "baron" was summoned on his own behalf, and in order that he might give his individual consent to a proposed levy; while 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 interfered with 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.[513]

Nothing is said, however, as to the validity of a protest made by those who came and expressed disapproval of what the majority agreed to. As the substance of this chapter was observed in practice (though omitted from subsequent confirmations), a precedent of the year 1221 may perhaps be cited to illustrate the interpretation put upon it by contemporary practice. A Council summoned by William Marshal, as Regent of Henry III., had consented to a levy of scutage, and the bishop of Winchester was assessed at 159 marks as the amount due for his knight's fees. He refused to pay, on the ground, quite untenable by modern standards, that he had all along dissented from the grant. The fact of his protest was vouched by Hubert de Burgh and others who had been present at the Council. The plea was actually accepted by the Regent, and the exchequer adjudged bishop Peter to be quit of the payment.[514] The incident shows how far the statesmen of the day were from realizing the most elementary principles of 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.

The barons by consenting in 1217 to accept a return to the fixed rates of scutage customary in the reign of Henry II., deliberately sacrificed such right of control over the finances of the nation as they may have obtained in 1215. At no time, indeed, did they show any appreciation of the vital nature of the constitutional issues at stake. The importance of the common council, and the necessity of defining its composition, functions, and privileges, lay entirely beyond their narrow sphere of vision.

It should be remembered, however, that the substance of this chapter of John's charter (although discarded in subsequent reissues) was virtually observed in practice by the Crown, and treated as in force by the barons. 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.[515]

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." This incident illustrates the extreme constitutional importance rightly attached by the barons to the rigid observance by the Crown of the established usage relative to the convening of Parliament.[516]

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498. On the whole subject of the *commune concilium*, cf. *supra* 151-4 and also 173-4.

499. *E.g.* Sir William R. Anson, *Law and Custom of the Constitution*, I. 14, emphatically declares that one of the two cardinal principles of the entire Charter is "that representation is a condition precedent to taxation."

500. This is illustrated by a comparison of the words used in the text with the phrases in which Henry and his sons expressed "the common consent" to important ordinances and charters: *e.g.* (*a*) the Assize of Clarendon in 1166 (*Select Charters*, 143) bears to have been ordained by Henry II. "*de consilio omnium baronum suorum*"; (*b*) John's Charter surrendering his kingdom to Innocent in 1213 declares that he acted "*communi consilio baronum nostrorum*" (*Select Charters*, 285); (*c*) Matthew Paris makes Earl Richard complain to his brother Henry III. in 1255 that the Apulian business had been entered on "*sine consilio suo et assensu barnagii*" (*Chron. Maj.* V. 520).

501. See Ramsay, *Angevin Empire*, p. 54, and authorities there cited.

502. 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.

503. See Prof. Medley, *Engl. Const. Hist.*, 123.

504. See *Dialogus de Scaccario*, II. x. D., "*baronias scilicet majores seu minores*."

505. Cf. *supra*, c. 2.

506. *Engl. Const. Hist.*, 123. "The smaller tenants-in-chief would thankfully regard the general summons as an intimation to stay away."

507. *Engl. Const.*, I. 466.

508. 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.

509. Cf. *supra*, p. 36. The writ appears in *Rot. Claus*, I. 165, and also in *Sel. Charters*, 287. Cf. *New Rymer*, I. 117.

510. Cf. *supra*, c. 12.

511. Cf. Anson, *Law and Custom*, I. 44. "The provisions of 1215 described an assembly of a type which was already passing away." Cf. what is said of reactionary tendencies in connection with cc. 37 and 39.

512. Cf. *Report on Dignity of a Peer*, I. 63, where it is mentioned as "remarkable that no one article in the Charter has reference to the previous existence of any assembly convened for general purposes of legislation; nor does the charter contain any provision for the calling of any such assembly in the future, or any provision purporting the existence by law of any representative system for the purpose of general legislation."

513. Cf. Stubbs, *Const. Hist.*, I. 607: "Absence, like silence, on such occasions implies consent."

514. See *Pipe Roll* of 5 Henry III., cited Madox, I. 675.

515. See Prothero, *Simon de Montfort*, 67, and authorities there mentioned.

516. See M. Paris, *Chron. Maj.*, V. 520. His words are: "*Et responsum fuit quod omnes tunc temporis non fuerunt juxta tenorem magnae cartae suae vocati, et ideo sine paribus suis tunc absentibus nullum voluerunt tunc responsum dare*." Matthew, however, probably improved his story in the

telling, adding local colour from the only version of the charter known to him—namely, that spurious copy he had incorporated in his own history. He clearly knew nothing of the essential differences between the charters of John and of Henry. The barons in 1255 may, or may not, have been equally ignorant.

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: sums of money are no longer to be extorted from them arbitrarily by their lords.[517] Different machinery, however, had here to be adopted, since the expedient relied on in chapter 12 ("the common consent of the realm") was clearly 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,[518] but in others their position was distinctly worse. Not only had they to satisfy the demands of their own lord for "aids," but they generally found that part of every burden laid by the king upon that lord's shoulders was transferred to theirs. In seeking to provide for under-tenants the protection of which they stood so much in need Magna Carta looked, not to the common council, but to the king. No mesne lord was to be allowed to compel his tenants to contribute to his necessities without obtaining a written licence from the Crown; and stringent rules forbade the issue of such licences except upon the usual three occasions. 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 right of private war, and was, as a logical consequence, 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 great 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" to 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 for that purpose in their 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 collective consent to an aid of 20s. per fee on the occasion of his daughter's marriage.[519] No such obligation, however, had been placed upon mesne lords by Magna Carta, which had sought a practical substitute for "the common consent of the realm" in quite a different direction, as will be explained immediately.

(3) A check upon such exactions was sought, not in any action by the court baron, but in the mesne lord's 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.[520] The Crown thus exercised what 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, employed it solely for his own advantage, selling writs to every needy lord who proposed to enrich himself (and, incidentally, the Crown also) at his tenants' expense.

Magna Carta forbade the two tyrants thus to combine against the sub-tenants, enunciating a hard-and-fast rule which, if duly observed, would have struck at the root of the grievance. The whole subject of aids was removed from the region of royal caprice into the region of settled law. 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. Only in one particular were the requirements of John's Magna Carta observed, namely, as regards the need for obtaining a royal licence. Mesne lords after this date, whatever may have been their reason, invariably asked

the Crown's help to collect their aids. They could not legally distrain their freeholders, except through the sheriff, and this was, in part at least, a result of Magna Carta.[521]

Henry III., however, entirely 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 may 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.[522]

(2) *Ordinary Aids.* (*a*) John in 1204 authorized the collection of "an effectual aid" from the knights and freeholders of the Constable of Chester for the ransom of their lord.[523] (*b*) A royal writ in 1235 allowed Henry Tracey, as already mentioned, to take an aid for his eldest 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 distrain his under-tenants for contributions.[524] (*b*) An heir, paying *relief*, might likewise transfer the obligation to his freeholders.[525] (*c*) The lord's *debts* were frequently paid by his tenants. The returns to the Inquest of 1170 contain particulars of the "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";[526] while in 1234 the Earl of Oxford and the Prior of Lewes each obtained a letter patent distraining their tenants to contribute to the discharge of their debts.[527] Sufficient 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 too minutely the justice of applications for such writs, if good fees were punctually paid. His letters, during the earlier years of his reign, 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, who apparently debated with his assembled knights of Devonshire the amount to be paid as "reasonable," and finally accepted 20s. per fee.[528] It is interesting to note, however, that this same mesne lord, twelve years later, obtained a writ bidding the sheriff of Somerset assist him to collect "the scutage of Gascony" at a specified rate, namely, 40s. per fee.[529]

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. The vague declaration that these should be reasonable in amount is replaced by the specification of a fixed rate, namely 40s., or double what had been usual at an earlier period. Definition of the amount and times of payment may, however, have been worth purchasing even at this increase.

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517. The chapter is, therefore, on the one hand a necessary supplement of cc. 12 and 14, while on the other it is merely a particular application of the general principle enunciated in c. 60, which extended to sub-tenants all the benefits secured to Crown tenants by previous chapters.

518. The exemptions enjoyed by them are explained under c. 43.

519. See Bracton's *Notebook*, case 1146, cited by Pollock and Maitland, I. 331.

520. 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 land-owner 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.

521. Cf. Pollock and Maitland, I. 331: "The clause expunged from the Charter seems practically to have fixed the law."

522. *Close Rolls*, I. 306, cited Pollock and Maitland, I. 331.

523. *Patent Rolls*, 5 John, cited Madox. I. 615.

524. *Close Rolls*, 7 John, cited Madox, I. 616.

525. See Glanvill, IX. 8.

526. See Round, *Commune of London*, 130.

527. 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."

528. *Supra*, p. 303, and cf. Pollock and Maitland, I. 331.

529. See Madox, I. 677.

CHAPTER SIXTEEN.

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

No one shall be compelled to perform 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; since it was not enough to protect themselves from exactions in money, if they were still exposed to arbitrary exactions in kind. John, therefore, 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 even among tenants-in-chivalry, in consequence of special exemptions or special burdens which appeared in title deeds or rested upon immemorial usage. The barons would be unwilling to enter on so intricate and laborious a task, fearing that the introduction of such complications might do more harm than good. The necessity for accurate definition may never have occurred to them: the main purport of their grievance was so vividly present to their own minds that they did not acknowledge the possibility of any mistake. The military Crown tenants had frequently objected to serve abroad, particularly during John's campaigns in Poitou, which involved a long expensive journey to a region in which they had nothing at stake.[530] They regarded themselves as not legally bound to make expeditions to such portions of the Angevin Empire as had not belonged to the Norman kings when their ancestors got their fiefs. To force them to enter on campaigns to the south of France, or to fine them heavily for staying at home, was, they 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 an absolute prohibition of compulsory service in Poitou, at all events.[531] The clause

was wide enough, however, to include many minor grievances connected with service. The barons did not confine its provisions to military service even, 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 full force 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 culminated in 1297 in Edward's unseemly wrangle with the Earls of Norfolk and Hereford, whose duty it was to lead the royal army as hereditary Constable and Marshal respectively, but who refused point-blank to embark for Gascony except in attendance on the king's person.[532]

It has been shown in the Historical Introduction[533] 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 had adopted the expedient of commuting military service for its equivalent value in money.

Feudal grievances also may be arranged in four corresponding groups, each redressed by special clauses of Magna Carta: abuse of *aids* by chapters 12, 14, and 15; abuse of the feudal *incidents*, by chapters 2 to 8; abuse of *scutage*, by chapters 12 and 14; and abuse of *service*, by the present chapter, which thus completes the long list of provisions intended to protect tenants against their feudal lords.

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530. See the authorities cited *supra*, p. 85, nn. I and 2.

531. 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.

532. Walter of Hemingburgh, II. 121. Cf., on the whole subject of foreign services, *supra*, 154.

533. *Supra*, 72–86.

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.

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 one, fixed, pre-appointed spot, and must no longer follow the king as he moved about from place to place. The full extent of the boon conferred by this reform 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 originally centred in the king and his household, or *Curia Regis*, which performed royal and national business of every kind. 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. One result of throwing so many and miscellaneous duties on a small body of hard-worked officials was to produce a congestion of business. 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 entailed intolerable delay, annoyance, and expense upon litigants who brought their pleas for the king's decision. The case of Richard d'Anesty is often cited in illustration of the hardships which this system inflicted upon suitors. His own account is extant and gives 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 his enormous outlays, mostly travelling expenses, he had to discharge his debts with accumulations of interest at the ruinous rate of 86⅔ per cent.[534]

II. *Common Pleas and Royal Pleas.* Long before 1215 all 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 pleas 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 therefore possible to appoint a special bench of judges to sit permanently in some fixed spot, to be selected once for all as likely 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 in reference to this chapter: "We may also say that Magna Carta gave England a capital."[535] The barons in 1215, however, in asking this reform, were not insisting on any startling innovation, but demanding merely the strict 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.[536] Magna Carta insisted that all exceptions must cease; the rule of law must supersede the royal caprice.

III. *Effects of Magna Carta on the genesis of the three Courts of Common Law.* The ultimate consequences of the accomplishment of this reform reached further than was foreseen. Intended merely to remove from litigants a practical grievance of frequent occurrence, it had important indirect effects on the development of the English Constitution. By securing for

common pleas a permanent home, it gave an impetus to the disintegrating tendencies already at work within the many-sided household of the king. It contributed somewhat to the slow process whereby the *Curia Regis*, as an administrative organ, was differentiated from the same *Curia* as the dispenser of justice. 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 were 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.[537]

The double process by which these two small courts separated themselves 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—that office in which money was weighed and tested and the royal accounts drawn up. Many disputes or pleas affecting Crown debts and debtors had to be there decided, and in due time a special group of officials were set aside to try these. These men, called, not judges, but "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—the Court of King's Bench, the Court of Common Pleas, and the Court of Exchequer—were thus offshoots of the king's household. In theory, each of these ought to have confined itself to the special class of suits to which it owed its origin—to royal pleas, common pleas, and exchequer pleas respectively; but by a process well known to lawyers and law-courts in all ages, each of them eagerly encroached on the jurisdictions and the fees appropriate to the others, until they became, for most purposes, three sister courts of similar and co-ordinate authority. They were bound to decide all suits according to the

technical and inflexible rules of common law; and their jurisdiction thus 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 Court of Common Pleas, like its sister Courts of King's Bench and Exchequer, was the result of a long process of gradual separation from a common parent stem. Prior to 1215 several tentative efforts seem to have been made towards establishing each of these. On the other hand, it is probable, nay certain, that long after 1215 the Court of Common Pleas did not completely shake off either its early dependence upon the *Curia Regis*, or yet its close connection with its sister tribunals.

Three stages in the process of evolution may be emphasized. (1) The earliest trace of the existence of a definite bench of judges, set apart for trying common pleas, is to be found in 1178, not in 1215. When Henry II. returned from Normandy in the former year, he found that there had been irregularities in his absence. To prevent their recurrence, he effected certain changes in his judicial arrangements, the exact nature of which is matter of dispute. A contemporary writer[538] 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 Court of King's Bench, but Mr. Pike[539] 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.

It must not be supposed that the arrangement thus made in 1178 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 court then

instituted may have been pulled down and set up again many times. The bench which appears in 1178 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.[540] On the other hand, this tribunal had in John's reign ceased to follow the king's movements habitually (thus disregarding the decree of 1178), and had established itself at Westminster.[541] It was in 1215 considered an abuse for John to try a common plea elsewhere. Times had changed since his father had granted as a boon that a set of judges should remain constantly at "his court" to try such cases.

(2) Magna Carta in 1215 gave authoritative sanction to the already recognized rule that common pleas should be tried at Westminster, instead of moving with the king. No exceptions were henceforth to be allowed. Young Henry renewed this promise, and the circumstance of his minority favoured its strict observance. A mere boy could not make royal progresses through the land dispensing justice as he went. Accordingly, all pleas continued for some twenty years to be heard at Westminster. The same circumstances, which thus emphasized the stability of common pleas (along with all other kinds of pleas) in one fixed place, may have arrested the process of cleavage between the two benches. All the judges of both courts sat at Westminster, and therefore there was the less need for allocating the business between them with any exactitude. The two benches were in danger of coalescing.

(3) About the year 1234 a third stage was reached. Henry began to follow the precedent, set by his ancestors, of moving through his realm with judges in his train, hearing pleas wherever he stopped. While one group of judges went with him, another remained at Westminster. Some way of allocating the 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. Each provided itself with separate records. From the 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 specially 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. In 1234 the common bench and

the royal bench had become distinct.[542] Evidence drawn from a few years later proves that a definition of common pleas had been arrived at and that the rule which required them to be held "in a fixed place" was insisted on. 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.[543]

With royal pleas, however, it was very 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. 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."[544]

V. *Erroneous Views.* In the reign of Edward I. the real motive of this chapter of Magna Charta—so quickly had the organization of the law courts progressed—had already been lost sight of. The day of wandering common pleas, such as that of Richard d'Anesty, had been long forgotten. Some litigants of Edward's time had, however, a different grievance of their own, connected with the hearing of their suits. The Court of Exchequer was willing, for an adequate consideration, to place its specially potent machinery, devised originally for the king's exclusive use, at the disposal of private creditors, thus treating "common pleas" as "exchequer pleas." Ordinary debtors, summoned as defendants before the *barones scaccarii*, were subjected to harsher treatment than they would have experienced elsewhere. It was not unnatural that defendants who found themselves thus hustled should read the words of Magna Carta relative to "common pleas" as precisely suited to their own case. They made this mistake the more readily as the original motive had been forgotten. The Charter was thus read as preventing the stationary Court of Exchequer (not the constantly moving King's Bench) from hearing ordinary suits. This erroneous view received legislative sanction. The *Articuli super cartas* in 1300 declared that no common pleas should thenceforth be held in the Exchequer "contrary to the form of the Great Charter."[545]

This is a clear misinterpretation of the intention of Magna Carta. The Exchequer never "followed the Crown"; it stayed at Westminster where its offices, tallies, and pipe rolls were. The Charter would have expressed itself in widely different words if it had desired to exclude common pleas from the Exchequer. 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 their fees which kept pace with the increase of business.[546]

The evil directly attacked by Magna Carta was something quite different —an evil wider, more pressing and less technical, namely, the practice of causing ordinary litigants, with their legal advisers and witnesses, to dance attendance on a constantly moving court.

534. Cf. J. F. Stephen, *Hist. of Crim. Law*, I. 88-9.

535. *Jurisprudence and Ethics*, 209. Sometimes, however, another "fixed place" was substituted. The Court of Common Pleas once sat at York under Edward III. and 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.

536. See Prof. Maitland, *Select Pleas of the Crown*, xiii.-xvi.

537. Cf. *supra*, 109.

538. The chronicler known as Benedict Abbot, I. 107 (Rolls Series).

539. *House of Lords*, 32.

540. 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 that in 1205 there were two distinct courts, one known as *de banco* and the other as *coram rege*.

541. See Maitland, *Ibid.*

542. See Maitland, *Sel. Pl. Crown*, xviii.

543. 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.

544. 28 Edward I. c. 5.

545. 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) the so-called statute of Rhuddlan (12 Edward I., see *Statutes of Realm*, I. 70). Madox also (II. 73-4) takes the erroneous view that c. 17 of the Great Charter relates to the Exchequer; so does Mr. Bigelow (*History of Procedure*, 130–1), who goes further astray

by explaining the point of the grievance as the difficulty of getting speedy justice at the Exchequer, because the barons refused to sit after their fiscal business had been finished, at the Easter and Michaelmas sessions. This is 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.

546. 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.

CHAPTER EIGHTEEN.

Recogniciones de nova dissaisina, 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, mittemus 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 county-courts,[547] 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[548] in the county court, on the day and in the place of meeting of that court.

Provision is thus made for holding before the king's travelling justices, frequently and in a convenient manner, three species of judicial inquests known as "the three petty assizes." These are of exceptional interest, not only in relation to Magna Carta, but from their intimate connection with several constitutional problems of prime importance; with the reforms of Henry II. on the one hand, and with the genesis of trial by jury and of the Justices of Assize on the other.

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 which its officials conducted within the precincts of the royal exchequer by the occasional despatch of chosen individuals to inspect the provinces in the royal interests, 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,[549] 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 natural sphere of the labours of these royal commissioners as they passed from district to district was the court of each shire, specially convened to meet them. They formed in this way the chief link between the old local popular courts and the system of royal justice organized by Henry II.,[550] subordinating the former to the latter, until the county courts virtually became royal courts. These travelling justices passed through two stages, two different types receiving royal recognition at different periods, the Justices in Eyre and the 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 history extends from the reign of Henry I. to the end of the fourteenth century.[551] Their outstanding characteristics were the sweeping nature of the commissions under which they acted (*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 they visited was left impoverished by fines and penalties. On one occasion, the men of Cornwall "from fear of their coming, fled to the woods."[552]

An eyre was only resorted to at long intervals—every seven years came to be the recognized term—and was intended as a severe method of punishing delinquencies and miscarriages of justice occurring since the last one, and of collecting arrears of royal dues. It was not a visit from these universally-hated Justices of Eyre that the barons in 1215 demanded four times a year.

(*b*) *The Justices of Assize* were also 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.[553] They seem to have been popular from the first, as their primary function was to determine pending suits by a rational and acceptable form of procedure; while the scope of their jurisdiction, although gradually extended as their popularity increased, was at all times limited strictly by the express 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 one species of judicial work, namely, to presiding at enquiries of the kind specially mentioned in the text. These particular inquests were known as “assizes,” and the new species of travelling judges were hence called “Justices of Assize,” a name which 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 last necessitated their total abolition.[554] They are still “justices of assize” in an age which knows nothing of assizes.

II. *The Nature and Origin of the three 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.[555]

The *duellum*, introduced at the Norman Conquest, remained for a century thereafter the chief method in use among the upper classes for determining all serious pleas or litigations. Gradually, however, it was confined to two important groups of pleas, one civil and the other criminal: namely, appeals of treason and felony on the one hand, and suits to determine the title to land on the other.[556] This process of restriction was accelerated by the deliberate policy of Henry II., who attempted, indeed, to carry it much further, devising machinery which provided for the defendant or accused party, wherever possible, an option by resorting to which he could, in an ever increasing variety of circumstances, escape trial by battle altogether. Under chapter 36 will be explained the expedient adopted for evading combat in an appeal of treason or felony. The present chapter relates to the procedure devised by Henry for superseding the *duellum* in certain important groups of civil pleas,[557] and incidentally affords proof that this part of his reforms had already become popular with the opponents of the Crown. The frequent use of the three Petty Assizes was now insisted on, although the Grand Assize was still viewed askance for reasons to be explained in connection with chapter 34.

(1) *The Grand Assize* is not mentioned in Magna Carta; but some acquaintance with it is a necessary preliminary to a proper appreciation of the Petty Assizes. In the troubled reign of Stephen—which was rather the reign of anarchy in his name—lands changed hands frequently. This left to his successor a legacy of quarrels, too often leading to bloodshed. 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*.

At some uncertain date, near the commencement of his reign, Henry II. introduced a startling innovation. The holder of a property *de facto* (that is the man in actual enjoyment of the estate in virtue of a *bona fide* title), when challenged to combat by a rival claimant was allowed an option: he might force the claimant (if the latter persisted) to refer the whole matter to the oath of twelve knights of the neighbourhood. Henry's ordinance laid down careful rules for the appointment of these recognitors. Four leading knights of the whole 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 coming.[558] The name Grand Assize was applied alike to the procedure and to the knights who gave the verdict. The twelve knights thus anticipated the functions of a modern jury, while the king's justiciars acted like the presiding judge at a modern trial.[559]

Valuable as was this innovation, it had one obvious defect. The option it conferred might sometimes be usurped by the wrong man. It was intended to operate in the interests of order and justice by favouring the peaceable holder *de facto*; but what if a turbulent and lawless claimant, scorning an appeal to legal process, took the law into his own hands, evicted the previous 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, be regarded as the outcome of Henry's determination to prevent such misuse of his new engine of justice. If one claimant alleged that the other had usurped his rights by violence or fraud, 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 there were three kinds, all related to questions of "possession," as opposed to questions of "ownership," which could only be determined by battle or by the Grand Assize.

(*a*) *The assize of 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 or possession of land; and was the technical term applied to such violent acts of eviction as were likely to defeat the intention of Henry’s ordinance of the Grand Assize. “Novel” disseisin implied that such violent ejection was of comparatively recent date, for a summary remedy could only be given where there had not been undue delay in applying for it. 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 in a rapid manner 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, and formed a necessary supplement to the ordinance of the Grand Assize, preventing all danger that the option intended for the man of peace should be usurped by the man of violence.[560]

(*b*) *The assize of mort d’ancestor.* The protection afforded to the victim of a “novel disseisin” did not remove all possibility of justice miscarrying. Interested parties, other than the man forcibly ejected, even his heirs, were left unprotected. Further, an heir might be forcibly deprived of his tenement either by his lord or by some other rival claimant before he had an opportunity to take possession; never having been “in seisin,” he could not plead that he had suffered “disseisin.” For the benefit of such an heir, a second petty assize, known as "mort d’ancestor," was invented.[561] This is mentioned in article 4 of the Assize of Northampton, an ordinance issued by Henry in 1176; and this earliest known reference probably marks its origin. Procedure, essentially similar to, though not quite so speedy or informal as, that already described was thus 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 of absolute ownership to be determined (if challenged) by the more cumbrous machinery of the Grand Assize.

(*c*) *The assize of darrein presentment.* Advowson or the right of appointing the incumbent to a vacant church benefice was then, as now, a species of real estate. Such patronage was highly prized, affording as it did an opportunity of providing a living for a younger son or needy relative; or it might be converted into ready cash. Disputes often arose both as to the possession and as to the ownership of advowsons. Any one who claimed the absolute right or property as against the holder must do so by battle or the Grand Assize, exactly as in the case of any other form of real estate; and the Charter says nothing on this head.[562] On the other hand, the less vital question of possession might be more rapidly determined. If a benefice fell vacant, and each of two proprietors claimed the patronage, the Church could not remain without a shepherd, for years perhaps, until the question of title was decided. 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. Even here there was room for dispute as to the facts. Twelve local men decided which claimant had actually made the last appointment (the "darrein presentment"); and the claimant thus preferred had a legal right to fill up vacancies, remaining in possession until someone proved a better title by battle or the Grand Assize.

All three forms of the petty assize were merely new applications by Henry Plantagenet of the royal procedure known in England, since the Norman Conquest, as *inquisitio* or *recognitio*.[563]

III. *The Assizes in 1215.* The petty assizes, when invented by Henry II., were resented bitterly as innovations; but public opinion, half a century later, had abundantly vindicated the wisdom of this part of his reforms. The insurgent barons in 1215 were far from demanding their abolition; their new grievance was rather that sessions of the justices of assize were not held often enough. They prescribed the way in which these assizes, now grown so popular, were to be held, and several points were specially emphasized. (1) No inquiry of the kind was to be held elsewhere than in the county where the property was situated. Justice was in such cases to be brought to every landowner's door, although pleas of the Crown might still follow the king, and ordinary common pleas had to be taken to Westminster. This was intended to save expense and to meet the convenience of litigants, of those

who served on assizes, and of all concerned.[564] Within two years, however, it was seen that this provision went too far. It was more convenient to hold certain inquiries before the Bench at Westminster than in the particular locality. The reissue of 1217 therefore made two important modifications: (*a*) All assizes of darrein presentment were thereafter to be taken before "the Justices of the Bench." (*b*) Any assize of novel disseisin or of 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.[565]

(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 amicably settled. Such excessive frequency was quite uncalled for, and involved unnecessary expense on the king, and an amount of labour on his officers out of all proportion to the good effected. The Charter of 1217, accordingly, provided that a circuit 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.[566]

(3) The Charter speaks of the two justices and of the four county knights, but says nothing of the twelve knights from the immediate neighbourhood of the disputed property. The omission has no special significance. Magna Carta had no directions to convey on this matter, and therefore it kept silence; but the presence of the twelve must have been presumed, since their verdict formed the essential feature of the entire procedure.[567] The twelve formed the jury, and the two justices were the judges, while the chief duty of the four was to select the twelve. The chapter directed the justices "to hold the assizes along with the four knights"; but it does not appear whether the latter were to sit as local assessors of the court, or to serve along with the twelve recognitors, or to act as a link between the two.

(4) One fact about them was clearly stated, namely, the mode of their appointment. The four knights were to be "elected" in the county court (*cum quatuor militibus ... electis per comitatum*), and much emphasis has been laid on this provision by historians searching for ancient prototypes of modern institutions. These knights have been warmly welcomed as county magistrates elected on a more or less extended suffrage.[568]

As the provisions of the reissue of 1217 are more carelessly expressed, and as in particular they contain no word implying "election," it has been assumed that a change in the mode of appointment was intended; that a step tentatively taken towards representative local government in 1215 was deliberately retraced two years later.[569] "*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 enlistment of the best soldiers available for his army. 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 secured the chief share in the appointment. No evidence is forthcoming that any special importance was attached in 1217 to the use of the word "*electus*," and its omission may have been due to inadvertence.

IV. *An Erroneous View.* Henry 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."[570] 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—over the courts baron, as they were afterwards called, the most important of the three courts into which manorial jurisdictions afterwards split. 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, not by the sheriff. The county courts by this time had fallen completely under the domination of the king, and were to all intents and purposes (and in especial for this purpose) royal courts. The present chapter is thus conclusive evidence of the triumph of the king's justice over all rivals in three important groups of pleas. Royal justice was the best article in the market, and, in spite of all defects, deserved the popularity which in this province it had evidently won, even among the barons whose jurisdiction it was superseding.

V. *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, have 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 of their functions as were not inconsistent with the change that was gradually transforming the medieval into the modern system of justice.[571] It was the custom for the Crown to issue new commissions to the justices as they set out upon each new circuit. Five distinct types of such commissions conferred jurisdiction over five different departments of judicial business.

(1) *The commission of assize* was the earliest of all, authorizing them to hold petty assizes, but not the grand assize. Of this sufficient has already been said.

(2) *The commission of nisi prius* conferred a wider civil jurisdiction, embracing practically all the non-criminal pleas pending at the time in the counties which they visited. These powers were originally based on the terms of the Statute of Westminster II., which became law in 1285,[572] and directed that all civil pleas (under certain exceptions) might be heard in their own counties. Thenceforward most ordinary suits might be tried either locally before the justices of assize, or else before the bench at Westminster. The statute directed, however, that sheriffs, in summoning jurors to Westminster, were only to do so conditionally—jurors were to attend there unless already (*nisi prius*) the justices of assize had come into the county; that is, if the justices arrived meanwhile in the locality, the jurors and all others concerned were saved a journey, and the pleas in question were heard on the spot. The commissions under which the travelling justices heard locally such civil pleas were therefore known as "Commissions of *nisi prius*."

(3) *The commission of gaol delivery* was, subsequently to 1299, invariably conferred on the justices of assize, in accordance with a statute of that year,[573] 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, sometimes quite unfit for such a trust, who had too often abused their authority.

(4) *Commissions of Oyer and Terminer*, issued spasmodically from as early a date as 1285,[574] to more or less responsible individuals, were from 1329 onwards conferred exclusively on the justices of assize, who thus obtained authority[575] "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 commissions of assize and *nisi prius* combined gave them full jurisdiction over all civil pleas.[576]

(5) *The ordinary commission of the peace* was invariably issued to the justices of assize from the reign of Edward III., conferring on them powers similar to those of the local justices of peace in every county which they might visit.

By a process of the survival of the fittest the justices of assize, from the small beginnings referred to in John's Great Charter, thus gradually gathered to themselves the powers exercised originally by various rival sets of commissioners; and they have continued for many centuries to perform the functions conferred by these five different commissions, forming a characteristic and indispensable part of the judicial system of England.[577]

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547. "*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, (p. 238, n.)

548. "The *said* assizes" were previously called, not assizes but "inquests" (*recogniciones*), a wider term of which the three petty assizes here named were three special applications.

549. See *supra*, c. 17.

550. Cf. *supra*, p. 106.

551. See W. S. Houldsworth (*History of English Law*, p. 115), who cites 1397 as the date of the final abolition of Eyres.

552. This was in 1233: see Pollock and Maitland, I. 181.

553. Blackstone, *Commentaries*, III. 58, assigns 1176, (the assize of Northampton) as the date of their institution.

554. 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).

555. The name "Assize" is sometimes a source of confusion, because of the various meanings which attach to it. (1) Originally it denoted a session or meeting of any sort. (2) It came to be specially reserved for sessions of the king's Council. (3) It was applied to any Ordinance enacted by the king in such a session, *e.g.* the Assize of Clarendon or the Assize of Northampton. (4) It was extended to every institution or procedure established by such royal ordinance, but (5) more particularly applied to the institutions or procedures known as the Grand Assize, and the Petty Assizes, from which the "Justices of Assize" took their name. (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" of the king's council or of some other authority.

556. See Neilson, *Trial by Combat*, 33–6, and authorities there cited.

557. Cf. *supra*, pp. 103-4 for the place of "combat" in legal procedure; and pp. 108-9 for Henry's policy in discouraging it. For the later history of trial by battle, see *infra*, under c. 36.

558. See Glanvill, II. 7.

559. The various steps in the procedure ought to be clearly grasped, (*a*) A claimant challenged the title of the actual tenant in the court baron of the lord, from whom the tenement was held, and offered battle by a champion, who was supposed to be a witness. (*b*) The tenant (now become a defendant) applied to the king for a royal writ, the issue of which, *ipso facto*, stopped all procedure in the court baron, (*c*) The claimant (plaintiff) had thus to make the next move; and Henry's ordinance left only one move which he could make, namely to apply for a new royal writ, but one of a

different kind. This new writ referred the question of title to twelve knights of the Grand Assize. (*d*) Before these could be appointed and give their verdict, many formalities and delays necessarily intervened, involving expensive journeys to the king's *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. This ingenious reform, while superseding trial by battle, incidentally superseded also the jurisdiction of mesne lords. Hence the Grand Assize never became popular with the magnates. Cf. under c. 34.

560. The date of the ordinance of the Grand Assize is not known. It has been argued that its origin may be traced to an earlier date than that of the assize of novel disseisin (see Mr. J. H. Round in the *Athenaeum* for 28th January, 1899); but in any case the *logical* sequence seems to be that given in the text. The question of *chronological* sequence is still open.

561. 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.

562. Such was the law as late as 1285. The Statute of Westminster II. (13 Edward I. c. 5) authoritatively explains that, when any one had wrongfully presented a clerk to a vacant church, the real patron could not recover his advowson except by a writ of right "*quod habet terminari per duellum vel per magnam assisam*."

563. The relations of the assizes to the ancient *inquisitio* and to the modern jury are discussed *supra*, pp. 158-163.

564. 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.

565. See Bracton's *Note Book*, case No. 1478; a case also cited by Coke (*Second Institute, proem.*). If this assize had presented points of special

difficulty it might have been held at Westminster without violating Magna Carta.

566. 13 Edward I. c. 30. Stephen, *History of Criminal Law*, 105–7, gives further details.

567. See Assize of Northampton, c. 4.

568. See, *e.g.* Stubbs, *preface* to R. Hoveden, IV. xcviii.; Blackstone, *Great Charter*, xxxvi.; Medley, *Engl. Const. History*, 130.

569. 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."

570. See *Middle Ages*, II. 464.

571. Cf. Coke, *First Institute*, 293 b.: "As the power of justices of assises by many acts of parliament and other commissions increased, so these justices itinerant by little and little vanished away."

572. 13 Edward I. c. 30.

573. 27 Edward I. c. 3.

574. 13 Edward I. c. 39; see Stephen, *Hist. Criminal Law*, p. 106.

575. 2 Edward III. c. 2. *Ibid.*, 110.

576. 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.

577. Mr. W. S. Holdsworth, *Hist. Eng. Law*, 116–123, gives an admirable and concise account of the justices and their commissions. For fuller information see Stephen, *Hist. Criminal Law*, I. 97-111.

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 judicia 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 the press of other business had 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 on the morrow would inflict hardship on those whose presence was required elsewhere. The framers of the charter were met by a dilemma in seeking to combine the rapid dispatch of business with the minimum of inconvenience to those who came to make the court.

The Articles of the Barons had made two definite demands not readily reconciled; namely that none save jurors and the parties to pending suits should be summoned to meet the justices of assize on their quarterly rounds (article 8); and that assizes should be "shortened" (article 13), which simply meant that the law's delays should cease.

The terms of Magna Carta, as befitted a carefully-drawn, business-like document, were more precise. They 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 the proceedings of the full shire-moot. Nothing was said of "shortening" the procedure; and the Charter showed its appreciation of the fact that there might be more business than could be got through in one day. If that happened, 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 stipulated for upon the first day—not admitting, indeed, the possibility that a second day might be required. The discrepancy between the schemes of the two documents might be explained on the supposition that the device of timing 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.[578]

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.[579]

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578. 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).

579. 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 way in which strict adherence to inflexible rules was found to inflict hardships upon litigants. 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 (which it associated in this connection with inquests

quare impedit) to be taken “in their own counties.” The Act 6 Richard II. c. 5 curtailed the discretionary powers previously conferred, directing that justices assigned to take assizes and to deliver gaols should hold sessions in the county towns in which the shire courts were wont to be held. The Statute 11 Richard II. c. 11 once more relaxed this rule, alleging that it had resulted in the inconvenience of suitors. Therefore authority was given to the chancellor, with the advice of the justices, to determine in what places assizes might be held, notwithstanding the provisions of the Statute of five years previous.

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 small 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 his offence, yet saving always his "contenement"; and a merchant in the same way, saving his wares; 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 amercements shall be imposed except by the oath of honest men of the neighbourhood.

This is the first of three consecutive chapters which seek to remedy grave abuses connected with royal amercements. To understand fully 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 of which any evidence survives was the practice of retaliation, or the bloodfeud. The injured man, or his heir if he were dead, took the law into his own hands and exacted satisfaction by the aid of battle-axe or spear. This right of vengeance, formerly clothed with the entire sanction of the law, had practically disappeared before the dawn of authentic history in England; but its previous existence may be confidently inferred from certain traces which it left on the laws of a later period.

(2) *Fixed money-payments.* At some early, but uncertain, date it had become customary to accept money in lieu of vengeance. The new practice, at first exceptional, and applied to cases only of accidental injury, was gradually extended to all cases in which the wronged individual was willing

to accept a compromise. It was made compulsory on evil-doers to offer solatium in money for every crime committed, and finally it was made compulsory also upon the injured man to accept it when offered. At this stage the right of private revenge had become almost a thing of the past. It was lawful only after the aggrieved individual had demanded, and been refused, compensation at the recognized rate.

Various codes formulated intricate rules for determining the amounts thus payable. Each man had his own money value or *wer* (from the simple freeman, reckoned at 200 shillings, up to the prelates and lay nobles, estimated at much higher figures). These were the legal values at which each man's life was appraised. Smaller wrongs could be compensated by smaller sums in name of damages, known as *bots*: so much for a foot, or an eye, or a tooth. The king or other feudal lord exacted further payment 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 was of extreme simplicity and differed widely in many ways from the complicated system it superseded. It is found in full working order very shortly after the Norman Conquest, but was still regarded as an innovation at the accession of Henry I. It is known as the system of amercements. 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 into the protection of the law, and into the community of well-doers, became increasingly burdensome. He had to satisfy the 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 pledge (*vadium*) as evidence and security of the surrender.[580]

Although in theory the wrongdoer put his property unreservedly at the king's disposal, there was a tacit understanding that he should receive in

return, not only a free pardon, but also the restoration of the balance of his effects, after the king had helped himself to a share. Such a course, at first optional, would gradually come to be followed with absolute uniformity. By-and-by, it was assumed that every culprit wished to avail himself of this means of escape, and thus the words "in mercy" were written in court records as a matter of course, after the name of every one convicted of a crime.

