I've cleaned this up somewhat from the version that I used in class. Angle brackets (<>) indicate that the text in the brackets was not read in the class.

I. THE KING AND THE LAW

There is much that is controversial about the sources of Magna Carta, but there is relatively little controversy that one of them is the Coronation Charter of Henry I (1103). Let's take a look at the charter with Magna Carta in mind.

1. The Coronation Charter of Henry I (1103) (Sharpe trans.)

Henry king of the English to Bishop N. and M. sheriff and all his barons and sworn men French and English of Anyshire greeting.

<[1] Know that, by the mercy of God and the common counsel of the barons of the realm of England, I have been crowned king of the same realm. And because the realm has been burdened with unjust exactions,> **I**<, out of respect for God and the love I have towards you <all>, in the first place> **cause God's church to be free, on such terms that I shall neither sell [it] nor lease it at farm, and when an archbishop or bishop or abbot has died I shall receive nothing from the demesne of the church or from its men until a successor enters into it.** <And all the bad customs by which the realm of England was unjustly burdened I take away from it, which bad customs I here record in part.>

Magna Carta (1215): Clause 1. We in the first place, have granted to God and by this our present charter have confirmed, for us and our heirs in perpetuity, that the English church is to be free, and is to have its rights in whole and its liberties unharmed, *and we wish it so to be observed; which is manifest from this*, *namely that the liberty of elections, which is deemed to be of the greatest importance and most necessary for the English church, by our free and spontaneous will*, *before the discord moved between us and our barons*, *we granted and confirmed by our charter*, *and obtained its confirmation from the lord pope, Innocent the third, which we shall both observe and wish to be observed by our heirs in perpetuity in good faith.*

The general idea of the liberty of the church can be found in the Anglo-Saxon period. It found powerful reinforcement during the Gregorian reform in the western church, which took place at the time of the of the Conquest. The specific issue to which Henry's charter refers, the right of the king to take the revenues from church lands during the vacancy of and episcopacy or abbacy, was not an issue in 1215. It had been resolved favorably to the king. The resolution of the specific issue to which the 1215 charter refers was not continued in later versions of Magna Carta. (That's what the italics in the translation on the outline mean.) The practice that developed was more favorable to the king than was the deal that John cut with Innocent III about the selection of Stephen Langton as archbishop of Canterbury.

[2] If any of my barons, whether earls or others who hold of me, shall have died, his heir shall not redeem his land as he used to do in my brother's time, but shall relieve it with a lawful and just relief. Likewise also the men of my barons shall relieve their lands of their lords with a lawful and just relief.

Magna Carta (1215): Clause 2: If any one of our earls or barons, or others holding from us in chief by knight service, dies, and when he dies his heir is of full age and owes relief, he is to have his inheritance for the ancient relief: namely the heir or heirs of an earl for a whole barony £100; the heir or heirs of a baron for a whole barony £100, the heir or heirs of a knight for the whole fee 100*s* at most. And who owes less is to give less according to the ancient custom of fees.

The specificity of Magna Carta as opposed to the vague 'lawful and just' of the Coronation Charter is notable. Study of the Pipe Rolls shows that the 100s figure is approximately what had been charged in the past for knights' fees. The earls and barons, however, got a very good deal at £100. Notable, too. is the fact that there is nothing in Magna Carta that corresponds to the last sentence of the Coronation Charter. In practice, however, the 100s of Magna Carta tended to be followed, with the result that with inflation over time, reliefs became less valuable to lords.

Succession to fiefs was a major issue in the time of Henry I and remained so in the time of King John. Having dealt with reliefs clause 2, the Coronation Charter turns to questions of inheritance by women, male heirs who are minors, and widows in clauses 3 and 4. Magna Carta does so in clauses 3 through 8.

[3] And if one of my barons or my other men shall have wished to give his daughter to marry or his sister or his niece or his cousin, he shall speak with me on the matter. But I shall not receive anything of his for this permission nor shall I forbid him to give her, unless he wished to marry her to my enemy.

The Coronation Charter begins with an issue that is not treated specifically in Magna Carta, the consent of the king to marriage of daughter s and other female relatives, particularly those who stood to inherit. The Coronation Charter says that the king will consent to such marriages unless the prospective husband is one of the king's enemies. That seems reasonable enough and was probably the reason why the consent continued to be required. The Coronation Charter also says that the king will not charge for such consent. That was not, in fact, what Henry I did. Charging for the consent continued in the intervening reigns and continued after Magna Carta.

[3, cont'd] And if, when my baron or another man has died, his daughter shall have remained as heir, I shall give her and her land by the counsel of my barons.

The right of the king to dictate whom an heir, not only a daughter, would marry is reflected in Magna Carta in a general principle:

Magna Carta (1215) clause 6. Heirs shall be married without disparagement; *yet so that before the marriage is contracted it shall be announced to the blood relatives of the said heir*.

[3, cont'd] And if, when a husband has died, his wife shall have remained and shall be without children, she shall have her dower and marriage gift, and I shall not give her to a husband except in accordance with her wish.

[4] But if any wife shall have remained who has children, she shall have her dower and marriage gift for as long as she shall have kept her body lawfully, and I shall not give her except in accordance with her wish.

A bad piece of draftsmanship. The two provisions could well have been combined since they say the same thing. The peculiarity may reflect the fact that the original draft made some distinction between widows with and widows without children. On what the widow is to get on the death of her husband, Magna Carta is much more explicit:

Magna Carta (1215) clause 7: A widow, after the death of her husband, immediately and without difficulty, is to have her marriage portion (*maritagium*) and inheritance (*hereditatem*); nor shall she give anything for her dower (*dos*) or for her marriage portion or her inheritance, which inheritance she and her husband held on the day of his death. And she is to remain in the house [1225: principal dwelling] of her husband for forty days after his death, within

which time her dower is to be assigned to her. [1225 adds: "unless it has been assigned to her earlier, or unless that house is a castle. And if she leaves the castle, she is at once to be provided with a suitable house in which she may honourably dwell until her dower is assigned to her as aforesaid. And in the meantime she is to have her reasonable estover (firewood) from the common. Moreover, she shall be assigned as dower one-third of all the land held by her husband during his lifetime, unless she was endowed with less at the church door."]

On the remarriage of widows, Magna Carta is more restrictive:

Magna Carta (1215) clause 8. No widow shall be forced to marry so long as she wishes to live without a husband; yet so that she shall give security against marrying without our consent if she holds of us, or without the consent of her lord if she holds of another.

[4 cont'd] And the custodian of the land and the children shall be either the wife or another relative who ought more justly to be custodian. And I command that my barons likewise shall restrain themselves towards the sons and daughters or wives of their men.

The wardship of minor heirs remained an issue for the drafters of Magna Carta. Three clauses deal with it, and they make clear that wardship of minor heirs is for the benefit of the guardian, not of the ward. They are too long to read in full, but the effort seems to be to ensure that the guardian, who is entitled to income from the land, does not impede its capital value.

<Magna Carta (1215) clause 3. If, however, the heir of any such person [in clause 2] is under age a*nd is in wardship, he shall, when he comes of age, have his inheritance without relief and without fine* [i.e., without having to cut a deal with king and pay him money]. [The 1217 Charter and subsequent reissues rewrite, beginning at the word 'age': "his lord shall not have wardship over him or over his land before receiving his homage. And when such heir being under wardship comes of age—that is to say [attains] his twenty-first year—he shall have his inheritance without relief and without fine; so that although he may become a knight while he is yet under age, his land shall nevertheless remain under the wardship of his lords until the term aforesaid."]

Magna Carta (1215) clause 4. The guardian of the land of such an heir who is under age shall not take from the land of the heir more than reasonable issues and reasonable customs and reasonable services, and this without destruction and waste of men or things. And if we entrust the wardship of any such land to a sheriff or to any one else who is to answer to us for its issues, and if he causes destruction or waste of [what is under] wardship, we will exact compensation from him; and the land shall be entrusted to two discreet and lawful men of that fief, who shall answer for the issues to us or the man to whom we may assign them. And if we give or sell the wardship if any such land to any one, and if he causes destruction or waste of it, he shall forfeit that wardship and it shall be given to two discreet and lawful men of that fief, who likewise shall answer to us as aforesaid.

Magna Carta (1215) clause 5. Moreover, the guardian, so long as he has wardship of the land shall from the issues of that same land keep up the houses, parks, preserves, fishponds, mills, and other things belonging to that land. And to the heir, when he comes of full age, [the guardian] shall give all his land, stocked with ploughs *and produce,* [Stephenson and Marcham note: "*Wainnagium*, by which the context forces us to understand chiefly harvested crops necessary for seed and the upkeep of the estate"] *according to what crops may be seasonable and to what the issues of the land can reasonably permit*. [The 1217 Charter and subsequent reissues rewrite, beginning at the word 'ploughs': "and with all other things as, at least, he received it. All these [provisions] are to be observed with regard to custody over archbishoprics, bishoprics, abbeys, priories, churches and vacant prelacies that belong to us except that rights of this sort ought not to he sold.">

We can skip the remaining provisions in the Coronation Charter. They deal with issues that were of concern in 1103 and which were not of concern in Magna Carta. Clause 10 is an exception. It deals with the forests. That was the subject of an entirely separate charter, the Charter of the Forest, which was first promulgated in 1217, and was repromulgated with each subsequent iteration of Magna Carta.

<[5] The common mint tax, which was levied through boroughs and shires, which did not happen in King Edward's time, I altogether forbid that this shall happen hereafter. If anyone shall be seized in possession of false money, whether he be a moneyer or someone else, lawful justice shall be done in the matter.

[6] All pleas and all debts that were owed to my brother I pardon, apart from my lawful farms and apart from those that were agreed for the inheritances of others or for those things that more justly fell to others. And if anyone had pledged anything for his own inheritance, I pardon that and all reliefs that had been agreed for lawful inheritances.

[S. E. Thorne, "Henry I's Coronation Charter c. 6," EHR 93 (1978) 794 would translate as amended: "I remit all payments and debts owed to my brother, except my rightful dues and except those promised for the heirs of others or for the lands that belonged to others, and all rightful reliefs agreed upon for inheritances. If anyone has promised something more than is right for his inheritance, that I remit.]

[7] And if any of my barons or men shall be sick, just as he will give or intend to give his wealth, so I grant it to have been given. But if he is cut short unexpectedly by warfare or sickness and shall not have given or intended to give his wealth, his wife or his children or relatives or his lawful men shall divide it as shall have seemed best to them for the good of his soul.

