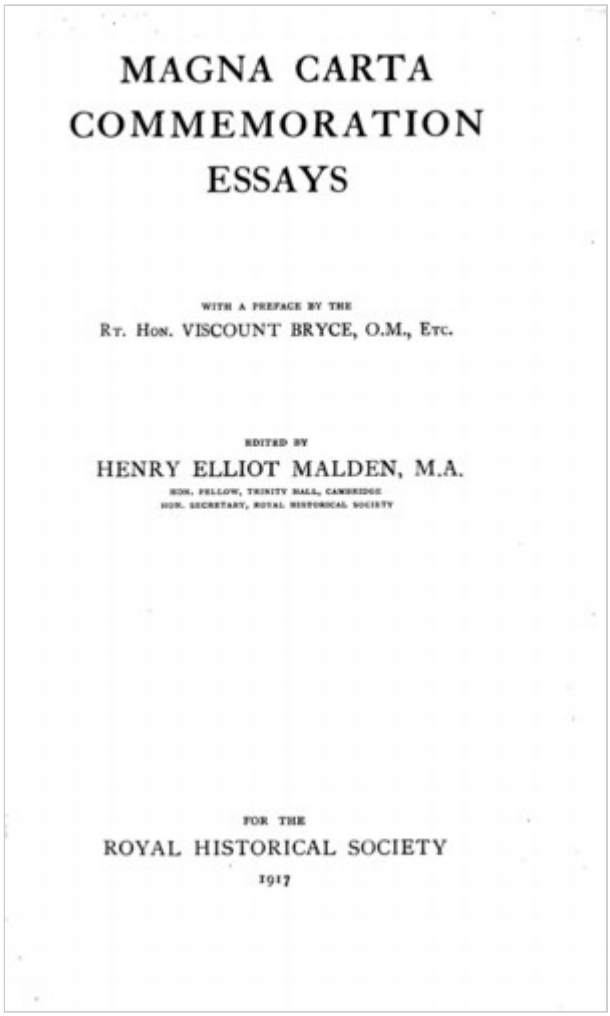
The Online Library of Liberty

A Project Of Liberty Fund, Inc.

Henry Elliot Malden, ***Magna Carta Commemoration Essays*** [1917]

The Online Library Of Liberty


MAGNA CARTA
COMMEMORATION
ESSAYS

WITH A PREFACE BY THE
RT. HON. VISCOUNT BRYCE, O.M., ETC.

EDITED BY
HENRY ELLIOT MALDEN, M.A.
HON. FELLOW, TRINITY HALL, CAMBRIDGE
HON. SECRETARY, ROYAL HISTORICAL SOCIETY

FOR THE
ROYAL HISTORICAL SOCIETY
1917

Edition Used:

Magna Carta Commemoration Essays, edited by Henry Elliot Malden, M.A. with a Preface by the Rt. Hon. Viscount Bryce, O.M., Etc. For the Royal Historical Society, 1917.

Editor: Henry Elliot Malden
Foreword: Viscount James Bryce

About This Title:

A collection of essays about the history and continuing significance of Magna Carta.

About Liberty Fund:

Liberty Fund, Inc. is a private, educational foundation established to encourage the study of the ideal of a society of free and responsible individuals.

Copyright Information:

Fair Use Statement:

CONTENTS.

v

Table Of Contents

[Back to Table of Contents]

MAGNA CARTA CELEBRATION, 1915.
GENERAL COMMITTEE.
Nominated In 1914.

(*Italics indicate University or Society nominating a Representative on the Committee*.)

CHAIRMAN:

?The Right Hon. Viscount Bryce, O.M., D.C.L., LL.D., F.R.S., F.B.A.

PRESIDENT OF THE ROYAL HISTORICAL SOCIETY:

? C. H. Firth, LL.D., Litt.D., F.B.A., Regius Professor of Modern History, University of Oxford.

His Grace the Lord Archbishop of Canterbury.
His Eminence Cardinal Gasquet.
The Rt. Hon. the Lord Mayor of London.
The Rt. Hon. Viscount Dillon, M.A., F.S.A., *Society of Antiquaries*.
The Rt. Hon. Lord Cozens-Hardy, Master of the Rolls.
The Rt. Hon. Lord Fitzmaurice, M.A.
? The Rt. Rev. Bishop G. F. Browne, D.D., D.C.L., F.S.A.
The Rt. Hon. Lord Justice Kennedy, F.B.A. (the late) *Lincoln's Inn*.
The Rt. Hon. Sir Frederick Pollock, Bart., D.C.L., LL.D., F.B.A., *Selden Society*.
Sir James H. Ramsay, Bart., M.A., D.L.
Sir E. W. Brabrook, C.B., F.S.A., *London and Middlesex Archæological Society*.
Sir William Byrne, K.C.V.O., C.B., *Gray's Inn*.
? Sir C. E. H. Chadwyck-Healey, K.C.B., K.C., F.S.A., *Selden Society*.
Sir Henry Howorth, K.C.I.E., F.R.S., *Royal Archæological Institute*.
? Sir Frederic G. Kenyon, M.A., D.Litt., Ph.D., F.B.A., Director and Principal Librarian, British Museum.
Sir Vesey Knox, K.C., *Gray's Inn*.
Sir Sidney Lee, Litt.D.
Sir H. C. Maxwell Lyte, K.C.B., F.S.A., F.B.A., Deputy Keeper of the Records.
Sir Edward Maunde Thompson, G.C.B., D.C.L., LL.D., Litt.D., F.B.A.
Sir Adolphus Ward, Litt.D., LL.D., F.B.A., Master of Peterhouse, Cambridge.
The Very Rev. the Dean Of Lincoln, D.D.
The Very Rev. the Dean Of Salisbury, D.D.
The Very Rev. the Dean Of Carlisle, D.D.
? The Ven. Archdeacon Cunningham, D.D., LL.D., F.B.A.
The Hon. John Abercromby, President, *Society of Antiquaries of Scotland*.

Professor G. B. Adams, Ph.D., *Yale University, U.S.A.*
Professor C. M. Andrews, Ph.D., *Yale University, U.S.A.*
H. W. Appleton, M.A., Professor of Ancient and Modern History, *University of Sheffield*.
Robert Bagster, F.S.A., *British Archæological Association*.
Professor J. F. Baldwin, *Vassar College, U.S.A.*
C. R. Beazley, D.Litt., F.R.G.S., Professor of History, University of Birmingham.
Charles BÉmont, Directeur-Adjoint à l'École des Hautes-Etudes, Paris.
E. deGray Birch, LL.D., F.S.A.
Sir F. A. Bosanquet, K.C., *Inner Temple*.
P. Hume Brown, M.A., LL.D., Professor of Ancient History and Palæography, University of Edinburgh.
Oscar Browning, M.A.
William Moir Bryce, M.A., *Society of Antiquaries of Scotland*.
R. M. Burrows, M.A., D.Litt., Ph.D., Principal King's College, *University of London*.
W. A. Cater, F.S.A., *British Archæological Association*.
Miss A. M. Cooke, M.A., Lecturer in History, *University of Leeds*.
? J. F. Chance, M.A.
Patrick Cooper, M.A., *University of Aberdeen*.
W. J. Corbett, M.A.
? H. W. C. Davis, M.A.
The Rt. Hon. H. A. L. Fisher, M.A., LL.D., F.B.A., Vice-Chancellor, *University of Sheffield*.
The Hon. J. W. Fortescue, M.V.O., Librarian, Windsor Castle.
Edwin Freshfield, LL.D., *Pipe Roll Society*.
Rev. Henry Gee, D.D., *University of Durham*.
? G. P. Gooch, M.A.
A. J. Grant, M.A., Professor of History, *University of Leeds*.
Mrs. J. R. Green.
? Hubert Hall, F.S.A., Literary Director, Royal Historical Society; Secretary to the Royal Commission on Public Records.
Frederic Harrison, Litt.D.
Professor C. H. Haskins, Ph.D., *Harvard University, U.S.A.*
H. D. Hazeltine, Litt.D.
? F. J. C. Hearnshaw, M.A., LL.D., Professor of Mediæval History, University of London.
W. S. Holdsworth, D.C.L., All Souls Reader in English Law, *University of Oxford*.
Sir Courtenay P. Ilbert, K.C.B., K.C.S.I.
Professor J. F. Jameson, Ph.D., LL.D., Carnegie Institution, Washington, U.S.A.
C. H. Jenkinson, M.A., *Surrey Archæological Society*.
Edward Jenks, B.C.L.
C. S. Kenny, LL.D., F.B.A., Downing Professor of the Laws of England, *University of Cambridge*.
? C. L. Kingsford, M.A., F.S.A.

? G. T. Lapsley, M.A., Ph.D., *University of Cambridge*.
Felix Liebermann, Ph.D., LL.D., University of Berlin.
W. A. Lindsay (the late), K.C., D.L., *Pipe Roll Society*.
A. G. Little, M.A., Lecturer in Palæography, Victoria University of Manchester.
Colonel E. M. Lloyd, R.E.
R. Lodge, M.A., Litt.D., LL.D., Professor of History, *University of Edinburgh*.
Miss E. A. McArthur, Litt.D.
J. D. Mackie, M.A., Lecturer in Modern History, *University of St. Andrews*.
C. H. McIlwain, Professor of History and Government, Harvard University, U.S.A.
Rev. J. P. Mahaffy, C.V.O., D.D., D.C.L., LL.D., Vice-Provost of Trinity College, Dublin.
? W. S. McKechnie, LL.B., D.Phil., Lecturer in Constitutional Law and History, *University of Glasgow*.
D. J. Medley, M.A., Professor of History, University of Glasgow.
J. Hepburn Millar, B.A., LL.B., Professor of Constitutional Law and Constitutional History, *University of Edinburgh*.
J. H. Morgan, M.A., Professor of Constitutional Law, University of London.
George Neilson, LL.D.
C. W. C. Oman, M.A., F.S.A., F.B.A., Chichele Professor of Modern History, *University of Oxford*.
Colonel M. B. Pearson, C.B., *London and Middlesex Archæological Society*.
W. Petit-Dutaillis, Recteur de l'Université de Grenoble, *Université de France*.
L. O. Pike, M.A.
Professor H. Pirenne, *Université de Gand*.
Sir H. B. Poland, K.C., *Inner Temple*.
A. F. Pollard, M.A., Litt.D., Professor of Constitutional History, University of London, *Historical Association*.
F. M. Powicke, M.A., Professor of History, University of Belfast.
? G. W. Prothero, M.A., Litt.D., LL.D., F.B.A.
R. S. Rait, M.A., Professor of Scottish History and Literature, *University of Glasgow*.
Professor Ludwig Reiss, *The University, Berlin*.
? R. A. Roberts, formerly Secretary, Public Record Office.
Sir Albert Kaye Rollit, D.C.L., LL.D., Litt.D., B.A., F.K.C.L., *University of London*.
J. H. Rose, Litt.D., Reader in Modern History, University of Cambridge.
J. H. Round, M.A., LL.D., *Pipe Roll Society*.
A. Forbes Sieveking, F.S.A., *Surrey Archæological Society*.
C. Sanford Terry, M.A., Burnett-Fletcher Professor of History and Archæology, *University of Aberdeen*.
J. Tait, M.A., Professor of Ancient and Mediæval History, *Victoria University of Manchester*.
? H. R. Tedder, F.S.A., Treasurer, Royal Historical Society.

T. F. Tout, M.A., F.B.A., Professor of Mediæval and Ecclesiastical History, *Victoria University of Manchester; Historical Association*.
G. M. Trevelyan, M.A.
K. H. Vickers, M.A., Professor of Modern History, Armstrong College, Newcastle-on-Tyne, *University of Durham*.
Sir Paul Vinogradoff, M.A., Hon. D.C.L., LL.D., F.B.A., Corpus Professor of Jurisprudence, University of Oxford.
? Basil Williams, M.A.
J. W. Willis-Bund, F.S.A., *Society of Antiquaries*.

King John'S Charter of a.d. 1215, the Great Charter as it came in later days to be specially called by those who looked back to it with reverence, is dealt with in so many of its aspects by the eminent writers who have contributed to this volume that this preface need contain nothing more than a few general reflections on the place which it occupies in the history of English politics and English law.

One such reflection is suggested by a comparison of English law with the only other legal system which holds an equally important place in the jurisprudence of civilized mankind. That system is the law of the Roman city which ultimately became the law of the ancient world, and survives in the modern world as the basis of the codes of great nations like France, Italy, and Germany, and, in a more diluted form, of many other states.

As Magna Carta is the first document of high legal significance for England, so for Rome the first such document was the Law of the Twelve Tables. In no other country, ancient or modern, can we find any body of legal rules which, framed at an early period in a nation's growth, has so powerfully influenced its subsequent development, as did the "Lex Duodecim Tabularum". The nearest parallels are what we call the Law of Moses in the Pentateuch, and the Koran of Mohammed, but the differences are so great that it is hardly worth while to pursue a comparison.

The Twelve Tables were enacted about four centuries before that remarkable expansion and modernization of Roman law which began in the last age of the Roman Republic, and Magna Carta four centuries before the days of Coke, Pym, and Selden, when the law and constitution of England passed into a new phase of development. Both the Charter and the Tables included what the Romans called "Ius publicum" and "Ius Privatum," "fons omnis publici privatique iuris," says Livy. The distinction between these elements had not been clearly drawn, either in Rome or in England, at the time of their enactment. But it was the private element that turned out to be of most consequence in the Roman case, the public or constitutional element in the English. Both enactments arose out of political troubles. The Twelve Tables were prepared and passed to meet the demand of the Roman plebs for some formal and permanent definition and limitation of the arbitrary executive authority exercised by the consuls, and they contained rules which gave some protection to the civil rights of the individual citizen. So likewise the Charter was demanded by those who complained of the irregular and arbitrary violence of King John, and the restrictions it imposed upon the Crown's action became the corner stone of English freedom. Its provisions, never repealed, though varied and to some extent amplified in subsequent

instruments similarly extorted from subsequent monarchs, were solemnly reasserted in the famous declaration by Parliament in 1628 which we call the Petition of Right, and were finally re-enacted in the Bill of Rights of 1689. Thus the Charter of 1215 was the starting-point of the constitutional history of the English race, the first link in a long chain of constitutional instruments which have moulded men's minds and held together free governments not only in England but wherever the English race has gone and the English tongue is spoken. The Bill of Rights was in the thoughts of those who framed the first Constitutions of Massachusetts and Virginia when the North American Colonies renounced their allegiance to the British Crown; and much of the document of 1689 was incorporated in those Constitutions. From them the old provisions, largely in the original words of the Great Charter, passed into the Federal Constitution of the United States when it was drafted in 1787 and adopted, with the first ten amendments, between 1788 and 1791. Nor does the chain of historical sequence stop here. The Federal Constitution supplied a model for republican Constitutions enacted in later days. It was imitated by the republics of Spanish America when they threw off the yoke of Spain. It influenced the form which France from 1790 onwards gave to the successive frames of Government she adopted, and led to the placing in most of them of declarations of the primordial or so-called "Natural" Rights of Man. The positive and pragmatic phrases of Stephen Langton—if it was he who was the chief draftsman of Magna Carta—had now been transmuted by the spirit of Rousseau into wider and vaguer terms. Further influences may be traced in the constitution of the Swiss Confederation and those of other European countries. It seems not too fanciful to say that the prelates and barons of Runnymede, building better than they knew, laid the foundations of that plan of Written or Rigid Constitutions which has now covered the world from Peru to China.

The influence of the Law of the Twelve Tables upon the development of legal thought and institutions in later ages need not be followed out here, as it worked chiefly in the field of Roman private law. But two resemblances between that code, if code it can be called, and Magna Carta may be noted. Both had the character, to those who enacted them, not so much of what we call legal commands as of Solemn Covenants. Magna Carta is a series of engagements contracted by the Crown with the magnates of the realm, accepted by them, and authenticated by the King's Great Seal. So among the Romans one of the definitions of Lex is "communis reipublicae sponsio". It is a public "Stipulatio". The presiding magistrate interrogates the people in a "Rogatio" whether they wish to be bound by what he proposes. The people, if they accept, answer "Uti rogas;" "Be it as you ask"; and thus the obligation is constituted. There is a real meaning in this, though it may seem a point of form. Both moreover purport — and this is a matter of substance—to be in reality and fact not so much enactments of new law as declarations, explicit and precise, of pre-existing customary law. The Twelve Tables included some rules which were, if not new, at any rate doubtful, and some others plainly new. But in the main they were a digest of existing customs and regulations of procedure. Some of the liberties which the barons claimed and some which the commonalty also desired, had, to a certain extent, been recognized in Henry the First's Charter of Liberties; and John's concessions were not extorted grants of new rights but rather the solemn renunciation of old abuses, abuses so inveterate that they reappeared under his successors and had to be again renounced.

Neither the Twelve Tables nor the Great Charter was established, like most modern Fundamental Instruments, in such a way as to make it unchangeable by ordinary legislative methods. That was a device reserved for later ages. And in point of fact many provisions of both became by degrees obsolete, because inapplicable to the conditions of a constantly developing community. One enactment of the Decemvirs was repealed within a few years, others were varied later. Yet down to the days of Cicero's youth boys learnt these ancient texts by heart as a "carmen necessarium," though Cicero adds "quas iam nemo discit". Magna Carta had become so sacred that in the seventeenth century there would seem to have been lawyers who doubted whether it could be repealed by an ordinary statute. Parts of it have been in later times modified by Parliament; and we have just seen some of them infringed or suspended by the Defence of the Realm Act of 1914. Yet other parts may be quoted to-day as binding not only in England but in the Courts of Australia or Illinois, just as the Twelve Tables could be quoted in the Courts of Thrace or Syria down to the days of Justinian, who made a clean sweep of all antecedent legislation. Both, it may be added, set in the directness and precision of their language an example which had a healthy influence on the form of statutory enactments for many generations, until a time came, after the Antonine emperors, when rhetorical diffuseness depraved the legislation of the later Roman monarchs and when in England, especially in Hanoverian days, the effort to attain completeness induced undue prolixity and a tedious enumeration of particulars. It is a part of the service which may be credited to both documents, that they helped to form exact habits of legal thinking and legal interpretation in both peoples, qualities to which the chief merits of both the two great systems of law that now rule the world may be ascribed.

Passing from the legal to the wider historical aspects of the Great Charter, let us see what share may be assigned to it in the rendering of those services by which Britain has helped forward the cause of freedom and good government throughout the world. The first place among these services is often assigned to the development of representative government in the English Parliament. But the representative system, although more successful in England than elsewhere, was not peculiar to England. It may be deemed another service that she set, in the nineteenth century, the example of an extension of the right of the masses of the people to share in self-government. In this, however, the ancient republics had anticipated her, and so had some few of the Swiss cantons. Rather perhaps may we find the chief contribution of England to political progress, in the doctrine of the supremacy of law over arbitrary power, in the steady assertion of the principle that every exercise of executive authority may be tested in a court of law to ascertain whether or no it in fringes the rights of the subject. Does the "Law of the Land" warrant and cover the act done of which the subject complains? Though it is now generally held that the famous phrase "nisi per legale iudicium parium suorum vel per legem terrae," does not, as used to be supposed, constitute the basis of what we call "trial by jury," still it remains true that these words, and especially the declaration of the supremacy of the "Lex Terrae," are the critical words on which the fabric of British freedom was solidly set before a representative Parliament had come into existence. It was this guarantee of personal civil rights that most excited the admiration of Continental observers in the eighteenth century, and caused the British Constitution to be taken as the pattern which less fortunate countries should try to imitate. If it be said, and truly said, that this

fundamental principle could not have been maintained in England without the assertion by the Parliaments of the fifteenth and, again more forcibly and persistently, by those of the seventeenth century, of control over the power of the Crown, it is to be remembered that their efforts might not have succeeded had not the earlier resistance to that power by the men who secured Magna Carta created and fostered in the minds of the upper and middle classes that firm and constant spirit of independence, that vigilant will to withstand the aggressions of the executive, which overthrew Charles the First and expelled James the Second.

Supreme power has now passed into the hands of the whole people, who not only enact the laws through their representatives but supervise administration by their control of the executive Ministers, so that conflicts between the law and the executive need no longer be feared. Where the people make the law, the risk of transgressions of the law by the servants of the people is but slender. Such dangers to liberty as may now be feared are of a different order. If they arise, they will arise from a tendency on the part of majorities to encroach by the exercise of legislative power on the sphere which ought to be reserved for the unchecked action of the individual citizen and the self-guided development of his own aims and purposes. We may hope that here in Britain that attachment to individual rights which has now by long tradition become instinctive in our race will preserve us, and preserve also those British peoples beyond the seas, who have inherited our spirit and our time-honoured traditions, from any such dangers, making us and them prudently watchful to keep legislative authority within its proper limits. One may say of Liberty what the Roman historian said of Empire: “It is preserved by the same methods which achieved it”. The Spirit of Freedom is always the same, and has had, and will have, similar work to do for the welfare of mankind, whether at Runnymede in 1215 or seven centuries later.

[Back to Table of Contents]

INTRODUCTION
By
H. E. MALDEN, M.A.

The seven hundredth anniversary of the granting of the Great Charter by King John occurred in June, 1915. Some kind of celebration of the event was so likely to be undertaken that the Royal Historical Society determined that if such took place at all it should be directed by competent persons, and early in 1914 organized a Committee for a due commemoration. The Right Hon. Viscount Bryce consented to act as Chairman of a Committee, which representatives of Universities, and learned Societies, and leading historical scholars from the United Kingdom, America, and some other countries, were invited to join. The Archbishop of Canterbury, and the Lord Mayor of London, represented the continuity of English life from 1215–1915. A small executive Committee was appointed to arrange details, among which a visit to Runnymede and an address upon the spot were contemplated. By 1915 this intended celebration proved not desirable, nor indeed possible. The memory of the assertion of the principle of government by law was overclouded by the cares of the immense struggle to maintain that principle through force of arms. Several eminent scholars had, however, prepared papers upon certain points or aspects of the Great Charter, or on matters of cognate interest, and these it is thought well to present to the Fellows of the Royal Historical Society, and to preserve in book form for the general use of historical students. These papers, it may be said, were not written with any idea of sequence, nor as aiming at any complete comment upon all points of the Charter. The authors were free to offer such contributions as they chose. But there will, nevertheless, be found, running through several of them, a line of general agreement. The old uncritical admiration which found in the Great Charter something more than the germ of all the more important parts of the Constitution and law of recent centuries has vanished from every place, except occasionally from Parliament and the public platform. The natural reaction which saw in the Charter merely the assertion of class privileges has begun to suffer from criticism in turn. Motives are indeterminate, even to those near at hand. Who knows all the motives of the Whigs of the Reform Bill of 1832? Who can confidently assert all those of Stephen Langton in 1215?

But to those afar off the general tendency of actions is more clear. In effect, by ten years after the Charter was given, it was popularly accepted, when recast and repeated, as national, not only as baronial in its benefits, confirming liberties “tam populo quam plebi”. The barons did more than they knew, perhaps more than they would have intended had they known it; but whatever the interpretation in their minds of “liber homo,” the interpretation of the courts soon gave it a wider scope than has sometimes been allowed to it by commentators.

As has often been pointed out, those who asserted the rule of law, and provided a sort of privileged civil war for the vindication of that rule, had travelled but a little way upon the path of constitutional progress. But the rude awakening of our own age has again forced upon us this unfortunate fact of a yet imperfect society, that liberties of a

class, of a nation, or of a world, are only secure for those who can in the last resort venture their lives for their defence, and have the means to make that venture successful.

The present struggle for the rule of law explains the absence of some names from the list of contributors, and of some subjects which might have been treated. A German professor, well known for his mastery of early English law, once a friend of England, had promised a communication. A courteous letter, through Sweden—"suum cuique tribuito"—regretted his inability to contribute. The great French scholars to whom we owe so much light upon the reigns of the Angevin Kings, were necessarily preoccupied. It was hoped that from a Hungarian source we might have had a treatise on the likeness and differences between the privileges of the Anglo-Norman and Magyar nobility. A Belgian professor might have written on the parallels between our constitutional laws and the "Joyeuse Entrée" of Brabant, and other Netherland liberties. We are fortunate, however, in securing the aid of Señor Rafael Altamira upon the analogies of English and Spanish liberties. What we at home owe to the pious interest in the antiquities of their motherland felt by the scholars of America, the following pages show a little. We all know how much has been done by them elsewhere.

There is a peculiar satisfaction, however, in an English celebration of a thirteenth century document and event. Here, as elsewhere, in the course of 700 years all things have changed. But here, as not elsewhere, all things have changed by processes of development, which have often left names, offices, titles, and some more essential features of national life the same. Can any other country read at the beginning of its book of Statutes a law in the form in which it was made 692 years ago? The national spirit and aspirations, which at all events adopted as their own the articles of Runnymede, are the same to-day as then. While no peer of the United Kingdom represents in the male line any one of the barons of 1215, yet the blood of several of the latter flows in the veins of many Englishmen, Scots, and Irishmen, noble, gentle, and simple. The King wears, as the centre of a legal government, the crown which his ancestor John was admonished that he must wear in accordance with a law older than his dynasty. The titles of nobility, and of the archbishops and bishops who advised the Charter, remain.

In one case at least an English peer, the Duke of Norfolk and Earl of Arundel, is now lord of manors and castles which his ancestors in the female line held in 1215. The bishops in 1917 hold in many cases the same houses and estates which their predecessors in title held when by their advice John gave the Charter. Langton had his house at Lambeth, Peter des Roches at Farnham Castle, where their successors live now, in the latter case in some of the same buildings.

Our race across the seas claims an inheritance in liberties which were declared to be ancient at Runnymede.

There is something in this unbroken line of social and national descent akin to the ever-changing yet essentially permanent features of the stage upon which the national drama was enacted.

The face of the country has been changed since 1215, but it is the same land, and of all places in it Runnymede has probably changed among the least. Sir John Denham's Cooper's Hill looks across it, and up to Windsor and down to London, over more thickly inhabited distances; a few inns and boat-houses, standing amid enclosures, fringe the river, but in the foreground a meadow by the Thames there was, meadows by the Thames remain. In 1215 the hay of the Commoners of Egham must have been ruined, unless the season was unusually early. The hay crop would now stand as an obstacle to a celebration upon the spot on the actual anniversary in the middle of June.

Whether the place was the scene of any ancient meetings is unknown. Leland first advanced, with the boldness of the amateur etymologist, the derivation of the "Mead of Counsel" to explain the name. Certain topographical considerations in fact governed the selection of the place for a conference between John, who was at Windsor, and his barons whose base was London. A Roman road ran from the south-west towards the valley of the lower Thames, and when London had become the great commercial city of Roman Britain, in London it ended. Staines must be on or near the site of the Roman station "Ad Pontes," or "Pontibus". It would seem, from the name, that here must have been the earliest Roman bridge across the Thames, made perhaps before London was all important. There is another Roman road, recoverable in Sussex and Surrey in very short portions of its course, one of the longer is in Somersbury Wood near Ewhurst, which if, continued in a straight line would hit the Thames near Staines. But the undoubted road from Silchester, known locally as the Devil's Highway, crosses Easthampstead Plain and runs through Virginia Water, an artificial pond made in the eighteenth century, and heads directly towards Staines. When the succession no doubt of Roman bridges which crossed the low meadows subject to floods, as well as the river itself, fell into ruin, no one knows. But there is reason to believe that a bridge had been restored at Staines before 1215. In the Patent Rolls of Henry III,[1] 29 July, 1228, is a table of tolls which the warden ("custos") of Staines bridge may impose, "in auxilium pontis de Stanes reparandi et emendandi". There is no reference to the bridge being newly made then, and the natural inference is that a bridge which needed repairs had been standing more than thirteen years.[2]

Here then was the obvious reason for the baronial host coming to Runnymede on their way to Windsor. They had marched from London by the Roman road, and had crossed Staines bridge. Runnymede was a good camping ground, with a good communication with London behind it. The local tradition which places the granting of the Charter in Magna Carta island in the Thames is contradicted by the Charter itself, "data in prato quod vocatur Runingmede". The erroneous tradition was fixed by the lord of a Buckinghamshire manor (the island is in that county), who put up a fantastic building with an inscription on the island in 1834, saying that it was the true spot. If there is any reason behind it further than the assumption by Mr. George Simon Harcourt that the notable event took place upon his land, it may be found in a passage where Matthew Paris, in "Chronica Majora," adds to Wendover's account of the treaty between the French Prince Louis and the Earl of Pembroke in 1217, that it was negotiated "quadam insula," near Staines. Buckinghamshire must not rob Surrey of its greatest event. Surrey has also its own baseless tradition, perpetuated by an inscription, that the barons arranged their Articles in the caves under de Warenne's Castle at Reigate. Considering the attitude of John's cousin de Warenne, this would

be equivalent to the Reform Bill of 1832 having been concocted in the cellars of Apsley House. Moreover the caves in question were made for getting fine sand, and were valued as sandpits in a survey of the manor of Reigate in 1622. Runnymede, with the adjacent Longmead, and Yardmead, are in the manor of Egham, which formerly, and in 1215, belonged to Chertsey Abbey, and after the dissolution became the property of the Crown, though granted for terms of years to various holders.1 At the time of the Parliamentary surveys of the late King's lands in 1650 it appears as meadow land belonging to Egham manor. In 1811 there were some ten tenants who enjoyed the use of the land for hay from March to Old Lammas Day. After that date it was thrown open for grazing to the cattle of the tenants of the manor of Egham. An Enclosure Act in 1814 (54 G. III, c. 153), and the consequent Award made in 1817, divided it among nineteen holders and the Crown, as lord. In Runnymede proper there were over 71 acres. The adjacent Longmead, of 76 acres, was divided among the Crown and nine tenants. The whole might be stocked with horses and cattle from old Lammas Day to 13 November, and with sheep from 13 November to 2 February. From 2 February to August it is to be left for hay. The central part was and is left unenclosed. But the Act stipulated that any enclosures which should interfere with the holding of Egham races upon the usual course at the end of August must be removed every year. William IV gave a plate to be run for at the meeting, and on the first occasion, in 1836, being present, the races coinciding with festivities at Windsor for his daughter's marriage, made a speech, in which a contemporary reporter found, "good feeling and patriotism equally blended". The King declared that "neither himself nor any other could be present without calling to mind that it was here that our liberties were obtained and for ever secured, and that we were here to enjoy those liberties and sports which he would with his utmost power ever protect and foster". His Majesty forebore to specify which clause of the Charter secured the liberty of horse-racing. The rather unusually disreputable crowd which frequented Egham races probably never at any other time recalled at all the more momentous gathering. The races ceased in 1884.

But with Aristophanes we may say:—

καὶ ταῦτα μὲν δὴ σμικρὰ κἀπιχώρια·

and revert to the studies of a great subject which follow.

The first paper was delivered as an address by Prof. W. S. McKechnie in 1915, before the Royal Historical Society and some members of the Magna Carta Committee, the Right Hon. Viscount Bryce being in the chair. It was the only celebration in the seven-hundredth year. It justifies the title Great as applied to this Charter, and explains how every succeeding age builded upon it conclusions to suit its own aspirations. When we read the glosses of the school of Coke we may be reminded of an ingenious preacher, who founds upon a simple text consequences which were far from the mind of the original writer. With Molière's character we may exclaim, "tant de choses en deux mots"; but it is hard to deny a great value to that which contained a principle of such varied practical application.

Prof. George Burton Adams, of Yale, U.S.A., follows with an article upon the Bull and the letter of Innocent III condemning the Charter, and prints the letter itself in an accessible form. The grounds for the Pope's interference were not the feudal supremacy which John had conceded to him, but rather his position as ecclesiastical arbiter of European quarrels, and special guardian of the rights of a professed crusader. That the thirteenth century Court of International Appeal made a great mistake in its excursion into English national politics, is more unfortunate than surprising.

Dr. J. Horace Round contributes a penetrating criticism upon the distinction between the lesser barons, who by clause 14 were to be summoned "en bloc" to Councils, and the "Milites" of the Charter. It will be a reminder needed by some, to whom comment has become more familiar than the words commented upon, that "barones minores" are not so named in the Charter at all.

The barons in 1255 are said to have appealed to Clause 14, concerning the writ of summons, which was not repeated in the reissues of the Charter.4 Is it possible that the many copies of the first issue of 1215 were in fact more numerous, or more generally accessible, than the reissues which should have superseded them? Or, to draw a suggestion from Prof. McIlwain's paper, was what had once been declared to be ancient practice considered binding, later laws notwithstanding?

Prof. Sir Paul Vinogradoff, and Prof. F. M. Powicke deal with the famous clause 39, "liber homo," "legale iudicium parium suorum," and "lex terrae". Too much cannot be written upon it by competent people. The clause is considered from slightly differing standpoints, but not with very different conclusions. It is here that the expansible nature of the Charter, as society expanded, is so clearly to be seen. "Liber Homo" is a very Proteus with whom to grapple, he assumes many shapes, but he was not always a military tenant only. John had fifteen years before 1215, in a charter,5 greeted as "liberi homines" the men of Kingston upon Thames, who had all in Domes-day been merely villeins on ancient demesne.

Prof. McIlwain, of Harvard, U.S.A., deals with Magna Carta and the Common Law, in an exhaustive treatise upon the whole subject of ancient custom, statute law, and ordinances.

Dr. H. D. Hazeltine, U.S.A., and Emmanuel College, Cambridge, treats of the inheritance in the Charter of the American colonies before and after the Declaration of Independence.

Señor Rafael Altamira, of Madrid, reminds us that in the early Middle Ages England was far from having a monopoly of constitutional liberties, and that there may be positive influence from the Pyrenean lands upon English constitutional developments. Certainly the elder Simon de Montfort, when in the November of 1212 he settled the affairs of the conquered Albigensian lands, called a Parliament at Pamiers, which was attended by barons, clergy, knights, and citizens, antedating by fifty-three years his more famous son's Parliament after Lewes. The device of a Parliamentary Committee to do the real business, not unknown in England and stereotyped in Scotland, was

employed. Two bishops, a Templar, a Hospitaller, four French knights, two Languedocien knights, and two Languedocien burgesses were the "Lords of the Articles".2

Both the younger Simon and Edward I had ruled Gascony, and the latter had seen Spain. But we may hesitate to yield the palm to the Spanish kingdoms in the practical attainment of liberties. Spanish constitutional phenomena have yet to be studied as fully as those of England, and Señor Altamira admits that generalization is so far premature. When English constitutional studies were younger the tendency was to exaggerate the evidence of early popular liberties. When those of Aragon and Castile have been as exhaustively explored, a similar shrinkage of claims may follow. At any rate, moderation, slow advance, a practical sense aiming at the necessary and the attainable from time to time, with the continuance which was the fruit of these, were what made English constitutional gains solid.

Finally, Mr. Hilary Jenkinson, late of the P.R.O., now Captain R.G.A., gives an extremely interesting review of the financial organization, or disorganization, of the reign of John, drawn from the Records. It tends to show that by some one, perhaps by the King himself, some effort was being made to introduce method into business which had outgrown its earlier machinery.

The editor must return hearty thanks to Mr. F. A. Kirkpatrick, M.A., F.R.Hist.S., for the translation of Señor Altamira's paper; to Mr. C. Johnson of the Record Office for the correction of Mr. Jenkinson's proofs; and to Prof. McKechnie for invaluable help in the reading of proofs, doubly useful when it was impossible to send some of these across the seas for the final corrections by the authors. Nor is his debt to the greatest authority upon the Charter confined to this alone.

By arrangement Dr. Hazeltine's paper has appeared already in the "Columbia Law Review," Vol. XVII, January, 1917.

[Back to Table of Contents]

MAGNA CARTA (1215–1915). AN ADDRESS DELIVERED ON ITS SEVENTH CENTENARY, TO THE ROYAL HISTORICAL SOCIETY AND THE MAGNA CARTA CELEBRATION COMMITTEE.

By Professor Wm. S. McKechnie, L.L.B., D. Phil.