It is easy to understand why the Norman kings favoured this system; for the Crown thus got whatever it chose to demand, while other claimants got nothing. Gradually, then, the old complicated system of *wers* and *bots* and *wites* became obsolete and was in time forgotten altogether; the system of amercements reigned in its stead. Strictly speaking, the man's life and limbs and all that he had were at the king's mercy.[581] The Crown, however, found that it might defeat its own interests by excessive greed; and generally contented itself with exacting moderate sums. Soon, rules of procedure were formulated for its own guidance. The amounts taken in each case 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.[582]

Thus a sort of tariff grew up, defining the amounts to be exacted for various offences of most general occurrence. The Crown and its officials usually respected this in practice, but never formally abandoned the right to demand more. Such payments were known as "amercements" and were always technically distinguished from "fines" (or voluntary offerings). Records, still extant, of the reign of John show us that for very petty offences, men were constantly placed "in mercy"; for example, for failure to attend meetings of the hundred or county court; for false or mistaken verdicts; for petty infringements of the king's forest rights; and for a thousand other trivial faults. Every man who raised an action and failed in it was amerced. It will be readily understood how important it was that these amercements, forming so tempting a source of revenue to the exchequer, should not be abused. The Charter of Henry I. (chapter 8) had promised a remedy, drastic indeed but of a reactionary and impossible nature. He there agreed to abolish altogether the system of amercements (then of recent introduction) and to revert to the earlier Anglo-Saxon system of bots and

wites, already discussed. This promise, like others, of Henry I. was made only to be broken.[583]

II. *Magna Carta and Amercements.* All classes had an interest in this subject, since no one could expect to pass through life (perhaps hardly through a single year) without being subjected to one or more amercements. 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 vaguely anticipating the conception of three estates of the realm;—commons, nobles and clergy. The "third estate" is further analysed for the purposes at least of this clause, into three subdivisions—the freeman, the villein, and the merchant.[584]

(1) *The amercement of the freeholder.* 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, various safeguards were devised to regulate the amercing of freemen. (*a*) For a petty 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: three-pence 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 must the offender be pushed absolutely to the wall. His means of livelihood must be saved to him. Even if all other effects of the defaulting freeman had to be sold off to pay the amount assessed, he was to retain his ancestral freehold (or "contenement," a word to be afterwards discussed). He might, however, find himself liable for a large sum which he had to pay off by instalments during many years. (*d*) Another clause provided machinery for giving effect to all these rules. The amount of the amercement must be fixed, not arbitrarily by the Crown, but by impartial assessors, "by the oath of honest men of the neighbourhood."

It seems probable that all these provisions were declaratory of existing usage, that is of the usage of John's reign; but, apparently, a different procedure and one less favourable to wrong-doers had been in vogue, so recently as the reign of Henry II. Amercements had then been assessed, not by local jurors but, by the barons of the exchequer, who might, however, where arrears were still due, revise their own findings of previous years.[585]

The Pipe Roll of the fourteenth year of Henry II.[586] shows how a certain priest, who in this respect stood on precisely 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 how 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." His case illustrates how an important change was gradually effected. Local jurors first assisted, and then superseded, the barons of exchequer in assessing the amounts payable as amercements. This important boon, which transferred the decision from unsympathetic Crown officials to the defaulter's own neighbours, was confirmed by Magna Carta to all clergy and to all members of the third estate. It will be shown, in connection with chapter 21, how earls and barons lost a similar privilege.[587]

(2) *The amercement of the merchant.* The provisions in favour of freeholders were extended to members of the trading classes. One modification, however, had to be made. In the normal case, the merchant's means of livelihood were his wares, not his freehold. These wares, accordingly, were saved to him, not his "contenement" (if he had one). The traders of many favoured towns, however, had already gained special privileges in this as in other matters, and these had received a general confirmation from chapter 13 of the Great Charter. Some boroughs had anticipated Magna Carta by obtaining in their own special charters either a definition of the maximum amercement exigible, or in some cases, by a definition of the amercing body. Thus, John's Charter to Dunwich of 29th June, 1200,[588] 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 the Londoners, Henry I. had promised that no citizen *in misericordia pecuniae* should pay a higher sum than 100s. (the amount of his *wer*).[589] This was confirmed in the Charter of Henry II., who declared "that none shall be adjudged for amercements of money, but according to the law of the city, which they had in the time of King Henry, my grandfather."[590] John's Charter to London of 17th June, 1199, also specially referred to this;[591] and the general confirmation of customs contained in chapter 13 of Magna Carta would further strengthen it. In all probability, it 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 great offences as well as to small ones, and embracing merchants everywhere, not merely the burgesses of chartered towns.

(3) *The amercement of the villein.* The early history of villeins as a class is enveloped in the mists which still surround the debateable question of the rise of the English manor. Notwithstanding the brilliant efforts of Mr. Frederic Seebohm[592] to find the origin of villeinage in the status of the serfs who worked for Roman masters upon British farms or *villae* long before the Teutonic immigrations began, an older theory still holds the field, namely, that the abject villeins of Norman days were the descendants of the free-born "ceorls" of Anglo-Saxon times. On this theory—the orthodox one, and rightly so, since it is supported by the greater weight of evidence—most of England was once cultivated by free Anglo-Saxon peasant proprietors originally grouped in little societies each of which formed an isolated village. These free villagers were known as "ceorls," to distinguish them from the gentry or nobility called "eorls," who enjoyed social consideration but (so it is usually argued) no unfair political advantages on the score of their noble blood. The "ceorls" 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 harsh measures of the Norman conquerors. The bulk of 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 the villeins in the thirteenth century has at the present day been ascertained with accuracy and certainty. Economically they were reckoned part of the necessary equipment of the manor of their lord, whose fields they had to cultivate as a condition of being left in possession of acres which had once been, in a more real sense, their own. The services to be exacted by the owner of the manor, 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 manifold obligations were discharged, little time was left him for the ploughing and reaping of his own small holding. The normal villein possessed his portion of land, of a virgate or half virgate in extent (thirty or fifteen scattered acres) under a tenure known as *villenagium*, sharply distinguished from the freeholder's tenures, whether of chivalry, serjeanty, or socage. He was a dependent dweller on a manor which he dared not quit without his master's leave. It is true that he had certain 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 lord's steward presided with powers wide and undefined. Legally speaking, the villein was a tenant-at-will whom the lord could eject without the interference of any higher tribunal than his own. Politically, however, the position of the villein was peculiar. While allowed to enjoy none of the privileges, he was yet expected to perform some of the duties, of the freeman. He attended at the shire and hundred courts, acted on juries, and performed other public functions, thus suffering still further encroachments on the scanty portion of time which he might call his own, but preserving for a brighter day some vague tradition of his earlier liberty. The fact that such public duties were performed by the villein, lends strong support to those who argue in favour of his descent from the old "ceorl" who enjoyed all the rights, as well as performed all the obligations, of the free. Such duties would never have been required from a race of hereditary slaves; but it is easy to understand how men originally free might be gradually robbed of their legal rights, while left to perform legal duties of a kind so useful to society and to their masters.

The words of this chapter of Magna Carta undoubtedly extend some measure of protection to villeins. Two questions, however, may be asked:—What measure, and from what motive? Answers are called for, because of the importance attached to this clause by writers who claim for Magna Carta a popular or democratic basis. One thing 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 the merchant enjoys in similar plight—his "wainage," that is his plough with its accoutrements, including possibly the oxen, being saved to him. What is the motive of these restrictions? It is usually supposed to have been clemency, the humane desire not to reduce the poor wretch to absolute beggary. It is possible, however, to imagine an entirely different motive; the villein was the property of his lord, and the king must respect the vested interests of others. That he 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 limiting the restraints on the king's power are there introduced—*villanus alterius quam noster*. The king was not to inflict absolutely crushing amercements on any villeins "*other than his own*," thus leaving the villeins on ancient demesne unreservedly in his power.[593]

It must not be thought, however, that the position of the king's villeins—"tenants on ancient demesne," as they were technically called—was worse than that of the villeins of an ordinary unroyal manor. On the contrary, it has been clearly shown[594] that the king's peasants enjoyed privileges denied to the peasants of other lords. Magna Carta—that "bulwark of the people's rights"—thus left the great bulk of the rural population of England completely unprotected from the tyranny of their lords in amercements as in other things. The king must not take so much from any lord's villeins as to destroy their usefulness as manorial chattels; that was all.[595]

(4) *The difference between fines and amercements.* In the thirteenth century these terms were sharply contrasted. "Amercement" was applied to such sums only as were imposed in punishment of misdeeds, the law-breaker amending his fault in this way. He had no option of refusing, and no voice in fixing the amount assessed upon him. "Fine," on the contrary, was used for voluntary offerings made to the king with the object of procuring some concession in return—to obtain some favour or to escape some punishment previously decreed. 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 as it was 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 usually be evaded by calling the sums exacted "fines." For example, 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. The letter of Magna Carta was in this way strictly observed, since the prisoner was nominally as free to abstain entirely from offering as was the king to reject all offers until the figure was sufficient to tempt his greed. Enormous *fines* might thus be taken; while royal officials were strictly 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.[596]

(5) *Contenement.* This word, which occurs in Glanvill[597] and in Bracton,[598] and also (in its French form) in the Statute of Westminster, I.,[599] as well as in Magna Carta, has formed a text for many laboured and unsatisfactory explanations from the days of Sir Edward Coke[600] to our own.

There seems to be no real obscurity, however, since it is clearly a compound of "tenement"—a word well known as an exact technical term of feudal conveyancing—and the prefix “con.” A “tenement” is precisely what a freeman might be expected to have, namely, a freehold estate of his own. The “con” merely intensifies the meaning, emphasizing the closeness of the connection between the freeman and his land. Any other tenements he had might be taken away, without inflicting extreme hardship; but to take from him his "contenement"—his ancestral lands—would leave him poor indeed.

The word occurs, not only in Glanvill and Bracton, but also in several entries on the Exchequer Rolls of Henry III. and Edward I., collected by Madox,[601] and by him collated with other entries which 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 the case of an offender who had failed 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 also 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*.”[602]

These illustrations of the actual procedure of later reigns, in agreeing so closely with the rules laid down by the Great Charter, show how a man’s contenement might be saved to him without any loss to the Crown. Magna Carta apparently desires that time should be granted in which to pay up debts by degrees. Meanwhile, the amerced man was not forced to sell such holding (or wares, or wainage) as was necessary to maintain him with his wife and family. Leniency, in the long run, might prove best for all concerned, the Crown included.

580. See Charter of Henry I. c. 8, which however, condemns the whole practice among the other innovations of the Conqueror and Rufus.

581. See *Dialogus de Scaccario*, II. xvi.

582. 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.

583. 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 unnecessary 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 (*a*) for grave crimes, the culprit's life and limbs were at the king's mercy as well as his property; (*b*) for less important offences, his lands were forfeited, but his person was safe; while (*c*) for minor faults, his moveable 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 in the "mercy" of his lord, as well as of the king. The records of manorial courts are full of petty amercements for petty transgressions of the customs of the manor.

584. Even Coke (*Second Institute*, p. 27) has to confess that for the purposes of this chapter at least he must abandon the attempt made elsewhere (*Ibid.*, p. 4, and p. 45) to bring the villeins into the class of freemen. Under the plea that the villein was relatively free as against third parties except his lord, he claimed for him all the benefits secured by anticipation in chapter 1 of the Charter, and he made a special application of the same doctrine in connection with the right to *judicium parium* secured to all freemen by chapter 39 (*q.v.*). Here, however, he is forced to admit the distinction between freeman and villein, the former term being, for the purpose of amercements, virtually identified with "freeholder."

585. See note by editors of *Dialogus de Scaccario*, p. 207.

586. Madox, I. 527.

587. 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."

588. *Rotuli Chartarum*, 51.

589. See *Select Charters*, 108.

590. See Birch, *Historical Charters of London*, p. 5.

591. *Ibid.*, p. 11.

592. See *English Village Community*, *passim*.

593. 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*." 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.*).

594. Notably by Professor Vinogradoff in his *Villeinage in England*, *passim*.

595. The wide gulf which separated the villein from the freeman in this matter of amercements is shown by an entry on 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 heavily amerced for merely claiming to be free. It is peculiarly 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.

596. Cf. *infra*, c. 55, which supplements this chapter, providing for the cancellation of all amercements unjustly inflicted in the past, whereas this chapter seeks to prevent the infliction of new ones in the future.

597. IX. 8.

598. III. folio 116 b.

599. 3 Edward I. c. 6.

600. *Second Institute*, p. 27.

601. See II. 208-9.

602. See Madox, *Ibid.*

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.

The amercement of earls and barons. The *barones majores*, as matter of course, intended to secure for themselves privileges at least equal with those of the ordinary freeholder. In assessing their amercements, both the gravity of the offence and their ability to pay (as measured by their property) would naturally be considered. Magna Carta mentions only the former criterion—it was, indeed, unnecessary to call the king's attention to the fact that more could be taken from their wealth than from the ordinary freeholder's comparative poverty. The saving of a "contenement" to them would also naturally be assumed. One vital difference, however, was distinctly stated. The amercing body was not to be a jury of good men of the locality; but a jury of their "peers."[603] The barons here asked only what was their undoubted right—to have the amount of their forfeits determined neither by their feudal inferiors (freeholders of their own or of other mesne lords) nor yet by Crown officials, but by magnates of their own position and with interests in common. This was not an innovation. Mr. Pike[604] has shown how, in Richard's reign, barons were not amerced with the common herd: at an eyre held at Hertford in 1198-9, a list of those amerced was drawn up and definite sums were entered after each name, with two exceptions, Gerald de Furnivall and Reginald de Argenton, each of whom was reserved for special treatment "as a baron." A local jury had evidently on the spot assessed the amercements of villeins and ordinary freeholders (in exact accordance with the rules of chapter 20); but the following entry was made opposite each of the two barons' names "to be amerced *at the Exchequer* for a disseisin." The Pipe Roll of John's first year shows that this was subsequently done.[605]

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"? Did this merely mean that a few peers, a few Crown tenants, should be present at the exchequer when they were amerced; or was it a demand for the assembling, for that purpose, of a full *commune concilium* like that defined in chapter 14?

The Crown, in the following reign, placed its own interpretation on these words, and succeeded in turning into a special disadvantage what the barons had insisted on as a privilege. Bracton[606] repeats this chapter verbatim, but adds what seems to be an official gloss, qualifying it by these words: "*et hoc per barones de scaccario vel coram ipso rege*." Barons, under this interpretation of Magna Carta, had their amercements assessed neither by the whole body of "their peers" in a full council, nor yet by a select jury of those peers empannelled in the exchequer for that purpose, but by royal officials, the barons of exchequer, or the justices of King's Bench. Thus the words of the Charter were perverted by the ingenuity of the Crown lawyers to authorize precisely what they had been originally intended to forbid.[607]

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. For example, a certain Thomas de Furnivall 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 the 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,"[608] 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 amerce him at a lower figure than that fixed by the exchequer barons. A few years earlier the Abbot of Croyland had made a similar plea, but without success.[609]

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.[610] In the reign of Edward IV. a duke was normally amerced at £10, and an earl or a bishop at 100s.[611]

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603. Cf. *infra*, under c. 39.

604. *House of Lords*, 255.

605. Cited by Pike, *Ibid.*

606. III., folio 116 b.

607. 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. Is it possible that one reason why the name *Barones Scaccarii* was retained as the official title of the four justices who presided over the Court of Exchequer was the Crown's wish to preserve the fiction that these official "*barones*" were really peers of the holders of "baronies"?

608. Madox, I. 535-8.

609. See Madox, *Ibid.*, and also Pike, *House of Lords*, 257.

610. See Pike, *Ibid.*

611. 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.

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 church 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 the extent of his wealth, no account was to be taken of the value of his "church benefice." A sharp distinction is here drawn between *laicum tenementum* (or, as the 10th of the Articles of the Barons expressed it, *laicum feodum*) and *beneficium ecclesiasticum*. This antithesis between "lay fee" and "alms"—that is, between lands held by barony, knight's service, or any other secular tenure on the one hand, and lands held by frankalmoin on the other—was a familiar one in the Middle Ages.[612]

Only the former was to be reckoned in fixing the defaulting clerk's amercement. This would leave the bishop or abbot exposed to a higher payment proportionate to his barony, while exempting the parish priest from any assessment on account of his rectory and glebe. It would almost seem that in the normal case the incumbent with no wealth but the produce and rents of his benefice would thus escape from amercement altogether; yet, if he had no lay tenement, he might still have chattels, or might at least pay instalments from the annual increase of his crops. This exemption in favour of those who held lands in "alms" may have proceeded from several possible motives. Frankalmoin enjoyed many privileges, including, in the reign of Henry II., complete immunity from the jurisdiction of all secular courts.[613] Perhaps the Exchequer did not dare to levy contributions upon such lands. In any view, it would have been manifestly unjust to treat the clerical incumbent as though he were the owner in fee simple of the church's patrimony.

The word “clerk” was a wide one, including not only the ordinary parish priests (whether rectors or vicars) with the deacons and those who had taken minor orders, but also the monks and canons regular (whose vows of poverty, however, left no loophole for the legal retention by them of private property which could require protection). It included also the higher clergy, great prelates, bishops and abbots, whose status was, however, complicated by their ownership of Crown lands. Their character of “baron” was often more prominent in constitutional questions than that of “clerk in holy orders.” Their treatment in the matter of amercements is a case in point.[614] There could have been no doubt from the first that a bishop “in mercy” must submit to have his barony taken into consideration in fixing his amercement. It would almost seem that the great prelates were not intended to benefit in any way from this exemption. Such is the suggestion conveyed by a slight alteration effected in the Charter of 1217, which substitutes for the wider “*clericus*” of the text the more restricted expression "*ecclesiastica persona*"—words which in the thirteenth century denoted the parish clergy, and were used much as is the word “parson” in colloquial speech at the present day.

A certain looseness in the arrangement of the Latin words of this chapter, as it originally stood in 1215, seems to have suggested the need for improvement. Alterations, apparently of a verbal nature, were made with some evidences of care in Henry’s reissues. The “*de laico tenemento*” of 1215 was omitted altogether in 1216; but a reference to the “lay fees” of the clergy was reintroduced in 1217, subject to a complete reconstruction of the sentence to make it read smoothly, and so avoid the possibility of misconception.[615]

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612. See *supra* 66-70 and cf. Constitutions of Clarendon (c. 9), which distinguish *tenementum pertinens ad eleemosinam* from *ad laicum feudum*.

613. See Constitutions of Clarendon, *Ibid.* The Crown soon withdrew this immunity.

614. Cf. Pike, *House of Lords*, 254.

615. In its final form it reads: “*Nulla ecclesiastica persona amercietur secundum quantitatem beneficii sui ecclesiastici, sed secundum tenementum*

suum et secundum quantitatem delicti." Dr. Stubbs, *Sel. Charters* 345, by a curious oversight, reads for "*tenementum*" the compound "*contenementum*," for which there seems to be no authority.

CHAPTER TWENTY-THREE.

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

No community or individual[616] shall be compelled to make bridges at river banks, except those who from of old were legally bound to do so.

The object of this chapter is obvious; to compel the king to desist from his practice of illegally increasing the extent of an obligation—admitted as perfectly legal within the limits defined by ancient usage—the obligation to keep in good repair all existing 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 which made John keen to enforce it.

I. *Origin of the Obligation to make Bridges.* The Norman kings seem to have based their claim to compel their subjects to maintain such bridges as were necessary, upon an ancient threefold obligation,[616] (known as the *trinoda necessitas*) incumbent on all freemen during the Anglo-Saxon period. Three duties were[617] required of all the men of England in the interests of the commonweal: attendance on the fyrd 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 attached to certain manors or freeholders. In other words, it was made a part of the services incidental to the feudal tenure of particular estates. The present chapter, in forbidding the illegal extension of this burden to communities or individuals other than those who rendered it as part of the services due for their lands, seems to be only a particular application of the general principle enunciated in chapter 16. The evil complained of, however, required special treatment because of the prominence into which it had been forced by John, who had abused powers vested in his ancestors for national purposes, in order to further his

own selfish pleasures, in a manner so well known to his contemporaries as not to require specification in Magna Carta.

II. *The King's interest in the Repair of Bridges.* John's motives for making an oppressive use of this prerogative must be sought in a somewhat unexpected quarter, in the king's rights of falconry, and in his frequent need for ready means of crossing rivers in pursuit of his valuable birds of prey. 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 in every district which his capricious pleasure might lead him to visit. Several such writs of the reign of Henry III. are still extant. The exact words of these vary somewhat, but a comparison of their terms leaves no room for doubt either as to the nature of the commands they conveyed or the reasons for issuing them. Addressed to the sheriffs of such counties as the king was likely to visit, at a convenient interval beforehand, these letters gave instructions that all necessary steps should be taken in preparation for the king's hawking. The writs contained two commands, an order for the 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 "riviating" (*ad riviandum*) upon the said rivers." The writ then proceeded to command the sheriff to issue a general prohibition against any one attempting "to riviate" along the river banks, previous to the coming of the king ("*ne aliquis riviare praesumat per riparias illas antequam rex illic venerit*").[618]

The Latin verb, for which "to riviate" has been coined as an English equivalent, has long 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.[619]

These writs prove that the Crown claimed and exercised a monopoly of, or at least a preferential right to, this form of sport along the banks of certain rivers; and these "preserved" rivers were accordingly said to be placed "in defence" (*in defenso*), a phrase which occurs in many of the writs referred to, as well as in a later chapter of Magna Carta.[620]

Two distinct hardships were thus imposed on the nation by the king's exercise of his rights of falconry, one negative and the other positive. In the interval between the king's intimation and his arrival at the indicated rivers, the sport of all other people was interfered with, while the obligation to reconstruct otherwise useless bridges was a more material burden on every village and individual exposed to it. A wise king would be careful to use such rights so as to inflict on his subjects a minimum of hardship. John, however, knew no moderation, placing "in defence" not merely a few banks at a time, but many 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 amercements on those who neglected prompt obedience to his commands. Great consternation was aroused by John's action at Bristol in 1209 when he prohibited the taking of birds throughout the entire realm of England.[621]

Both of these grievances, thus augmented by the policy of King John, were redressed by Magna Carta, though in different clauses. In the present chapter John promised not to impose the burden of repairing bridges on those from whom it was not legally due.[622] Chapter 47, in which he agreed to withdraw his interdict from all rivers which he had placed "in defence" during his own reign, and also to disafforest all forests of his own creation, was entirely omitted in the Charter of 1216;[623] but in 1217 it reappeared in a new position and expressed in different words. The provision of the original chapter 47, relating to forests, was relegated to the *Carta de Foresta*, then granted for the first time, and the other part of that chapter, relating to falconry, was naturally enough 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 any further in this direction. Yet Henry III. had ample opportunities of harassing his subjects by an inconsiderate use of the rights still left to him. By issuing wholesale orders affecting every preserved river which he had an admitted right to put "in defence," he

might inflict widespread and wanton hardships. In many cases dubiety existed on the question of fact as to what banks had actually been "defended" by Henry II., and a vague general command which named no special rivers left in cruel uncertainty the district to be visited. Henry III., accordingly, either yielding to pressure or in return for grants of money, made important concessions. After the year 1241, he invariably specified the particular river along whose banks he intended to sport, and sometimes even 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 altogether from the exercise of a right which inflicted hardships on the people out of all proportion to the benefits conferred on the king.[624]

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 to this effect 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. by his writ commanded the sheriff of Oxfordshire to declare that all bridges should be repaired and all fords marked out with stakes for the crossing of the king "with his falcons" during the approaching winter season.[625]

III. *Erroneous Interpretations.* There is nothing astonishing in the fact that a pastime so passionately followed as falconry was in the Middle Ages, should have left its traces on two chapters of Magna Carta, the full import of which has not hitherto been appreciated by commentators, partly from failure to bring both of them together, but chiefly because of the too precipitate assumption that the words *ad riviandum* and *in defenso*, occurring in writs and charters, referred to *fishing* rather than to fowling.[626]

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,[627] were influenced by a desire to preserve public rights of fishing against encroachment by the king or by private owners. In either case the motives were entirely different. In the Middle Ages, fishing was a means of procuring food, not a form of sport: to depict John and his action-loving courtiers as exponents of the gentle art of Isaac Walton is a ridiculous anachronism.

It is quite 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.[628] 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*;[629] 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. In that year the men of York complained that Earl Richard had interfered with their rights of fishing by placing *in defenso* the rivers Ouse and Yore, a proceeding they declared to be "against the tenor of Magna Carta."[630] This error, the first appearance of 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.

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616. 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.

617. See *Rot. Claus.*, 19 Henry III., cited by Moore, *History and Law of Fisheries*, p. 8.

618. See *Rot. Claus.* 19 Henry III., cited in Moore, *History and Law of Fisheries*, p. 8.

619. 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" (*cum avibus suis*). (*b*) A writ of 28th October, 1283, gives *aves capere* as the

equivalent of *riviare*. This writ contains a licence to the Earl of Hereford "during the present winter season to *riviate* and to take river-fowl of this nature (*riviare et aves ripariarum hujusmodi capere*) throughout the rivers Lowe and Frome which are in defence (*in defenso*)."

620. *I.e.* c. 47 (*q.v.*). Any district or object over which the king or a private individual had sole rights of any kind to the exclusion of the public might apparently be said to be placed *in defenso* in regard to the object of such rights. In this case, the word "riviation" makes the object plain.

621. R. Wendover, II. 49 (R.S.), "*Ibi capturam avium per totam Angliam interdixit.*"

622. Article 11 of the Barons had demanded that no *villa* should be *amerced* for failure to make such 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.

623. 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*, 169.

624. Moore, *Ibid.*, 9.

625. Moore, *Ibid.*, 12.

626. The *Mirror of Justices* is cited as first suggesting this. See Moore, *Ibid.*, 12–16, where the gradual development of the error is traced. Coke, *Second Institute*, 30, was misled by the *Mirror*, and he has in turn misled others.

627. Cf. *infra*, under c. 33.

628. This was 13 Edward I., stat. 1, c. 47, cited Moore, *Ibid.*, 173.

629. *Ibid.*, p. 6.

630. *Ibid.*, p. 16.

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.

The main object of this provision is beyond doubt: men accused of crimes must be tried before the king's judges and not by local magistrates of whatsoever kind. The innocent looked confidently for justice to the representatives of the central government; while they dreaded the jurisdiction of the less responsible officials resident in the county—local tyrants whose harshness had earned them a hearty and widespread hatred. The sheriffs and castellans thoroughly deserved their bad reputation; for the records of the age overflow with tales of their cruelties and illegal oppressions. It ought not to be forgotten, however, that if this chapter contains a condemnation of the local administration of justice, it testifies, at the same time, to the comparative purity of the justice dispensed by the king's own judges. So far there is no difficulty; but some differences of opinion exist as to the exact bearing of this provision on certain points of detail.

I. *Pleas of the Crown.* All litigations tended to be distinguished into two kinds, royal pleas and common pleas, according as the interests of the Crown were or were not specially involved. This classification has already been discussed in connection with chapter 17, which sought to regulate the procedure in common pleas. 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 all royal business, whether specially relating to legal 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 it was thereafter reserved for criminal trials held before the king's judges. This process of contraction had been nearly completed before the accession of John.

Another tendency, however, 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.[631] The royal courts steadily extended the sphere of their activity over all misdeeds, however trivial, until the whole realm of criminal law fell under the description of "pleas of the Crown."

In the reign of John this process of expansion was far from complete: the words then, indeed, embraced grave criminal offences tried in the king's courts, but not the numerous petty offences, which were still disposed of in the sheriffs tourn or elsewhere.[632]

North of the Tweed the same phrase has had a completely different history: in modern Scots law its connotation is still a narrow one; and this is a direct 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 the zenith of its power. The kings of Scotland failed to crush their powerful and unruly vassals, and consequently the 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, mainly as a consequence of the rebellion of three years previously, 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.[633] 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 a grave crime and the formal trial of the criminal, since it was necessary

to wait for the coming of the itinerant justices, which only took place at intervals of about seven years. Meanwhile, preliminary steps must be taken to collect and record evidence of offences, which might otherwise be lost. The magistrate responsible for these preliminary steps was said to "keep" the pleas (*custodire placita*)—that is, to watch them or prevent them from passing out of mind while waiting the coming of the justices who would formally "hold" or "try" or "determine" the same pleas (*placitare* or *habere* or *tenere placita*).

Before the reign of John, not only had the fundamental distinction between these two stages of procedure been clearly grasped, but 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 justices who represented the central government could "hold" them. The process of differentiation was accelerated towards the close of the twelfth century 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 on a more than usually important visitation of the counties contain two provisions intended to keep the growing pretensions of the sheriffs within due bounds.[634]

They were expressly forbidden to act as justices within their own counties, or, indeed, in any counties in which they had acted as sheriffs at any time since Richard's coronation.[635]

It is safe to infer that the "trying" of royal pleas was the province from which in particular the sheriff was thus 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 instructions[636] 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.[637]

The ordinance of 1194 seems to have settled subsequent practice in both respects. Sheriffs, while still free to punish petty offenders on their own

authority, 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 strongly approved both rules, yet John condoned and encouraged irregularities, allowing sheriffs to meddle with pleas of the Crown, even when the coroners were not present to check their arbitrary methods;[638] and allowing them to give a final judgment on such pleas, involving, mayhap, loss of life or limb to those found guilty, without waiting the arrival of the Justices.[639] Such deviations from the normal course of procedure could be no longer tolerated. Magna Carta accordingly, in this first of a series of chapters directed against the misdeeds of sheriffs and other local magistrates, forbade them to interfere in this province.

III. *The Intention of Magna Carta.* The barons, in this matter as in so many others, were merely demanding that the Crown should observe strictly and impartially the rules which it had laid down for its own guidance: caprice must give way to law. Sheriffs must not, with or without the king's connivance, usurp the functions of coroners; nor must sheriffs and coroners together usurp those of the king's justiciars. The opposition leaders naturally associated these two irregularities together, and may even have assumed that expressly to abolish the one implied, with sufficient clearness, an intention to abolish the other also. Such a supposition would explain a peculiar discrepancy between the Articles and the Charter, in its final form, which it is otherwise difficult to account for. While Article 14 demanded redress of one specific grievance, Magna Carta granted redress of an entirely different one. The earlier document, neglecting the distinction between "keeping" and "trying" pleas, simply requires that coroners (whose comparative popularity is explained by their appointment in the county court) should always be associated with the sheriff when he meddles in any way with pleas of the Crown. The Charter is silent on this subject; but forbids sheriffs and coroners, whether acting separately or together, to "try" or finally determine pleas of this description. These two provisions are the complements of each other. Magna Carta would thus 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 perhaps strictly enforced in Henry's reign, soon became absolute. Under Edward I. it was interpreted to mean that no one could determine such pleas unless armed with a royal

commission to that effect;[640] and the commission would take the form either of gaol delivery, of trailbaston, or of oyer and terminer.[641]

IV. *An Erroneous View.* Hallam seems to have misunderstood the object aimed at by this provision. Commenting on the corresponding chapter of Henry's Charter of 1225, he declares that the "criminal jurisdiction of the Sheriff is entirely taken away by Magna Charta, c. 17."[642] This is a complete mistake: both before and after the granting of the Charter, the sheriff exercised criminal jurisdiction, and that of two distinct 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 completely responsible for every stage of procedure in regard to trivial offences. He heard indictments and then tried and punished petty offenders in a summary manner.[643] Several statutes of later reigns confirmed, even while regulating, the authority of the sheriff to take indictments at his tourns,[644] until this jurisdiction was transferred, by an act of the fifteenth century, to the justices of peace assembled in Quarter Sessions.[645]

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."[646] 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.[647]

V. *Local Magistrates under John.* The urgent need of preventing the petty tyrants who controlled the administration of the various districts from exercising jurisdiction over the lives and limbs of freemen can be abundantly illustrated from the details furnished by contemporary records of the ingenious and cruel oppressions they constantly resorted to. 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 from unjust dealing,[648] and, again, some two months later, when John, at the instance of Nicholas of Tusculum, the papal legate, promised to restrain their violence and illegal exactions.[649] Little or nothing, however, was effected in the way of reform; and Magna Carta, in addition to condemning certain specified evils, contained two general provisions,

namely, 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.[650]

(1) *The sheriff.* No royal officer was better or 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. The very briefest sketch of the origin and 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 royal house of Wessex had been entrusted to an agent or man of business 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*.[651] It is an illustration of the tenacity of the Anglo-Saxon customs and names that this Latin title never took root, whereas the old title of sheriff continues to the present day.

It is true that in England during the Anglo-Saxon period the chief power over each shire or 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 the spiritual affairs of his diocese; while the deliberate policy of the Conqueror and his successors relegated the earl to a position of dignity altogether 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 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. The zenith of the sheriff's power, however, was passed in the twelfth century, and before its close changes had been introduced with the view of checking his abuses. Henry II. frequently punished his sheriffs for their misdeeds, and removed them from office.

It has already been explained how in 1194 the sheriff's powers were further restricted, while new officers were appointed in each county to share the authority still left to him. To the very next year (1195) is usually traced the origin of the justices of the peace, who gradually took over the chief duties of the sheriff until they had practically superseded him as the ruling power in the county. In Tudor days a new rival appeared in the Lord

Lieutenant, then first appointed in each shire to represent the Crown in its military capacity, and particularly to take over command of the militia of the county. The fall of the sheriff from his former high estate was thus gradual, although finally most 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 Edward for each county by picking at random one name out of a list of three leading land-owners presented to him for that purpose by the judges. The gentleman on whom this sometimes unwelcome dignity is thrust is still nominally responsible during his year of office for the execution of all writs of the superior Courts within his county, 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. All the real duties of his office are now performed in practice 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 an inferior court, namely, the local court of his shire, known as "the Sheriff Court." He has thus retained intact his judicial functions, to which such nominal administrative duties as still remain to him are entirely 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 in England, Scotland, and America respectively.

(2) *The constable.* Portions of certain counties were exempted, partially or entirely, from the sheriff's bailiwick, and placed under the authority of specially appointed magistrates. Thus districts afforested were administered by forest wardens assisted by verderers who excluded the sheriffs and coroners; while royal fortresses, together with the land immediately surrounding them, were under the sole command of officers known

indifferently as castellans or constables.[652] 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," although they may attach or "keep" them (with the co-operation of the verderers), and present them for trial before the king's emissaries when next sent to hold a forest eyre—thus offering a complete parallel between procedure at "forest pleas" and that prescribed by the present chapter for ordinary pleas of the Crown.[653]

The name constable is an ambiguous one, since it has at different periods of history 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 that member of the royal household who was specially responsible for the king's stables. At a later date, he shared with the Earl Marshal the duties of Commander-in-chief of the king's armies. The name of constable was also used in a wider sense to designate other and subordinate royal ministers. It came to be applied to commanders of small bodies of troops, whether in castles or elsewhere. At a later date the word lost its warlike associations, and was used in connection with the duties of watch and ward. A constable was a person specially entrusted with enforcing order in his own locality. Thus each hundred had its high constable and each village its petty constable in the fourteenth and fifteenth centuries.[654] These various officials were thus, at different dates, all designated by a name usually, at the present day, confined to ordinary members of the police force.

The word as used in Magna Carta had not yet lost its military character, but denoted the castellan who commanded the troops which garrisoned a royal castle.[655] Such an office was one of great trust; and correspondingly wide powers were conferred upon its holder. The warden of a castle held an important military command, and acted as gaoler of the prisoners confided 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 and 29 of Magna Carta, where they are discussed under the head of purveyance. 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. This 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."[656] It is not known at what date the judicial powers of constables fell into disuse; but they still acted as gaolers at a much later period. 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 whom they had unjustly condemned in another. This practice was put down by statute in 1403.[657]

It would seem that at an earlier period the constable sometimes acted as a deputy-sheriff. Chapter 12 of the Assize of Northampton provided that when the sheriff was absent the nearest *castellanus* 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. The nature of their duties is explained by the oath of office 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 all such preliminary investigations as might throw light on the case when the formal trial was afterwards held; they had, for example, to examine the size and nature of the victim's wounds in a charge of mayhem.[658] They were required, in particular, to keep a watchful eye on all royal property, being responsible for the safe-keeping of deodands, wrecks, and treasure trove. They had also to appraise the value of all chattels of criminals 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 also kept a record of those who

had been outlawed, and received "appeals" or private accusations of criminal charges.[659]

Magna Carta forbade the coroner to determine the pleas of the Crown; but, even after 1215, he sometimes did justice upon felons caught red-handed, whose guilt was self-evident without trial. An act of Edward I.[660] accurately defined his duties, empowering him to attach pleas of the Crown and to present criminals to the justices for trial, but forbidding him to proceed further alone.

The coroner's functions, originally so wide and varied, have been gradually narrowed down, until now there is practically only one duty commonly associated with his office, namely, the holding of an inquest on a dead body where there are suspicious circumstances.[661] In addition to this, however, he is still responsible for treasure-trove or valuables found buried in the ground, and he is also competent to act generally as the substitute of the sheriff in case of the latter's illness or absence during his 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 Crown officials. The term "bailiff" may be correctly applied to every individual to whom authority of any sort has been delegated by another. It would, in the present instance, include the assistants of sheriffs and constables, 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.

631. Traces of it may be found as late as the reign of Henry II. See Glanvill, I. c. 1.

632. The gradual 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. I, 2, and 3; (*c*) the Assizes of Clarendon and Northampton; (*d*) the ordinance of 1194; and (*e*) the present chapter of Magna Carta.

633. The *Criminal Procedure* (*Scotland*) Act, 1887 (50 and 51 Victoria, c. 35) gave him jurisdiction over three of them.

634. See *Forma procedendi in placitis coronae regis*, cc. 20 and 21, cited in *Sel. Charters*, 260.

635. *Ibid.*, c. 21.

636. *Ibid.*, c. 20.

637. The *Forma procedendi* of 1194 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. Prof. Maitland remains unconvinced (*Eng. Hist. Rev.*, VIII. 758, and Pollock and Maitland, I. 519).

638. This is the inference to be drawn from the 14th of the Articles of the Barons.

639. This is the inference to be drawn from c. 24 of Magna Carta.

640. See Coke, *Second Institute*, 30, and authorities there cited.

641. For explanation of these terms, see *supra*, c. 18.

642. See *Middle Ages*, II. 482, n.

643. 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, when it was still confined to a few specific crimes of special gravity, and the present day, when it has become synonymous with the whole field of criminal law.

644. *E.g.* 13 Edward I. c. 13, and 1 Edward III., stat. 2, c. 17.

645. 1 Edward IV. c. 2.

646. 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.

647. Dr. Stubbs, *Const. Hist.*, I. 650, thinks that the proposals of the Articles and Charter indicated a tendency towards judicial absolutism, only curbed by the growth of trial by jury. Yet the barons in providing against the sheriff's irregularities had certainly 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. The problem of local government had thus assumed a new form (cf. *supra*, p. 20). 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.

648. See *supra*, p. 34.

649. See W. Coventry, II. 214-5.

650. 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.

651. Cf. *supra*, pp. 17-20.

652. These localities were completely independent of the ordinary executive authorities of the county; in addition, partial exemption from the sheriff's control was enjoyed by (*a*) chartered boroughs and (*b*) holders of franchises.

653. Cf. *infra*, c. 48.

654. See H. B. Simpson in *English Historical Review*, X. 625, and authorities there cited.

655. The evidence collected by Coke, *Second Institute*, 31, conclusively proves the identity of these two offices. See also Round, *Ancient Charters* No. 55, where Richard I. in 1159 speaks of "*constabularia castelli Lincolniae*."

656. See *Articuli super cartas*, 28 Edward I. c. 7.

657. 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."

658. See Bracton, f. 122 b.

659. In 1197, Richard's Assize of Measures appointed six *custodientes* in each county and town. These were *coroners* over a limited class of offences, viz., the use of false weights and measures. Cf. *infra*, under c. 35.

660. Statute of Westminster, I. c. 10.

661. Cf. Coke, *Second Institute*, 31, "In case when any man come to violent or untimely death, *super visum corporis*."

CHAPTER TWENTY-FIVE.

Omnes comitatus, hundrede, wapentakii, et trethingic, 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 also was directed against the sheriffs, and shows a praiseworthy 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, the long process had been already completed by which England had been gradually mapped out into shires on lines substantially the same as those which still exist. Each county had been further 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 specially large counties such as York and Lincoln, each of which had three "trithings" or ridings.