[8] If any of my barons or men shall have done wrong, he shall not give a pledge in the mercy of his wealth as he used to do in my father's time or my brother's, but according to the measure of the wrong he shall pay compensation as he would have paid compensation before my father's time in the time of my other predecessors. But if he shall be convicted of perjury or crime, he shall pay compensation in accordance with what is just.

[9] I pardon all murders before the day on which I was crowned. And those that have been done thereafter, they will be justly compensated in accordance with the law of King Edward.

[10] Forests, by the common consent of my barons, I have retained in my hand just as my father had them.

11] To knights who earn their lands by military service, I grant by my own gift that they shall have the lands of their demesne ploughs quit of all gelds and of all works, so that being relieved of so great a burden they shall so equip themselves better with horses and arms that they shall be fit and ready for my service and for the defence of my realm.

[12] I set a firm peace in my whole realm and I command that it be kept hereafter.

[13] The law of King Edward I restore to you together with the improvements by which my father improved it by the counsel of his barons.

[14] If anyone took anything from what is mine or from the property of anyone else after the death of King William my brother, he shall quickly restore it in full and shall not pay compensation. And if he shall have retained anything thereof, he will pay heavy compensation on what shall be found.

[Witn] Witness Maurice bishop of London and William bishop elect of Winchester and Gerard bishop of Hereford and Earl Henry and Earl Simon and Walter Giffard and Robert de Montfort and Roger Bigod and Eudo Dapifer and Robert fitz Haimo and Robert Malet. At Westminster when I was crowned. Farewell.>

We should, however, say something about five of the many provisions in Magna Carta that deal with the king's justice, something that was not an issue in 1103, because the king's justice at that time was rudimentary:

Clause 18. Recognitions of novel disseisin, mort d'ancestor, *and of darrein presentment*, are not to be taken unless in their counties and in this way. We or, if we are out of our kingdom, our chief justiciar shall send two justices through each county *four times a year, who, with four knights of each county, elected by the county court are to take the aforesaid assizes, in the county court and on the day and in the place of the county court*.

1225 omits darrein presentment, reduces the number of visits of the justices to once an year and adds: "And those matters which cannot be concluded during that visit in the county by the aforesaid justices, sent to hold the said assizes, shall be concluded by the same men elsewhere on their eyre. And those matters which owing to the difficulty of some particulars cannot be determined by the same men shall be referred to our justices of the bench and there concluded."

It is sometimes argued that the barons at Runnymede were atavistic. They wanted to restore the justice system to what it was before the time of Henry II, when their courts had considerably more power. That is a hard argument to make in the light of this provision. As we have seen novel disseisin and mort d'ancestor had substantially reduced the power of the barons' courts, and they wanted more of both, four times a year in every county. By 1225 that was clearly impracticable, and hearing of the assizes in the counties was reduced to once a year, and not even that was always achieved.

Clause 17. Common pleas are not to follow our court, but are to be held in some definite place.

King John had made it a practice of removing civil cases to those justices who were attending him personally, and he could be any place in the kingdom. That made it difficult for those who wanted to bring what we would call civil actions to find where the court was and attend it. Once more, the barons clearly wanted to use the civil actions that had largely developed in the times of Henry II and his sons, and having a branch of the central royal court that sat permanently at Westminster allowed them to do so. As a result of this provision the central royal court divided into two branches, the Common Bench and the Court Before the King, later called Common Pleas and King's Bench.

Clause 24. No sheriff, constable, coroner, or other of our bailiffs are hold the pleas of our crown.

Major felonies and cases concerning royal prerogative revenues are clearly 'pleas of the crown', and these are to be heard by justices of the royal courts. Later, we will see that trespass may be a plea of the crown if the writ alleges that what was done was against the peace of the king, but not if the writ does not say that.

Clause 34. The writ which is called *praecipe* is not to be made out henceforth in such a way as to deprive a free man of his court.

As we have seen, after 1216, *Glanvill's* 'writ of first summons' was no longer issued, but was replaced by the writ of right *in capite*, the writ of right *quia dominus remisit curiam*, and multiple writs of entry. Those who argue that this clause was intended to restore all jurisdiction in the right to the lords' courts are quite mistaken.

Clause 39. No freeman (*nullus liber homo*) shall be captured or imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land.

This is the famous ‘due process’ clause, though that term was not used to describe it until the 14th century. The reference in the clause to ‘judgment of his peers’ is not a reference to trial by jury, which did not exist criminal cases in 1215. Rather, it is a reference to a feudal court attended by the peers of the defendant. The reference to ‘the law of the land’ probably refers to many different processes, but the most important of these at the time would be those held pursuant to the assize of Clarendon, which, as we have seen, did not call for a trial jury, but did call for something that is very much the ancestor of the grand jury.

2. <Magna Carta (1215) (Stephenson and Marcham trans., with indications of later amendments; italics indicate that the language was omitted in the 1215 charter). What follows quotes only a few clauses and is drawn from the lecture on Magna Carta in the course.>

II. THE CHARTER IN GENERAL

<1. Clauses of Magna Carta arranged by topic (references are to the numbering in the 1215 charter) (Only one topic only per clause; a more complicated arrangement would split clauses (e.g. 12) that deal with more than one topic.):>

As the table on the outline shows the 60 clauses of Magna Carta cover a wide variety of topics, though the clauses themselves are not arranged in topical order. One way of arranging the topics shows that more of them (20) concern justice than any other topic. This is followed closely by what we might call ‘feudal grievances’ (18), such as the provisions about reliefs and wardship that we dealt with above. Eleven deal with royal administration. All the other topics pale in comparison.

< a. The church (4): 1, 22, 42, 46

b. The burgesses (2): 13, 41

c. Economic matters, debts and Jews (5): 9, 10, 11, 33, 35.

d. Feudal grievances (18):

i. Relief, wardship, marriage: cc. 2, 3, 4, 5, 6, 7, 8, 37, 43, 53

ii. Aids and scutages: cc. 12, 14, 15, 16, 26, 27, 29, 32

e. Justice (20): 17 (CP), 18, 19 (petty assizes), 20, 21, 24, 34, 36, 38, 39 (judgment of peers), 40, 44, 45, 52, 54 (appeals), 55, 56, 57, 58 (Welshmen), 59 (Scots)

f. Administrative (11): 23, 25 (farms), 28, 30, 31 (royal works), 47, 48 (forests), 49, 50, 51 (foreign ministers), 53

g. Administration of Magna Carta (1): 60 (sometimes divided into 4 clauses, 60–63). >

2. <Magna Carta today in Alberta (* for England):> Despite the ‘constitutional’ status of the document only four provisions of Magna Carta are still law in England today.

	1225	Topic
c. 1	*1	General confirmation of liberties of the Church
c. 39	*29	Due process
c.	*37	A subsidy in respect of the Charter

III. THE CHARTER EVALUATED

1. Finding the right level of generality
2. Parallels between the Magna Carta process and parliamentary process
3. The relationship between sovereignty and the rule of law
4. The relationship between the Charter and the events of 1642
5. The relationship between the Charter and contemporary charters
   a. Treaty of Constance (1183)
   b. Charter of Alfonso IX of León (1188)
   c. Draft charter of Peter II of Aragon (1205)
   d. Charter of Frederick II (1220)
   e. ‘Golden Bull’ of Hungary (1222)
   f. Charter of Henry VII of Germany (1231)
   g. Charters after the Sicilian Vespers (1282–3)

6. Magna Carta and the *ius commune* (Roman and canon law) – the Helmholz thesis: 40 of the 63 clauses in Magna Carta are ‘congruent’ with the *ius commune*, examples:

a. Terminology not found in native English law prior to 1215: *delictum* in clause 20

b. A specific idea not found in native English law prior to 1215: one must proceed against the principal debtor before proceeding against his sureties in clause 9

c. Terminology common to both: e.g., *libertas ecclesiae* in clause 60

d. Ideas common to both:

i. Specific: removal of obstructions to navigation in the Thames and Medway in clause 33

ii. General: the notion of due process in clause 39

e. Bottom line: borrowing, influence, and congruence are not the same thing. The congruence is certainly there. Magna Carta was very much a document of its time, but we make a serious mistake if we think that the conceptual economy of customary feudal law is the only conceptual economy of the time and the only one reflected in the document.

3. *Bracton* on Kingship (S. E. Thorne, trans.)

Many passages in *Bracton* are puzzling. At times, he seems to contradict himself. My predecessor, S. E. Thorne, who translated the work into English for the first time in a long time, suggested that we could solve most of these puzzles if we assume that the work did not have a single author. To a base text, which was written in the 1220s, someone or a group of people made additions and glosses to the text, reflecting both different views and changes in the law. <In the translation below, passages that Thorne identifies as later additions to the base text are marked with italic square brackets (*[ ]*); passages that had already been identified as *additiones* are marked in angle brackets (< >); words or phrases that Thorne added to the translation to make it make better sense are marked with roman square brackets ([ ]). Thorne’s notes explain his markings, reference parallel passages in the text (by page numbers), identify sources of the text, and reference modern literature. The Latin and English text of *Bracton*, with the Thorne markings identified in color, may be found at http://amesfoundation.law.harvard.edu//Bracton/.> Thorne also posited that Henry of Bratton (c. 1210 – c. 1268) (*Bracton*) was probably not principal author either of the base text or of the additions and glosses. He may, however, have been the last possessor of the original manuscript, which is now lost, and made a few later additions to a work that had largely been written in the 1220s and 1230s. The work was not widely known until after Henry’s death, and none of the surviving manuscripts is earlier than the late 13th century. The following passages are among the best known in the book and remain, even after Thorne’s work, full of puzzles.

BRACTON, DE LEGIBUS ANGLIE, fols. 7a, 34a–34b, 55b–56a, 107a–107b

in *Bracton on the Laws and Customs of England* II:33, 109–10, 166–67, 304–6 (S. Thorne trans., Cambridge, 1968) [footnotes renumbered])

The king has no equal.