Seven hundred years ago, at a meadow on the Thames between Staines and Windsor, known as Runnymede, a spot thereafter hallowed for all lovers of England and of freedom, King John, bending before a storm he had raised but could not lay, set the great seal of England to a Charter of Liberties. The event proved memorable in many ways, but pre-eminently because of its clear enunciation of the principle that the caprice of despots must bow to the reign of law; that the just rights of individuals, as defined by law and usage, must be upheld against the personal will of kings.

John Lackland, in acceding to the demands of his barons, under picturesque and memorable circumstances, tacitly admitted the doctrine of later constitutional law that rulers are accountable for the use they make of their sovereign powers. The royal surrender at Runnymede thus presaged the darker tragedy enacted at Whitehall, four centuries later, when the chief exponent of the Stewart doctrine of the Divine Right of Kings died a martyr to his faith. In 1215, King John, sorely against his will, was forced to take the first painful step on that road of constitutional progress that led, in the course of centuries, to the firm establishment of the modern doctrines of the Royal Impersonality, and the Responsibility of Ministers for the actions of their King.

The events that led to so notable a surrender must be briefly told. John's father, Henry Plantagenet, a prince endowed with a double portion of the untiring vigour, the ability, and the hot blood of the race of Anjou, had prepared strong foundations for his English throne. In organizing an efficient administrative system, he had strained to the utmost every prerogative of the Crown, and reduced to the narrowest limits the franchises and privileges and independence of the great feudatories, his earls and barons. With one hand he had increased in frequency and amount every one of the galling feudal services and incidents performed by his vassals; with the other, he had curtailed their profitable franchises, their rights of holding courts and trying prisoners.

These, then, were the two chief sets of feudal grievances felt in the thirteenth century—increase of feudal burdens and curtailment of feudal privileges—that made the barons restive under even the indomitable energy of the formidable Henry. Under Henry's hot-tempered sons, Richard and John, both forms of oppression were pressed home more ruthlessly on the tenants of the Crown; and a third set of grievances was added in the failure of both these princes, for different reasons, to continue the efficient, orderly system of Government for which the barons under Henry had paid so heavy a price; and in the employment of a class of unscrupulous foreign adventurers who were placed as officers of the royal household and as sheriffs or bailiffs in every county of the land.

Every feudal service and incident was made more galling by the stringent methods of enforcement John adopted. Scutages, in particular, or money paid in commutation of actual military service in the field, increased in frequency and in amount, and became more burdensome from the rigorous manner of their exaction. Every rule of the unwritten but well-recognized feudal law was broken by John and his horde of unbridled mercenaries, such as Engelard of Cigogne, and Geoffrey of Martigny and their associates branded by name in the fiftieth chapter of Magna Carta. Cruel private wrongs, inflicted by John as a man, added to the growing flame of resentment kindled by his extortions, lawlessness, and inefficiency as a ruler.

By 1213, the barons, seething with discontent, only waited an opportunity to demand redress, with weapons in their hands. Direction and point and unity of action were given to their endeavours when Archbishop Stephen Langton, a name ever to be honoured by the heirs of English liberty, produced a copy of the Coronation Charter, granted in the year 1100 by John's great-grandfather, Henry I, as a model from which they might begin, at least, to formulate their claims for reform of abuses.

Only a fit occasion was needed for the rebellion to break forth; and that occasion came in the autumn of 1214, when John set sail from France, vanquished and humiliated by the complete failure of his grandiose schemes for winning back from Philip Augustus the lost French provinces of the Angevin inheritance, by means of a grand alliance, with the Emperor as its central figure. Returning, discomfited, on 15 October, 1214, John found himself confronted with a domestic crisis unique in English history. The northern barons took the lead in demanding redress. Their cup of wrath, that had long been filling, overflowed when a new scutage, at the unprecedently high rate of three shillings for each knight's fee, was demanded.

Roger of Wendover narrates how, after a futile conference with John, on 4 November, the magnates met at Bury St. Edmunds "as if for prayers; but there was something else in the matter, for after they had held much secret discourse, there was brought forth in their midst the Charter of King Henry I, which the same barons had received in London from Archbishop Stephen of Canterbury". After binding themselves by a solemn oath to take united action against the King, the barons separated to prepare for the resort to arms, the muster being fixed for Christmas. The covenanters kept their tryst; a deputation from the insurgents met John in London at the Temple on 6 January, 1215; and a truce was patched up till Easter.

In April, the northern barons again met in arms and marched southward to Brackley. They were met there by emissaries from the King to inquire as to their demands; who took back with them to John a certain schedule—the rude draft that was afterwards expanded into the baronial manifesto that is to-day exhibited to the public in the British Museum in the same case with Magna Carta, commonly known as the "Articles of the Barons," but describing itself more fully and accurately as "Capitula quæ barones petunt et dominus rex concedit".

John's consent, however, was not to be easily obtained. When the embassy bore back these demands to Wiltshire, where the King then was, John, livid with fury, declared, with his favourite blasphemous oath, that he would never grant them liberties that

would make himself a slave; asking sarcastically, "Why do not the barons, with these unjust exactions, demand my Kingdom?"

On 5 May, the barons, having chosen as their leader, Robert Fitzwalter, acclaimed by them as "Marshal of the Army of God and Holy Church," performed the solemn feudal ceremony of *diffidatio*, or renunciation of their fealty and homage, a formality indispensable before vassals could, without infamy, wage war upon their feudal overlord. Absolved from their allegiance at Wallingford by a Canon of Durham, they marched on London, on the attitude of which all eyes now turned with solicitude. When the great city opened her gates to the insurgents, setting an example to be immediately followed by other towns, she practically made the attainment of the Great Charter secure. The Mayor of London thus takes an honoured place beside the Archbishop of Canterbury among the band of patriots to whose initiative England owes her Charter of Liberties. John, deserted on all sides, and with an Exchequer too empty for the effective employment of mercenary armies, agreed to a conference on the 11th day of June, a date afterwards postponed till the 15th of the same month.

It was on 15 June, then, in the year 1215, that the conference began between John, supported by a slender following of half-hearted magnates, upon the one side, and the mail-clad barons, backed by a multitude of determined and well-armed knights, upon the other. The conference lasted for eight days, from Monday of one week till Tuesday of the next. On Monday the 15th, John set seal to the demands presented to him by the barons, accepting every one of their forty-eight "Articles," with the additional "Forma Securitatis" or executive clause, vesting in twenty-five of their number full authority to constrain King John by force to observe its provisions.

This was merely a preliminary measure. Numerous minor points had yet to be adjusted before the final settlement, which took place on Friday, 19 June, when the completed Charter, containing the substance of the Articles in an altered sequence, and with numerous additions and amendments as to points of detail, was also sealed, not merely in duplicate or triplicate but in considerable numbers, each of the great English Cathedral churches in particular receiving a certified parchment for its own. Four of these originals still exist, two of them in the British Museum, one at Lincoln, and one at Salisbury. The more famous of the Museum copies, originally deposited in Dover Castle, is now scarred by the marks of fire and in part illegible.

Throughout the conferences, as in the discussions and embassies that preceded them, Stephen Langton played the leading part, alike in giving direction and unity of aim and moderation to the counsels of the barons, in preventing complete rupture of diplomatic relations, in pressing the barons' just claims upon the King, while remaining a faithful servant of the best interests of the Crown, and perhaps also in focussing the baronial demands, and thus accepting in some sort the responsibilities of an editor in the drafting of the actual clauses of Magna Carta. The Great Charter, whose weighty declaration "Quod Anglicana ecclesia libera sit," has helped to build into one whole the rights of the national Church with the constitutional liberties of the nation, so that they should act as mutual buttresses, was thus merely repaying the obligation it owed to the greatest of English primates.

When John, on that Friday morning of a memorable June, set seal to the completed record of his surrender, known to contemporaries as "Carta Libertatum," or "Carta Baronum," or "Carta de Runnymede," and to after-ages simply and pre-eminently, as "The Great Charter," he had no intention of being bound by his promises longer than circumstances compelled him. The wax on which the great seal had been impressed had scarcely hardened when John appealed to Rome for leave to repudiate his consent, alleging his intention of going on Crusade. In response, Innocent III issued a Bull, in which he sternly forbade, under ban of anathema, that John should observe the Charter, or that the barons and their "accomplices" should exact its enforcement. At a Lateran Council, Innocent excommunicated all those English barons who had "persecuted" his liegeman "John, King of England, crusader and vassal of the Church of Rome, by endeavouring to take from him his Kingdom, a fief of the Holy See".

Meanwhile, the points at issue between the English King and his feudatories had passed from the sphere of conferences, legal documents and diplomacy to the sphere of civil war. The insurgents, in their urgent need, invited the aid of Louis, son of the French King, offering him the rich guerdon of the Crown of England.

The fortunes of war still trembled in the balance, when John's death at Newark on 19 October, 1216, and the consequent desertion of the French Prince's cause by many of the English barons, paved the way for the healing of internal discords on a peaceful and permanent basis. William the Marshal, acting as Regent for the boy King, son and heir of John, accepted and confirmed the Great Charter in young Henry's name, subject to certain omissions and modifications, as the basis of his future scheme of Government. Confirmations of the Charter were accordingly issued in 1216, on Henry's accession, and in 1217, when it was arranged by treaty that Louis of France should renounce his pretensions to the English throne and depart from England; and, finally, in Henry's third Great Charter, impressed with his own seal in 1225, Magna Carta took its definitive shape, assuming the form, word for word, in which it stands to-day as the earliest enactment on the Statute Rolls of England.

Thenceforward the almost sacred text of the Great Charter has remained fixed and stereotyped, together with that of the Forest Charter which, issued in 1225 for the first time as a separate document, formed its natural complement, the two being confirmed together in future reigns, without suffering variation in one jot or tittle.

New confirmations in 1237 and 1253 were accompanied by solemn ceremonials, repeated on several occasions during the reign of Edward I. The constitutional importance and results of the "Confirmatio Cartarum" of 1297 are known to all; and of later confirmations, Coke has counted fifteen under Edward III, eight under his grandson Richard, six under Henry IV, and one under Henry V. No further confirmation was required thereafter, for the Great Charter had by that time been woven inextricably into the fabric of the national law and the national life.

Such, in brief, were the stages in the genesis of the Great Charter of English liberties. From even the hastiest examination of these facts, one question emerges and presses for an answer. Whence did the Charter acquire the right to be described, without qualification, and without rival, as being "Great"? Why did the granting of it mark an

epoch in English history, and perhaps in the history of civilization? Whence came its world-wide fame?

To begin with, it is obvious that its title to distinction cannot be exclusively derived from any one of its isolated characteristics; for its chief merits, in the eyes of different ages, have not always been the same. Gazing backwards over the crowded centuries that separate the present from the day when John surrendered to the mailed fists of the feudal host at Runnymede, is it possible to estimate the stages by which the prestige of Magna Carta has slowly been built up? The task is no easy one; but it would seem that three separate periods may be distinguished, in each of which the chief merits of the Charter have been differently rated, being found respectively in its reference to the *present*, the *future*, and the *past*.

The First Epoch.

The importance of the Charter for the men of 1215 did not lie in what forms its main value for the constitutional theorists of to-day. To the barons at Runnymede its merit was that it was something definite and utilitarian—a *present* help for *present* ills. To them, it was by no means what it became to the English lawyers and historians of a later age, who looked on it as something intangible and ideal, a symbol standing for the essence of the Constitution, a bulwark of English liberties.

To the barons, every clause was valued because it gave relief from a current wrong; little they thought of its influence on the development of constitutional liberty in future ages. The individual Crown tenant smarted under the steadily increasing burden of feudal exactions. His scutages were more frequent and at a higher rate. On succeeding to his fief, he had been forced to pay a relief of an amount bounded only by the limits of John's greed. If his father's lands had fallen into wardship, on coming of age he found them exhausted and laid waste. When he died, his widow and children would be subjected to a host of harrying and unjust exactions. In Magna Carta he sought an immediate remedy to these embittering ills. The same Crown tenant found that by the insidious extension of the use of certain royal writs, the profitable jurisdiction of his court-baron was being infringed, and his authority as a local magnate undermined. He found too that where the royal justice was beneficial, it was fitfully administered; and that the same upstart aliens, on whom John bestowed in marriage the best-dowered heiresses of the realm, were given a free hand to abuse the powers of the lucrative offices that were showered upon them. To Magna Carta the baron looked as an immediate end of all these abuses and irregularities.

No contemporary estimates of the value of Magna Carta, considered as one whole, are extant. The biographer of William the Marshal excuses himself from discussing the Charter and the Civil War on the ground that "there were too many incidents which it would not be honourable to recount". The chief contemporary source of information is a Chronicle composed by a minstrel who visited England in the train of Robert of Béthune, one of John's familiars, who gives a fragmentary catalogue of particular clauses rather than a general estimate.

The provisions of the Charter which this troubadour found worthy of mention were the clauses that redressed three abuses, namely the "disparagement" of heiresses, the loss of life or limb for killing deer, and the encroachment on feudal courts, and the clause appointing the baronial executive committee. The selection of these four topics as of outstanding value gives point to the view already expressed that to the men of 1215 Magna Carta was an intensely practical document, valued as an immediate remedy of present ills, with nothing whatever of the glamour of romance.

The Second Epoch.

By the Stewart era, if not earlier, a marked change had taken place. After a period of comparative neglect, the Great Charter established new claims to popular esteem when it proved its usefulness as a shelter against the stretches of prerogative by a James or Charles Stewart. It is interesting to compare the glowing rhetoric of Coke with the colder estimates contemporary with Magna Carta. Speaking of one of the Charter's famous clauses, Sir Edward Coke breaks thus into rhapsody: "As the gold-finer will not out of the dust, threads or shreds of gold, let pass the least crumb, in respect of the excellency of the metal; so ought not the learned reader to pass any syllable of this law, in respect of the excellency of the matter".

By that age the Charter had become, too, a powerful instrument of reform in the hands of the leaders of the parliamentary opposition to the arbitrary Government that accompanied the Stewart doctrine of the Divine Right of Kings. It became indeed the strongest link that bound together past and future in the constitutional development of English freedom. It served this purpose all the better, because of the antique flavour of its language in redressing old-world abuses of which the seventeenth century had forgotten the meaning. The very fact that many of the feudal grievances of 1215 had died a natural death and been forgotten centuries before the struggle with the Stewarts began; that much of its phraseology was no longer understood, made it possible for Coke and Hampden, Eliot and Pym and Hakewell, to give to its numerous clauses meanings that favoured their own aspirations in the cause of constitutional progress. For its seventeenth-century exponents the Charter's great value lay thus in its bearing on the *future*. By discovering precedents for a desired reform in some obscure passage of Magna Carta, a needed innovation might be readily represented as a return to the time-honoured practice of the past. The veneration with which his contemporaries viewed the antiquarian and black-letter learning of Sir Edward Coke, that unrivalled master of the intricacies of the common law, secured the unquestioned acceptance of his declaration of what exactly had been meant by obscure chapters of the Charter. The Great Charter, as enshrined in the imaginations of the parliamentary leaders of the Puritan Rebellion was, to a great extent, the creation of Coke's legal intellect. It has been contended, indeed, in a brilliant and still recent article, under the startling title of "The Myth of Magna Carta" that no Charter really existed to correspond with the conceptions formed of it by the leaders of the Long Parliament; and that Coke was the creator of the Charter, or of the "Myth" which alone had political significance or value.

It seems safer, however, to maintain that there are two Great Charters (or two aspects of one charter) each of which, valuable in its own sphere and period, has rendered

inestimable services to the growth of sound theories of Government—the original feudal charter, and the charter of seventeenth-century interpretations. Part, at least, of the greatness of the Charter would thus seem to lie, not so much in what it was to its framers in 1215, as in what it afterwards became to the political leaders, to the judges and lawyers, and to the entire mass of the people of England in later ages.

The Third Epoch.

In our own day, when the privilege of living under the best constitution in the world has come to be more lightly valued, by a generation who are prone to take their heritage for granted, Magna Carta is no longer resorted to as an indispensable storehouse of precedents for desired reforms. Its chief value is not now for its bearing on the *present*, as it was to the men of 1215, nor on the *future* as it was to the men of 1628 or 1688, but as a helpful means of reconstructing the *past*. The vivid glimpses that the Charter gives us of life in England in the early thirteenth century open, as it were, a window into the past. To understand the Charter aright in all the clauses of its sixty-three chapters, traversing, as these do, fields both wide and various, requires intimate knowledge of every phase of mediæval England, whether feudal, social, economic, legal, or political. From the many points at which it touches the life and customs of the Middle Ages, its elucidation affords ample illustration of the principles that must animate every teacher of history, who seeks to gain the permanent interest of his hearers. That root principle is the necessity of never, for one moment, forgetting the closeness of the tie that binds the dead past to the living present. There is no document, however dry and obsolete it may to-day appear, which did not spring from a human situation that was once alive with hopes and fears. The pigeonholes of a lawyer's office, with their scores of uninteresting-looking documents, tied neatly into bundles with red tape, are, as it were, the fossil bones of human ambitions and passions and tragedies that have long since been struck cold. To the eye of imagination, however, there shines through every one of them, some ray of the sentiments and emotions with which they were once instinct. The lumbering clauses of the Articles of his Deed of Partnership cannot quite conceal the eager hopes of the young merchant making a first start in life; the Proceedings in Bankruptcy mark the close of a long-drawn agony; the Last Will and Testament suggests thoughts that run through the whole gamut of the infinite pathos of human life. Similar results flow from the application of imagination to any historical document, and notably is this true of the interpretation of Magna Carta. Read this feudal Charter apart from its historical context and without any effort of imaginative sympathy; and taking it thus, dull clause by clause, you will find it wearisome to extinction. But read it in the light of all that is known of life in the Middle Ages; read it in the light of the human passions and ambitions and wildly beating hopes of the barons in whose interests it was framed; read it in the light of its magnificent historical setting; and, behold, you have transformed the whole!What is the writ *præcipe*, or the assize of novel disseisin, or the crown's right of prerogative wardship to the men of to-day? Nothing, if we are ignorant of the once living context. Much, if we have the sympathy and historical insight to set them in their true perspective against a background of mediæval life.

The problem then, for the historical teacher, as for the historical researcher, is how best to reconstruct the once full-blooded life of the past out of the dry bones that now

cumber the ground. The Hebrew Prophet, Ezekiel (ch. xxxvii., verses 1 to 10) has described how this miracle comes to pass: “The hand of the Lord...set me down in the midst of the valley which was full of bones, and said unto me.... Prophesy upon these bones, and say unto them, O ye dry bones, hear the word of the Lord.... So I prophesied as I was commanded; and as I prophesied, there was a noise, and behold a shaking, and the bones came together, bone to his bone. And when I beheld, lo, the sinews and the flesh came up upon them, and the skin covered them above; but there was no breath in them.... So I prophesied, as he commanded me, and the breath came into them, and they lived, and stood up upon their feet, an exceeding great army.” So only by the spirit of sympathy and the breath of historical imagination can the dry bones of history be made to live again.

The nature and the motives of the interest that is to-day taken in Magna Carta are thus widely different from those that influenced the men of the seventeenth century, and both are different from those of the thirteenth; it is therefore useless to seek for any one quality as the sole source of the Charter’s fame.

It is further plain that its value cannot lie in any principle of logical arrangement; for the chapters are grouped in a disorderly manner, as though they had been jotted down exactly as they occurred to the memory of the framers, and that hurriedly in case they might be quickly again forgotten. The time now available makes it impossible, if indeed it were desirable, to give a detailed account of the sixty-three chapters of Magna Carta or even to attempt their classification; while a mere catalogue would serve no useful end.

There is certainly no one clause to which the chief value of the Charter can be exclusively traced. No such monopoly can be claimed for the twelfth and fourteenth chapters, limiting the King’s power of imposing aids and scutages without the “commune concilium” of the realm; nor for the thirty-ninth, which gave security of life and property against John’s arbitrary interference, by affording the protection of “judicium parium”; nor for the famous fortieth chapter, that declared, in oftquoted words, “To no one will we sell, to no one will we refuse or delay right or justice”; nor can it be claimed even for that extraordinary sixty-first chapter, which provided machinery for enforcing all the rest, by means of a committee of twenty-five of the baronial opposition to whom John granted authority, under certain conditions, of coercing him by the forcible seizure of his castles, lands, and possessions.

One who searches for the causes of the Charter’s greatness must thus look elsewhere than to even the most famous of its isolated provisions. The elements, indeed, that have contributed to the constitutional influence of Magna Carta are numerous and varied. While an attempt to classify these elements, on any principle of absolute mutual exclusion, would be artificial and stultifying, they may yet, perhaps, be regarded as roughly falling under the seven following heads: the inherent merits of the Charter; its historical setting; its continuity with the past; its continuity with the future; the number and solemnity of its confirmations; its flexibility; and its success in taking hold upon the popular imagination.The Great Charter is famous:—

First.—Because of its inherent merits; because of its moderation; the wide orbit of its range; its preference for practical details rather than vague generalities; its assertion of the existence of settled usages to which the King binds himself to conform. This is perhaps the cardinal principle of the whole, its insistence that there is something higher and more sacred than the will of sovereigns and rulers.

Secondly.—It is famous because of its vivid historical setting. Christendom was impressed by the spectacle of an anointed king obliged to surrender at discretion to his rebellious subjects.The fact that John was *compelled*to accept what previously he had passionately refused, meant a loss of royal prestige and an encouragement to future resisters of oppression. The dramatic circumstances of John's humiliation were stamped indelibly on the minds of future generations.

Thirdly.—It is famous because of its continuity with the *past*. It was modelled in some measure on the Charter of Henry I, and that Charter was in some respects an embodiment of the terms of the old coronation oath, under which the Conqueror and his sons had sworn to observe the laws of Edward the Confessor's reign; and that oath can in turn be traced back to the days of the early kings of Wessex. The demand for the confirmation of Magna Carta took the place of the older battle-cry of a return to the laws of good King Edward, and the halo as of a golden age that surrounded the "leges Eadwardi" was transferred to their supposed new embodiment in John's Charter of Liberties.

Fourthly.—It is famous because of its continuity with the *future*; because it stands directly in the line of development of English liberty and the reign of law; because it marks the first decisive step in the establishing of a system of government of great value to the whole of the civilized world. "Slow and sure" has been the motto of the builders of English liberty; and the influence of Magna Carta, and of the circumstances that gave it birth, have been woven into the whole fabric of our constitutional continuity.For one thing, the winning of the Charter marks the beginning of a new grouping of political forces in England. No longer, as in the days of those three master-builders of our constitution, William the Conqueror, Henry Beauclerc, and Henry Plantagenet, were Crown and people united, in the name of law and order, against a baronage that contended for feudal licence.All this was changed in 1215; the mass of merchants and yeomen, the small subvassals, and the clergy had in that year formed a league with the barons, as the new champions of law and order, against the Crown that had now become the chief law-breaker.This association with new allies was accompanied by a change of baronial policy.Convinced that the complete feudal independence of each feudatory in his own territory was now impossible, the feudal magnates sought to control and guide the royal power they could no longer defy. Magna Carta was the firstfruit of this new policy, and thus stands directly in the line of constitutional development.

Fifthly.—It is also famous because of its numerous re-issues and confirmations, and because of the solemnity with which some of these have been accompanied. It is true indeed that we are dependent upon an authority of some centuries' later date for some of the most impressive details. Holinshed, embroidering on the narrative of Matthew Paris, relates how, in a Parliament held at London in 1253, after Henry III had

confirmed the Charter, sentence of excommunication was pronounced by the Archbishop of Canterbury and thirteen of his bishops "revested and apparelled in pontificalibus, with tapers according to the manner...against all transgressors of the liberties of the church and of the ancient liberties and customs of the realm of England, and namely those which are contained in the great charter and in the charter of forest.... Whilst the sentence was in reading the King held his hand upon his breast with glad and cheerful countenance, and when in the end they threw away their extinct and smoking tapers, saying, 'So let them be extinguished and sink into the pit of hell which run into the dangers of this sentence,' the King said, 'So help me God, as I shall observe and keep all these things, even as I am a Christian man, as I am a Knight, and as I am a King, crowned and anointed'.1 "

Sixthly.—The Charter was found valuable as a weapon in the hands of later champions of freedom because of its *flexibility*. The original meaning of many of its clauses was in later centuries forgotten, and, after the decay of feudalism, new interpretations (as we have seen) superseded older ones. The process which substituted the redress of the abuses most bitterly felt in later centuries for those actually redressed in 1215 was usually a perfectly honest one; and, thus, even mistaken interpretations of Magna Carta have contributed to the advance of sound principles of government. This process of constantly adapting the half obsolete provisions of Magna Carta to meet the changing needs of succeeding generations had been begun in the reign of John's famous grandson, if not even in that of his son; while the interpretations of some of its most famous clauses commonly entertained under Edward III would have astonished alike John and his opponents. But the process of modernization culminated only in the reigns of the Stewarts.

If the inaccurate eulogies of Coke and Hampden have obscured the bearing of many chapters, and diffused false notions as to the development of English law, the service these very errors have rendered to the cause of constitutional progress is measureless. What was originally an affirmation of the validity of feudal law and custom against the arbitrary caprice of John, became in time an affirmation of seventeenth-century national law against the arbitrary stretches of prerogative by the Stewart Kings in furtherance of their personal or dynastic aims. Magna Carta, in this way, became a bridge between the older monarchy, limited by the restraints of mediaeval feudalism, and the modern constitutional monarchy, limited by a national law enforced by Parliament.

To the fame gained by Magna Carta in respect of its real and original meaning, must thus be added the fame gained by the imaginary Magna Carta, as evolved from the earlier Charter by the learning of Coke and his parliamentary associates. We have seen how, in the seventeenth century, it became a means of cloaking innovations in the guise of a return to the past, and how in an age averse from constitutional innovations, it enabled the opponents of the Divine Right of Kings to gain for their policy the approval of staid upholders of the venerated past. The *elasticity* of the Great Charter has thus enabled it to adapt itself to the ever-changing needs of succeeding centuries; and each century that enjoyed its powerful aid has heaped upon it, in return, tributes of grateful veneration, and has read into it new principles of which its framers never dreamed.

Seventhly and Lastly.—It has enjoyed an enduring fame because of the hold which, for these and other reasons, it gained and held for many generations upon the *popular imagination*. Its emotional and moral value is perhaps even greater than its strictly legal or constitutional value. All government is, at bottom, founded on public opinion—upon sentiments either of affection and veneration or of fear. Psychological considerations are often all-powerful in the world of politics and morality. It is no disparagement of Magna Carta, then, to admit that part of its value has been read into it by later generations, and that its power now lies in the halo almost of romance that has collected round it in the course of centuries. Sentiment counts for much in the most practical affairs of men. It is sentiment that has brought the flower of Anglo-Saxon and Celtic manhood from the shores of the seven seas—from Africa, Australasia, Canada, and India—to fight the mother-country's battles in Europe and in Asia—the twin sentiments of love of Empire and love of home; and these men claim justly, as their right, a full share in the goodly heritage of the free institutions and traditions of the homeland, of which Magna Carta forms an essential part.

The Great Charter is *great* because in ages long after its framers were dead and forgotten, it became a shield and buckler behind which constitutional liberty could take shelter. Fortified as it had been by the veneration of ages, it became a strongly entrenched position that the enemies of arbitrary government could safely hold. Apart from the salutary effect of many of its original enactments, its moral influence has steadily contributed to an advance in the national spirit and therefore to the more firm founding of the national liberties. The value of the Great Charter has continually increased in the seven hundred years during which traditions, associations, and aspirations have clustered ever more thickly round it.

In the forefront of this long catalogue of virtues, however, there lies the one great cardinal merit of the Charter, which has already been insisted on, namely that it is, in essence, an admission by an anointed king that he was not an absolute ruler; that he had a master in the laws he had often violated but now once more swore to obey; that his prerogative was defined and limited by principles more sacred than the will of kings; and that the community of the realm had the right to compel him, when he refused of his own free will, to comply. Magna Carta affirmed the doctrine that kings are accountable for their deeds, and thus paved the way for the shifting of the responsibility from the King to his ministers, holding office at the will of a Representative Parliament.

In conclusion, it may not be unprofitable to ask what valuable lessons (if any) Magna Carta and its historical context have for the men of 1915 in this time of unparallelled stress and anxiety. Here two lines of thought suggest themselves, one connected with our foreign relations and the other with our domestic troubles and reforms.

One set of problems lies in the realm of international, and the other of constitutional, law; and both of them turn on the possibility of substituting peaceful methods for brute force in settling acute differences of opinion. There are two ways, and only two, of reconciling conflicting principles and interests. One is by the method of rational men; the other, of savages and wolves and tigers. The one proceeds by the devising

and enforcing of wise laws and the framing of constitutions; the other, by the arbitrament of war.

Take the international problem first. More than nineteen centuries have elapsed since the Prince of Peace was born into the world at Bethlehem. War and the horrors of war should surely be obsolete and impossible in this twentieth Christian century; and yet never has a more widespread, unremitting, or inhuman war been waged than is waged to-day. What hopes, then, remain for the priests of peace? Must they, with averted faces, renounce all hope of the long-expected time when wars shall cease? The events surrounding Magna Carta would seem to furnish them with a ray of hope, however dim; for, in 1215, the granting of the Charter was the beginning, not the end, of a bitter Civil War; and at that date the possibility of permanently superseding domestic strife by peaceful constitutional methods seemed as remote as the possibility of devising machinery to prevent recurrence of war among rival nations appears to-day. Yet, in 1215, in spite of the blackest of outlooks, the process had really commenced of substituting, in domestic troubles, the settlement by reason for the settlement by brute force.

A Constitution for England had already in 1215 begun to be evolved. Similarly, may it not be possible that in 1915, when everything looks its blackest for the friends of peace, we may not be far from the coming of the dawn? International law may yet achieve what seems so impossible to-day; just as constitutional law has achieved what seemed equally impossible in 1215.

The second problem or group of problems, for light on which we turn to the history of Magna Carta, affects the internal policy of Great Britain and the British Empire. The present generation of Englishmen, like the spendthrift heirs of an industrious father, show a tendency to underestimate the value of that priceless heritage of the British Constitution that has come to them without effort of their own, as a product of the labour and the forethought of the generations that have gone before. Why is it that constitutional privileges that are the envy of all civilized foreign nations, privileges that were esteemed alike by Pitt and Fox and Edmund Burke, by Blackstone, Hallam, Mill and Macaulay, by Wellington and Earl Grey, by Peel and Palmerston and Lord John Russell, by Gladstone, Disraeli, and John Bright, have come to be cheaply held as airy trifles to be taken for granted, or to be lightly bartered away for the rapid attainment of the moment's transient and loud-voiced needs?

Why was it that, even for years before the evil example set by Germany at the commencement of her war against the foundations of civilization, there appeared everywhere signs of a tendency at work to discredit the constitutional heritage to which so many generations of Britons have contributed; of a retrograde movement, away from the method of settling disputes by the discussion of what is just and right to the method of self-help by organized violence? Whatever the reason, the facts are undoubted. A spirit of lawlessness, discontent, and greed had (even before the fateful August of 1914) bred a quick impatience of every constitutional barrier that stood in the way of its own immediate gratification.

It had ceased to be remembered that even red-tape, whether of the moral or legal variety, is an excellent thing *in its own place*. This universal impatience with legal and traditional restraints, from which Great Britain can by no means claim to have been wholly free, was perhaps only part of a great wave of discontent with constitutional impediments, which culminated in the felon's act of Germany in repudiating the obligations of her plighted word and violating every accepted code of law and honour.

The time will come, however, when the tide will turn; when public opinion will recognize once more the merits of the slow but sure constitutional methods of settling disputes; when the British Constitution, readjusted and amended, perhaps, to meet the new destinies that lie ahead, will return into the sunshine of popular favour; when Magna Carta and other "scraps of paper" or of parchment will come to their own again.

The centre of world-interest will then swing back again from the work of the bayonet and the howitzer to the work of the pen. Then all eyes will centre once more on constitutional problems, of which three at least are likely to occupy the foreground of public attention: The framing of a new, perhaps federal, Constitution for the British Isles; the framing of a new Imperial Constitution to bind the Overseas Dominions more closely to the mother-land; the framing of some stepping-stone, at least, toward a scheme of government for Europe and the world, capable of substituting the decisions of justice and reason for the grim arbitrament of war.

For that new world, towards whose dawn we are peering through the darkness, yet with stout hope in our hearts, Magna Carta has grave lessons, which it cries aloud with no uncertain voice. The part that the Great Charter has played in achieving the enduring reforms of earlier centuries, is a sermon on the text of "slow but sure". It teaches the value of continuity in all matters of constitutional development. It shows that ground, to be permanently held against the encroachments of the enemy, must be slowly and painfully acquired and carefully entrenched yard by yard against the inevitable counter-attack to be openly delivered, or prepared more insidiously underground.

Magna Carta and its historical context proclaim to all idealists who are in haste for quick results, the danger of breaking with the past. Framers of new schemes of government, whether for the United Kingdom or the Empire, will find sure evidence of the strength given to national institutions by continuity, when they look back on the long, slow, steady growth of the English Constitution through the vicissitudes of the seven hundred years that separate the Conference at Runnymede from the present day. When the happy day has dawned on which Britons meet to celebrate, on bended knee, the restoration of peace to a tortured Europe, they will do well to return thanks also for the free land into which they and their sons were born:—

> A land of settled government,
> A land of just and old renown,
> Where freedom broadens slowly down,
> From precedent to precedent.

[Back to Table of Contents]

INNOCENT III AND THE GREAT CHARTER.

Professor G. B. Adams, Ph.D.

That John expected the Pope to release him from his obligation to the Charter upon some ground or other is, I think, reasonably certain. That the Pope honestly believed that he was acting with competent authority in doing so, is even more clear from the evidence. But no attempt has ever been made, so far as I am aware, to show by an analysis of the evidence upon what basis of legal right the Pope supposed he was resting his Bull of 24 August, 1215, or to subject his right to annul the Charter to a legal criticism. I can hope in this paper to do no more than to make a beginning in that direction.

To determine the legal basis of the Pope's action, one turns first of all to the Bull itself, but the answer which it gives is too indefinite to be satisfactory.1 One naturally expects to find the Pope's action based upon the vassal relation of England to the papacy. This relationship is indeed clearly mentioned in the Bull, but it is not emphasized. It is put forward as one fact among others explaining the Pope's interest in the case; but his interest in the fact that John was a crusader is more strongly insisted on.2 Nowhere is the feudal relationship asserted as the ground of right on which the Pope was acting, nor is there any attempt made to show that the Charter reduced the value of the fief or its ability to perform the service by which it was held, nor are these facts even asserted. In the formal phrases of annulling at the close of the Bull, it is the apostolic authority which is put forward, and there is no mention of the feudal relationship.1 So far as the language of the Bull is concerned, there is nothing in it to prevent our saying that, if the relationship had not existed, the Pope would have taken the same action.

If now we turn from the Bull to the other contemporary evidence, documentary and chronicle, which has come down to us, the information we gain is no more definite, but certain things bearing on the question stand out rather clearly.

I. The feudal dependency of England upon the papacy was recognized by all parties during the whole period, with the single exception of Philip II of France and his son in their debate with the Pope. They, however, do not deny the fact of the relationship, but the right of John to enter into it and its legality.2 John of course makes the matter entirely clear in his two Charters, recording his oath of fealty, of 15 May, and 3 October, 1213.3 He there calls England for the first time "patrimonium beati Petri" a phrase recurring again in connection with the Charter. In his letters in 1215 John also refers frequently and clearly to the relationship, as does also the Pope, and the phrase "patrimonium Petri" occurs several times. Too much emphasis has, I think, been placed upon the barons' recognition of the vassal relation in their letter to the Pope in February, 1215, for rhetorical purposes merely, but they certainly do recognize it, according to the statement of John's envoy.1

II. In certain cases John had acted, or seems at first sight to have acted, as the Pope's vassal:—

1. He sought a confirmation from the Pope of his grant of freedom of election to the churches of 15 January, 1215.2 That this is the act of a feudal vassal seeking a confirmation from his lord of a grant which would be invalid without it, is exceedingly doubtful. It probably would have been sought in any case; the prelates would naturally desire this sanction added to the King's grant. The confirmation is "auctoritate Apostolica confirmamus," and there is no reference in it to the feudal relationship nor to feudal rights. The language of all the clauses of confirmation and sanction follows closely the model which had long been in use in the papal chancery for similar confirmations issued in large numbers to monasteries and churches with reference to lands and rights by whomsoever given.1 It is not possible to cite this case as evidence of action upon feudal principles.