In commenting upon chapter 24, it has been already 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 practically the chief magistrate and local judge in the county. His financial duties, however, long remained the most important: William I. and his successors had greater pecuniary interests in the English counties than their Anglo-Saxon forerunners ever had, and the sheriffs were their agents in collecting all rents and other dues. Even before the Conquest, however, the sheriff of an ordinary county 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*: he bought for a yearly rent the right to collect and appropriate to his own uses the various revenues

of the county. The Crown got only the exact sum stipulated for, known as the *firma comitatus*; while the balance, if any, remained with the sheriff. That officer was liable, on the other hand, for the sum agreed on, even when the annual yield fell short of his anticipations. In plain words, the sheriff speculated in the returns, and 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 slump sum known as *firma comitatus*; but undoubtedly the two chief sources of revenue embraced were the profits of justice dispensed in the local courts, and the rents and returns from the various royal manors in the county.

William I. sharply raised the amounts of all these farms for his own benefit, and his successors endeavoured, whenever possible, to increase them still 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 primarily falling upon him to the shoulders of those who were subject to his authority. When the king exacted more from the sheriff, the latter in turn increased the pressure on the inhabitants of his county or group of counties. His rule tended always to be oppressive, but his unjust fines and exactions would be doubled at times 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 a curtailment of the pretensions of the sheriffs. He punished their excesses, and frequently deprived them of office. Under John the sheriffs had a comparatively free hand to oppress their victims, for he entered into a tacit alliance with them, in order that the two tyrants (the heads of the central and the local government respectively) might together fleece the men of the county more effectually. In addition to the fixed annual rents in name of *firma* which had again become stereotyped, John extorted an additional lump payment called either an *incrementum* or by various other names, and allowed the sheriffs to inflict new severities in order to recoup themselves for their additional outlay.[662]

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 an *incrementum*.

If this reform benefited the men of the counties in their dealings with the sheriffs, it also gave the sheriffs an unfair 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 absurd to bind the Crown by a hard-and-fast rule which would practically make a present of this future "unearned increment" to the sheriff. It belonged of right to the Crown; and the exchequer had increasing need of supplies to meet the increasing duties of the central government. To stereotype the *firma* to be paid in return for a constantly increasing revenue was unfair to the Crown.[663] It is thus easy to understand why this chapter was entirely omitted in 1216 and in subsequent reissues. The *Articuli super cartas*, on the other hand, while conceding to the counties the right of electing their own sheriffs, reaffirmed the principle of John's Charter, declaring that neither the bailiwicks and hundreds 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."[664] 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.[665]

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 deliberately left exposed to arbitrary increases of their annual rents. The towns in this respect were practically in the same position as the demesne manors. It is true that many of them had received separate charters fixing the amounts annually payable under the name of farm (*firma burgi* in their case), and that all such charters received a general confirmation in chapter 13 of the Great Charter, but the Crown could probably evade these promises by applying the name of "increment" to any additional payments desired, or, if that were objected to, might still resort to an arbitrary "tallage," the right to extort which had not been taken away by Magna Carta. The money was as good to the Crown under one name as under another.[666]

662. Cf. Miss Norgate (*John Lackland*, p. 214) who explains that the Crown claimed a share of the sheriffs' ever-increasing surplus, and "this was done, not by putting the ferm at a higher figure, but by charging the sheriff with an additional lump sum under the title of *crementum*, or, in John's time, *proficuum*." But this practice was by no means an innovation invented by John. Henry II. often exacted such extra payments under the name of "*gersuma*." Thus in *Pipe Roll* Henry II. (p. 11) the Sheriff of Norfolk and Suffolk paid 200 marks under that name. The method adopted was practically to set up the office of sheriff to auction. The highest suitable bidder obtained the post, and the amount of the successful bid was entered at the exchequer as a *gersuma*.

663. Cf. Sir James Ramsay, *Angevin Empire*, 476, who describes this provision as "an impossible requirement." Dr. Stubbs' paraphrase is not entirely happy: "the ferms of the counties and other jurisdictions are not to be increased." See *Const. Hist.* I. 575.

664. These are the words of the Statute of 1330, cited below.

665. See 4 Edward III. c. 15; 14 Edward III. c. 9; and 4 Henry IV. c. 5.

666. Cf. *supra*, pp. 278-80.

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 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 racionabilibus 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 lawful men, provided always that nothing whatever be thence removed until the debt which is evident[667] 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, however, it throws light on the general question of the right of bequeathing property.

I. *The Nature of the Grievance.* When a Crown tenant died it was almost certain that arrears of one or other of the numerous scutages, incidents, or other payments due to the Crown remained unpaid. The sheriff and the bailiffs of the district where the deceased's estates lay were in the habit of seizing everything they could find on his manor under the excuse of securing the interests of their royal master. They attached and sold chattels out of all proportion to the sum actually due; and after satisfying the Crown debt, a large surplus would often remain in the sheriff's hands which it would be exceedingly difficult for the relatives of the deceased freeholder to force him to disgorge.

Magna Carta here sought to make such irregularities impossible for the future by carefully defining the exact procedure to be followed in such circumstances. The sheriff and his bailiffs were forbidden to touch a single chattel of a deceased Crown tenant, unless they came armed with a legal warrant in the form of royal letters patent vouching the existence and the amount of the Crown debt. Even after exhibiting a warrant in proper form, the officers were only allowed to attach as many chattels as could reasonably be considered necessary to satisfy the full value of the debt due to the exchequer; and everything so taken must be carefully 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 generally, 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 of the chattels, even those not so attached, until the full ascertained amount had actually been paid to the exchequer. The Crown's preferential claims remained over everything on the manor until the debt was extinguished. Only after that had been done, could a division of the estate take place among the deceased man's relatives or those in whose favour he had executed a Will.

These provisions should be read in connection with the terms of chapter 9,[668] 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 the case of a deceased Crown debtor and to that of a living one.

II. *The Right to Bequeath.* The main interest of this chapter lies, however, for the historian of law and institutions, in quite a different direction; to him it is valuable for the light incidentally thrown on the limits within which the right of making Wills was recognized in 1215. The early law of England seems to have had great 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.[669] Of the law of bequests in the twelfth century, however, it is possible to speak with greater certainty; definite principles had by that time received general recognition. All

testamentary rights over land or other real estate (so far as these had ever actually existed) were now abolished, not, as has sometimes been maintained, in the interest of the feudal lord, but rather in the interests of the expectant heir.[670] Thus the right to devise land had been absolutely prohibited before the end of the twelfth century. Many reasons contributed to this result. For one thing, it had become necessary to prevent churchmen from using their influence to wring bequests of land from dying men, to the impoverishment of the rightful heir, and to the destruction of the due balance between Church and State, already menaced by the rapidly accumulating wealth of the various religious orders.

Churchmen, in compensation as it were for the obstacles thus opposed to their thirst for the land of the dying, made good their claim to regulate all Wills dealing with personal estate; that is money, goods, and chattels. They claimed and obtained for their own courts the right to exclusive jurisdiction over all testamentary provisions, now, of course, competent in respect of personal estate only. The Courts Christian "proved" Wills, (that is, usurped the right to determine whether they were really valid acts of the departed or not) and also superintended their administration. In particular, they had control over the "executors" who were originally the friends to whom the deceased had made known his wishes as to the distribution of his money and chattels on his death. The Church Courts ensured that the executors loyally carried out these intentions, and prevented them from appropriating to their own uses what had been entrusted to them for the good of the deceased's soul. In John's reign, however, the Crown and its officers interfered alike with the rights of testators to make Wills and the rights of the bishop of the diocese to supervise the distribution. Not only did the sheriffs find pretexts to help themselves; but John seems to have maintained that Wills were not valid 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.[671] The king's interference in this province seems, however, to have been regarded as an entirely illegal encroachment.

In strict law, rights of testation, though prohibited *quoad* land, were recognized *quoad* personal estate. It must not, however, be supposed that the testator was at liberty to divide or "devise" all his money and chattels. The reasonable claims of wife and children must first be respected, and only the free balance, after satisfying these, could be distributed. It was long

before any exact rule was established for determining the amount of these "reasonable" claims. Much could be said for an elastic rule which allowed the proportion of personal estate falling to wife and children to vary with the circumstances of each case; but this vagueness had one grave objection; it inevitably led to friction and family quarrels. Magna Carta in this respect simply confirmed existing practice, and made no attempt at definition. During the thirteenth century, however, the lawful shares of wife and children were definitely fixed by the English common law, and that, too, at exactly the same proportions of the entire personal estate as are recognized to the present day by the law of Scotland. Where a Scots testator dies leaving wife and children, his moveable or personal estate is regarded as falling naturally into three equal parts, known as the widow's part, the bairn's part, and the dead's part, respectively. It is only with the last mentioned third of his own moveables that he can do as he likes. If he disposes of the rest, wife and children may claim their legal rights and "break the Will." Where a wife survives but no children, or *vice versa*, the division is into two equal portions. Magna Carta recognises a similar threefold or twofold decision, and contains a clear acknowledgment of what Scots law to the present day quaintly describes as "the dead's part." It was only the residue of the deceased's chattels after claims of wife and children had been satisfied, which was "to fall to the deceased," and which is also spoken of as the portion of personal estate left to the executors "to fulfil the testament of the deceased." This portion was appropriated "to the use of the dead": that is, his executors, under the guidance of the Church Courts, would use it for the salvation of his soul. The deceased might either have given specific directions, or have left full powers to his executors (frequently churchmen) to make the division for charitable and religious purposes according to their own discretion. Part might go to needy relations, or to the poor of the district; part to endow religious houses; and part in masses for his eternal welfare.

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 the same to the present day, recognizing still the widow's *jus relictae* and the children's *legitim*, the English law has, by slow steps, the details of which are obscure, entirely changed. The rule which 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. Finally the power to bequeath personal estate has (in sympathy with exaggerated modern conceptions of the sacredness of rights of "property") expanded to such an extent that a father may leave his children entirely penniless; and the law will not interfere. The law of England, at the present day, does not compel him to leave his son or daughter even the proverbial shilling. The phrase "to cut off a son with a shilling," which still lives in popular usage, may possibly perpetuate a now forgotten 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.[672]

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667. Cf. the use of the phrase "a liquid debt" in Scots law.

668. Cf. what is there said of the sheriff's oppressions and the attempts made to put an end to them.

669. The subject is exhaustively discussed by Pollock and Maitland, II. 312-353.

670. See Pollock and Maitland, II. 324.

671. 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.

672. The reissue of 1216 makes no alteration here, but that of 1217 omits "*et pueris*," thus protecting the wife's "reasonable portion" but not that of the sons. The words omitted were restored in 1225. It was probably a mere clerical error.

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 the supervision of the church, saving to every one the debts which the deceased owed to him.

Here the Great Charter proceeds to remedy an evil connected with *intestate* succession, a natural sequel to the subject of *testate* succession. John was made to promise that he would not seize, as forfeit to his exchequer, the chattels of men who had neglected to make a will. In the Middle Ages all classes of men, good and bad alike, exhibited an extreme horror of dying intestate.[673] Several causes contributed towards this frame of mind. Churchmen, from motives not unmixed, diligently inculcated the belief that a dying man's duty was to leave part at least of his personal estate (the only property over which the law allowed him powers of disposal) for religious and charitable objects. The bishop or priest, who had power to give or withhold extreme unction to the sinner who had confessed his sins, was in a peculiarly strong position to enforce his advice upon men who believed the Church to hold the keys of heaven. Thus, every man on his death-bed had powerful motives for making his will in such form as the Church approved. Motives of a more worldly kind urged him in the same direction. If he died intestate, a scramble for his personal effects would undoubtedly result. Many powerful claimants were ready to compete. In Glanvill's day, for example,[674] every feudal lord claimed the goods of his intestate vassals. Such demands were difficult to defeat, although Bracton, at a later date[675] declared them to be illegal, at least in cases of sudden death. Then, the kinsmen—rich and poor relations—had certain rights never very clearly defined. The Church, too, stood ready, with claims judiciously vague, which might be expanded as occasion required. It arrogated, at the very lowest, the right to distribute the dead man's chattels for the good of

his soul, and there are instances when a strong-minded bishop or abbot insisted on such a distribution, although the deceased had died unrepentant, leaving no will.[676]

Prelates allowed themselves liberal discretion in regard to "the dead's part" over which they thus assumed control. Something might go to the poor, but much would naturally be spent on masses for the departed soul, while a portion might openly be retained as a recompense for trouble expended in this pious cause. The king was another competitor for the goods of those who left no will; and attempts were made at various times to treat intestacy, more especially in the case of clerks, as a cause of forfeiture.[677] For our present purpose it is unnecessary to discuss whether this claim was founded on the royal prerogative or on the rights of the king in his capacity either as overlord or as patron of vacant sees.[678]

This chapter of Magna Carta was directed against all such pretensions of the Crown or its officials. Whoever else might get these windfalls, King John must not compete. So much is clear; some sort of compromise was, further, made between the two most likely claimants. Magna Carta provided for a friendly co-operation between the deceased's kinsmen and the Church in distributing the residue of the intestate's personal estate, after satisfying all preferential claims of creditors, wives, and children. This chapter, although afterwards struck out of all reissues of the Charter, seems to have been observed in practice.[679] Apparently, however, the right of the kinsfolk to share the control with the Church gradually receded into the background, while the Courts Christian assumed complete authority in all cases of intestacy; so much so, that churchmen had frequently to be reminded that they were only the dead man's administrators, and not entitled to appropriate the goods to their own uses.

It is easy to understand the motives which, in 1216, led those responsible for the government of the young Henry III. to withdraw this provision of Magna Carta. The Crown had then need of all the money it could get, and so long as the uncertainty of the law allowed a scramble to take place for the goods of intestates, the king could not be asked to stand aside with his hands tied by a clause of Magna Carta. He would take his chance with the other claimants. It was the Church, however, and not the Crown, which finally secured the prize.[680]

673. Pollock and Maitland, II. 354.

674. VII c. 16.

675. F. 60 b.

676. This course was taken in 1197 by Abbot Samson, whose deeds are portrayed for us by Jocelyn of Brakelond to the delight of Thomas Carlyle. See *Past and Present*, *passim*. Cf. also Pollock and Maitland, II. 355.

677. 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.

678. Royal prerogatives in the twelfth century were still elastic and undefined. 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 authorities there cited.) It is interesting in this connection to note that the making of a will was looked on as 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). John, so we may infer from Magna Carta, went further, and appropriated the chattels of all intestates. Were there any precedents from his father's reign for this wider claim? Madox (I. 346) cites an entry from the *Pipe Polls* of 1172, recording 60 marks due 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.)

679. Cf. Pollock and Maitland, II. 355. "This clause, though it was deliberately withdrawn, seems to have settled the law."

680. This chapter should be compared with a corresponding provision in the Charter of Liberties granted by Henry I. William Rufus, like John, had evidently helped himself freely to the chattels of intestates. Henry I. (c. 7) made what seems to be merely a partial renunciation of this right: where the deceased had been prevented "by arms or infirmity" from making his will, his relations and vassals might distribute his goods for him. Are we to infer that Henry reserved the right to seize them in all other events? Stephen, in his second or Oxford Charter (cf. *supra*, p. 121 and appendix), clearly and unambiguously resigned all such rights, as far as the property of churchmen was concerned. *Si vero morte preoccupatus fuerit, pro salute anime ejus ecclesie consilio eadem fiat distributio.* He also confirmed full rights of making wills to churchmen. We have already seen that his successors did not observe these provisions. (See *supra*, pp. 383-4, and also Pollock and Maitland, 1. 503.)

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 which redressed abuses springing from one root, namely, the exercise of the royal right of purveyance by the various agents of the local government.

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 their courts constantly from district to district. During these royal progresses the difficulties must have been great of finding sufficient food for the enormous retinues surrounding the king in times of peace, and for his armed levies in time of war. It was to the interests of the community as a whole that the work of government and of national defence 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, such necessaries as 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 times of peace, and was known as the prerogative of purveyance.[681] Unfortunately, the conditions under which supplies might be requisitioned were left vague: the privilege was therefore subject to constant abuse. In theory it was always spoken of as merely 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 often 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. What was worse, in the hurry of the moment, the king's purveyors often omitted the formality of paying altogether.

Magna Carta did not abolish purveyance, and placed no restrictions whatever upon its use for the legitimate and original 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.[682] 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 suitable 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, which had fallen into disuse during the Commonwealth, were abolished.[683] Yet in the following year a new statute[684] 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 in spite of its burdensome nature because of its absolute necessity, when confined to its original purpose of 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. The annoyance and hardships inseparable from such arbitrary interference with the rights of private property were thus increased tenfold, while ample discretionary authority was vested in a class of officials least qualified to use it, unscrupulous foreign adventurers hired by John 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 as an instrument of local administration.

(1) *The provisioning of castles.* Commanders of fortresses were left perfectly 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, on whom a compulsory sale was forced, consented to postpone the date of payment. The Charter of 1216 made a slight modification in favour of castellans. Payment for goods taken from inhabitants of 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 prove creditors who pressed unduly for payment. Under Henry's Charters, as under that of John, immediate payment had to be tendered to owners of goods who lived elsewhere than in this neighbouring town.[685]

(2) *The requisitioning of horses and carts.* The provisions of chapter 30, modified in subsequent re-issues, sought to prohibit sheriffs from exacting compulsory cartage from the property of freemen.

(3) *The 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.[686]

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. In addition to the constant friction kept up through many centuries by its employment as a means of supplying the wants of the king's household, two minor aspects of purveyance came into special prominence in later history.

(1) *The requisition of forced labour.* Hallam points out that the king's rights of pre-emption over such goods as he required 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 their 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."[687] Perhaps, however, such demands did not form a branch of purveyance at all, but were merely instances of illegal royal encroachments.

(2) *Billeting of soldiers in private houses.* This practice, 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.[688] Charles I. made an oppressive use of this branch of what seems to have been once a perfectly legal prerogative, punishing householders who opposed his unpopular measures by quartering his dissolute soldiery upon them, a practice branded as illegal by the Petition of Right in 1628.[689]

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681. See Blackstone, *Commentaries*, I. 287, for an often-quoted definition of purveyance.

682. 3 Edward I. c. 32.

683. 12 Charles II. c. 24, ss. 11-12.

684. 13 Charles II. c. 8.

685. 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 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 provided (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.

686. For details, see under cc. 30 and 31.

687. Hallam, *Middle Ages*, III. 221.

688. See *Rotuli de oblatis et finibus*, 119.

689. See 3 Charles I. c. 1.

CHAPTER TWENTY-NINE.

Nullus constabularius distringat aliquem militem ad dandum denarios pro custodia castri, si facere voluerit custodiam illam in propria persona sua, vel per alium probum hominem, si ipse eam facere non possit propter racionabilem 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 freehold estates. 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.[690] It was probably this duplication of duties that prevented castle-guard from hardening into a separate tenure.[691] The right to enforce these obligations was naturally entrusted to the constables of the various castles whose duty it was to keep their garrisons at their full strength. John, however, 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. Castellans were, therefore, in the habit of demanding money even from those who offered personal service. What was worse, when the freeholder had 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 forms of this abuse were absolutely forbidden in 1215. 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.[692]

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690. See the examples collected in Pollock and Maitland, I. 257. See also in *Rotuli de oblatis 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."

691. Cf. *supra*, p. 70.

692. *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.

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 any other person, shall take the horses or carts of any freeman for transport duty, against the will of the said freeman.

The Charter here returned to the subject of purveyance, one branch of which it 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 use of the Crown without the owner's consent; that is to say, they could not be requisitioned at all. The clause, however, was carefully limited to freemen; the inference is plain, that the horses and implements of villeins were left at the disposal of the Crown without leave asked or price paid for their use. The relative chapter of the reissue of 1216 practically restored this branch of purveyance; consent of the owner, even when a freeman, need not be obtained, provided hire was paid at the rates sanctioned by ancient custom. Those rates, however, were definitely stated, namely, 10d. *per diem* for a cart with two horses, and 1s. 2d. for one with three.[693] Thus 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. Here again we have evidence of care to make it clear, if not that villeins were to have no part or parcel in the benefits of the great Charter, at least that their rights, if they had any, could not stand against the more important rights of the Crown. Yeomen and small freeholders were also left exposed to this annoying form of interference. Abuses continued. Purveyors would occasionally lay hands on all available 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, would pay ransom money to regain possession. Edward I. enacted that perpetrators of such deeds should be "grievously punished by the marshals," if they were members of his household, and therefore 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.[694]

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693. 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.

694. See 3 Edward I. c. 32.

CHAPTER THIRTY-ONE.

Nec nos nec ballivi nostri capiemus alienum boscum ad castra, vel alia agenda nostra, nisi per voluntatem ipsius cujus 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 estates 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.[695] 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.[696]

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695. 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."

696. See Coke, *Second Institute*, 36.

CHAPTER THIRTY-TWO.

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

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 the Property of Felons.* The Crown had gradually established certain rights, not too clearly defined, in the property of all criminals formally indicted and sentenced for felony. John, here as elsewhere, took full advantage of the vagueness of the law to stretch prerogative to its utmost limit. Magna Carta, therefore, attempted to define the exact boundaries of his rights. The old customary law seems invariably to have given the chattels of a condemned man to the owner of the court which tried him, and the desire for such perquisites must have created an unfortunate bias against the accused. It was not possible, however, to adopt so simple a rule with regard to the real estate of felons, for this was claimed as escheat by the feudal lord from whom the lands were held. Custom gave the land of a felon to his feudal lord, and his chattels to the lord who tried him. The Crown gradually encroached on the rights of both, claiming the real estate of felons, as against mesne lords, and their personal estate, as against the lords who had jurisdiction.

(1) *The felon's lands.* No difficulty arose when Crown tenants were convicted, since there 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.[697] 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, who makes it perfectly clear that before the lands were given up at the expiration of the year, the houses were thrown down and the trees rooted up, thus purging away the taint of crime and enriching the exchequer with the price of the timber and building materials.[698] The exercise of this right of waste inflicted upon the lord of the escheat an amount of damage out of all proportion to the benefit it brought to the king. The lord, when at last he entered into possession of the escheated lands, found a desert, not a prosperous manor.[699]

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 for this, to hand over the land with all buildings and appurtenances intact.[700] 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.[701] 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.[702] A year was by no means too long for a thorough exercise of the right of waste.

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.[703] Magna Carta prohibited such abuses for the future; prompt evacuation must henceforth take place when the year was over; and this settled the law for centuries.[704] 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.[705]

(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 entire 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 what was practically a royal monopoly of jurisdiction over felons; and this logically implied a monopoly over their chattels as well—an inference confirmed by the express terms of article five of the earlier Assize. As the list of "pleas of the Crown," which is in this connection identical with the list of "felonies," grew longer, so this branch of royal revenue increased proportionately at the expense of the private owners of "courts leet." Even in the ten years between the criminal codes of 1166 and 1176, two new offences were added to the list, forgery and arson. The goods of all outlaws and fugitives from justice likewise fell to the exchequer—the sheriff who seized them being responsible for their appraised value.[706]

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 forfeit 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."[707]

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 already been shown[708] 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 lawful 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.[709]

If the prisoner was acquitted or died before conviction, then 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 the burning of a house, had died in gaol *non convictus*. As the *Pipe Roll* clearly states, his chattels did not pertain to the king.[710]

(2) *Conviction.* If the sheriff presided over all preliminary procedure connected with indictment, 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.[711] Prior to 1215 the usual test, in accordance with the Assize of Clarendon, was the ordeal of water in the ordinary case, or of the red-hot iron in the case of men of high rank, or of women. If the suspected man 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 guilty pronounced by what was virtually a petty jury, became the normal "test" which 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 thus "standing mute," as the phrase was, make his own "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 to submit to a jury's verdict was theoretically recognized, barbarous measures were in reality adopted to compel consent. The Statute of Westminster in 1275[712] directed that all who refused should be imprisoned *en le prison forte et dure*. The object seems to have been to ensure that obstinate offenders should not escape altogether unpunished, although they saved their property by avoiding a technical conviction. This

statutory authority for strict confinement, however, was very liberally interpreted by the agents of the Crown, who treated it as a legal warrant for revolting cruelties, aimed at compelling the stubborn to put themselves upon a jury. Food and drink were virtually denied to them, a little mouldy bread and a mouthful of impure water only being allowed them 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 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.[713]

(3) *Attainder.* Coke in commenting on this passage draws a further distinction between "conviction" which resulted immediately either from a confession or from a verdict of guilty, and "attainder" which required in addition a formal sentence by the judge. In his age, apparently, it was the sentence of attaint which implied the 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 at all in 1215, must have been quite immaterial then. It was under the Tudor sovereigns that the doctrine of the penal effects of attainder was fully elaborated. When sentence was passed on a felon, a blight as it were fell immediately upon him: his blood was henceforth in the eye of the law impure, and his kindred could inherit nothing that was his or that came through him. No one could be treated as a blood relation of one whose entire blood was tainted; and the Crown naturally reaped the profit.[714]

A series of statutes of the nineteenth century modified the harshness with which this rule bore on the felon's innocent relations;[715] and finally the Forfeiture Act of 1870[716] abolished "corruption of blood" and deprived the

Crown completely of all interest in the estates of felons, alike in escheats and in chattels. Thus the word “attainted” has become practically obsolete, and the distinction insisted on by Coke has ceased to have any importance in modern law. A 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.

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697. Pollock and Maitland, II. 500, consider that the present chapter had a distinct influence in accentuating this twofold classification of crimes.

698. 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.

699. 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.

700. *Second Institute*, p. 36.

701. 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.

702. Cf. *supra*, pp. 244-6.

703. 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.”

704. 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.

705. *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.

706. Madox. I. 344-8, cites from the *Pipe Rolls* many examples.

707. This case is cited by Madox, I. 347, from 18 Edward I.

708. *Supra*, p. 108.

709. See Bracton, II. *folio* 123, and *folio* 137.

710. *Pipe Roll*, 2 John, cited Madox, I. 348.

711. Cf. *supra*, c. 24.

712. 3 Edward I. c. 12.

713. 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.

714. This fiction of corrupt blood was apparently based in part on a false derivation of the word "attainder." See *Oxford English Dictionary*.

715. *E.g.* 54 George III. c. 145, and 3 and 4 William IV. c. 106, s. 10.

716. 33 and 34 Victoria, c. 23.

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 coast.

The object of this provision is open to no reasonable grounds of doubt; it was intended to remove from rivers all obstacles likely to interfere with navigation. The full importance of such a measure can only be understood when the deplorable condition of the few roads which existed in the Middle Ages is kept in view. The water-ways were the great avenues of commerce; when these were blocked, the townsmen and traders suffered loss, while those who depended on them for their necessaries, comforts, and luxuries, shared in the general inconvenience. Magna Carta intervened in the interests of all classes, and demanded the immediate removal of obstructions which interrupted inland traffic. Only one class of impediments indeed was mentioned, "kydells" (or fish-weirs), not because of the purposes to which these were put, but because they were the form of obstruction which called for repressive measures at the moment. This word, whatever narrower technical meaning it may have borne in later days, seems to have been used by the framers of Magna Carta in a wide general sense, as applying to all fixed and bulky contrivances or "engines" intended to catch fish, and likely to interfere with the free passage of boats.[717]

It has been gratuitously assumed that the motive for prohibiting these "kydells" must have been of a similar kind to the motive for constructing them; and that therefore the object of the present chapter was to prevent the Crown or others from acquiring a monopoly of rights of fishing to the exclusion of the public. Law courts and writers on jurisprudence for many centuries uniformly endorsed this mistaken view, and treated Magna Carta as an absolute prohibition of the creation of "several" (or exclusive) fisheries in tidal waters.[718] Although this legal doctrine has been frequently and authoritatively enunciated, it rests undoubtedly on a historical

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-coast*." It would have been a manifest absurdity to allow the creation of monopolies of taking fish in the open seas, while insisting on perfect freedom of fishing in rivers, the banks of which were private property. The sense is quite clear: no objection was taken to "kydells," whatever they might be, 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 of Magna Carta, 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 gorces, mills, weirs, stanks, stakes, and kydells."[719] 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 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.[720]

So far as the 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 all *kydelli* in the Thames and Medway had been purchased from Richard I. for 1500 marks, and a further sum had been paid to John to have this confirmed. The charter of Richard I. is dated 14th July, 1197; and that of John, 17th June, 1199. Each king declared, in words practically identical, that Hubert Walter, Archbishop of Canterbury, and others had pointed out "that great detriment and discommodity hath grown to our said city of London, and also to the said realm by occasion of the said kydells." Accordingly each charter declared that the king has "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 of 1199 went further than that of Richard, making it clear that the prohibition referred to the Medway as well as to the Thames, and granting the right to inflict a penalty of £10 upon anyone infringing its provisions.[721]

Magna Carta merely confirmed, and extended to all rivers, a prohibition already secured by the Londoners specially for their own river. The provision was repeated in the reissues of Henry III. The citizens, however, did not rest content with a clause in a general enactment, but purchased for 5000 marks 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.[722]

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717. 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," and also as "an arrangement of stake-nets on the sea-beach for the same purpose."

718. 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.

719. 25 Edward III., stat. 3, c. 4.

720. 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.

721. It seems to have been generally assumed that these charters conferred positive as well as negative privileges on the citizens of London; that not merely were obstructions to navigation thereby prohibited in their interests, but that wide rights of administration and jurisdiction over the waters of the Thames were conferred on the city authorities (rights which previous to 1197 had been exercised, it is assumed, by the Constable of the Tower of London). See Noorthouck, *New History of London* (1773) p. 36, and Luffman, *Charters of London* (1793) p. 13. The latter says of Richard's grant in 1197: "By this charter the citizens became conservators of the river Thames." The *Patent Rolls* of 33 Edward I.; 5 Edward III.; 8 Edward III., *etc.*; contain Commissions of Conservancy. See Moore, *ibid.*, p. 176. In 1393 the statute of 17 Richard II. c. 9 granted authority to the Mayor of London to regulate weirs likely to destroy fish, and generally to "conserve" the Thames from Staines downwards, along with the Medway.

722. See *Rotuli Cartarum*, under the year 11 Henry III.

CHAPTER THIRTY-FOUR.

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

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

In extorting from John a solemn promise to restrict the use of the particular writ here referred to, the barons gained something of infinitely greater value than a petty reform of court procedure; they committed their enemy to a complete reversal of a line of policy vigorously and consistently pursued for at least half a century. The process by which the jurisdiction of the king's courts was steadily undermining that of the feudal courts was now to be suddenly arrested. Magna Carta by this apparently inoffensive clause was grappling in reality with an urgent political 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 the Feudal Jurisdictions.* The class of writs, called from their initial word "Writs *praecipe*," was a large one, and freely used by the Crown for issuing peremptory orders of various kinds to its officers and others. This provision of Magna Carta had special reference to one type of these writs only, the so-called *praecipe quod reddat*.[723] These were intended to inaugurate, before the king's justices, pleas for determining the ownership of property either by battle or by grand assize—preferably the latter. They were called "Writs of Right," because they treated of questions of title, not merely questions of possession.

The form of a *praecipe quod reddat*, as actually issued from the Chancery of Henry II. (who invented it), is given by Glanvill, and its terms illustrate the insidious methods by which the Crown encroached on feudal jurisdictions.[724] The writ was directed to the sheriff, and began bluntly: —"Command" (*praecipe*) A. "to give back" (*quod reddat*) to B. a piece of ground there specified, or alternatively, "to explain why he had not done

so" (*ostensurus quare non fecerit*). The real object does not, however, appear upon the surface. It was by no means intended that the man to whom the command was issued, should abandon his claim without discussion. He would naturally take the alternative allowed him, namely, appear before the king's justices and there "show cause" why he had not obeyed the order, by proving (if he could) a better title to the property in dispute than that alleged by the rival claimant. 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 *praecipe* was thus mainly an ingenious device for "evoking" a particular cause from the manorial court to the king's court.[725]

Henry II., in inventing or systematizing the legal procedure known as "the writ process," because its leading feature was that it forbade any action to be begun without a royal writ, had two objects in view. While reforming by its instrumentality 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, step by step, 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 defendant'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."[726]

Now, the chief instrument devised by Henry for effecting such usurpations was precisely this particular form of the writ *praecipe* (or Writ of Right).[727] Tenants whose titles were challenged gladly purchased such writs, as the only way to escape trial by combat; and John frequently issued them to the prejudice of feudal lords, whose jurisdiction was thus curtailed. The barons in 1215 considered this a grievance; and Magna Carta in demanding its redress deliberately attempted to arrest the process of royal usurpation. The tide must be turned back; the system of feudal justice, now fast becoming obsolete, must in its entirety be revived. Each freeman or baron must be left without competition as the sole source of justice to his own tenants in all pleas of land, unmolested by these new-fangled writs of right. It was not intended, of course, to abolish completely the extensive and useful class of writs *praecipe*; but merely to prevent the Crown using them as an engine of encroachment upon manorial jurisdictions.[728] The king might keep his own court and issue writs to his own tenants; but let him respect the courts of others. 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 it to the great king who had invented it.

The present chapter must, therefore, be regarded as containing one of the most reactionary provisions of the entire Charter. The barons had, at last, succeeded in compelling John to promise a complete reversal of a central part 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."[729] That may well be; but John had already more than once rejected this proposal with violence. 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.[730]

II. *Influence of this Provision on later Legal Development.* One important question still remains: Was this provision observed in practice? The answer is partly Yes, but chiefly No. Its letter was stringently enforced; but its spirit was evaded. (1) 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 all under-tenants, who were thus left to find redress at the feudal court of the magnate from whom they held their land.[731] The measure thus forced on the Crown in the selfish interests of the baronage inflicted hardship on tenants of mesne lords, in whose faces the doors of the king's tribunals, opened to them by Henry II., were once more closed in all pleas touching their freeholds. In such cases the court baron of their lord was now their only source of 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 this was rendered difficult by an obstacle which the Crown made the most of.[732] They had difficulty in getting together twelve knights willing to act as jurors; and they could not force them to give a sworn verdict against their will. The king might compel; but a mesne lord could only persuade. Men of the required status objected to the waste of time, and dreaded the danger of being punished for false verdicts, inseparable from the duty of serving on a grand assize. Whatever hopes the barons may have 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."[733] 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.[734]

(2) While the letter of Magna Carta was strictly kept, its spirit was evaded. It was impossible to give loyal effect to an enactment which went directly counter to the whole stream of progress. Manorial justice was falling fast into disrepute and abeyance, while royal justice was becoming more efficient and more popular, and was soon to rid itself of all competitors and obtain a monopoly. Under-tenants, deprived of access to the king's court by the direct road of the writ *praecipe*, sought other and

more tortuous modes of entrance. Legal fictions were devised. The great 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 slow and wary steps, in the teeth of bitter opposition from the powerful owners of seignorial courts. The process adopted consisted of a series of formal changes in the technical procedure of the king's courts. Its key lies in the ingenious original (or originating) writs invented by Crown lawyers, which really effected one thing while professing to effect something quite different. These new writs were known as writs of entry and came half-way between writs of right (or writs *praecipe*) and the petty assizes; half-way between writs commencing actions dealing with title (and therefore attacked by chapter 34 of Magna Carta) and writs dealing with possession (and therefore welcomed by chapter 18). 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, 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 cheat mesne lords out of the rights secured to them by the present chapter. In Edward's reign, then, the legal machinery invented for this purpose was brought to perfection, so that thereafter no action relating to freehold was ever again tried in the courts baron of the magnates. All such pleas were, in direct violation of the spirit of Magna Carta, decided in the courts of the king.[735]

The claimant, then, had no need to infringe the prohibition against the writ *praecipe* when he could obtain another writ, equally effective, under a different name. A writ of entry was, indeed, to a peaceable plaintiff, infinitely 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 writ *praecipe*, came to prefer the

more modern substitute; and clause 34 of Magna Carta was thereafter virtually obsolete.

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. [736]

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723. The numerous varieties of writs *praecipe* are arranged by Coke (*Second Institute*, p. 40) in three groups, according to the nature of the orders they were intended to convey, viz.:—(a) *praecipe quod reddat*; (b) *quod permittat*; and (c) *quod faciat*. Those specially referred to in this chapter are of the first type.

724. The writ ran as follows:—*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, summone 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.* See Glanvill, I. c. 6.

725. Cf. Stubbs, *Const. Hist.*, I. 576.

726. See Bigelow, *Hist. of Procedure*, 78. Glanvill, read between the lines, contains admissions which support this view. Friend of prerogative as he was, he shows consciousness of a distinction between the proper and improper use of the royal jurisdiction. Thus in I. c. 3, he speaks of the king's courts as normally dealing with "pleas of baronies" (*i.e.* litigations concerning Crown fiefs); in I. c. 5, he speaks of what he evidently considers an abnormal expansion of this jurisdiction to any plea anent a free tenement

or fief, if the Crown so desired,—that is, the Crown claimed an option, in circumstances admitted to be abnormal, of deciding pleas as to fiefs held under mesne lords. This distinction is identical with that on which the present chapter of Magna Carta is based.

727. The normal procedure seems to have included the following steps: (*a*) a claimant in the court of the lord of the fief offers to prove by battle a better title than the tenant in possession; (*b*) the tenant applies to the king to have the issue decided by grand assize; (*c*) a writ *praecipe quod reddat* is then issued in the form given by Glanvill, I. c. 6, (already cited) virtually forbidding the claimant to proceed elsewhere than before the king; (*d*) a second writ follows in the form given by Glanvill, II. c. 8, forbidding the lord "to hold in his court the plea between the litigants M. and R. because M. the tenant has put himself upon my assize." Cf. *supra*, c. 18.

728. Cf. Bracton, folio 281. See also Bracton's *Note Book*, case 1215, where a certain writ *praecipe* was held not to be struck at by Magna Carta, since it did not take any man's court away.

729. Pollock and Maitland, I 151.

730. 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 the villeins of mesne lords. Perhaps the object of the addition is to make it clear that there was no interference with the king's rights over the holdings of his own villeins on royal demesne.

731. The writs, thus restricted so that only tenants *in capite* could obtain them, were thereafter known as writs *praecipe in capite*. Under that name the writ appears in Coke's version of the charter of Henry III. (*Second Institute*, p. 38), and in the translation given in the *Statutes at Large* of the reissue of 1225. There is no authority in any text of Magna Carta for the addition of the words *in capite*, and the explanation of their presence in these versions must be sought in the tendency of lawyers in an age long subsequent to 1215 to re-edit Magna Carta in the technical language of their own day. Coke emphasised the restriction of this remedy to Crown tenants. "No man ought to have this writ out of the Chancery upon a suggestion, but

oath must be made, before the granting thereof, that the land is holden of the king *in capite*," (p. 38), and he illustrates what he says by reference to two cases drawn from the reign of Edward I.

732. 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 at least, exceptional it is true, John acquiesced in grand assizes being held in feudal courts. On 4th May, 1201, he granted licence to Hubert Walter (and his successors) to hold them for his tenants in gavelkind, a tenure peculiar to Kent. See *New Rymer*, I. 83.

733. See article 18 (*Select Charters*, p. 404). Other articles show a similar strong bias against seignorial justice. Cf. chapter 29 of the Petition of the Barons (*Select Charters*, 386), and the comment of 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."

734. There was, however, a partially successful attempt made to revive feudal jurisdictions as late as the reign of Edward III. See Stubbs, *Const. Hist.*, II. 638-9.

735. Technical details are admirably 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.

736. Cf. Pollock and Maitland, I. 151, and *Sel. Pleas in Manorial Courts*, already cited.

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 halbergectorum, 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), to wit, two ells within the selvedges; of weights also let it be as of measures.