[fol. 7a] [1]The king has no equal within his realm, *[*Subjects cannot be the equals of the ruler[2] because he would thereby lose his rule, since equal can have no authority over equal.*]*[3] nor *a fortiori* a superior,[4] because he would then be subject to those subjected to him. The king must not be under man but under God and under the law, because law makes the king,[5] *[*Let him therefore bestow upon the law what the law bestows upon him,[6] namely, rule and power.*]* for there is no *rex* where will rules rather than *lex*. Since he is the vicar of God,[7] *[*And that he ought to be under the law appears clearly in the analogy of Jesus Christ, whose vicegerent on earth he is, [8]for though many ways were open to Him for his ineffable redemption of the human race, the true mercy of God chose this most powerful way to destroy the devil's work, he would use not the power of force but the reason of justice.[9] Thus he willed himself to be [10]under the law that he might redeem those who live under it.[11] For He did not wish to use force but judgment. And in that same way the Blessed Mother of God, the Virgin Mary, Mother of our Lord, who by an extraordinary privilege[12] was above law, nevertheless, in order to show an example of humility, did not refuse to be subjected to established laws. Let the king, therefore, do the same, lest his power remain unbridled.*]*[13] there ought to be no one in his kingdom[14] who surpasses him in the doing of justice, but he ought to be the last, or almost so, to receive it, when he is plaintiff.[15] If it is asked of him, since no writ runs against him there will [only][16] be opportunity for a petition, that he correct and amend his act; if he does not, it is punishment enough for him that he await God's vengeance.[17] No one may presume to question his acts, much less contravene them.[18]

[1]*Supra* i, 117–19 (full collation); F. Schulz in *E.H.R.*, lx, 143–4, 172–3; in *L'Europa e il diritto romano*: *Studi in memoria Paolo Koschaker*, i, 23 [2]'inferiores ... potentiori (for 'potentioribus')' from line 8: D.4.7.3.pr.: 'potentiori pares non possumus'; Drogheda, 13, 43; cf. Schulz, 172 [3]Drogheda, 310; Schulz, 138 (11); *infra* iv, 156 [4]Glanvill, vii, 10: 'Quia dominus rex nullum potest habere parem, multo minus superiorem'; *infra* 157, 253, 305, iv, 159, 281, *B.N.B.*, no. 1108 [5]*Infra* 110, 308; Cortese, i, 152–4, ii, 223–5 [6]Azo *Summa Cod.* 1.14, no. 16, as *infra* 306 [7]*Supra* 20, *infra* 166, 305 [8–9]Leo Magnus, in *P.L.*, liv. col. 196: 'Verax namque misericordia Dei, cum ad reparandum humanum genus ineffabiliter ei multa suppeterent, hanc potissimum consulendi viam elegit, qua ad destruendum opus diaboli non virtute uteretur potentiae sed ratione iustitiae.' I owe this identification to Peter Kelly, S.J. [10–11] Epist. ad Galatas, 4:5:'sub lege, ut eos qui sub lege erant redimeret.' [12]'privilegio' [13]*Infra* 110, 305 [14]'regno' [15]'in iustitia exhibenda,' 'in iustitia suscipienda,' as *infra* 305 [16]'tantum,' as *infra* iii, 43 [17]But see *infra* 110, iii, 43, iv, 159 [18]The two supplementary paragraphs which once followed here now appear *infra* 109, n. 18 to 110, n. 15

a. The first statement of the theme comes at the beginning of the book in the section on persons when the a. is talking about the king. The king has no equal in his realm, and, of course, no superior. The bracketed gloss states a theory pretty close to what we would call sovereignty. But the king is under God and under the law. Skipping the religious gloss for a moment. The king therefore ought to surpass all in the doing of justice. But because he has no equal there is no legal remedy against him, only a remedy by way of petition. If he does not adhere to the petition, God will judge him. Now this is a very traditional statement of the descending theory of power, and it is reinforced by the religious analogies in the glosses. The king is the vicar of God; he should submit himself to the law as Christ submitted himself to the law, as the Virgin submitted herself to the law. The only problem with the religious analogy is that it admits an element of paradox. In the traditional statement the king was under the law; there was just no remedy on this earth against him, but the exploration of the religious analogy suggests that the king is in some sense freed from the law, but voluntarily submits himself to it. We may call this Bracton's paradox.

That the justices must not question royal charters nor pass upon them.

[fol. 34a–34b][1]Private persons cannot question the acts of kings,[2] nor ought the justices to discuss the meaning of royal charters: not even if a doubt arises in them may they resolve it; even as to ambiguities and uncertainties, as where[3] a phrase is open to two meanings, the interpretation and pleasure of the lord king must be awaited, since it is for him who establishes to explain his deed.[4] And even if the document is completely false, because of an erasure or because the seal affixed is a forgery, it is better and safer that the case proceed before the king himself.

[*The so-called* "*Addition about Charters*"]

[5]<No one may pass upon the king's act *[*or his charter*]* so as to nullify it,[6] but one may say that the king has committed an *injuria*,[7] and thus charge him with amending it,[8] lest he *[*and the justices*]*[9] fall into the judgment of the living God because of it. The king has a superior, namely, God.[10] Also the law by which he is made king.[11] Also his *curia*, namely, the earls and barons,[12] because if he is without bridle, that is without law, they ought to put the bridle on him. *[*That is why the earls are called the partners, so to speak, of the king;[13] he who has a partner has a master.*]*[14] When[15] even they, like the king, are without bridle, then will the subjects cry out and say 'Lord Jesus, bind fast their jaws in rein and bridle.'[16] To whom the Lord [will answer], 'I shall call down upon them a fierce nation and unknown, strangers from afar, whose tongue they shall not understand,[17] who shall destroy them and pluck out their roots from the earth.'[18] By such they shall be judged because they will not judge their subjects justly, and in the end, bound hand and foot, He shall send them into the fiery furnace and into outer darkness, where there will be wailing and gnashing of teeth.>[19]

[1]*Supra* i, 131–2 (full collation). This portion including the *addicio* following detached from *supra* 33, n. 19. Its new place required recasting to give prominence to charters rather than acts. E. Kantorowicz, 158 n.; Lewis in *Speculum*, xxxix, 257 n., 262 n. [2]*Supra* 33, *infra* 169, iv. 159 [3]'ut si' [4]Drogheda, 132: 'cum eius sit interpretari cuius fuit condere,' 342, 355; not D. 46.5.9; *infra* 302 [5]*Supra* i, 124–5 (full collation), 332, 378; Schulz in *E.H.R.*, lx, 144–5, 173–5; *supra* 33, n. 19, 109, n. 18 [6]*Supra* 21 [7]'iniuriam' for 'iustitiam'; *om*: 'et bene ... quod male,' made necessary by the misreading; Schulz, 173 [8]*Supra* 33, *infra* 169, iii, 43, iv, 159 [9]*Infra* iv, 150: 'si iustitiariis suis necessitatem imponat rex quod iudicium reddant' [10]*Supra* 33, *infra* 157, iii, 43, iv, 159 [11]*Supra* 33, *infra* 306 [12]*Infra* iii, 43; Richardson in *T.R.H.S.* (4th ser.) xxviii, 22, *Bracton*: *the problem of his text*, 31–5 [13]*Supra* 32 [14]'Ideo dicuntur comites quasi ... magistrum'; cf. Tierney in *Speculum*, xxxviii, 314 [See now Blecker, in *Studi Senesi* xcvi, 66–118. CD] [15]'Ubi'; cf. Schulz, 174–5 [16]Psl. 31:9 [17]Jerem. 5:15 [18]Ezech. 17:9 [19]Matth. 22:13, 13:42; *supra* 22

b. I'm going to skip the second passage for a moment, the *additio de cartis*. Some have doubted that it is part of the original text rather than something added at the time of the Barons' Wars. Recent understanding of the work would lead us to doubt that it is that late. If it is referring to specific events, it might be referring to those around Magna Carta.

Of liberties and who may grant liberties and which belong to the king.

[fol. 55b–56a] We have explained above how rights and incorporeal things are transferred and *quasi*-transferred, how they are possessed or *quasi*-possessed, and how retained by actual use. Now we must turn to liberties [and see] who can grant liberties, and to whom, and how they are transferred, how possessed or *quasi*-possessed, and how they are retained by use. Who then? It is clear that the lord king [has all] dignities, [1]*[*[It is the lord king] himself who has ordinary jurisdiction and power over all who are within his realm.[2] For he has in his hand all the rights[3] belonging to the crown and the secular power and the material sword pertaining to the governance of the realm. Also justice and judgment [and everything] connected with jurisdiction, that, as minister and vicar of God,[4] he may render to each his due. Also everything connected with the peace, that the people entrusted to his care may live in quiet and repose, that none beat, wound or mistreat[5] another, [or] steal,[6] take and carry off by force and robbery another's property, or maim or kill anyone. Also coercion, that he may punish and compel wrongdoers,[7] [8]*[*He in whose power it is to cause[9] the

laws, customs,[10] and assizes provided, approved and sworn in his realm to be observed by his people, ought himself to observe them[11] in his own person.*]* for it is useless to establish laws unless there is someone to enforce them.*]*[12] [13]rights or jurisdictions in his hand. He also has, in preference to all others in his realm, privileges by virtue of the *jus gentium*. [By the *jus gentium*] things are his which by the *jus naturale* ought to be the property of the finder, as treasure trove,[14] wreck, great fish, sturgeon, waif, things said to belong to no one.[15] Also by virtue of the *jus gentium* [things] which by natural law ought to be common to all, as wild beasts and undomesticated birds, which by natural law ought to be acquired[16] by apprehension and capture or fowling, [or] by occupation and apprehension, [as] of another's property, as where a thing is cast away and taken to be abandoned.[17] Those concerned with jurisdiction and the peace *[*Those connected with justice and the peace belong to no one save the crown alone and the royal dignity, nor can they be separated from the crown, since they constitute the crown *[*For to do justice, [give] judgment and preserve the peace is the crown.*]* [18]without which it can neither subsist nor endure.*]*[19] [20]cannot be transferred to persons or tenements, neither the right nor the exercise of the right,[21] nor be possessed by a private person unless[22] it was given him from above as a delegated jurisdiction, nor can it be delegated without ordinary jurisdiction remaining with the king himself. Those called privileges, however, though they belong to the crown, may nevertheless be separated from it and transferred to private persons, but only by special grace of the king himself;[23] if his grace and special grant do not appear time does not bar the king from his action. Time does not run against him here since there is no need for proof.[24] For it ought to be apparent to all that such things belong to the crown unless the contrary can be shown by a special grant.[25] In other matters, however,[26] where proof is needed, time runs against him just as against all others.[27]