2. Confirmation was also sought from the Pope of the arrangement made with Berengaria in 1215 in regard to her dower rights. In this case the papal confirmation is lacking, though one was sent to Berengaria in answer to her request,2 and one was no doubt sent to John. We have, however, John's requests, two separate requests of even date, in regard to two distinct agreements.3 In these no reference is made directly or indirectly to the feudal position of the Pope. In the one which concerns the main agreement, there is no request for confirmation, but, in the language of the agreement, the Pope is asked "ut praesenti compositioni addat securitates quas viderit expedire et nos ratum habebimus quicquid inde statuerit". In the second the word "confirmat" is used but clearly not in a technical sense, and the meaning of the request is the same as in the first, not that the Pope will make legal something which is otherwise beyond the capacity of the contracting party, but that he will add further, unknown, sanctions to the agreement. This is quite in accordance with what would at any time be normal, considering the question between the parties and the Pope's earlier interest in the case. In a letter on the subject addressed to John in 1207,1 he had clearly stated the grounds of his right to act in the case, his special duty towards widows, and commanded ("mandamus") him to represent "in praesentia nostra" what he was going to do. This case is also clearly non-feudal.

3. In his letter of 29 May, 1215, John said that he had declared to the barons that his land was the patrimony of St. Peter, held of him and of the Roman Church and of the Pope, that he emphasized to them his obligations, and claimed his privileges as a crusader, and then appealed through the Earls of Pembroke and Warenne against the disturbers of the peace of the land.2 Roger of Wendover states that John's messengers to the Pope, presumably those whom he says the King sent soon after granting the Charter, in the account of events which they gave the Pope, mentioned an appeal by the King before the entry of the barons into London.1 In his Bull of 24 August, the Pope says that John had twice appealed to him. There is no further evidence for these statements, but there is no reason to doubt them. It should be noted that they give us no clear evidence of the ground on which the appeal was made.

4. Roger of Wendover in the account just referred to makes the King's envoys say that at some indefinite time before the granting of the Charter John publicly protested before the barons that, because the kingdom of England belonged to the Roman Church "ratione dominii," he could not and ought not to decree anything new without the consent of the Pope nor to change anything in the kingdom to his prejudice. This same statement is also made by the Pope in the Bull of 24 August.2 Here is clearly an appeal to feudal law. The Pope's attention was called to a principle upon which he might act against the Charter, and that principle was clearly in his mind when the Bull was drawn up. Nevertheless it was not made the basis of the Pope's action. In regard to the point of law, we may so far anticipate the later discussion as to say that in the first part of his statement John was quite wrong, and in his second more nearly right.

5. In the Bull of 24 August, the Pope says that after offering to the barons "secundum formam mandati nostri justitie plenitudinem exhibere," which they refused, the King "ad audientiam nostram appellans obtulit eis exhibere justitiam coram nobis, ad quos hujus cause juditium ratione dominii pertinebat."1 This is the first appeal mentioned by the Pope, and if the appeals have been correctly indicated in 3 above, it is the one made through the Earls of Pembroke and Warenne. In his letter 29 May, John, in mentioning this appeal, does not add these legal particulars, and the source of the Pope's information is not evident. Judging by his general practice, however, he was probably following English information from some source. It is also quite possible that John, in order to confuse the situation, may have made an appeal in some such terms. It is out of the question, however, that any practical result should follow from such an appeal, or that it should be legally defensible. It is theoretically possible that the Pope could create a lay court of peers for the trial of an appeal by John, but not actually possible. The King of Sicily was in the midst of his campaign for the throne of Germany. The King of Aragon was a minor. The Pope's royal vassals in Hungary and the Balkans could hardly be expected to appear in Rome for such a purpose. A lay court of the Pope's vassals in Rome and its neighbourhood could easily have been called together, but it would hardly have been a court of the peers of John. In relation to him they would be in the position of those who held in England "ut de honore" instead of "ut de corona". The legal difficulties are equally formidable. The language used by the Pope plainly implies a judicial proceeding. If the Pope states the facts correctly, and the evidence goes to show that he did, on the arrival in England of his letter of 29 March, John offered to the barons—"quod...in curia sua per pares eorum secundum legem et consuetudines regni suborta dissensio sopiretur". This, however, would not be a suit at law. With reference to the barons' complaints, the King would be in the position of a defendant, but as King he could not be sued. He states the situation with technical correctness in his letter of 29 May, which is probably the source of the Pope's information.1 He says: "et praeterea eis optulimus quod de omnibus petitionibus suis, per considerationem parium suorum justitiae plenitudinem eis exhiberemus". That is the barons' case could come before the curia regis only by way of petition, and the answer would be a matter of equity, that is an act of the curia as council, not as court, if we may

make a distinction perfectly valid in 1215, but which perhaps the men of that day could not have drawn. In such a case John could have no appeal to his suzerain on technical grounds. Every action of the council was technically his action, and no decision of the whole baronage against him would have any legal validity if he withheld the "Rechtsgebot". The only technical appeal possible would be by the barons. They, however, refused the King's offer and then John appealed, on what grounds we do not know. It could not have been on grounds of legal technicality, but the general appeal to his lord for protection was always open to him, though it could have been made in this case only by a quibble. Equally difficult is the Pope's statement that John offered to do the barons justice before him to whom "hujus cause juditium ratione dominii pertinebat". In the relation of England to the papacy, no right of judgment pertained to the Pope "ratione dominii" except in cases brought before him by way of appeal. It is necessary to say that the Pope is here using language which is apparently technical, but which cannot be justified upon such grounds, but only if it is regarded as used in the most general and non-technical sense.1 John's curia was as fully competent to judge finally every case between the King and the barons after as before he became the vassal of the Pope and without any reference to his overlord. His position was not that of an English vassal of the King, but that of one of the sovereign great barons of France, and, under the terms by which the fief was held, he could not even be called upon for court service as a matter of right.

III. Although John calls attention several times to his feudal relation to the Pope, and seems disposed to make what he can of it, he clearly does not trust to it as sufficient. On 4 March, 1215, he took the cross, thereby gaining the ecclesiastical protection and extensive privileges granted to the crusader, but also securing the interest of the Pope in regard to the plans which Innocent had most deeply at heart. In this new relationship John undoubtedly secured all that he needed, and the skilful use which he could make of it is shown in his letter of 29 May in which he puts the situation in such a light as to make clear to the Pope his inability to take any steps towards the crusade because of the trouble the barons were making.1 On this ground alone the Pope would undoubtedly have felt himself justified by existing law and practice in acting as he did. Not merely did the privileges granted crusaders relieve them from contracts which interfered with the carrying out of their vows,2 but the popes assumed the right to protect a crusade, and crusaders, from any interference with the undertaking. In his excommunication of the crusaders of the fourth crusade, for their attack on Zara, Innocent based his action wholly on ecclesiastical grounds, and did not allude to the fact that the King of Hungary, whose territory was thus violated, was his vassal whom he would be bound to protect in the possession of his fief.1

IV. According to Roger of Wendover's account of the embassy to the Pope soon after the granting of the Charter, Innocent was informed that the barons had demanded "quasdam leges et libertates iniquas quas dignitatem regiam nulli decuit confirmare". The same chronicler informs us that John, angry at the demands of the barons presented in their preliminary schedule, cried out "Et quare cum istis iniquis exactionibus barones non postulant regnum," and attributes a similar exclamation to Innocent when certain clauses of the Charter were shown him in writing.2 If these

statements refer to specific demands, it would be exceedingly interesting to know which ones they were. If regarded as intended to furnish a legal basis in feudal law for the Pope's action against the Charter, they are certainly much too strong for anything which it contains. The only clauses which demand extreme concessions from the King I have discussed elsewhere sufficiently, I think, to show that taken all together they would not justify such statements.3

If finally we turn to feudal law, as understood either in England or on the Continent, to inquire if, by its principles alone, the Pope would have been justified in annulling the Charter, the answer must be, I think, in the negative. The details of the law which would apply to this case differed in different countries, but the underlying principle was the same everywhere: without the lord's consent the vassal might do nothing with or in his fief which reduced its value to himself to such an extent as to endanger his ability to perform the service by which he held it.1 In some cases this principle was extended to mean that no reduction, however small, like the emancipation of a serf, could be made in the capital, or permanent, value of the fief, undoubtedly with reference to the possibility of escheat, as is stated in the English Statute of Mortmain. In applying this principle to the case of Innocent III and John, it must first of all be remembered that John did not hold England by indefinite feudal, or by military tenure, but by a clearly defined money payment only. That is England was a "feudum censuale," which is the term applied by Innocent to the exactly similar relation of Aragon to the papacy.1 In both John's Charters of 1213 making the concession to the Pope, and in the Pope's acceptance of 2 November, 1213, the money payment is distinctly said to be "pro omni servicio et consuetudine, quod pro ipsis facere deberemus," saving St. Peter's pence. This definition of the service is perfectly clear and normal, and it limits not merely John's obligations but also the Pope's rights. Under it the Pope would be in duty bound to protect the King in the possession of his fief against any outside attack or any internal revolution which would deprive him of it, but he could find no ground in feudal law on which he could object to any arrangement entered into by his vassal for its internal management which did not seriously affect his ability to pay the specified annual sum. If all the financial clauses of the Charter be put together and interpreted as they must have been understood in 1215, the absurdity of supposing that they would justify the annulling of the Charter by the overlord will be apparent. But the Pope and the King apparently understood the weakness of such a case, notwithstanding John's extreme statements and the Pope's seeming endorsement of them; neither of them trusted the feudal relationship as a sufficient ground of action against the Charter, and the fact accounts for John's assumption of the cross, and for the way in which the Pope passed over his feudal rights in the Bull of 24 August. It is upon his ecclesiastical rights that Innocent founded his action and upon them alone.

APPENDIX.

The Pope's letter of 18 June, 1215, to which reference is made above, is in the Public Record Office, Papal Bulls, Box 52, No. 2. The upper left-hand corner has been destroyed at some time in the past, so that the entire address and portions of diminishing length of the first ten lines have been lost, and a single word and portions of words, as indicated in the text, have been lost elsewhere in the letter. The lines

contain an average of 202 letter and word spaces. The address was probably general to the people of England. The letter seems to have a special reference to John's letter to the Pope of 29 May, and in the first portion it follows rather closely the Pope's letters of 19 March. The text was printed by Prynne in his "History of King John" (1670), p. 27, who supplied the address "Innocentius Episcopus nobilibus viris universitati Baronum Angliae hanc paginam inspecturis, salutem et Apostolicam benedictionem," (which can hardly be correct), and portions of the missing words, distinguishing his additions in two cases only. Modern historians have mostly not noticed its existence. Ramsay, "Angevin Empire," p. 486, n. 1, refers to Prynne's text (reference a misprint) and says the letter "does not read quite like one of Innocent's utterances". Gasquet, "Henry Third and the Church," pp. 13–15, gives a reference to the original, says it was "addressed to Langton and the other English bishops," which it certainly was not, and gives an otherwise inaccurate abstract of its contents. There is no reference to it in Potthast. As the letter is highly characteristic of the method in which the papal letters were composed during this conflict, and may be called in some respects a first draft of the Bull of 24 August, it seems worth while to print it in a new and more accessible edition. A comparison of the text with that of the other letters, papal and royal, of the crisis, beginning with that to Eustacede Vesci of 5 November, 1214 (Rymer, i. 126), will show the characteristic borrowing of phrases of which I have spoken. I have referred in the notes by date to some of the more important or interesting cases.

It will be noticed that in this letter the Pope says that he has given directions to the archbishop and his suffragans to excommunicate the barons unless within eight days they come to an agreement with the King according to the form which he had earlier recommended to their messengers. The only papal letter which we have corresponding to this statement is the Bull "Miramur plurimum" preserved without date by Roger of Wendover (iii. 336). The dating of this Bull is admittedly difficult. Its place among the events of Roger of Wendover's narrative can give us no clue. In Walter of Coventry (ii. 223), a Bull of similar purport is said to have been shown to the bishops at a meeting at Oxford on 16 August. It is dated by Potthast (No. 4992) end of August, and most modern historians have accepted Walter of Coventry's date as that at which it was presented. Sir James Ramsay ("Angevin Empire," p. 478) concludes against August in favour of 16 July. The most serious objection to considering the Bull "Miramur plurimum" to be the one referred to in the letter of 18 June is the definite statement that the barons were to be allowed an interval of eight days in which to come to an agreement with the King. That statement is not in the Bull "Miramur plurimum". It may have been contained in a supplementary letter, or have been committed to the messengers to be made known orally, as not quite consonant with the dignity of a formal papal command. It should be noticed that the Bull shows no knowledge of the Charter. I am inclined to believe that it should be dated 18 June, and the meeting at which it was shown the bishops 16 July, though I am not prepared to assert this definitely.

TEXT OF THE POPE'S LETTER OF 18 JUNE.

...partibus Anglie nuper auribus nostris...odo Regni Anglie; sed etiam aliorum.....quasdam inter eos et Carissimum.....opus esset cum humilitate ac

devotione repetere1 ...super hoc iidem Barones suos ad nos nuntios destinassent;2 et nos Ue...

...dedissemus litteris in preceptis. ut conspirationes. et coniurationes3 presumptas. a tempore suborte discordie inter Regnum et sacerdotium, apostolica denu.....es; ne talia decetero temptarentur, iniungerent baronibus antedictis; ut per devotionis et humilitatis ind[i]cia tam animum Regis placare.4 quam recon.....es, quod ab eo ducerent postulandum; conseruando sibi regalem honorem et5 exhibendo seruitia debita.6 quibus ipse rex non debebat absque iudicio spoliari;7 ac insuper...prefatam in remissione sibi peccaminum iniungendo. quatinus benigne pertractans nobiles antedictos, iustas petitiones eorum clementer admitteret8 plena eis in uniendo. morando. et recedendo secu.....essa pariter atque data. Ita quod si forte non posset inter eos concordia prouenire; in curia sua per pares eorum9 secundum Regni consuetudines atque leges mota deberet dissensio terminari; Barones ipsi nostro non expec10 tato responso, postquam idem Rex signum crucis assumpsit in subsidium terre sancte; contempta iustitia quam ipse Rex superhabundanter offerebat eisdem;1 contra dominum suum arma mouere temeritate nefaria presumpserunt. non timentes taliter crusis negotium impedire; ac regni periculum procurare. cum pecuniam quam pro liberatione terre sancte deberet expendere;1 in destructionem etiam terre sue profundere compellatur. Quodque nefandum est et absurdum. cum ipse Rex quasi peruersus deum et ecclesiam offendebat; illi assistebant eidem. Cum autem conuersus deo et ecclesie satisfecit; ipsum impugnare presumunt.2 sicque uidetur quod conspirationem inhierint detestandam; ut eum taliter de Regno possint eicere.3 hominio et fidelitate sibi prestitis penitus uiolatis. quod quam crudele sit actu. et horrendum auditu; cum perniciosi exempli materia sit et causa nostris temporibus inaudita; manifeste cognoscit. quicumque iudicio utitur rationis. unde ualde dolendum existit. cum hoc in iniuriam summi dei. ecclesie Romane ac nostrum contemptum. Regis et Regni obprobrium et periculum. et terre sancte ad cuius subsidium se deuouerat Rex prefatus, nimium detrimentum redundat. Cum igitur debeamus et libenter uelimus pacem Regni Anglie procurare. ipsius turbationes4 propellere, ac dicti Regis qui uasallus noster existit conseruare iustitias et iniurias propulsare. maxime5 cum idem propter caracterem crusis assumptum. specialiter sub nostra protectione consistat; prefatis Archiepiscopo et Suffraganis eius in obedientie uirtute districte[5] dedimus in preceptis. quatinus nisi prefati Barones infra octo dies6 post susceptionem litterarum nostrarum, ab eis uel aliquo ipsorum diligenter ammoniti. receperint et seruauerint formam descriptam superius a [nobis] nuntiis eorum presentibus cum multa deliberatione prouisam; iidem omni cauillatione post-posita;[1] eos et fautores ipsorum sublato cuiuslibet contradictionis et appellationis obstaculo; excommunicationis mucrone percellant et terras illorum [ecclesi] astico subiciant interdicto, facientes utramque sententiam per totam angliam singulis diebus dominicis et festiuis sollempniter publicari. Ne igitur propter quosdam peruersos uniuersitatis sinceritas in Anglia corrumpatur. que hactenus ab infidelitatis contagio fuit prorsus immunis. Uniuersitati uestri per apostolica scripta precipiendo mandamus. et in remissionem iniungimus peccatorum. quatinus prefato Regi aduersus peruersores huiusmodi oportunum impendatis auxilium et fauorem. ita quod in confusionem ipsius et aliorum Regnorum, non possit tanta nequitia preualere, sed tempestate sedata; Regnum ipsum optata tran-quillitate letetur. Scientes procerto. quod si Rex ipse remissus esset aut tepidus in hac parte, nos Regnum Anglie non pateremur ad

tantam ignominiam et uilitatem deduci, cum sciamus per dei gratiam et possumus talium insolentiam castigare. Dat. Terentin'. xiiii Kal Iulii. Pontificatus nostri Anno Octauodicimo.

An endorsement in a later, but thirteenth-century, hand, possibly not much later than the original, reads: Innoc' de turbacione orta inter Regem I. et barones Anglie verbum ultimum competens est. Examinatur.

[Back to Table of Contents]

"BARONS" AND "KNIGHTS" IN THE GREAT CHARTER.

J. H. Round, LL.D.

The passage in the Great Charter on which I propose to comment is contained in its second "chapter," and is here italicized.

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

If we view these provisions in isolation and endeavour to make the text here its own interpreter, we observe (1) that those to whom they apply are the tenants-in-chief *by knight service;* (2) that these are divided into three categories, (*a*) earls, barons, and "others"; (*b*) earl, baron, and knight; (3) that the holdings recognized are only two, viz. the "barony" and the knight's fee. It is important to observe that in this chapter no distinction is made between "greater" and "lesser" barons.

The difficulty presented by these provisions is that no one has been able to give a satisfactory explanation of the difference between the baron and the knight or between the two holdings here specified, when their holders were alike tenants -in-chief by knight service. The barons' returns of their knights ("Cartae baronum") in 1166 imply that all such tenants-in-chief stood on the same footing and that the "milites" were not among them, but were the under-tenants whom they had enfeoffed upon their lands. The above difficulty was already felt in the seventeenth century, when Selden considered that the holdings of tenants-in-chief were originally alike in status, but were subsequently differentiated, some being classed as "baronies" and others as "knight's fees".1 Madox, on the other hand, boldly assumed that the difference in status of the two holdings went back to the Norman Conquest, that "William I enfeoffed his Barons of their Baronies, or his Knights of their Knights' Fees".2 While I do not presume to hope that I shall wholly solve a difficulty by which historians and antiquaries have been so long baffled, I shall endeavour to elucidate the problem to the best of my ability and to clear away some of the confusion by which it is at present surrounded. For it affects an important development in our constitutional history.

That problem is the status and fate of those lesser tenants-in-chief who ceased to attend the Great Council. Were these lesser barons known as "Barones minores" or as "milites"? And, if the latter, is it possible to trace any connection between these "milites" and the representative "knights" of the shire?

There has been, if I may venture to say so, on the part of the commentators on the Charter, too much glossing and too much assumption. When we examine the text itself, we find (1) that in the *second* chapter—dealing with reliefs—the two classes below the earls are the "baron" and the "knight"; (2) that in the *fourteenth* chapter—dealing with summons to the Council—the two classes below the earls are the "majores barones" and "all those (others) who hold of us in chief". It has been assumed, but not proved, that, in both chapters and for both purposes, the line of division is the same, and it follows, as a consequence of this assumption, that

the "barones" of one clause of the Great Charter seem to be the "barones majores" of another.... It seems that the "baro" who has a "baronia" in the one clause is the "baro major" who is to have a special summons in the other clause.1

Nor is this the only consequence which follows from that assumption. For it involves, we find, the still more improbable equation of the knight ("miles"), who held a knight's fee, in chapter 2 with the alleged "barones minores" of chapter 14.2 I use the term "alleged" because, in spite of the freedom with which the phrase is used by the commentators on the Charter,3 it is not found in that chapter or, indeed, anywhere else in the text of the document. This is no mere verbal quibble: the phrase "barones majores" does, indeed, imply that there were lesser barons, but it certainly does not involve the gloss that "all those (others) who hold of us in chief" were "barones minores"; they might—and, judging from chapter 2 they would—comprise at least the "knights" as well as the lesser barons, in which case these classes were distinct and the alleged equation disappears.

Let me endeavour to make the point absolutely clear. The "tenants-in-chief by knight service" include, according to chapter 2, (*a*) barons, (*b*) knights. Chapter 14 introduces a further distinction by speaking of "majores barones". This, no doubt, implies the existence of "barones minores," but it does not affect the "knights," who would remain, as before, distinct from all "barons," whether "greater" or "less". Therefore "miles" cannot be used as the equation of "baro minor".

Putting the point differently, the line in chapter 2 (which is concerned with reliefs) is so drawn as to include the minor barons with greater ones; but in chapter 14 (which is concerned with separate summons) it is drawn athwart the baronage, and, by excluding the lesser barons, creates (so far as summons is concerned) a fresh class. Again, the phrase "all (others) who hold of us in chief" (in chapter 14) may include, in addition to the lesser barons, not merely the knights, but others, such as tenants by serjeanty. Stubbs, indeed, admits in one place,1 when speaking of "the greater and lesser barons," that "the entire body of tenants-in-chief included besides these (i.e. the greater barons) the minor barons, the knightly body, and the socage tenants of the crown,"2 all of whom, he deems, were entitled to be summoned by the general summons, as provided in chapter 14. It is true that he writes, in another place, of the phrase "Barones secundae dignitatis" (who are admitted to be identical with the "barones minores"), that "Hallam rightly understands this to refer to the knightly tenants-in-chief,"1 which virtually accepts the wrong equation; but this only illustrates the need of greater clearness in definition.

No one, I think, will suspect me of imperfect appreciation where our great historian is concerned, but his work occasionally betrays a certain vagueness of conception, a lack of clearness in definition, which perhaps is sometimes met with in the work of English scholars.2 For instance, we first find him treating of "the great council" in Norman times and recognizing the barons (greater and less) and the "knights" as distinct classes among its members.3 But when he turns to the composition of this same great council "under Henry and his sons," he appears to lose sight of the essential distinction between these classes. This, I think, was due to the influence upon him of Gneist, to whom we may clearly trace the fundamental error of confusing the line drawn by the Charter (cap. 2) between the "baron" and the "knight" with that which it draws (cap. 14) between the "greater baron" and the tenants-in-chief below them.

GNEIST.	STUBBS.
"From the first, the distinction between 'barones majores' and 'minores' was known in the Exchequer. Reliefs, wardships, and marriages of the great feudatories formed the principal items in the financial administration. Whilst those of the single knight's fee were fixed at a hundred shillings, those of the greater lordships were not until later times fixed at a hundred marks."[1]	"Gneist points out that...in the Exchequer the difference of relief between a hundred shillings for the knight and a hundred marks for the baron, in the court and in the shiremoot, the interval between the two classes must have made itself apparent. 'Dialogus de Scacc.' ii. 10."[2]

[1] "History of the English Constitution," i. 290.
[2] Op. cit. i. 366, note.

By "the interval between the two classes," Stubbs here obviously means "the distinction of 'majores' and 'minores barones'". Yet "Dialogus de Scacc." ii. 10, so far from making that distinction, actually denies that there was any, so far as relief was concerned.13 Here again the identity of "the knight" with the minor baron is wrongly assumed. In the "History of English Law,"14 Pollock and Maitland, it will be found, have fallen victims to the same confusion; they write vaguely of "the greater men" and the "lesser men," and evidently treat as identical the two lines of division, which we have to keep distinct.

Another error traceable to Gneist is the connection of the distinction between greater and lesser barons with two passages in Domesday.

GNEIST.	STUBBS.
"At the time of Domesday Book the maxim held good, that only vassals ('taini') who possess six 'maneria' or less, should pay 'relevium' to the Vicecomes. Those possessing more than six 'maneria' pay immediately into the Exchequer (at all events this principle is expressly mentioned in two counties). Dom. 280*b*, 298*b*."[1]	"It may indeed be fairly conjectured that the landowners in Domesday who paid their relief to the sheriff, those who held six manors or less, and those who paid their relief to the King, stood in the same relation to one another"[2] (as the greater and lesser barons).

[1] "History of the English Constitution," i. 143–4.

[2] "Constitutional History," i. 366, note.

Prof. Adams similarly refers to the antiquity of the distinction drawn in chapter 14 of the Charter: "See the difference in the payment of relief in Domesday, i. 280 (Vinogradoff, 'Society in the Eleventh Century,' p. 308, note 2)".3 Now the two passages in Domesday to which Gneist refers relate only to Yorkshire and to Derbyshire and Notts, and I have explained in "Feudal England" (pp. 72–3) that the practice described is part of that duodecimal system which is peculiar to the "Danish" district in the northern portion of England. It would not, consequently, be met with outside that district, that is to say, in the larger portion of the country. It could, therefore, have nothing to do with the later distinction between "greater" and "lesser" barons.

This point is of some importance if—improbable though it may seem—we have here the origin of Stubbs' statement that the lesser tenants-in-chief paid their reliefs to the sheriff, but the greater ones direct to the Crown.4 This statement is repeated without question by Maitland,5 by Pollock and Maitland,6 and by Prof. Medley.7 It is, however, at variance with the evidence of the "Pipe Rolls," which proves that holders of a single fee or even less are found paying their reliefs as directly to the Crown as a great baron.

Hitherto I have been endeavouring to prove that the line drawn in the second chapter between "barons" and "knights" by the Charter has nothing to do with that which it draws in its fourteenth chapter, between the "greater barons" and the rest of the tenants-in-chief. A different and far more difficult question is that of the identity of the "knights," mentioned in the second chapter.1 For the wording of that chapter, as I contend, is sufficient to prove that they cannot possibly have been, as is so loosely assumed, the "minor barons". How then did they differ in status from the "barons," from whom the amount of their relief distinguishes them so sharply?

It is usually endeavoured to interpret this chapter of the Charter by the help of (*a*) Glanville's book, (*b*) the "Dialogus de Scaccario," both of them written in the latter part of the reign of Henry II.2 Now what Glanville says is this:—

Cum autem heres masculus et notus heres etatem habens relinquatur, in sua hereditate se tenebit ut supradictum est etiam invito domino, dum tamen domino suo sicut tenetur suum offerat homagium coram probis hominibus et suum rationabile releuium

alicujus iuxta consuetudinem regni, de feodo unius militis centum solidos; de socagio vero quantum valet census illius socagii per unum annum; de Baroniis vero nihil certum statutum est, quia iuxta voluntatem et misericordiam domini Regis solent Baronie capitales de releviis suis domino Regi satisfacere. Idem est de serjanteriis (ix. c. 4).

The obvious difficulty of this passage is that Glanville is here speaking of reliefs due to a lord ("dominus") and yet includes among them the reliefs due from "baronies" to the King. Mr. McKechnie claims that "Glanville's words are ambiguous," and there seems to be, among the latest commentators, some difference of opinion as to whether they cover the case of a knight's fee held in chief "*ut de corona*". The authors of the "History of English Law"[1] are alleged to hold that they do, though this is by no means clear. On the other hand, the learned editors of the "Dialogus de Scaccario" consider that the holder of such a fee did not enjoy the privilege of a fixed relief,[2] and in this they are followed by Mr. McKechnie[3] and by Prof. Adams[4] who considers him to be right. The view of these writers is based on the "Dialogus," which, undoubtedly, limits the privilege to those knights' fees which were held "ut de honore".

Si vero decesserit quis tenens tunc de rege feodum militis, non quidem ratione corone regie, set potius ratione baronie cuiuslibet, que quouis casu in manum regis delapsa est, sicut est episcopatus vacante sede, heres iam defuncti, si adultus est, pro feodo militis c. solidos numerabit, pro duobus x. libras, et ita deinceps, iuxta numerum militum, quos domino debuerat antequam ad fiscum deuoluta foret hereditas. (II, x. E).	Si vero de eschaeta fuerit, que in manu regis, deficiente herede, vel aliter, inciderit, pro feodo militis unius hoc tantum regi, nomine relevii, soluet, quod esset suo domino soluturus, hoc est centum solidos (II, xxiv.).

These statements are exceedingly precise, and the editors are justified in inferring from them "that the tenant of a single knight's fee would be a 'Baro minor,' since the certainty of relief depends not on the extent of the estate held, but on its being held of a mesne lord".[1] On the other hand, this is at direct variance with the second chapter of the Great Charter, which draws its line of division between "barons" and "knights," unless we restrict the latter to those who held "ut de honore". This, we shall see, appears to be opposed to another chapter of the Charter as well as to the obvious meaning of chapter 2 itself. Unfortunately, Mr. McKechnie, seeking to produce record evidence that only the "tenants of mesne lords...had their reliefs fixed," states, by a singular error, that

Madox (i. 315–16) cites from "Pipe Rolls" large sums exacted by the Crown: in one case £300 was paid for six fees—or ten times what a mesne lord could have exacted ("Pipe Roll," 24 Hen. II).[2]

The reference is obviously to the entry which Madox cites correctly: "Tedbaldus de Valeines debet xxx l. (*sic*) de relevio vj militum ('Mag. Rot.' 24 Hen. 11)."[3] The amount, therefore, was not £300, but £30, the very amount that "a mesne lord could have exacted".

The knight's fees to which the "Dialogus" refers in the above parallel extracts cannot well be those mentioned in the second chapter of the Charter, because their case is specially dealt with in its forty-third chapter. Moreover, if that second chapter is read with care, it will be seen that the knight's fee there spoken of had been held, not of a mesne lord, but directly of the Crown, like a barony. Otherwise it would be tempting to identify the two, as it would dispose of the difficulty raised by the passage in chapter 2. Mr. McKechnie, however, does identify the two, but admits that, on this hypothesis, "the need for this reference (in cap. 43) to relief is not, at first sight, obvious".1 It seems to be clear, at least, that the distinctive privilege of paying only £5 relief on the knight's fee extended to three classes of fees: (1) those specially mentioned in chapter 43, which were held of an escheated honour, such as that of Wallingford, etc.; (2) those which were held of a fief temporarily in the hands of the Crown, owing to wardship or other cause; (3) those held of an ecclesiastical fief which was in the hands of the Crown during a vacancy.2 For all three classes were affected by the same principle, viz. that the King stood in the shoes of the former holders of the fief and could therefore, only exact from the under-tenants the same dues as their former lords exacted. Speaking of this forty-third chapter, Mr. McKechnie admits that, though it only mentions escheats, "the same rule applied to subtenants of baronies in wardship (which was analogous to temporary escheat)" or of ecclesiastical fiefs during a vacancy.3

It is, however, conceivable that, as Mr. McKechnie suggests, John wanted to draw a distinction by which he could treat knights' fees held "de eschaeta" as held of him "ut de corona" and, therefore, liable, like baronies, to an arbitrary relief. But, at least under Henry II, the "Pipe Rolls" do not show any trace of such a claim and confirm the evidence of the "Dialogus". Nor has any evidence, I believe, yet been produced in support of the suggestion.

With almost monotonous regularity the "Pipe Rolls" record "reliefs" on fees held "de excaeta" at the rate of £5 on the fee. For instance, in 1172, Michael de Preston pays £22 10s. relief on 4½ knights' fees "de escaetis Regis".1 Similarly, on a lay fief, Nigel, son of the chamberlain, pays £57 10s. on 11½ fees held of the "Honour" of Richmond,2 then in the King's hands, in 1175,3 while, on an ecclesiastical fief, Hamo Fitz William pays £18 15s. on 3¾ fees and Robert Brutun £2 10s. on half a fee, held in each case of the See of Canterbury, in 1171.4 It is needless to multiply instances of the rule, but exceptions to the rule are worth noting, though they are not easy to find. And here it may be observed that the evidence of the "Pipe Rolls" is by no means so easy to use as might be imagined. Extreme care in identifying the fees on which relief is paid is constantly required, as there is often nothing to show whether they are held of a fief or an escheated "Honour," or directly of the King "ut de corona". For instance, in 1181, two men are charged 30 marcs relief for two knight's fees which had been Robert of Tilbury's.5 There is nothing to identify these fees or to explain why the relief was £20, instead of £10. But they can hardly fail to be the two fees which a later Robert of Tilbury held of the "Honour" of Rayleigh (forfeited by Henry of Essex) in West Tilbury and Childerditch (or Dengey), Essex.6

Again, Gilbert son of Gerbert "de Archis," who pays 50 marcs "pro fine terre patris sui" in 11827 eludes us, though the mention of a "fine" instead of a "relief" leads one to look for his father and himself among the holders of "baronies".

Gilbert, however, is found only as holding two knights' fees of the Honour of Tickhill in 1203.1 His name is not found in a feodary of the Honour later in the reign, but we do there find "Malveisin de Grava" as the holder of two fees.2 This entry is explained by one on the "Pipe Roll" of 1209 which shows us Malveisin de Hercy and William Ruffus charged 50 marcs and two palfreys for the succession of their wives to the holding of this Gilbert "de Archis," their father. This holding was in Grove (*Grava*), Notts, which thus descended to the Hercys of Grove.3 Now this case might possibly be claimed as supporting the view that John was trying to extort baronial reliefs from fees held "de eschaeta"; but it has been shown that the holder of these fees had been similarly charged 50 marcs in 1182, and, moreover, the "Pipe Rolls" under John show him regularly paying scutage, not as the holder of a "barony," but only as a tenant of the Honour of Tickhill.

Mr. McKechnie's actual comment on the "escheat" portion of the Charter (chapter 43) is this:—

This chapter reaffirms a distinction recognized by Henry II, but ignored by John...John ignored this distinction, extending to tenants "ut de escaeta" the more stringent rules applicable to tenants "ut de corona". Magna Carta reaffirmed the distinction.4

It appears to me that this conclusion is based on the assumption that, because the Charter limits the rights of the Crown, it was John who had attempted to extend these rights. My own position is that the "Pipe Rolls" show the Crown's right to feudal incidents to be already extended under Henry II.

We have now seen that chapter 2 of the Great Charter, from which this paper started, cannot apply to any of the three categories of "knights" dealt with by the "Dialogus," that is to say, not to those who held of a lay or ecclesiastical fief temporarily in the King's hands, because the text forbids it, or to those who held of an escheated Honour, because, in addition to straining the text, such knights are specially dealt with in chapter 43, which is concerned with escheats.1 Who then are the "knights" that in chapter 2 are distinguished so sharply from "barons" by the "relief" on their succession?

The ultimate and indisputable evidence on which the answer depends is found in the "Pipe Rolls" themselves, but that evidence has to be combined with that of the various returns of knights' fees, especially the "Cartae baronum" of 1166. It may, however, be said at once that the "Pipe Rolls" do show a very marked distinction between the arbitrary sums charged as relief on baronies, and those of £5 or some multiple thereof charged on the knights' fees. Normally—though not always—the former are further distinguished by the word "finis," which is rightly used, as implying a composition. The difficulty about the latter is that we have to make sure that the "fees" are held, as strictly as the "baronies," "ut de corona".2

Although we are not here concerned with the reliefs on serjeanties, it is advisable to note that those on the "Pipe Rolls" confirm Glanville's statement as to their arbitrary character. For instance, in 1163, the charge of 100 marcs on Ralf Fitz Wigein "pro relevio terre sue";1 was on a serjeanty of some value,2 though the fact is not stated. So also was that of 75 marcs (£50), charged to Robert Fitz Hugh, in 1186, "pro fine terre sue".3 This "terra" was at Upton, granted by Henry II. The tenure of his successors, the Chanceus family, proves that it was held by the service of a serjeant for forty days in war, which must not be confused with knight service.