This chapter re-enacted an important ordinance of Richard I., usually known as the Assize of Measures, but sometimes as the Assize of Cloth. That ordinance, the exact date of which is 20th November, 1197, was, according to modern conceptions of the proper sphere of government, partly commendable and partly ill-advised. It showed, on the one hand, a praiseworthy desire to set up definite standards of weights and measures, uniform throughout all parts of England. It strove thus to overcome the serious inconvenience experienced by traders, who met with varying standards as they moved with their wares from place to place. What was of more importance, the assize sought to obviate also the frauds frequently perpetrated upon buyers by unscrupulous merchants under the 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 ordinance of Richard went much further than modern ideas of *laissez faire* would tolerate. In particular, legitimate freedom of trade was interfered with by the cloth regulations reported by Roger of Hoveden.[737] No cloth, he tells us, was to be woven except of a uniform width, namely, "two ells within the lists."[738]

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, apparently, 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 each 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, whether by their own admission or by failure in the ordeal (*confessus vel convictus*); 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.[739] 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,[740] an attempt not repeated in Magna Carta.

The same author who gives us the text of the ordinance of 1197 tells us also that its terms were found to be too stringent, and had to be frequently relaxed in practice.[741] This was done in 1201. The king's justices, we are told, wished to seize the cloth of certain merchants on the ground that it was less than the legal width. They compromised, however, by accepting a great sum of money "to the use of the king and to the damage of many." Thus Hoveden denounces what he regards as an unlawful bargain between the justices and the traders for injuring buyers by evading the strict letter of the ordinance.

Many examples of evasion may be found in the *Pipe Rolls* both before and after Magna Carta. The justices, indeed, were usually more bent 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 also mulcted in one mark for performing their duty negligently—an exact illustration of the words of the ordinance.[742] 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.[743] Merchants frequently paid heavy fines to escape the ordinance altogether.[744]

When the barons in 1215 insisted upon John enforcing his brother's ordinance in all its rigour, 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 all subsequent charters, it seems never to have produced much effect. The difficulty of enforcing such provisions in their strictness was great, and evasion continued. One example may suffice. In

the second year of Henry III.[745] 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, the provisions of Richard's Assize of Measures and of John's Assize of Wine were still enforced. In 1219 a Lincolnshire parson, with a liberal conception of the scope of his parochial duties, had to pay 40s. for wine sold *extra Assisam*.[746] Parsons, apparently, might engage in trade, but only if they conformed to the usual regulations.

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737. R. Hoveden, IV. 33-4.

738. 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 I 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."

739. Cf. *supra*, c. 20, for "amercements," and *supra*, c. 24, for "custodes" of pleas (or coroners).

740. See R. Hoveden, IV. 100.

741. See Hoveden, IV. 172, and Stubbs, *Const. Hist.*, I. 616.

742. See *Pipe Roll*, 4 John, cited Madox, I. 566.

743. See *Ibid.*

744. 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.

745. See *Pipe Roll*, cited Madox, I. 509.

746. *Pipe Roll*, 3 Henry III., cited Madox, I. 567.

CHAPTER THIRTY-SIX.

Nichil detur vel capiatur de cetero pro brevi inquisicionis 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 particular writ upon which such emphasis is here laid had been invented by Henry II. to obviate the judicial duel in certain cases, by allowing the accused man virtually to refer the question of his guilt or innocence to the sworn 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,[747] 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. Hence "combat" became the normal mode of deciding all serious disputes among the upper classes. Even from the first, however, it seems not to have been competent for property of less than 10s. in value,[748] 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, or was at least so lax and spasmodic in

performing that function as to leave many wrongdoers unpunished. Appeal followed by battle was probably in its origin a form of legal procedure substituted for the older blood-feud.[749] Those who had suffered wrong would be more readily dissuaded from their vendetta if they were allowed instead the right of judicial duel under fair conditions laid down by the court. The Norman trial by combat was thus a survival from an earlier stage of society when the wronged person, not the magistrate, had been the avenger of crime; and this explains several peculiarities—why, for example, when the accused had uttered "that hateful word craven,"[750] thus confessing himself vanquished and deserving a perjurer's fate, the victorious accuser was entitled to his vengeance, even in the face of a royal pardon. When Henry of Essex, constable and standard-bearer of Henry II., accused by his enemy, Robert de Montfort, in 1163, had been worsted in the combat, the royal favour could not shield him, though apparently the king's connivance enabled him, by renouncing his possessions and becoming a monk, and therefore dead in law, to escape actual death by hanging.[751] It would seem that at an early date the whole procedure had resembled even more closely a legalized private revenge, since the appellant who had vanquished his foe was allowed personally to put him to death. "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."[752]

The evils of trial by combat are obvious. From the first it was dreaded and avoided 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 great statesman, endowed with the ardent instincts of a reformer, despising utterly all obsolete and irrational modes of procedure, and quite devoid of reverence for tradition, trial by combat was entirely abhorrent. He would gladly have abolished it out and out if he had dared; but he prudently followed the more subtle policy of slowly 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.[753] (1) Every facility was afforded the parties to a civil suit who were willing to forego the *duellum* voluntarily. Henry placed at their disposal, as a substitute, a procedure which had by his ancestors been specially 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 defendant the option of a peaceful settlement even when the claimant preferred battle. The men to whose oaths such cases were referred were known as an *assisa*, not a *jurata*, since both litigants had not consented. The three various groups of assizes welcomed by the barons in chapter 18 have already been discussed. The *assisa*, like the *jurata*, could be applied only to civil pleas. (3) Attempts were made to discourage trial by combat in criminal pleas also by discouraging the exercise of the right of private "appeal," its natural prelude. The corporate voice of the accusing jury was made as far as possible to supersede the individual complaint of the injured party offering battle. 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.[754] (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 which 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*,[755] was intended to protect from duel men unjustly appealed of homicide. Rash or malicious accusations might be raised by turbulent knights, who made fighting their pastime, in order to gratify a grudge against traders or other men of peace, and many an appealed man was glad to purchase from the king permission to escape by assuming the habit and tonsure of a monk;[756] 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 royal chancery a writ known by that name, which referred the preliminary plea thus raised to the verdict of a sworn body of twelve recognitors drawn from his own locality. If his neighbours upheld the plea all further proceedings on the appeal were quashed: the *duellum* was avoided.[757] A similar privilege was afterwards extended to all those guilty of homicide in self-defence, or of homicide by misadventure, not of deliberate murder.[758] Soon every man appealed of murder, whether guilty or not, alleged as a matter of course that

he had been accused groundlessly and maliciously, mere "words of common form." This expansion of the writ's sphere of usefulness was accompanied by another change. The main issue of guilt or innocence, not merely the preliminary pleas, came to be determined by the neighbours' verdict,[759] which, whether for or against the accused, was treated as final. No further proceedings were necessary: none were allowed. The *duellum* had at last been successfully elbowed aside, although it was not abolished until 1819.[760]

III. *Subsidiary Uses of the Writ.* This inquest of life and limb, devised as a means of substituting a sworn verdict for the *duellum* in cases of homicide, has often been claimed as the direct antecedent of, if not as identical with, the procedure which in the seventeenth century became so valuable a bulwark of the subject's liberty, under the name of *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.[761]

The opinion generally though erroneously held, is not without excuse; for the writ mentioned by Magna Carta, besides effecting its main purpose, was put to another and subsidiary use, which bears a superficial resemblance to that served by the *habeas corpus* of later centuries. 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, in the normal case, no right to be released on bail, a privilege allowed to those suspected of less grave crimes. This was hard in cases where the accused was the victim of malice, or guilty only of justifiable homicide. Prisoners, placed in such a plight, might purchase from the Crown, always ready to accept fees in a worthy cause, royal writs which 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.[762]

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 (possibly even before the date of Magna Carta) 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,[763] declares it to be

iniquitous that innocent men accused of homicide 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 the tearful friends of accused men scarcely applies to John, who listened only to suitors with long purses which they were ready to empty into his exchequer. The writs which liberated homicides had become a valuable source of revenue. Sheriffs were frequently reprimanded for releasing prisoners on bail without the king's warrant, but, in spite of heavy amercements, they continued their irregularities, either through favour to individuals or in return for bribes. Thus, in 1207, Peter of Scudimore paid to the exchequer a fine of 10 marks for setting homicides free upon pledges, without warrant from the king or his justices.[764] In that year, John repeated his orders, strictly forbidding manslayers to be set free upon bail, unless by royal command, until they had received judgment in presence of the king's justices.[765]

To John, then, the excessive and arbitrary 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, contained in the present chapter, 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 be held speedily, and if the jury decided that the accusation had been made maliciously, or that the slaying had been committed in self-defence or by accident, the Crown was to be informed of this. Thereafter, from the chancery would be issued a second writ, the form of which is also given by Bracton (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. Such writs, however, if in one sense "freely" issued, had always to be paid for. A certain Reginald, son of Adam, when accused in 1222, offered one mark to the king 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" (*per odium et atiam*) which William de Ros, appellant's lord, bore to Reginald's father "*vel per verum appellum*."[766]

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.[767] 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. The Statute of Westminster, I., for example, after a preamble which animadverted on the manner in which sheriffs impannelled juries favourable to the accused, provided that inquests "shall be taken by lawful men chosen out by oath (of whom two at the least shall be knights) which by no affinity with the prisoners nor otherwise are to be suspected."[768] The Statute of Gloucester, on the other hand, ordered the strict confinement, pending trial, of offenders whose guilt was apparent.[769] 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."[770]

The writ in question was in use in the year 1314,[771] and seems never to have been expressly abolished, but to have sunk gradually into neglect, as appeals became obsolete and commissions of gaol delivery were more frequently held.

IV. *Later History of Appeal and Battle.* The right of private accusation was restricted only, not abolished, by Henry II. and his successors. It could not be denied to any injured man, who was not suspected of abusing his right. Prosecutions in the king's name 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 suspense for ever; 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.[772] To ensure that the accused should escape all risk of a double prosecution for the same crime, it was necessary that the Crown should supplement the provisions of this act by delaying to prosecute until the year and day had expired. This rule was followed in 1482. Such immunity from arraignment at the king's suit for the space of twelve months (combined

with the provisions of the Statute of Gloucester) would undoubtedly have obviated the possibility of two trials for one offence; but it produced a worse evil of a different kind, by facilitating the escape of criminals from justice. After experience of its pernicious effects, this rule was condemned by the act of parliament which instituted the Star Chamber.[773]

This remedied the more recent evil, but revived the old injustice; the same statute enacted that acquittal should not bar the right of appeal of the wife or nearest heir of a murdered man. Thus, once again, a man declared innocent by a jury might find himself still exposed to a second prosecution. This unjust anomaly remained without formal redress until the nineteenth century; and in 1817 the British public was startled to find that a long-forgotten legal 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 which suggested foul play. Suspicion fell on Abraham Thornton, who had been in her company on the night when she disappeared. After indictment and trial at Warwick Assizes on a charge of rape and murder, he was acquitted. The girl's eldest brother, William Ashford, was not satisfied by what was apparently a perfectly honest verdict. He tried to secure a second trial, and with this object claimed the ancient right of appeal of felony, which the judges did not see their way to 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. The judges had to admit his legal right to defend himself against the appeal "by his body," and Thornton thus successfully foiled the attempt to force him to a second trial, as the court never contemplated the possibility of a medieval judicial combat being actually fought in the nineteenth century. The appeal was withdrawn and the proceedings terminated.[774]

The unexpected revival of these legal curiosities of an earlier age led to their final suppression. In 1819 a Statute was passed abolishing proof by battle alike in criminal and in civil pleas; and the right of appeal fell with it.[775]

747. See *supra*, pp. 103-6.

748. See *Leges Henrici primi*, c. 69, §§ 15-16.

749. Cf. *supra*, c. 20.

750. "*Illud verbum odiosum quod recreantus sit.*" Bracton, *folio* 153.

751. See Jocelyn of Brakelond, pp. 50-2.

752. Blackstone, *Commentaries*, IV. 316.

753. Cf. *supra*, 107–9, and also 158-163.

754. Some particulars are given under c. 54.

755. 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 waranto fecerunt sacramentum illud de vita et membris*, without the king's licence. See Bracton's *Note Book*, case 592.

756. Madox, I. 505, has collected instances.

757. Cf. Pollock and Maitland, II. 585-7, and Thayer, *Evidence*, 68.

758. It was extended in another direction also: some of the feudal courts adopted a similar procedure in false 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.

759. See Pollock and Maitland, II. 586.

760. 59 George III. c. 46.

761. The early history of *habeas corpus* is traced by Prof. Jenks in a learned and interesting article in the *Law Quarterly Review*, VIII. 164. The writ *de odio* was obsolete at a date prior to the invention of the *habeas corpus*.

762. Cf. Brunner, *Entstehung der Schwurgerichte*, p. 471.

763. See *folio*, 123.

764. See *Pipe Roll*, 8 John, cited Madox, I. 566.

765. See *Rot. Pat.*, I. 76, cited Madox, I. 494. The date is 8 November, 1207.

766. See Bracton's *Note Book*, case 134, and cf. case 1548.

767. Stephen, *Hist. Crim. Law*, I. 242 (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.

768. 3 Edward I. c. 11.

769. 6 Edward I., stat. 1, c. 9.

770. 13 Edward I. cc. 12 and 29.

771. See *Rot. Parl.*, I. 323.

772. 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 which followed 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. by the Parliament which deposed him, was that "in violation of Magna Carta" (that is, probably, of chapter 39) persons maliciously accused of treasonable words were tried before the constable and marshal, and although they might be "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, the Statute 1 Henry IV. c. 14 provided that no appeals should in future be held before Parliament, but only before the Court of the Constable and Marshal.

773. See 3 Henry VII. c. 1, s. 11. This statute emphasized how 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."

774. See *Ashford v. Thornton*, 1 B. and Ald. 405-461.

775. See 59 George III. c. 46.

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 petty 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.

By these provisions the Charter reverts once more to the subject of wardship, laying down three rules which will be better understood when their sequence is somewhat altered, the second being taken first.

(1) *Ordinary wardship.* The reason for claiming wardship from lands held in chivalry, namely, that a boy tenant could not perform military service, did not apply to fee-farm, to socage, or to burgage. There was much looseness of usage, however; and of this John took full advantage. The Charter stated the law explicitly; wardship was not due from any such holdings, except in the somewhat anomalous cases where lands in fee-farm expressly owed military service.[776] 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, just as in the case of great serjeanties. In Littleton's time, the law had been changed. Petty serjeanties were then exempt.[777]

(2) *Prerogative wardship.* When a tenant-in-chivalry died leaving two separate military fiefs held of different mesne lords, each of these lords enjoyed, during the minority, wardship over his own fief. This was perfectly 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.[778] 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 other free tenure. It was outrageous thus to claim prerogative wardship in respect of fee-farm, socage, or burgage lands, which were themselves exempt from ordinary wardship. John accordingly was made to promise amendment.[779]

(*b*) *Petty Serjeanties*[780] were in a slightly different position. Although Magna Carta did not abolish the Crown's rights of ordinary wardship over these, it forbade that that should form an occasion of prerogative wardship. The king might enjoy the custody of his own fief if he pleased, but not of the wider fiefs of others on that pretext.[781]

Prerogative wardship (even in the limited form admitted by Magna Carta) might involve a double hardship on the mesne lord deprived by it of the custody of his fief. Suppose that the common tenant held lands from a mesne lord on condition of, say, five knights' service, in addition to 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.[782]

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776. Cf. *supra*, pp. 66-70, and 75-7.

777. II. viii. s. 158.

778. 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.”

779. Glanvill, VII. c. 10, had laid it down that burgage tenure could not give rise to prerogative wardship.

780. See *supra*, p. 68.

781. See Bracton, *folio* 87 b. The *Note Book*, case 743, contains a good illustration. The motive for these restrictions was clearly 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 for which he rendered twenty arrows a year, and (ii) land of considerable value held in socage. The Crown took possession of both estates, on the assumption that the admitted right of 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 were refunded by the exchequer to the disappointed purchaser. See *Pipe Roll*, 5 Henry III., cited Madox, I. 325-6.

782. 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. 241.

CHAPTER THIRTY-EIGHT.

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

No bailiff for the future shall put any man to his "law" upon his own mere word of mouth, without credible witnesses brought for this purpose.

The evident intention of this provision was to prevent irregularities at the critical stage of a trial, when the *lex* appointed by the court was attempted. This word *lex*, in its technical sense, may be correctly 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. [783] In this passage of Magna Carta, it may be used in its widest connotation, but reasons will be immediately adduced for the belief that *ordeal* was specially present to the minds of those who framed it. Bailiffs, (the word is a wide one, including certainly the sheriffs and their underlings, and possibly also the stewards who presided in manorial courts) [784] had evidently been guilty of irregularities which public opinion of the day condemned. So much is clear: but authorities differ widely as to the exact nature of the abuse which is here prohibited.

I. *Probable Object of the Chapter.* The key is supplied by the words of article 4 of the Assize of Clarendon, the provisions of which still regulated the Crown's practice in criminal cases in the reign of John. That ordinance explains the procedure to be followed when robbers, murderers, or thieves, apprehended by the sheriffs upon indictment, were brought before the justices for trial: "and the sheriffs shall bring them before the justices; and with them they shall bring two lawful 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 identified with ordeal;[785] 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 verbal report of the indictment "*sine testibus fidelibus ad hoc inductis*" was not sufficient. The "county" and the "hundred" which had accused the prisoner must send representatives to bear record of the facts.[786]

The ordeal indeed was a solemn affair for which careful rules had been laid down. Every precaution was taken against the sheriff abusing his authority. His account of the indictment was checked by the presence of subordinate officials as well as of these members of the accusing jury. Moreover, lords of feudal courts, claiming this franchise, could only exercise it under royal warrant. Henry, the inventor of the system, sternly repressed all irregularities whether those of his own bailiffs or of the stewards of private lords.[787]

The same rules of procedure prevailed under John, who was less careful, however, than his father had been, to suppress irregularities. In Magna Carta he promised amendment. The presence of witnesses required by the Assize of Clarendon was once more insisted on as a check upon the capricious or unfair use of the ordeal. The Charter of 1216 repeated this provision without alteration. In 1217, however, 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, no longer so engrossed in pressing matters of state as they had been in the previous year, 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 they should appoint, when ordeal had been forbidden. 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 new Charter then made it clear that the provisions applied in 1215 to ordeal were to be extended to the other tests which were now being substituted for it. The "*ad legem*" of John's Charter became in the new version "*ad legem manifestam nec ad juramentum*," which might very well include battle and the decisions of jurors, as well as ordeal.[788]

II. *Medieval Interpretations of the Passage.* Ignorance of the exact 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.[789]

(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).[790] This last of the three interpretations thus suggested in the reign of Edward II. has its modern adherents, as will immediately be shown; but the discussion inaugurated in Plantagenet days has not yet received an authoritative settlement. It was discussed in the Court of Common Pleas so recently as 1700,[791] and historians at the present day differ as widely as do the lawyers.

III. *Modern Interpretations of the Passage.* No two of the recent authorities hold precisely similar opinions. Four views, at least, may be distinguished. (1) The provision is sometimes regarded as an attempt to prevent plaintiffs in civil suits from being treated with undue favour 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.[792]

(2) A second theory treats the clause as forbidding bailiffs (whether royal officers or manorial stewards) to use their authority to forward suits to which they happened to be parties. In certain circumstances, it would seem, the steward who presided as his master's representative over the manorial court claimed the right to put a defendant to his proof, without first

producing "suit" or its equivalent, a privilege, however, which he could exercise only once in every year. Royal bailiffs claimed this privilege, and that without any similar restrictions. One object of Magna Carta, in this view, was to reduce bailiffs to an equality with other litigants. No longer should their bare assertion enable them to dispense with the formalities which the court required from ordinary plaintiffs before putting their adversaries to the risk of "a law" or proof.[793]

(3) In marked contrast to these two theories, which read Magna Carta as preventing undue favour to plaintiffs, comes a third which regards it as forbidding undue favour to defendants. The Crown, it is pointed out, favoured Jews against Christians with whom they went to law. The 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."[794] 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.[795]

(4) A fourth theory reads the chapter as a prohibition of undue severity in criminal prosecutions. A formal indictment by the accusing jury must always precede the "trial." No bailiff ought to put anyone to the water or the red-hot iron upon suspicion, or private information.[796] Much may be said for this interpretation so far as it goes; but the Assize of Clarendon and Magna Carta agree in demanding something more. It was not enough that indictment should precede ordeal; they required that some members of the presenting jury who had made the accusation at the first diet should 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 verbal report must be corroborated by the testimony of representative jurors.

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783. 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 even further, so as 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-Normannica*, 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.

784. Cf *supra*, c. 24. Coke, *Second Institute*, p. 44, following the doubtful authority of the *Mirror of Justices*, extends it to all king's justices and ministers. The unqualified "*ballivus*" of this passage should, perhaps, be contrasted with the "*noster ballivus*" of cc. 28 and 30.

785. See article 12 where "*eat ad aquam*" is contrasted with "*non habeat legem*" of article 13 (*Select Charters*, 144).

786. The "*ad portandum recordationem comitatus et hundredi*" of the ordinance is exactly opposed to the "*simplex loquela sua*" of the Charter.

787. 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 of edition of Pipe Roll Society). 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.*). Apparently the bailiffs were sometimes described as the king's serjeants and sometimes as the sheriff's serjeants: the same 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.).

788. See Thayer, *Evidence*, 37, n. for a case of 1291, where "*ad legem manifestam*" can only mean trial by combat. The Statute of Westminster I. (3 Edward I. c. 12) described men refusing to put themselves on a jury's verdict, "*come ceaus qui refusent la commune ley de la terre*."

789. 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.

790. Cf. *supra*, pp. 101-2. 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.

791. See City of London *v.* Wood, cited *infra*.

792. 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 his 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."

793. This reading is emphasized by Brunner, *Entstehung der Schwurgerichte*, 199-200.

794. See J. M. Rigg's admirable preface to Sel. *Pleas from Rolls of Jewish Exchequer*, p. xii., and cf. *supra*, c. 10.

795. See *Ibid.*, p. 89, where the case is cited.

796. 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.

CHAPTER THIRTY-NINE.

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

No freeman shall be arrested, or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested; and we will not set forth against him, nor send against him,[797] unless by the lawful judgment of his peers and by the law of the land.

This chapter occupies a prominent place in law-books, and is of considerable importance, although there are reasons for holding that its value has been grossly exaggerated.

I. *Its Main Object.* It has been usual to read it as containing a guarantee of trial by jury to all Englishmen; as absolutely prohibiting arbitrary commitment; and as undertaking solemnly to dispense to all and sundry an equal justice, full, free, and speedy.[798] The traditional interpretation has thus made it, in the widest terms, a promise of law and liberty, and good government to every one.[799] A careful analysis of the words of the clause, read in connection with its historical genesis, suggests the need for modifications of this view. It was in accord with the practical genius of this great document that it should direct its energies, not to the enunciation of vague platitudes and well-sounding generalities, but to the reform of a specific and clearly defined group of abuses. Its main object was to prohibit John from resorting to what is sometimes whimsically known in Scotland as "Jeddart justice."[800] It 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 isolated cases, happily not numerous, John proceeded, or threatened to proceed, by force of arms against recalcitrants as though assured of their guilt, without waiting for legal procedure.[801] Complaint was made of arrests and imprisonments suffered "without judgment" (*absque judicio*); and these are the very words used in the "unknown charter"—"*Concedit Rex Johannes quod non capiet*

homines absque judicio."[802] Both the Articles of the Barons and Magna Carta expand this phrase. *Absque judicio becomes nisi per legale judicium parium suorum vel per legem terre*, thus guarding, not merely against the more obvious evil—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 judicium parium*: every judgment must be delivered by the accused man's "equals." The need for "a judgment of peers" was recognized at an early date in England.[803] It was not originally a class privilege of the aristocracy, but a right shared by all grades of freeholders; whatever their rank they could not be tried by their inferiors.[804] In this respect English custom did not differ from the procedure prescribed by feudal usage on the Continent of Europe.[805] 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 freeholding tenants assembled in the Court Baron of the manor. In either case judgments were given *per pares curiae*, who decided what "test" should be appointed, who thereafter sat as umpires while their accused "peer" carried this through to success or failure, and who finally pronounced a sentence in accordance with the result. Crown tenants and under-tenants alike complained that they were deprived by John of the only safeguard they could trust, the judgment of a full court of Englishmen of their own rank, who presumably, therefore, had no undue bias towards conviction. John, not here an innovator, but merely resorting wholesale to practices used sparingly and with prudence in earlier reigns, had set these rights openly at defiance. His political and personal enemies were frequently exiled, or deprived of their estates, by the judgment of a tribunal composed entirely of Crown nominees ready to give any sentence which John might dictate. Magna Carta promised a return to the recognized ancient practice. No freeman should henceforth suffer in person or in property as the result of a judgment by the professional judges forming the bench of Common Pleas, or the other bench known as *coram*

rege. This was to abolish not merely the abuses of John, but the system of Henry II., which he abused.

The varied meanings conveyed by the word "peers" to a medieval mind, together with the nature of *judicium parium*, may be further illustrated by the special rules applicable to four exceptional classes of individuals:—(*a*) all Jews of England and Normandy enjoyed under John's charter of 10th April, 1201, the right to have complaints against them judged by men of their own race. For them a *judicium parium* was a judgment of Jews.[806] (*b*) A foreign merchant, by later statutes, obtained the right to a special form of *judicium parium*—to a jury of the "half tongue" (*de medietate linguae*), composed partly of aliens of his own country.[807] (*c*) The peers of a Welshman seem, in some disputes with the Crown, to have been men drawn from the marches, and therefore unlikely to side entirely either with the English or with the Welsh point of view. Such at least is the most plausible interpretation of the phrase "*in marchia per judicium parium suorum*," occurring in later chapters of Magna Carta, and granting to the Welsh redress of wrongful disseisins.[808] (*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.[809] 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.[810]

(3) *Per legem terrae.* No freeman could be punished except in accordance with the law of England. These often-quoted words were used in Magna Carta with special though not perhaps exclusive reference to the narrow technical meaning of "*lex*" which was so prominent in 1215 and which has been already explained.[811] The Great Charter promised that no plea, civil or criminal, should henceforth be decided against any freeman until he had failed in the customary "proof"—whether battle, or ordeal, or otherwise.[812]

This 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 meaning 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 the wider expression "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.[813]

The Act of 1352, for example, after reciting the provision of Magna Carta at present under discussion, insisted on the necessity of "indictment or presentment of good and lawful people of the same neighbourhood where such deeds be done." Coke,[814] founding apparently on the terms of these fourteenth-century statutes, makes "*per legem terrae*" of the Charter 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 Right[815] 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, and applying to the rude system established by Henry of Anjou reforms more appropriate to the highly developed administration of the Tudors.

These glosses must be discarded; 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.

(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*.[816] Comparison with the 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 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 prosecutions 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.[817] 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.

(1) *Capiatur vel imprisonetur.* If these two words were literally interpreted, and the provision they embody strictly enforced, all orderly government would be at an end. When a crime has been committed, the offender must be arrested and provisionally detained, without waiting for any judgment, whether of peers or otherwise. A man accused of crime may, indeed, justly demand three things: a trial before condemnation, that the trial be not too long delayed, and that under some circumstances he should be meanwhile released on bail. Magna Carta goes further, promising complete exemption from arrest until judgment had been passed upon him. Here the barons extorted a wider concession than could possibly be enforced. Their excess of caution had led them to use a loose and dangerously wide phrase, which ought not to be too literally interpreted.[818]

(2) *Aut disseisiatur.* Avarice was one of the most frequent motives of John's oppressions: the whole machinery of justice was valued primarily as 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 one of their grievances to which the barons attached supreme importance is shown in many ways: by the care taken in the 25th of the Articles of the Barons and in chapter 52 of the Charter to provide procedure for restoring to their rightful owners estates of which they had been improperly "disseised,"[819] and by the terms of certain writs issued by John after the treaty at Runnymede, for example the letter of 19th June to his half-brother, the Earl of Salisbury, explaining that peace had been made on condition of the immediate restoration of all "lands, castles, and franchises

from which we have caused any one to be disseised *injuste et sine judicio*."[820]

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."[821] (*a*) *Liberum tenementum.* "Free" tenements were freeholds as opposed to the holdings of villeins. None of their belongings thus protected were more highly valued by the barons than their feudal strongholds.[822] Castles claimed by great lords as their own property are mentioned in many writs of the period—for example, in that to the Earl of Salisbury already cited—while chapter 52 of Magna Carta gives them a prominent place among the "disseisins" to be restored. (*b*) "*Libertates*" covered feudal rights and incidents of too intangible nature to be appropriately described as "holdings." In a sense, all the rights secured by Magna Carta were "liberties"; but the word is probably used here as equivalent to "franchises," embracing feudal jurisdictions, immunities, and privileges of various sorts, all treated by medieval law as falling within the category of "property." (*c*) *Consuetudines* had two meanings, a broad general one and a narrower financial one.[823] 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 throughout the territory of the lord who enjoyed them; and it follows that Coke, in treating this passage as a text on which to preach the doctrine that monopolies have always been illegal in England, aims unusually 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."[824] In this error he has been assiduously followed.[825]

(3) *Aut utlagetur, aut exuletur, aut aliquo modo destruatur.* The practice of placing outside the protection of the law such evildoers as could not be brought to justice had its origin in those early days when the existing machinery of law was inadequate to the work required of it. With the progress of order and organization, the criminal's chances of evading justice became fewer; and the declaration of outlawry, which could only be made in the county court, tended to become a mere formality, preliminary to the forfeiture of the outlaw's lands and goods. The expedient was one which recommended itself peculiarly to John's genius; it was his deliberate policy

to terrify those with whom he had quarrelled, until they fled the country; then to summon them three times before the county court to answer the charges against them, knowing well 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 suffered by two of the baronial leaders, Robert Fitz Walter and Eustace de Vesci, in the autumn of 1212.[826] Outlawry was not always, however, a mere formality in John's reign. The man who had been outlawed 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 in 1196 for the head of William of Elleford.[827] 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 molested."[828]

(4) "*Nec super eum ibimus, nec super eum mittemus.*" These words have been frequently misinterpreted. They must be viewed in the light of the historical incidents of the immediately preceding years; and, so read, they present no difficulties, and leave no room for ambiguity. Their object was to prevent John from substituting violence for legal process; from taking the law into his own hands and "going against them" with an army at his back, or "sending against them" in similar wise. 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 some part of Magna Carta, of a warrant for every legal principle established in his own day, has utterly misled several generations of commentators. He maintained that what John promised was to refrain from raising in his own courts actions in which he was personally interested. In elaborating this error, he drew a fine distinction between the court of King's Bench, otherwise known as *coram rege*, because the king was always in theory present there, and other courts in which were present only those to whom he had delegated authority by a writ "sent" to it. *Ibimus*, he seems to think, applied in the former case; *mittemus* in the latter. To quote his own 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."[829] Coke is completely in error; it was the use of brute force, not merely a limited form of legal process, which John in these words renounced.

III. *What Classes of Men 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 the villeins as free for the purposes of this chapter and of chapter I., while rejecting them for the purposes of chapter 20.[830] His right to the status of a freeman has already been disallowed,[831] and any possible ambiguity as to his share in the benefits of the present chapter is removed by the deliberate 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."[832] 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 carefully the property of villeins and even holdings of *villenagium* (or unfree land) belonging to freemen.[833] Care was thus taken to make it plain beyond any reasonable doubt that no villein should have part or lot in rights hailed by generations of commentators as the national heritage of all Englishmen.[834]

IV. *Reactionary Side of these Provisions.* To insist rigorously 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 officials of the Common Bench and the King's Bench, was to reverse one of the outstanding features of the policy of Henry II. In 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.[835] Yet a real danger lurked in these provisions; the clause was, after all allowance has been made, a reactionary one, tending to the restoration of feudal privileges and feudal jurisdictions, inimical alike to the Crown and to the growth of really popular liberties. John promised that

feudal justice (as before the reforms of his father) should be dispensed in feudal courts; 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.[836]

V. *The Genesis of the Chapter.* The interpretation here given of this famous chapter is emphasized by a comparison of its words 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 protecting himself and his allies from the very evils which John subsequently committed against his own barons. The words of this treaty of 1191 admirably bring out what Richard's barons sought to secure, and what they sought to escape. Longchamp conceded in Richard's name that the bishops and abbots, earls and barons, "vavassors" and free-tenants, should not be disseised of their lands and chattels at the will of the justices or ministers of the king, but that they should be dealt with by judgment of the king's court according to the lawful customs and assizes, or by the king's command.[837] The magnates were not to be judged by officials whom they despised as their social inferiors and mistrusted as the paid instruments of royal tyranny; their claim to be tried by their equals in the king's court was granted.

Now, the main subject of the arbitration, ending in the treaty from which this excerpt has been taken, 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 attempted to take vengeance upon his opponents in a manner which they are not likely to have forgotten two years later at Runnymede, and which probably influenced the wording of the present chapter. John, resenting bitterly 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* of his feudal tenants, without even a trial and

sentence by one of his Benches, without making any effort to investigate the justice or injustice of their pleas for refusing, he set out with an army to punish them. He had gone as far north as Northampton on his mission of vengeance when he was overtaken by the archbishop of Canterbury, a strong advocate of conciliation. On 28th August, 1213, Stephen Langton persuaded the king to defer forcible proceedings *until he had obtained a legal sentence* in a formal *Curia*.[838] That John once again threatened recourse to violent methods may be safely inferred from the words of a 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*."[839] 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 freemen, other than barons, would be found, not among the barons in the king's court, but among the freeholders in the court baron.[840]

The words of Magna Carta, taken in connection with the treaty of 1191 and the writ of 1213, are thus seen to have a narrower meaning than that extracted from them by subsequent commentators.

VI. *Later History of "Judgment of Peers."* The claim made by the barons at Runnymede was re-asserted in somewhat varying forms by the same barons or by their descendants on many subsequent occasions. The "*judicium parium*" was destined to enjoy a long and brilliant career, and the interpretations put upon it by the Crown and by the opposition respectively, while interesting in themselves, afford strong confirmation of the somewhat restricted estimate of the scope of the present chapter, which has been above enunciated.

(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.

(2) *The royal contention.* The Crown, on the other hand, while not openly infringing the charter, tried to narrow its scope. The judges appointed by the king 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 Henry III. and his justiciar, 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 judicio curiae suae et parium suorum*," as Matthew Paris carefully relates,[841] 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 judicio 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 the *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.[842] 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.[843] 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 all other classes 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 forfeiture or escheat was involved, they should be judged only by earls and barons."[844] This concession was by no

means based on the broad ground taken by the Charter. 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 is the reason why, from Bracton's day to our own, "the privilege of peers," which gradually assumed its modern form, has never extended to misdemeanours, since such convictions never involved forfeiture or escheat to the Crown.

The manner of giving effect to this concession is noteworthy. The *judicium parium* was secured to earls and barons in later reigns, not merely by giving seats on the judicial bench to a few holders of "baronies," but 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.[845] 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.[846] The subject has been further complicated by the gradual growth of the modern conception of a "peerage," embracing various grades of "nobles." In essentials, however, the rights of a baron (or of any magnate of higher grade) accused of crime have remained unchanged from the days of Henry III. to our own. The privilege of "trial by peers," whatever the reason underlying it, 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. Petty offences committed by peers, like those committed by commoners, come before the ordinary courts of law. Under these limitations, then, the privilege of a peer to be tried only in the House of Lords (or in the Court of the Lord High Steward) 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.[847]

(*b*) *For tenants of a mesne lord*, however, 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 the knight or the landed gentleman. All are judged in the same tribunals and by the same procedure. 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 as a class, or by its influential members, to make good a claim to *judicium parium* in civil cases.[848] 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 entirely 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 are here perfectly on a level. No "peer of the realm" has for many centuries asked to plead before a special court of his peers in any ordinary non-criminal litigation, whether affecting his real or his personal estate.

VII. *Erroneous Interpretations.* The general tendency to vagueness and exaggeration has already been incidentally discussed. Two mistakes of unusual persistence require more 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.[849] The mistake probably owes its origin to a not unnatural tendency of later generations of lawyers 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, so far at least as affected those who were not Crown tenants; they found nothing in Magna Carta (unless it were this clause) to correspond with their own trial by jury: therefore they identified the two, interpreting the present chapter as a general guarantee of the right to trial by jury.[850] Mr. Reeves, Dr. Gneist, and other writers long ago exposed this error, but the most conclusive refutations are those recently given by Prof. Maitland and Mr. Pike. The arguments by which these writers prove that "judgment by peers" is one thing and the "verdict of a jury" quite a different thing are of a somewhat technical nature;[851] but as their importance is far-reaching they must be explained, however briefly. They seem to be mainly three in number:

(*a*) The criminal petty jury cannot here be intended, since it had not been invented in 1215:[852] 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 all 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 the specific question put to it. The insurgent barons demanded more than this: they asked a decision on the whole case.[853] 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.

(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, although strong reasons of state might urge the detention of dangerous individuals. Hallam, for example, declares that from the era "of King John’s Charter, it must have been a clear principle of our institutions that no man can be detained in prison without trial." Yet every king of England from the days of John Lackland to those of Charles Stewart, claimed and exercised the prerogative of summarily committing to gaol any man suspected of evil designs against the Crown or Commonwealth. Strong kings used this power freely to remove those whom they wished to silence. Frequently no cause of arrest was mentioned, no explanation given, except the words "by the king’s command." During all these centuries the legality of such procedure was never challenged as contrary to Magna Carta, or on any other ground. 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 comparatively insignificant exceptions. Such rights inherent in the Crown, dangerous undoubtedly to liberty but yet perfectly legal, were never seriously challenged until the struggle between Charles I. and his parliaments had fairly begun. Then it was that old precedents were eagerly sought out and put to new uses. Then only was it

suggested, for the first time, 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 famous 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."[854] The parliamentary leaders, however, too grimly in earnest to be deterred by logic, were far from abandoning their error because Heath had unanswerably 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" (or only *per speciale mandatum regis*) as contrary to the tenor of Magna Carta—an effective contention as a political expedient, but essentially unsound in law.

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797. The corresponding provision of the Articles of the Barons (29) adds the word "*vi*" ("*nec rex eat vel mittat super eum vi*"). The idea of open violence, thus clearly indicated, is expressed in contemporary documents by the fuller phrase, *per vim et arma*. The accepted translation, as contained in the *Statutes at Large*, "nor will we pass upon him nor condemn him," is thus inadequate. The editors of the *Statutes of the Realm*, I. 117, suggest "deal with him" as an alternative translation. Coke, it will be seen *infra*, is the original source of the error which connects this "going" and "sending" with legal process.

798. See, *e.g.*, Coke, *Second Institute*, 55.

799. 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, *English Constitution*, 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."

800. 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.

801. 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."

802. See Appendix.

803. The earliest known reference occurs in the so-called *Leges Henrici primi* (c. 31). *Unusquisque per pares suos judicandus est et ejusdem provinciae*.

804. Cf. Pollock and Maitland, I. 152, and authority cited. As there was no "peerage" in England in the modern sense (cf. *supra*, p. 237) 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. Every man's equals were his "peers."

805. See Stubbs, *Const. Hist.*, I. 578, n., for foreign examples of *judicium parium*.

806. "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. 269.

807. See *Carta Mercatoria*, c. 8; 27 Edward III. stat. 2, c. 8; and 28 Edward III. c. 13; also Thayer, *Evidence*, p. 94.

808. See *infra*, cc. 56, 57, and 58. Under c. 59 the barons of England were called peers of the King of Scots.

809. See *Placitorum Abbreviatio*, p. 201, cited Pollock and Maitland, I. 393 n.

810. 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."

811. See *supra*, p. 103, and cc. 18, 36, and 38.

812. 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. 400. 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."

813. 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.

814. *Second Institute*, p. 46.

815. 3 Charles I. c. 1.

816. 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 an opposite 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.