[1]'McIlwain, *Constitutionalism Ancient and Modern*,77; Schulz in *E.H.R.*, lx, 143, 172. This portion belongs *infra* 304, at n. 12 [2]'*Infra* iv, 281, 298 'omnes' [3]'E. Kantorowicz, 153 [4]'*Supra* 20, *infra* 305, 412 [5]'tractet' for 'contrectet', as *infra* 171; 'verberaverunt et male tractaverunt'; 296, 325: 'verberaverit, vulnaverit et male tractaverit', 439, iii, 21 [6]'ne quis rem alienam contrectet,' as *infra* 425 [7]*Supra* 21, *infra* 304; 'coerceat,' as V and Fleta, i, ca. 17; 'coercet,' CE, LA, MB, MG, OA, OB, OC [8]Belongs *infra* 306, at n. 5 [9]'faciat'; 'Ille qui habet' [10]'consuetudines,' as Fleta; customs are 'approbatas,' *supra* 22 [11]'eas' for 'sua' [12]*Supra* 23, *infra* 305; Drogheda, 36 [13]*Reading*: 'rex habet [omnes] dignitates, iura sive'; *om*: 'Habet ... huiusmodi,' a connective [14]*Supra* 41, 47, *infra* 339 [15]Supra 42, 58, *infra* 293, 339 [16]'adquiri'; 'communia' has erroneously been twice copied [17]*Supra* 41, 42, *infra* 339 [18]*Om*: 'et' [19]*Supra* 58, *infra* 305; D. W. Sutherland, *Quo warranto*, 13, 103–4 [20]*Om*: 'Huiusmodi ... iurisdictiones,' a connective [21]'neque ius neque' [22]'neque ... possideri nisi hoc' [23]*Supra* 58, *infra* 339 [24]*Supra* 58, *infra* 293; E. Kantorowicz, 168 [25]Sutherland, 14 [26]'vero' [27]*Supra* 58

c. The next passage concerns the power of the king to grant privileges. The passage originally said: The lord king has all dignities, rights or jurisdictions in his hand. Some examples of rights are given such as treasure trove and hunting. Another example is jurisdiction. But jurisdiction is different. It cannot be alienated but only delegated, and the delegation must leave ordinary jurisdiction in the king's hand. Privileges, however, (treasure trove and hunting might be examples) may be granted by the king but a grant must be shown. Royal privileges cannot be acquired by prescription. The glossator came along and made it more complex. In the first place he added a justification for the concept of inalienability of sovereignty. The king cannot give away jurisdiction because to do so would be to give away the crown. Jurisdiction is of the essence of the crown. That much is clear. What the big gloss in the first passage does is less clear. A very great scholar of the last generation, without knowing that this was a gloss, thought that the passage drew a distinction between *jurisdictio* and *gubernaculum*. In exercising *jurisdictio* the king was subject to the law, but in exercising *gubernaculum* he was not. Perhaps, but I must confess that I don't see a distinction between the two being drawn here, nor do I see any indication that the king's relation to the law is any different in the two. The paradox remains; the king is both above and below the law.

Of the division of jurisdiction; *of the church and the realm.*

[fol. 107a–107b] [1]*[*There are spiritual causes, in which a lay judge has neither cognisance nor (since he has no power of coercion) execution, cognisance of which belongs to ecclesiastical judges who govern and defend the priesthood, and secular causes, jurisdiction over which belongs to kings and princes who defend the realm, with which ecclesiastical judges must not meddle.*]* since their rights or jurisdictions are limited and separate, except when sword ought to aid sword,[2] for there is a great difference between the clerical estate and the realm.[3]

Of the regulation of jurisdictions in the realm (as to the ecclesiastical estate nothing for the present).

Since nothing relating to the clerical estate is relevant to this treatise, we therefore must see who, in matters pertaining to the realm, [has ordinary jurisdiction,[4] and then who] ought to act as judge. It is clear that it is the king himself and no other, could he do so unaided, for to that he is held bound by virtue of his oath. For at his coronation the king must swear, having taken an oath in the name of Jesus Christ, these three promises to the people subject to him.

Of the oath the king must swear at his coronation.

[5]In the first place, that to the utmost of his power he will employ his might to secure and will enjoin that true peace shall be maintained for the church of God and all Christian people throughout his reign. Secondly, that he will forbid rapacity to his subjects of all degrees. Thirdly, that he will cause all judgments to be given with equity and mercy, so that he may himself be shown the mercy of a clement and merciful God,[6] in order that by his justice all men may enjoy unbroken peace.

For what purpose a king is created; *of ordinary jurisdiction.*

[7]To this end is a king made and chosen, that he do justice to all men *[*that the Lord may dwell in him, and he by His judgments*]* may separate*]*[8] and sustain and uphold what he has rightly adjudged, for if there were no one to do justice peace might easily be driven away and it would be to no purpose to establish laws (and do justice) were there no one to enforce them. The king, since he is the vicar of God on earth, must distinguish *jus* from *injuria*,[9] equity from iniquity,[10] that all his subjects may live uprightly, none injure another, and by a just award each be restored to that which is his own.[11] He must surpass in power all those subjected to him, *[*He ought to have no peer, much less a superior,[12] especially in the doing of justice,[13] that it may truly be said of him, 'Great is our lord and great is his virtue etc.,'[14] though in suing for justice he ought not to rank above the lowliest in his kingdom.*]* [15]nevertheless, since the heart of a king ought to be in the hand of God,[16] let him, that he be not unbridled, put on the bridle of temperance and the reins of moderation, lest being unbridled, he be drawn toward injustice. For the king, since he is the minister and vicar of God on earth, can do nothing save what he can do *de jure*,[17] *[*despite the statement that the will of the prince has the force of law,[18] because there follows at the end of the *lex* the words 'since by the *lex regia*, which was made with respect to his sovereignty'; nor is that anything rashly put forward of his own will,[19] but what has been rightly decided with the counsel of his magnates, deliberation and consultation having been had thereon, the king giving it *auctoritas*.*]* His power is that of *jus*, not *injuria*[20] *[*and since it is he from whom *jus* proceeds, [21]from the source whence *jus* takes its origin no instance of *injuria* ought to arise,[22] and also, what one is bound by virtue of his office to forbid to others, he ought not to do himself.*]*[23] [24]as vicar and minister of God on earth, for that power only[25] is from God, *[*the power of *injuria* however, is from the devil, not from God, and the king will be the minister of him whose work he performs,*]* whose work he performs.[26] Therefore as long as he does justice he is the vicar of the Eternal King, but the devil's minister when he deviates into injustice, [27]For he is called *rex* not from reigning but from ruling well, since he is a king as long as he rules well[28] but a tyrant when he oppresses by violent domination the people entrusted to his care.[29] Let him, therefore, temper his power by law, which is the bridle of power,[30] that he may live

according to the laws, for[31] the law of mankind has decreed that his own laws bind the lawgiver,[32] and elsewhere in the same source, it is a saying worthy of the majesty of a ruler that the prince acknowledge himself bound by the laws.[33] Nothing is more fitting for a sovereign than to live by the laws,[34] nor is there any greater sovereignty than to govern according to law,[35] and he ought properly to yield to the law what the law has bestowed upon him,[36] for the law makes him king.[37] And since it is not only[38] necessary that the king be armed with weapons and laws but [with wisdom],[39] let the king learn wisdom that[40] he may maintain justice, and God will grant wisdom to him, [41]and when he has found it he will be blessed if he holds to it,[42] [43]for there is honour and glory in the speech of the wise and the tongue of the imprudent is its own overthrow;[44] [45]the government of the wise man is stable, and the wise king will judge his people, but if he lacks wisdom he will destroy them,[46] for from a corrupt head corruption descends to the members, and if understanding and virtue do not flourish in the head it follows that the other members cannot perform their functions. [47]A king ought not only to be wise but merciful, his justice tempered with wisdom and mercy. Yet though there is greater safety in having to render a final account for mercy rather than judgment,[48] it is safest that [a judge's] [49]eyes precede his steps,[50] that judgment not become uncertain through unconsidered discretion nor mercy debased by indiscriminate application, for mercy is indeed unjust when it is extended to the incorrigible. [51]Nor does the grace of our august liberality extend to those who, having been pardoned an earlier offence, take it to be approved by custom rather than deserving of punishment.[52] And when a judge is indulgent to the unworthy, does he not expose all to the infection of regression?[53] Let him therefore be merciful to the unworthy in this way, as always to feel compassion for the man. And let him not in judgment show mercy to the poor man,[54] that is, the mercy of remission, though to him there ought to be shown, as to all men, the mercy of compassion. And to whom and in what fashion a judge[55] should be merciful, the merits or demerits of persons shall instruct him.

[1]Br. and Azo, 198–9 [2]*Infra* 383, iv, 278, 327, 375 [3]*Infra* iv, 248, 281, 298 [4]The portion *supra* 166, n. 2 belongs here; a portion belonging et 306, n. 5, has been transferred with it; see also 306, n. 24 [5–6]Coronation oath, third recension: Richardson in *Speculum*, xxiv, 44: Hoyt in *Traditio*, xi, 238, 251 [7]Schulz in *E.H.R.*, lx, 137–43; Richardson in *Traditio*, vi, 76 ff. E. Kantorowicz, 143 ff.; Lewis in *Speculum*, xxxix, 253 ff. [8]Belongs *infra* n. [9]; 'ipse per' [9]*Supra* n. [8] [10]D.1.1.1.1; 'aequum,' as D., *infra* iii, 52 [11]Inst. 1.1.3; D.1.1.10.1; supra 166 [12]Glanvill, vii, 10; *supra* 33, 157, *infra* 253, iv, 159, 281 [13]*Supra* 33 [14]Psl. 146:5 [15]*Om*: et licet ... praecellat,' a connective [16]Prov. 21:1; C.1.1.8.3; *supra* 20 [17]Cf. E. Kantorowicz, 155 [18]Inst. 1.2.6; D.1.4.1.pr.; *supra* 19. Cf. Schulz, 171, Richardson, 76, but 77 n. 11, E. Kantorowicz, 152 [19]Inst. 1.2.6, gl. *v.* 'placuit,' 'non omnis vox iudicis est sententia, et sic nec omnis vox principis est lex.' [20]*Infra* iii, 184: 'Est enim ius et eius contrarium iniuria' [21–22]C.8.4.6.pr.; cf. E. Kantorowicz, 155 [23]D.8.5.15: 'quod alium facientem prohibere ex officio necesse habuit, id ipse committere non debuit'; 'quod,' 'ipse,' as D; *infra* iv, 244 [24]*Om*: 'Exercere ... iuris,' a connective [25]'sola' for 'solius' [26]Cf. Schulz, 140, 171; Richardson, *Bracton*, 29 [27–28]Leges Angl. 11, 1 B 7:Liebermann, i. 637 [29]*Policraticus*, viii, 17 (777d) [30]*Supra* 33, 110 [31]'quia,' as Schulz, 171 [32]D.2.2; 2.2.1; Schulz, 141, 166 [33]C.1.14.4; Azo, *Summa Inst.* proe. Azonis, no. 1 [34]C.6.23.3 [35]C.1.14.4; E. Kantorowicz, 104 [36]Azo, *Summa Cod.* 1.14, no. 16; *supra* 33 [37]Supra 33, 110 [38]'solum,' as Schulz, 141, 172; Kantorowicz, 44–6 [39]*Supra* 21 [40]'ut,' as Fleta, i, ca. 17 [41–42]Prov. 3:13; 3:18 [43–44]Eccl. 5:15 [45–46]Eccl. 10:1; 10:3; *Policraticus*, v. 11 (567d), v. 7 (554b) [47]New paragraph [48]C. 26, qu. 7, c. 12: 'nonne melius est propter misericordiam rationem dare quam propter crudelitatem?' [49–50]Prov. 4:25 [51–52]C.1.4.3.4 [53]C. 23, qu. 4, c. 33: 'Nonne cum uni indulget indigno, ad prolapsionis contagium provocat universos?' [54]*Ibid.*, c. 44; Exod. 23:3 [55]Not the king, as Schulz, 172.