That "baronies" were liable to arbitrary relief is admitted on all hands. But in order to ascertain the sums exacted under Henry II, it is not enough to copy the extracts made by Madox; one has to examine the "Pipe Rolls" for oneself. And even then evidence may be missed; for the phrase "finis terre" is only indexed in some of the printed volumes of "Pipe Rolls," though "relevium" is indexed regularly.4 It is for the former that we have, in the case of baronies, to look. It would be necessary, therefore, to read through the whole of the volumes in order to make one's list exhaustive. The table on the opposite page, however, will illustrate the nature of the sums paid under Henry II.

The first point to strike one here is that most of these sums are either £200 or £100, 200 marcs or 100 marcs. This is an unexpected result, the more so as no relation can be traced between the size of the

Year.	Baron.	Fees.	£	Marcs
1156	Robert de Helion . . .	10(?)	—	100
1158	William Paynel	15(?)	—	100
1165	Roger d'Oilli	—	—	200
1166	Helias Giffard	—	100	—
1166	Alan de Furneaux . . .	—	—	100
1166	Walter "Brito" . . .	15	200	—
1167	Humfrey de Bohun . . .	—	200	—
1167	Richard de Siffrewast[1] . .	—	—	100
1168	John d'Aiencurt . . .	40	—	100
1168	William de "Scalariis" . .	15(?)	100	—
1171	William Fossard . . .	33½	—	80
1176	John the Constable (of Chester)[2]	—	—	400
1176	William de Montacute . .	10(?)	—	100
1177	William Chendeduit . . .	—	—	200
1178	Robert de Lacy . . .	—	—	1000
1180	Hasculf de Tani . . .	7½	100	—
1181	Hugh de Gournay . . .	—	100	—
1182	Nicholas de Meriet . . .	2½	20	—
1183	Guy de Rochford . . .	—	—	40
1186	Hamo Fitz Meinfelin . .	15	—	200
1186	Barony of Eaton Hastings .	5	—	200
1186	Hugh de Say	15(?)	200	—
1186	Richard Fitz John . . .	—	—	200

[1] For Chesham.
[2] For his mother's land.

barony and the relief exacted. Moreover, of these four sums, only two exceed the maximum fixed by the Charter, while one is actually below it. This emphasizes the contrast between the arbitrary "fine" from a barony and the fixed sum of 100 shillings due from a knight's fee. When we confine our attention to the figures for a single county, the contrast, we shall find, becomes striking.

The evidence for Northumberland is of peculiar value for more reasons than one. In the first place, the proportion of single fees held in chief is exceptionally large, and, in the second, we have copious information on the constituents of the holdings together with notable evidence on the use of the word "barony".3 Let us first take a typical five-knight barony, that of the Bertrams of Mitford.1 In 1166 Roger Bertram certified that it was held by the service of five knights.2 In 1177 his successor, William Bertram, was called upon to pay "pro fine terre patris sui" no less than £200.3 In 1212 another Roger Bertram is returned as holding the "barony" by the service of five knights.4 Here then is a clear case of an undoubted "barony"—by no means a large one, as baronies went—charged exactly twice the amount prescribed in the Great Charter as the rightful and ancient ("antiquum") relief. We have thus a striking illustration of the fact that, as I have insisted,5 the feudal extortions remedied by the

Charter were not, as is so often implied,6 introduced by John, but are found in full existence under Henry 11. Again, we observe, that the sum exacted is rightly styled "finis terre," not "relevium," for it represented, as the "Dialogus" and Glanvill's book explain, a special commutation of the King's right to exact, in the case of a "barony," an arbitrary sum.

From this Northumberland "barony" we will pass to a smaller one, the story of which is more complicated and has to be reconstructed. In 1163 William de Greinville1 was holding what we learn from evidence of three years later was a "barony" held by the service of three knights.2 Next year it had passed to two co-heiresses, of whom Ralf de Gaugy married the elder, and Hugh de Ellintone (i.e. Ellington) the younger. This we learn from the same evidence, namely from their respective returns in 1166.3 The "Pipe Roll" of 1164 shows each of them paying a sum "pro relevio terre sue".4 Ralf pays 40 marcs and Hugh 20, so that the whole "relief" exacted was 60 marcs (£40) though the service due from the "barony" was only that of three knights. Hugh, however, admitted that his tenure was baronial,5 and the entire holding appears, in 1212, as a "baronia," in the hands of Ralf de Gaugi.6 This exposed it to an arbitrary "relief" (as the payment is in this case termed) in 1164, namely £40, in lieu of the £15 which would have been payable if the holding had not been a "barony," but three knights' fees.

Let us now compare with these "baronies" three or four Northumberland holdings, the returns for which were similarly made among the "Cartae baronum" in 1166. For these were similarly held in chief, though each of them owed the service of one knight at most.

William, son of Siward, who made return in 1166 that he held a knight's fee by the service of one knight1 is proved by his tenure of Gosforth to be a Surtees,2 and, therefore, identical with the William "de Tesa" (or "Tesia") of 1161–1162.3 In 1174 his successor, Randulf "de Super Teise," was charged 100 shillings (£5) "de relevio suo".4 This was the fixed relief on a knight's fee.5 The next case is that of Ernulf de Morewic, who returned his holding, in 1166, as a knight's fee,6 "of the old feoffment". In 1177 his successor, Hugh de Morewic, was charged 100 shillings (£5) for his "relief".7 This Hugh appears as one of Henry's ministerial officers towards the end of the reign, and it is interesting to note that so early as 1161 he has a discharge "precepto Cancellarii" of 2 marcs charged to his father;8 which suggests that he was already in official employment. The third case is that of Robert Caro, who returned himself, in 1166, as holding five carucates as one knight's fee.9 In 1179 Peter "Carhou" accounted for 100 shillings for his relief.10 Even more notable is the case of Godfrey Baiard, who returned his holding in 1166 as one-third of a fee,1 and who had been charged the year before 33s. 4d.;2 that is, just a third of the regulation £5.

The importance of this evidence is that in each of three cases where the holding was one fee or less, and where the holding was not part of an escheated honour, relief was uniformly charged at the rate of £5 a fee. On the other hand, a three fee "barony" was charged, we have seen, £40, and a five fee "barony" £200. Moreover, in 1168 an entry on the "Pipe Roll" runs: "Idem vicecomes redd. comp. de feodis *Baronum et militum* qui de rege tenent in capite in Ballia sua qui Cartas de Tenemento suo Regi non

miserunt".3 The sheriff was here dealing, as I was above, not with holdings on escheated "honours," but with those which were held "in capite *ut de corona*". If we now pass to the other end of England, we find in Devon Geoffrey del Estre paying £5 in 1183 as the relief on a knight's fee.4 There is nothing by which he can be identified in the "Cartæ" of 1166, but an analysis of the scutage returns shows that the "Robertus filius Galfridi" of 1166 ("Red Book" p. 258) must have been Robert, son of Geoffrey de L'Estre, and father of the Geoffrey who succeeded in 1183. Again, turning from Devon to Norfolk, we find William de "Colecherche" returning his small tenement as held by the service of "half a knight".5 His son Richard, on succeeding him, paid for his "relief" 50 shillings,1 the sum due on half a fee. In these two cases we can clearly identify the holdings among those held "in capite" in 1166.

It has, at least, now been clearly established that those who made their returns in 1166, although then treated, apparently, as being all on the same footing, were not treated alike in the matter of their reliefs. Those who held, in the cases examined, one fee or less, were only called upon to pay at the rate of £5 on the knight's fee.

Are we then to infer that the distinction between the two reliefs was that, if a man held a single fee or less, he paid £5 (or less *pro rata*), while if he held more, he was liable to a relief of £100 as holding "by barony"? It would seem that such a proposition need only be stated to be rejected as absurd. There is, however, a remarkable case discussed in the "Reports on the Dignity of a Peer," and known to us from a petition to Parliament in 1354 (28 Edw. III), which certainly seems to show that, at this date, that proposition was the law.

In the Parliament of the 28th of the King, Robert de la Mare suggested, that after the Death of Peter de la Mare, his father, he had attorned to the King, and done Homage, for a Moiety of the Manor of Lavynton, for which Moiety he came into the Exchequer, and acknowledged his Tenure, that he held the Moiety of the said Manor by the Service of One Knight's Fee, and for that fee had paid One hundred Shillings for his Relief; nevertheless, for that in the Red Book of the Exchequer it was found, that Henry the Second, to marry his Daughter to the Duke of Saxony, demanded of every Knight of his Kingdom a Mark in Aid of that Marriage, and commanded that every Prelate and Baron should certify to the said King in Writing how many Knights he held of the King in Chief, among which Prelates and Barons one Peter de Mara had certified that he held Lavynton by Two Knights' Fees, the Barons of the Exchequer insisted that Peter de Mara was Ancestor of the Petitioner, and that the Petitioner held by Barony, and for Service of Barony they charged him of his said Relief, where he held only the Moiety of the Manor by the Service of One Knight's Fee only; and he prayed a Writ to the said Treasurer and Barons, that if they could not find, by Inquest or otherwise, that the said entire Manor was held by greater Service than Two Fees, and that there is another Tenant of the other Moiety of the Manor, that then they would accept his Relief for One Fee only, notwithstanding the things found in the Red Book mentioned.

A writ was accordingly ordered to the Treasurer and Barons of the Exchequer, that if they should find, by Record, or other Remembrances of the Exchequer, or by Inquest, or in any other proper Manner, that the Petitioner held the Moiety of the Manor by the

Service of One Knight's Fee, as supposed by the Petition, and not by Barony, that then, having received from him "solonc l'aferrant" of One Fee for his Relief, they should discharge him of the Remainder, notwithstanding the Name of the said Peter was found in the Red Book amongst the Names of the Barons.

It seems from this Entry, that in the Reign of Edward the Third, holding by Barony, and holding by Knights' Service only, were so far considered as distinct, that if a Man held by the Service of a Knight's Fee, he was subject only to a Relief of One hundred Shillings, and if he held by Barony, he was chargeable with One hundred Marks for his Relief, though his Barony consisted only of Two Knights' Fees. The Entry shews also that the Red Book of the Exchequer was then considered as a Document of Such Degree of Authority in the Court of Exchequer, that the Court had acted upon it. The whole Proceeding, however, seems to shew that a Writ of Summons to Parliament did not then necessarily follow Tenure by Barony; the Committee not having found any Person of the Name of Mara, at any Time summoned to Parliament. Not having discovered what was done on the Reference of this Petition to the Exchequer, they are unable to give any further Information on the Subject.1

As this is an unsatisfactory comment on the case, it seems desirable to state the facts. In 1166 Peter de (la) Mare returned himself, under Wilts, as holding (Steeple or Market) Lavington by the service of two knights.1 He was succeeded by Robert, and Robert by Peter, de la Mare, who paid scutage on two fees.2 A notable entry in the "Wiltshire Inquisition" of 1212 (?) records the "Baronia (*sic*) Roberti de la Mare, ij feoda,"3 though in what is printed as the same list we find:—

Galfridus filius Petri, j feodum in Lavintone.

Robertus de la Mare, j feodum in Lavintone.4

In any case the manor came to be held in two moieties some years later, for William de la Rokele sued Peter de Mare for it in 5 Henry III (1220–1221),5 and must have obtained a moiety of it, as we learn from the "Testa,"6 the evidence of which is confirmed by the "Hundred Rolls".

The "Inquisitiones post mortem" bear similar witness; that on Peter de la Mare gives the holding as one fee,7 and so does that on a later Peter de la Mare in 1292;8 though that on Robert de la Mare, in 2 Edward II, records it as half a fee.9 It is clear, therefore, that Peter de la Mare, as he claimed in his Petition, did not owe the service of more than one knight, and, therefore, by the admission of the Crown, he was only liable to a relief of £5 and not to that of £100, which would have been due from a "barony".

On the other hand, there is a decided case of earlier date (1306–1307) which points in quite a different direction for the legal interpretation, at its date, of the clause about reliefs. William de Briouze (*Braosa*), son of William, raised a question as to the relief due from him for the "castle of Bramber," Sussex, and the "land of Guher," i.e. Gower, the South Wales peninsula. He boldly claimed that, in the host, Bramber had only rendered the service of one knight.1 The barons of the Exchequer decided the

question (1) by reference to the "book of fees," (2) by evidence that William and his predecessors had always been amerced as barons without protest. They found that "in Libro Feodorum Brembre repertum est sub titulo de Honoribus," and that "tantum debere solvi pro relevio de Honore quantum pro relevio Baroniæ". The reference to the "Book of Fees" must, apparently, be to the "Testa de Nevill," p. 222*a*, where the tenants of knights' fees "de Brembre" are all entered as holding "de eodem honore". But it is difficult to understand why these entries should be chosen when on p. 223 the same list is headed "Isti tenent *de baronia* de Brembre...Johannes le Cunte tenet iiij feoda...de eadem *baronia*". Moreover, on p. 226*b* we read:—

In rapo de Brembre Willelmus de Breuse et antecessores ejus tenuerunt rapum de Brembre in capite de domino Rege et antecessoribus ejus ex conquestu Anglie per servicium x militum.

The barons decided, quite rightly, that William should be charged relief for Bramber as for a barony.2

But far more important for our purpose is their decision as to Gower. William pleaded:—

Dicta terra de Guher tenetur de rege in Capite per servicium unius feodi militis, de dono et feoffamento Regis Johannis.

In proof thereof he produced a charter of John, 24 February, 1202–1203 (4 John) granting to his predecessor, William "de Braosa," the whole land ("terra") of "Guher" with all its appurtenances in Wales,1 "per servicium unius militis pro omni servicio". This was accepted by the barons as proof that he held "Guher" "pro uno feodo militis," and he was accordingly charged only the £5 relief "pro terra de Guher in Wallia quæ tenetur de Rege in capite per servicium unius feodi militis".

In this case the barons seem to have deemed the documentary evidence decisive. We must, therefore, conclude that in all the cases in which such evidence could be produced, the tenure was admitted to be "knight's fee," not "barony". Now this class of knights, those who were enfeoffed by charter, must have formed a fairly numerous body, who could all claim that they did not hold by "barony" and were therefore not liable to the relief due from a baron (i.e. the holder of a barony). It was the custom under Richard and John (and even under Henry II) to grant considerable estates as single knight's fees, as we learn from the entries in the "Red Book" of holdings created subsequent to 1166.2 The existence of this class of holdings seems to have been overlooked by those who have discussed the subject. The only point that remains doubtful is whether holdings so created as knights' fees, but owing the service of more than one knight, were called upon to pay relief as "baronies" or not. In the case of those who held by the service of a single knight there would seem to have been no question.

Some support for the view that a line was drawn (as in the case of the De La Mare holding cited above) between those who held by the service of more than one knight

and those who only held a single fee or less, is afforded by the returns of 1236,1 in which the sheriffs are directed to make separate returns of these two classes.

Perhaps the most remarkable return for its bearing on chapter 2 in the Great Charter, is that made by the Sheriff of Shropshire in 1212.2 In this return the first entry relates to William Fitz Alan, who is described as holding "in capite de domino Rege *per baroniam*". The second states that Roger Mortimer "*baro* tenet in capite de domino Rege". The third and fourth show us Walter de Lacy and Robert Mortimer holding "similiter". In the next five entries each holder "*baro* similiter tenet". In the tenth William "Botrealus *baro* tenuit in capite de domino rege per servicium dimidii militis," which was also the service of Peter Fitz Herbert, the last but one in the first portion of the list. Then come six entries, in the first four of which we have the formula "miles tenet in capite de domino rege," while in the fifth and sixth the word "miles" is omitted, though in the sixth the service is that of one knight.

This list suggests several considerations. In the first place, it obviously identifies "baro" with the man who holds "per baroniam"; in the second, it names the ten "barones" first and the six "milites" after them; in the next we find two "barones" who hold only half a fee apiece (in Shropshire at least).1 Certainly we have here a list that seems to have unique importance as bearing on the "barons" and "knights" of the Great Charter, three years later. It is, however, unfortunate that Shropshire was a county which had only come into the hands of the Crown on the downfall of its earls' house early in the reign of Henry I. If their fief was deemed to constitute an escheated Honour, the status of their tenants after the forfeiture might be that of those who held "in capite *ut de Honore*". This question arose in 1225, only ten years after the Great Charter. Hugh Pantulf appears in our list as a "baro" holding "in capite," whose service was that of five knights. His son William was charged £100 for his relief, as for a "barony," but he protested before the King "quod non tenet de Rege in capite nisi feoda v militum de terra quae fuit Roberti de Belesme".2 His contention was allowed and his payment reduced from £100 to £25. On the other hand, Robert Corbet, the subject of the next entry,3 who similarly held, as a "baro," five knight's fees, contended, in 1250–1251, that none of his predecessors had paid relief on them, but was made to pay "the baronial" fine of £1004 on his barony of Caus.

This singular contrast affords a further illustration of the difficulties and confusion by which this subject is surrounded. Even so far back as the seventeenth century Dugdale acutely observed that Hugh de Morewic5 "had the reputation of a baron, but his barony consisted of no more than that one knight's fee, by which service he held the manor of Chivington".1 His holding is carefully distinguished as a "villa" (not a "baronia") in "Testa," p. 392*b*, but is styled the "Baronia Hugonis de Morewyc," on p. 382*b*, though the said manor is there entered as held "per feodum unius militis".

In spite, however, of much confusion and contradiction on the subject, it is clear that the Great Charter, by drawing the line it did between the relief due from a barony and that which was due from a knight's fee, must have led to a definite distinction between the two kinds of tenure. And the ever increasing subdivision of baronies must have accentuated that distinction. We have seen that even under Henry II the two moieties of a barony of only three knights' fees were, each of them, called upon to

pay relief on a higher scale than that of the £5 due from a knight's fee, because the tenure was baronial. Whether this arrangement favoured the tenant or the Crown depended on the number of knights due ("servitium debitum") from the barony. For instance, in 1236–1237 the barony of D'Aubigny ("De Albini") of Cainhoe was divided between three co-heirs, each of whom was called upon to pay 50 marcs, the third of that hundred pounds which was due from the "baronia integra". As the "service due" from the barony was twenty-five knights, each third was reckoned at 8? fees, on which the "baronial" relief was £33 6s. 8d., though, at £5 on the knight's fee, the sum payable would have been £41 13s. 4d. (62½ marcs).2 Similarly, the Essex barony of Montfichet was divided into three portions, one of which fell to Richard de Playz, who was charged 50 marcs "ut pro tercia parte Baroniae.... Baronia integra tunc temporis onerata fuit versus Regem de relevio suo de C*l*".1 Again, in 21 Edward I, Alice de Mucegros had paid 25 marcs for the sixth part of a barony, but her heir, in 35 Edward I, was only charged £11 2s. 2½d. for the same (two-thirds of the amount), because the relief on a "barony" had been reduced, in the interval, from £100 to 100 marcs. Eventually the complications caused by these tenures became very great. In 18 Richard II (1394–1395) Robert de Todenham admitted that he held certain property by the service of the third part of the eighteenth part (i.e. the fifty-fourth part) of the barony of Beauchamp of Bedford and part of an advowson by the service of the seventh part of the third part of the said barony, together with a Suffolk manor which he held "in capite ut de honore Boloniae," by the service of two knights. For this last tenure he paid £10, but only small fractional sums for his two baronial tenures. No wonder that Madox summed up his evidence as proving that "Land Baronies were divided and subdivided till at length they were brought to nought".2

At last we are in a position to arrive at some conclusions with regard to the difficult problem dealt with in this paper. As I observed, just above, it depended on the "service" due from a barony whether it was in the tenant's interest to claim that his tenure was "baronial" or that of "knights' fees". So, conversely, with the Crown. When the baronial relief stood at £100, it was in the interest of the holder, or holders, of a barony owing the service of more than twenty fees to claim that what they had to pay was the baronial relief; when that relief was reduced to 100 marcs, the above statement would hold true of baronies (or portions of baronies) owing the service of thirteen and a third knights or more. On the other hand, the holders of small "baronies" would naturally try to pay relief at the rate of £5 on the knight's fee. In each case the interests of the Crown were of course opposed to theirs, and thus there would often arise the question whether the tenure was "barony" or "knight's fee".

As to one class of knights there seems to have been no difficulty; those who held of an escheated Honour would always pay relief at the rate of £5 on the knight's fee, however many fees they might hold. The Great Charter provided for their case in its forty-third chapter. But as to tenants per "servitium militare" who held "in capite ut de corona," questions would arise. Perhaps we may divide them into two classes: (1) those who could produce a charter of enfeoffment from the Crown; (2) those whose tenure was prescriptive. If a man could produce such a charter enfeoffing his predecessor to hold by the service of one knight, his tenure was admitted to be "knight's fee," and he would escape with a relief of £5, as we saw in the case of Gower.1 But if the service due was more than that of one knight, it is difficult to state

with certainty what his relief would be. Turning to prescriptive tenure, the rule seems to have been that if the predecessor in title, in 1166, sent in his return among the "Cartae baronum," this was "prima facie" proof that the tenure was baronial.2 But the presumption so created could be rebutted, as we saw in the De La Mare case, by proof that the service was that of one knight only.1 Again, as we learn from the Bramber case, the formal entry of a fief in a public record as a "Barony," or even as an "Honour," was sufficient to establish the fact that the tenure was baronial. And there is nothing to show that this evidence could be rebutted.

Finally, the keen and frequent discussion as to the amount of relief payable under the second chapter of the Charter strongly confirms the main contention in this paper. For the line drawn by that chapter could not be left undefined; the question whether a tenure was baronial or not had to be determined before it could be known what was the relief that it was liable to pay. On the other hand, the line drawn in the fourteenth chapter between the "greater barons" and other tenants was of little, or no, practical consequence and could, therefore, be left undefined.2 My reason for saying so is that the right of the lesser barons to summons to councils was not taken away by the Charter but was even asserted. Whether they looked on such attendance as a privilege or—as is more likely at that period—a duty laid upon them, they would have no occasion *in practice* to raise the question of the line and where it should be drawn.1 For they could attend if they wished. The future developments of the principle could not then be foreseen.

To sum up, I claim to have shown that the commentators' glossing of the text, by which the "knights" of the second chapter were made identical with the alleged "lesser barons" of the fourteenth, creates needless difficulties and rests on no foundation.2 The line drawn in the second chapter was, in practice, sharply defined because the "relief" payable to the Crown could only be determined by it; the line drawn in the fourteenth was, on the contrary, vague and remained in practice undefined.

[Back to Table of Contents]

MAGNA CARTA, C. 39.

NULLUS LIBER HOMO, ETC.

Sir P. Vinogradoff, F.B.A., LL.D., D.C.L.

By a curious coincidence the year 1915 has been marked, among other striking events, by a revival of the controversy between arbitrary power and the rule of law which, in the midst of heterogeneous particulars, formed the substance of the struggle of 1215. The discussion in the course of the elaboration of the Defence of the Realm Act and its amendment has led to extreme pronouncements. On the one hand, Lord Parmoor appealed to the principle of safeguarding the freedom and right of individuals as expressed in the Great Charter and guaranteed by trial by jury Lord Newton, on the other hand, took this occasion to pronounce in favour of a discretionary procedure untrammelled by lawyers, and declared that sensible persons in this country were not in the least worried about Magna Carta at this moment.1

We need not follow the details of this curious passage of arms and of the correspondence called forth by it, and may confine ourselves to the remark that if Lord Parmoor was not strictly exact in tracing the trial by jury to Magna Carta, Lord Newton seems to have somewhat rashly discarded the inheritance of legality of which English citizens have been so proud for ages.

Turning to the historical problem fringed by these modern polemics one may say that the predominant strain in the analysis of the Great Charter by modern scholars may be characterized as a sceptical reaction against the great constitutional claims made for Magna Carta since the days of Coke. The note is sounded in a terse page of the "History of English Law," and Messrs. McKechnie, J. H. Round, E. Jenks, L. O. Pike, and others have followed on the same lines with great effect. They have taken pains to prove that the barons who forced the Charter on John Lackland were guided by class interests and aimed at reaction and anarchy rather than at legality and progress. The feudal framework of their scheme is sufficiently clear and has been described very fully by G. B. Adams. There can be no doubt also that Coke, Blackstone, and Thomson were guilty of many anachronisms in their attempts to trace legal conceptions of a later age into these feudal beginnings, and that even Stubbs rather exaggerated the sentimental and institutional importance of the principles embodied in Magna Carta. And yet there is room for doubt whether the general effect of the modern criticism to which the text of the Great Charter was subjected has been altogether conducive to the proper treatment of the subject. Granted that the Charter has been prompted by the selfish considerations of the barons, and bears in every line the impress of their special aims, it remains to be explained why it obtained such a hold on national life, why it was re-enacted and remanipulated in the course of several generations, why it became the watchword of English legalism, why it was accepted and developed by those very royal judges against whose encroachments its provisions were to a large extent directed. We cannot wonder Magna Carta was partially eclipsed

by the arbitrary rule of the Tudors, but right through the Middle Ages and in the seventeenth century again it was considered as the principal enactment of English law, and this fundamental fact deserves as much consideration from historians as the feudal environment of the Runnymede agreement. Clause 39 which I have selected for particular examination stands, as it were, in the centre of the Magna Carta controversy, and is well adapted for an illustration of its characteristic features.

So much learning and ingenuity has been expended on the interpretation of this text that I can dismiss in a few words a number of more or less important points which seem to me to have been definitely settled by scholars. It would be superfluous to refute Coke's view as to the meaning of "nec ibimus nec mittemus super eum". Nor is it necessary to dwell at length on the meaning of outlawry, disseisin, or destruction. It is quite clear that the famous "Vel" between "Judicium Parium" and "Legem Terrae" was employed in a conjunctive and not in a disjunctive sense. But several points remain worth discussion even when we have taken careful stock of the results achieved by the interpreters.

The "nullus liber homo" itself deserves a few words. The meaning attached to the term by the baronial party at Runnymede restricted the scope of the term to that of "libere tenens," and it was further emphasized and developed in the Confirmation of 1217 and in later issues. Such an interpretation, far from being self-evident in the beginning of the thirteenth century, cuts right through the difficulties arising out of two firmly established views; namely, against the frequent combinations of free birth with unfree tenure, of which the simplest case is presented by the freemen holding in villainage,1 and against the doctrine that all men worthy of were and wite,1 if not providing the security of free tenement, were to join the frank-pledge2 ("plegium liberale") and had to attend the public court twice a year at the sheriff's view. This arrangement was merely the expression of the fact that in criminal and police matters the villain was on the level of the free. As the narrow conception of freedom aimed at in the barons' charter did not square with important doctrines well established in early Common Law, the interpretation given to "Nullus liber homo" by the judges was bound to take a different course from that intended by the originators of the document. It has been argued that the barons did not intend to bestow any of the guarantees of clause 39 on people who did not belong to their order, that is who were not tenants-in-chief. If such was their intention, it was not adequately expressed, because the class of "liberi homines," even in the strictest legal sense, embraced all the free tenants, the vavassors, socmen, and franklins as well as the barons. The fact that clause 34 applied only to barons holding courts of their own did not militate in the slightest degree against such an interpretation. Clause 34 merely said that when free men had courts1 they were not to be deprived of their privileges; free men who had no courts were not concerned in clause 34 at all. But as soon as the line was drawn so low as to include all those who could prove their freedom, say by the action "de libertate probanda," it became impossible to insist even on the restricted meaning of free tenants. This being so, possible cases of infringement of personal liberty, of illegal imprisonment, come very much to the fore, and the differentiation between the protection of the person ("corpus"2), and of property and privileges ("tenementum, consuetudines") is carried out in the later issues of the Charter. Again, when this personal acceptation of the term "liber homo" has obtained a firm footing, the

transition from the feudal notion of liberty to the civic one becomes a matter of substitution. The fall of the stone into the lake calls forth automatically wider and wider circles on the surface. That this is no mere speculation of ours may be proved by textual evidence.

In a statute of 1350 (28 Edw. III, c. 3) issued after the Black Death it was expressly provided that "Nul homme de quel estate ou condicion il soit" should be imprisoned or disseised in infringement of the Great Charter, and this elaborate formula was evidently meant to remove all doubts as to the general application of the rule. In an earlier instance, namely, in a statute of 1331 (5 Edw. III, c. 9), the term used is simply "homme," but it stands in the place of "liber homo," and the omission of the qualifying epithet is not likely to have been accidental: the wording of such clauses was the result of very careful consideration, and the change in terminology has to be taken into account at least as much in this case as the insertion of the words about free tenements and franchises in the earlier confirmations of the Charter.

It may be noticed in this connection that the defence of a person refusing to release a prisoner on bail in an action "de homine replegiando" was not that the prisoner was a villain, but that the prisoner was the villain of the lord who had imprisoned him.1

I should like now to examine a second point—the expression "Per Legem Terrae" which forms the conclusion of our clause. I entirely agree with Prof. C. B. Adams that the only sense in which these words can be construed is that of an assertion of legality. "Lex terrae" means the law of the land. It is amplified in some of the confirmations by the expression "legale judicium," and both in conjunction would point to legality in procedure as well as in substance. Of course "Lex" is used sometimes in the technical meaning of compurgation, but such a technical acceptance would square badly with the accompanying expression "per judicium parium". What is more important, the general meaning of "Law of the Land" is conclusively established by two texts directly connected with the history of the Runnymede transaction—the Patent of 10 May, 1215,2 by which King John wished to conciliate the moderate among his enemies, and the papal letter1 in which Innocent III exhorted the barons to cease their opposition to the King. No reasonable canon of interpretation could warrant a separate treatment of "legem regni nostri et judicium parium" of John's Patent or the "per pares vestros secundum consuetudines et leges regni" of Innocent's Bull from the "per judicium parium suorum vel per legem terrae" of Magna Carta.2 The terms of the three documents are identical in substance and significant in their technical differentiation under two heads. At the same time the slight variations of phraseology enable us to supplement to some extent the barrenness of the central statement in Magna Carta, clause 39. "Regnum nostrum" appears in the letter of 10 May as a welcome gloss to "terrae," but the reference to "leges et consuetudines regni" is even more explicit: it shows conclusively that a contemporary potentate, thoroughly conversant with the subject in dispute and fully able to express his thoughts in a definite manner, understood the "lex terrae" in the broad and ordinary sense of the "laws and customs of the realm". It would be inadvisable for us to dissent from this authoritative interpretation. The struggle was waged to secure trial in properly constituted courts of justice and in accordance with established law. The latter requirement would apply equally to substantive rules as far as they existed, and

to procedure; it was in fact a declaration in favour of legality all round. Here again, as in the case of the *free man*, the formulation was elastic enough to stand carrying over from the class justice of feudal lords to the common law of the growing Commonwealth.1 The mention of a properly constituted tribunal, however, discloses in a curious way a certain opposition between the views of the barons and those of the Royalists, as expressed by King and Pope. While the baronial documents merely speak of judgment by peers, the royal and the papal pronouncements state that such a judgment should be given in the King's Court (in "curia mea"). The omission of these words in the text of the Charter is hardly accidental. One of the objects of this curtailment may have been the wish to extend the application of the clause relating to peers to the courts of the barons themselves on the principle indicated by clause 60. But there is yet another connection in which the barons had an interest in avoiding a direct mention of the Curia Regis. They wanted to make clear that they would not recognize as legal judgments not delivered by the peers of the accused. In this they followed the feudal doctrine (cf. Conrad's II edict,1 and King David's formula2) which had been emphatically asserted, e.g. in 1208 by William of Braose.1 Now as against such an unadulterated feudal doctrine stood a view according to which the administration of justice was the outcome of royal power and not of feudal contract. From this point of view Pierre des Roches in 1233 contested the very existence of peers in England.2 But there was also an intermediate position favoured by the Judges of the King's Court: according to this compromise the Curia was not only a body with attributions delegated to it by the King, but also a meeting of the King's vassals, and it exercised its functions in virtue of the collective power of the assessors. In this sense the justices derived their office not only from the sovereign, but also from the circle of peers. Indeed both in France and in England the Court of Peers was regarded as one section of the High Court of Parliament which in itself was the enlarged Curia Regis. One more step was required to reach the conclusion that the professional judges of the Court might be taken to serve as a substitute for the cumbersome process of judgment by the full Court. This step was not only actually made both in England and in France, but it was justified in both cases on similar grounds. I have in view the introductory sentence of Bracton's treatise1 on the connection of the single judge with the full Court of Magnates and the chapter of Beaumanoir's "Coutumes de Beauvaisis"2 on the juris-diction of the "bailli". In both cases stress is laid on the subordinate character of a decision given by a single judge. His action is important for practical reasons because it would be useless to overburden the full Court with trials which develop on ordinary lines and can be easily settled by reference to well-known rules. In all doubtful cases, however, the single judge ought to revert to the fountainhead of his authority, that is to the Curia. The expressions used by Bracton are exceedingly characteristic: it is as a member of the aristocracy and not as a learned delegate of royal justice that the judge is made to appear. By the Magna Curia may be meant either a sitting of the full Curia Regis or the High Court of Parliament, a body of rather uncertain composition in the thirteenth century.1 A characteristic complement to the jurisdiction of Parliament in the centre appears in the shape of the commissions in circuit composed of local magnates by the side of ordinary judges.2 For our purpose it is important to note that in the main the requirement as to justice administered by one's peers gradually resolved itself in the hands of the justices who founded the Common Law into a potential appeal to a High Royal Court.

It cannot be said that this process of transformation took place without opposition and misunderstandings, or that it followed a perfectly straight course. It is well known how the higher baronage obtained a strict recognition of its position as a group of peers of the Realm. A corollary to that purely feudal view appears in the claim of privileged exemption from trying the causes of lower people.3

It is also interesting to note that sometimes attempts were made to establish further gradations within the peerage, e.g. in the case of Gilbert of Clare, Earl of Gloucester, who wanted to be tried by lord marchers like himself.1

The process affecting the free population below the exalted ranks of the peerage is more interesting. Here also we find an occasional attempt to establish group divisions. A Yorkshire knight seeks and obtains from an itinerant justice to be tried by fellow-knights instead of a jury of freemen selected without distinction of rank.2 The justiciar in this case complies with the request of the accused, and gets rid in this way of one of the latter's many objections. But, as we know, such an exclusive point of view did not prevail as to the composition of juries, both grand and petty. The rule established by practice required merely that members of the jury should be empanelled from the country ("patria") or the neighbourhood ("visnetum"), that they should be free and lawful men of some social standing, and that their several appointments could not be challenged on personal grounds. Anyway, even when knights are selected for the recognition, it is evident that they do not belong to a circle of peers of the accused in any other sense but that of being his equals in rank. They do not constitute in themselves an ordinary Court of Peers to which the accused man would eventually be a suitor. They are members of the "patria," in the case just quoted from the county of Yorkshire, and act in a representative capacity. One more characteristic feature has to be noted—the knights in question are selected to satisfy the requirement as to "judicum parium," and at the same time they are a jury, a petty jury according to the technical terminology of later days. Submission to the verdict on the part of the accused is enforced by means of the threat of applying the regime of hunger and thirst which formed such an important element in the "peine forte et dure". Altogether the report of the trial looks like a standard case selected for the purpose of illustrating all sorts of dodges, countermoves, and exceptions which might be resorted to by an accused person.

There can be no doubt that in this way a criminal petty jury was taking the place of a batch of peers, and though we have no similar means of exact identification in other instances, the mere reading of Crown trials in such collections as that of the Select Pleas of the Crown, the Crown Pleas of the County of Gloucester, and the Notebook of Bracton, affords ample corroborative evidence of the treatment of criminal cases on those lines. All cases of felony in these volumes are tried and decided in Royal Courts either by appeals or by recognitions of juries. The latter mode becomes more and more common, and, except in the case of a great man, depends not on a judgment by the feudal peers of the accused, but on a recognition by men of the same group, free and lawful men of the "country". The question arises, is the treatment of the recognition as a judgment the result of mere confusion and looseness of terminology,1 or has it been brought about by the deliberate overriding of the Magna Carta provision

by royal justices? Neither the one nor the other solution is likely to commend itself to modern students.