817. See, *e.g.*, Pike, *House of Lords*, 217, citing Littleton in *Year Book*, Easter, 10 Edward IV., No. 17, fo. 6.

818. If "*vel*" might be translated by "and" and "*imprisonetur*" by "detained in gaol," the phrase would then mean that no freeman should be kept too long in prison pending his trial, or permanently imprisoned without trial.

819. For this word cf. *supra*, c. 18. The treaty entered into by John in 1191 (discussed *infra*) speaks of the "disseisin of chattels," showing that the word had not yet been absolutely restricted to real estate.

820. See *Rot. Claus.*, I. 215. Mr. Pike (*House of Lords*, p. 170) maintains, indeed, that the prevention of disseisins "*sine judicio*" 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 and land-tenure. Pollock and Maitland, I. 393, countenance a broader interpretation. One point is beyond doubt: *judicium parium* extended to the assessing of amercements. In c. 21 earls and barons are confirmed in the right to be amerced only *per pares suos*.

821. *De libero tenemento suo vel libertatibus vel liberis consuetudinibus suis.*

822. Cf. *supra*, p. 176.

823. Cf. *supra*, p. 290.

824. *Second Institute*, p. 47.

825. 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.

826. See *supra*, p. 30.

827. See *Pipe Rolls*, 7 Richard I., cited by Madox, I. 201.

828. *E.g.*, Coke, *Second Institute*, p. 48.

829. See *Second Institute*, page 46. John Reeves, *History of English Law*, I. 249 (third ed.), while condemning Coke, gives an even more strained interpretation of his own, founded on the chance juxtaposition of the two verbs in one passage of the Digest. On quite inconclusive grounds he draws the inference that both words refer exclusively to diligence against "goods and chattels"—diligence against the person, and diligence against landed estate having previously been treated in words specially appropriate to each of them respectively. Dr. Lingard, *History of England*, III. c. 1, deserves praise as the first commentator who took the correct view.

830. *Second Institute*, pp. 4, 27, and 45.

831. See *supra*, c. 20.

832. *Simon de Montfort*, 17, n. Cf. Blackstone, *Great Charter*, xxxvii., “the more ample provision against unlawful disseisins.”

833. Cf. Pollock and Maitland, I. 340, n.

834. Cf. *supra*, p. 142. 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.

835. Mr. G. H. Blakesley in an able article in the *Law Quarterly Review*, V. 125, goes so far as to reduce the entire chapter to an attempt to protect feudal justice in its struggle with royal justice. "It may reasonably be suspected that cap. 39 also was directed merely to maintain the lord's court against Crown encroachments."

836. 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 fellow barons among the judges of the "Benches," and did not necessarily involve a full meeting of the *commune concilium* summoned in the accustomed way. *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. This feudal tendency is emphasized by the consideration that private franchises and private castles bulked prominently among the rights of property protected from arbitrary seizure by the king.

837. See R. Hoveden, III. 136. This truce, which was dated 28th July, 1191, had been brought about by the mediation of the archbishop of Rouen and of certain of the English prelates.

838. Cf. *supra*, p. 35.

839. The writ is dated 10th May, 1215, and appears in *New Rymer*, I. 128.

840. Magna Carta also omits as unnecessary "*per vim et arma*," though the Articles of the Barons had contained the word "*vi*."

841. *Chron. Maj.*, III. 247-8.

842. M. Paris, *Ibid.*, III. 251-2.

843. 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 a more intimate knowledge of the law he administered as justiciar in 1233 than any modern writer can have. In the matter of amercements, at least, the barons of the exchequer acted as the peers of earls and barons.

844. Pike, *House of Lords*, 173. See also Bracton, f. 119; Pollock and Maitland, I. 393.

845. "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.

846. Pike, *Ibid.*, 174–9.

847. The privilege was extended to peeresses by the statute 20 Henry VI. c. 9.

848. The Earl of Chester claimed it in 1236-7, and the Earl of Gloucester (in a special form as a lord marcher) in 1281. See Pollock and Maitland, I. 393, n.

849. Cf. *supra*, pp. 158-163.

850. 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, and in Taswell-Langmead, *Const. Hist.*, 110. It was repeated only the other day by so high an authority as Dr. Goldwin Smith in his

recently published work, ”*The United Kingdom*," I. 127, where he maintains that chapter 39 of Magna Carta “affirms the right of trial by jury.”

851. Pollock and Maitland, I. 152, n., and Pike, House of Lords, 169.

852. Cf. *supra*, p. 161.

853. 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.

854. See *State Trials*, III., p. 1, and S. R. Gardiner, *History*, VI. 214.

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 one with which it is so closely connected, has had much read into it by commentators which would have astonished its original framers. The application of modern standards to ancient practice has resulted in a complete misapprehension. The sums customarily received by John, as by his predecessors, at every stage of legal procedure, were not necessarily the wages of deliberate injustice. This is evident from several considerations. Thus litigants paid fines for redress against the Crown itself; in disputes between two private parties, the sum offered by the highest bidder was by no means always accepted; sometimes justice was rendered to one litigant gratis in spite of a heavy offer by the other. Many payments, then, 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 for justice 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."[855] It was John's abuse of the system, not the system itself, which called for condemnation; and the

worst that could be said against it, according to medieval standards, was that it lent itself too readily to abuse.

If the barons really desired that John should continue to dispense royal justice in the new fields occupied by his father, but should do so without pecuniary return, their demands were unfair and even absurd; but probably they only wished a strict adherence to the customary rules and charges which they had come to expect as normal in connection with royal tribunals. The system, indeed, has many objectionable features to modern critics; but in 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 the certainty of losing as much again in extra-judicial outlays, and the 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. A body of highly trained clerks could not be kept by the king to issue writs gratuitously to all who asked them, and a staff of judges, "who knew the law and meant to keep it," to determine pleas which would bring in no return to the Crown.

The intention of those who framed this chapter was probably to secure a more moderate and reasonable measure of reform. Abuses of the system were to be redressed.[856] 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?[857]

Whatever the intention may have been, the practical effect of the clause was *not* to secure the abolition of the sale of writs and justice. 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 necessaries 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."[858]

Probably the practice before and after 1215 showed few material differences. Some of the more glaring abuses of the system were checked: that was all.[859] Parliament in subsequent reigns had frequently to petition against the sale of justice in breach of Magna Carta.[860] The king usually returned a politic answer, but was careful never to surrender 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."[861]

It is thus evident that Magna Carta did not put down the practice of charging heavy fees for writs. Yet this chapter, 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 gradually 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 most bitter humiliation we find evidence of the triumph of the policy of the Crown inaugurated half a century earlier by his far-seeing father.

It is not to such considerations as these, however, that this chapter owes the prominence usually given to it in legal treatises; but rather to the fact that it has been broadly 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."[862]

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855. *Middle Ages*, II. 451.

856. 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."

857. 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" (*pro recto suo festinando*). 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 judicio 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?

858. Pollock and Maitland, I. 174. Cf. *Ibid.*, II. 204, and authorities cited.

859. 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."

860. Instances are collected by Sir T. D. Hardy in *Rot. de oblatis*, p. xxi. See also Stubbs, *Const. Hist.*, II. 636-7.

861. *Rot. Parl.*, III. 116, cited Stubbs, *Const. Hist.*, II. 637.

862. *Second Institute*, 56.

CHAPTER FORTY-ONE.

Omnes mercatores habeant salvum 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 inveniantur 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, 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, like all other classes and interests, had suffered severely from John's greed, unrestrained by regard for the rights of others. The control of commerce was specially reserved for the king's personal supervision. No 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 merchant 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.[863]

John increased the number and amount of such exactions, to the detriment alike of foreign traders and of 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 the merchants by securing to them certain rights, which may

perhaps be analysed into three: safe-conduct, 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 and just rates of "customs," with the abolition of John's "evil tolls" or additional exactions.

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 primarily to foreign traders from friendly states. Attempts have been made, indeed, to argue otherwise, namely, that denizens were to benefit equally with strangers, Magna Carta holding the balance even between them. 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.[864] His main argument was that certain statutes of the reign of Edward III.,[865] 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 Magna Carta referred chiefly, perhaps exclusively, to merchants of foreign lands.[866] Denizens trading in England did not require those "safe conducts" which form the chief concession in this chapter; and 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 to them in a previous part of the great Charter.[867] It was the alien merchants who required special protection, since they had, strictly speaking, no status in the eye of the law, and held their privileges from the king, who, moving along the line of least resistance, frequently preferred to overtax them rather than his own subjects.[868] The Crown might vouchsafe the protection they needed either willingly or grudgingly, and under conditions to be altered at discretion, but never unless well paid for. 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 Rolls and the Patent Rolls afford many 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 in Richard's other lands in time of war as well as of peace.[869]

At the commencement of John's reign, traders resident in England seem collectively to have 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.[870]

These arrangements were merely temporary. John did not intend that any such 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."[871] 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 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 merely declaratory of the 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.[872] There were thus precedents for those rules for foreign traders, which have aroused the admiration of Montesquieu.[873]

II. *Customs and Tolls.* "*Consuetudines*" is in this passage used in its narrower financial sense, relating to those duties on imports and exports which are still specially 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 from the defencelessness of merchants, whatever, on each occasion, 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."[874] From other merchandise a share was claimed of a fifteenth or sometimes a tenth of the whole. Such tolls, if originally a species of blackmail, 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*."

It must be remembered, however, that the king was not the only one who exacted tolls. Every town in England, and many feudal magnates, by prescriptive usage or by royal grant, levied payments on all goods bought or sold at various 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 liberal 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 an entire misconception: Englishmen in the beginning of the thirteenth century had formulated no far-reaching theories of the rights of the consumer, or the advantages of 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, in inserting this stipulation among the promises wrung from John, acted on their own initiative and from purely selfish motives. The rich nobles, both lay and ecclesiastic, desired that nothing should prevent the foreign rivals of the insular burghers from

importing the wines and rich apparel which England could not produce. John, indeed, as a consumer of continental luxuries, partially shared their views, but his short-sighted policy threatened to strangle foreign trade by gradually increasing the burdens attached to it, until it ceased to be remunerative. The barons, therefore, in their own interests, not in those of the foreign merchants, still less in those of native traders, demanded that the custom 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, jealous of foreigners alike in their home markets and in the carrying trade, desired a monopoly for 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 to their cause 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.[875] 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.[876]

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 several 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 privileges of the citizens of Rouen or of Paris than of those of York or of Lincoln; their ambition was to inflict restrictions upon all rivals alike. 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 some citizen. He was strictly prohibited from engaging in retail trade and 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 the goods 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 the 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 in England, whose cause was temporarily triumphant. At the accession of that Prince, London bought itself back into royal favour for the time being. At the same period an attempt was made to define what tolls or customs 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*, to distinguish them from an additional fifty per cent., levied from foreign merchants at a later date and known as *parva et nova custuma*. The settlement of 1275 was by no means final. 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 the increased rates of duty now imposed and known henceforth as *parva et nova custuma*. Edward I. made several attempts to exact the higher rates from denizens as well as from 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."[877] Seven years later this was confirmed by an act which in considerable detail 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 with its enforcement.[878] 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.[879] Such sweeping regulations were in advance of their age and could not be carried out without revolutionising the entire 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.[880] 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.[881]

863. 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, considers the prerogative as merely one aspect of purveyance, that is of the right of the king to requisition what he required for his own needs and those of his household. Many such "theories" are anachronisms. The prerogative was founded on fact—on the brute force at the Crown's disposal. Kings took what they could, and left future ages to invent theories to justify or explain their actions.

864. See *State Trials*, II. 407-475, and especially 455-6.

865. *E.g.* 2 Edward III. c. 9 and 14 Edward III., stat. 1, c. 21.

866. 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.

867. See *supra*, under c. 13.

868. For the legal position of aliens, see Pollock and Maitland, I. 441-450.

869. See *Pipe Rolls*, 27 Henry II. and 8 Richard I., cited Madox, I. 467-8.

870. See *Rot. Chart.*, 60 (5th April, 1200).

871. See *Pipe Roll*, 6 John, cited Madox, I. 469, where other illustrations will be found. Cf. also *Rot. Pat.*, 170. 170*b*, 171, 172*b*.

872. 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 and take with them none but their own crews. See *Rot. Claus.*, I. 211, and cf. series of writs in I. 210.

873. 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 merchandises 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!*"

874. S. Dowell, *Hist. of Taxation*, I. 83, citing Madox, I. 525-9 [2nd ed. I. 765-770], and *Liber Albus*, I. 247-8.

875. See *supra*, 41–2.

876. 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."

877. 2 Edward III. c. 9.

878. See 9 Edward III. c. 1 and cf. 25 Edward III., stat. 4, c. 7.

879. Cf. *supra*, pp. 290-1, where the inconsistency between the two parts of the Great Charter is pointed out.

880. See 2 Richard II., stat. 1, c. 1 and 11 Richard II. c. 7.

881. See 5 and 6 William IV. c. 76, s. 14.

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 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 quite general in its scope, embracing all classes and ranks of men, 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 that kingdom without the king's licence. The grant of freedom of intercourse in 1215 thus 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 the royal licence had frequently to pay fines.[882]

The stringency with which this prerogative was at first enforced tended, however gradually, to become more lax. The king still preserved the right, but only exercised it by means of proclamations over particular classes or on special occasions, the inference 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.[883] 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., which, in confirming the king's power to prohibit free egress from England, does so, subject to very wide exceptions. Under its provisions the Crown had the right to prohibit the embarkation of all manner of people, as well clerks as others, from every port and other place upon the sea-coast 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.[884] 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. It remained in force, however, 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."[885] 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 almost seems, therefore, to argue that the Crown in the seventeenth century retained authority which extended precisely over those classes mentioned in the ordinance of 1352.

In any view, the prerogative of interfering with the subject's freedom to depart from England has never been completely taken from the Crown. Yet, in the course of centuries a great change has been gradually effected: the

onus has been shifted from the individual who wished to leave the kingdom, on to the king who wished to detain him. 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 special royal writ. Coke[886] 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 invenienda 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.[887] 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 always with suspicion by the courts of common law as a creature of prerogative, 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 at the present day, since the Judicature Acts have merged the Court of Chancery in the High Court of Justice.[888]

The use of such writs in this restricted sphere could not be reckoned an oppressive interference with the liberty of the subject. 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 in the course of centuries been fully realized.[889]

Two phrases, occurring in this chapter, call for comment, although for different reasons:—one as embodying an ancient legal doctrine, now obsolete, the other as anticipating a characteristically modern point of view. (1) *Salva fide nostra.* This short-lived clause of Magna Carta, in granting freedom to leave the country, very properly provided that mere absence from England should absolve no one from allegiance to his king. The old doctrine of nationality was indeed a very stringent one. The rule which prevailed was *Nemo potest exuere patriam*. Everyone born in the land owed allegiance to its king—and this tie continued unbroken until severed by the death of subject or sovereign; it could be broken in no other way. According to this maxim, a man born a subject of the king of England must remain his subject wherever he wandered. A breach of the duties of allegiance, which were 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 Naturalisation Act of 1870, have entirely abrogated this ancient doctrine, and substituted one of perfect

liberty. Any 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 legal 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 a restriction on the right of free egress, during the actual continuance of hostilities, declared that such restriction was to be imposed for the common good of the kingdom, thereby enunciating what is generally regarded as a very modern doctrine: John was to take action, not for his own selfish ends but only *pro bono publico*.

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882. *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 profectus 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 compotum de XX marcis, quia exivit de terra Domini Regis*."

883. See Coke, *Ibid.*, citing the Close Roll of 25 Edward III.

884. 5 Richard II., stat. 1, c. 2.

885. 4 James I. c. 1, s. 22.

886. *Third Institute*, p. 178.

887. Its origin is obscure. See Beames, *Brief view of the writ of Ne Exeat*, *passim*.

888. See *Encyclopaedia of Laws of England*, IX. 79.

889. On the whole subject of these writs, see Stephen, *Commentaries*, II. 439-40 (ed. of 1899), and authorities there cited.

CHAPTER FORTY-THREE.

Si quis tenuerit de aliqua eskaeta, sicut de honore Wallingfordie, Notingeham, Bolonie, Lancastrie vel de aliis eskaetis, 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 one who holds of some escheat (such as the honour of Wallingford, of Nottingham, of Boulogne, of 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 which had been 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 treatment from Henry II. for reasons to be immediately explained. The older law of escheats was too vague to prove an effective restraint on royal prerogative; the king, when a fief had escheated to the Crown, might reckon grants made by its former owner as void, refusing to acknowledge as binding upon him the titles of the sub-tenants, treating all sub-tenancies as wiped out by the mere fact that their lord's fief had escheated to the Crown. A mesne lord, on the contrary, had no similar rights over the sub-tenants of his tenant who had suffered escheat.

The king usually 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.[890] Not only so; but Henry II. 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).[891] 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 II. had to pay large and arbitrary reliefs, those *ut de escaeta* paid no more than 100s. per knight's fee.[892] Nor was their obligation of "suit" (or attendance at the feudal court of the lord of the fief) 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."[893]

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.[894] 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.[895] To understand this concession, it must be remembered that under Henry III., as under Henry II., sub-tenants of baronies were still liable to have their titles reduced through the reduction by escheat of the title of their lord; while sub-tenants of those who were themselves sub-tenants were not exposed to a similar mischance by the escheat of their immediate lord. Here also the position of 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 1258[896] complained that Henry had granted charters conferring rights which were not his to give (*aliena jura*), but which he had 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:[897] 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.[898]

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890. 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.

891. See Madox, *Baronia Anglica*, 169–171; also Pollock and Maitland, I. 261, and authorities there cited.

892. See *Dialogus*, II. x. F, and *Ibid.*, II. xxiv. The same rule applied to sub-tenants of baronies in wardship (which was analogous to temporary escheat). For example, when the see of Lincoln was vacant, and therefore in ward to the Crown 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 *fortiore* 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.

893. *Report on the Dignity of a Peer*, I. 60.

894. The need for this special 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 of the former tenants 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 for his father's land, 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.

895. See c. 38 of 1217, and cf. the gloss given by Bracton (II. folio 87, b.) 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.

896. See *Sel. Charters*, 384.

897. See 1 Edward III., *stat.* 2, c. 13, *Statutes of Realm*, I. 256.

898. See 1 Edward VI. c. 4, *Statutes of Realm*, III. 9.

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 the many abuses connected with the administration of the oppressive forest laws.

I. *The Royal Forests.* For at least a century before John's reign the word "forest" had acquired an exact technical meaning, and was applied to certain 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 absolutely 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 oppressive law prevailed to the absolute exclusion of the common law which ruled outside. The forests with their inhabitants had been deliberately omitted from the unifying process, by which the rest of England had been assimilated under a uniform *lex terrae*. They remained in great measure at the discretion of the Crown. This exclusion of the common law from the confines of the forests was the root from which many evils grew. In no other sphere was the prerogative so unfettered as within the charmed circles which marked off these royal preserves from more fortunate parts of the kingdom.

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. In certain places the king's proprietary rights might be co-extensive with his forestal rights; but, more frequently, large tracts of the *solum* (whether wooded or bare) were owned by freeholders, whose rights of property tended to become merely nominal, when overridden by the king's rights of the chase. Men might live, and did live, within the boundaries, but they could enjoy no rights of personal freedom or of property inconsistent with the rules laid down by the Crown to protect its own interests. Within the imaginary line the king's power was supreme, and he used it frankly for the preservation of beasts of the chase, not for the good government of the men who happened to dwell there. These unhappy beings were absolutely subject to the harsh forest code, 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 royal prerogative, customary rules grew up, obtained authoritative recognition, and gradually hardened into laws which set some limits, however inadequate, to royal caprice. Before John's time the forest code, as set forth in the Assize of Woodstock, and exemplified by the practice of forest officials, had taken its place as a definite system of law distinct from common law and canon law alike.[899]

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 Cnut on the subject admitted to be authentic enacted merely that every man should have his own hunting, while the king should have his.[900] The rights of the Crown, however, were strengthened and consolidated 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 a preferential, and, at last, 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.[901] The Conqueror and his sons set great store on their hunting, and warned all intruders off the wide

tracts of land claimed as royal preserves. Henry I. formulated the doctrine of the forest law, and it was probably due to him that “forest” acquired its highly 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 in this respect as in so much else, 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, the process of organization was completed by Henry II. building on the foundations laid by his grandfather; and the whole structure was bequeathed in a state of high efficiency to his sons. John’s attitude to the forest laws was not entirely consistent. The monk of Barnwall, whose work is incorporated by Walter of Coventry in his own, relates to John’s credit how, in the year 1212, he attempted, among other reforms meant to propitiate the people, some relaxations in the severity of the forest code.[902] Such clemency was exceptional. 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.[903]

III. *Forest Officials.* The local magistrates who administered the rest of England were excluded from the confines of 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.[904] His appointment was permanent, and his duties, which continued between the eyres, were administrative rather than judicial. He had discretionary authority to release trespassers imprisoned for offences against the forest laws.[905] 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."[906] For the king’s use 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.[907] "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."[908]

The office was one of authority and of profit, usually paid in kind rather than by a salary. The warden often held 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, gladly paid large sums to the warden, and recouped themselves, with an ample profit, by extortions from the humble dwellers in their bailiwicks.[909] These unpaid foresters were expressively said "to live upon the country." They formed a powerful official class, whose excessive numbers were a source of constant complaint. They may be classified in various ways, as, into riding and walking foresters (of whom there were one and four respectively in the normal case), 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.[910]

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 gentlemen 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, as the office of coroner had been instituted in the reign of Richard I. 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, whose whole time was

absorbed by the duties of office and remunerated by fixed salaries or by perquisites, but rather local landowners whose magisterial services were unpaid, and were presumably required only on special occasions. They were responsible directly to the king, and 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.[911] (*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 "expeditation" or cutting of their claws),[912] and generally upon everything owned by private individuals likely to harm the beasts of the forest.[913] (*c*) The *Agistors* are mentioned in the same clause of the Assize of Woodstock which mentions the Regarders. Four knights were appointed, apparently by the warden of each forest, whose duty it was 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 with liberty to feed on the 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.[914]

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 under their care from being destroyed or wasted: the king was an interested party in these, since they formed shelter for his 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 confined to taking 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, [915] 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.[916] (2) *Courts of Inquisitions.* When a serious trespass against the forest laws was discovered, a special court was, in early days, summoned immediately to make investigations. The foresters and verderers conducted the inquiry, but it was their right and their duty to assemble the men of the neighbouring townships to help them. In strictness, apparently, all the 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; and they would be made to suffer if they failed to discover the culprit. In one district at least (Somerton) the definition of beasts of the chase extended to the ordinary hare; and we read[917] 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, which was held to imply a desire to shield him. Some alleviation of the burden of attendance 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 the judgments were reserved for the justices. (3) *The 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 very 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,” inflicting small amercements, and “pleas of the venison,” punishing by imprisonment those previously found guilty, until they ransomed themselves by heavy

fines. These eyres came to be known as “Courts of Justice Seat,” but not until long after the reign of John. No juries were present, nor were they required; the justices punished offenders who had already been convicted by juries at a lower court.

These three classes of tribunals exercised functions analogous to those of a modern court of law. 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*,[918] and sometimes even as “views of expeditation,” 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 which lasted 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 of officials was held in June to make arrangements for excluding cattle of all kinds from the king’s woods during the period when the deer were fawning, but at this the presence of the agistors was not required.[919]

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, and whose ambiguity was in later centuries the source of many errors. 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 the word “swain,” on the supposition that courts so-called were normally resorted to by the general body of 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 which had once been a royal forest, but 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 therein from the Crown to the grantee, while somewhat 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, varying 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 thus obtained a franchise over the chase and the royal beasts it contained.[920] (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.[921] 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.[922] (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."[923] In practice it chiefly embraced hares and foxes.[924] 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 for the preservation of game, so as to bear with increasing hardship on the common people, securing a monopoly of hunting to the land-owning aristocracy, and passing gradually into the modern Game Laws.[925] Dr. Stubbs held, apparently, too narrow a conception of warren when he read it in its modern sense of "a rabbit warren."[926] 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, like all Crown officials, great and small, might inflict cruel injustice on the common people;[927] but their

power of doing harm was less than that of foresters, as they were dependent on the common law. The forest code did not apply even to royal warrens.[928]

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, freeholders and peasantry alike, were greater out of all proportion. Not only were the best interests of the forest-dwellers deliberately sacrificed to the royal hunting, not only were the legal fines swelling the exchequer rendered trebly burdensome by the galling and wasteful manner of their collection; but the men who paid them were the 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, if more than a form and willingly given, would suggest that the barons were allowed some share in these royal rights of hunting which led them here to make common cause with the Crown. Henry, as a matter of fact, retained not only the forests of his father but those of Rufus as well, and created new ones of his own.[929] Stephen, while retaining the forests of the two Williams, renounced those added by Henry I. Under Henry II., afforestation began anew.[930] The words of the Great Charter leave no room to doubt that Henry of Anjou had extended the boundaries of Stephen's forests; and that both Richard and John carried the process further, bringing within the circle of the cruel law, not only waste and moor, but also many "woods" belonging to private owners. These royal encroachments were the more oppressive, occurring as they did in an age when population was rapidly increasing and seeking an outlet in the reclamation of waste places on the debateable land which surrounded the forests. The vagueness of the frontier aggravated this grievance, as it was often difficult for the honest reclaimer of barren land to know whether he was committing a trespass for which he might be punished by a crushing fine.[931]

(2) *The monopoly of hunting.* The Crown not only extended the bounds, but also made the law more stringent. Such privileges of hunting as the barons had were restricted as big game became scarce. The Crown's insistence on a strict monopoly of the more exciting forms of the chase 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 vestiges of their right to share in the hunting of royal beasts.[932] 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*. They could not destroy a tree or lop off branches (except under stringent conditions), without being guilty of *waste*.[933] 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").[934] Heavy tolls were, under the name of "chiminage," taken from carts and sumpter-horses passing through the woods. In all these and many other ways, rights of private property in forests were so restricted as to become valueless. 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 materially curtailed: it was made lawful for a man to construct on his own freehold in the forest, mills, ponds, lime pits, ditches, and arable lands, provided these were not placed within the covert (that is in wooded places fit to shelter game) and did not infringe on any neighbour's rights.[935] They might also keep eyries

for breeding falcons and other birds of prey, and take honey found on their own ground—rights previously denied to them.[936]

(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.[937] 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 strictly 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, 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."[938] A small 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."[939] Dwellers within or near the forests were also 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.[940] Nor could they keep bows or arrows, so necessary for their protection amid the dangers which beset the inhabitants of lonely districts throughout the Middle Ages.[941] No tanner or bleacher of hides could reside in the forest districts, unless within the walls of a borough.[942]

(5) *Attendance at forest courts.* Unlike the grievances already mentioned which pressed chiefly on those within the forests, the burden of performing "suit" at the forest courts was specially resented by those who lived without. At every inquisition representatives from neighbouring townships must be present, while the entire population were compelled to meet the justices on their forest eyres. Henry II., whatever may have been the earlier practice, enforced this duty of attendance 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. All and sundry must be present at the eyres. The double duty of doing suit at county courts and at forest courts meant a 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.[943]

(6) *Fines and punishments.* Frequent exactions ground down the dwellers in the royal forests to abject poverty. If they failed to attend one of the numerous inquisitions, they paid a fine. If they failed to disclose the guilty poacher, they paid a fine. If they gave false information, they paid a fine. If they sold or gave away timber, they paid a fine. If they kept grey hounds or mastiffs, which had not been "lawed," that is deprived of the requisite number of claws, they paid a fine.[944] If a bow or arrow were found in their keeping, they paid a fine. If they committed any one of the numerous forms of waste or trespass, they paid a fine. Truly, the wretched peasant must walk warily if he would preserve sufficient of his miserable pittance to keep himself, his wife and children, in life and health.

The Northamptonshire Eyre Roll of 1209 illustrates how a whole 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."[945] There was clearly a strong inducement, in such cases, to find someone guilty.

In certain cases Henry II. would not accept a fine, but inflicted loss of limbs 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 for two offences. For the third offence nothing would suffice save the body of the offender. John's Magna Carta made no specific regulation on this head, although the general provision for abolishing "evil customs" afforded some relief. 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 future good behaviour, or failing such sureties be banished from the realm.

(7) *Arbitrary government and illegal exactions.* If the laws of Henry's code were stringent and the legal payments onerous, it was a worse evil that the law, such as it was, could be safely defied by the 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 Allexton, 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."[946] In this evil pit, miscalled a gaol, men illegally arrested on mere suspicion were allowed to rot or starve to death if they failed to pay heavy ransoms. 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. These petty despots were practically irresponsible, since the eyres were held at wide intervals of seven years. Even then the sufferers might hesitate to complain, fearing a worse fate when the backs of the justices were turned. If such things could happen after the grant of the charters of 1215 and 1217, it is not likely that the foresters were more merciful before. John was always too indifferent or too busy to redress such wrongs. The only guarantee against their recurrence in the future was that honest officials should be selected. Magna Carta sought to secure this by the provisions of chapter 45, which (occurring amongst the forest clauses) directed that no justiciar, sheriff, constable or bailiff should be appointed, except such as knew the law of the land and meant to observe it. The word constable included the wardens, while bailiff was wide enough to embrace the foresters. It is doubtful whether this clause would have effected any improvement; it 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, and reserved them for the justices in eyre. 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. Blackmail, under thin disguises, was levied upon all who would escape the unwelcome attentions of those in power. 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 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."[947]

Each one of these abuses had been specifically 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 to enforce.

VII. *Later History of Forests and Forest Laws.* The Forest Charter signally failed to secure a pure administration of the law; but two processes were at work which tended to lighten the burdens inflicted. The long struggle to define accurately 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.[948] Within these restricted limits, time and the progress of civilization gradually softened the severity of the forest code, many customs becoming obsolete.[949] 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.[950] The result was a drastic act of the Long Parliament limiting them to their old extents.[951] 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,[952] although the offices of justice and warden of the forests were not abolished till 1817.[953] The forests, much curtailed in extent, are still the property of the Crown, though now administered in the interests of the public by the Commissioners of Woods

and Forests.[954] The operation of the common law is, of course, no longer excluded from their confines, the old antithesis between the forest law and the law of England being now a thing of the past.[955]

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 offices under the Crown. The list of officers given 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.[956] The clause was directed in particular against John's foreign favourites such as the Poitevin Bishop of Winchester, Peter des Roches,[957] who had wielded and abused the authority of chief justiciar in 1214 when the king was abroad, or such as Engelard de Cygony and the other tools of John's extortions, stigmatized by name in a later part of Magna Carta,[958] who had filled various posts as sheriffs, wardens, and officials of the exchequer. 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. There is thus no difficulty in understanding what class of men were here excluded from office; but what class were to fill their places? Bishop Stubbs, commenting on this passage, credits the draftsmen of the Charter 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."[959] The clause of Magna Carta, however, refers exclusively 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, it was not great lawyers whom the barons desired John to employ, but plain Englishmen with a rough-and-ready knowledge of insular

usage, who would avoid arbitrary acts condemned by the law of the land. The barons at Runnymede in 1215 desired exactly what the council of St. Albans had desired on 4th August, 1213, when it issued formal writs commanding all sheriffs and foresters to observe the laws of Henry I. and to abstain from unjust exactions;[960] and it must be remembered that these laws of Henry were but the older laws of Edward Confessor slightly amended.

The attitude of John's barons was the same as that of Henry's barons, when the latter declared in 1234 in such emphatic terms that they did not wish the laws of England to be changed.[961] 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. The laws which the Crown's officers must know and observe were the old customary laws of England, as opposed alike to the canon law and the civil law of Rome. Honest Englishmen were wanted, with a reputation for straightforward dealing and in sympathy with native prejudice. Crown ministers might do well enough without any academic training in an age when only one short treatise on the law of England had been written (that of Glanvill); while the stewards of court leets, referred to by Bishop Stubbs, might even be ignorant of the common law, provided they were versed in "the custom of the manor."

This provision of Magna Carta, directed primarily against alien sheriffs, castellans, and other ministers, disappeared in 1216 (without any comment in the so-called "respiting clause"), along with several provisions of a temporary nature, also directed against foreigners. Even if this well-meaning chapter of John's Great Charter had remained in force, it would not have effected much, in the absence of adequate machinery to ensure its enforcement. In promising the selection 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 to which appeal could be made, no neutral arbitrator to decide between the fit and the unfit, and no 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 the oaths of office to be taken by castellans and ministers of all grades were carefully provided.[962] Even this was only a first step towards settling a problem which was not

completely solved until, after the struggles of many centuries, the modern doctrine of ministerial responsibility was firmly established.

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899. A convenient short account of the forests, with their special laws, special officials, and special courts, will be found in W. S. Houldsworth's *History of English Law*, pp. 340-352. For fuller information see *Dialogus de Scaccario*, I. xii.; John Manwood, *Book of the Forests* (1598); Coke, *Fourth Institute*, 289–317; G. J. Turner, Preface to *Select Pleas of the Forest* (1901); and an article in the *Edinburgh Review* for April, 1902.

900. *Select Charters*, 156.

901. *Select Pleas of the Forest*, xiii.

902. See W. Coventry, II. 207, and Stubbs' Preface, lxxxvii. By a writ of 18 May, 1204 (*New Rymer*, I. 89), he disafforested all Devonshire except Dartmouth and Exmoor.

903. R. Wendover, III. 227. This, however, is clearly a biased account of the king's resumption of forest tracts illegally put under cultivation by way of purpresture.

904. 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 almost invariably 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.

905. *Select Pleas*, xv.

906. Mr. Turner, in *Select Pleas*, xvii.

907. Engelard de Cygony, 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.

908. *Select Pleas*, xix.

909. *Ibid.*, xxi.

910. The same chapter, however, fixed the rates of “chiminage.”

911. For the earliest notice of verderers see *Select Pleas of the Forest*, xix., n. Their appointment in the 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.

912. See *Carta de Foresta*, c. 6.

913. After 1217, if not before, it was one of their duties to fix the number of foresters required, so that the inhabitants need not groan under a heavier burden than necessary.

914. 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.”

915. *Carta de Foresta*, c. 8.

916. *Select Pleas of the Forest*, xxx.

917. *Select Pleas of the Forest*, p. 42.

918. *Dialogus*, I. xi. E.

919. It is expressly stated in the *Carta de Foresta* (1217) that only the verderers and foresters need be present at the June moot, and the same officers, with the agistors, at the two others. The public were specially exempted.

920. *Select Pleas of the Forest*, cix. *et seq.*

921. *Ibid.*, cxvii.

922. Statute of Merton, c. 11.

923. *Select Pleas of the Forest*, cxxiii.

924. *Ibid.*, cxxviii-cxxix. Wild cats should perhaps be added.

925. See W. S. Houldsworth, *History of English Law*, p. 346.

926. See *Select Charters*, 552.

927. Some of these Magna Carta sought to guard against. See c. 48.

928. Rights of hunting were sometimes conferred on subjects over territory which was not their own. Richard I., by a charter, granted permission to Alan Basset to hunt foxes, hares, and wild cats throughout the realm. See Round, *Ancient Charters*, No. 18.

929. 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.

930. 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.

931. 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.

932. See *Rot. Claus.*, I. 85 (dated 11 June, 1207).

933. For detailed information as to wastes, purprestures, and assarts with their ascending scale of penalties, see *Select Pleas*, lxxxii.

934. See Assize of Woodstock, article 7.

935. See *Carta de foresta*, c. 12.

936. *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.

937. See Assize of Woodstock, article 3.

938. See *Select Pleas*, 123 (6 Edward I.).

939. *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.

940. Assize of Woodstock, article 14. Cf. *Carta de foresta*, c. 6.

941. *Ibid.*, article 2.

942. *Ibid.*, article 15.

943. See *Carta de foresta*, c. 2.

944. At one time it had evidently been the practice to exact an ox in reparation of such transgression, thus leaving the peasant without the means of tilling his land. The Forest Charter (c. 6) limited the fine to 3s.

945. See *Select Forest Pleas*, p. 4.

946. *Select Pleas*, 50.

947. *Select Pleas*, 126.

948. See *infra*, under c. 47.

949. The "*assisa et consuetudines forestae*," issued by Edward I. in 1278, although merely declaratory, may have done something towards curtailing the limits of discretionary authority. See *Statutes of Realm*, I. 243, and Bémont, *Chartes*, lxv.

950. See S. R. Gardiner, *Hist. Engl.*, VII. 363, and VIII. 282.

951. 16 Charles I. c. 16.

952. *Commentaries*, III. 72.

953. By 57 George III. c. 61.

954. In virtue of a series of Acts of which 14-15 Victoria c. 42 is the latest.

955. See Stephen, *Commentaries*, II. 465-6.

956. Constable and bailiff are discussed *supra*, c. 24, and shown to include forest magistrates, *supra*, c. 44.

957. See *supra*, 36–7, and cf. Blackstone, *Great Charter*, viii.

958. See c. 50.

959. *Const. Hist.*, I. 578, n.

960. Cf. *supra*, p. 34.

961. "*Nolunt leges Anglie mutare que usitate sunt et approbate.*" See Statute of Merton, c. 9.

962. See *Select Charters*, 388–391, and Madox, II. 149, with authorities there cited.

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.

The religious houses of the various orders, (abbeys, priories, and convents), which had increased so 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, certain valuable rights of property, of which 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 separate charter to the clergy he had renounced in favour of all churches and monasteries, cathedral and conventual, all control over election of prelates, had carefully 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, wherever he had any plausible pretext, usurped the wardship over private foundations, in addition to his own. It would appear from the terms of a later chapter,[963] that in 1215 the Crown actually held in ward certain abbeys founded by mesne lords, for provision is there made for their restoration. The present chapter looks to the future, forbidding new usurpations of this nature.

In the reissues of the Charter certain verbal changes occur, but it is not clear that they imply any 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 especially applied to the lands of bishoprics and religious houses in 1216 by a clause which had no parallel in John’s charter.

[964] In 1217 three other small changes tend to widen the scope of the clause. The "barons who have founded abbeys" of John's grant become "the patrons of abbeys"; royal "charters" become more explicitly "charters of advowson"; "ancient tenure" is expanded into "ancient tenure or possession."[965]

Is it possible that the influence of the Church was powerful enough at Runnymede to prohibit all mention of lay "patrons" and lay presentations or "advowsons"; whereas it was powerless to prevent the barons pressing their rights of patronage two years later? John's promise of free canonical election[966] had interfered with royal patronage, and Stephen Langton would be unwilling to admit a subject's claim to rights which he had forced the Crown to renounce. The question of lay patronage, indeed, was not directly raised in any version of Magna Carta; but prior to 1215 John seems to have interfered between abbeys and their founders. On 16th August, 1200 he granted to William Marshall, Earl of Pembroke, the privilege of bestowing the pastoral staff of Nuthlegh Abbey, which lay within that nobleman's fief; this shows that John forbade appointments without royal licence.[967] The present chapter of Magna Carta made little difference in practice. Henry III. claimed wardship over abbeys and priories formed by earls and barons on their own fiefs, and kept them vacant, by preventing their patrons making appointments without his licence.[968]

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 royal 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 in one well-known instance at least, the creation of the New Forest, he made good his claim, at the cost of much suffering to his humbler subjects. Large tracts of land were thus consecrated to the wild boar and the stag. The king claimed somewhat similar powers for protecting his preferential rights of fowling. If woods could be "afforested" for hunting, rivers might be placed "in defence" for hawking. 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,[969] 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 river-banks might be "defended," disappeared, together with the relative clause of chapter 48 ("*ripariis et earum custodibus*"), from the reissue of 1216; but, in the respiting clause there was promised further deliberation, which resulted in its replacement in chapter 20 of the final version of Magna Carta.[970]

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 at least extended the boundaries of the old ones. All such encroachments are to be immediately given up. This summary redress, which implies that John's aggressions were so notorious as to admit of no dispute, should be contrasted with the more judicial procedure appointed by chapter 53 for

determining encroachments made by Henry II. and Richard I. 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, making more explicit the meaning of the earlier grant. 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.[971]

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 the 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.