d. The final passage comes from the section in which the a. treats of jurisdiction generally. Again leaving out the problematical gloss in the middle it says that the function of the king is to do justice. This is what he swore to do at his coronation. In doing justice he is the vicar of God on earth. But if he does injustice, then he is not the vicar of God but the vicar of the devil; he is not a king but a tyrant, quoting John of Salisbury, who went on, as the author of the passage does not, to suggest that a tyrant might be deposed. The passage concludes with some reflections on the relationship between justice and mercy. In the middle of the passage comes the troublesome gloss: "Despite the statement that the will of the prince has the force of law, etc." Now what is going on here is an

extraordinary twisting of the most absolutistic of texts in Roman law: "What pleases the prince has the force of law, since by the *lex regia* the people have given all authority to him." It is hard not to conclude that the author of the gloss is rejecting the Roman text and saying that the *lex regia* in England does not give the king the power to make all laws by himself, but only with the counsel of his magnates, deliberation and consultation having been had thereon, the king giving it *auctoritas*. This view is confirmed in the second passage with the mysterious statement that the *curia* is superior to the king and may "put a bridle" on him. But this is not the mainstream argument of the text. The mainstream argument of the text establishes a hierarchy descending from God to the law to the king. The law makes the king. If the king does not do according to the law he unmakes himself king. There is no legal remedy if this happens, but God's judgment will be severe. In the middle of the century people were thinking of mechanisms whereby they might be able to help God in rendering his judgment. Wild-eyed radicals would suggest a right of revolution. But the paradox remained unresolved.

4. *Confirmatio cartarum* (Confirmation of the Charters) (1297) (Stephenson & Marcham, trans.) in S&M, pp. 164–5 (No. 51)

Edward, by the grace of God king of England, lord of Ireland, and duke of Aquitaine, to all who may see or hear these present letters greeting. Know that, for the honour of God and of Holy Church and for the benefit of our entire kingdom, we have granted for ourself and for our heirs that the Great Charter of Liberties and the Charter of the Forest, which were drawn up by the common assent of the whole kingdom in the time of King Henry, our father, are to be observed without impairment in all their particulars. And we will that those same charters shall be sent under our seal to our justices—those of the forest as well as the others—to all sheriffs of counties, and to all our other ministers, as well as to all cities throughout the land, together with our writs providing that the aforesaid charters are to be published and announcement is to be made to the people that we have granted these [charters] to be observed in all their particulars; and that our justices, sheriffs, mayors, and other ministers whose duty it is to administer the law of the land under us and through our agency, shall cause the same charters in all particulars to be admitted in pleas and judgments before them—that is to say, the Great Charter of Liberties as common law and the Charter of the Forest according to the assize of the forest, for the relief of our people. And we will that, if any judgment is henceforth rendered contrary to the particulars of the charters aforesaid by our justices, or by our other ministers before whom pleas are held contrary to the particulars of the charters, it shall be null and void. And we will that these same charters shall be sent under our seal to the cathedral churches throughout the kingdom and shall there remain; and twice a year they shall be read to the people. And [we will] that the archbishops and bishops shall pronounce sentences of greater excommunication against all those who, by deed or aid or counsel, shall violate the aforesaid charters, infringing them in any particular or violating them in any way; and the aforesaid prelates shall pronounce and publish these sentences twice a year. And if the same prelates—the bishops or any of them—prove negligent in making the aforesaid denunciation by the archbishops of Canterbury and York who at the time hold office, they shall be reproved in a suitable manner and compelled to make this same denunciation in the form aforesaid.

And whereas some people of our kingdom are fearful that the aids and taxes (mises), which by their liberality and good will they have heretofore paid to us for the sake of our wars and

> other needs, shall despite the nature of the grants, be turned into a servile obligation for them and their heirs because these [payments] may at a future time be found in the rolls, and likewise the prises that in our name have been taken throughout the kingdom by our ministers: [therefore] we have granted, for us and our heirs, that, on account of anything that has been done or that can be found from a roll or in some other way, we will not make into a precedent for the future any such aids, taxes, or prises. And for us and our heirs we have also granted to the archbishops, bishops, abbots, priors, and other folk of Holy Church, and to the earls and barons and the whole community of the land, that on no account will we henceforth take from our kingdom [p. 165, Mats. V–37] such aids, taxes, and prises, except by the common assent of the whole kingdom and for the common benefit of the same kingdom, saving the ancient aids and prises due and accustomed.
>
> And whereas the greater part of the community all feel themselves gravely oppressed by the maltote on wool—that is to say, 40s. from each sack of wool—and have besought us to relieve them [of the charge], at their prayer we have fully relieved them, granting that henceforth we will take neither this nor any other [custom] without their common assent and good will, saving to us and our heirs the custom on wool, wool-fells, and hides previously granted by the community of the kingdom aforesaid.
>
> In testimony whereof we have caused to be written these our letters patent. Given at Ghent, November 5, in the twenty-fifth year of our reign.
>
> (French) Stubbs, *Select Charters*, pp. 490 f.

Much has been made of this document, perhaps too much. It did, however, fix the text of Magna Carta in the 1225 version. It was entered both on the Charter Rolls and on the Statute Rolls. The 800th anniversary of Magna Carta produced an outpouring of literature on the topic. Many historians argued that Magna Carta was a feudal document that spoke to the conditions of the first half of the 13th century that was later turned into a symbol. That argument probably goes too far. Magna Carta was a statute. Throughout the Middle Ages and well into the early modern period specific provisions of it were effective as law. Magna Carta was also, however, a symbol, even in the Middle Ages. Separating the statutory uses from the symbolic uses is not always easy, but the two possible uses must be kept in mind when dealing with references to it.

II. TOWN AND COUNTRY

1. *Lex Mercatoria* (extracts) (1297) (Basile, et al., trans.)

   The version referenced in the Lectures tab translates five of the 21 chapters. Both the Latin and English of those chapters may be found there. The entire text, including the elaborate introduction and indices, may be found in HeinOnline under the publications of the Ames Foundation. Suffice it to say here that the editors believe that this little treatise contains a description of the practice of the mercantile courts in late 13th-century England mixed in with arguments about how it ought to proceed. The author does not distinguish between the descriptive and the tendentious parts. Interpretation is made more difficult by the fact that the sole surviving manuscript was written by an incompetent scribe. Literature prior to the Ames Foundation edition of the text in 1998 is unreliable because the authors of it were unaware of these facts.

   Reproduced below are translations of three of the chapters, 1, 2 and 20, all that we are likely to have time for in class. Any of the chapters in the treatise would make an good topic for a short paper.

Here begins *Lex mercatoria:*

I. What, When, Where, Among Whom, and Concerning What It Is.

Mercantile law is thought to come from the market, and thus we first need to know where markets are held from which such laws derive. So it should be observed that such markets take place in only five [types of] place, specifically in cities, fairs, seaports, market-towns, and boroughs, and this by reason of the market.[1] From this it should further be seen that just as markets are held in five [types] of place, so mercantile law or the law of the market always follows, namely: In [i] cities and [ii] fairs (whether *nundine or ferie,* for they are the same thing), where purchases and sales of merchandise, specifically of clothes, foodstuffs, and almost every type of movable good, are continually made, the law follows after itself continuously in these two like the market. And so attachments or adjournments of mercantile law here are from hour to hour, as from before noon[2] to after-[p. 2]noon, or from one day to the next, as from Monday

[1] The Latin is awkward. The first clause of the first sentence may have an etymological import, but the thought turns rapidly to what a modem reader would regard as substance. Two, possibly three, senses of *mercatum* are involved: (I) the legal institution, or the franchise; (2) concrete instances of the institution in the five types of place (translated above in the plural), and (3) the buying and selling associated with the institution. See Niermeyer, *Lexicon,* s.v., *mercatus.* PB suggests that we should assume at the end "by reason of the market [activity that takes place there]," i.e., that the third meaning is dominant. It is also possible that the first meaning is here intended. See the introduction, sec. 1D at note 25. Something may be missing. The text may originally have read something like: *Et hoc est videndum quod lex mercatoria de hiis quinque locis provenit racione mercati. Unde ulterius est videndum,* etc. "And by this it should be seen that mercantile law comes from these five places by reason of the market. From this it should further be seen," etc.

[2] *horam nonam*–the alternative meaning, "the ninth hour," i.e., mid-afternoon, is possible but less likely.

to Tuesday and from Tuesday to Wednesday, unless the parties agree on a longer or shorter time.

In [iii] ports, attachments or adjournments follow in the order[3] that things for sale come into and leave the port, specifically from one day's high tide to the next (but nocturnal high tides are not to be included).