In order to understand the process of *substitution* by which the jury was put in the place of the circle of feudal peers, we have to attend, as it seems to me, not only to the existence and rapid increase of small freemen who had no standing as vassals, but also to the popular conception of a public court in thirteenth century England. The opposition between judgment and verdict developed only gradually in consequence of the growth of the jury system, and although, as has been convincingly shown by H. Brunner, the trial by jury was in truth the outcome of inquests held by professional judges under the authority of the King, yet in the popular mind there lingered the notion that jurors were delegates of a body of doomsmen. This is assumed in the Yorkshire case under discussion, but it is also indicated by the frequent substitution of an award by jurymen for the doom or judgment of a popular court. One of the earliest extant records of a post—conquestual plea—the account of a suit in which Bishop Odo of Bayeux ultimately got the best of it against his opponent1 contains the notice that sworn representatives of a county were substituted for the full court of the county. From a case inserted in "Bracton's Note-book"2 we can gather that the right to make dooms, that is to pronounce judgments, was considered to be inherent in the status of a member of a county court, though its proper exercise depended on the holding of a regular session of the court. It could certainly not be denied that a suitor of the county acting as an assessor of its courts was able to exercise judicial functions by the side of the sheriff or of the royal justice who presided in the court. In the same way a juror, representing the "patria," was deemed to contribute in a certain sense to a judgment, although in another sense the judgment as a final decision of the case appertained to the royal justice.

This manner of treating the question led to a rather ambiguous phraseology, but it helps to explain how the rule as to "judicium parium" was applied by the royal courts in the case of freemen not belonging to the highest social rank of the peerage.

It remains for me to consider the constitutional widening of the prohibition of arbitrary imprisonment and "destruction". It has been currently held to be the germ of the Habeas Corpus doctrine, and there is a good deal of truth in this view although it certainly does not comprise the whole truth. The narrow class basis on which the rule was originally drawn up need not be insisted on—it is the initial assumption from which further analysis has to start. What I should like to emphasize is the fact that right through the Middle Ages the rule was recognized by the judges and became one of the fundamental principles, not of the law of peerage but of the Common Law. It was reasserted again and again by various Parliaments1 with slight variations in form which showed that it was not treated as an empty formula kept up by meaningless tradition. In John de la Lee's case1 it formed the basis of the defendant's claim. In the quashing of Thomas of Lancaster's sentence,2 and in the proceedings as to Maltravers' pardon,3 royal officers, and even the peers of Parliament were charged with flagrant breaches of the rule of law,4 safeguarding the right of free Englishmen to a fair trial. It must be conceded, at the same time, that there was a powerful doctrine which ran counter to a consistent application of clause 39 of Magna Carta, namely, the exceptional power assigned to the King in virtue of his prerogative as

sovereign ruler of the Commonwealth.... Thomas of Lancaster was condemned to death without trial because Edward II had personally recorded the notorious fact of his treason. The personal command of the King is often recognized by judges to outweigh purely legal considerations. In the procedure of replevin as applied to accused persons, it was taken for granted that an arbitrary arrest might be justified by the personal order of the King. This point may be illustrated, e.g. by the following extract from a writ "de homine replegiando" of Edward I's time: The Sheriff of Cambridgeshire is ordered to replevin a certain Richard and others, who had been arrested by the bailiffs of the Bishop of Ely, "nisi capti essent per speciale praeceptum nostrum vel capitalis justiciarii nostri" (Public Record Office, Chancery Files, Writs and Returns, 18 June, 2 Edw. I).

The passage applies, of course, to preliminary arrest and not to punishment, but it was well understood already in mediæval times that such preliminary arrests might create the greatest hardship, and ought to be guarded against.1

How is one to reconcile these conflicting tendencies? They cannot be reconciled by logical construction: they represent, as it were, the two poles of English political development in the Middle Ages. The historical struggle between John and the barons, Henry III and Monfort, Edward II and Lancaster, Edward III and the Good Parliament, had its counterpart in conflicting legal theories as to the extent of the royal prerogative and the application of legal rules. But as one might say of the English Justinian, Edward I, that he was eminent as a powerful ruler and at the same time as a most efficient promoter of legal order,2 so it may be said of the judges who shaped the Common Law, that they were fully alive to the necessity of a rule of law, and regarded the modifying interference of the prerogative as an exceptional agency which ought not to affect the general administration of justice. The principle of legality as formulated in Magna Carta is one of the elements of England's constitutional growth, and it has certainly exerted an influence on the destinies of the nation which is not lessened by the fact that the roots of the Charter were embedded in the soil of feudalism.3

PER IUDICIUM PARIUM VEL PER LEGEM TERRAE. Professor F. M. Powicke.

In his recent treatise upon the origin of the English Constitution Prof. G. B. Adams has pushed to its logical conclusion what may be called the baronial tendency in current interpretations of the thirty-ninth clause of the Great Charter. The barons, he suggests, were thinking almost entirely, if not entirely, of themselves. They were demanding that they should not be imprisoned, disseised, or outlawed except after a trial in the King's Court "by the judgment of their peers and by the whole body of law and custom which such judgments are intended to interpret and apply".1 By the King's Court the barons meant the magnates of the realm, not the judges alone; by the law of the land they meant no particular form of procedure, certainly not the processes of indictment and presentment. As I understand this view, the barons desired to place themselves beyond the scope of the judicial system elaborated in the reign of Henry II

and Richard I. They were thinking of such trials as those of William of Saint-Calais and St. Thomas of Canterbury.2

This view is clear and intelligible. It is a good starting-point. Without traversing the whole field of speculation fully described in Mr. McKechnie's commentary, I wish to put over against Prof. Adams' view the old fourteenth-century interpretation of the clause and see what can be said for it. There appears to be no doubt that, in the minds of politicians of Edward III's reign, the clause comprehended all freemen, and the law of the land covered all the due processes of law, even indictment and the appeal; whether there was a judgment of peers or not depended on the circumstances. We can all agree that the barons were thinking mainly of their own safety and were *not* thinking directly of trial by jury,1 but if we accept the Edwardian view, we cannot hold that the Charter is simply the programme of a pack of feudal reactionaries. According to Prof. Adams the barons were seeking to undermine—so far as it concerned them—the whole fabric of the new judicial system, "including the jury, the itinerant justice court, and the permanent central Court of Common Pleas".2 According to the fourteenth-century politicians, the barons frankly recognized the value of the judicial system, new and old, and in this clause were maintaining the rights of the subject against an arbitrary prerogative.

The inquiry involves two separate but related questions. In the first place, assuming that the clause was intended to apply to the barons alone, was it only concerned with a trial by peers in the King's Court? In the next place, ought we to limit the phrase "liber homo" to the baron? If the barons were not thinking of the ordinary freeman, they may none the less have been thinking of more than one judicial method. If they did include the ordinary freeman in their demand, they would naturally allow a variety of procedure.

I.

"Nullus liber homo capiatur1 uel imprisonetur aut dissaisiatur aut utlagetur aut exuletur aut aliquo modo destruetur nec super eum ibimus nec super eum mittemus nisi per legale judicium parium suorum uel per legem terrae."

The barons and their followers were in this clause included among the "liberi homines". Indeed, John's letters of 10 May, 1215, show that the baronial desire for protection was perhaps the original motive of the clause. These letters, addressed a month before the date of the Charter, read as follows:—

"Sciatis me concessisse baronibus nostris qui contra nos sunt quod nec eos nec homines suos capiemus nec dissaisiemus nec super eos per uim uel per arma ibimus nisi per legem regni nostri uel per judicium parium suorum in curia mea donec consideracio facta fuerit per iii/^{or} quos eligemus ex parte nostra et per iii/^{or} quos eligent ex parte sua et dominum Papam qui superior erit super eos."2

It does not appear, however, that the King is promising a trial by peers in his court as a remedy in all cases. Even though by the barons' men only their more important followers were intended, John is not likely to have given an undertaking that all

charges against them would be brought before the supreme authority.1 Nor do the words "per legem regni uel per judicium parium," taken in their natural sense, suggest that the law of the realm and a judgment of peers are indissolubly connected or, in this case, identical. Such a serious conclusion must be based upon a much stronger argument than the probable meaning of "uel". The word "uel" is used about sixty times in Magna Carta, but never, so far as I can see, in an explanatory or a cumulative sense. However vague or weak its disjunctive quality may be, it cannot suddenly be construed as "et etiam" or "id est". As the author of the "Dialogus de Scaccario" points out, even "et" was frequently used at that time in a disjunctive sense.2 Unless the meaning of the terms themselves suggests a much closer connection between the ideas of the "lex regni" and the "judicium parium," the use of "uel" can only suggest that they are not rigid alternatives. One would expect the King to mean that, without stating exactly the scope of the law of the realm, he would observe it: it might include a judgment of peers or it might not; if the circumstances were peculiar—owing, for example, to the importance of the offender or the difficulty of the case—the judgment would not be arbitrary. The defendants' peers could be or would be called upon to see that justice was done.

The practice of the time and the general meaning of the words used strengthen the probability of this interpretation.

In many cases a judgment of peers in the King's Court was doubtless the normal method of procedure. A great baron's default of service, for example, might result in disseisin by such a judgment. But a judgment of peers was not the only legal way. During the sharp quarrel in 1205 between King John and William the Marshal, the Marshal offered to defend his fidelity against the most valiant man in the kingdom. "By God's teeth," swore the King, "that is nothing. I want the judgment of my barons." The Marshal was ready to stand this test also, but the barons shrank from giving judgment; and when John of Bassing-bourn, one of the King's bachelors, ventured to speak, the Count of Aumâle silenced him. "It is not for you or me to judge a knight of the Marshal's quality. There is no man here bold enough to put his default to the proof of the sword ('si hardi qui vers lui mostrast le forfeit')."1 The duel is distinguished in this scene from the "judicium parium"; the barons regard the duel as the more appropriate test, while the King prefers the "judicium".

Did the "lex regni" mean the old form of procedure, such as the feudal trial by combat? Procedure was certainly part of the law of the realm; and some scholars have wished to limit the meaning of the phrases "lex regni," "lex terrae," to this form of trial, excluding any wider sense, e.g. process, and the methods of appeal and indictment which might precede the actual proof.2 I can see no reason for any such limitation in the thirty-ninth clause of the Great Charter. The "lex terrae," which is substituted for John's "lex regni," was certainly used of the ancient forms of proof, but in Norman1 and in Anglo-Norman law, it was more frequently used in the sense of the "general body of law operating through familiar processes".2 The word "terra" was used sometimes to denote a holding as in the phrase "terrae Normannorum," but also to denote a district subject to public law, whether the local "patria" or the "regnum" as a whole.3 Its substitution for "regnum" in the clause under discussion shows that "lex terrae" was here intended to apply to the customs of England, and

probably to cover also any varieties of local customs, such as those recognized by the justices in Kent and Herefordshire.4 And it may be noticed that the phrase "lex terrae" was commonly used of actions and procedure generally; for example, of the possessory assizes, a writ of right, and the proceedings in outlawry.5

The phrase "judgment of peers," on the other hand, had a more limited and precise meaning. It implied a particular kind of court, a court of doomsmen. The judgment must be delivered on behalf of a company of men who were of the same race or nationality or status as that of the accused or party. It involved the equitable principle which underlay the recognition and the accusing jury; indeed, the processes of inquiry and judgment met in the jury of arbitrators, of which we have an example in John's letters of May, 1215; but the judgment of peers was not the same as, and did not include, the recognition and the presentment. The Jews in England claimed the judgment of their peers, but they objected to a mixed jury of recognitors.1 A solemn trial in the Curia Regis in the presence of the magnates of the realm, the ordinary session of the shire court, perhaps also the trial of possessory actions before justices enforced by local knights involved a judgment by peers. The proceedings before the justices on eyre did not, I think, involve this kind of judgment. But the "lex terrae" would be enforced in all alike.

A contemporary change in Norman procedure illustrates very clearly the distinction between the "lex terrae" and the "judicium parium". After the conquest of Normandy, King Philip Augustus took the trial of ducal pleas in the bailliwicks out of the hands of justices and gave it to local men. The custumal says: "assisie vero tenentur per barones et legales homines. Par per parem iudicari debet."2 The procedure of the court and the law enforced by the court were not affected by the change; the "lex terrae" was observed both before and after; but henceforward a trial according to law would in Normandy involve a "judicium parium". In England this was not necessarily the case.

The phrase "lex terrae," then, though not excluding a judgment of peers, suggests so many varieties of law and procedure that a demand for a judgment of peers in every possible case could hardly be expressed in words so mild and general as "per judicium parium uel per legem terrae". I have pointed out that even a great baron accused of default did not regard the judgment of his peers as the most natural or obvious way of meeting the charge. Moreover, other clauses of the Charter indicate that the barons used more explicit language when they wished to emphasize a demand for a "judicium parium". Disputes about land on the Welsh border were to be settled "per judicium parium secundum legem," in accordance with the law of England, Wales, or the March, as the case might be.1 The conclusion is forced upon my mind at least that the thirty-ninth clause was intended to lay stress not so much on any particular form of trial as on the necessity for protection against the arbitrary acts of imprisonment, disseisin, and outlawry in which King John had indulged.

If we turn to some leading cases of the next twenty years—a period during which the Great Charter was solemnly renewed, fresh in men's minds, and acknowledged as authoritative—this view is confirmed. There is the same insistence upon protection, the same concern for the observance of law, and also the same hesitation or

indifference about the actual constitution of the court. The King acknowledges that he has disregarded the forms of law, it may be in his own court or it may be in a shire court. Redress is given by the magnates of the realm, if the case is of great importance, or by a judge in the royal following. Maitland was fond of reminding us that the distinctions between the royal courts were but vaguely defined in the thirteenth century; and with similar indefiniteness we find "coram rege" cases decided now by the assembled magnates, and now by a single justice.

One such case concerned a great Yorkshire house. The desirable manor of Cottingham, which had been much improved first by William, then by Nicholas de Stuteville, was claimed by Nicholas's co-heiresses on their father's death in 1233; but it had been for some weeks in the possession of his nephew Eustace, a man of some importance in the affairs of the shire. This was clearly a case for an assize of mort d'ancestor, and for a writ of right. For some reason the King intervened, dispossessed Eustace, installed the heiresses and their husbands, and finally ("per consilium magnatum de curia sua") took the manor into his own hands. Eustace had offered large sums for a judgment, and in 1234, at Wallingford, on the octave of Trinity (25 June), his claim was heard by William Ralegh. The King was present, and admitted that he had acted on his own initiative in disseising Eustace, without due process of law — "sine summonitione et sine judicio". Eustace was ready again with his offer of £1000. The fine was accepted, and judgment was given that he should be reinstated pending a settlement by assize of mort d'ancestor and writ of right, "secundum legem terrae".1

Eustace de Stuteville seems to have come to an arrangement with Hugh Wake, one of his rivals,1 and was clearly doubtful of his claim. But the King had disseised him without a judgment, and the decision at Wallingford points to the legal process by assize and writ, to a possessory and proprietary action, as the means of "summons and judgment". A thousand pounds was a large sum. Yet a royal admission of error in the royal court was perhaps worth the money. The case appears on a roll of "pleas which followed the King before W. de Ralegh". Eustace was apparently restored, not by "judicium parium," but by one of the King's judges. The other claimants were disseised by an administrative act of their peers; but in Eustace's history there is no mention of such a judgment. Stress is laid, not on it, but on summons, judgment, assize of mort d'ancestor, writ of right, the law of the land.

A more famous trial of the same year illustrates the proceedings "per legem terrae" in the case of outlawry. The decrees of outlawry declared by King Henry against the great Hubert de Burgh and also against Gilbert Basset and other companions of Richard, Earl Marshal, were annulled by a judgment of their peers, declared by the mouth of the same William Ralegh who decided the Cottingham case. The King, says the record,2 desired to show justice, and on 23 May, 1234, called together all the magnates then present in his court at Gloucester, including Edmund, Archbishop of Canterbury, bishops, earls, and others. This judgment ended the political crisis during which the Earl Marshal, before his violent death in Ireland, and Gilbert Basset had made the claim to be tried by their peers, and had been met by Peter des Roches with the well-known retort "There are no peers in England". One would expect, therefore, a deliverance by the court at Gloucester on the question as to whether a baron could

be outlawed without a judgment of his peers. But the judgment contains nothing of the kind. It reverses the decree of outlawry in Gilbert Basset's case, (1) because the act which provoked the King (the rescue, namely, of Hubert de Burgh from sanctuary at Devizes) was done in the course of war ("occasione guerrae") and was not, therefore, an ordinary criminal offence; (2) because the proceedings of outlawry in the shire court of Wiltshire were irregular; and only in the third place (3) because Gilbert and his friends had been prepared to stand their trial in the King's Court. The decree against Hubert de Burgh was annulled on the ground that escape from prison was not in itself punishable by outlawry. In both cases, stress is laid on the proceedings in the shire court, that is to say, on the "lex terrae".1 The magnates clearly imply that these barons, distinguished though they were, could have been lawfully outlawed if they had fled "per appellum racionabile, aut per sectam Domini Regis ubi fama patriae accusaret". Bracton, as Maitland points out, probably had this judgment in mind when he stated (f. 127) that outlawry at the King's suit or command is a nullity unless an inquest has been taken by the justices and the fugitive has been found guilty.1 Elsewhere Maitland describes the judgment in Hubert's case as an "important step in constitutional history," since it made indictment or appeal a necessary preliminary to outlawry.2 But was not the court simply enforcing the principle laid down in the Great Charter? Was it not interpreting the principle to mean that the "lex terrae" in a case of outlawry was the process in the shire court, involving either the indictment or the appeal?

II.

I have suggested that the barons did not claim a judgment of peers as an essential and universal remedy even for themselves. Their words do not imply this claim, and actual practice did not enforce it. The "lex terrae" might be trial by combat, as in the Marshal's case in 1205, or proceedings in a possessory action, as in Eustace de Stuteville's case, or indictment or appeal, as in the case of Gilbert Basset and Hubert de Burgh; it did not involve a "judicium parium". That was either an alternative or a last resort, a solution of a judicial or political deadlock.3 But it is not clear that the barons were thinking only of themselves. Indeed, the conviction that this clause asserts a claim to the judgment of peers in all cases has, I think, been father to the thought that the words "liber homo" do not include the ordinary freeman. Students of the Charter have felt that a claim to the judgment of his peers by the ordinary freeman was either unnecessary or absurd. They have urged also that the barons had no special interest in the judicial rights of the ordinary freeman, and in the manner of King Charles I liked to speak of themselves as freemen. The substitution of the words "liber homo" in the thirty-ninth clause for the "barones et homines sui" of King John's letters had no special significance.

First, let us look at the use of the words in the Charter. The freeman appears six times. In the fifteenth clause he is protected against unlawful and unreasonable aids levied by his lord; in the twenty-first against amercements which might shatter his social position; in the thirtieth against forced contributions of horses and waggons for carrying purposes; in the thirty-fourth against the loss of his court by a writ "praecipe"; in the thirty-ninth against arbitrary imprisonment, etc.; and in the twenty-seventh clause regulations are laid down for the distribution of his chattels if he

should die intestate. If we set aside the thirty-fourth and thirty-ninth clauses for the moment, the Charter clearly safeguards the ordinary freeman; limits are set to the power of his lord; local officials are to respect his freedom; judges are to permit his neighbours to amerce him fairly; his relatives are not to suffer when he commits that last sin of intestacy. In two of these clauses the ordinary freeman is explicitly distinguished from the baron; in the twenty-seventh and thirtieth he is primarily intended. Is it credible that in the thirty-fourth and thirty-ninth clauses the same phrase, "liber homo," can exclude him?1

Recent exponents of the Charter have not, I think, allowed sufficient weight to the fact that the document was not a baronial manifesto, but a carefully drafted statement of a settlement in which churchmen, citizens, and statesmen who had large experience of public affairs took part. Archbishop Langton and several of the barons on each side were not likely to overlook the growing significance of the freeman in English society, or the danger which the community of the realm would run if his economic and legal position were not protected. By the close of the twelfth century the freeholder was an important element in every feudal State of civilized Europe. In most countries it is probable that he did little more than represent a general economic tendency towards fixed services and money rents; and that affranchisement was a privilege of more or less sentimental value, not affecting the actual position of a serf.1 In England the freeman, however slightly his economic status might differ from that of the villein, was becoming essential to the State, as the State was more and more defined in laws and institutions.2 Within the economy of the manor, the freeman, or, to speak more accurately, the free tenant,3 strengthened the wealth and dignity of the lord. On the one hand, enfranchised villeins were founding families.1 On the other hand, as the "Domesday Book" of St. Paul's records, old tenements were frequently resettled, or new tenements divided, among free tenants paying fixed rents.2 It was to the common interest that these men should not be broken; and the thirty-ninth clause of the Charter, in protecting them and their tenements against illegal interference from the King and his officials, in my opinion simply applied the general principle expressed in other clauses.

We have seen that, in the case of outlawry, the "lex terrae" required a charge either by indictment or appeal in the shire court.3 There is some evidence for the view that the thirty-ninth clause met in addition the desire of the freeman for protection against administrative proceedings at the King's command, and especially against imprisonment without the prospect of a trial in the local court. The contest between the principles of order and liberty had already begun. The natural instrument of order was the prison. During a political crisis or an epidemic of criminal unrest it was convenient to issue commands for a summary inquiry and for the imprisonment of suspected persons "during his Majesty's pleasure". The well-known "edictum regium" of 1195, preserved in the chronicle of Roger of Howden,4 was in fact a command of this sort—a Crimes Act, disregarding the usual procedure. During King Richard's absence in the Holy Land the country had been much disturbed; and Hubert Walter, the new justiciar, was determined to restore order. The great inquiry of 1194 did not meet the situation: the justices had probably been too busy to get through the ordinary police business; indeed Roger of Howden tells us that a very important inquiry into the administration of sheriffs and local officials was postponed. Hence in

1195 knights were appointed to deal with crime. A sworn obligation was imposed upon all males of fifteen years and upwards. The inhabitants of each district ("ballia") swore that they would keep the King's peace, join in the hue and cry, deliver all who were guilty or suspected of robbery and theft to the knights appointed. The knights passed on the malefactors to the sheriff, who was not to release them save at the command of the King or justiciar "non deliberandos nisi per regem aut ejus capitalem justitiam". The duty prescribed to the King's subjects was very similar to that which they performed in the hundred court,1 but the procedure was different. The presentments were received by special commissioners, and the imprisonment of those presented followed as a matter of course: "per sacramentum fidelium hominum de visneto," says Roger of Howden,2 "multos ceperunt et carceribus regis incluserunt." No mention is made of judgment in the shire court before the justices. The trustworthy men were not the jury of presentment: and the accused had no opportunity of alleging their general good character and of submitting to the proof. It is probable that the ordinary methods of attaching and trying criminals had broken down; they broke down periodically during the Middle Ages; but they were quite definite and must have been well understood.1 Suspected persons were arrested by the sheriff and his bailiffs, sometimes by the tithing man or in the hue and cry. They might be locked up in the the King's gaol or entrusted to the custody of the tithing; or they might be handed over to their relatives or pledges who would be made responsible for their appearance.2 They were presented, whether in captivity or not, at the sheriff's tourn, and again at the shire court before the justices on eyre. If they were of bad repute and had been arrested in the act, they might be punished according to the discretion of the court without further inquiry, that is to say, without going to the ordeal or other proof; yet even in such a case the assize of Clarendon admitted the right of the accused to find a warrenty—"si non habeat warrentum non habeat legem".3 Other suspected persons, those, for example, of decent repute who had been found in possession of stolen goods, went to the ordeal and, after the abolition of the ordeal, were given the opportunity of placing themselves "super patriam," of standing by the verdict of a jury. In all this process imprisonment was merely an incidental affair; it was not yet a common form of punishment after conviction, and only gradually became so general as a form of detention as to necessitate commissions of gaol delivery.

The distinction between the normal procedure and the drastic action taken by Hubert Walter in 1195 was to be of the greatest importance in future history. Was it realized at the time?

At first sight the answer seems to be decidedly in the negative. It is not likely that any opposition was made to the particular edict of 1195; the royal duty of good government included the maintenance of the public peace. These malefactors were persons of ill fame and were arrested after sworn inquiry among their neighbours. Whether they were tried or not in the future would be a matter of general indifference and could be left to the royal discretion. Moreover, the King was the source of justice; "the man committed to gaol 'per mandatum domini Regis' would," in the twelfth and thirteenth centuries, "have found none to liberate him."1 By Bracton's time a sheriff who released on mainprise a man who had been arrested by the King's command or on the command of the justiciar would have defied the law of England;2 and,

although this rule, it is true, applied to prisoners awaiting trial, there was nothing to compel the King to bring them to trial.

It must be admitted that administrative action such as Hubert Walter's was regarded as within the lawful scope of authority; also that persons imprisoned by the King's command could, before the law of "habeas corpus" had been painfully hammered out, be tried at the King's pleasure. The Edictum Regium of 1195 is the first of a long series of formal acts, enforcing what may be termed the "administrative law" of the prerogative—a prerogative which still exists in King and Parliament. Yet I believe that, even at the close of the twelfth century, the desire to emphasize the extra-ordinary nature of this reserved power was both felt and expressed. This desire is expressed, I think, in the thirty-ninth clause of the Great Charter. The Charter did not succeed in abolishing the prerogative right of imprisonment—it was more successful in stretching the protection of the law over the free tenement—but it did assert the principle that the freeman must normally be accused and punished in a special manner, however awkward or inefficient that manner might be.

From the days of Henry II, the two methods of keeping the King's peace—the one "per legem terrae," the other by administrative action—may be traced in mediæval England.

1. It is clear that Henry II anticipated the action of Hubert Walter, probably with much less formality. The proof is to be found in the action of Queen Eleanor after Henry's death in 1189. She sent commissioners through England to liberate prisoners. The orders given to these commissioners carefully distinguished various kinds of persons who were in gaol. Offenders against the forest law[1] were to be set free and pardoned. Persons imprisoned "per commune rectum" were to find pledge for their appearance in case an appeal should be brought against them; if they could find no pledge, they were to be sworn to appear. Various other classes who had been subject to legal process were also enumerated; they were in most cases to be released under conditions. But one group was, like the offenders against forest law, to be freed unconditionally:—

"Et ut omnes alii qui capti essent et retenti per uoluntatem regis uel justitiae ejus, qui non essent retenti per commune rectum comitatus uel hundredi uel per appellationem, quieti essent."[2]

Clearly, in 1189 the King's prisons contained persons who had been imprisoned by decree, not in accordance with the procedure defined in the assizes of Clarendon and Northampton. Unimportant people who should have been presented at the hundred court had not escaped Henry's attention. However salutary this direct intervention may have been, it was felt to be anomalous; in order to show that a new reign had begun the Queen Mother declared an act of grace.

2. Two years later restrictions were imposed by the barons on the justiciar's power of administrative disseisin. The critics of William Longchamp admitted the right of the King to disseise a vassal of his property without a rigid observance of the new

procedure; but as a rule the lawful customs and assizes of the kingdom must be observed:—

"Sed et concessum est quod episcopi et abbates, comites et barones, uauassores et liberi-tenentes, non ad uoluntatem justitiarum uel ministrorum domini regis de terris uel catallis suis dissaisientur sed judicio curie domini regis secundum legitimas consuetudines et assisas regni tractabuntur uel per mandatum domini regis."1

Two points are noticeable in this passage. The free tenant, who is distinguished from the baron and vavassor, was explicitly included; and protection was particularly desired from the royal officials. The demand was extended in 1215, to protection against the King, and was defined still more clearly in 1217, in a passage which recalls the wording of this treaty:—

"Nullus liber homo...dissaisietur de libero tenemento suo uel libertatibus uel liberis consuetudinibus suis...nisi per legale judicium parium suorum uel per legem terrae."2

3. Disseisin was more easily dealt with than imprisonment. We have seen that, between 1189 and 1215, Hubert Walter systematized the practice of imprisonment "per mandatum regis," and forbade release "nisi per regem aut ejus capitalem justitiam". In John's reign, this practice, recognized as anomalous in 1189, became a nuisance. John was for one thing not concerned to take the opinion of his victims' neighbours into consideration: he was after booty, not justice. He spared neither small nor great; and he was compelled to surrender this prerogative in 1215. As Mr. McKechnie has reminded us, later opponents of the jurisdiction of the King's council interpreted the thirty-ninth clause of the Charter in this way. They insisted upon the necessity of indictment or presentment by good and lawful people of the neighbourhood in which the crime was committed. Coke borrowed the same construction from Edward III's statutes when he translated "per legem terrae" by the words "due process of law".1 The phrase, indeed, is a very fair equivalent to Queen Eleanor's "per commune rectum comitatus uel hundredi uel per appellationem". On this view the clause comprehended the criminal procedure of the twelfth century. It said in effect: "Unless the case is so anomalous or the accused so important that a trial in the King's Court by the magnates of the realm is desirable, he must be dealt with in the usual way, by presentment or indictment, in hundred or shire courts with recourse to the customary proofs".

4. Neither baron nor freeman got matters all his own way. In the thirteenth century we have "state-prisoners" who did not find much help in Magna Carta. In 1241 the sheriffs were instructed by Henry III to keep suspected persons "in prisone nostra donec a nobis aliud habueris mandatum".2 In 1264 Simon de Montfort went further than Hubert Walter had gone in 1195. In the King's name he placed every shire under a single "custos pacis," who was instructed to use the whole strength of the shire for the arrest of criminals and disturbers of the peace; the arrested persons were to be kept in custody "donec aliud inde praeceperimus".1 But Simon's action was taken under very abnormal conditions. On the whole, the principles laid down in the Charter were observed with remarkable continuity. I have already pointed out how Henry III was obliged in 1234 to reverse an unlawful disseisin and the unlawful outlawry of certain

barons. The freeman was also protected. The royal officials, for example, had reason to be very prudent and circumspect in their dealing with suspected persons: a rash imprisonment might involve them in heavy damages.2 The periodic revival of disorder, in fact, was encouraged by the conditions which made officials and communities alike unwilling to prosecute their duties—a false step was so expensive. The Government tried to deal with disorder by reforms in the police organization, but did not—except on rare occasions, as in 1241 and 1264—interfere with procedure. The police reforms were no more an infringement of the Charter than was the growth in the practice of imprisonment pending trial, or the rule that a man so imprisoned by the King's command could not be replevied. Yet these reforms have probably been confused with the occasional edicts interfering with the "lex terrae," although in reality they maintained continuity in procedure. The thirteenth century conservators of the peace, whether they were serjeants elected by the shire, or knights appointed by the King,1 or important barons invested with special powers, were concerned mainly with the "visum armorum" and the process of arrest. Just as the headboroughs and constables kept the peace in township and manor,2 so the conservators assisted the execution of the common law in hundred and shire. The elaborate writ of 1242, which assigned knights in each shire, refers explicitly to the subsequent trial of suspected persons "per legem terrae," thus correcting the action taken in the previous year:—

"Suspectos autem de die per quoscumque arestatos recipiant vicecomites sine dilacione et difficultate et salvo custodiant, donec per legem terræ deliberentur."3

One of the objects of the Statute of Winchester, which codified previous legislation in 1285, was the more conscientious and exhaustive presentment of malefactors by the local juries. The conservators were gradually given judicial functions and developed into the justices of the peace; but they still administered the common law—the "lex terrae". Hence, when Stubbs traced a connection between Hubert Walter's "milites assignati," Earl Simon's "custos pacis," and the justice of the peace, he was, I venture to think, suggesting a misleading confusion between the exceptional and the normal in the history of criminal law.4 So far as their police duties were concerned, the connection between these officials is clear, but it is easy to forget that, whereas the justice of the peace had behind him the Assizes of Arms and Clarendon, the officials appointed in 1195 and 1264 had not. The peculiarity of the measures taken in 1195 and 1264 lay, not in the method of arrest, but in the imprisonment during the King's pleasure. The commissions issued to the justices of the peace, on the contrary, from the period when they combined the functions of conservators and justices until the year 1590, directed the enforcement of the Statute of Winchester, that is to say, of the final definition of the system laid down in the Assizes of Arms, Clarendon and Northampton.1 The justices were so circumscribed by the "lex terrae" that in the fifteenth and sixteenth centuries they could not order an arrest until the accused had been indicted in "open sessions of the peace".2 In Edward III's reign the practice was more elastic, but well within the limits of the traditional system. According to the commission of 1357 the justices were to arrest after inquiry "per sacramentum proborum et legalium hominum," and to determine the cases "secundum legem et consuetudinem regni nostri Angliae". The statute of 1360 ordered them to pursue, arrest, and punish evildoers "selonc la ley et custumes du roialme".3

The “lex terrae” constantly broke down in the time of justices of the peace as it had constantly broken down in hundred and shire. The difficulties are described clearly in the Statute of Winchester, and in the petitions to the judges on eyre, to council, to the chancellor, and to Parliament. The folk of the district would not present, officials grew slack and corrupt. The justices in their turn were too often either over-worked or open to unjust influences. In the twelfth and thirteenth centuries, the King’s ministers or council tried to remedy matters by decrees for laying criminals by the heels; in the fourteenth the council began to hear and determine petitions on its own account—began, in short, to lay the foundation of that judicial control which was later to develop into the Courts of Star Chamber and Requests.1 It was under these new circumstances that Parliament, appealing to the Great Charter, raised its voice on behalf of the “lex terrae,” the system of indictment and presentment. The party of law, not for the last time in our history, was not the party of order, even though it was the party of progress.

In the fourteenth century the important phrase was “lex terrae”; in the seventeenth the party of law and progress fastened on the phrase “judicium parium”. In this paper I have tried to show that, however badly the contemporaries of Pym and Selden may have blundered, there is a good deal to be said for their fourteenth-century predecessors. In 1215 neither baron nor freeman was concerned primarily with a judgment of peers so much as with justice. The “judicium parium” ran through a good part of English procedure, but was not universal. From the baronial standpoint it was especially important as a last resort, in cases where justice had not been done, and the law was uncertain. The barons had no intention of excluding from the “lex terrae” any part of the new judicial system, neither the Court of Common Pleas, nor the justices in eyre, nor the presentment of the grand jury. They were demanding, as they demanded at Merton a few years later, that the practices of English law should not be changed. In the same spirit they desired that sheriffs and other local officials should be men acquainted with the “lex regni”.1 And on the whole they got their way. The peculiarity of English history is not that the common law is supreme, but that it is so practised as to seem supreme, and that other expressions of the sovereign power—whether the equitable jurisdiction of the King’s Council in the fourteenth century or a Defence of the Realm Act in the twentieth—are universally admitted to be temporary and abnormal. If King John had not grossly abused his power as the source of justice, it is quite possible that this tradition would never have been formed. The policy of efficiency practised by men like Hubert Walter, Thomas Cromwell, and Francis Bacon might well have gathered momentum and swept aside the prejudices in favour of the Common Law.

[Back to Table of Contents]

MAGNA CARTA AND COMMON LAW.

Charles Howard McIlwain, *Professor of History and Government, Harvard University.*

In estimating the importance of Magna Carta what we chiefly need is a history of the document in the period after 1215.1 One of the most significant points in that subsequent development is the famous confirmation by Edward I in 1297. This confirmation is in part as follows: "Know ye that we to the honour of God and of the holy Church, and to the profit of all our realm ('et a profist de tout nostre roiaume'), have granted for us and our heirs, that the Great Charter of Liberties ('le graunt chartre des fraunchises') and the Charter of the Forest, which were made by common assent of all the realm ('les queles feurent faites par commun assent de tout le roiaume'), in the time of King Henry our father, shall be kept in every point without breach ('soient tenues en toutz leur pointz, saunz nul blemisement'). And we will that these same charters shall be sent under our seal to our justices, both to those of the forest and to the rest, and to all sheriffs of shires, and to all our other officers, and to all our cities throughout the realm, together with our writs in the which it shall be contained that they cause the aforesaid charters to be published and have it declared to the people that we have granted that they shall be observed in all points, and that our justices, sheriffs, mayors, and other officials who under us and by us have to administer the law of the land ('qui la loy de la terre desoutz nous et par nous ount a guier'), shall allow the said charters in pleas before them and judgments in all their points; 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. ('c'est a savoir la grande chartre des franchises cume lay commune, e la chartre de la forest solom l'assise de la forest, al amendement de nostre poeple').