After the issue of the *Carta de foresta* on 6th November, 1217,[972] machinery was set in motion, in obedience to its terms, to ascertain the old boundaries and to disafforest all recent additions. The work of redress continued for some years, suffering no interruption from the issue of the new royal seal at Michaelmas, 1218.[973] In face of many difficulties only slow progress was possible. More strenuous efforts followed the reissue of the Charters on 11th February, 1225;[974] 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, as 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.[975]

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., towards the close of his reign, 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 which met at Lincoln on 25th January, 1301. The king, as the result of hostile forces converging from several sides, had to surrender; and on 14th February he confirmed the Forest Charter, and formally 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 the concessions made at Lincoln.[976] 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 they had been defined at his father's Parliament in 1301. This settlement was confirmed by statute in the first year of the reign of Edward III.,[977] 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.[978]

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 those who suffered damage. The same course was followed by Charles I. in creating the Forest of Richmond in 1634. Finally, as a result of the attempts of the Stewarts to revive obsolete forest 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."[979]

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963. See *infra*, c. 53.

964. Compare *supra*, p. 250.

965. This chapter in its final form (1217 and 1225) runs thus: *Omnes patroni abbatiarum qui habent cartas regum Anglie de advocatione vel*

antiquam tenuram vel possessionem habeant earum custodiam cum vacaverint, sicut habere debent et sicut supra declaratum est.

966. Cf. *supra*, p. 39.

967. 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. Alban's). See J. H. Round, *Eng. Hist. Rev.*, XIX. 710-1.

968. See Petition of Barons (c. 11), *Sel. Charters*, 384.

969. Mention of these officers is made in c. 48. The phrase "in defence" is explained *supra*, pp. 357-8.

970. Cf. *supra*, p. 356.

971. Mr. P. 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.

972. Cf. *supra*, p. 171.

973. Cf. *supra*, 180, and see *Select Pleas*, xcv.

974. Cf. *supra*, p. 181.

975. Cf. *Select Pleas*, xcix.; and see also *supra*, p. 184.

976. See *Select Pleas*, cv. Mr. Turner's account of Edward's conduct may be compared with the estimate of M. Bémont, *Chartes*, xlviii.

977. 1 Edward III., stat. 2, c. 1.

978. See *Select Pleas*, cvi. There was one exception. On 26th December, 1327, Edward III. had to submit to further disafforestations in Surrey.

979. 16 Charles I. c. 16.

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 inquisicionem factam, penitus, ita quod numquam revocentur, deleantur per eosdem, ita quod nos hoc sciamus prius, vel justiciarius noster, si in Anglia non fuerimus.[980]

> All evil customs connected with forests and warrens, foresters and warreners, sheriffs and their officers, river-banks and their 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), 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.[981] The word "evil" is not defined, but here (in favourable contrast to elsewhere) machinery is provided for arriving at a definition. This takes the form of a new application of the useful *inquisitio*. 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" generally. All practices condemned by them (after hearing on oath smaller local juries, doubtless) 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 absolutely necessary, both on grounds of policy and of ordinary courtesy, it would appear that this clause was inserted only at the instance of the king's friends; at least, it is written (as an afterthought) at the foot of two of the copies of the Great Charter.

Whether acting under pressure or from grounds of policy, John lost no time in instituting the machinery necessary for effecting this part of the reforms. On the very day on which the terms of peace were finally concluded between king and barons 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 by the county in the first county court, who should make sworn inquest into evil customs.[982]

These orders were obeyed: knights were appointed in the various counties, who seem to have taken a liberal view of their own functions. Far from confining themselves to declaring customs to be evil, or even to seeing them abolished, they claimed to share with the sheriffs the exercise of the entire 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.[983] 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 which all classes bore to the forest laws is well illustrated by the iconoclastic spirit in which these knights concurred with the jurors of each small district, and with all others concerned, for the drastic treatment of abuses. Moderate-minded men began to fear that these sweeping changes would virtually abolish the royal forests altogether (in their technical legal sense). Accordingly, the leading prelates, who were in large measure responsible for inducing the king to make truce at Runnymede, and were thus under a moral obligation to do what they could to prevent the barons breaking faith, issued a written protest. They declared that the chapter in question must be understood by both parties "as limited," and "that all those customs shall remain, without which the forests cannot be preserved."[984]

Clearly, the whole code of the forest laws was in danger of being swept out of existence, as forming one huge "evil custom." 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, however urgently required. In 1216 the subject was one of those "respited" for future consideration, and in 1217 an attempt was made to specify in detail those evil customs which were to be abolished. The dangerous experiment of leaving such definition to local juries in each district was not repeated.

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980. The last sixteen words, inclusive of "*per eosdem*," appear at the foot of both of the Cottonian versions of Magna Carta. Cf. *supra*, 194–7.

981. Contrast the more restricted meaning of the same word in c. 41.

982. See *Rot. Pat.*, I. 180, cited also *Select Charters*, 306–7. Cf. *supra*, p. 47.

983. Cf. *infra*, c. 61.

984. Cf. *supra*, p. 52. 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 of the bishops of London, Winchester, Bath, Lincoln, Worcester, and Coventry, forming (with one exception, the bishop of Rochester) precisely those mentioned in the preamble to Magna Carta.

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 immediately after its acquisition, took with him Edgar Atheling and the Earls Morkere and Eadwin; and many other instances readily occur. Such cases were, however, exceptional, until John established an unfortunate claim to distinction as the only king of England who ever resorted to such a policy, not merely in face of danger, but as a constant and normal practice in times of peace. It may be that his continual suspicions were well grounded; but this scarcely excuses them, since it was his own bad government which goaded his subjects into a condition of perpetual unrest.

John lived in his native England like a foreign 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 aim, 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 the 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. Those nobles whom the tyrant did not thus control through their tenderest affections were too few for effective resistance. At the slightest show of temper, they, too, were suddenly pounced upon for hostages, thus joining the ranks of those who dared not rebel.[985]

The entire history of the reign shows of what excessive practical importance this question of hostages had become. It abounds with examples of the varied pretexts upon which John demanded them, and of his drastic methods of visiting upon their heads the sins of those who had pledged them. 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.[986] 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 quarters for the billeting of his archers. The king, as usual, demanded hostages, but ultimately allowed the citizens to escape on payment of £100 to buy back the king's goodwill.[987]

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.[988]

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."[989] 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.[990] 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. On his arrival, at the muster, early in September, John found awaiting him a great concourse, who were treated to 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.[991] This ghastly spectacle could not have been forgotten by

any one then present, 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. The inveterate Eustace de Vesci and Robert fitz Walter preferred to seek safety in flight, the only alternative open to them.[992] The others, with the Nottingham horror fresh in their memories, were constrained to hand over, with feelings that may be conceived, their 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 his preparations for the campaign of 1214, ending as it did in utter 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, John had control over a few hostages, and the chapter now under discussion demands the immediate restoration of those of English birth (the Welsh receiving separate treatment) together with the charters which John held as additional security, very much as a creditor might hold the titles of a mortgaged property. This provision of Magna Carta was immediately carried out. Letters were dispatched to the custodians of royal hostages, ordering an immediate release.[993] 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 future loyalty. Simon fitz Walter, for example, thus gave up his daughter Matilda.[994]

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985. The only magnates not exposed to this dilemma were the prelates, whose celibacy cut them adrift from family ties. They had no hostages to give, and were, further, in the normal case, exempt from fear of personal violence.

986. See R. Hoveden, IV. 161.

987. See *Rotuli de Finibus*, p. 119.

988. See R. Wendover, III. 224-5, and M. Paris, II. 523.

989. R. Wendover and Matthew Paris, *Ibid.*

990. See authorities cited by Miss Norgate, *John Lackland*, p. 288.

991. Cf. *supra*, p. 30.

992. Cf. *supra*, p. 30.

993. See for example a letter of 23rd June to Stephen Harengod, referred to *supra*, p. 49.

994. See *Rotuli de Finibus*, 571. The custody of hostages might, apparently, be a desirable office, since in 1199, Alan, the earl's son, offered three greyhounds for the custody of a certain hostage of Brittany; so it appears from *Rotuli de Finibus*, p. 29.

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 Martinny 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 de Athyes (so that in future they shall have no bailiwick in England), namely Engelard de Cygony, Peter, Gyon, and Andrew of the Chancery, Gyon de Cygony, Geoffrey de Martyn 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. Their names prove them of foreign extraction. They had come from Brabant, Flanders, and Poitou,[995] and several of them stayed on in England and held lucrative posts under Henry III. in spite of the ban here laid upon them. The clause of John's Charter which excluded them from office was indeed omitted from future reissues, along with chapter 45.

The reasons which had rendered them obnoxious to the barons are not explained, but may be readily imagined. They had filled the unpopular posts of collectors of customs, wardens of forests, and commanders of royal garrisons, and had distinguished themselves by their unscrupulous zeal in pushing the king's prerogatives connected with trade, castles, forests, and purveyance.

The career of Engelard de Cygony may be taken as typical of the rest. He was a nephew of Gerard de Athyes,[996] and was deep in the confidence of his master, as is proved by the number of responsible offices with which he was entrusted. We know that in 1211 he acted as Sheriff of Gloucester, since he accounted to the Exchequer for the *firma comitatus*. He further accounted for the *firma burgi* of Bristol,[997] which seems to imply

interference with the chartered liberties of that city. It was probably because John required his services elsewhere, that some of his sheriff's duties were performed by deputy, a burgess named Richard rendering accounts on his behalf. Engelard also held pleas of the Crown for Gloucestershire, in violation alike of the ordinance of 1194 forbidding any sheriff to act as justiciar in his own county, and of the customary rule (confirmed only, not originated, by chapter 24 of Magna Carta) which prevented sheriffs from holding pleas of the Crown.[998] Several entries tell of barrels of wine which he took as "prise" from ships entering the port of Bristol. For example, the exchequer officials allowed him to deduct from the amount which he owed as *firma*, the sum of 60s., in respect of four tuns of red wine, as certified by the king's writ,[999] an entry which suggests that he had purchased from the Crown the profits yielded by the prerogative of taking prise; and had then resold to the king the hogsheads actually required for the royal use at 15s. each. Engelard also guarded a rich treasure for the king at Bristol, probably as constable of the castle there, sums being paid to him *ad ponendum in thesauro regis*.[1000] On one occasion he was entrusted with the custody of more than 10,000 marks of the king's money.[1001] 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.[1002]

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.[1003] 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.[1004] He acted as sheriff of Surrey under William Marshal, the Regent, but was suspended from this office in 1218 in consequence of a dispute with Earl Warenne.[1005] He remained warden of the castle and forests for twenty years after the accession of Henry III.,[1006] 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;[1007] while his son Oliver received the lucrative post of guardian over the lands and heirs of Henry de Berkley.[1008]

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,[1009] he fell under suspicion of treason, and escaped imprisonment only on finding hostages that he would hold the castle of Windsor for the king, and surrender it at his will.[1010] 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.[1011] 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 de Cygony 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."[1012] Engelard thus died, as he had lived, the trusted servant and favourite of kings. His career illustrates how the very same men who had incurred odium as the partizans of John became, when the civil war was over, the instruments of his son's misgovernment.[1013]

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995. Cf. Bémont, *Chartes*, 22, n, and 116.

996. See R. Wendover, III. 238.

997. *Pipe Roll*, 12 John, cited Madox, I. 333.

998. *Ibid.*, II. 146.

999. *Pipe Roll*, 12 John, cited Madox, I. 766.

1000. *Ibid.*, I. 606.

1001. *Ibid.*, I. 384.

1002. *Rot. Pat.*, 16 John, m. 9 (I. 125), and *New Rymer*, I. 126.

1003. 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.

1004. See Bracton's *Note Book*, No. 684.

1005. See *Rot. Pat.*, 2 Henry III. m. 7.

1006. *Ibid.*, 19 Henry III.

1007. See *Testa de Neville*, p. 18, and *Ibid.*, p. 120.

1008. *Rot. Pat.*, 9 Henry III. m. 6.

1009. R. Wendover, IV. 66.

1010. *Annals of Dunstable*, III. 68.

1011. *Mem. Roll*, 28 Henry III., cited Madox, II. 201.

1012. *Mich. Communia*, 29 Henry III., cited Madox, II. 229.

1013. Some particulars respecting the other individuals named will be found in Thomson, *Magna Charta*, 244–5. Philip Mark was Constable of Nottingham under John (R. Wendover, III. 237), and Sheriff of Nottingham both before and after 1215 (see *e.g. Rot. Claus.*, I. 412), while Guy de Chancel in 1214 accounted for the scutage of the honour of Gloucester (Madox, I. 639), and for the rent of the barony of William of Beauchamp (*Ibid.*, I. 717).

CHAPTER FIFTY-ONE.

Et statim post pacis reformacionem 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, who had acted as the agents of his tyrannies, keeping the native English in subjection, and ever ready to take the field in the event of rebellion. These men, who had garrisoned the royal castles which formed such formidable engines of oppression in the Middle Ages, are now to be banished "as soon as peace is restored," an indication that, even at the date of Magna Carta, a state of virtual war was recognized. This promise was partially fulfilled. On 23rd June writs were issued for the disbandment of the mercenaries.[1014] The renewal of the civil war, however, was followed by the enrolment of new bands of foreigners on both sides, and these men long continued to exercise an evil influence in England. Their 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 ring-leader, Falkes de Bréauté, at their head.

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 earlier short bow, but had, in turn, to succumb to the long bow, which was apparently derived from Wales, and was developed as the regular weapon of one branch of the English army 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 of Henry V.

1014. See *Rot. Pat.*, 17 John, m. 23 (*New Rymer*, I. 134).

CHAPTER FIFTY-TWO.

Si quis fuerit disseisitus vel elongatus per nos sine legali judicio parium suorum, de terris, castellis, libertatibus, vel jure suo, statim ea ei restituemus; et si contencio super hoc orta fuerit, tunc inde fiat per judicium viginti quinque baronum, de quibus fit mencio inferius in securitate pacis: de omnibus autem illis de quibus aliquis disseisitus fuerit vel elongatus sine legali judicio 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 warantizare, respectum habebimus usque ad communem terminum crucesignatorum; exceptis illis de quibus placitum motum fuit vel inquisicio facta per preceptum nostrum, ante suscepcionem crucis nostre: cum autem redierimus de peregrinacione nostra, vel si forte remanserimus a peregrinacione nostra, statim inde plenam justiciam exhibebimus.

If any one has been dispossessed or removed[1015] 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.[1016] 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 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.

The Charter here reverts to a topic of vital interest to the barons, the subject of illegal disseisins already raised in chapter 39, which is here supplemented. Legal remedy is provided for everyone dispossessed by the Crown "*sine legali judicio parium suorum*." A distinction is drawn, however, between two classes of wrongs, according as they have been inflicted by John himself, where summary methods are to rule, or 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," that is, of the executors, to be afterwards more fully discussed. Both cases, however, were in the Articles qualified by a stipulation which calls for comment. John had taken the crusader's vow a few months previous, and now claimed the usual three years' "respite" allowed to those preparing for the holy war, from all legal proceedings against them. The barons, viewing John's vow as a deliberate and notorious perjury, rejected his claim. The point was referred by the Articles of the Barons to arbitration. The prelates, whose *judicium* 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.

The crusader's privilege was not allowed by Langton and his fellow-arbitrators in cases where John himself had been the disseisor; the twenty-five executors might there decide forthwith. Respite was allowed, however, in respect of the disseisins of Henry and of Richard (except where legal proceedings were already pending).[1017] The Charter says nothing of the procedure to be adopted at the close of the three years; but there was probably no 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 disseisins effected by him. Many delicate points would thus be referred to the summary decision of a baronial committee, sure to be composed of his most bitter enemies—the very men, perhaps, whom he had 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.[1018]

1015. The *elongatus* of the Charter replaces the *prolongatus* of the Articles of the Barons.

1016. That is, in the so-called "executive clause" the "*forma securitatis ad observandum pacem*" of the Articles, which became chapter 61 of the Charter (*q.v.*).

1017. This "benefit of a crusader" was extended to John in three other sets of complaints, specified in c. 53 (*q.v.*).

1018. This chapter embraced not merely estates still retained in John's possession, but also those granted out anew, the titles of which had been guaranteed by the Crown. If the former owner recovered these, the Crown was legally bound by feudal law to make good the loss inflicted on the present holder by his eviction. The case of Welshmen is specially treated in c. 56 (*q.v.*).

CHAPTER FIFTY-THREE.

Eundem autem respectum habebimus, et eodem modo, de justicia 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 peregrinacione nostra, super hiis conquerentibus plenam justiciam statim exhibebimus.[1019]

> 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 abbeys founded on other fiefs than our own, in which the lord of the fee claims to have 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 advance upon the Articles of the Barons, extending to three kinds of abuses, not specially mentioned there, 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 the proper boundaries of forests said to have been extended by his father or by his brother; (*b*) wardships over the lands of under-tenants usurped by him by reason of his illegal extension of prerogative wardship, and (*c*) abbeys founded by mesne lords and seized by John during vacancies in violation of the rights of wardship of such founders.[1020]

1019. 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.

1020. It thus supplements three previous chapters (*a*) c. 47; (*b*) c. 37; and (*c*) c. 46 respectively.

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.[1021] In civil pleas wherein combat was legally competent, neither party could fight in person: champions were insisted on, although *hired* champions were condemned. In theory, these men were witnesses, each swearing that he had actually seen the seisin—that is, had been present at the infeftment of the claimant whose title he supported, or at that of his ancestor from whom he inherited the land.[1022] In criminal pleas, on the other hand, the parties must fight in their own persons. This distinction is not so illogical as it seems at first sight, for the appellant was supposed to be an eye-witness of the crime[1023]; and the apparent anomaly disappears when both rules of procedure are treated as deductions from the principle that the combatants in all cases were witnesses whose conflicting testimonies must be weighed in the balance of battle, with an overruling Providence holding the scales.

In a case of murder, 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, because of the closeness of the bond of blood or of homage between the two. 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."[1024]

The rule also which required an appellant to offer proof by his own body was relaxed in certain cases; women, men over sixty years of age, and those with broken bones or who had lost a limb, an ear, a nose, or an eye, were unable to fight effectively, and might therefore appear by proxy.[1025] The privilege thus accorded to women was looked on with much disfavour as conferring an unfair advantage as against appellees who were not allowed to produce a substitute. Accordingly an option was given the man accused by a woman; he might, in Glanvill's words, elect either "to abide by the woman's proof or to purge himself by the ordeal."[1026] This option was freely used; an appellee in 1201 was allowed to go to the ordeal of water, [1027] while two years later when the widow of a murdered man offered to prove her accusation "as the court shall consider," the accused was allowed to go to the ordeal, "for he has elected to bear the iron."[1028] After the virtual abolition of ordeal in 1215, appeals by women were usually determined *per patriam* (that is by the sworn verdict of a jury of neighbours). Such is the doctrine of Bracton,[1029] whose authority is amply 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.[1030]

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.[1031]

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 seem to recognize the possibility of a woman's appeal of homicide save for the death of her husband.[1032] He seems to deduce the reason for allowing it in that case from the principle already explained: "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.[1033]

There seems to be no authority whatever for Coke's hasty inference from the provisions of this chapter, that previous to 1215 a woman had an appeal for the death of any one of her "ancestors."[1034] The chapter, in spite of its declaratory nature, seems an ungallant one, indicating that the barons were more careful to guard themselves against unnecessary risk than to champion the cause of defenceless women.[1035]

1021. Cf. *supra*, c. 36.

1022. Bracton, *folio* 151 *b.*, cites the case of a champion sentenced to mutilation of a foot because he confessed that he was paid to appear, and was not really a witness. The Statute of Westminster, I. (3 Edward I. c. 41), enacted that champions need not swear to the personal knowledge of what they maintained. See also Neilson, *Trial by Combat*, 48–51.

1023. 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.

1024. Glanvill, XIV. c. 3.

1025. See Bracton, II. ff. 142 *b*, 145 *b*; also Neilson, *Trial by Combat* 47, and authorities there cited.

1026. Glanvill, XIV. c. 3.

1027. *Sel. Pleas of the Crown*, No. 1.

1028. *Ibid.*, No. 68. Cf. No. 119.

1029. Bracton, *folio* 142 *b*.

1030. *Select Pleas of the Crown*, No. 130.

1031. The Act 6 Richard II. c. 6, to prevent the wife'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.

1032. Glanvill, XIV. c. 3.

1033. Glanvill, XIV. c. 33, Fleta I. c. 3, seems by different words to indicate only the same doctrine of constructive presence, when he speaks in this connection "*de morte viri sui inter brachia sua interfecti*," although laboured explanations of this passage 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.'"

1034. 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 other claims for the death of sons. See *Select Pleas of the Crown*, Nos. 32, 117, and 118.

1035. A peculiarity in the wording of this clause should, perhaps, be noticed. It restricts explicitly not appeals by women, but merely "arrest and imprisonment" following on such.

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 judicium viginti quinque baronum de quibus fit mencio inferius in securitate pacis, vel per judicium 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 judicium, 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 of the Barons, forming the draft of this chapter, refers specially to one particular class of illegal fines, namely those exacted by John from defenceless widows in return for being allowed the peaceful enjoyment of their legal rights of property in their own and their husband's estates ("*pro dotibus, maritagiis, 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 even the clause of the Articles of the Barons did not intend to limit its own operation to this one group of unjust fines; and it mentions amercements, without any qualification. In any view, the terms of

Magna Carta were broadened out to embrace illegal fines and amercements of every sort.[1036]

The distinction between fines and amercements, absolute in theory but tending to become obliterated in practice, has been explained in a former chapter.[1037] The system of arbitrary fines, always so galling a feature in the Crown's policy throughout the Middle Ages, 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 his 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."[1038] Hallam commented on this in a passage which has become classical. "The bishop of Winchester paid a ton 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*)."[1039]

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 thus nominate, and there is no attempt to define their powers relative to those of the other members of the board, a somewhat unbusinesslike omission, but one which testifies to the great confidence placed in Langton by those who approved its terms. Care is taken to prevent such members of the twenty-five as were likely to be biased from sitting in judgments on suits like their own—a stipulation which might with advantage have been extended to several other chapters.

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

1036. In its expanded form the clause becomes a supplement, not merely to c. 7, but 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 for them).

1037. See *supra*, c. 20.

1038. See *Preface* to W. Coventry, II. lxix.

1039. *Middle Ages*, II. 438. Hallam's examples are all drawn from Madox, I. 507-9. Other 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.

CHAPTER FIFTY-SIX.

Si nos disseisivimus vel elongavimus Walenses de terris vel libertatibus vel rebus aliis, sine legali judicio parium suorum, in Anglia vel in Wallia, [1040] eis statim reddantur; et si contencio super hoc orta fuerit, tunc inde fiat in marchia per judicium 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.

This is the first of three chapters directed towards redressing wrongs suffered by Welshmen: and the three taken together testify to the importance attached by the barons to the value of 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).

The present chapter does for Welshmen what the first part of chapter 52 had already done for Englishmen. The reasons for treating Welshmen separately were probably twofold, partly for the sake of emphasis, and partly because some slight differences of detail were required. "Judgment of peers," indeed, was applied to both cases, but for the dispossessed Welshmen, "*in marchia per judicium parium suorum*" takes the place of the "*per judicium viginti quinque baronum*" provided for Englishmen in like case. The "venue" was thus apparently fixed in the marchland for all Welshmen's cases, although three different kinds of law were to be applied according to the situation of the property in dispute. This clear 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. The "peers" of a Welshman were not defined; but a court composed of Welsh barons or freeholders was probably meant.

The final words of the chapter, declaring that Welshmen were to afford reciprocal redress to John and his subjects, are interesting, since they imply that Welshmen had, in some cases, successfully seized lands claimed by Englishmen. Here, as usual, the barons were mainly interested in securing their own rights.

1040. The words "*in Anglia vel in Wallia*" are written at the foot of one of the Cottonian versions, (cf. *supra*, 195, n.); but their omission from their proper place is clearly a clerical error, since they appear *in situ* in the Articles of the Barons.

CHAPTER FIFTY-SEVEN.

De omnibus autem illis de quibus aliquis Walensium disseisitus fuerit vel elongatus sine legali judicio 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 warantizare, 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 justiciam 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 here made for restoring to Welshmen estates of which they had been unjustly dispossessed by Henry or Richard are expressed in terms identical with the similar provisions made in the latter part of chapter 52 for Englishmen in like case, except for the last words, “in accordance with the laws of the Welsh in relation to the aforesaid districts,” indicating the three systems of law referred to in the previous chapter. No machinery is here specified for declaring or applying that law; the need for this indeed had been rendered remote by John’s success before the arbitrators who determined that a crusader’s privilege should be accorded him.[1041]

The Articles of the Barons had, however, mentioned the procedure to be adopted; and a comparison of the terms of articles 25 and 44 with those of chapter 57 of the Charter suggests the antithesis between “*per judicium parium suorum in curia regis*” for Englishmen in such cases, and “*in marchia per judicium parium suorum*” for Welshmen.

1041. See *supra*, c. 52.

CHAPTER FIFTY-EIGHT.

Nos reddemus filium Lewelini 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 fully illustrated.[1042] The patent and close rolls of the reign show a constant coming and going of these living pledges of the peace. A writ of 18th December, 1214, for example, bade Engelard de Cygony restore three Welsh nobles to Llywelyn.[1043] Since then, new hostages, including Llywelyn's own son, had been handed over; and charters also had apparently been pledged. John now promised unconditionally to restore all of these; and the Welsh Prince must have breathed more freely when this was fulfilled, allowing him, his son by his side, with a light heart to prepare for the hostilities against the English Crown, long seen to be inevitable and now to be resumed in alliance with the disaffected English barons.

The Articles of the Barons had to some extent treated this question of the Welsh hostages and charters as an open one, referring its final determination to the arbitration of Stephen Langton and such others as he might nominate to act with him. The point had apparently been decided in favour of the Welsh before the Charter was engrossed in its final form.[1044]

1042. See *supra*, p. 517.

1043. See *supra*, p. 520.

1044. No. 45 of the Articles of the Barons is connected by a rude bracket with No. 46 (relating to the king of 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*, 202. So far as related to Scotch affairs, the king's *caveat* found its way, although in an altered form, into Magna Carta. See c.59.

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 judicium parium suorum in curia nostra.

> We will do toward 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.

A heterogeneous body of forces was drawn into temporary union by common hatred of John. The barons welcomed allies whether from Wales or from Scotland; if the three preceding chapters were a bid for Llywelyn's support, this one 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." This last word covered Alexander's claim to independence and also whatever title he might prove good to various English fiefs which he claimed to hold under the English Crown.

Opinions have been, and still are, sharply divided as to whether, or in what degree, Scotland was subject to feudal overlordship. Of one fact there can be no doubt; 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 widely 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, namely, the earldom of Huntingdon, the isolated position of which enabled the English Crown without danger to admit the claim, and the counties of Northumberland, Cumberland, and Westmoreland, the proximity of which to the border rendered their possession by a Scottish prince a source of weakness to

England.[1045] The terms in which the oath of homage was taken did not indicate for what fiefs it was sworn—whether for the English earldoms alone, or for the whole country north of Tweed as well.

The position of the kings of Scots remained ambiguous in this respect, until William the Lion was placed at a terrible disadvantage by his capture at Alnwick in 1174, after supporting the rebellion against Henry II. To gain his release he ratified the Treaty of Falaise on 8th December, of that year, by which he agreed in future to hold all his territories as fiefs of the English Crown. All his tenants in Scotland were to take a direct oath to Henry; while hostages were surrendered along with the castles of Berwick, Roxburgh, Jedburgh, Edinburgh, and Stirling.[1046]

This notable achievement of Henry's diplomacy was, like other portions of his life's work, 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 ancient kingdom; but this restoration of the relations that had prevailed previous to 1174, involved a restoration of all the old ambiguities. When Richard died, William despatched ambassadors to England, pressing his claims upon the northern counties, promising to support John's title in return for their admission, and adding threats.[1047]

John avoided committing himself to a definite answer 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, taking the oath in public on the summit of the hill of Lincoln, on 21st November, 1200, "reserving always his own right."[1048] The saving clause left everything vague as before.

In April, 1209, the king of Scots incurred John's displeasure by sheltering bishops who had supported the policy of Rome in the matter of the interdict. 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 7th August, 1209.[1049] 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 (the two ladies referred to in Magna Carta) became the wards of John, who had the right to bestow them in marriage—stipulations which come suspiciously near an admission of feudal vassalage.[1050] There seems, however, to have been some understanding that one of them should

wed John's eldest son.[1051] Margaret and Isabel, though kept virtually as prisoners in Corfe Castle, Dorset, were yet honourably and kindly treated there. The Close Rolls of the reign contain several entries (which read strangely enough among the sterner memorials of John's diplomacy) containing orders for supplying them with articles of comfort and luxury. Thus on 6th July, 1213, John, busy as he must have been with affairs of state, 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."[1052] Margaret and Isabel had no reason to complain of such treatment, whatever thoughts the Mayor of Winchester may have had of so liberal an interpretation of his civic duties.

Meanwhile, events in Scotland had favoured English pretensions. In the year 1212, William, now in advanced age, although his son was still a stripling, was compelled by internal troubles to appeal for aid to John. Cuthred, a claimant for the Scottish throne as a descendant of Donald Bane MacWilliam, having acquired a considerable following in Scotland, endeavoured to dethrone King William; and his attempt seemed likely to succeed, when English succour was asked and paid for by a Treaty signed at Norham on 7th February, 1212. By this, 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"—a phrase already explained.[1053] William further pledged himself and his son to keep faith and allegiance to John's son, Henry, "as their liege lord" against all mortals.[1054] The young Scottish prince thereafter journeyed southwards in the train of John, by whom he was knighted on the 4th of March at London. In June an English army entered Scotland; the pretender was defeated and killed. William had saved his Crown, but his independence was impaired. Scotland was gradually sinking into the position of a vassal state. This was recognized at Rome. On 28th October, 1213, Innocent III., among other healing measures consequent on John's surrender of his kingdom, ordered the king of Scotland and his son to show fealty and devotion to John, in terms similar to those addressed to the English barons.[1055]

William the Lion died at Stirling on 4th December, 1214, and Alexander was crowned at Scone two days later,[1056] his peaceful succession being facilitated by the knowledge that he had the support of John. On 28th April, 1215, the English king, already deep in his quarrel with the barons, acknowledged receipt of Thomas Colville and other Scotsmen as hostages.[1057] 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, since his unsatisfied claims on the northern counties predisposed him against the English king. The barons, therefore, did nothing calculated to endanger such hold as England had over the Scottish Crown. John promised to restore Alexander's sisters and other hostages unconditionally, but used words which committed him on none of the disputed points.[1058] Franchises and "right" were to be restored only in so far as accorded with the terms of King William's "charters" as interpreted by the judgment of the English barons in the court of the English king.[1059]

The allusion 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. 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.[1060]

Alexander, though no party to the treaty at Runnymede, was willing to extract such benefit from it as he could. Accordingly, on 7th July, 1215, he despatched the Archbishop of St. Andrews and five laymen to John "concerning our business which we have against you to be transacted in your court."[1061] Nothing came of this; and when the civil war began 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 holes."[1062] Neither Alexander's participation in the war nor the subsequent efforts of diplomacy achieved settlement of the questions in dispute. None of the latent ambiguities had been finally removed when the relations between the two countries entered on a new

phase as a consequence of the attempts at annexation made by Edward I., "the hammer of the Scots."

1045. See Stubbs, *Const. Hist.*, I. 596.

1046. See Ramsay, *Angevin Empire*, 183–4. In the spring of 1185, Henry confirmed William's claim to the Earldom of Huntingdon, and the Scots king, prior to Christmas, 1186, transferred it to his brother David. *Ibid.*, 226, n.

1047. See Miss Norgate, *John Lackland*, 66.

1048. 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.

1049. *New Rymer*, I. 103, where "Northampton" is apparently a mistake for "Norham." See Ramsay, *Angevin Empire*, 421, n.

1050. Ramsay, *Ibid.*, and authorities there cited.

1051. Ramsay, *Angevin Empire*, 421, and authorities.

1052. *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.

1053. See *supra*, c. 6.

1054. *New Rymer*, I. 104. See also W. Coventry, II. 206.

1055. See *New Rymer*, I. 116.

1056. Ramsay, *Angevin Empire*, 477, n.

1057. See *Rot. Pat.*, I. 134, and *New Rymer*, I. 120.

1058. 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, Earl of Kent (mentioned in preamble of Magna Carta); Isabel as wife of Roger Bigod, Earl of Norfolk (one of the Charter's executors). See Ramsay, *Angevin Empire*, 421, and authorities there cited.

1059. This reference to charters was probably intended to cover (*a*) the Treaty of Falaise, (*b*) the agreement of 7th August, 1209, and (*c*) the writ of 7th February, 1212, with the other charters to which it refers. It called itself a charter, and suggested others by the words *hinc et inde*.

1060. No. 46 of the Articles of the Barons (as qualified by the clause in the bracket) referred the question of Alexander's "right" in reference to his father's charters to the judgment of Langton and his nominees, for which Magna Carta substituted "judgment of his peers in our court."

1061. *New Rymer*, I. 135.

1062. Matthew Paris, *Chron. Maj.*, II. 642: "*Sic fugabimus rubeam vulpeculam de latibulis suis*."

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 the 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—the men without whose support they would have been powerless at Runnymede—those very exactions which they compelled the king to abjure as against themselves. Accordingly, the benefit of the same "customs and liberties" conceded by John to his feudal tenants was—in a somewhat perfunctory manner it is true—extended also 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, if not exclusively, intended, since the view of society indicated is feudal rather than national, and this is quite in keeping with many other clauses of the Charter.

These considerations suggest that too wide and 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, and as enunciating a doctrine of mutual responsibility between the king and his subjects. "This is the chief felicity of a kingdom, when good laws are reciprocally of prince and people (as is here undertaken) duly observed."[1063] In this view he has had many followers, and the present chapter has received undue emphasis as supporting a democratic interpretation of Magna Carta.[1064] It has sometimes been referred to as "the only clause which affects the whole body of the people."[1065] The better view is that its provisions were confined to freeholders.

Even authors who interpret the chapter in this restricted application are still prone to exaggerate its importance. Two opposite lines of comment, in favour respectively with historians of two different schools, seem equally in need of supplement. (1) This clause is sometimes regarded as springing directly from the barons' own uncontrolled initiative. Dr. Stubbs takes this view, contrasting its substance with similar restraints imposed by Henry I. on the barons by his Charter of Liberties, and emphasizing as specially notable the fact that the present clause was "adopted by the lords themselves."[1066] Such praise is unmerited; the barons had no option, since the omission of provisions to this effect would have been a glaring absurdity and a most imprudent act. (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."[1067]

The substance of this chapter appears in the reissues of 1217 and 1225; but its force is there greatly impaired by the addition of a new clause inconsistent with its spirit, 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 had.[1068] The chief object of this was presumably to make it clear that Magna Carta, while conferring benefits, took nothing away; but it would naturally be interpreted as a saving clause in favour of aristocrats in their relations with their dependants ("*erga suos*") as well as with the Crown, thus modifying the clause which immediately preceded it.

1063. *Second Institute*, 77.

1064. Cf. *supra*, 133–4.

1065. Thomson, *Magna Charta*, 269, and authorities there cited.

1066. *Const. Hist.*, I. 570. Cf. *supra*, 139–140.

1067. *History of Great Britain*, VI. 74. (6th edition, 1823). See also S. Henshall, *History of South Britain*, cited by Thomson, *Magna Charta*, 268-9.

1068. See c. 46 of 1217.

1069. The words "*in perpetuum*" are written at the foot of one of the Cottonian versions. See *supra*, 195, n.

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 perpetuum[1069] 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 viginti quinque baronibus, et illi viginti quinque barones cum communa tocius terre distringent et gravabunt nos modis omnibus quibus poterunt, 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 intendent 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 numquam 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 underwritten 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 and liberties we have granted and confirmed to them by this our 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 corrected 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, distrain 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 entrusted 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.

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*).[1070] It contains the only executive clause of the Charter, the sole constitutional machinery provided for enforcing the rights now defined on parchment, the sole protection against future attempts of the king to render them of no effect.

I. *The Nature of the "Security" or legal Sanction.* The procedure devised for enforcing the Charter was exceedingly crude: John conferred upon twenty-five of his most bitter enemies a legal right to organize rebellion, whenever in their opinion he had broken 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 in practice, the "sovereignty," or supreme power in England, would have been split into two for practical purposes. While the old monarchy remained theoretically intact, John would have held the sceptre, still nominally his, only until his opponents declared that he had broken some part of the Charter, when, by his own previously-granted mandate, it would pass, along with wide powers of coercion, to the twenty-five barons forming what is sometimes described as a Committee of Executors, but which was rather a Committee of Rebellion.[1071] Instead of using, as was afterwards done with steadily increasing success, the king's own administrative machinery and his own servants to restrain his own misdeeds, the barons preferred to set up a rival executive of their own, with wide but ill-defined powers, and connected with the older executive by no constitutional bonds. So long as a single alleged grievance remained unredressed, a new administration composed of John's political antagonists existed in an attitude of, at best, armed neutrality, side by side with King John as the representative of the older system of monarchic administration.

The procedure for redressing grievances was described in some detail; the wronged party must make known his case to four barons of the twenty-five, and these would then personally make it known to the king, and ask redress. John was allowed time to effect this, but if he refused or delayed, then compulsion might be used. The Articles of the Barons had left the maximum term of delay unspecified, merely saying "within a reasonable time to be determined in the Charter." The Charter did determine this, naming forty days. Compulsion might take any form (for example seizure of castles, lands, and personal estate), except violence against the person of the king, or against his wife or children. The present chapter, then, contained the only legal sanction mentioned in the Charter, and this may be briefly summarized as the delegation by John to a revolutionary committee of the baronial opposition, of wide powers of coercion to be used against him.

II. *Minor Details of the Scheme.* Although the whole expedient seems utterly 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 to be adopted at different stages and in various contingencies.

(1) *Appointment of the twenty-five executors.* The members of the committee were to be, in the first instance, "elected" (a loose word already discussed) by the "barons." The *majores barones* of chapter 14 would undoubtedly have the controlling voice; but the *minores barones* might possibly have taken some share in the appointment. Vacancies which occurred through death, absence from England, or any other cause, 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, but to last during John's lifetime or longer. Twenty-five magnates seem to have been actually selected. The 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.[1072] 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 Mumbezon, William of Huntingfield, Richard de Muntfitchet, and William of Albini.[1073] There are here no churchmen and no members of the moderate party whose names appear in the preamble. All except two, or at the most three, of the twenty-five were drawn from those factions of the baronage who were the declared enemies of John.[1074] It was an oligarchy of disaffected Crown tenants, whose baronial homogeneity was only broken by the presence of one representative of other classes, the Mayor of London. Such a committee was not likely to use the excessive powers delegated to it by John to further any other interests than its own. Even Stephen Langton and his fellow-prelates were soon to discover this, as the two protests issued by them clearly prove.

(2) *A majority of those present to form a quorum.* Driven by the necessities of the case, the barons devised, or stumbled upon, a peculiarly modern expedient. The presence of every member of the committee of twenty-five could not reasonably be expected upon every occasion, while absolute unanimity on questions of delicacy 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. It is notable that no provision was made for summoning or constituting meetings of the committee endowed with these tremendous powers. Room was thus left for packed meetings of one faction being hurriedly convened and usurping the rights of the whole body. The precedent thus tentatively introduced for the right of a majority to act for the whole was followed only timidly and at long intervals. Still, its appearance in John's Charter marks a stage in the advance of the valuable principle of modern politics which substitutes the "counting of heads for the breaking of them."