In [iv] market-towns and [v] boroughs, attachments and adjournments should be made from one market to the next.[4]

To these laws naturally pertain all pleas excepting only those of land. But if the lords[5] and pleading parties would rather withdraw and prosecute pleas of appeals[6] begun before them in the aforesaid places in other courts at common law,[7] and refuse mercantile law, they certainly can, and they do so more often than not throughout the whole kingdom.

[3] *ordinatim*–unusual but classical; see OLD, s.v. Alternatively, emend to *ordinata* and translate "are likewise arranged just as," etc.

[4] Translation assumes that *in mercato* is redundant.

[5] Subsequent chapters, e.g., 5, 9, 17, and 18, indicate that the *dominus* referred to here is the *dominus curie,* 'lord of the court', who also appears to be the *dominus mercati* (see chs. 13 and 15).

[6] Probably to be understood in its common-law sense of criminal appeal. See the introduction, sec. 1D, text and notes 5–6.

[7] At a minimum this refers to the central royal courts, the itinerant justices, and the county courts. The possibility

mentioned below (ch. 9) that the lord of the court of the market might have a court at common law suggests that various kinds of franchisal courts were also conceived of as being ‘at common law’.

The following note is taken from the introduction to the edition:

Our author’s coupling of the pattern of adjournment of “cities” with that of fair courts rather than with that of “boroughs” is curious. His understanding of “borough” is discussed below (sec. 2[12–13]). We ask here a question for which we do not have a satisfactory answer: What accounts for our author’s quite different assertions as to the way in which “city” and “borough” courts conducted their business?

He justifies his statement by analogizing cities and fairs: “[I]n cities and in fairs ... where purchases and sales of merchandise, specifically of clothes, foodstuffs, and almost every type of movable good, are continually made, the law follows after itself continuously in these two like the market.” The point, then, seems to be that the pace of market activity is much faster in major trading centers than in smaller towns having only weekly markets. But our author's breezy assertion that city courts adjourn from hour to hour like fair courts is not supported **by** the surviving records of the London sheriffs’ court. Nor do such adjournments seem to have been the regular practice of the mayor’s court of that city, at least in our author’s period.

A clue to our author’s thought may lie in the fact that two of the three major commercial centers mentioned in the statute of Acton Burnell, London and York, were cities in a technical sense of the word; they had both a cathedral and “citizens.” The third, Bristol, was not a city in this sense. It operated as a port, however, and so our author probably thought that its courts adjourned from tide to tide. It is thus possible that our author took what he knew to be the case about commercial activity in London (and perhaps York) and expanded it to all “cities,” without regard to the variety of situations of the other English cities of his time.

***2.* In What Way Mercantile Law Differs from the Common Law.**

The law of the market differs from the common law of the kingdom in three general ways. First, it generally delivers itself [of a judgment] more quickly.

Second, whoever pledges someone to answer for a trespass, covenant, debt, or detinue of chattels pledges the whole debt, damages, and costs of the plaintiff, if the one pledged is convicted and does not have enough [to pay the judgment] within the bounds of the market. And if the one pledged happens to be first attached by gage or by chattels[1] and afterwards he takes [p. 3] the gage away, when[2] the market-reeve lets him take it3 outside the bounds of the market on account of such a pledging, the pledge should answer the court or the plaintiff for a gage of this sort or its value. And [the law of the market] differs in a third way because it does not admit anyone to [wager of] law on the negative side, but in this law it always belongs to the plaintiff to prove, for example, by suit or by deed or both, and not to the defendant.

And with respect to other matters, such as prosecutions, defenses, essoins, defaults, delays, judgments, and executions of judgments, the same process should be used in both laws.

[1] These are probably not two different processes, but alternative ways of referring to the same goods taken in attachment.

And it should be known that whoever buys or exchanges anything with a merchant, whether or not the buyer or exchanger is a merchant, so long as the thing is of his [the merchant's] merchandise or belongs to his merchandise, and the buyer does not keep his [appointed] day against the merchant about it, he is held to answer the same merchant according to mercantile law wherever he can be arrested or attached within the boundaries of the said five places. And the same law applies if the merchant does not keep his [appointed] day against the other, whoever the other is, whether or not he is a merchant, unless the parties happened to agree and prefer to plead at common law in the same cities and the same [places] where they have courts after the fair, tide, and market and in which [courts] the common law is observed.

[2] Reading *ubi,* because only one situation seems to be contemplated, in place of *vel,* See the introduction, sec. 2(2).

[3] Literally, "releases [the gage] outside. the bounds of the market."

<That mercantile law generally delivers itself of a judgment more quickly is supported by the surviving records of the courts that seem to be following some version of mercantile law. We might imagine that medieval merchants, like the modern *homo economicus*, were more interested in getting a quick answer to a legal question than they were in taking the time necessary to get it right.

That mercantile law refuses to admit anyone to wager of law on the negative side is not is supported by the surviving records of the courts that seem to be following some version of mercantile law. There wager of law by the defendant is very common. Our author seems to be proposing that that should not be the case. He asserts that the plaintiff has the burden of proof, an idea that he may have gotten from Romano-canonical procedure. His proposal seems to be that the plaintiff's suit should be examined by the court, as if they were witneses to the transaction at issue. The introduction to the edition discusses this proposal at some length, sec. 1F.

It remains to consider the third difference, namely, that in mercantile law, "whoever pledges someone to answer for a trespass, covenant, debt or detinue of chattels pledges the whole debt, damages, and costs of the plaintiff."

Although the rule just given is stated in uncompromising fashion, the text goes on to describe the situation in which the defendant has removed the attachment on the strength of the pledge in a way that suggests that the pledges are liable only for the value of the attachment. Our author may therefore be contemplating two different situations. In the first, the pledge has gone surety for the defendant's appearance. If he fails to appear, the pledges are responsible for the entire value of the debt plus damages and costs. In the second, the defendant has been allowed to remove attached goods on the strength of a pledge. In this case the pledges are responsible only for the value of the attached and removed goods.

This second situation is described in a case from the fair court of St. Ives. One Mr. John of Lincoln was distrained to appear in court by a large number of chattels, some of which seem to have been merchandise and some personal to him. These were released on the surety *(per plegium)* of four men, who were to respond jointly and severally for the gages *(vadia)* or their appraised value at the next fair.>

Rather than reading the complicated provision on attaints that follows, I offer, below the provision, an explanation of it taken from the introduction to the edition.

<20. On Attaints.

When the parties arrive at an inquest of the market, an attaint should not be granted in mercantile law by a mercantile court without a writ of the lord king.[1] [This is] because the parties agree to such juries or inquests and have the same challenges against merchants as if they were at the common law of England.

But in a case in which an action or defense has been proved[2] by suit examined in open audience of the whole court–which examination ought to be done principally by the seneschal and two of the more discerning men of the same court chosen for this purpose by the court–before judgment is rendered, the defendant should be asked if he has anything [to produce] on his behalf or if he knows anything to say whereby judgment should not proceed in accordance with the proofs. In the [affirmative] case it is ordained that if the defendant is then there in his own person and offers himself ready to condemn and convict the plaintiff or demandant and the suit of perjury, he should be allowed admittance under this form:

First he will swear that the plaint or demand that his opponent makes against him is unjust and untrue, and that those–and they should be named singly–whom [his opponent] produced with himself or whom he had come with him by the aid of the court to testify on his behalf swore a falsehood and that he himself intends and firmly believes that he can convict them of the same [falsehood] and that he will convict them to the best of his ability.[3]

And then, in addition,[4] he should find good security by gage and pledges to prosecute both against his opponent and against his [opponent's] wit-[p. 32]nesses and by name against all concerned on a plea of attaint. The security should be sufficient for a new amercement to[5] the court and for new damages to be adjudged to the [opposing] party if [the one prosecuting the attaint] does not convict him. When this security has been found and enrolled, a day should be given to the plaintiff to produce [proof] and prove with a trustworthy suit that does not excite suspicion, specifically, at the next or second next court. And the same day should be given to the defendant, who was previously the one bringing the case, to hear the attaint and further to defend his right and his part in the aforementioned things, if these things seem expedient to him.[6]

[1] 'For the reading *sine* rather than *sive* (opposite, note 1), see the introduction, sec. 1H.

[2] Something is clearly wrong. The translation assumes that *vel* got repeated by mistake. Alternatively, supply something like *vel per testes* before *vel per sectam.* See *id.*

[3] Reading *convinceret* for the second *convincere.* Alternatively, emend to *ipse intendit eos convincere pro posse suo et firmiter credit quod ipsos convincere potest de eodem* and translate "he himself intends to convict them to the best of his ability and firmly believes that he can convict them of the same." This emendation, far more elaborate but perhaps making better sense than the first, assumes that *quod eos convincere* and *pro posse suo* were repeated by dittography, and that a later scribe, trying to correct the errors, took out the wrong *ipsos convincere pro posse suo.*

[4] See ch. 6, text and note 19.

And it should be known that each [party] can then produce [proof], specifically, the plaintiff in order to convict and the defendant in order to strengthen his first suit brought forth.

And the one whose proof at that time is found better and more true should have the judgment for him, with respect, however, had for the beginning of the plea, because the conviction or attaint should be held as void unless he who is doing the convicting surpasses him who is to be convicted by at least two witnesses in number.[7] [This is] because all rights and all laws always favor tenants[8] and defendants until their standing is weakened or a reason for withdrawing favor from them is proved.

And it should be known that attaint in these mercantile laws cannot be begun by attorney, but it is necessary that he who wants to prosecute the attaint be in court in his own person when he pledges the attaint, on account of the bodily oath that he is about to give. But as for other days, he can certainly proceed through an attorney. And if the parties name any witnesses who will not come with them voluntarily and who are distrainable within the bounds of the market, they should then be distrained to come, as has been said before concerning such witnesses in chapter six above “On Recovering Debts Without Writing or Tally.”>

<[5] *versus–see* ch. 6, note 20.

[6] The formulae sound like those of Romano-canonical procedure, particularly in the use of *agens* for the plaintiff.

[7] The reference to the beginning of the plea indicates that to get a conviction of at- taint, the prior defendant, now turned *actor* must provide two more witnesses than the number of the original plaintiff’s suit. For further discussion, see the introduction, sec. I H.

[8] The common-law term for a defendant in a real action.>

The second mention of a royal writ in the treatise occurs in chapter 20, “On Attaints,” perhaps the most puzzling chapter in the entire treatise. Part of the difficulty is that our text is clearly corrupt in one place and may be corrupt in others. The reference to the royal writ occurs in the first sentence: “When the parties arrive at an inquest of the market, attaint is not to be granted in mercantile law by a mercantile court without [*sine*] a writ of the lord king.” The manuscript says *sive* where we have read *sine.* The emendation is an easy one to make because our scribe confuses *n* and *v* or *u* elsewhere.