"II. And we will that if any judgments be given from henceforth, contrary to the points of the charters aforesaid by justices or by any other our ministers that hold pleas before them touching the points of the charters, they shall be undone and holden for naught.

"('E volums qe si nuls jugementz soient donez desoremes encontre les pointz des chartres avauntdites, par justices et par nos autres ministres qui contre les pointz des chartres tenent plez devant eus, seient defaitz e pur nient tenuz').

"III. And we will that the same charters shall be sent under our seal to cathedral churches throughout our realm, and there remain, and shall be read before the people twice in the year.

"IV. And that archbishops and bishops shall pronounce sentences of greater excommunication against all those that by word, deed, or counsel shall go against the aforesaid charters, or that in any point break or go against them. And that the said curses be twice a year denounced and published by the prelates aforesaid. And if the same prelates or any of them be remiss in the denunciation of the said sentences, the

Archbishops of Canterbury and York for the time being, as is fitting, shall reprove them and constrain them to make that denunciation in form aforesaid."[1]

Under the first of these sections the King's justices are directed to administer Magna Carta "as common law" ("cume lay commune"). "The sense hereof," says Coke, "is, that the Great Charter and the Charter of the Forest are to be holden for the Common Law, that is, the law common to all; and that both the charters are in amendment of the realm; that is to amend great mischiefs and inconveniences which oppressed the whole realm before the making of them."[2]

This paper is an attempt to explain still further "the sense hereof". But the most difficult part of the explanation as usual lies in that part of the provision whose meaning seems at first the most obvious—"lay commune". "No tolerably prepared candidate in an English or American law school will hesitate to define an estate in fee simple," says Sir Frederick Pollock. "On the other hand, the greater have been a lawyer's opportunities of knowledge, and the more time he has given to the study of legal principles, the greater will be his hesitation in face of the apparently simple question, What is Law?"[3] One's opportunities of knowledge would have to be great indeed to be even in slight degree commensurate with his hesitation in attempting to define "common law" with all that it implied in 1297, but defined it must be in some fashion before we can understand the real significance of Magna Carta in the later Middle Ages. Some examination of contemporary records has convinced me that Coke's interpretation is in the main the correct one, but one of his statements seems also to show that it is correct in a sense possibly somewhat different from the one he had in mind. This is his inclusion without comment of the Charter of the Forest with Magna Carta as the common law. What, then, is "the law common to all," what made it "common" in 1297, how did this conception of a common law and the mass of corresponding rights actually come into existence, and finally what light is thrown by an explanation of these things upon the history and character of Magna Carta itself?

For a considerable part of the period when the common law was taking form in England there may be observed in the writers on law a certain struggle between the Roman idea of "lex" and the mediæval conception of law as immemorial usage. The judges of those times, who were generally in orders, were better acquainted with Roman legal conceptions than many of their brethren of a much later time. Their knowledge and reverence for these ideas, coupled with the necessity they were under of administering a law of a different origin, at a less advanced stage of development, but with roots so deep in the traditions and habits of the people that its binding force was unquestionable—these are the chief explanation of apparently incompatible statements concerning the basis and extent of the royal authority, which even the "addiciones" in a text like Bracton's cannot wholly explain. In the field of private law somewhat the same struggle is to be seen between "lex" and "consuetudo"; the one a product of the classical period of Roman law, the other a growth of the Middle Ages out of roots that are quite different. The mediæval desire for unity led the jurists of the time to make interesting attempts to reconcile these conflicting conceptions. Constantine's famous dictum, "Consuetudinis ususque longaevi non vilis auctoritas est,[1] they gladly fasten upon, but it will not fully serve their needs until it is practically inverted.[2] So the author of Glanvill feels it necessary to apologize to his

learned readers for an English customary law which he never thinks of questioning.3 Glanvill is quoted word for word by the author of "Fleta," but without acknowledgment.4 Bracton also begins his treatise with the usual liberal quotations from the "Institutes," and borrows from Glanvill the sentence identifying "consuetudo" with "lex," but his treatment of the subject is fuller and much more valuable.5 It is clear that these mediæval writers are faced with a "cousuetudo," a "lex non scripta," which is binding much as "lex" was binding in the later Roman Empire. In order then, to apply their favourite texts in support of the existing law, they are under the necessity of including within "lex" what was certainly not included in Justinian's time. The outstanding fact is that custom had really become "law". It was accepted by common usage "pro lege". This is almost the central fact in early English law; but we moderns, like the Romans of the later Empire, are so prone to identify "lex" and "law" that we can hardly appreciate the difficulty in which Glanvill and Bracton found themselves. Glanvill's apology for "consuetudo" was directed at the classicists, and is easily understood by ourselves; to a twelfth-century Englishman, if unlearned in Roman law, it probably had very little meaning.

But "consuetudo" was a thing well understood. Evidence of its importance and its binding character is abundant. Glanvill himself, in the passage quoted above,1 though he is paraphrasing the "Institutes," cannot say, as they do, that in England the "law" is what the people, or what anyone, "constituebat". Instead, he has to say that it consists of those things "quas super dubiis in consilio definiendis, procerum quidem consilio, et principio accedente authoritate, constat esse promulgatas". It is something already in existence, which may indeed need defining, but can only be promulgated, not made. The celebrated Excommunication of 1253 mentions only those who violate the liberties of the Church, Magna Carta, the Charter of the Forest, "vel antiquas regni consuetudines approbatas".1 It is not difficult to prove that these "ancient customs of the realm" were of binding force, even of supreme binding force. So the author of the "Mirror of Justices," who may certainly be trusted as an interpreter of contemporary words and phrases, though we can no longer believe all his stories, declares that the article in the Statute of Marlborough concerning redisseisors is reprehensible, because "no special ordinance ought to exceed common law" ("car nul mandement especial ne deit passer comun dreit").2 And we find the justices of both benches required to take oath that in case they receive letters from the King commanding anything "contrary to the law," they will enforce the law not-withstanding such letters. The Parliament Roll of the year 13303 contains an interesting petition by several nobles setting forth that they were entitled to lands escheated at the time of the suppression of the Templars, which lands, however, had been handed over, by a statute irregularly procured by the Despencers, to the Hospitallers. They pray that this statute be annulled and quote the opinions of the judges against it—"Les dites Justices disoient appertement et expressement, qe le Roi ne ne devote ne ne le poiet faire par Ley; non pas pur ce les ditz Hugh et Hugh, par poair q'il avoient, firent fair un Statut, sicome piert par le Statut, Qe les Hospitaliers eussent les terres de Templiers. Et en lequel Estatute poet estre trowe, qe les Justices ne s'assentirent point; car ils ne poient pur lour serment par la disheritaunce du Roy et de ses gentz. Et disoient, qe ce sunt contrarie a Ley, isse qe cel Estatut se fist contre Ley et contre reson." In 1341, during the struggle between Edward III and his Parliament, the King had been compelled to make certain important concessions in return for the parliamentary grants, but when these had to be

put in the form of a statute, the chancellor, treasurer, and some of the justices protested that they would not enforce them "en cas qe meismes les Estatutz fussent contraires a les Leies et Usages du Roialme lesqueux ils feurent serementez de garder".1 The reasons they assign are significant whether they were sincere or not. For the year 1347 there is a petition on the Parliament Roll against a judgment made in Parliament, which is declared to be "contre le Leis de Roialme et les Usages aprovez".1 In 1397 Parliament annulled the award of Parliament convicting Hugh Despencer, and seemingly endorsed the charge that the Act of Edward III affirming this award "feust fait contre droit, loy, et reson...quel Estatut qant a les ditz articles n'est my droiturel ne resonable, ne deust estre de force par la ley...estoit encontre droit et reson et encontre la ley de la Terre".2 Two years later, on the accession of Henry IV, the new King declared: "Qe il n'est pas son entente ne voluntee pur tourner les Leyes, Estatutz, ne bones Usages,...mes pur garder les anciens Leyes et Estatutz, ordeignez et usez en temps de ses nobles progenitours...solonc son serment ".1 The "Pronunciatio," by which the Parliament of 1 Henry VI was opened, declares the purpose of the session to be the enjoyment by all classes of their liberties and franchises which have not been repealed "ne par la Communé leie repellables,"2 and the statutes of the next year open with a confirmation of all such franchises "bien usez et nient repellez ne par la commune ley repellablez".3

Some of these examples undoubtedly arise out of factional and even revolutionary struggles, but the frequent and repeated insistence upon the supremacy of the common law, as a justification, even though it may be at times an unjust action that is justified, seems to show conclusively the position occupied by the common law. It was, in a very real sense, a fundamental law.

But if this law was really supreme it becomes the more necessary to try to discover the points in which it differed from other rules or enactments; to ascertain as nearly as we can just what was common law. From the passage quoted above from Bracton4 it appears that custom has the force of law in England, "approbata more utentium"; and that these "consuetudines" are either "plures et diversae," i.e. particular customs; or common custom, which is "consuetudo regni Angliae". Thus he speaks of the King's retaining an outlaw's lands for a year and a day, "sicut esse debet secundum consuetudinem regni nostri Angliae";5 or of waste "contra consuetudinem regni nostri";6 or of an inquest "secundum consuetudinem regni Angliae".7 So he declares: "Et sicut papa ordinare potest in spiritualibus quoad ordines et dignitates, ita potest rex in temporalibus de haereditatibus dandis vel haeredibus constituendis secundum consuetudinem regni sui. Habet enim quodlibet regnum suas consuetudines et diversas, poterit enim una esse consuetudo in regno Angliae, et alia in regno Franciae quantum ad successiones.1 In Bracton's day the organization and powers of Parliament were still undeveloped and the terminology of legislation was not yet fixed. His favourite term for enactments is "constitutio," in which he shows his Roman and canon law training. He refers to the Statute of Merton as "Nova constitutio,"2 and to a violation of it as "fraus Constitutioni".3 He says also that a writ of novel disseisin will not issue where a tenant has granted so much of his estate in frankalmoign that his lord had lost his service, "quia hoc est contra constitutionem".4 In another place he asserts the same rule, "propter constitutionem libertatis".5 These "constitutiones" are in addition to "consuetudines" which are in use throughout the

realm. Hence many things are controlled by the law *and* custom of the realm. It is no accident that the writs appointing the justices for an assize of novel disseisin command them to do justice "secundum legem et consuetudinem regni nostri Angliae".6 Judges are so to conduct themselves, says Bracton, "ut constitutiones et eorum edicta, juri et consuetudinibus approbatis, et communi utilitati sint convenientia."1 These are the rules to which Bracton refers as "lex terrae et regni consuetudines,"2 and "jus commune".3 Whether customary or statutory, it is the law common to the realm, as distinguished from particular law. So in discussing waste Bracton says: "Et quid debeat adjudicari ad vastum, et quid non, propter magnitudinem et parvitem, habet quaelibet patria suum modum, constitutionem et consuetudinem".4 And modus, he says, following the familiar doctrine of the Roman lawyers, though in a sense probably never meant by them, and here speaking of grants, "legem dat donationi; et modus tenendus est contra jus commune, et contra legem, quia modus et conventio vincunt legem".5 Of the law of succession he says: "Item poterit conditio impedire descensum ad proprios heredes, contra jus commune".6

"And because it is given to all in common it is called common law," says the author of the "Mirror of Justices," of the law with which he deals.7 References to the common law became more frequent as the thirteenth century closed. For example, it is said to be "encontre la commune ley" for a subject to inflict the death penalty on a criminal.8 Later, in the reign of Richard II, the Commons complain of royal interference with "la ley de la Terre et commune Droit".9

It is not necessary to multiply instances further, though they are many. The general connotation of "common law" is beyond doubt. Its exact meaning becomes clearer, however, when we take note of the special law that contemporaries were wont to contrast with it. At times we find "la commune Loy" thus designated to distinguish it from enactment.1 Or it might be the law of the Church that was contrasted with it;2 the "lex forestae";3 "les Loys d'armes"4 the laws of the Court of the Constable and Marshal;5 the law of the staple;6 Roman law; or the "lex Parliamenti".7

But the "special law" found most often in contrast with "ley commune" is the "consuetudo," less frequently the "lex," of some particular region or district, which differs in its provisions from the "lex et consuetudo regni".1

In 2 Edward II it was argued that a manor which formed a part of the King's ancient demesne was "tiel lieu qe n'est pas a la commune ley".2 In a case in 1307 certain tenements were declared to be devisable "solom la coustume de Everwyk" (York).3

Cases of the law of Kent are numerous. For example it was said in the Common Pleas in 20 Edward I that certain tenements are not transferred from the common law to a special law ("changez hors de la commune ley en la Especial ley") unless the partibility of the tenement could be proved. Here the "special law" is a customary one, "le usage du pays".4 Wales and the Marches naturally give us many examples in the Middle Ages, particularly before the enactment of "Statutum Walliae". For tenements in Wales and the Marches article fifty-six of the Great Charter of John guarantees to

Welshmen and Marchers trial by peers “secundum legem Walliae” and “secundum legem Marchiae” respectively.1

In 25 Henry III a Welsh litigant pleads “quod nescit placitare secundum consuetudinem Anglie” and obtains a continuance “ad deliberandum”.2 In 1281 Edward promised Llewelyn that the laws of Wales and the Marches should not be disturbed, and informed him that the judges had been so instructed.3 The “Statutum Walliae” itself,4 while asserting Edward’s right to declare, interpret, increase, and take away from these particular laws, especially in pleas of the crown, expressly excepts the law of succession to lands, contracts, procedure, etc., which are to remain as they were, “quia aliter usitatum est in Wallia quam in Anglia...et a tempore cujus non extitit memoria”. In a case arising upon a disseisin in 19 Edward I, the defendant answers “quod tenementa non sunt in comitatu [Hereford] sed sunt in Marchia Wallie et debent in judicium deduci secundum legem Marchie et non per legem Anglie juxta statutum de Ronemede. Et quod non sunt in comitatu et ideo non deberent tractari per legem communem.” The point was conceded.5 Two years later Richard Fitz Alan declares he is a baron of Wales, “ubi est consuetudo approbata,” that the barons should submit their disputes to the arbitration of a friend of both parties.6 In 1321 a number of persons in Wales petition the Chancellor to issue a writ to the Justice of North Wales to do justice “secundum legem et consuetudinem parcium illarum”.7 The law of the Scottish March, of course, was on the same general basis. In 1249 a commission consisting of twelve English and twelve Scottish knights were sworn to the observance of the “Leges Marchiarum”.1

It seems clear, then, that common law is the “lex et consuetudo regni Angliae, usitae et approbatae, communi utilitati convenientes”; and that the basis of “consuetudo,” as of “lex,” is that it is approved, if not by express enactment, “more utentium”. This law is “common” because it is “jus regni Angliae,” enforced and observed “de consensu magnatum et reipublicae communi sponsione”. Special custom is such as in like manner “observatur in partibus”—and, it might be added, by certain classes or estates of the people—“ubi fuerit more utentium approbata, et vicem legis obtinet”; and special “leges” are those expressly assented to by the particular persons so bound by them. So we return to Coke’s dictum that the common law is “the law common to all”.2

If our difficulties ended here, it would seem rather unnecessary to labour a point so apparently obvious at such length as I have done. But Magna Carta was not only common law: it was also enactment, and constantly referred to as such. In order to understand its real significance, we must first examine the larger question of the relation of enactment in general to the “ley commune”; and to make this difficult question as clear as possible it seemed necessary as a preliminary to restate much that is obvious in connection with the common law itself.

The next problem that meets us, then, is the relation of enactment to the law, particularly the common law, in mediæval England, and this is a problem of great difficulty.

As indicated above, the names of enactments of law for the realm were variable until they became stereo typed by the general acceptance of Parliament's enacting power. The author of the "Leges Henrici," speaking probably of Henry I's famous writ for the holding of the shire and hundred courts, says the practice, founded in ancient custom, had lately been confirmed by a *record*—"vera nuper est recordacione firmatum".1 The Constitutions of Clarendon are spoken of in the preamble to the document as "ista recordatio vel recognitio cujusdam partis consuetudinum et libertatum et dignitatum" of the King's predecessors.2 Similarly the Assize of Clarendon is termed "haec assisa,"3 as is also the Assize of the Forest in 1184.4 John's Charter of Liberties itself is called "this present charter of ours".5 Bracton speaks, as we have seen, of the Statute of Merton as "nova constitutio,"6 and elsewhere refers to a change in the law of dower made by it as brought about "nova superveniente gratia et provisione".7 In a case in 43 Henry III one of its sections was referred to as "Provisio de Merton".8 "The Edictum de Kenilworth' is well known, and it was so called by contemporaries.9 The Statute of Winchester is cited by the author of the "Mirror of Justices" as "la constitucion de Wincestre".10 In the reign of Henry III the word "statute" begins to be prominent; but at first hardly in any technical sense and alternative with other terms. For example, in 39 Henry III the statement is made that a rule in "consilio apud Merton provisum fuit et statutum," concerning the procedure on a writ of right "post illam constitucionem".1 So in 52 Henry III mention is made of the pardon for transgressors in the time of the recent war, "occasione provisionum seu statutorum Exoniae non observatorum".2

By the time of Edward I, however, it is evident that "statute" is becoming a technical term, and the other names cease to be applied to the same enactments. So the author of the "Mirror" in the third chapter of his first book—"Des premiers constitucioun"—tells us that Alfred ordained "pur usage perpetuele" that his nobles should assemble at least twice a year "pur parlementer sur le guiement de people Dieu. Par cele estatut," he says, divers ordinances were made in times subsequent.3 "The Statutum de Marleberge" is referred to in pleas of the fifth and sixth years of the reign.4 In Michaelmas Term, 13 & 14 Edw. I, judgment was given under a rule "quod constitutum fuit per Regem per secunda statuta Westmonasteriensia".5

It is unnecessary to continue further a list which grows rapidly longer after this date. Statute has now become the usual word for a certain kind of enactments of Parliament, and it is sometimes applied to acts, such as the one known as "De Asportatis Religiosorum," which are known to us only in forms not usual in statutes, some of them being found only in the form of writs.6 The uncertainty of some of these so-called statutes may be due to a looseness in the application of the term which disappeared later, when the word invariably conveyed one definite and technical meaning. "Statutum" seems to be a popular rather than a technical term before the reign of Edward I, and it is possible that the non-technical employment of it may have survived longer in isolated cases to the confusion of the modern historian.

Our real difficulty arises with the question, what was the real nature of these "statuta" after the meaning of the word had been fixed, and how did they differ, if at all, from the law that preceded them, and from enactments which were not termed statutes?

The subject of the relation of enactment to the law which precedes, as that relation was understood in the later Middle Ages, is a subject that has received a good deal of attention in recent years. We have passed beyond the naïve view that men of the Middle Ages *must* have understood that relation just as we understand it to-day. We are trying to discover what the men of that time really thought about it. For example, Mr. Lapsley's view that the well-known declaration of Parliament in 1322, seeming to require the participation of all the estates of the realm in binding legislation, applied merely to such constitutional arrangements as had been effected by the ordinances of 1311;1 or Prof. Merriman's interpretation of Parliament's legislative functions as the repealing rather than the enacting of law.2

As an alternative interpretation I submit an explanation, which might be summarized as follows:—

First.—Enactments of substantive law in England in the later Middle Ages were made for the general purpose of affirming the law already approved or of removing abuses which hindered its due execution—"pur surement garder les Loies ove due execution et hastif remedie pur abusion de la Loye en usurpation".1

Such affirmance implied frequent interpretation, the supplying of additional penalties to secure proper execution, and even supplemental enactments for the same purpose. This eventually led to changes in the law itself, but such changes came gradually and in the main only incidentally, and were not the main purpose of enactment. Repeal of the laws used and approved is in the beginning not thought of. It comes very gradually, and in the guise of the removal of provisions which have wrongfully interpreted or added to the old law and tended to the introduction of abuses rather than the removal of them. The substance of the old law itself is in theory not repealable, at least in early times. When statutes are repealed the oftrepeated reason is that they are against the law of the land or prerogative. Repeal is strictly in the beginning, nothing more than a remedy "pur abusion de la Loye en usurpation". Occasionally, in times of disorder, whole Parliaments were repealed in the fourteenth and fifteenth centuries, but the reason alleged is usually that their summons is irregular or their acts unlawful. It is only at a comparatively late period that the repeal of statutes is openly avowed as one of the purposes of Parliament; even then such a power is hardly considered as reaching the central principles of the common law. On the contrary, an examination of parliamentary rolls of the fourteenth and fifteenth centuries will show that the first business of a Parliament is the re-enactment or affirmance of the whole body of the fundamental law, including the statutes of the King's predecessors. This is nearly always stated among the purposes of the Parliament in the "Pronunciationes," and it is almost invariably prayed for first among the petitions of the Commons. It would not be beyond the truth to say that in this period, Parliament was, in its "legislative" capacity, above anything else, an affirming body, for such affirmations *en bloc* are almost invariable.1 It is only in the latter part of this period that the Commons in their petition for the affirmance of preceding enactments begin to add the significant phrase, "et nient repellez".2 There is a remarkable, and possibly not accidental, similarity between these repeated affirmations at the opening of each Parliament and the earlier proclamations of the King's peace, at the beginning of each reign.

Second.—Participation in the enactment of such laws is based on the theory that the binding enactment of a law can be made only by those whom it touches. It must be a law "approbata utentium," to use Bracton's phrase.3 If an enactment is to bind the clergy, the clergy must assent; to one binding the baronage, the barons must assent; a provision affecting merchants only is binding on account of their consent alone; and the law of particular districts is recognized as valid "more approbata utentium". But likewise, "what touches *all* should be approved by *all*".1 And what touches all is the law common to all—the "lex communis, lex terrae, lex regni".

On this basis of consent Glanvill had tried to fit feudal conditions into Roman terms, by saying that the people had enacted a law that had been "approved" by immemorial custom; much in the same way that Roman lawyers, ages before him, had interpreted the "uti legassit" of the Twelve Tables in the development of the law of testamentary succession. If this were true, it would not be absurd to assimilate English custom with Roman "lex". It certainly was observed "pro lege". All this is clear enough for local and particular customs. But what of the common law? How can it really be said to be enacted, affirmed, and "approbata utentium omnium"?

For much of the thirteenth century the baronage, lay and ecclesiastical, made good their claim that they alone were the "populus"; that "all" included none beyond themselves. "Populus" is frequently used in that sense at that time, and their assent seems to have been considered the assent of the realm. But by the fourteenth century this was changed. Other communes besides theirs were making themselves felt in the national councils, the "communitas bacheleriae Angliae"1 and the communities of the towns, who considered themselves a part of the "communitas Angliae"2 to which the "lex communis" applied. It is a striking fact that Edward's principle that what touches all should be approved by all was carried no further than those communities until the Reform Bills of the nineteenth century. Those had a right to participate in the enactment of common law, to whom common law applied, and by the fourteenth century the communes of the counties and the towns were able successfully to vindicate in Parliament their claim to be a part of the "populus" to which that law and all provisions affirming it were common.

It is clear that such a principle could not be enforced, and could indeed hardly arise, before the composition of Parliament was settled on the basis which it retained until the legislation of the nineteenth century. Naturally, while that composition was still unsettled this principle was doubtful. Even if a law must be "utentium approbata," how could the whole "communitas Angliae" consent in Parliament? At first, apparently, while the composition of Parliament fluctuated, there was doubt as to the validity of an enactment until it had been proclaimed locally throughout the realm. Only gradually did the theory arise that the whole of England was constructively in Parliament; that they were all assumed to be there consenting to what Parliament did. The theory of representation was complete in the fourteenth century. The fact that much of the representation was only "virtual" need give us little concern, when we remember that this remained equally true for five hundred years after, and that to a certain extent it is true to-day. This theory then did not necessarily give to the estates in Parliament alone the right to legislate for particular persons, classes, or places. That might be done by the King by charter or otherwise with the assent of those only who

were affected. Neither did it require the assent of "all" the estates in Parliament unless that assent was given to some enactment which touched them all. The one thing that obviously did touch them all was an enactment affecting the "lex communis". To that the assent of "all" was necessary.

Third.—This theory of the participation of the estates in enactment, if true, will in part explain the nature of the enactments of Parliament themselves. Statutes are enactments of law "perpetuelment a durer". If this law happens to be "common," then all must assent. But the real distinction between statute and ordinance, which gave Coke so much trouble, does not arise from the difference between enactments of common law and other enactments; nor from the fact that the King, Lords, and Commons must all unite upon a statute, while this is not necessary for an ordinance, as Coke thought. The real difference is that a statute, in its original meaning, is an affirmance of law. If it is in affirmance of the common law, it shares the nature of the law it interprets, and I have tried to show that one of the characteristics of that common law is its permanence and its supremacy in the realm. Like the law it authoritatively interprets, a statute in affirmance of the common law is permanent also; it has become in a sense a part of that law. Statutes affecting law other than common are for a long time less numerous and less important, and the name statute was probably applied to them later than to acts for the whole realm and on the analogy of the latter. But the essential characteristic in all cases seems to be the purpose on the part of those enacting that their work shall endure for all future time; a characteristic that parliamentary statutes were conceived to have, because their origin was traceable to the affirmance of a law that was permanent, extending "a tempore cujus non extitit memoria". This theory is weakened somewhat in the fifteenth century, but it is safe to say that this is the general conception of parliamentary "legislation" from the thirteenth century on. Statutes are enactments "per-petuelment a durer". It is their permanence that makes them "statutes," and necessitates somewhat greater formality in their promulgation than is necessary in acts of a character less permanent and therefore less important.

Ordinances, on the other hand, are temporary provisions, which are not considered to affect the permanent law unless they are re-enacted "in form of a statute," as they often were. The essence of a statute, then, is permanence, that of an ordinance is its temporary character. Statutes in affirmance of the common law had to be assented to by all; so had ordinances if they touched all the estates represented in Parliament. Both statutes and ordinances are found that touch fewer classes. When they are, only those classes so affected need assent in order to make them binding law for them. These distinctions, are, like the conception of affirmance, much clearer in the fourteenth century, than in the fifteenth; when many of the older ideas of Parliament's functions are becoming blurred, and precedents are beginning to form which are later to furnish the basis for the modern theory of legislative sovereignty.

These are the three chief points which the contemporary records seem to me to indicate in regard to the nature of enactment. Before taking up their bearing on the history and nature of Magna Carta, I shall set forth a few of these records, under the three headings mentioned above; and first, under that of—

I. THE AFFIRMANCE OF COMMON LAW.

In this connection, nothing is more significant than the words of the preambles of Edward I's two remarkable Statutes of Westminster, which, more than anything else he did, justify the application to him of the title the English Justinian.1 One statement in the preamble to the second statute is particularly interesting. It recites the fact that at Gloucester, in the sixth year of the reign, certain statutes had been passed, but that certain cases remained undetermined — "quidam casus in quibus lex deficiebat remanserunt non determinati, Quaedam enim ad reprimendum oppressionem populi remanserunt statuenda". Hence the present statute. Commenting on this, the author of the "Mirror" says: "What is said in the second Statute of Westminster as to the failure of law in divers cases is open to objection, because for all trespasses there is law ordained though it may be disused, forgotten, or perverted by those who know it not. And the first three articles are no statutes, but merely revoke the errors of negligent judges." The first of these three articles is the important enactment "De Donis Conditionalibus," which certainly does do nothing but restore the law as it was before judicial decision modified it. In his biting comments on this and the other important enactments of the early part of Edward's reign, the same author says, for example: one "is no statute, but the revocation of an error"; another "affirms, rather than repeals an error"; another, though it is "but common and ancient law," gives insufficient remedy; another "is merely the revocation to right law of a prevailing error"; another "is a novelty injurious to the lords of fees"; another "seems rather error than law"; another, "no statute, but lawless will and pleasure"; another "is founded upon no right"; another is "not founded on law"; while others "are just humbug (*truffe*) for they are not regarded". He also refers to Alfred's laws as a "statute" under which "divers ordinances were made by divers kings down to the present time, which ordinances are disused by those who are less wise and because they are not put in writing and published in definite terms".1

The form of the coronation oath, which remained with but few modifications until the accession of William and Mary, was probably used first at the coronation of Edward II. It was certainly used at the coronation of Henry IV.2 In it there is one promise that was not demanded before—"Concedis justas Leges et Consuetudines esse tenendas, et promittis per te eas esse protegendas, et ad honorem Dei corroborandas quas vulgus elegerit, secundum vires tuas. Respondebit, Concedo et promitto". This is the oath so much referred to by the King and by Parliament in the fourteenth and fifteenth centuries, and its importance is very great in the history of enactment. The celebrated ordinances of 1312 provide that all the statutes made "en amendement de la lei et au profit du poeple" by the King's ancestors, "soient gardez et maintenuz si avaut come estre devient par lei et reson," provided they are not contrary to the Great Charter, the Charter of the Forest, or the present ordinances; and that if any statute were made "countre la fourme susdite, soit tenuz pur nul et tout outrement defait".1 Two entries on the Parliament Roll for 1343 during the struggle of the King and Parliament are instructive on this point. It was agreed that the statute of two years before (15 Edw. III) "soit de tut repellez et anientez et perde noun d'Estatut, come cel q'est prejudiciel et contraire a Leys et Usages du Roialme et as Droitz et Prerogatives de nostre Seigneur le Roi". But as there are certain articles embraced in the said statute which "sont resonables et acordantz a Lei et a Reson," the King and his Council agree that

these articles, together with others agreed upon in the present Parliament, "soit fait Estatut de novel" on the advice of the "Justicies et autres Sages, et tenuz a touz jours".2 In the same Parliament the Commons pray that the statutes concerning grants be observed. The King replies that since he perceived that "le dit Estatut feust contre son serment et en blemissement de sa Corone et de sa Roialte, et contre la Ley de la terre en plusours pointz," it should be repealed. But he wishes that the articles of the said statute be examined and that such as are found "honurables et profitables pur le Roi et son poeple soient ore faitz en novel Estatut, et gardez desore".3

In 1347 the Commons petitioned that a plaintiff recovering damages on a writ of trespass should have execution on the defendant's lands, but were answered by the King that this could not be done "sanz Estatut," upon which he desires the advice of his Council, and will do what seems best "pur son poeple".1 In 1348 the Commons prayed that the King would give no response changing their petitions as a result of any "Bill" presented in Parliament "in the name of the Commons". By advice of the Prelates and "Grantz" the King replied to these petitions "touchantes la Lei de la terre, Qe le Leies eues et usees en temps passez, ne le Process d'icelle usez cea en arere, ne se purront changer saunz ent faire novel Estatut. A queu chose faire le Roi ne poait adonques, ne unquore poet entendre par certeines causes. Mes a plust tost q'il purra entendre," he with his Council will ordain touching those articles and others "touchantz Amendement de Lei" according to reason and equity, for "all his lieges and subjects and for each of them".2 A very important entry occurs in the roll for 25 Edward III, where the Parliament interprets the law of succession. "Nostre dit Seigneur le Roi veuilliant qe totes doutes et aweres fuissent oustes, et la Lei en ceo cas declare et mise en certeine, fist charger les Prelatz, Countes, Barons, et autres Sages de son Conseil, assemblez a ceo Parlement, a faire deliberation sur cel point. Lesqueux d'un assent ont dit, Qe le Lei de la Corone d' Engleterre est, et ad este touz jours tiele....Laquele Lei nostre Seignur le Roi, les ditz Prelatz, Countes, Barons, et autres Grantz, et tote la Commune, assemblez el [en] dit Parlement, approevent et afferment pur touz jours".3

For much of the fourteenth and fifteenth centuries the Parliaments are regularly opened by a "Pronunciatio"; such as the one which states, among the chief reasons for the summons, "qe l'Estatutz faitz cea en arer pur amendement des Leies de la terre et du people ne sont pas gardez ne usez en lour effect";1 another, which urges that the good laws and customs be guarded and preserved and violators punished;2 another asking the Commons for information "coment ses Leyes de sa Terre et l'Estatutz sont gardez et executez";3 or one which announces that it is the will of the King that the laws "serroient tenuz et gardez," and promises that by letters under the secret seal or privy seal or otherwise, "la Commune Loie ne serroit destourbez, ne le poeple en lour pursuyte aucunement delaiez".4 For the same period the petitions of the Commons usually begin with a prayer, such as the one in 1379, which asks, among other things, "that the common law of the land be held as used in the time of the King's ancestors".5

As seen in many of the instances given above, affirmance and interpretation often go together in re-enactments of the law, as well as supplementary provisions of great importance. But Bracton was expressing the conception of his time, in distinguishing

what adds to the law from what is contrary to it: “Non destruitur quod in melius commutatur”6 . So, he says, a writ is quashed if “contra jus et regni consuetudinem et maxime contra chartam libertatis....Si autem praeter jus fuerit impetratum, dum tamen fuit rationi consonum *et non juri contrarium*, erit sustinendum, dum tamen a rege concessum et a consilio suo approbatum.”1 The general business of a Parliament was well stated in the “Pronunciatio” of the Parliament of 38 Edward III2 to be—“les Lois, Custumes, Estatutz, et Ordinances en son temps, et en temps de ses Auncestres faites, meintenir, et si nuls soient que busoignent declaration, ajoustement, ou artement, solonc le cas, temps, et necessite, ensement de lour bon avis et conseil declarer, ajouster, retrere, et amender”. The great importance of affirmance in enactment is also illustrated in the limits which were set to the King’s dispensing power. The one kind of statute with which he might not dispense, was the kind passed in affirmance of the law.3

II. PARTICIPATION.

It would be rash to say that the principle underlying the participation of the various classes “represented” in the English Parliament came entirely from feudalism. There are precedents in Rome, and precedents in England and on the Continent after the fall of the Roman Empire, of quite another kind. But these came to the men of the later Middle Ages through a feudal channel. To put it in another way, feudalism is the stage through which English institutions had passed and were still passing at the time when the common law was forming and the functions of Parliament developing, and the participation of the “estates” in “legislation” can no more be understood without taking this into account than can the existence of these estates themselves. Behind them all lies the “Curia” of the lord in which the laws of the fief are “found” and applied by all the tenants who owe suit there and have the corresponding right to be tried only by the “pares curtis”. The Court of the King was the “Curia Regis,” and the laws “found” there by its suitors were the “lex terrae”. But while tenants-in-chief alone might “find” those laws, they had not made them. For a long time the barons were able to make good their claim that they were the “populus,” and through that fiction might alone interpret and enforce the law, but this fiction never destroyed the underlying theory that law was approved “consensu omnium utentium,” and just so soon as other classes became strong enough they asserted their right to assent to enactments affecting themselves. Precedents might be found as early as the preamble to Alfred’s laws and the indefinite “right” of the people to ratify the “election” of a King, as it appears in the Norman period,1 a “right” to be traced back no doubt to much the same origin as the similar procedure in the choice of the Popes before the “constitution” of the Papacy was definitely formed; but it seems best to go back no further than the thirteenth century. A beginning might be made with the clear statement of Bracton who mentions the “leges Anglicanae et consuetudines...quae quidem cum fuerint approbatae consensu utentium, et sacramento regum confirmatae, mutari non poterunt nec destrui sine communi consensu et consilio eorum omnium, quorum consilio et consensu fuerunt promulgatae”.1 Enactment and interpretation by the King and his Curia are permissible without this “consilium omnium,” since they do not destroy, but only improve the law. In “melius tamen converti possunt, etiam sine eorum consensu, quia non destruitur quod in melius commutatur”. So also things “nova et inconsueta et quae prius usitata non fuerint in regno, si tamen similia

evenerint, per simile judicentur....Si autem talia nunquam prius evenerint, et obscurum et difficile sit eorum judicium, tunc ponantur judicia in respectum usque ad magnum curiam, ut ibi per consilium curiae terminentur". When, however, anything is enacted, it is "communi consensu omnium," in theory, even though not in fact. We know that the barons alone enacted what Bracton calls "quaedam constitutio quae dicitur constitutio de Merton," yet he says one of its articles "provisuum est et concessum *ab omnibus*".2 The sentence of excommunication pronounced in 1253 against violators of Magna Carta, or the liberties of the Church, "vel antiquas regni consuetudines approbatas," is followed by a ratification under the seal of the King and certain magnates, concluding with a warning, that if any additions are made to the document, "dominus Rex, et predicti magnates omnes, et *communitas populi* protestantur publice...quod in ea nunquam consenserunt nec consenciunt, set de plano eis contradicunt".3 It seems pertinent in this connection also to refer again to the form of the coronation oath, which seems to date from 1307, under which the King promised to hold, protect, and strengthen the just laws and customs "quas vulgus elegerit".1 The word "vulgus" was not used by accident—nor "elegerit" either. The "consensus omnium" includes theirs, in theory at least, even though it be often merely the tacit assent to immemorial custom.