(3) *The sub-committee of four.* Four of the twenty-five Executors were to act as a medium of intercourse between aggrieved individuals and the king, being charged with the duty of hearing complaints and laying them before John. Such a position would involve wide discretionary powers; for if the

four barons refused to endorse the justice of the complaint, John also would be in safety to refuse.[1075]

(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 the local representatives of the revolutionary committee, being associated with the sheriff in the discharge of all his duties and armed with power to constrain him 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 the enforcement of the oath of obedience to the revolutionary committee, and with the confiscation of the property of all who refused.[1076]

(5) *The part to be played by the public.* The king authorized his subjects to side with the executors and against him if he should violate the Charter, and to assist them in such acts of violence as the forcible seizure of his castles, lands, and personal estate; for his general mandate was granted to the twenty-five "*cum communa totius terre*," while licence was "freely and publicly" bestowed on everyone so disposed to swear obedience to the Executors in all such acts, and to bring their weight to bear on the king to the best of their ability. Two aspects of this provision require special attention: (*a*) *Its relation to allegiance and treason.* It was intended to operate as a provisional release of John's subjects from their oaths of fealty and homage, and consequently from the pains and penalties of the treason laws. John solemnly authorized his subjects, in certain circumstances, to transfer their allegiance from himself to the committee of his foes. If they refused, he promised to compel them; 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.[1077] (*b*) *Communa totius terre.* 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. A group of interesting questions clusters round the three words "borough, guild, and commune," and the appearance in Magna Carta of a body described as a "commune" (*communa totius terre*) in conjunction with an oath of obedience to a revolutionary committee suggests an interesting

comparison with the form of civic constitution known in that age as "the sworn commune."[1078] A second field of enquiry, equally alluring, is suggested by the fact that the lower chamber of the Mother of Parliaments, the English "House of Commons," was originally composed of the representatives of the various communes or communities known as counties and boroughs respectively.

These wider questions are here referred to merely as illustrations of the difficulties that lurk in the word "commune," and in the equally perplexing phrase "commune of the whole land."[1079] The mere use of such a phrase cannot be accepted as a proof that the Charter rests on a broad popular basis.

III. *Criticism of the Scheme.* The faults of the scheme, whether viewed from the side of theory or of practice, are obvious. It was a violent and unnatural 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.[1080] Instead of preventing the king from inflicting wrongs, it merely provided forcible measures for the redress of those already committed, thus adding the crowning evil of civil war to those minor evils it sought to reform. That the whole scheme was foredoomed to failure constitutes perhaps its least conspicuous fault in the eyes of later history. It is instructive to note a few of its other defects in detail.

(1) The scheme challenged hostility by its want of moderation. It aimed at reducing the Crown at one blow from the plenitude of irresponsible tyranny to a position of degrading impotence. 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 humbly before a tribunal in which his opponents sat as judges. The scheme was thus repugnant to the mass of loyal Englishmen, who cherished a respect for the time-honoured principle of monarchy. No king with a grain of self-respect would long submit tamely to a position so illogical and degrading—to remain a sovereign whose "sovereignty" existed merely on the sufferance of his enemies, a puppet-king whose subjects had the legal right to coerce him. The powers thus conferred on a baronial committee 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 for all time as "the Mad Parliament," because of the violence of its measures against the king.

(2) Rebellion, even where morally justified, is essentially and necessarily illegal; to attempt to map out for it a legitimate sphere of action is to attempt the logically impossible. The barons, in their dearth of political experience, and in the extremity of their need, had demanded and obtained something more dangerous than the amplest measure of constitutional authority. They 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. They set up side by side two rival Executives, each in different circumstances supreme. The relations of the two were far from accurately defined, even in theory, while collisions were certain to occur frequently in practice. The powers of the twenty-five, a body which received no proper organization, were those of aggression rather than of administration. Viewed in this light, the claims of the barons to constructive statesmanship rank extremely 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, always nervous under this sword of Damocles, would lose all power of initiative, while the committee, so powerful to reduce him to impotence, would be powerless alike 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, however, the efficiency of the committee would have been completely neutralized in either of two contingencies: if the barons composing it disagreed among themselves, or, if the king refused to surrender, preferring the appeal to arms. The monarch had always the alternative of civil war, and the material and moral advantage of acting on the defensive lay with him; while the committee had to face the risks to which an attacking party is invariably exposed. Not a single step to restrain the king could legally be taken until he had precipitated matters by committing a clear act of aggression, and had thereafter 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 meet 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, since it was nothing less than the devising of legal machinery to prevent the king from abusing the powers entrusted to him. The barons sought the best method of turning royal promises of reform into laws which succeeding kings must obey. In attempting this, Magna Carta moved along lines which were radically wrong; 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" in regard to all vital questions of the day, 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, although under various modifications on points of detail; but they met with no success. After half a century of unrest a settlement seemed as far distant as before. If the same policy had been persisted in during Edward's reign the English constitution, as it became known to after ages, would never have been evolved. The dangers and defects of schemes like those of 1215 and of 1258 are most 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 himself. The principle was slowly established that the sovereign could perform no single act of prerogative except through the agency of the proper minister or group of ministers. Each function of government became associated with a specific office or organ of the royal household. The rights of the official head of each department became stereotyped, and his position obtained full legal acknowledgment, 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 expedients of an earlier age disappeared as no longer required, when the king's good faith was secured by means of the friendly control of his own ministers, not by the violent compulsion of his opponents. The credit of starting the constitution on its right line of development is in great measure due to Edward I.[1081]

IV. *Dr. Gneist's Criticism.* Dangerous and even absurd as this scheme appears, it has found its apologist. Dr. Gneist accuses English historians of making "very inappropriate comparisons" between this baronial committee

and the continental expedients of the same period. While in most countries of Europe, each baron arrogated the right of private war against his sovereign in circumstances to be determined by his own individual judgment, Magna Carta conferred rights of rebellion only on the barons "in their collective capacity," and "as represented by definite organs."[1082] The substitution of collective repressive measures for the right of private feud undoubtedly marks an advance; but rebellion, even when organized, cannot be considered a satisfactory constitutional expedient. Dr. Gneist is scarcely more convincing when he argues that English historians and jurists have condemned too unreservedly a scheme which is "so far in harmony with the spirit of the feudal state of the Middle Ages as it was based upon a mutual relation of feudal protection and fealty, that is, upon compact." "The concession by agreement," he continues, "of the rights of distress was altogether so entirely consonant with the legal conceptions of the Middle Ages that in this way the committee of resistance loses a portion of its apparently revolutionary character."[1083] That the Middle Ages approved of revolution does not, however, change it into constitutional action; while the fact that it was founded upon the feudal conception of mutual contract may explain it, but does not render it more worthy of admiration. The whole scheme was, of course, thoroughly in accord with the public opinion of the age, but that merely shows how wide is the gulf which separates medieval conceptions from modern ones, and how absurd it is to regard the Great Charter, as is sometimes done, as anticipating the fundamental principles of the English constitution of to-day.

In spite of all apologies, the crudeness of the only sanction provided by Magna Carta for its own enforcement prevents it from ranking as a great monument of constructive statesmanship.

V. *Failure of the Scheme.* Almost before John's Magna Carta, in its completed form, had been engrossed and sealed, the futility of its sanction was recognized. Each side grew suspicious and demanded new "sanctions," new guarantees not contained in the Charter.

(1) *Quis custodiet ipsos custodes?* Magna Carta, assuming apparently that perfect trust could be placed in the rectitude and wisdom of the Revolutionary Committee, provided no machinery for controlling them, no guarantee that they would observe the Charter without misinterpreting its provisions to suit their own selfish interests. 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 Paris[1084] 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."[1085] 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."[1086] The thirty-eight were required to constrain the twenty-five, as the twenty-five constrained the king.[1087]

(2) *Suspicions of the barons' good faith.* Whether the appointment of the committee of thirty-eight was due partly to John's influence or was entirely the result of mutual jealousies in the ranks of those opposed to him, there is absolute evidence that the king was distrustful of the barons' good faith, and desired on his part some "sanction" that they would not again renounce that allegiance, the renewal of which was the *quid pro quo* for which he had granted the Charter. Apparently the leading barons did renew their oath of fealty and homage on 19th June at Runnymede; but refused to grant a formal Charter to that effect, although they had promised to give any security John might require, except hostages or castles. The prelates when appealed to sided with the king; they executed a formal declaration or protest, recording the barons' promise and subsequent refusal to give effect to it. There is no reason to doubt the testimony of the prelates; they had been present at all the negotiations, and it was by their mediation that the terms of peace embodied in Magna Carta had been settled. This was not the only matter on which the bishops found it necessary to intervene on the king's behalf. The new baronial executive and the twelve knights who acted as their agents in each county, pushed to unfair lengths the authority to reform abuses conferred on them in terms of Magna Carta. In particular, they proceeded virtually to abolish the royal forests altogether by abrogating as evil customs the procedure on which this branch of the Crown's prerogative rested. The prelates placed on record a formal protest on this head also.[1088]

(3) *Suspicions of John's good faith.* If neither the king nor the nation at large considered that the Great Charter contained sufficient safeguards of

their interests against the Committee of Executors, the barons themselves soon came to the conclusion that the Committee, in spite of all its powers, formed an inadequate sanction against John. Accordingly 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 Anglie et barones ejusdem regni*," which thus supplied a new sanction, or "form of security," supplementing, if not superseding, that contained in chapter 61 of Magna Carta.[1089]

(4) *Precautions against papal intervention.* The Articles of the barons afford undoubted evidence of its framers' suspicions that John would apply to Rome for absolution from his bargain. They showed considerable shrewdness in demanding that the English prelates and the papal legate should become the king's sureties that he would not procure from the Pope anything to invalidate the Charter or diminish its efficacy. If Pandulf, as the Pope's accredited agent, had actually put his seal to such a document, he would have seriously embarrassed his august master in supporting John in a course of repudiation.

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. No mention was made of Innocent by name, the clause being made quite general in its terms. John merely promised to procure a dispensation "from no one," while the question of sureties was quietly ignored. The reason for the omission readily suggests itself; Pandulf would naturally object to commit his principal or himself to any pledge of the kind. The Pope preserved perfect freedom, and the use which he made of this is matter of common knowledge.[1090]

1070. This phrase occurs in the 49th (and last) of the Articles of the Barons as the title of a clause which is separated from the others by a blank on the parchment 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 the same as "*super securitate ista*."

1071. Cf. S. R. Gardiner, *Short History of England*, 183: "a permanent organization for making war against the king."

1072. R. Wendover, from whom Paris borrows so freely, gives no list.

1073. The list is taken from Matthew Paris, *Chron. Maj.*, 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*, 198, n). Paris gives "Boys" in place of "Ros," and "Roger de Munbrai" in place of "Roger of Mumbezon." This list should be contrasted with (*a*) that of the moderate party named in the preamble to Magna Carta, and (*b*) that of John's foreign favourites named in c. 50. For biographical information, see Thomson, *Magna Charta*, 270–312.

1074. These three were Earl Aumâle (a title apparently sometimes exchanged for that of Earl of York, see Round, *Geoffrey de Mandeville*, 157, n.), William of Albini, and, possibly, Geoffrey de Say (see Stubbs, *Const. Hist.*, I. 583).

1075. An alternative explanation is also possible, namely, that the function of intermediary might be exercised by any four members of the twenty-five. In that view, an aggrieved individual might have pressure placed upon the king if he persuaded any four to act together in support of his claim. This would imply a second quorum, this time of four, for a special purpose, in addition to the quorum of varying numbers already discussed. In either view, the road to redress would be easier for the great man than for his obscure neighbour.

1076. Cf. *supra*, c. 48.

1077. See Appendix.

1078. It was only fourteen years since London (in 1191), probably following the lead of Rouen, had extorted its "sworn commune" from Prince John as the price of its support (cf. *supra*, c. 13). It might be dangerous, however, to push so tempting an analogy too far.

1079. Cf. *supra*, pp. 137-8.

1080. See *supra*, p. 150.

1081. Cf. *supra*, pp. 189-193 for a sketch of Edward's policy.

1082. Gneist, *English Const.*, 251.

1083. *Ibid.*

1084. *Chron. Maj.*, II. 605-6.

1085. *Const. Hist.*, I. 583, n.

1086. *John Lackland*, 236.

1087. One version of the narrative of Matthew Paris is much fuller than the other. The first MS. merely says, "*Isti omnes juraverunt quod obsequerentur mandato viginti quinque baronum.*" The second gives the important addition, "*Omnes isti juraverunt cogere si opus esset ipsos* xxv. *barones ut rectificarent regem*. *Et etiam cogere ipsum si mutato animo forte recalcitraret*," II. 606, n.

1088. The texts of both Protests are given in the Appendix.

1089. See *supra*, 51–2. The text is given in Appendix. Thirteen of the twenty-five executors are mentioned by name as agreeing to this new treaty on behalf of themselves and other earls, barons and freeholders unnamed. Cf. R. Wendover, III. 319 ("*et turrem Londonarum*"). A third sanction, or form of security, appears in the garbled versions of the Charter given by R. 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 executors. See M. Paris (*Ibid.*). This clause has not been found in any known copy of any issue of Magna Carta. Cf. Mr. H. R. Luard's *preface* to the second volume of Matthew Paris, pp. xxxiii. to xxxvi., where he discusses the peculiarities of the versions given by Wendover and Paris.

1090. Cf. *supra*, p. 55.

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 out to them letters patent of Stephen, archbishop of Canterbury, Henry, archbishop of Dublin, the bishops aforesaid, and master Pandulf, as evidences of this clause of security and of the foresaid concessions.

The clauses which follow the *forma securitatis* are entirely of a formal nature, adding nothing to the substance of Magna Carta. The present chapter, after making a well-meant declaration that bygones should be bygones, and that perfect 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 terms of the Great Charter. Such letters were actually issued, and their terms are preserved in the Red Book of the Exchequer.[1091]

1091. See *folio* 234. The text which is reproduced by Bémont, *Chartres*, p. 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 predicte aliquid possit addi vel ab eadem aliquid possit subtrahi vel minui, huic scripto sigilla nostra apposuimus."

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 concessiones, 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 for purposes of convenience, not by its framers, but by modern commentators, contains little that calls for special comment. Beginning with a repetition of the declarations already made in chapter one that the English 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 went on to record the fact that both parties had taken oath to observe its contents in good faith.[1092] The magnates named in the preamble were thereafter, along with many others who were not named, referred to collectively as witnesses. The Charter concludes with the declaration that it has been “given by our hand,” the place and date being specified, so as to conform to the formalities required in legal documents. The actual giving by John’s hand was effected by the impress of his great seal.[1093]

1092. Cf. *supra*, 125.

1093. There are no signatures to the document. The frequent references to "the signing of the Great Charter" (*e.g.* Medley, *Const. Hist.*, 127) 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." That Magna Carta, in spite of its mention of its own date as 15th June, was actually sealed on the 19th has already been asserted, *supra*, 48–49. To the proofs there adduced should be added the testimony of the *Annals of Dunstable*, III. 43, which report that peace was made between king and barons at Runnymede "*die Gervasii et Protasii*."

APPENDIX.
DOCUMENTS RELATIVE TO, OR ILLUSTRATIVE OF JOHN'S MAGNA CARTA.

I. THE CHARTER OF LIBERTIES OF HENRY I.[1094]

(1100.)

Anno incarnationis dominice M.CI. Henricus, filius Willelmi regis, post obitum fratris sui Willelmi Dei gratia rex Anglorum, omnibus fidelibus salutem.

1. Sciatis me Dei misericordia et communi consilio baronum totius regni Anglie, ejusdem regem coronatum esse. Et, quia regnum oppressum erat injustis exactionibus, ego, Dei respectu et amore quem erga vos habeo, sanctam Dei ecclesiam inprimis liberam facio, ita quod nec vendam, nec ad firmam ponam, nec mortuo archiepiscopo, sive episcopo, sive abbate, aliquid accipiam de dominico ecclesie vel de hominibus ejus, donec successor in eam ingrediatur. Et omnes malas consuetudines, quibus regnum Anglie injuste opprimebatur, inde aufero; quas malas consuetudines ex parte hic pono:

2. Si quis baronum, comitum meorum, sive aliorum qui de me tenent, mortuus fuerit, heres suus non redimet terram suam sicut faciebat tempore fratris mei, sed justa et legitima relevatione relevabit eam. Similiter et homines baronum meorum justa et legitima relevatione relevabunt terras suas de dominis suis.

3. Et si quis baronum vel aliorum hominum meorum filiam suam nuptum tradere voluerit, sive sororem, sive neptim, sive cognatam, mecum inde loquatur; sed neque ego aliquid de suo pro hac licentia accipiam, neque defendam ei quin eam det, excepto si eam vellet jungere inimico meo. Et si, mortuo barone sive alio homine meo, filia heres remanserit, illam dabo consilio baronum meorum cum terra sua. Et si, mortuo viro, uxor ejus remanserit et sine liberis fuerit, dotem suam et maritationem habebit; et eam non dabo marito, nisi secundum velle suum.

4. Si vero uxor cum liberis remanserit, dotem quidem et maritationem habebit dum corpus suum legitime servaverit, et eam non dabo, nisi secundum velle suum; et terre et liberorum custos erit sive uxor, sive alius propinquarius qui justius esse debeat. Et precipio quod barones mei similiter se contineant erga filios vel filias et uxores hominum suorum.

5. Monetagium commune, quod capiebatur per civitates et comitatus, quod non fuit tempore regis Edwardi, hoc ne amodo sit omnino defendo. Si quis captus fuerit, sive monetarius, sive alius, cum falsa moneta, justicia recta inde fiat.

6. Omnia placita et omnia debita que fratri meo debebantur condono, exceptis rectis firmis meis, et exceptis illis que pacta erant pro aliorum hereditatibus, vel pro eis rebus que justius aliis contingebant. Et si quis pro hereditate sua aliquid pepigerat, illud condono, et omnes relevationes que pro rectis hereditatibus pacte fuerant.

7. Et si quis baronum vel hominum meorum infirmabitur, sicut ipse dabit vel dare disponet pecuniam suam, ita datam esse concedo; quod si ipse, preventus armis vel infirmitate, pecuniam suam non dederit val dare disposuerit, uxor sua, sive liberi, aut parentes, et legitimi homines ejus, eam pro anima ejus dividant, sicut eis melius visum fuerit.

8. Si quis baronum vel hominum meorum forisfecerit, non dabit vadium in misericordia pecunie, sicut faciebat tempore patris mei vel fratris mei; sed, secundum modum forisfacti, ita emendabit sicut emendasset retro a tempore patris mei, in tempore aliorum antecessorum meorum. Quod si perfidie vel sceleris convictus fuerit, sicut justum fuerit sic emendet.

9. Murdra etiam, retro ab illa die qua in regem coronatus fui, omnia condono; et ea que amodo facta fuerint, juste emendentur secundum lagam regis Edwardi.

10. Forestas, omni consensu baronum meorum, in manu mea retinui sicut pater meus eas habuit.

11. Militibus qui per loricas terras suas defendunt, terras dominicarum carrucarum suarum quietas ab omnibus gildis et omni opere proprio dono meo concedo, ut, sicut tam magno allevamine alleviati sunt, ita se equis et armis bene instruant ad servitium meum et ad defensionem regni mei.

12. Pacem firmam in toto regno meo pono et teneri amodo precipio.

13. Lagam Edwardi regis vobis reddo cum illis emendationibus quibus pater meus eam emendavit consilio baronum suorum.

14. Si quis aliquid de rebus meis vel de rebus alicujus post obitum Willelmi regis fratris mei cepit, totum cito sine emendatione reddatur; et si quis inde aliquid retinuerit, ille super quem inventum fuerit michi graviter emendabit.

Testibus Mauricio Lundonie episcopo, et Gundulfo episcopo, et Willelmo electo episcopo, et Henrico comite, et Simone comite, et Waltero Giffardo,

et Rodberto de Monfort, et Rogero Bigoto, et Henrico de Portu, apud Londoniam, quando fui coronatus.

II. THE SECOND OR OXFORD CHARTER OF STEPHEN.[1095] (1136.)

Ego Stephanus Dei gratia, assensu cleri et populi in regem Anglie electus, et a Willelmo Cantuariensi archiepiscopo et sancte Romane ecclesie legato consecratus, et ab Innocentio sancte romane sedis pontifice postmodum confirmatus, respectu et amore Dei sanctam ecclesiam liberam esse concedo, et debitam reverentiam illi confirmo. Nichil me in ecclesia vel rebus ecclesiasticis simoniace acturum vel permissurum esse promitto. Ecclesiasticarum personarum et omnium clericorum et rerum eorum justiciam et potestatem et distributionem honorum ecclesiasticorum in manu episcoporum esse perhibeo et confirmo. Dignitates ecclesiarum privilegiis earum confirmatas et consuetudines earum antiquo tenore habitas inviolate manere statuo et concedo. Omnes ecclesiarum possessiones et tenuras, quas die illa habuerunt qua Willelmus rex avus meus fuit vivus et mortuus, sine omni calumpniantium reclamatione, eis liberas et absolutas esse concedo. Si quid vero de habitis vel possessis ante mortem ejusdem regis quibus modo careat, ecclesia deinceps repetierit, indulgentie et dispensationi mee vel restituendum vel discutiendum reservo. Quecunque vero post mortem ipsius regis liberalitate regum vel largitione principum, oblatione vel comparatione, vel qualibet transmutatione fidelium eis collata sunt, confirmo. Pacem et justiciam me in omnibus facturum et pro posse meo conservaturum eis promitto.

Forestas quas Willelmus avus meus et Willelmus avunculus meus instituerunt et habuerunt mihi reservo. Ceteras omnes quas rex Henricus superaddidit, ecclesiis et regno quietas reddo et concedo.

Si quis episcopus vel abbas vel alia ecclesiastica persona ante mortem suam rationabiliter sua distribuerit vel distribuenda statuerit, firmum manere concedo. Si vero morte preoccupatus fuerit, pro salute anime ejus, ecclesie consilio, eadem fiat distributio. Dum vero sedes propriis pastoribus vacue fuerint, ipsas et earum possessiones omnes in manu et custodia clericorum vel proborum hominum ejusdem ecclesie committam, donec pastor canonice substituatur.

Omnes exactiones et injusticias et mescheningas sive per vicecomites vel per alios quoslibet male inductas funditus exstirpo. Bonas leges et antiquas et justas consuetudines in murdris et placitis et aliis causis observabo et observari precipio et constituo. Hec omnia concedo et confirmo, salva regia et justa dignitate mea.

Testibus Willelmo Cantuariensi archiepiscopo, et Hugone Rothomagensi archiepiscopo, et Henrico Wintoniensi episcopo, et Rogero Saresberiensi episcopo, et Alexandro Lincolniensi episcopo, et Nigello Eliensi episcopo, et Evrardo Norwicensi episcopo, et Simone Wigorniensi episcopo, et Bernardo episcopo de S. Davide, et Audoeno Ebroicensi episcopo, et Ricardo Abrincensi episcopo, et Roberto Herefordiensi episcopo, et Johanne Rovecestriensi episcopo, et Athelulfo Carlolensi episcopo, et Rogero cancellario, et Henrico nepote Regis, et Roberto comite Gloecestrie, et Willelmo comite de Warenna, et Rannulfo comite Cestrie, et Roberto comite de Warewic., et Roberto de Ver., et Milone de Glocestria, et Brientio filio Comitis, et Roberto de Oilly conestabulis, et Willelmo Martello, et Hugone Bigot, et Hunfredo de Buhun, et Simone de Belcamp dapiferis, et Willelmo de Albiniaco, et Eudone Martello pincernis, et Roberto de Ferreriis, et Willelmo Pevrello de Notingeham, et Simone de Saintliz, et Willelmo de Albamarla, et Pagano filio Johannis, et Hamone de Sancto Claro, et liberto de Laceio. Apud Oxeneford. Anno ab incarnatione Domini M.C. XXXVI., set regni mei primo.

III. CHARTER OF HENRY II.[1096]
(CIRCA 1154.)

Henricus Dei gracia rex anglie, dux Normannie et Aquitanie, et comes Andegavie, omnibus comitibus, baronibus et fidelibus suis Francis et Anglicis, salutem. Sciatis me, ad honorem Dei et sancte Ecclesie, et pro communi emendacione tocius regni mei, concessisse et reddidisse et presenti carta mea confirmasse Deo et sancte ecclesie et omnibus comitibus et baronibus et omnibus hominibus meis omnes concessiones et donaciones et libertates et liberas consuetudines, quas rex Henricus avus meus eis dedit et concessit. Similiter eciam omnes malas consuetudines, quas ipse delevit et remisit, ego remitto et deleri concedo pro me et heredibus meis. Quare volo et firmiter precipio quod sancta ecclesia et omnes comites et barones et omnes mei homines omnes illas consuetudines et donaciones et libertates et liberas consuetudines habeant et teneant libere et quiete, bene et in pace et integre, de me et heredibus meis, sibi et heredibus suis, adeo libere et quiete et plenarie in omnibus, sicut rex Henricus avus meus eis dedit et concessit, et carta sua confirmavit. Teste Ricardo de Luci apud Westmonasterium.

IV. THE SO-CALLED "UNKNOWN CHARTER OF LIBERTIES" OF JOHN[1097]

(WHICH MAY, PERHAPS, BE IDENTIFIED WITH THE SCHEDULE OF 27TH APRIL, 1215).

1. Concedit Rex Johannes quod non capiet hominem absque judicio, nec aliquid accipiet pro justitia, nec injustitiam faciet.

2. Et si contingat quod meus baro vel homo meus moriatur et haeres suus sit in aetate, terram suam debeo ei reddere per rectum releveium absque magis capiendi.

3. Et si ita sit quod haeres sit infra aetatem, debeo iiij^{or} militibus de legalioribus feodi terram bajulare in custodia, et illi cum meo famulo debent mihi reddere exitus terrae sine venditione nemorum et sine redemptione hominum et sine destructione parci et vivarii; et tunc quando ille haeres erit in aetate terram ei reddam quietam.

4. Si foemina sit haeres terrae, debeo eam maritare, consilio generis sui, ita non sit disparagiata. Et si una vice eam dedero, amplius eam dare non possum, sed se maritabit ad libitum suum, sed non inimicis meis.

5. Si contingat quod baro aut homo meus moriatur, concedo ut pecunia sua dividatur sicut ipse diviserit; et si praeoccupatus fuerit aut armis aut infirmitate improvisa, uxor ejus, aut liberi, aut parentes et amici propinquiores pro ejus anima dividant.

6. Et uxor ejus non abibit de hospitio infra XL. dies et donec dotem suam decenter habuerit, et maritagium habebit.

7. Adhuc hominibus meis concedo ne eant in exercitu extra Angliam nisi in Normanniam et in Britanniam et hoc decenter; quod si aliquis debet inde servitium decem militum, consilio baronum meorum alleviabitur.

8. Et si scutagium evenerit in terra, una marca argenti capietur de feodi militis; et si gravamen exercitus contigerit, amplius caperetur consilio baronum regni.

9. Adhuc concedo ut omnes forestas quas pater meus et frater meus et ego afforestaverimus, deafforesto.

10. Adhuc concedo ut milites qui in antiquis forestis meis suum nemus habent, habeant nemus amodo ad herbergagia sua et ad ardendum; et habeant foresterium suum; et ego tantum modo unum qui servet pecudes meas.

11. Et si aliquis hominum meorum moriatur qui Judaeis debeat, debitum non usurabit quamdiu haeres ejus sit infra aetatem.

12. Et concedo ne homo perdat pro pecude vitam neque membra.

V. THE ARTICLES OF THE BARONS.[1098]
(1215.)

Ista sunt Capitula que Barones petunt et dominus Rex concedit.

1. Post decessum antecessorum heredes plene etatis habebunt hereditatem suam per antiquum relevium exprimendum in carta.

2. Heredes qui infra etatem sunt et fuerint in custodia, cum ad etatem pervenerint, habebunt hereditatem suam sine relevio et fine.

3. Custos terre heredis capiet rationabiles exitus, consuetudines, et servitia, sine destructione et vasto hominum et rerum suarum, et si custos terre fecerit destructionem et vastum, amittat custodiam; et custos sustentabit domos, parcos, vivaria, stagna, molendina et cetera ad terram illam pertinentia, de exitibus terre ejusdem; et ut heredes ita maritentur ne disparagentur et per consilium propinquorum de consanguinitate sua.

4. Ne vidua det aliquid pro dote sua, vel maritagio, post decessum mariti sui, sed maneat in domo sua per .xl. dies post mortem ipsius, et infra terminum illum assignetur ei dos; et maritagium statim habeat et hereditatem suam.

5. Rex vel ballivus non saisiet terram aliquam pro debito dum catalla debitoris sufficiunt; nec plegii debitoris distringantur, dum capitalis debitor sufficit ad solutionem; si vero capitalis debitor defecerit in solutione, si plegii voluerint, habeant terras debitoris, donec debitum illud persolvatur plene, nisi capitalis debitor monstrare poterit se esse inde quietum erga plegios.

6. Rex non concedet alicui baroni 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 hoc faciet per rationabile auxilium.

7. Ne aliquis majus servitium faciat de feodo militis quam inde debetur.

8. Ut communia placita non sequantur curiam domini regis, sed assignentur in aliquo certo loco; et ut recognitiones capiantur in eisdem comitatibus, in hunc modum: ut rex mittat duos justiciaros per .iiii^{or}. vices in anno, qui cum .iiii^{or}. militibus ejusdem comitatus electis per comitatum,

capiant assisas de nova dissaisina, morte antecessoris, et ultima presentatione, nec aliquis ob hoc sit summonitus nisi juratores et due partes.

9. Ut liber homo amercietur pro parvo delicto secundum modum delicti, et, pro magno delicto, secundum magnitudinem, delicti, salvo continemento suo; villanus etiam eodem modo amercietur, salvo waynagio suo; et mercator eodem modo, salva marcandisa, per sacramentum proborum hominum de visneto.

10. Ut clericus amercietur de laico feodo suo secundum modum aliorum predictorum, et non secundum beneficium ecclesiasticum.

11. Ne aliqua villa amercietur pro pontibus faciendis ad riparias, nisi ubi de jure antiquitus esse solebant.

12. Ut mensura vini, bladi, et latitudines pannorum et rerum aliarum, emendetur; et ita de ponderibus.

13. Ut assise de nova dissaisina et de morte antecessoris abbrevientur; et similiter de aliis assisis.

14. Ut nullus vicecomes intromittat se de placitis ad coronam pertinentibus sine coronatoribus; et ut comitatus et hundredi sint ad antiquas firmas absque nullo incremento, exceptis dominicis maneriis regis.

15. Si aliquis tenens de rege moriatur, licebit vicecomiti vel alii ballivo regis seisire et imbreviare catallum ipsius per visum legalium hominum, ita tamen quod nichil inde amoveatur, donec plenius sciatur si debeat aliquod liquidum debitum domino regi, et tunc debitum regis persolvatur; residuum vero relinquatur executoribus ad faciendum testamentum defuncti; et si nichil regi debetur, omnia catalla cedant defuncto.

16. Si aliquis liber homo intestatus decesserit, bona sua per manum proximorum parentum suorum et amicorum et per visum ecclesie distribuantur.

17. Ne vidue distringantur ad se maritandum, dum voluerint sine marito vivere, ita tamen quod securitatem facient quod non maritabunt se sine assensu regis, si de rege teneant, vel dominorum suorum de quibus tenent.

18. Ne constabularius vel alius ballivus capiat blada vel alia catalla, nisi statim denarios inde reddat, nisi respectum habere possit de voluntate venditoris.

19. Ne constabularius possit distringere aliquem militem ad dandum denarios pro custodia castri, si voluerit facere custodiam illam in propria persona vel per alium probum hominem, si ipse eam facere non possit per

rationabilem causam; et si rex eum duxerit in exercitum, sit quietus de custodia secundum quantitatem temporis.

20. Ne vicecomes, vel ballivus regis, vel aliquis alius, capiat equos vel carettas alicujus liberi hominis pro cariagio faciendo, nisi ex voluntate ipsius.

21. Ne rex vel ballivus suus capiat alienum boscum ad castra vel ad alia agenda sua, nisi per voluntatem ipsius cujus boscus ille fuerit.

22. Ne rex teneat terram eorum qui fuerint convicti de felonia, nisi per unum annum et unum diem, sed tunc reddatur domino feodi.

23. Ut omnes kidelli de cetero penitus deponantur de Tamisia et Medeweye et per totam Angliam.

24. Ne breve quod vocatur "Precipe" de cetero fiat alicui de aliquo tenemento unde liber homo amittat curiam suam.

25. Si quis fuerit disseisitus vel prolongatus per regem sine juditio de terris, libertatibus, et jure suo, statim ei restituatur; et si contentio super hoc orta fuerit, tunc inde disponatur per juditium .xxv. baronum, et ut illi qui fuerint dissaisiti per patrem vel fratrem regis, rectum habeant sine dilatione per juditium parium suorum in curia regis; et si rex debeat habere terminum aliorum cruce signatorum, tunc archiepiscopus et episcopi faciant inde juditium ad certum diem, appellatione remota.

26. Ne aliquid detur pro brevi inquisitionis de vita vel membris, sed libere concedatur sine pretio et non negetur.

27. Si aliquis tenet de rege per feodi firmam, per sokagium, vel per burgagium, et de alio per servitium militis, dominus rex non habebit custodiam militum de feodo alterius, occasione burgagii vel sokagii, nec debet habere custodiam burgagii, sokagii, vel feodi firme; et quod liber homo non amittat militiam suam occasione parvarum sergantisarum, sicuti de illis qui tenent aliquod tenementum reddendo inde cuttellos vel sagittas vel hujusmodi.

28. Ne aliquis ballivus possit ponere aliquem ad legem simplici loquela sua sine testibus fidelibus.

29. Ne corpus liberi hominis capiatur, nec imprisonetur, nec dissaisietur, nec utlagetur, nec exuletur, nec aliquo modo destruatur, nec rex eat vel mittat super eum vi, nisi per juditium parium suorum vel per legem terre.

30. Ne jus vendatur vel differratur vel vetitum sit.

31. Quod mercatores habeant salvum ire et venire ad emendum vel vendendum, sine omnibus malis toltis, per antiquas et rectas consuetudines.

32. Ne scutagium vel auxilium ponatur in regno, nisi per commune consilium regni, nisi ad corpus regis redimendum, et primogenitum filium suum militem faciendum, et filiam suam primogenitam semel maritandam; et ad hoc fiat rationabile auxilium. Simili modo fiat de taillagiis et auxiliis de civitate Londonie, et de aliis civitatibus que inde habent libertates, et ut civitas Londonie plene habeat antiquas libertates et liberas consuetudines suas, tam per aquas, quam per terras.

33. Ut liceat unicuique exire de regno et redire, salva fide domini regis, nisi tempore werre per aliquod breve tempus propter communem utilitatem regni.

34. Si quis mutuo aliquid acceperit a Judeis plus vel minus, et moriatur antequam debitum illud solvatur, debitum non usurabit quamdiu heres fuerit infra etatem, de quocumque teneat; et si debitum illud inciderit in manum regis, rex non capiet nisi catallum quod continetur in carta.

35. Si quis moriatur et debitum debeat Judeis, uxor ejus habeat dotem suam; et si liberi remanserint, provideantur eis necessaria secundum tenementum; et de residuo solvatur debitum salvo servitio dominorum; simili modo fiat de aliis debitis; et ut custos terre reddat heredi, cum ad plenam etatem pervenerit, terram suam instauratam secundum quod rationabiliter poterit sustinere de exitibus terre ejusdem de carucis et wainnagiis.

36. Si quis tenuerit de aliqua eskaeta, sicut de honore Walingeford, Notingeham, Bononie, et Lankastrie, et de aliis eskaetis que sunt in manu regis et sunt baronie, et obierit, heres ejus non dabit aliud relevium, vel faciet regi aliud servitium quam faceret baroni; et ut rex eodem modo eam teneat quo baro eam tenuit.

37. Ut fines qui facti sunt pro dotibus, maritagiis, hereditatibus, et amerciamentis, injuste et contra legem terre, omnino condonentur; vel fiat inde per juditium, .xxv. baronum, vel per juditium majoris partis eorumdem, una cum archiepiscopo et aliis quos secum vocare voluerit ita quod, si aliquis vel aliqui de .xxv. fuerint in simili querela, amoveantur et alii loco illorum per residuos de .xxv. substituantur.

38. Quod obsides et carte reddantur, quae liberate fuerunt regi in securitatem.

39. Ut illi qui fuerint extra forestam non veniant coram justiciariis de foresta per communes summonitiones, nisi sint in placito vel plegii fuerint; et ut prave consuetudines de forestis et de forestariis, et warenniis, et

vicecomitibus, et rivariis, emendentur per .xii. milites de quolibet comitatu, qui debent eligi per probos homines ejusdem comitatus.

40. Ut rex amoveat penitus de balliva parentes et totam sequelam Gerardi de Atyes, quod de cetero balliam non habeant, scilicet Engelardum, Andream, Petrum, et Gyonem de Cancellis, Gyonem de Cygony, Matheum de Martiny, et fratres ejus; et Galfridum nepotem ejus et Philippum Mark.

41. Et ut rex amoveat alienigenas, milites, stipendiarios, balistarios, et ruttarios, et servientes qui veniunt cum equis et armis ad nocumentum regni.

42. Ut rex faciat justiciarios, constabularios, vicecomites, et ballivos, de talibus qui sciant legem terre et eam bene velint observare.

43. Ut barones qui fundaverunt abbatias, unde habent cartas regum vel antiquam tenuram, habeant custodiam earum cum vacaverint.

44. Si rex Walenses dissaisierit vel elongaverit de terris vel libertatibus, vel de rebus aliis in Anglia vel in Wallia, eis statim sine placito reddantur; et si fuerint dissaisiti vel elongati de tenementis suis Anglie per patrem vel fratrem regis sine juditio parium suorum, rex eis sine dilatione justiciam exhibebit, eo modo quo exhibet Anglicis justiciam de tenementis suis Anglie secundum legem Anglie, et de tenementis Wallie secundum legem Wallie, et de tenementis Marchie secundum legem Marchie; idem facient Walenses regi et suis.

45. Ut rex reddat filium Lewelini et preterea omnes obsides de Wallia, et cartas que ei liberate fuerunt in securitatem pacis. . .

46. Ut rex faciat regi Scottorum de obsidibus reddendis, et de libertatibus suis, et jure suo, secundum formam quam facit baronibus Anglie . . . .

nisi aliter esse debeat per cartas quas rex habet per juditium archiepiscopi et aliorum quos secum vocare voluerit.

47. Et omnes foreste que sunt aforestate per regem tempore suo deafforestentur, et ita fiat de ripariis que per ipsum regem sunt in defenso.

48. Omnes autem istas consuetudines et libertates quas rex concessit regno tenendas quantum ad se pertinet erga suos, omnes de regno tam clerici quam laici observabunt quantum ad se pertinet erga suos.

[Here, there occurs a blank space in the original.]