Much depends on how our author conceived of the relationship between the process that he goes on to describe and the process under the writ. He seems to be referring to the writ of attaint. This writ and the procedure to which it gave rise are described at some length in *Bracton,"* a description that was sufficiently up-to-date in mid-century that a reader in or after 1254 could have annotated it without changing its basic import. For *Bracton,* attaint procedure is available only in the petty assizes. It is not even available where the assize is converted into a jury because a specific question that the general verdict of the assize will not answer has been raised in pleading. The reason why attaint is not available in such cases, *Bracton* tells us, is that the parties have consented to such juries and so must abide by their verdict. The same argument is used, somewhat speciously, to justify the unavailability of attaint procedure for the grand assize. Either our author had been reading his *Bracton* or the argument was a standard one in the profession, because we find the same argument in the next sentence of our text: "[This is] because the parties agree to such juries or

inquests and have the same challenges against merchants as if they were at the common law of England."

Since attaint was not available, at least in the time of *Bracton,* for juries or jury-like bodies other than the petty assizes, we must wonder why our author suggests, at least by negative inference, that an attaint process might be available against a mercantile jury. The answer may be that the availability of attaint was gradually being expanded in our author's period. Chapter 38 of Westminster II extends the availability of attaint procedure to all inquests in real actions, hence eliminating *Bracton's* distinction between a petty assize and a jury that arises out of a petty assize. Statutory expansion of the availability of the writ to the personal actions did not occur until the fourteenth century, but we know from the example of formedon that the Chancery frequently experimented with new writs before they received formal statutory authorization. It is possible that our author knew examples of attaint procedure being used in personal actions, or, at least, that he wanted to suggest the possibility of its being so used. He may even have been continuing the analogy suggested in chapter 5 between the relationship of a free man to his land and that of a merchant to his merchandise. That is, just as a free man may have attaint against a jury in a land case, so a merchant should be able to have one against a jury in a case involving merchandise.

If our author is further intending to imply that the king might authorize a mercantile court to conduct an attaint procedure, this implication seems far-fetched. So far as we are aware, the process never took place other than before royal justices. Attaint procedure was serious business. This fact probably accounts for the reluctance to expand it. A jury of twenty-four was required to convict the jury of twelve, and the consequences of conviction were severe. *Bracton* tells us that the convicted were arrested and imprisoned; they lost their chattels and had to redeem their land after waste, and they incurred perpetual infamy for their perjury.

Much of *Bracton's* treatment of attaint is taken up with distinguishing between genuine perjury by the members of the assize as opposed to honest mistakes. The latter, he believes, should not give rise to conviction on attaint. Whether these distinctions were ever applied in practice we do not know, but the need clearly existed for a process that could reverse wrongful verdicts and yet did not carry the awful consequences of conviction on attaint. A more than usually murky passage in *Bracton* closes with the following remark: "A jury or inquest does not admit of conviction, but if their verdict is challenged for some reason certain, emendation follows by a change of jurors or their afforcement." Just previously in arguing that the parties need not put themselves on the jury, he had said that there are other methods of proof, like purgation, and "a defense against a presumption, which is called neither a jury nor an inquest nor a purgation, that is, where one alleges that something is true and produces suit, defense against the suit then follows, proof, so to speak, against the presumption."

What follows in our text can be viewed as a spelling out of the suggestions in these two sentences in *Bracton.* Our author proposes a process that he calls attaint but that does not correspond to the known common-law attaint procedure, in that the defendant produces witnesses to convict the plaintiff's witnesses or suit of perjury. He is not suggesting that this process should be available against an inquest. The parties have chosen the inquest, and they must abide by the verdict. But this modified attaint procedure is available, or at least should be available, against a plaintiff who has proved his case by suit, or, if our suggested emendation of the corrupt third sentence is correct, by witnesses. (The two methods of proof seem to be virtually interchangeable in our treatise.)

The outline of this attaint procedure is clear. Before judgment is rendered the defendant must appear personally and challenge the plaintiff and his suit (or witnesses). He must post security to

pay for an additional amercement to the court and for the damages to the plaintiff resulting from the delay, if the procedure is unsuccessful. The procedure is like a new lawsuit. The original plaintiff becomes the defendant and the original defendant the plaintiff. Process is available to compel reluctant witnesses to come to court, and the now-plaintiff is given twice as much time to produce his proof "on account of the difficulty of attaint." The burden of proof is on the one seeking the attaint, and his witnesses must surpass those of the one to be convicted by at least two in number. If the attaint fails, judgment is entered for the plaintiff in the original case, and, as mentioned above, the unsuccessful plaintiff in attaint has to pay an additional amercement and costs.

What happens if the attaint procedure is successful, and who is to determine if it is successful? Our author does not say. At a minimum, we would suppose that if the attaint procedure is determined to be successful, the original lawsuit would fail and the plaintiff in that suit would be amerced for a false claim. Whether the consequences of common-law attaint would be visited on those convicted is hard to know. We can certainly imagine that such a conviction would render those convicted infamous, at least before this court, and perhaps before others, if the system of *intermutua mandata* described in chapter 21 could be made to apply to it.

Our author thus fails to provide the information that we most want to know, and the reason for this failure may be that he is not describing an actual practice but a proposed one, the consequences of which he has not fully worked out. None of the surviving records of mercantile courts from this period that we have been able to examine reveal anything like it. This attaint procedure is curious in several respects. It has some aspects of Romano-canonical exceptions against witnesses and their testimony. That process, as a matter of practice, if not of law, frequently charged the plaintiff's witnesses with perjury. But the purpose of the charge was not to punish perjury but rather to bring before the judge testimony that he had to weigh in determining the ultimate outcome of the case.

The proposed procedure also has some aspects of common-law attaint. Like common-law attaint, it is a separate process, though it is brought before judgment in the first case is rendered rather than after. Like common-law attaint, the standard of proof is high. The requirement that the person who is doing the convicting must surpass the one to be convicted by at least two witnesses in number may reflect *Bracton's* notion that there must be two oaths of the attaint jury for every oath of the original jury, and the principle, asserted by *Fleta,* that the defendant in debt should produce oath-helpers in double the number of the plaintiff's suit.

We might speculate that the need for this proposed procedure arose from "the ancient pattern of lawsuit,'" in which there was nothing more to be done after the assignment of proof. Thus, if proof was assigned to the plaintiff's suit and witnesses and it succeeded, the defendant had no opportunity to make a defense. But our author was aware of a process, that of the *ius commune,* in which both plaintiff and defendant had an opportunity to present testimony and the judge rendered a judgment after weighing the evidence on both sides. That process fit uneasily with both the ancient pattern of lawsuit and with contemporary common-law procedures, which gave little formal opportunity for rebuttal once the parties put themselves on the jury or one of them was allowed to wage his law. But there was at least one common-law procedure in which a sworn verdict could be upset by a better verdict–attaint. What our author does, then, is to propose a procedure that would have been a recognizable variant of attaint procedure for those who were familiar with the common law.

The proposal failed, we might suggest, because the procedure was too elaborate. Not even our author could fully work out the consequences, which depended on an evaluation of conflicting

testimony by courts that had little experience in doing it. He was, nonetheless, dealing with a real problem, and the procedure he outlined shows considerable legal imagination.

2. Selected Cases in Local Courts (1278 X 1511) (trans. various). The Lectures tab links you to a collection of cases in the Mats. derived from the records of local courts (mercantile, borough, staple [the statute], central royal, and ecclesiastical) with dates ranging from 1278 to 1511. Any one of these cases would make a good topic for a paper. We will look at some of them later in the corse. It has recently been argued (Tom Johnson, *Law in Common: Legal Cultures in Late-Medieval England* [Oxford: OUP, 2020]) that it is to these courts that we must look if we want to know how the law on the civil side in late medieval England affected most ordinary people.

3. Manor Court Roll of Great Horwood (extracts, 1317 X 1331) (L. Poos and L. Bonfield, trans., *Select Cases in Manorial Courts*, 114 Selden Society [1997], nos. 4, 15, pp. 3–8, 16–17).[1]

4. a. GREAT HORWOOD (Buckinghamshire), 29 October 1317

It was found by inquest that Robert de Salden, who held of the lord one messuage and half a yardland of land of the lord in villeinage, is a fugitive and of ill fame, so that he cannot hold that land henceforth, but has utterly forfeited that land. Whereof they say by their oath that the lord can hand over that tenement to whomever he should wish, to hold without reclamation by the aforesaid Robert or any other of his issue for ever.

Fine 100s.

The lord by his grace granted to Walter Hogges one messuage and half a yardland of land with their appurtenances, which Robert Salden once held [p. 4] of the lord in villeinage, to have and hold the aforesaid tenements of the lord as the aforesaid Robert held them, performing the customs and services as the same Robert was accustomed to do. The aforesaid Walter gives the lord 100s. as a fine to have this grant and grace, two and a half marks to be paid at the Purification of the Blessed Mary [2 February] and two and a half marks at the Nativity of St John the Baptist [24 June]. And he will sustain the houses and buildings in the aforesaid tenements in as good a state as he received them or better. And both for paying the money, for performing the services and customs, and for sustaining the houses and buildings the aforesaid Walter provided pledges, namely William Baynard, Robert Saunders, Ralph the son of Richard, and Thomas Hogges. And he did fealty to the lord.

<4. b. GREAT HORWOOD, 19 June 1318[1]

Fine of land 100s.

The lord by his grace granted to Stephen le Carter that messuage and that half a yardland of land with the appurtenances which Walter Hogges once held in villeinage, to have and hold the aforesaid tenement as the aforesaid Walter was accustomed to hold it, performing the customs and services as the aforesaid Walter was accustomed to do. Moreover the aforesaid Stephen gives the lord 100s. as a fine to obtain this grant and grace, of which he pays 60s. immediately, because they are allowed to him for the debt of Walter Stevenes. And for 40s. he has a day to pay, half at the feast of All Saints next following [1 November], and the other half at the Purification of the Blessed Mary next to come. And the aforesaid Stephen will sustain the houses and buildings in the aforesaid tenements in as good a state as he received them or better. And both for paying that

[1] The document linked on the lectures tab contains more cases from the manor court at Great Horwood (Bucks.) in the Selden Society edition at 17–18, 51–54, 80–83, 97, 100, 145–147.

money and for performing the customs and services and also for sustaining all the buildings he provided pledge, namely Ralph the son of Richard the reeve, John Isoude, Walter Stevenes, John de Okele, Robert Saunders and Robert Blakeman. And that tenement was delivered to the aforesaid Stephen to hold in villeinage in the form aforesaid.>

4. c. GREAT HORWOOD, 8 June 1329[2]

Isabel who was the wife of Robert de Salden complains of Stephen le Carter in a plea that he should render to her the third part of one messuage and half a yardland of land with the appurtenances, which ought to descend to her by [p. 5] reason of her dower, because the said

[1] The property is issue in this case also appears in case 15, below.