Participation in grants need not detain us. The word "consuetudines," customs, had in the Middle Ages, as it has now, a double meaning; and undoubtedly it was the desire for a larger participation in grants rather than in enactments that led to the application by Edward I to the "Magnum Concilium" in larger measure than before of the old principle that what touches all should be approved by all. The vindication of the right of consent to grants was understood and is understood now. For participation in "legislation" more proof is needed, but fortunately it exists.

For example, in 1364 the Rolls of Parliament refer to certain good purveyances and ordinances passed with assent of "Ducs, Countes, Barons, Nobles et Communes...*et touz autres qe la chose touche*". Some of these are referred to later in the roll as 'Estatutz".2

In 1354 the Commons complain of the ordinance of the Staple lately passed *in the Council* at Westminster. They insist that such matters can be determined only in Parliament because they really concern the King *and all his people*. They declare that they have inspected these provisions "et queles lour semblerent bones et profitables pur nostre Seigneur le Roi et tut son people, soient affermez en cest Parlement, et tenuz par Estatut a durer pur touz jours. A quelle priere le Roi et touz les Grantz s'acordent unement, issint totes foitz, qe si rien soit ajouster soit ajouste, ou qerien soit a ouster soit ouste en Parlement, quele heure qe mestier en serra, et nemye en autre manere."1

In 1363 the rolls say, "Et issint le Parlement continue sur tretee de divers choses, touchantz si bien les Petitions baillez par les Communes et autres singulers persons *come les Busoigues du Roy et son Roialme*."2

In 1371 the Commons recite the statute ordering "qe nul Justise par mandement de Grant ou Prive Seal ne lessera de faire commune Ley et Droit as parties"; and pray

that it be observed, and "qe par comandement du Roi, ne prier des gentz prives, n'autres, la Commune Ley ne soit delaie ne bestourne".3

In 51 Edward III the Commons petition not to be bound by any statute or ordinance made without their consent, and that statutes made in Parliament be annulled only there, "et ceo de commune assent du Parlement". They pray more especially that they be not bound by any statute or ordinance granted on petition of the clergy to which they have not consented. "Ne qe voz dites Communes ne soient obligez par nulles Constitutions q'ils sont pur lour avantage sanz assent de voz dites Communes, Car eux ne veullent estre obligez a null de voz Estatutz ne Ordenances faitz sanz lour assent". The response is, "Soit ceste matire declares en especial"; probably because it might be a nice question whether the matters objected to were not really things which touched only the clergy rather than "tut son people," and therefore such as might rightly be determined without the Common's assent.4

In the midst of the troubles of the year 1381 an interesting entry is found in the Rolls of Parliament. The Chancellor "en plein Parlement" asks the opinion "de toutz illeoques" on the repeal of the manumission recently granted to the serfs. To which the lords spiritual and temporal, the knights, citizens, and burghers, responded with one voice in favour of the repeal—"Adjoustant, qe tiele Manumission ou Franchise des Neifs ne ne poast estre fait sanz lour Assent q'ont le greindre interesse".1

Eight years later the Commons petition that neither the Chancellor nor the Council, after the dissolution of Parliament, should make any ordinance "encontre la commune Ley, ne les aunciens Custumes de la Terre, et Estatutz devant ces hures ordeinez, ou a ordeigner en cest present Parlement: *einz courge la commune Ley a tout le poeple universel*".2

The proclamations for the publication of statutes or of Magna Carta, and the "pronunciationes" and petitions in Parliament also furnish considerable general evidence on this point. In all these the matters upon which the whole Parliament has acted are expressly stated to be articles "pur le commun profit du peuple e du reaume," as in the royal proclamation of the confirmation of Magna Carta in 1297;3 or a grant "a soen poeple pur le pru de soen roiaume," in the "Articuli super Cartas" of 1300.4 So a mandate to the Justice of Chester, of 1275, orders him to publish in Chester certain provisions and statutes enacted by the magnates "for the good of the realm and for the relief of the people".5 Such expressions are common later in the "pronunciations du Parlement," but they are not found after Edward II's reign in cases where the Commons have not assented. For example, in 1351 there is mention made of "l'Estatutz faitz...pur amendement des Leies de la terre et du poeple";6 in 1378, of the good laws and customs of the realm;1 in 1397, "Loyes justes et honestes universelment, par queux si bien les grantes come les petitz deussent estre governez". The King wishes to know if any of his subjects have been hindered in obtaining remedies "par la commune Ley, et sur ce estre conseillez par toutz les Estatz du Parlement, et ent faire bone et due remede en cest present Parlement".2 In 1414 the King desires the preservation of "les bones Leies de sa Terre"; and also asks Parliament "pur faire autres Leies de novell, a l'aise et profit de ses lieges".3 The

language is somewhat different from what would have been thought of a century earlier, but the principle is the same.

The petitions of the Commons, like the "Pronunciationes" in the King's name, seem to make this distinction also. In 1341 the Commons pray for the observance of Magna Carta and "des autres Ordinances e Statutz, faitz pur profit du commune poeple entendant les pointz de la dite Chartre, ensemblement od les autres perpetuelment a durer".4 Again in 1368 they petition for the maintenance of the charters "e touz les Estatuz faitz devant ces hures *pur profit de la Commune*".5 The next year they ask that the statutes be maintained, "si bien l'Estatut de la Foreste, come touz autres Estatutz, lesqueux deivent suffire a bon Governement s'ils soient bien gardez".6

Very important is the careful answer of the Archbishop of Canterbury in 1399 to the prayer of the Commons to be excused from taking part in the judgments of Parliament.7 It is true, he says, as the Commons have set forth, that they need not take part in Parliament's actions—"Sauve q'en Estatutz a faires, ou en Grantes e Subsides, *ou tiels choses a faires pur commune profit du Roialme*, le Roy voet avoir especialment leur advis e assent".

This evidence of the necessity for the advice of the Commons on matters "pur commune profit" is supplemented by proof of the converse—that matters which were clearly not of this character, which affected particular classes only—needed no ratification by the Commons to make them binding law for those whom they did affect.

So we find a regulation of the Exception of Neifty by "le Conseil en Parlement" in 1347;1 and an "Accord" in 1331 by which the lords agree, "qe nul Grant de terre" will aid any robber, but give aid to the justices in punishing them.2

In 51 Edward III to a request of the Commons for an ordinance regarding foreign merchants, the King answers that he and the magnates will consider and ordain what is best.3

Matters specially affecting the clergy are among the most valuable on this point. In 1389 the two archbishops made a protestation in full Parliament that they do not assent to any statute of that Parliament "nunc noviter edito, nec antiquo pretenso innovato," which is in restriction of "Potestas Apostolica" or the liberties of the Church.4

In 1397 the prelates protest that they cannot assent to any enactment of the King or the temporal lords touching the rights of the Pope. There is no mention of the Commons.5 The Commons had in fact petitioned that the King would, with the advice of such sages and worthies as he pleased, at the next Parliament ordain such changes in the Statute of Provisors as seemed reasonable and profitable in their discretion.1 In the same year a committee of Parliament, consisting of lords and knights, but commissioned "par vertue e auctorite du Parlement, de l'assent des Seigneurs Espirituels e Temporels," annulled the Duke of Hereford's patent.2

In 1433 the Commons prayed for a modification of the Statute of the Staple of Calais, and were answered that it should be done as they desired, "Savant toutz foitz au Roy, poair et auctoritee de modifier mesme l'Estatut quant luy plerra, par advys de son Counseil solonc ceo qe meulx luy semblera pur le profit du Roy, e du Roialme".3

III. VARIETIES OF PARLIAMENTARY ENACTMENT.

Enactments of Parliament are referred to in contemporary official records under various names: "provisiones, etablissements (stabilimenta), constitutiones, accords, awards, ordinationes, statuta," and a number of others. Most of the treatment of the points vital to this paper may be included, however, under the last two of these, and that treatment need not be very long, after the many excellent discussions of this subject from the seventeenth century to the present.4

The treatises referred to above quote or cite most of the important precedents in the Rolls of Parliament,1 and it would therefore be useless to give here more than a few of these.

In 1324 was passed the statute concerning the lands of the Templars, which was afterwards objected to as against law. The statute was made by the King and Magnates only, but it was declared to be "concordatum...provisum et statutum pro lege in hac parte perpetuo duratura".2

Two years later the King replied to a petition of the Commons, that certain ordinances should be viewed and examined "et les bones soient mis en Estatut, et les autres soient oustez".3

The Statute of Purveyors,4 passed by the King, Lords, and Commons, is followed by five additional articles which are to be in force without change until the next Parliament. Just following these articles there is a note on the Statute Roll—"Et memorandum quod in parliamento predicto concordatum fuit quod articuli predicti non tenerentur pro Statuto".

Probably the most conclusive entry in the Rolls of Parliament occurs in 1340, where a committee is chosen consisting of knights and burgesses as well as lords, who are instructed to look over the records of that Parliament from day to day and cause "*mettre en Estatut* les pointz et les articles *qe sont perpetuels*. Lequel Estatut nostre Seignur le Roi, par assent des touz en dit Parlement esteantz, comanda de engrosser et ensealer et ferment garder par tut le Roialme d'Engleterre....Et sur les pointz et articles *qe ne sont mye perpetuels, einz pur un temps*, si ad nostre Seignur le Roi, par assent des Grantz *et Communes*, fait faire et ensealer ses Lettres Patentes...."1

In 15 Edward III an interesting case occurs. Apparently the previous petitions of Parliament had been assented to, but not authenticated as statutes by the Great Seal. Now, as a condition of the payment of an instalment of a previous grant, the demand is made that these be affirmed as granted by the King—"C'est assavoir, *les pointz a durer par estatut et les autres par Chartre ou Patent*, et liverez as Chivalers des Counteez sauz rien paier."2 The word ordinance does not occur.

In 1344 the Commons pray that the "Provisions, Ordinances, and Accords" made in a previous Parliament "soient affermez par Estatut perpetuelment a durer".3

In 1347 they petition that a provision already agreed on in Council without delay be made "selonc la fourme de l'Estatut," and the King promises that that article and the points contained in it "soient tenuz et gardez en touz pointz, solonc la fourme d'Estatut ent fait".4

The Statute of Provisors of 13505 cites Edward I's Statute of Carlisle—"le quel Estatut tient touz jours sa force".

A perfectly clear instance is found in 1354. William de Shareshull, the Chief Justice, announces among the causes of the summons, the permanent fixing of the Staple. The Council had made certain provisions or "ordinances" which had been published throughout the realm, and that Council had included prelates, lords, justices, serjeants, "and others of the Commune". But now—"pur ceo qe nostre Seignur le Roi, et les autres, si bien Grantz come Communes qi lors estoient au dit Conseil, verroient qe la dite Estaple se tendroit et durroit perpetuelment es Roialme et terres avant ditz, si ad mesme nostre Seignur fait somondre son Parlement a ce jour de Lunedy, aufyn qe les Ordinances de la dite Etaple soient recites en meisme le Parlement, et si rien soit a adjouster q'il soit ajouste, et soit a durer perpetuelment come Estatut en Parlement".1

Another case, equally important, is found in 1 Richard II.2 The Commons in that year prayed the King that the "petitions" of the recent Parliament which were "pur profit de son poeple" (no doubt to distinguish them from the "bills" presented by individuals)3 should be now shown to the Commons, and that such as had been assented to in the form "*Le Roi le veet* ""soit afferme pur Estatut; ce q'est dit as Communes touchant partie des dites Petitions qe ce ne fuist qe Ordenance et nemie Estatut, qe ceo puisse estre vieuwe et rehercee as Communes, et ceo qe resonable est qe y soit ordene pur Estatut."

The next year the Commons pray that "bills" of private persons receive no response, but that their own petitions be answered, a remedy ordained before the dissolution of the Parliament, and upon that—"et sur ce—due Estatut soit fait en ce present Parlement, *et enseale a demurrer en tout temps a venir*".1

In the third year of the same reign the Commons petition that an existing ordinance "soit mys en Estatut, en affirmance d'icelle"; and the King replied, "soit mesme l'Ordeinance...tenuz et gardez pur Estatut."2

In 1399 mention is made of certain statutes "que semper ligarent donec auctoritate alicujus alterius Parliamenti fuerint specialiter revocata."3

Many instances might be given to show that this distinction between statute and ordinance, apparently perfectly clear, as to form at least, in the time of Edward III, was becoming much less so in the fifteenth century.4

These illustrations seem to show that there was a double difference between a statute and an ordinance—a difference in subject matter, and one of form and effect. Statutes

were, in the beginning, affirmances of the ancient law, other kinds of enactment were employed, for temporary administrative measures.

At the opening of Parliament, the whole body of the ancient customary law, together with the two charters and all previous statutes, was affirmed or confirmed. This was on the analogy of the earlier declarations of the King's peace at the opening of a reign, and it is the nearest approach mediæval England shows toward a fundamental law. Before the days of modern written constitutions this was the most authoritative way in which a fundamental law could be promulgated.

After the affirmance, came, as indicated in the "pronunciationes," the removal of abuses, or of enactments contrary to or impeding the execution of this fundamental law, and the enactment of legislation supplemental to it which might be of sufficient importance to be classed with that law itself and therefore put into a statute or statutes. As we have seen, one of the chief characteristics of the law so affirmed, interpreted, cleared, or improved, is its permanence. And the instances given above show clearly enough that the test of a statute is the question whether the enactment made by it is really incorporated into this law, along with it "perpetuelment a durer" and to be affirmed along with it in all subsequent Parliaments. The inference is clear, then, that in the beginning, probably all statutes were of this kind. But composed as they were of such subject matter, it is evident that their enactment is more important than other "acts" of a Parliament. As such, they required a different mode of authentication than less important acts. They were sealed with the Great Seal and engrossed upon the Statute Roll as a part of the permanent law, after which they were sent to the Chancery and the courts of the two benches, and also to Ireland and elsewhere in cases where this was necessary. Copies were also sent to the sheriffs of the counties, ordering their proclamation, preservation, and enforcement, within the counties.

This authentication was in the hands of the Council, consisting largely of the judges, or in special cases of a committee; who went over the Parliament Roll, during or after the Parliament; which led to many omissions and some changes and additions, sometimes complained of by the Commons. Ordinances, originally, as temporary law, were not affirmed generally at the opening of Parliament as the charters, ancient law, and previous statutes were. They also required a less formal mode of authentication than statutes. Without a formal engrossment they could be taken by the Council as the basis for royal writs, charters, or letters patent, by which they were published and their enforcement secured.

As time went on, the distinction between the subject matter of statutes and of ordinances became less marked. The difference came to be regarded more as a difference of form, though the real distinction did not disappear until the fifteenth century. Thus, in case of an enactment such as the ordinance concerning apparel in 37 Edward III, where the subject was new, there might be a question whether this was fundamental or not, and the Parliament was asked whether it preferred *the form* of a statute or of an ordinance—"s'ils voleient avoir les choses issint acordez *mys par voie* de Ordinance ou de Statuyt". They answered that they preferred the form of an ordinance, in order that it might be changed if necessary at the next Parliament.[1] In the fifteenth century the distinction seems to be largely disregarded, as temporary acts

are termed indifferently statutes or ordinances. In the half century embraced by the reign of Edward III, however, when the original distinction is still clearly preserved, there seems no doubt that a perfectly well understood difference existed between a statute "perpetuelment a durer" and an ordinance "pur en temps".

It would hardly have been necessary to enlarge so much on this point but for the evident confusion existing even in the minds of the latest writers on this important subject. Thus Sir William Anson says: The ordinance "is an act of the King or of the King in Council: it is temporary, and is revocable by the King or the King in Council. The *Statute* is the act of the Crown, Lords, and Commons; it is engrossed on the Statute Roll; it is meant to be a permanent addition to the law of the land; it can only be revoked by the same body that made it and in the same form."1

He proceeds to prove this by an entry from the roll of 1340 which is certainly the clearest statement of the real difference to be found in the Rolls of Parliament.2 But an examination of it shows—and this is corroborated by dozens of other instances—that the ordinances in this case, as well as the statutes, were assented to by King, Lords, and Commons. It proves his statement that the statutes were permanent law and the ordinances temporary provisions; it expressly contradicts his other assertion that an ordinance is necessarily "an act of the King or of the King in Council" in distinction from a statute, to which the Commons' assent must be added.

It is said in the excellent preface to Ruffhead's edition of the statutes,3 that the real difference between the subject matter proper to a statute and to an ordinance lies in the distinction between ancient law and "novel ley"; which is undoubtedly true, but I think hardly in the sense in which Ruffhead meant it. He says many acts were not entered upon the Statute Roll, "For if the Bill did not demand 'Novel Ley,' that is, if the Provision required would stand with the Laws in Force, and did not tend to change or alter any Statute then in being, in such Case the Law was compleat by the Royal Assent on the Parliament Roll, without any Entry on the Statute Roll: and Such Bills were usually termed Ordinances." But the term "novel ley," as used in the Rolls themselves and in the Year Books of the time, does not seem to mean new law so much as new enactment. Acts in affirmance are continually spoken of as "novel ley" in distinction to the ancient law lying behind it. And while the rest of his statement seems to be completely supported by the Rolls themselves, this assertion and his inference based upon it seem to go too far.

One more point in regard to enactment seems in need of explanation before we are in position to form a true estimate of Magna Carta at this time, and that is the legal necessity, and the legal effect, of the publication of statutes.

The sealing,1 engrossing,2 and publication,3 are the outward marks of an early statute. The procedure is so fully described in the introduction to the "Statutes of the Realm,"1 that it need not be repeated here. Their publication, however, was so important a part of the authentication of statutes in early times that a statute is usually referred to before the middle of the fourteenth century as "statutum editum" in a certain Parliament or year.2

The theory of "representation" is found surprisingly early in England, but so long as the composition of Parliament was uncertain, publication in the counties must have been of even greater importance than it was afterward. It is probable that some doubt existed in this period as to the reality of the assent "omnium utentium" unless a statute had been actually proclaimed locally throughout the realm.

This probability is strengthened by the cases where the King, who alone could give effect to an enactment, saw fit temporarily to suspend its operation. In the later Middle Ages there is considerable evidence of the existence of a suspending power on the part of the King, notwithstanding the summary dismissal of it as "pretended" by the Parliament in 1689.3

It seems certain, however, that when the composition of Parliament settled down into its final form, such doubts, if they existed, were swept away by the full acceptance of the theory that the whole body of the people were constructively in Parliament and therefore were bound by all its statutes on their mere enactment without publication, though the publication was actually continued until the invention of printing made it no longer necessary. This view was stated with vigour and clearness in 39 Edward III, in the case of *Rex v. the Bishop of Chichester*.1 The prosecution was under the Statute of Provisors, and Serjeant Cavendish, counsel for the Bishop set up as a part of his defence that this enactment was not binding because it had not been published in the counties. He was answered by Sir Robert Thorpe, the Chief Justice: "Granting that proclamation was not made in the county, nevertheless every one is considered to know what is done in Parliament: for so soon as Parliament has concluded anything, the law presumes that every person has notice of it; for the Parliament represents the body of all the Realm; wherefore it is not necessary to have proclamation where the statute took effect before".

It now remains to apply these deductions to Magna Carta and to Edward I's mandate requiring its enforcement by his judges, as common law.

John's Charter was in form a royal grant guaranteeing rights almost all of which had already existed by feudal custom or otherwise. It was granted primarily to his tenants-in-chief and their "homines". It was a feudal rather than a national document, and the grantees were probably then conceived to include none lower than "vavassores".2 But the reign of Henry III was from the point of view of the development of institutions, almost a revolutionary epoch. The loss of Normandy and other influences brought about in this period a remarkable development of the idea of nationality, which is reflected in the growth of the National Assembly and in other respects.1 This influence can be seen in Magna Carta. In addition to the extension of John's articles on the forest into a new, separate, and more detailed charter, Magna Carta itself was reissued three times, with new clauses, defining, interpreting, and enlarging some of the original articles of a permanent nature and omitting the parts obviously temporary. In addition, it was solemnly confirmed by an excommunication against all who should break or change it, and it was confirmed by the Statute of Marlborough. An examination of these documents and incidental inferences in other writings of this reign, official and non-official, leads to the conclusion that contemporary ideas of the nature of Magna Carta greatly changed during this period. It was now seen that this

was more than a "carta libertatum": it was a "carta libertatis". Though originally granted only to feudal "homines," it was now applied to all "liberi homines": though "conceded" at first as by royal favour, in this period it comes to be regarded as a solemn affirmance of fundamental rights, guaranteed to all, and approved by all. For the year 1225 the Annals of Dunstaple, in speaking of the reissue of Magna Carta in that year, say, that in the "colloquium generale" in London, "Post multas vero sententiarum revolutiones, communiter placuit quod rex *tam populo quam plebi* libertates, prius ab eo puero concessas, jam major factus indulsit".2

The sentence of excommunication in 1253 condemns all who shall violate, infringe, diminish, or change the rights of the Church, the ancient and approved customs of the realm, "et praecipue libertates et liberas consuetudines que in *cartis communium libertatum* et de foresta continentur".1 Bracton calls the third reissue of Magna Carta "constitutio libertatis"2 or "constitutio" merely,3 and, as we have seen, Magna Carta is referred to officially in 19 Edward I as "statutum de Ronemede".4 The author of the "Mirror of Justices" mentions it as "la constitution de la chartre des franchises".5 By 1297 it has become "la graunt chartre des fraunchises d'Engleterre," proclaimed "pur le commun profit du peuple e de reaume;6 or Magna Carta "domini Henrici quondam regis Anglie...de libertatibus Anglie";7 though to Pope Clement V it is only "concessiones variae et iniquae".8 By the time the word statute has come to have a definite meaning, we begin to find that term also applied to Magna Carta.9 In 15 Edward III the Commons strengthen one of their petitions by a reference to "les pointz de la Grande Chartre faitz par les nobles Rois et ses Progenitours, et les Grantz du Roialme sages et nobles adonques Pieres de la terre, et puis sovent confirmez de divers Rois; Et puis molt des autres Ordinances, e Statutz, faitz pur profit du commune poeple entendant les pointz de la dite Chartre, ensemblement od les autres perpetuelment a durer, sanz estre enfreintz sinoun par acorde et assent des Pieres de la terre, et ce en pleyn Parlement".1 In 1432 the Commons appeal to "ye Statut of the Grete Chartre, confermed by diverse oder Statutes".2

Thus it is clear that Magna Carta had come to be considered an enactment much in the original sense of a statute: in affirmance of ancient law. The quotation above from the roll of 15 Edward III brings this out clearly.3 It also shows that Magna Carta was regarded as common law, with its interpretations.

It is such statements as this that enable us to put Magna Carta in its true setting in the fourteenth century. But there is another phrase in the same quotation from the roll of 15 Edward III—"Et puis molt". Magna Carta, while much the same in character as other statutes, in binding force is classed far above them. While it is said they may be changed in Parliament, this statement does not include Magna Carta itself. We shall see later that this distinction was constantly made. Magna Carta had, in fact, from the time of Henry III, been recognized as in some sense a law fundamental. Henry III's reissue of 1225 was the form considered final. We have evidence of this as early as Bracton's time. In a quotation given above, Bracton says a writ is to be quashed "si impetratum fuerit contra jus et regni consuetudinem et *maxime* contra chartam libertatis".4

The author of the "Mirror," in his fifth book, "De Abusions," begins with Magna Carta, "cum la lei de ceste reaume *fondee sur xl pointz de la grande chartre des fraunchises* soit desuse dampnablement par les guiours de la lei e par estatuz pus fetez contraiauz a ascuns de ces poinz".1 He then proceeds to enumerate the "defautes" of the various articles of the Charter, implying that they are in affirmance of the law ("fondie sur dreit"), though in some cases incomplete ("defectif");2 but he has no doubt that they render invalid ("destrut") any subsequent statute inconsistent with them.3 "And," he declares, "what is said of this statute [Merton] is to be understood of all statutes made after the first making of the Great Charter in the time of Henry III, for it is not law that anyone should be punished for a single deed by imprisonment or any other corporal punishment, and in addition by a pecuniary punishment or ransom."4

In 14 Edward I the sheriffs of London had been violating the article of Magna Carta guaranteeing judgment by peers. "Et justiciarii dicunt, quod Dominus Rex hoc nullo modo concedere, secundum Magnam Chartam Angliae, sed est ultra regiam potestatem et contra omnem justitiam," etc.5

The so-called statute "De Tallagio non Concedendo" provides that if, against the ancient laws and liberties or against any article of Magna Carta, any statute had been published by the King or his predecessors, or any customs introduced, such statutes and customs "vacua et nulla sint in perpetuum".6 We have seen that the confirmation which was actually enacted at that time declared null, not previous acts, but "jugementz donez desoremes".7

The terms of the letters patent of confirmation in 1301 are very interesting. There it is declared that "si que statuta fuerint contraria dictis cartis vel alicui articulo in eisdem cartis contento, ea de communi consilio regni nostri modo debito emendentur vel eciam adnullentur".1

The difference between this provision and that of the confirmation of 1297, as well as the possible relation of both to the provision in the so-called statute "De Tallagio non Concedendo," is very significant.

By 1301 the normal way of obtaining the common counsel of the realm on the amendment or annulling of any law—the "modus debitus"—had certainly become an enactment by Parliament. An accord or judgment of Parliament was "le plus haute le plus solempne juggement de ceste terre"; an award, "fait en la plus haute place en le Roialme".2 Whether, in dealing with Magna Carta, Parliament should act in its judicial capacity or in a legislative way by statute, no more effective sanction could be devised in those days. The confirmation of 1301 must be considered as an honest attempt to secure enforcement, in the most effective manner known, of the provisions of Magna Carta.

It would seem fair to say, then, that Magna Carta was considered a really "fundamental law"; and that the confirmation of 1301 first authorized the manner of confirming it which was regularly followed until all confirmations ceased.

After this confirmation no additions were made to the Charter, and it became the custom to confirm it as a matter of course at the beginning of each Parliament. This is as near to a fundamental law as the conceptions of mediæval Englishmen could reach. We should not expect to find more.

Parliament was not content in the years following merely to confirm Magna Carta: it occasionally declared in general terms that all inconsistent acts should be void. The famous ordinances of 1312 declared that any such acts "soit tenuz pur nul, e tout outrement defait".1 In 1368, in response to the Commons' petition, the King promised that the charters should be observed and that any statute passed "a contrarie soit tenu pur nul".2 The statutes of that year add these words to the usual confirmation.3

In 1376 the Commons complain of infringements of Magna Carta "par sinistrers interpretations d'ascuns gentz de Loi," and pray that it be observed, notwithstanding any statute, ordinance, or charter to the contrary.4 The same request was made in another Parliament in the same year.5 A similar one is found in 1379.6

In 1 Henry IV the Commons petition for the repeal of a statute of the King's grandfather which they allege to be "expressement fait encontre la tenure e effect de la Grande Chartre".7

In 1397 Parliament declared the "award" of Parliament against the Despencers void as against law, right, and reason, and against Magna Carta.8

In 1341 the Peers prayed that infringements of Magna Carta should be declared in Parliament, and "par les Pieres de la terre duement redrescez".9

During the fourteenth and fifteenth centuries the practice continued of confirming Magna Carta, as is proved by both the Parliament and the Statute Roll; but it would serve no purpose to refer to any of these numerous confirmations, which are usually brief and stereotyped in form. The regularity of the practice was recognized in 1381 in a petition of the Commons praying, "since by the Great Charter it was ordained and affirmed "communement *entouzautres Parlementz*," that law be not denied or sold to anyone, that therefore fees be no longer taken by the Chancellor for writs.1

The confirmations of these years vary in the comprehensiveness of their statements, but they almost invariably include Magna Carta, the Charter of the Forest, and former statutes. In the fifteenth century the reference to these statutes (but not to the charters) is usually limited by the phrase "et nient repellez".

Sometimes the Commons try to go further than a mere confirmation. In 1341 they petitioned that all the great officers of the realm be sworn to observe Magna Carta and the other laws and statutes,2 that Magna Carta be publicly read and affirmed by oath, and that penalties be inflicted on sheriffs or other ministers of the King who failed to enforce its observance.3 In 1354 they petitioned for the reading of Magna Carta.4 In 1377, at the opening of the new reign, the Commons again asked that it be read in Parliament; and this was done.5 It was read again in the Parliament of 1380.6

Occasionally there is a demand that the Charter be not merely read, but officially interpreted.7 In 1377 this demand goes further. The Charter was not only to be read, but it was to be declared point by point by the members of the Continual Council with the advice of the judges and serjeants or others if necessary. The "pointz" so declared and amended were to be submitted to the Lords and Commons at the next Parliament, and then "estre encresceez e affermez pur Estatut s'il semble a eux q'il soit a faire; eiant regarde coment le Roi est chargee a son Coronement de tenir e garder la dite Chartre en touz ses pointz". The King, in general terms, promised that it be read and observed, but ignored the request for interpretation.1

If space permitted, many instances might also be given of Parliament's solicitude, not merely for general confirmations of the Charter, but also for the observance of its specific provisions by the courts.

Magna Carta, in the later Middle Ages, is looked upon and treated as an enactment in affirmance of fundamental common law, to be confirmed and observed as a part of that law; but undoubtedly all other enactments of such law are regarded as "puis molt".

The evolution of a "constitutional law" in America has generally been considered by British writers as without precedent in earlier English institutions. Such a view is hardly supported by a study of those institutions in the Middle Ages, before the modern doctrine of the legislative sovereignty of Parliament had taken definite form.

But it seems hardly possible completely to identify the "fundamental law" of mediæval England with the usual modern forms of such a law. In fact the content of that law, of which Magna Carta is the best example, was not entirely nor mainly "constitutional". "Rigid" constitutions are a development of modern times. To us it seems natural to place the framework of government in a class by itself. We think of it alone as the fundamental law. We go so far as to make of "fundamental" and "constitutional" practically equivalent terms. This was not done in mediæval England.

For the Englishmen of that day the "fundamental law" did indeed include the law of the Crown, but it included also the law of the realm, and the second bulked larger than the first. Even what we might be tempted to call "the law of the constitution," was in those days what it still remains, in England and even in great measure in the United States, notwithstanding our written constitutions: "little else than a generalization of the rights which the Courts secure to individuals".1

Though this be true, an added interest is undoubtedly given to a study of the earlier manifestations of the idea of a law fundamental by the growing tendency in certain quarters in England, arising out of the recent and almost revolutionary constitutional changes, to demand that the structure of the State be placed above and beyond the possibility of change by the ordinary law-making organ.

[Back to Table of Contents]

THE INFLUENCE OF MAGNA CARTA ON AMERICAN CONSTITUTIONAL DEVELOPMENT.

By H. D. Hazeltine, M.A., Litt.D.

For seven centuries Magna Carta has exerted a powerful influence upon constitutional and legal development. During the first four centuries after 1215 this influence was confined to England and the British Isles. With the growth of the British Empire during the last three hundred years, the principles of the Charter have spread to many of the political communities which have derived their constitutional and legal systems from England, and which have owed in the past, or which still owe, allegiance to the mother-country. The earliest, and perhaps the most important phase of this imperial history of Magna Carta is its effect upon the constitutions and laws of the American colonies and of the Federal Union that was established after their War of Independence.

In this story of the Charter's influence upon American constitutional development three separate periods should be distinguished. The colonial period, which began with the granting of the first Virginia Charter by James I in 1606 and which ended about 1760, was followed by the epoch of the American Revolution. With the Treaty of Paris of 1783, in which Great Britain acknowledged her former colonies to be "free, sovereign, and independent States," the present period of national existence had its definite beginnings. Each one of these periods is closely related to earlier events and ideas in the history of England and of the colonies. Together the three periods constitute American constitutional and legal evolution as a whole; but this American evolution is one that rests for its foundation upon the long centuries of English development that preceded its own beginnings, and that bears also, in a marked degree, the imprint of constitutional and legal changes in England during the period of colonization and even in later times.

Indeed, rightly to understand the constitutional and legal history of the colonies and of the United States of America, in each period of which Magna Carta plays a rôle, we should not forget that the Englishmen who settled in America in the seventeenth century inherited all the preceding ages of English history. To them belonged Magna Carta and the Common Law; to them belonged the institutions and ideas that were inextricably bound up with Magna Carta and the Common Law; to them belonged the legal traditions of the Tudor age—the age that immediately preceded the period of colonization. The colonies did not fail to enter upon their inheritance; and the result has been that colonial institutions and principles, both of public and of private law, retained much of the Tudor and the pre-Tudor tradition, and that even to-day American institutions and principles bear the impress of its influence.

For England the seventeenth century was the first great age of the Empire—the age of commercial and colonial expansion not only in the West, but in the East; and it was the age also of the momentous struggle at home between the Crown and Parliament—between the claims of royal prerogative and of Parliamentary

supremacy. In America the century was pre-eminently the age of settlement and the growth of chartered colonies, either of proprietary or corporate character, this American development constituting one phase of English expansion; and it was likewise the age in which the results of constitutional conflict in England exerted their first influences upon the development of colonial institutions and of colonial legal and political ideas. The growth of the colonies in America meant, from the very beginning, the extension of English institutions and laws to these little Englands across the sea. To their birth-right of the English traditions of the sixteenth and earlier centuries was now added the gift of the constitutional and legal principles established in seventeenth-century England, the England of Stuart kings, of Commonwealth and Pretectorate, of Revolution; for the changes in the public and private law of England during the century directly and vitally affected constitutional and legal growth in the colonies. As the Common Law emerged at the end of the century enriched by judicial decisions and constitutional enactments, the fundamental principles which they embodied were added to the Common Law heritage of Englishmen in the colonies. Thus, like Magna Carta itself, the great constitutional documents of the seventeenth century, such as the Petition of Right, the Habeas Corpus Act, and the Bill of Rights, have a colonial as well as a purely English history. To these statutes, as to Magna Carta, the colonists turned as the documentary evidence of the fundamental rights and liberties of all Englishmen, whether they resided in the home-land or in the English communities of America.

Perhaps the most important feature of American history before the revolutionary epoch was the gradual transition from chartered colonies to royal provinces and, owing to British colonial and commercial policy of the times, the tightening of imperial control through Crown and Parliamentary agencies. Although the constitutional changes in England during the eighteenth century, including the further development of Parliamentary sovereignty, vitally affected the relationship between the colonies and the home-country, yet they failed to influence in any marked degree purely colonial constitutional development.1 From the early eighteenth century down to the present day American institutions have developed, in the main, along their own lines, largely upon the basis of English development in the seventeenth and earlier centuries, colonial development in the seventeenth century, and American political thought and constructive statesmanship of the eighteenth, nineteenth, and twentieth centuries.