49. Hec est forma securitatis ad observandum pacem et libertates inter regem et regnum. Barones eligent .xxv. barones de regno quos voluerint, qui debent pro totis viribus suis observare, tenere et facere observari, pacem et libertates quas dominus rex eis concessit et carta sua confirmavit; ita videlicet quod si rex, vel justiciarius, vel ballivi regis, vel aliquis de ministris suis, in aliquo erga aliquem deliquerit, vel aliquem articulorum pacis aut securitatis transgressus fuerit, et delictum ostensum fuerit .iiii^{or}. baronibus de praedictis .xxv. baronibus, illi .iiii^{or}. barones accedent ad dominum regem, vel ad justiciarium suum, si rex fuerit extra regnum; proponentes ei excessum, petent ut excessum illum sine dilatione faciat emendari; et si rex vel justiciarius ejus illud non emendaverit, si rex fuerit extra regnum, infra rationabile tempus determinandum in carta, predicti .iiii^{or}. referent causam illam ad residuos de illis .xxv. baronibus, et illi .xxv. cum communa totius terre distringent et gravabunt regem modis omnibus quibus poterunt, scilicet per captionem castrorum, terrarum, possessionum, et aliis modis quibus poterunt, donec fuerit emendatum secundum arbitrium eorum, salva persona domini regis et regine et liberorum suorum; et cum fuerit emendatum, intendant domino regi sicut prius. Et quicumque voluerit de terra jurabit se ad predicta exequenda pariturum mandatis predictorum .xxv. baronum, et gravaturum regem pro posse suo cum ipsis; et rex pubblice et libere dabit licentiam jurandi cuilibet qui jurare voluerit, et nulli umquam jurare prohibebit. Omnes autem illos de terra qui sponte sua et per se noluerint jurare .xxv. baronibus de distringendo et gravando regem cum eis, rex faciet jurare eosdem de mandato suo sicut predictum est. Item si aliquis de predictis .xxv. baronibus decesserit, vel a terra recesserit, vel aliquo modo alio impeditus fuerit quominus ista predicta possint exequi, qui residui fuerint de .xxv. eligent alium loco ipsius pro arbitrio suo, qui simili modo erit juratus quo et ceteri. In omnibus autem que istis .xxv. baronibus committuntur exequenda, si forte ipsi .xxv. presentes fuerint et inter se super re aliqua discordaverint, vel aliqui ex eis vocati nolint vel nequeant interesse, ratum habebitur et firmum quod major pars ex eis providerit vel preceperit, ac si omnes .xxv. in hoc consensissent; et predicti .xxv. jurabunt

quod omnia antedicta fideliter observabunt et pro toto posse suo facient observari. Preterea rex faciet eos securos per cartas archiepiscopi et episcoporum et magistri Pandulfi, quod nichil impetrabit a domino papa per quod aliqua istarum conventionum revocetur vel minuatur, et, si aliquid tale impetraverit, reputetur irritum et inane et numquam eo utatur.

VI. WRITS SUPPLEMENTARY OF JOHN'S GREAT CHARTER.

(1) *Writ to Stephen Harengod, dated 23rd June, 1215, announcing that terms had been arranged*.[1099]

Rex Stephano Harengod etc., Sciatis quod firma pax facta est per Dei gratiam inter nos et barones nostros die Veneris proximo post festum Sancte Trinitatis apud Runemed., prope Stanes; ita quod eorum homagia eodem die ibidem cepimus. Unde vobis mandamus firmiter precipientes quod sicut nos et honorem nostrum diligitis et pacem regni nostri, ne ulterius turbetur, quod nullum malum de cetero faciatis baronibus nostris vel aliis, vel fieri permittatis, occasione discordie prius orte inter nos et eos. Mandamus etiam vobis quod de finibus et tenseriis nobis factis occasione illius discordie, si quid superest, reddendum, nichil capiatis. Et si quid post illum diem Veneris cepistis, illud statim reddatis. Et corpora prisonum et obsidum captorum et detentorum occasione hujus guerre, vel finium vel tenseriarum predictarum, sine dilatione deliberetis. Hec omnia predicta, sicut corpus vestrum diligitis, faciatis. Et in hujus etc., nobis mittimus. Teste meipso apud Runemed., xxiij. die Junii anno regni nostri xvij.

(2) *Writ to Hugh de Bova, dated 23rd June, 1215, ordering disbandment of mercenaries.*[1100]

Rex Hugoni de Bova, salutem. Mandamus vobis quod in fide qua nobis tenemini non retineatis aliquem de militibus vel servientibus qui fuerunt apud Dover., sed in patriam suam in pace sine dilatione ire faciatis. Et in hujus, etc. Teste meipso apud Runimed. xxiij. die Junii anno regni nostri xvij$^{mo.}$

(3) *Writs issued to the sheriffs of counties on 19th June, 1215.*[1101]

Rex vicecomiti, forestariis warennariis, custodibus ripariarum et omnibus baillivis suis in eodem comitatu, salutem. Sciatis pacem firmam esse reformatam per Dei gratiam inter nos et barones et liberos homines regni

nostri, sicut audire poteritis et videre per cartam nostram quam inde fieri fecimus, quam etiam legi publice precepimus per totam bailliam vestram et firmiter teneri; volentes et districte precipientes quod tu vicecomes omnes de baillia tua secundum formam carte predicte jurare facias xxv. baronibus de quibus mentio fit in carta predicta, ad mandatum eorundem vel majoris partis eorum, coram ipsis vel illis quos ad hoc atornaverint per litteras suas patentes, et ad diem et locum quos ad hoc faciendum prefixerint predicti barones vel atornati ab eis ad hoc. Volumus etiam et precipimus quod xii milites de comitatu tuo, qui eligentur de ipso comitatu in primo comitatu qui tenebitur post susceptionem litterarum istarum in partibus tuis, jurent de inquirendis pravis consuetudinibus tam de vicecomitibus quam eorum ministris, forestis, forestariis, warennis et warennariis, ripariis et earum custodibus, et eis delendis, sicut in ipsa carta continetur. Vos igitur omnes sicut nos et honorem nostrum diligitis, et pacem regni nostri, omnia in carta contenta inviolabiliter observetis et ab omnibus observari faciatis, ne pro defectu vestri, aut per excessum vestrum, pacem regni nostri, quod Deus avertat, iterum turbari contingat. Et tu, vicecomes, pacem nostram per totam bailliam tuam clamari facias et firmiter teneri precipias. Et in hujus, etc. vobis mittimus. Teste me ipso apud Runimede, xix. die Junii, anno regni nostri xvij$^{mo.}$

(4) *Writs issued to the sheriffs of counties on 27th June, 1215.*[1102]

Rex vicecomiti Warewic. et duodecim militibus electis in eodem comitatu ad inquirendum et delendum pravas consuetudines de vicecomitibus et eorum ministris forestis et forestariis warennis et warennariis ripariis et earum custodibus salutem. Mandamus vobis quod statim et sine dilatione saisiatis in manum nostram terras et tenementa et catalla omnium illorum de comitatu Warewic. qui jurare contradixerint viginti quinque baronibus secundum formam contentam in carta nostra de libertatibus vel eis quos ad hoc atornaverint. Et si jurare noluerint statim post quindecim dies completos preterquam terre et tenementa et catalla eorum in manu nostra saisita fuerint, omnia catalla sua vendi faciatis et denarios inde preceptos salvo custodiatis, deputandos subsidio terre sancte. Terras autem et tenementa eorum in manu nostra teneatis, quousque juraverint. Et hoc provisum est per judicium domini Cantuar. archiepiscopi

et baronum regni nostri. Et in hujus etc. Teste meipso, apud Winton. xxvij die Junii anno regni nostri xvij[mo.]

Idem mandatum est omnibus vicecomitibus Anglie.

(5) *Conventio facta inter Regem Anglie et barones ejusdem regni.*[1103]

Hec est conventio facta inter dominum Johannem regem Anglie, ex una parte, et Robertum filium Walteri, marescallum exercitus Dei et sancte ecclesie in Anglia, et Ricardum comitem de Clare, Gaufridum comitem Essex, et Glouc., Rogerum Bigot comitem Northfolc. et Suthfolc., Saherum comitem Wint., Robertum comitem Oxon., Henricum comitem Hereford., et barones subscriptos, scilicet Willielmum Mariscallum juniorem, Eustachium de Vescy, Willielmum de Mobray, Johannem filium Roberti, Rogerum de Monte Begonis, Willielmum de Lanvalay, et alios comites et barones et liberos homines totius regni, ex altera parte, videlicet quod ipsi comites et barones et alii prescripti tenebunt civitatem London, de baillio domini regis, salvis interim domino regi firmis redditibus et claris debitis suis, usque ad assumptionem beate Marie anno regni ipsius regis xvii[mo.] et dominus Cant. tenebit similiter de baillio domini regis turrim London, usque ad predictum terminum, salvis civitati London. libertatibus suis et liberis consuetudinibus suis, et salvo cuilibet jure suo in custodia turris London., et ita quod interim non ponat dominus rex munitionem vel vires alias in civitate predicta vel in turri London. Fiant etiam infra predictum terminum sacramenta per totam Angliam viginti quinque baronibus sicut continentur in carta de libertatibus et securitate regno concessis vel attornatis viginti quinque baronum sicut continentur in literis de duodecim militibus eligendis ad delendum malas consuetudines de forestis et aliis. Et preterea infra eundem terminum omnia que comites et barones et alii liberi homines petunt a domino rege que ipse dixerit esse reddenda vel que per xxv barones aut per majorem partem eorum judicata fuerint esse reddenda reddantur secundum formam predicte carte. Et si hec facta fuerint vel per dominum regem non steterit quominus ista facta fuerint infra predictum terminum tunc civitas et turris London. ad eundem terminum statim reddantur domino regi salvis predicte civitati libertatibus suis et liberis consuetudinibus suis sicut prescriptum est. Et si hec facta non fuerint et per dominum regem steterit quod ista non fiant infra predictum terminum barones tenebunt civitatem predictam et dominus archiepiscopus turrim London. donec predicta compleantur. Et interim omnes ex utraque parte

recuperabunt castra terras et villas quas habuerunt in initio guerre orte inter dominum regem et barones.

(6) *Protest by the Archbishops of Canterbury and Dublin, and other prelates, that chapter 48 of the Great Charter was to be interpreted by both sides as limited.*[1104]

Omnibus Christi fidelibus ad quos presentes littere pervenerint, Sancti Dei gracia, Cantuar. archiepiscopus, tocius Anglie primas et sancte Romane ecclesie cardinalis et H. eadem gracia, archiepiscopus Dublin., W. quoque London., P. Winton., J. Bathon et Glaston., H. Lincoln., W. Wygorn., et W. Coventr., ejusdem gracie dono episcopi, salutem in Domino. Cum dominus Rex concesserit et per cartam suam confirmaverit, quod omnes male consuetudines de forestis, et forestariis et eorum ministris, statim inquirantur in quolibet comitatu, per duodecim milites juratos de eodem comitatu; qui debent eligi per probos homines ejusdem comitatus; et infra xl. dies post inquisitionem factam penitus, ita quod nunquam revocentur, deleantur per eosdem; dum tamen dominus Rex hoc prius sciat; universitati vestre notum fieri volumus, quod articulus iste ita intellectus fuit ex utraque parte, quum de eo tractabatur, et expressus, quod omnes consuetudines ille remanere debent, sine quibus foreste servari non possint: et hoc presentibus litteris protestamur.

(7) *Protest by the Archbishops of Canterbury and Dublin and other prelates that the barons who had renewed their homage at Runnymede had repudiated their promise to ratify their oaths by formal charters.*[1105]

Omnibus Christi fidelibus etc. Stephanus, Dei gracia, Cantuar. archiepiscopus, totius Anglie primas, et sancte Romane ecclesie cardinalis Henricus Dublin archiepiscopus, Willielmus London., Petrus Winton., Joscelinus Bathon, et Glaston., Hugo Lincoln., Walterus Wigorn., Willielmus Conventr., Ricardus Cicestr., episcopi et magister Pandulfus domini Pape subdiaconus et familiaris, salutem. Noverit universitas vestra, quod quando facta fuit pax inter dominum regem Johannem et barones Anglie, de discordia inter eos orta, idem barones nobis presentibus et audientibus, promiserunt domino Regi, quod quamcumque securitatem habere vellet ab eis de pace illa observanda, ipsi ei habere facerent, preter

castella et obsides. Postea vero quando dominus Rex petiit ab eis, ut talem cartam ei facerent:—

> “Omnibus etc. Sciatis nos astrictos esse per sacramenta et homagia domino nostro Johanni Regi Anglie, de fide ei servanda de vita et membris et terreno honore suo, contra omnes homines qui vivere possint et mori; et ad jura sua et heredum suorum, et ad regnum suum custodiendum et defendendum.”

Ipsi id facere noluerunt. Et in hujus rei testimonium id ipsum per hoc scriptum protestamur.

VII. THE GREAT CHARTER OF HENRY III.[1106] (SECOND REISSUE, 6TH NOVEMBER, 1217.)

Henricus Dei gratia rex Anglie, dominus Hibernie, dux Normannie, Aquitanie, et comes Andegavie, archiepiscopis, episcopis, abbatibus, prioribus, comitibus, baronibus, vicecomitibus, prepositis, ministris et omnibus ballivis et fidelibus suis presentem cartam inspecturis, salutem. Sciatis quod intuitu Dei et pro salute anime nostre et animarum antecessorum et successorum nostrorum, ad exaltationem sancte ecclesie et emendationem regni nostri, concessimus et hac presenti carta confirmavimus pro nobis et heredibus nostris in perpetuum, de consilio venerabilis patris nostri domini Gualonis tituli Sancti Martini presbiteri cardinalis et apostolice sedis legati, domini Walteri Eboracensis archiepiscopi, Willelmi Londoniensis episcopi, et aliorum episcoporum Anglie et Willelmi Mariscalli comitis Pembrocie, rectoris nostri et regni nostri, et aliorum fidelium comitum et baronum nostrorum Anglie, has libertates tenendas in regno nostro Anglie in perpetuum.

1. In primis concessimus Deo et hac presenti carta nostra confirmavimus pro nobis et heredibus nostris in perpetuum quod anglicana ecclesia libera sit, et habeat jura sua integra et libertates suas illesas. Concessimus etiam omnibus liberis hominibus regni nostri pro nobis et heredibus nostris in perpetuum omnes libertates subscriptas, habendas et tenendas eis et heredibus suis de nobis et heredibus nostris.

2. Si quis comitum vel baronum nostrorum sive aliorum tenencium de nobis in capite per servicium militare mortuus fuerit, et, cum decesserit, heres ejus 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.

3. Si autem heres alicujus talium fuerit infra etatem, dominus ejus non habeat custodiam ejus nec terre sue antequam homagium ejus ceperit; et,

postquam talis heres fuerit in custodia, cum ad etatem pervenerit, scilicet viginti et unius anni, habeat hereditatem suam sine relevio et sine fine, ita tamen quod, si ipse, dum infra etatem fuerit, fiat miles, nichilominus terra remaneat in custodia dominorum suorum usque ad terminum predictum.

4. 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 terre illius nobis debeat respondere, 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 nobis respondeant 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.

5. Custos autem, quamdiu custodiam terre habuerit, sustentet domos, parcos, vivaria, stagna, molendina et cetera ad terram illam pertinencia de exitibus terre ejusdem, et reddat heredi, cum ad plenam etatem pervenerit, terram suam totam instauratam de carucis et omnibus aliis rebus, ad minus secundum quod illam recepit. Hec omnia observentur de custodiis archiepiscopatuum, episcopatuum, abbatiarum, prioratuum, ecclesiarum et dignitatum vacancium que ad nos pertinent, excepto quod hujusmodi custodie vendi non debent.

6. Heredes maritentur absque disparagatione.

7. Vidua post mortem mariti sui statim et sine difficultate aliqua habeat maritagium suum et hereditatem suam, nec aliquid det pro dote sua vel pro maritagio suo vel pro hereditate sua, quam hereditatem maritus suus et ipsa tenuerint die obitus ipsius mariti, et maneat in capitali mesuagio mariti sui per quadraginta dies post obitum ipsius mariti sui, infra quos assignetur ei dos sua, nisi prius ei fuerit assignata, vel nisi domus ilia sit castrum; et si de castro recesserit, statim provideatur ei domus competens in qua possit honeste morari, quousque dos sua ei assignetur secundum quod predictum est, et habeat rationabile estoverium suum interim de communi. Assignetur autem ei pro dote sua tercia pars tocius terre mariti sui que sua fuit in vita sua, nisi de minori dotata fuerit ad hostium ecclesie.

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

9. Nos vero vel ballivi nostri non seisiemus terram aliquam nee redditum pro debito aliquo quamdiu catalla debitoris presencia sufficiunt ad debitum reddendum et ipse debitor paratus sit inde satisfacere; nee plegii ipsius debitoris distringantur quamdiu ipse capitalis debitor sufficiat ad solutionem debiti; et, si capitalis debitor defecerit in solutione debiti, non habens unde reddat aut reddere nolit cum possit, plegii respondeant pro debito; et, si voluerint, habeant terras et redditus debitoris quousque sit eis satisfactum de debito quod ante pro eo solverint, nisi capitalis debitor monstraverit se inde esse quietum versus eosdem plegios.

10. Civitas Londonie habeat omnes antiquas libertates et liberas consuetudines suas. Preterea volumus et concedimus quod omnes alie civitates, et burgi, et ville, et barones de quinque portubus, et omnes portus, habeant omnes libertates et liberas consuetudines suas.

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

12. Communia placita non sequantur curiam nostram, set teneantur in aliquo loco certo.

13. Recognitiones de nova disseisina et de morte antecessoris non capiantur nisi in suis comitatibus, et hoc modo: nos, vel si extra regnum fuerimus, capitalis justiciarius noster, mittemus justiciarios per unumquemque comitatum semel in anno, qui cum militibus comitatuum capiant in comitatibus assisas predictas.

14. Et ea que in illo adventu suo in comitatu per justiciarios predictos ad dictas assisas capiendas missos terminari non possunt, per eosdem terminentur alibi in itinere suo; et ea que per eosdem propter difficultatem aliquorum articulorum terminari non possunt, referantur ad justiciarios nostros de banco, et ibi terminentur.

15. Assise de ultima presentatione semper capiantur coram justiciariis nostris de banco et ibi terminentur.

16. Liber homo non amercietur pro parvo delicto nisi secundum modum ipsius delicti, et pro magno delicto, secundum magnitudinem delicti, salvo contenemento suo; et mercator eodem modo salva mercandisa sua; et villanus alterius quam noster eodem modo amercietur salvo wainagio suo,

si incident in misericordiam nostram: et nulla predictarum misericordiarum ponatur nisi per sacramenta proborum et legalium hominum de visneto.

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

18. Nulla ecclesiastica persona amercietur secundum quantitatem beneficii sui ecclesiastici, sed secundum laicum tenementum suum, et secundum quantitatem delicti.

19. Nec villa, nec homo, distringatur facere pontes ad riparias nisi qui ex antiquo et de jure facere debet.

20. Nulla riparia decetero defendatur, nisi ille que fuerunt in defenso tempore regis Henrici avi nostri, per eadem loca et eosdem terminos sicut esse consueverunt tempore suo.

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

22. Si aliquis tenens de nobis laicum feodum moriatur, et vicecomes vel ballivus noster ostendat litteras nostras patentes de summonitione nostra de debito quod defunctus nobis debuit, liceat vicecomiti vel ballivo nostro attachiare et inbreviare catalla defuncti inventa in laico feodo ad 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 rationabilibus partibus suis.

23. Nullus constabularius vel ejus ballivus capiat blada vel alia catalla alicujus qui non sit de villa ubi castrum situm est, nisi statim inde reddat denarios aut respectum inde habere possit de voluntate venditoris; si autem de villa ipsa fuerit, infra quadraginta dies precium reddat.

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

25. Nullus vicecomes, vel ballivus noster, vel alius capiat equos vel carettas alicujus pro cariagio faciendo, nisi reddat liberationem antiquitus statutam, scilicet pro caretta ad duos equos decem denarios per diem, et pro caretta ad tres equos quatuordecim denarios per diem.

26. Nulla caretta dominica alicujus ecclesiastice persone vel militis vel alicujus domine capiatur per ballivos predictos.

27. Nec nos nec ballivi nostri nec alii capiemus alienum boscum ad castra vel alia agenda nostra, nisi per voluntatem illius cujus boscus ille fuerit.

28. Nos non tenebimus terras eorum qui convicti fuerint de felonia, nisi per unum annum et unum diem; et tunc reddantur terre dominis feodorum.

29. Omnes kidelli decetero deponantur penitus per Tamisiam et Medeweiam et per totam Angliam, nisi per costeram maris.

30. Breve quod vocatur Precipe decetero non fiat alicui de aliquo tenemento, unde liber homo perdat curiam suam.

31. 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 russettorum et haubergettorum, scilicet due ulne infra listas; de ponderibus vero sit ut de mensuris.

32. Nichil detur de cetero pro brevi inquisitionis ab eo qui inquisitionem petit de vita vel membris, set gratis concedatur et non negetur.

33. Si aliquis teneat de nobis per feodifirmam vel soccagium, vel per burgagium, et de alio terram teneat per servicium militare, nos non habebimus custodiam heredis nee terre sue que est de feodo alterius, occasione illius feodifirme, vel soccagii, vel burgagii, nec habebimus custodiam illius feodifirme vel soccagii vel burgagii, nisi ipsa feodifirma debeat servicium militare. N os 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.

34. Nullus ballivus ponat decetero aliquem ad legem manifestam vel ad juramentum simplici loquela sua, sine testibus fidelibus ad hoc inductis.

35. Nullus liber homo decetero capiatur vel inprisonetur aut disseisiatur de aliquo libero tenemento suo vel libertatibus vel liberis consuetudinibus suis, aut utlagetur, aut exulet, aut aliquo alio modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terre.

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

37. Omnes mercatores, nisi publice antea prohibiti fuerint, habeant salvum et securum exire de Anglia, et venire in Angliam, et morari, et ire per Angliam tarn per terram quam per aquam ad emendum vel vendendum sine omnibus toltis malis per antiquas et rectas consuetudines, preterquam

in tempore gwerre, et si sint de terra contra nos gwerrina; et si tales inveniantur in terra nostra in principio gwerre, attachientur sine dampno corporum vel rerum, donee sciatur a nobis vel a capitali justiciario nostro quomodo mercatores terre nostre tractentur, qui tunc invenientur in terra contra nos gwerrina; et, si nostri salvi sint ibi, alii salvi sint in terra nostra.

38. Si quis tenuerit de aliqua escaeta, sicut de honore Wallingefordie, Bolonie, Notingeham, Lancastrie, vel de aliis que sunt in manu nostra, et sint baronie, et obierit, heres ejus non det aliud relevium nec faciat nobis aliud servicium quam faceret baroni, si ilia esset in manu baronis; et nos eodem modo eam tenebimus quo baro eam tenuit; nec nos, occasione tabs baronie vel escaete, habebimus aliquam escaetam vel custodiam aliquorum hominum nostrorum, nisi alibi tenuerit de nobis in capite ille qui tenuit baroniam vel escaetam.

39. Nullus liber homo decetero det amplius alicui vel vendat de terra sua quam ut de residuo terre sue possit sufficienter fieri domino feodi servicium ei debitum quod pertinet ad feodum illud.

40. Omnes patroni abbatiarum qui habent cartas regum Anglie de advocatione, vel antiquam tenuram vel possessionem, habeant earum custodiam cum vacaverint, sicut habere debent, et sicut supra declaratum est.

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

42. Nullus comitatus decetero teneatur, nisi de mense in mensem; et, ubi major terminus esse solebat, major sit. Nec aliquis vicecomes vel ballivus faciat turnum suum per hundredum nisi bis in anno et non nisi in loco debito et consueto, videlicet semel post Pascha et iterum post festum sancti Michaelis. Et visus de franco plegio tunc fiat ad ilium terminum sancti Michaelis sine occasione, ita scilicet quod quilibet habeat libertates suas quas habuit et habere consuevit tempore regis Henrici avi nostri, vel quas postea perquisivit. Fiat autem visus de franco plegio sic, videlicet quod pax nostra teneatur, et quod tethinga integra sit sicut esse consuevit, et quod vicecomes non querat occasiones, et quod contentus sit eo quod vicecomes habere consuevit de visu suo faciendo tempore regis Henrici avi nostri.

43. Non liceat alicui decetero dare terram suam alicui domui religiose, ita quod eam resumat tenendam de eadem domo, nec liceat alicui domui religiose terram alicujus sic accipere quod tradat eam illi a quo ipsam receperit tenendam. Si quis autem de cetero terram suam alicui domui

religiose sic dederit, et super hoc convincatur, donum suum penitus cassetur, et terra illa domino suo illius feodi incurratur.

44. Scutagium decetero capiatur sicut capi consuevit tempore regis Henrici avi nostri.

45. Omnes autem istas consuetudines predictas et libertates quas 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.

46. Salvis archiepiscopis, episcopis, abbatibus, prioribus, templariis, hospitalariis, comitibus, baronibus et omnibus aliis tam ecclesiasticis personis quam secularibus, libertatibus et liberis consuetudinibus quas prius habuerunt.

47. Statuimus etiam, de communi consilio tocius regni nostri, quod omnia castra adulterina, videlicet ea que a principio guerre mote inter dominum Johannem patrem nostrum et barones suos Anglie constructa fuerint vel reedificata, statim diruantur. Quia vero nondum habuimus sigillum hanc [cartam] sigillis domini legati predicti et comitis Willelmi Mariscalli rectoris [nostri] et regni nostri fecimus sigillari.

VIII. CARTA DE FORESTA.[1107]
(6 NOVEMBER, 1217.)

Henricus Dei gratia rex Anglie, dominus Hibernie, dux Normannie, Aquitanie et comes Andegavie, archiepiscopis, episcopis, abbatibus, prioribus, comitibus, baronibus, justiciariis, forestariis, vicecomitibus, prepositis, ministris, et omnibus ballivis et fidelibus suis, salutem. Sciatis quod, intuitu Dei et pro salute anime nostre et animarum antecessorum et successorum nostrorum, ad exaltacionem Sancte Ecclesie et emendacionem regni nostri, concessimus et hac presenti carta confirmavimus pro nobis et heredibus nostris in perpetuum, de consilio venerabilis patris nostri domini Gualonis tituli sancti Martini presbiteri cardinalis et apostolice sedis legati, domini Walteri Eboracensis archiepiscopi, Willelmi Londoniensis episcopi, et aliorum episcoporum Anglie, et Willelmi Marescalli comitis Penbrocie, rectoris nostri et regni nostri, et aliorum fidelium comitum et baronum nostrorum Anglie, has libertates subscriptas tenendas in regno nostro Anglie, in perpetuum:

1. In primis omnes foreste quas Henricus rex avus noster afforestavit videantur per bonos et legales homines et, si boscum aliquem alium quam suum dominicum afforestaverit ad dampnum illius cujus boscus fuerit, deafforestentur. Et si boscum suum proprium afforestaverit, remaneat foresta, salva communa de herbagio et aliis in eadem foresta, illis qui eam prius habere consueverunt.

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

3. Omnes autem bosci qui fuerunt afforestati per regem Ricardum avunculum nostrum, vel per regem Johannem patrem nostrum usque ad primam coronacionem nostram, statim deafforestentur, nisi fuerit dominicus boscus noster.

4. Archiepiscopi, episcopi, abbates, priores, comites et barones et milites et libere tenentes, qui boscos suos habent in forestis, habeant boscos suos

sicut eos habuerunt tempore prime coronacionis predicti regis Henrici avi nostri, ita quod quieti sint in perpetuum de omnibus purpresturis, vastis et assartis factis in illis boscis, post illud tempus usque ad principium secundi anni coronacionis nostre. Et qui de cetero vastum, purpresturam, vel assartum sine licencia nostra in illis fecerint, de vastis et assartis respondeant.

5. Reguardores nostri eant per forestas ad faciendum reguardum sicut fieri consuevit tempore prime coronacionis predicti regis Henrici avi nostri, et non aliter.

6. Inquisicio, vel visus de expeditacione canum existencium in foresta, decetero fiat quando debet fieri reguardum, scilicet de tercio anno in tercium annum; et tunc fiat per visum et testimonium legalium hominum et non aliter. Et ille, cujus canis inventus fuerit tunc non expeditatus, det pro misericordia tres solidos; et de cetero nullus bos capiatur pro expeditacione. Talis autem sit expeditacio per assisam communiter quod tres ortilli abscidantur sine pelota de pede anteriori; nec expeditentur canes de cetero, nisi in locis ubi consueverunt expeditari tempore prime coronacionis regis Henrici avi nostri.

7. Nullus forestarius vel bedellus decetero faciat scotale, vel colligat garbas, vel avenam, vel bladum aliud, vel agnos, vel porcellos, nec aliquam collectam faciant; et per visum et sacramentum duodecim reguardorum quando facient reguardum, tot forestarii ponantur ad forestas custodiendas, quot ad illas custodiendas rationabiliter viderint sufficere.

8. Nullum suanimotum de cetero teneatur in regno nostro nisi ter in anno; videlicet in principio quindecim dierum ante festum Sancti Michaelis, quando agistatores conveniunt ad agistandum dominicos boscos nostros; et circa festum Sancti Martini quando agistatores nostri debent recipere pannagium nostrum; et ad ista duo suanimota conveniant forestarii, viridarii, et agistatores, et nullus alius per districtionem; et tercium suanimotum teneatur in inicio quindecim dierum ante festum Sancti Johannis Baptiste, pro feonacione bestiarum nostrarum; et ad istud suanimotum tenendum convenient forestarii et viridarii et nulli alii per districtionem. Et preterea singulis quadraginta diebus per totum annum conveniant viridarii et forestarii ad videndum attachiamenta de foresta, tam de viridi, quam de venacione, per presentacionem ipsorum forestariorum, et coram ipsis attachiatis. Predicta autem suanimota non teneantur nisi in comitatibus in quibus teneri consueverunt.

9. Unusquisque liber homo agistet boscum suum in foresta pro voluntate sua et habeat pannagium suum. Concedimus eciam quod unusquisque liber homo possit ducere porcos suos per dominicum boscum nostrum, libere et sine inpedimento, ad agistandum eos in boscis suis propriis, vel alibi ubi voluerit. Et si porci alicujus liberi hominis una nocte pernoctaverint in foresta nostra, non inde occasionetur ita quod aliquid de suo perdat.

10. Nullus de cetero amittat vitam vel menbra pro venacione nostra; set, si aliquis captus fuerit et convictus de capcione venacionis, graviter redimatur, si habeat unde redimi possit; et si non habeat unde redimi possit, jaceat in prisona nostra per unum annum et unum diem; et, si post unum annum et unum diem plegios invenire possit, exeat a prisona; sin autem, adjuret regnum Anglie.

11. Quicunque archiepiscopus, episcopus, comes vel baro transient per forestam nostram, liceat ei capere unam vel duas bestias per visum forestarii, si presens fuerit; sin autem, faciat cornari, ne videatur furtive hoc facere.

12. Unusquisque liber homo decetero sine occasione faciat in bosco suo, vel in terra sua quam habeat in foresta, molendinum, vivarium, stagnum, marleram, fossatum, vel terram arabilem extra cooperatum in terra arabili, ita quod non sit ad nocumentum alicujus vicini.

13. Unusquisque liber homo habeat in boscis suis aereas, ancipitrum et spervariorum et falconum, aquilarum, et de heyrinis et habeat similiter mel quod inventum fuerit in boscis suis.

14. Nullus forestarius de cetero, qui non sit forestarius de feudo reddens nobis firmam pro balliva sua, capiat chiminagium aliquod in balliva sua; forestarius autem de feudo firmam nobis reddens pro balliva sua capiat chiminagium, videlicet pro careta per dimidium annum duos denarios, et per alium dimidium annum duos denarios, et pro equo qui portat sumagium per dimidium annum unum obolum, et per alium dimidium annum obolum, et non nisi de illis qui de extra ballivam suam, tanquam mercatores, veniunt per licenciam suam in ballivam suam ad buscam, meremium, corticem vel carbonem emendum, et alias ducendum ad vendendum ubi voluerint: et de nulla alia careta vel sumagio aliquod chiminagium capiatur: et non capiatur chiminagium nisi in locis illis ubi antiquitus capi solebat et debuit. Illi autem qui portant super dorsum suum buscam, corticem, vel carbonem, ad vendendum, quamvis inde vivant, nullum de cetero dent chiminagium. De

boscis autem aliorum nullum detur chiminagium forestariis nostris, preterquam de dominicis boscis nostris.

15. Omnes utlagati pro foresta tantum a tempore regis Henrici avi nostri usque ad primam coronacionem nostram, veniant ad pacem nostram sine inpedimento, et salvos plegios inveniant quod de cetero non forisfaciant nobis de foresta nostra.

16. Nullus castellanus vel alius ten eat placita de foresta sive de viridi sive de venacione, sed quilibet forestarius de feudo attachiet placita de foresta tam de viridi quam de venacione, et ea presentet viridariis provinciarum et cum irrotulata fuerint et sub sigillis viridariorum inclusa, presententur capitali forestario cum in partes illas venerit ad tenendum placita foreste, et coram eo terminentur.

17. Has autem libertates de forestis concessimus omnibus, salvis archiepiscopis, episcopis, abbatibus, prioribus, comitibus, baronibus, militibus et aliis tam personis ecclesiasticis quam secularibus, Templariis et Hospitalariis, libertatibus et liberis consuetudinibus in forestis et extra, in warennis et aliis, quas prius habuerunt. Omnes autem istas consuetudines predictas et libertates, quas 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. Quia vero sigillum nondum habuimus, presentem cartam sigillis venerabilis patris nostri domini Gualonis tituli Sancti Martini presbiteri cardinalis, apostolice sedis legati, et Willelmi Marescalli comitis Penbrok, rectoris nostri et regni nostri, fecimus sigillari. Testibus prenominatis et aliis multis. Datum per manus predictorum domini legati et Willelmi Marescalli apud Sanctum Paulum Londonie, sexto die Novembris, anno regni nostri secundo.

1094. The text is founded on that of the *Statutes of the Realm*, I. 1; but has been also collated with the admirable text prepared by M. Bémont, *Chartes*, 1–6, whose emendations have been freely used not only for this Charter, but for all those which follow in this Appendix. M. Bémont gives an exhaustive account of the copies of the lost original of Henry's charter.

1095. The text is founded on that of the *Statutes of the Realm*, I. 3. Cf. Bémont, *Chartes*, 8–10, who discusses the various editions. Mr. R. Lane Poole has noted the variants of an original of the Charter preserved in the

muniment room of Salisbury Cathedral; see *Report on Manuscripts in Various Collections*, I. 384-5 (Historical Manuscripts Commission, 1901). Two of these variants have been here adopted (a) "*regem Anglie*" for "*regem Anglorum*" and (b) "*postmodum*" added after "*pontifice*."

1096. The text is taken from that given in *Statutes of the Realm*, I. 4, which is founded on a copy of the original preserved in the British Museum (Cotton, Claudius D. II., *folio* 107). Cf. Bémont, *Chartes*, 12–14.

1097. See *supra*, pp. 202-5 and Index. The text is founded upon that published by Mr. J. H. Round in the *English Historical Review*, VIII. 288, but effect has been given to most of the emendations suggested by Mr. Hubert Hall and Mr. G. W. Prothero. Cf. *Ibid.*, IX. 117 and 326. The copy in the French Archives follows, on the same parchment, a copy of the Charter of Liberties of Henry I. from which it is separated by the following words (indicating the nature of both documents, the one that had gone before and the other that was to follow): "Hec est Carta Regis Henrici per quam barones querunt libertates et hec consequentia concedit Rex Johannes." Then follow twelve clauses which are here numbered for convenience of reference, although no numbers appear in the copy.

1098. The text is taken from that of the *Statutes of the Realm*, I. 7-8, which is founded on the original in the British Museum. See *supra*, 200–202. Cf. Bémont, *Chartes*, 15–23.

1099. The text follows that of *New Rymer*, I. 133, but has been collated with *Rot. Pat.*, I. 143 (17 John m. 23) and two corrections made. This writ is here given as a specimen of many despatched during the week following the truce at Runnymede, intimating that peace had been made, and instructing release of hostages, etc. This writ is referred to *supra* 48 n. and 49 n. where its date is discussed.

1100. See *supra*, p. 522. The text is given in *New Rymer*, I. 134, and in *Rot. Pat.*, I. 144 (17 John m. 23).

1101. See *supra*, pp. 50-51, 512–3 and 552. The text is taken from *Rot. Pat.*, I. 180 (17 John m. 23, d.). It will be found also in *New Rymer*, I. 134, and in Stubbs *Sel. Chart.*, 306–7.

1102. See supra, p. 553. The text is given by *New Rymer*, I. 134, and in *Rot. Pat.*, I. 134 (17 John, m. 21). A French version appears in D'Achery, *Spicilegium*, XII. 573, and in Bémont, *Chartes*, xxiv. n.

1103. See *supra*, pp. 51-2 and 560-1. The text is taken from *New Rymer*, I. 133 on the authority of *Rot. Claus.*, 17 John, m. 27 d. It is printed by Blackstone, *Great Charter*, 25–6.

1104. See *supra*, pp. 52, 513, and 560. The protest is recorded in *Rot. Claus.*, 17 John, m. 27 d.; and is printed in *New Rymer*, I. 134.

1105. See *supra*, 560. The protest is printed in *Rot. Pat.*, I. 144 (17 m. 21 d.), and also in *New Rymer*, I. 134.

1106. See *supra*, pp. 171-9. The text is taken from that of the *Statutes of the Realm*, I. 17-19.

1107. See *supra*, pp. 171-2. The text is taken from that of the *Statutes of the Realm*, I. 20-21.

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Footnotes and index entries have been linked for quick reference. There are some index references to Statutes which are not mentioned in the designated text or note.

3 Edward I.	c.	11,	433 n.
6 Edward I.	c.	1,	177 n.
13 Edward I.	c.	4,	247 n.

The entry for '3 Edward I. c. 41' refers to '520 n.' which appears in '527 n.'

The entry for '5 Henry IV. c. 14' in the index of Statutes refers to '425 n.' That note refers to '1 Henry IV. c. 14', which is most likely correct. One summary of that Statute says that it "abolished appeals of treason in parliament, and sent the accuser to established courts of law." (Lolme, *The Constitution of England*, 1839, p. 137.)

Coincidentally, a reference in the index entry for 'Constables' refers to '456 n.' No note on that page mentions that topic. However, the 'Court of the Constable and Marshal' *is* mentioned in the same '425 n.', which is not indexed to that topic. We suggest that the reference to 425 n. was intended.

Lapses in the punctuation of index and footnote entries have been regularized with no further mention.

Other errors deemed most likely to be the printer's have been corrected, and are noted here. The references are to the page and line in the original. Those with a third number refer to the line within a footnote beginning on that page.

65.37	copyhold and leasehold[.]	Restored.
83.118.4	go with the King an[d] serve him	Restored.
149.23	whether conscious or uncon[s]cious	Inserted.
219.328.1	a prisoner in Corfe Castle[.[	Added.
307.31	to those of Charles II[.]	Added.

323.37	twelve local gentlem[e/a]n	Replaced.
367.20	for each county by p[r]icking at random	Removed.
386.3	he can have postpon[e]ment	Inserted.
422.762.1	*En[t]stehung der S[ch]wurgerichte*	Inserted.
425.14	I[n/t] was unfair that he should be	Replaced.
435.793.1	*En[t]stehung der Schwurgerichte*	Inserted.
440.809.1	See *Placitorum Abbrev[i]atio*	Inserted.
483.33	these high[ ]places of royal prerogative	Inserted.
488.914.3	to speak of "agisting a wood, [”]	Added.
490.35	exercised functions anal[a/o]gous to those	Replaced.
537.11	to be otherwise acc[c]ording	Removed.
540.1052.4	virtually her fellow-[p]risoners	Restored.
547.41	the said five-and[-]twenty barons	Restored.
577.37	manu nostra saisita[saisita] fuerint	Removed.
588.33	sumagio aliquod chim[u/i]nagium capiatur	Replaced.
588.38	detur chiminagium for[i/e]stariis nostris	Replaced.
601.18	influence o[n/f] church on Charter	Replaced.

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