[2] Walter Hogges, recipient of this tenement in (a) above, had been recorded dead at Great Horwood court held 2 June 1318.

Robert her husband held the said tenements of the lord in villeinage and never forfeited those tenements, whereby she ought to have her dower.

And the aforesaid Stephen comes and cannot deny that the said tenements never were forfeited by the said Robert her husband, nor rendered into the lord's hand, and he fully acknowledged that the said Isabel was his wife, whereby it was decided that the said Isabel should recover her dower, so that she be endowed of the tenements that the said Stephen now holds. And because the said Stephen at one time handed over by the lord's licence to Emma Isoude six and a half acres of the said tenements for a term not yet elapsed, therefore it was granted that the said Emma should hold the said six and a half acres of land for her term, so that after the aforesaid term the said tenements should remain to the aforesaid Stephen.

<[Chronologically Case no. 15, below, belongs here.]

4. d. GREAT HORWOOD, 16 August 1330

Thomas the son of Robert de Salden comes here into court and prays to be admitted to one messuage and half a yardland of land with the appurtenances in Great Horwood, to ho1d in villeinage etc., whereof he says that the aforesaid Robert, the father of the same Thomas, he1d the aforesaid tenements by the 1ord's grant and will in villeinage, by whose death the right accrued to the same Thomas as the first-born son of the same Robert, to hold the said tenements in villeinage according to the custom etc.

And because it was found by the rolls of the court held here on the Saturday [29 October 1317] next before the feast of All Saints in the eleventh year of the reign of King Edward the father of the present king that an inquest was taken in that court, and it was found by it that Robert de Salden, who held the aforesaid tenements of the lord in villeinage, was a fugitive and of ill fame, so that he could not hold that land thenceforth but utterly forfeited that land, and also that the lord could hand over the aforesaid tenements to whomever he should wish, to hold without reclamation by the aforesaid Robert or by any other of his issue for ever, by virtue of which the lord handed over and granted the aforesaid tenements to a certain Walter Hogges to hold in villeinage etc., after whose death the lord granted and handed over the aforesaid tenements to a certain Stephen le Carter to hold in villeinage etc., after whose death the 1ord granted the aforesaid tenements to a certain John le Carpenter and Joan his wife, the daughter of the aforesaid Stephen, as nearer of the blood of the same Stephen, to hold in villeinage etc.

And besides this, an inquest was taken by William Baynard, John le Smyth, William the son of John, Richard Baynard, Hugh the reeve, Geoffrey le Smyth, Ramo Ashwy, John Maykyn, Richard Baynard the younger, Richard Norman, [p. 6] John Gerard and Thomas Beneyt, who say by their

oath that the aforesaid Robert de Salden was a fugitive and of ill fame, so that he gave up the aforesaid tenements, whereby neither the same Robert if he were alive, nor any ofhis issue or blood, ought to or could hold the said tenements according to the custom etc. Therefore etc.>

4. e. GREAT HORWOOD, 8 January 1331

Again as before, Thomas the son of Robert de Salden comes and prays to be admitted in open court to one messuage and half a yardland of land with the appurtenances in Great Horwood, to hold in bondage according to the custom of the manor etc., whereof he says that the aforesaid Robert, the father of the same Thomas, held the aforesaid tenements of the lord by his grant and by a fine made with him, by whose death the right in the same tenements descended to the same Thomas as to the first-born son of the same Robert, to hold the aforesaid tenements in bondage according to the custom etc. And to clarify further his statement concerning his right, the same Thomas says that Isabel the wife of the aforesaid Robert was endowed in the said tenements by the decision of the court, which was found by the rolls of the court. And thereupon the whole homage, except Walter Stevenes and Robert Saunders who were challenged by the parties, was charged and sworn to certify to the lord how the aforesaid tenements came into the lord's hands, which says that the aforesaid Robert de Salden who held the said tenements of the lord in bondage was a fugitive, of ill fame and behaviour, whereby he gave up the aforesaid tenements, and for lack of tenants the lord seized the aforesaid tenements into his hands and handed them over to a certain Walter Hogges, to hold in bondage etc., after whose death the lord granted the aforesaid tenements to a certain Stephen le Carter, to hold in the foregoing form etc., after whose death the lord granted the aforesaid tenements to John le Carpenter and Joan his wife, who are now the tenants.

Being questioned further whether the same Robert was indicted of any crime and convicted of it, whereby he forfeited the aforesaid tenements, they say that he was not indicted nor convicted of any crime. But they say that whether he were a fugitive, and gave up the aforesaid tenements in the manner and for the reason aforesaid, would be a reason for forfeiture or not, they do not know, and they submit this to the discretion of the lord's council etc. Therefore a day was given to the aforesaid Thomas and John le Carpenter and Joan his wife, three weeks from this day, to hear their judgment.

Day at the next [court]

On which day the parties appeared. And it was said to the aforesaid parties by the lord's council that neither that withdrawal which the same Robert made, nor the fact that he gave up the aforesaid tenements in the manner aforesaid, is a reason for forfeiture, nor did he forfeit the tenements. Therefore it was decided that the aforesaid Thomas should recover the aforesaid tenements by making [p. 7] fine with the lord, to hold in villeinage etc., and the aforesaid John should recover his expenses laid out upon the said tenements by him, which are taxed by the homage at 7s. And it was granted by the lord to the aforesaid Thomas to hold the aforesaid tenements in villeinage by a fine of 66s. 8d. to be paid on Sunday in the middle of Lent, performing for the lord the services which the aforesaid Robert his father was accustomed to perform. And both for paying the money and for sustaining the houses and buildings and also for performing the services and customs he provided pledges, namely Robert Saunders and Henry Bicon. Therefore let seisin be delivered to him, saving the right of each etc. And he did fealty.

<Fine 66s. 8d. for Thomas de Salden

And it is granted to the same Thomas that he may demise to Henry Bicon six and a half acres of arable land of the aforesaid tenements for the term of fourteen years, which six and a half acres John Isoude once held, so that after the said term has elapsed the said six and a half acres should revert entirely to the said Thomas. And the same Thomas handed over the aforesaid land in the

foregoing form. And the same Thomas will pay to the lord yearly all rent and services, tallages and all other charges due for the said tenements for the entire time aforesaid. And the same Henry pays the lord 15s. as a fine.>

<[p. 16] 15. GREAT HORWOOD (Buckinghamshire), 30 October 1329[1]

Fine 6s. 8d.

It was granted by the lord to John le Carpenter that one messuage and two parts of half a yardland of land with their appurtenances in Horwood, which Stephen le Carter holds, and the third part of one messuage and of half a yardland of land which Isabel who was the wife of Robert de Salden holds in the name of dower and which after the death of the same Isabel ought to revert to the same Stephen, after the death of the same Stephen should remain to the aforesaid John and Joan his wife and the heirs of the same John, to hold in villeinage according to the custom of the manor, so that after the death of the same Stephen the aforesaid John and Joan should be quit of making fine for the aforesaid tenements. And because this grant occurs while the aforesaid Stephen survives, having regard that the aforesaid John and Joan cannot take the benefit of the aforesaid tenements while the aforesaid Stephen and Isabel are alive, the fine to have entry in them when the time should occur is set at 6s. 8d., which he immediately pays.

And because the same Stephen wished to impugn the aforesaid grant as much as he could, asserting that he wished to render the tenements to his younger daughter, although this stood utterly against the custom of the manor, whereby, while the same Stephen was present, in the presence of the lord it was inquired into by the whole homage. And it was found that when any tenant in villeinage has daughters, by the custom of the manor the first-born of those daughters should succeed alone into the inheritance by making fine with the lord, so long however as the first-born would not have been married with the goods of her father or her ancestors, and that the aforesaid Joan is [p. 17] the first-born of the aforesaid Stephen and was married against the will of the same

1 The property at issue in this case also appears in case 4, above.

Stephen, which was found by the confession of the same Stephen when questioned thereupon, and that the aforesaid John received nothing with the said Joan from the goods of the same Stephen for the aforesaid marriage. And the same John paid to Sir Ra1ph Burdet 12d. for his fee, namely as the lord's fellow[1]. And the said John after the death of the said Stephen did fealty for the two parts aforesaid by fine as above, to hold in the manner of a neif. And both for sustaining the houses and buildings and for performing the services and customs for the lord he provided p1edges, namely Walter Stevenes, Robert Saunders, and John Dymond.

1 In the early fourteenth century this manor belonged to Newton Longville Priory, so the reference to 'fellow' here is conceivably to be understood in the monastic sense.>

So what does this all add up to? During harvest time in late October 1317, an inquest at Great Horwood manor in Buckinghamshire determined that Robert de Salden, a villein, was "a fugitive and of ill repute" (*fugitivus et male fame*).[2] In light of his fugitive status, Robert "utterly forfeited" his land in Great Horwood, a permanent forfeiture that apparently allowed the lord to transfer the tenement to the person of his choice, to hold without any danger of a future claim by Robert or his issue. Yet Robert's interest in the land did not vanish with this bold proclamation by the manor court. Instead, the ensuing fourteen years witnessed a series of claims by interested parties, including Robert's own widow and son, ending ultimately in recovery by the fugitive's issue. What

[2] *Select Cases in Manorial Courts 1250-1550*, ed. L.R. Poos and Lloyd Bonfield (London: Selden Society, 1998), 3.

explains this reversal of the court's 1317 judgment, which supposedly precluded all claims by Robert and his issue *in perpetuum*? A former student in the class suggested that three factors were involed: (1) the involvement of a multitude of individuals with interests in the land, (2) the selective use of written precedent and manorial custom, and (3) the equitable discretion of the manor court in selecting the "rightful" tenant.