This striking divergence of American from English institutions, dating from the early eighteenth century, is in sharp contrast with the history of the law. Throughout the eighteenth century, though perhaps less in the period of the Revolution, English Common Law continued to influence the development of colonial legislation and judicial decisions; and even to-day the American system of Common Law and Equity is in its fundamental characteristics the same as that of England. So, too, in certain leading features of constitutional law—as distinct from constitutional institutions, such as the American system of three co-ordinate departments of government and the power of the judicature to declare an act of the legislature null and void because in conflict with the written constitution—we see a striking persistence of English principles. Rights and liberties of Englishmen embodied in Magna Carta, the Bill of Rights, and other constitutional documents became vital features of colonial

constitutional law, and have continued throughout the revolutionary and national epochs to the present day to be essential elements of American constitutional law.

The story of the influence of Magna Carta on American constitutional development is but one phase of the whole history of English institutions and law in America, and this in turn is but one chapter in the history of a broader, a further-reaching development—the extension of English institutions and of English Common and Statutory Law to the many political communities that have formed or still form parts of the British Empire. In studying Magna Carta in America we are concerned, therefore, with one feature and one only, of this whole vast process. But just as the influence of Magna Carta in England itself cannot be understood apart from the long history of the ever-changing body of rules and principles that go to make up the system of English Common Law, of which the provisions of Magna Carta form only a part, so, too, an understanding of the influence of Magna Carta in America can only be reached by considering this great legal document as but one of the many sources of English Common Law in its American environment. In the present paper certain main features of the American development, throughout its three periods, will be suggested; but without any attempt at exhaustive consideration.

I.

1. From the very beginning the colonists claimed that they were entitled as Englishmen to the law of Englishmen — the Common Law as a great *corpus iuris* based on the decisions of the courts and on the statutory enactments of Parliament, a body of the rules of private and public law which secured to Englishmen their rights as private individuals in their relations one with another and also their rights and liberties as subjects of the Crown. It was this Common Law of England which the various colonies, acting through their executive, legislature, and judicature, adopted or received, either partially or wholly, as the law adapted to the needs of English communities in America. Along with the English Law thus received by the colonists, there grew up in the various American communities new rules and principles based on colonial customs, the reformative skill of colonial law-makers, and, in the Puritan colonies of new England, natural or Divine law.1

If, for the moment, we view the whole system of English Common Law as partly public and partly private law, even though English legal thought does not draw a sharp distinction between the two, we may the more easily grasp the early attitude of the colonists towards the law of the home-land. Reinsch has expressed this attitude in these words: “English colonists, in their general ideas of justice and right, brought with them the fruits of the ’struggle for law’ in England.... Most of the colonies made their earliest appeal to the Common Law in its character as a muniment of English liberty, that is, considering more its public than its private law elements.”1 Or, in Channing’s phrase: “So far as [the English Common Law] protected them from the English government and from royal officials they looked upon it as their birthright; so far as it interfered with their development it was to be disregarded”.2 If we bear this fact in mind, we shall see the more clearly that English constitutional statutes and cases were, as their “birthright,” of fundamental importance to the English colonists of America in their struggles with colonial and imperial authorities. In the earlier

Stuart reigns Magna Carta, as the greatest of all English statutes of liberty, was regarded by the colonists as a bulwark of their rights as Englishmen. As the seventeenth century advanced, the great constitutional struggles in England were reflected in the colonies;3 and the Petition of Right, the Habeas Corpus Act, the Bill of Rights, and the Act of Settlement (1701) took their place beside Magna Carta in the minds of the colonists as statutory guaranties of the rights of Englishmen, both at home and away from home, in respect of life, liberty, and property.4 It is for this reason that we must view Magna Carta in its history in the colonies as only part—though a most valuable part—of the whole body of English constitutional law, the Common Law in its character of public rather than private law, the Common Law as it is found in constitutional cases and constitutional statutes.

As Englishmen owing allegiance to the Crown and settling upon land claimed by England as under its sovereignty, the colonists were, it would seem, entitled to the rights of Englishmen embodied in Magna Carta and other sources of Common Law without further sanction of royal charter or colonial legislation. But, not only did royal charters to the colonists secure these constitutional rights, they were incorporated also in colonial legislation.

2. The granting of the first Virginia Charter by James I in 1606 marks the real beginning of English settlement in America and the opening of a new era in the history of colonization in general. In this famous document—the final form of which was in part the work of Coke himself—the King not only claimed the right to colonize a large portion of the territory of the New World, but he asserted the principle that English colonists in this territory were to enjoy the same constitutional rights possessed by Englishmen in the home-land. This principle had been embodied in the Elizabethan patents to Gilbert and Raleigh; but the colonizing experiments of these adventurers under the Queen's authority had produced no permanent results, and it was not until after James's patent to the Virginia Company that the principle first took root in American soil. "Also we do," reads James's Charter, "for Us, our Heirs, and Successors, Declare, by these Presents, that all and every the Persons, being our Subjects, which shall dwell and inhabit within every or any of the several Colonies and Plantations, and every of their children, which shall happen to be born within any of the Limits and Precincts of the said several Colonies and Plantations, shall have and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of *England*, or any other of our said Dominions."1

It was this principle, repeated in many later charters to the American colonies, which gave to English colonization one of its most distinctive characteristics. In the sixteenth and seventeenth centuries the colonists of other countries were not privileged to enjoy the constitutional guaranties of the inhabitants of the colonizing States themselves; on the contrary, colonists were viewed as persons outside the constitutional and legal system of the home-country itself. It may well be questioned, as already suggested, whether the solemn declaration of the principle by English sovereigns was essential to the valid extension of English laws and constitutional privileges to the colonists; rather is it true to say that the colonists who settled on territory claimed by England and who recognized their allegiance to the English

Crown, carried with them, whether the King willed it or not, so much of the English constitutional and legal system as was applicable to their situation. The government of Plymouth rested, throughout its history as a separate colony, upon the Mayflower Compact, not upon royal charter. Penn's patent as proprietor in 1681, unlike the other colonial charters, contained no provision to the effect that the inhabitants of the colony should be deemed subjects of the Crown, and as such entitled to all the liberties and immunities of Englishmen; but, as the territory of the colony was claimed by England, and as the allegiance to the Crown was reserved, it would seem clear that the colonists were subjects and as such entitled to all the privileges of Englishmen. This, at any rate, was the opinion of the great Chalmers in regard to Penn's patent. But, whatever view we may hold upon this question, a solemn enunciation of the principle in royal charters furnished a solid documentary basis for the claim of the colonists that they possessed the rights of Englishmen. Royal charters were held by the colonists to be solemn compacts between the King and themselves; and these solemn compacts constituted the earliest written constitutions of the colonies. Embodied as they were in these fundamental instruments of government their constitutional rights as Englishmen seemed to the colonists unassailable. Time and time again, in their struggles with colonial and imperial authorities, the colonists relied upon their charters as the documentary evidence—the written title—of rights secured to them, as to all Englishmen, by Magna Carta, the Bill of Rights, and the general principles of the Common Law. The declaration of the royal charters thus acted as a powerful factor in the spread throughout the colonies of English constitutional principles — including the rights and liberties secured by Magna Carta and its confirmations.1

3. There is another feature of the royal charters which deserves attention; their expressed declaration that the colonies may legislate for themselves so long as the laws thus enacted conform to the English legal system. Thus, by way of example, the Massachusetts Charter of 1691 explicitly says: "*And* we doe...further...grant to the said Governor and the great and Generall Court...full power and Authority from time to time to make...all manner of wholesome and reasonable Orders Laws Statutes and Ordinances Directions and Instructions either with penalties or without (soe as the same be not repugnant or contrary to the Lawes of this our Realme of England) as they shall Judge to be for the good and welfare of our said Province".2

This grant of legislative power to the colonies produced important results, not the least of which was the growth of a body of colonial statutory law adapted to the needs of the new English communities across the sea. Both in form and in substance much of this written law of the colonies was a re-enactment of the Common and Statutory Law of England, and thus conformed to English legal traditions and to the requirements of the charters. On the other hand, the colonial legislatures introduced into their laws and codes many new features especially adapted to local conditions. Some of these features were archaic in character, while others, in their spirit of reform, were actually in advance of contemporary law in the mother-country. In the Puritan colonies of New England the Law of God gave a peculiar colour to the whole legal system; while in all the colonies local customary law moulded, in important respects, the decisions of the courts and the colonial legislation. Not all the resources of imperial control possessed by Crown and Parliament could keep the growing

American communities, with their novel conditions and special needs, within the strict confines of the legal system of the mother-country.

Incorporated in this statutory law of the colonies were many principles of English constitutional law derived from the decisions of English courts and from the great charters and statutes of English liberty. Of special interest to us, in our present study, is the embodiment of various rights and liberties of Magna Carta in the colonial written law. Even in the Puritan colonies of New England, which in theory based their earlier legal system upon the Word of God, and which in fact of all the colonies departed furthest from English juridical models, we find important features of Magna Carta placed in colonial legislative enactments.Indeed, in these and in other vital respects, English Common Law formed a greater element in Puritan law than the Puritans themselves at the time suspected, and than even present-day students of their system, attracted by the frequent citation of Scripture in decisions and statutes, are often-times aware.1 The laws of all the colonies deserve a long and detailed study with special reference to their incorporation of the provisions of Magna Carta, but for our present purpose it must suffice to draw attention to illustrative instances of this process.

In early Massachusetts the struggle for written laws, as opposed to the exercise of wide discretionary powers on the part of the executive and judicature, finally resulted in the enactment of the famous Body of Liberties. In the discussions that preceded this legislation, John Winthrop had argued, in his tract on “Arbitrary Government,” that it was unwise to place too great a restraint upon judges, who should decide cases in accordance with divine justice as revealed in the Bible. Still, even Winthrop admitted that, for the purpose of restricting capital punishment and of making men’s estates more secure against heavy fines, it would be well to have a general law like Magna Carta. The general position of the colonists was that their liberties were not safe from arbitrary power, because these liberties were not embodied in positive law. Winthrop, in his “History of New England,” says: “The deputies having conceived great danger to our State in regard that our magistrates for want of positive law in many cases might proceed according to their discretion, it was agreed that some men should be appointed to frame a body of grounds of law, in resemblance to a Magna Carta, which being allowed by some of the ministers and the General Court, should be received for fundamental laws”. Accordingly, at the General Court, 25 May, 1636, it was ordered that a body of laws “agreeable to the word of God,” to be the “Fundamentals of this Commonwealth,” should be drawn up and submitted to the General Court.As a result of this action the Body of Liberties finally became the law of the colony in 1641.Although the Word of God figures prominently in this code, the law-makers seem also to have followed in some sections the model of Magna Carta and of the English Common Law. Thus, for example, in its first section the Body of Liberties echoes the spirit of chapter thirty-nine of Magna Carta by declaring that, “No mans life shall be taken away, no mans honour or good name shall be stayned, no mans person shall be arested, restrayned, banished, dismembred, nor any wayes punished, no man shall be deprived of his wife or children, no mans goods or estaite shall be taken away from him, nor any way indammaged under Coulor of law, or Countenance of Authoritie, unlesse it be by vertue or equitie of some expresse law of the Country warranting the same, established by a generall Court and sufficiently published, or in

case of the defect of a law in any partecular case by the word of god.And in Capitall cases, or in cases concerning dismembring or banishment, according to that word to be judged by the General Court".1

In 1646 there arose an important controversy as to the constitutional guaranties of the Body of Liberties and other Massachusetts laws, which involved a careful examination of the provisions of Magna Carta by the colonists. Certain residents of the colony, led by Robert Child, discontented largely by reason of the religious policy of the colonial authorities, addressed the General Court, declaring that a settled government in accordance with the laws of England did not appear to them to have been established, and that they did not feel secure in the enjoyment of their lives, liberties and estates as free-born English subjects. They petitioned, therefore, for the establishment of the wholesome laws of England, that they might thus be admitted to the liberties to which all free Englishmen were accustomed both at home and in the colonies. In their reply to the petitioners the General Court compared at length the provisions of the Body of Liberties with those of Magna Carta and the principles of the Common Law. The Court maintained that this; comparison demonstrated the fact, that English and colonial laws were in agreement in all fundamental particulars, and that indeed civil liberty in Massachusetts under the Body of Liberties was as well protected as it was in England under Magna Carta and the Common Law. The General Court also sent in 1646 an address to the Long Parliament in which it was declared, that the government of the colony was framed in accordance with the colonial charter and "the fundamental and common laws of England, and conceived according to the same—taking the words of eternal truth and righteousness along with them as that rule by which all kingdoms and jurisdictions must render account of every act and administration in the last day". They then tried to prove the truth of their statement by setting forth in parallel columns the fundamental and common laws of England and the laws of the colony. In this comparison Magna Carta was viewed by the General Court as the chief embodiment of English Common Law.1

Connecticut, following the example of Massachusetts, early enacted a law embodying fundamental rights and liberties; and trial by jury, together with other English institutions and practices, became part of the colonial system. So too, in 1647, Rhode Island adopted a code of civil and criminal laws based in part upon English laws that were thought adapted to the needs of the colony. Prefixed to these "Lawes" was a reaffirmation of chapter thirty-nine of Magna Carta prohibiting arbitrary arrests and punishments, and a declaration that by law of the land ("lex terrae") was meant the law enacted by the General Assembly of the colony itself—not the law of England, unless adopted by the Assembly as colonial law.1

The New York "Charter of Liberties" of 1683 was the first statute enacted by the colonial legislature after the English conquest of Dutch New Netherlands. This statute, framed expressly for the colony by the Duke of York, secures a jury trial to all inhabitants of the colony and contains many of the provisions of Magna Carta, the Petition of Right, and the Habeas Corpus Act. Although the Charter of Liberties never received the royal assent, because it savoured too strongly of popular freedom and seemed to run counter to the Crown's prerogative and the legislative supremacy of

Parliament, yet the colonists always claimed that it was operative in protection of their constitutional liberties.2

The colonial Assembly of Maryland passed a bill in 1638 to recognize Magna Carta as a part of the law of the province. The Act expressly declared "that the inhabitants shall have all their rights and liberties according to the great charter of England". The Act was, however, disallowed by the King, because the Attorney-General expressed himself as uncertain "how far the enactment thereof will be agreeable to the constitution of this colony or consistent with the royal prerogative".1

In 1712 the colonial legislature of South Carolina by special Act adopted the English Common Law as a rule of adjudicature, and also one hundred and twenty-six English statutes selected by Chief Justice Trott as applicable to colonial conditions. Included among the English statutes thus put in force by the colonial legislature were Magna Carta and the other great English statutes which declared the rights and liberties of the subject. The similar adoption of English Common Law and Statutes was effected by the legislature of North Carolina in 1715.2

A striking illustration of the attention paid to Magna Carta by colonial law-makers is found in the history of Virginia. In the middle of the seventeenth century a sharp controversy arose in this colony—as elsewhere in America—in regard to lawyers. In 1756 certain colonial Acts hostile to lawyers were repealed; but in the following year a proposition for the ejection of lawyers was carried. Thereupon a new Act was passed by the legislature forbidding any person to plead or give advice in any judicial proceedings for reward. The governor and council did not look with favour on this Act, but they promised to give their assent to the measure, "so far as it shall be agreeable to Magna Carta".An examination of the terms of Magna Carta was then made by a committee, who reported that they failed to discover in them any prohibition of the colonial legislation in question.3

These and other colonial Acts and Codes which might be instanced prove that the colonial legislatures, representing in general the wishes of the colonists as opposed to those of royal officials, embodied principles of English Common Law, including provisions of Magna Carta, the Bill of Rights, and other great constitutional statutes, in the written law of Englishmen within the over-sea provinces. In general colonial legislation, which is an important feature of the working of early American self-government, was subjected to imperial control by reason of the requirement that colonial Acts must receive the assent of the Crown acting through the royal governors and the executive authorities in England. That the royal veto, which remained in full vigour in the relations of the Crown to the colonies long after its disuse in respect to Acts of the English Parliament, was employed to safeguard the interests of the royal prerogative, is strikingly illustrated by the history of colonial Acts which embodied Magna Carta and other English legal guaranties of the rights and liberties of the subject.Attention has already been drawn to the fact that the Maryland Act of 1638 enacting Magna Carta was disallowed by the Crown because it might be inconsistent with the royal prerogative, and that the New York Charter of Liberties of 1683, embodying Magna Carta, the Petition of Right, and the Habeas Corpus Act, never received the royal assent. Similarly, Sir John Somers, by reason of the fear that it

might prejudice the royal prerogative and the legislative supremacy of Parliament, advised the disallowance of the Massachusetts Habeas Corpus Act on the ground that the right to that writ "had never been conferred on the colonists by a king of England" and that the guaranty of a speedy trial in Magna Carta was inapplicable to the status of colonists.1 Various other Acts of colonial legislatures which merely repeated provisions of Magna Carta were likewise vetoed by the Crown.1

It is clear that the exercise of the royal veto—which always in theory, and many times in practice, acted as a wholesome restraint upon unwise colonial legislation and served to keep the law of the colonies in general harmony with English law—worked injustice to the colonists and sought to deprive them of their rightful privileges and liberties as English subjects, including the guaranties of Magna Carta and other English constitutional statutes. The exercise of the royal veto, particularly when it encroached upon their rights and liberties as Englishmen, was irritating to the colonists, but proved in most, if not all, cases ineffective. By disregarding the royal veto, by enacting new measures essentially like the ones vetoed, and by other similar devices, the colonists practically nullified the royal prerogative of disallowance.2 In effect, therefore, much of the colonial legislation which incorporated the principles of Magna Carta and other constitutional features of the Common Law, remained in force in the colonies.Indeed, the whole history of Magna Carta and English constitutional liberties as incorporated in the Acts and State Papers of the alter colonial period, the revolutionary epoch and the early national era, proves the persistence of the legal guaranties of the English Constitution in America. For the maintenance of what they viewed as the rights of all Englishmen, the colonists were not only willing to face the Crown and Parliament in constitutional struggles, but also in armed conflict.When the time of their independence came, the people still insisted, as we shall see later, on the incorporation of their fundamental rights and privileges in the Federal and State Constitutions, the parts of these instruments containing the declaration of rights being known as "Bills of Rights".

4. It is worth noting that "Magna Carta" became a generic term which included various documents of special constitutional significance. Attention has already been drawn to the fact that the Massachusetts Bill of Liberties of 1641 was framed, in Winthrop's words, "in resemblance to a Magna Carta". The Act of the New York legislature of 1683, which was known as the "Charter of Liberties and Privileges," and the Pennsylvania "Charter of Privileges," which was the fundamental law of the province from 1701–1776 and the "most famous of all colonial constitutions," may also perhaps be reckoned in this category. The instructions issued by the Virginia Company in 1618 to Sir George Yeardley as governor are known to Virginian writers as the "Great Charter"; and the term is said to be found also in some of the land grants.But while this document was undoubtedly of great importance in the constitutional development of the colony, it is perhaps going somewhat too far to liken it to a Magna Carta.1 The use of the term "Great Charter" is instructive, however, as showing the influence of Magna Carta upon legal terminology. Another illustration may be taken from the history of the Carolinas. In 1668 the proprietors of northern Carolina authorized the governor to grant land on the same terms and conditions as those that prevailed in Virginia. The colonists always referred to the

instrument containing this authorization as the “Great Deed of Grant” and regarded it as a species of Magna Carta.1

A point of even greater importance for our present purpose is that constitutional documents granted by colonial proprietors sometimes contain the clauses of Magna Carta itself. Thus, for instance, in the constitutions granted by the proprietors of New Jersey and Pennsylvania in the latter part of the seventeenth century, careful provision is made for the protection of personal liberty and of property and the familiar phrases of Magna Carta reappear.2

As a result of the constitutional struggles in England during the seventeenth century, the Petition of Right3 and the Bill of Rights similarly served as models for colonial constitutional documents; while, after the American Revolution, the “Bill of Rights,” in which fundamental civil rights and liberties are declared, takes its place, as already observed, as an established feature of the constitutions of the federal and state Governments.

Thus, the very names of Magna Carta and the Bill of Rights were transmitted to America through the influence of the English Constitution: and terminology in this case, as so often in the history of institutions and laws, masked no mere shadow, but the very flesh and blood of living rights.

5. Hitherto we have considered the embodiment of the principles of Magna Carta in the written law of the colonies—in royal charters, colonial laws and codes, and colonial documents of constitutional significance.A further question suggests itself in regard to the unwritten law of the colonies:Were the provisions of Magna Carta incorporated in case-law?In a Massachusetts case of 1687 the defendant pleaded that Magna Carta and the statute-law “secure the subjects’ properties and estates”.To this one of the judges replied, the rest of the court by silence assenting, “We must not think the laws of England follow us to the ends of the earth”.1 But such a judicial utterance is characteristic of the general attitude of Massachusetts and of the other Puritan colonies. Their legal system, avowedly based on the Law of God, contained many English features, but only, in case they had been expressly adopted by the colonial authorities, were they viewed as binding.It was but natural, therefore, for the Massachusetts judges to declare that they were not bound by Magna Carta itself, which as a complete document had never been adopted by the colony. But, through the Body of Liberties—and possibly other colonial Acts—certain provisions of Magna Carta were taken up into Massachusetts law.In general, we may say that principles of Magna Carta and the Common Law actually adopted by the legislatures of the colonies as their own law, undoubtedly bound the colonial courts, unless such enactments had been effectively vetoed by the Crown; and, in this connection, it should not be forgotten, as we have already observed, that the veto of the Crown often proved of no avail in checking the growth of colonial statutory law, even though that law seemed to the Crown to be infringing upon its prerogative. In colonies where Magna Carta was adopted as a complete instrument, and where the royal veto, if it was applied, proved ineffectual, it would seem that the courts must surely have applied its provisions in the cases that came before them. It has been impossible to examine the court records, many of them still in manuscript, from this point of view;

but it may be supposed that their careful study would disclose many cases where the courts applied the colonial Magna Carta—if one may be allowed the term—just as they applied in general the principles of the colonial Common Law.It may well turn out, on further research, that in at least four distinct ways the courts embodied the principles of Magna Carta in colonial case-law: first, in cases interpreting and applying colonial legislation such as the Massachusetts Body of Liberties, the Rhode Island Code of 1647, and the New York Charter of Liberties of 1683, which contained certain provisions of Magna Carta; secondly, in cases interpreting and applying colonial Acts which adopted the whole text of Magna Carta; thirdly, in cases decided under colonial Acts which adopted the whole of the English Common Law as the rule of colonial adjudicature; fourthly, and in general, in decisions of the many courts that were engaged, together with other institutions of the colonies, in adopting and adapting, either consciously or unconsciously, such portions of the English law as best suited the legal requirements of the colonial communities. This view that colonial case-law will be found, on examination, to embody principles of Magna Carta, is strengthened by the well-known fact that in judicial proceedings of the period parties frequently claimed the rights of "every free born English subject".1

6. There is abundant evidence that in the political and constitutional controversy of the colonial period the rights of the colonists as Englishmen played a vitally important part. In these disputes Magna Carta and other English statutory guaranties of the subject were relied upon as the source of political privilege and civil right.2

An illustration of this is to be found in the Dyer affair in New York during the governorship of Edmund Andros. Complaints as to the administration of Andros and even suggestions that New York officials had been guilty of peculation and extravagance, resulted in the Duke of York's summons to Andros in 1680 to return to England for the purpose of rendering an account of his doings. Before his departure from the colony Andros had neglected to renew the customs duties.Learning that the duties had thus legally expired, colonial merchants declined to pay the imposts which the Duke's collector, William Dyer, continued to levy.Having seized a vessel and her cargo Dyer was successfully sued by the owner for unlawfully detaining property which was not his own; and he was also indicted for high treason, the indictment charging him with having "contrived innovations in government and the subversion and change of the known, ancient, and fundamental laws of the Realm of England...contrary to the great Charter of Liberties, contrary to the Petition of Right, and contrary to other statutes in these cases made and provided". On appealing his case to England, Dyer was successful there; and Andros also exculpated himself.Despite all this, however, the colonists still refused to pay the duties levied on the authority of James. Channing, in his "History of the United States," has drawn attention to the fact that "this movement was the first colonial rebellion against taxation from England, and [that] the words of Dyer's indictment carry one backward to the times of the Puritan Rebellion in England and forward to the days of Otis, Henry, and Dickinson in America".Looked at from the point of view of the rights of Englishmen away from home, the Dyer case is a striking instance of the colonists' dependence upon Magna Carta as the bulwark of their liberties.1

A further illustration may be taken from the history of Massachusetts. In this, as in other colonies, questions in regard to the governor's salary loom large in the political controversy of the times. The assembly of Massachusetts insisted on making temporary salary grants, thinking by this means to secure a real control over the governor's actions.The governor's contention, on the other hand, was that permanent provision should be made for his salary, thus ensuring his free judgment in matters of legislation, on the analogy of English provision for the Crown by a permanent civil list.In one of Governor Burnet's messages to the assembly in 1728 in regard to the salary question, he drew their attention to the provision in the colonial charter that they were to pass wholesome and reasonable laws which were not harmful to the English Constitution. The members of the assembly caught up this reference to the charter and contended that the governor himself had thus admitted that they possessed the rights of Englishmen. In support of their contention they then proceeded to trace their rights as Englishmen not only to the English legislation of the Stuart and Tudor periods, but also to the English Constitution in the time of Edward I and Henry III, and even to Magna Carta itself. The exciting events that followed did not result in a settlement of the controversy in Burnet's time; and only under his successor, Belcher, was it finally arranged that the governor, with the consent of the English Government, should receive an annual grant, to be voted at the beginning and not at the end of the sessions of the assembly.The course of this controversy thus forms an interesting chapter in the history of Magna Carta as the foundation of colonial rights in opposition to the claims of the Crown and of royal governors.1

7. The importation from England, as well as the colonial publication, of English statutes and documents, law reports and juristic treatises, diffused, especially in the eighteenth century, a knowledge of the Common and Statutory Law, and thus acted as a very considerable factor in the extension of its principles—including the principles of Magna Carta and the English Constitution—throughout the colonies.2 Prominent among the books in the hands of the colonists were those dealing with the rights and liberties of Englishmen. Thus, among the first seven books printed in the colonies were Hawles' "The Englishman's Rights" (1693), Petyt's "Lex Parliamentaria" (1716), Somers' "The Security of Englishmen's Lives" (1720), and the fifth edition of Henry Care's "English Liberties or the Freeborn Subjects' Inheritance" (1721), the last of which contained Magna Carta, the Petition of Right, the Habeas Corpus Act, and various other English statutes, as well as some of the leading English constitutional decisions and a general account of the liberties of the subject, trial by jury, and other constitutional matters.Both in public and in private libraries were to be found copies of Year Books, English reports, Magna Carta and collections of English statutes, and the classics of English literature, such as the works of Glanvill, Britton, Fortescue, Prynne, Bacon, Selden, Coke, Plowden, Hale, and Blackstone.1

In this way the printed text of Magna Carta and the commentaries of the English jurists upon that text played their own special part in the legal education of the colonists and thus in their adherence to the Charter's principles of constitutional liberty. One or two interesting facts will illuminate this textual power. Thus, in 1647, the Governor and Assistants of Massachusetts ordered the importation of two copies each of Coke on Magna Carta and various other books of English law "to the end that we may have better light for making and proceeding about laws".2 As early as 1687

William Penn published at Philadelphia an edition of Magna Carta, the Confirmation of the Charters and the so-called Statute *de Tallagio non Concedendo*, accompanied by an address to the reader wherein the colonists were exhorted "not to give away anything of Liberty and Property that at present they do...enjoy, but take up the good example of our ancestors, and understand that it is easy to part with or give away great privileges, but hard to be gained if once lost".1 As a silent teacher of English notions of liberty, not only in Massachusetts and Pennsylvania, but in the other colonies as well, the printed text of the Charter exerted its own unique influence upon the legal and political ideas and the actual institutions of the Americans.

8. Throughout the colonies there existed a deep distrust of the legal profession. Most of the colonial judges were laymen; and there was much colonial legislation hostile to lawyers as a class.In the course of the eighteenth century, however, the legal profession, many of its members trained in the English Inns of Court and in American Colleges, began to take a more prominent part in colonial affairs.During the revolutionary epoch lawyers played a leading rôle in political and constitutional controversy; while in the early days of independence, when the Federal and State Constitutions were drafted and adopted and the laws and institutions of the youthful Republic were moulded to fit the new conditions, some of the foremost statesmen and judges were lawyers of high distinction.2

The rise of a legal profession introduced a new and powerful factor in the growth of American legal ideas. Learned in the principles of English Common Law and in English constitutional ideas and practices, the early American lawyers exerted a professional—a legal—influence upon American development; and their share in the work of incorporating the principles of Magna Carta in colonial and revolutionary documents and in the constitutions of the federal era must have been considerable.

Without pursuing this special topic further, in the present connection, we may yet note in a general way the services of the early American lawyers in the cause of the rights and liberties of the people. Warren, in his "History of the American Bar," expresses the main point in these words: "The influence, on the American Bar, of these English-bred lawyers...was most potent.The training which they received in the Inns, confined almost exclusively to the Common Law, based as it was on historical precedent and customary law, the habits which they formed there of solving all legal questions by the standards of English liberties and of rights of the English subject, proved of immense value to them when they became later (as so many did become) leaders of the American Revolution."1 Again, in another place, Warren remarks: "The services rendered by the legal profession in the defence and maintenance of the people's rights and liberties, from the middle of the Eighteenth Century to the adoption of the Constitution, had been well recognized by the people in making a choice of their representatives; for of the fifty-six Signers of the Declaration of Independence, twenty-five were lawyers; and of the fifty-five members of the Federal Constitutional Convention, thirty-one were lawyers, of whom four had studied in the Inner Temple and one at Oxford, under Blackstone.In the First Congress, ten of the twentynine Senators and seventeen of the sixty-five Representatives were lawyers."1

II.

By the close of the colonial period principles of Magna Carta, adapted to social and political conditions in the American communities, had become firmly embedded in their systems of law and government. In the revolutionary epoch—extending from 1760–1783—these principles, as part of the whole body of English Constitutional Law claimed by the colonists as English subjects, were to enter upon a new phase of their American history.

The years that immediately preceded the outbreak of war in 1775 and the Declaration of Independence in 1776 were characterized by a momentous controversy between the colonies and the mother-country over constitutional principles. The doctrine that the colonists had all the rights of Englishmen had more and more strenuously asserted itself throughout the eighteenth century. At last the claims of the colonists were largely focussed in the demand that there should be no taxation without representation, a principle which they held to be based on firm English foundations. As the controversy increased in intensity the colonists appealed less to the guaranties of the royal charters and more and more to the principles of the Common Law—especially the principles contained in Magna Carta, the Bill of Rights, and other documents of English liberty—in support of the views which they so strenuously asserted in opposition to the position taken up by Crown and Parliament.In the ten years just before the war there was indeed a marked tendency, evidenced by all the great State Papers, such as the Massachusetts Circular Letter of 1768, the Virginia Resolutions of 1769, the Declaration and Resolves of the First Continental Congress of 1774, the Declaration of the Causes and Necessity of Taking up Arms (1775),1 and the Declaration of Independence (1776) itself,2 to base colonial rights on political and legal fundamentals to be found in the Law of Nature and the English Constitution. The colonists looked upon the English Constitution as their own and revered it as the embodiment of their rights. The “common rights of Englishmen” formed the shield behind which they resisted what they held to be attempts upon their liberties. When the war at last came, it was fought out by the colonists in defence of what they held these rights to be—rights won in England in the long struggle for the rule of law and embodied in the doctrines of Common Law, especially in the principles of Magna Carta, the Bill of Rights, and other English documents that visualized for the colonists their claims for freedom as opposed to tyranny. Thus it resulted that the controversy between England and her colonies and the war that followed it were largely caused by differences of opinion as to constitutional and legal questions, and that in the struggle of the colonists for what they looked upon as their rights, Magna Carta, as one of the fundamentals, as a part of the legal inheritance, the “birth right,” of Englishmen at home and in the colonies, played a rôle of great prominence.3

In considering the constitutional aspects of the revolutionary epoch it should never be forgotten that since the early eighteenth century the institutions of England and of the colonies had been drifting apart, and that the colonists, unlike their kinsfolk in the mother-country, did not recognize the doctrine of the supremacy of Parliament as an imperial legislature. In one highly important point, therefore, we find that the American Revolution was like the English Revolution of 1688. In England powers of

the King, asserted to be based on legitimate foundations, were destroyed. In America powers of Parliament, unquestionably legal in character, were forcibly repudiated.1 Fundamental differences of opinion in regard to the authority of Parliament naturally affected the views of Englishmen at home and in the colonies as to the nature of constitutional rights and liberties and the interpretation to be placed upon constitutional documents such as the Great Charter and the Bill of Rights.

III.

In respect of private law the Revolution resulted in no break with the past. After, as before the Revolution, the Common Law, adapted and modified by its American environment, formed the general basis of private rights; and this feature of American law survives to the present day. So, too, in the matter of constitutional institutions, the Revolution made less difference than is sometimes imagined; for, in many of their main characteristics, the Federal and State Governments of the national era followed precedents of the colonial and revolutionary epochs. Thayer, in his essay on the "American Doctrine of Constitutional Law," sums up the Revolution in two short sentences: "The Revolution came, and what happened then? Simply this: we cut the cord that tied us to Great Britain, and there was no longer an external sovereign." That the Federal and State Constitutions contained vitally important features that were distinctively American, as opposed to English, is one of the common-places of political history. The institutional divergence from English models which set in, as we have already observed, during the early eighteenth century was sure to produce ultimate results very different from some of the leading features of the English Constitution. The federal nature of the Union, the sanctity of the written constitution as a document embodying the fundamental law, the co-ordination of the legislature, executive, and judicature as the three departments of Goverment which operate in distinct spheres and enjoy equality of position, the remarkable power of the judicature to declare an Act of the legislature that conflicts with the written constitution null and void—these are four of the main characteristics which mark a wide gulf between American constitutional institutions and the unwritten Constitution of England, under which Magna Carta and the Bill of Rights, although of fundamental significance, are yet subject, like any ordinary statute and the decisions of the courts, to the legislative sovereignty of Parliament. But, in at least one highly important respect the American Constitutions display a striking adherence to the traditions of the English Constitution. In the "Bill of Rights," which forms a part of each of the written constitutions, both State and Federal, there is a persistence of those fundamental rights of Englishmen embodied in Magna Carta, the Bill of Rights of 1689, and other leading sources of the Common Law. This whole development is summarized by Sir Frederick Pollock in one sentence of "The Genius of the Common Law": "Our fathers laboured and strove chiefly in the field of Crown law to work out those ideals of public law and liberty which are embodied in the Bill of Rights and are familiar to American citizens in the constitutions of the United States and of their several commonwealths". It is this American Bill of Rights, forming an important element in constitutional law, as distinct from constitutional institutions, which chiefly links the American Constitutions of to-day with the Magna Carta of 1215.

1. As the direct descendants of the royal colonial charters, these charters being based on still earlier models, the State Constitutions are the oldest feature of American political life. Nearly all of the original thirteen colonies, when they declared their independence and framed their State Constitutions, included in these documents, as perhaps their most important feature, a declaration of the fundamental rights and liberties of man. Most of the clauses of this declaration, known collectively as the Bill of Rights, were taken over from colonial and revolutionary laws and constitutional documents, the contents of which, in turn, as we have already seen, had been derived originally, in important particulars, from Magna Carta, the Bill of Rights and other great constitutional statutes which secured the liberties of Englishmen. As new States have been admitted into the Union from time to time, they too have embodied a Bill of Rights in their constitutions. In this way, therefore, the Bill of Rights of the State Constitutions traces its pedigree back to Magna Carta. In each separate State of the Federal Republic, as in England, the Great Charter of 1215 still exists, protecting men in their lives, liberties, and estates from the encroachments of arbitrary or tyrannical government.1

Naturally the State Constitutions vary in the form of words chosen to express the rights and liberties derived from Magna Carta. Some constitutions, more especially, perhaps, the earlier ones, follow the original model closely; others are couched in terms more suited to American conditions.But the main features of the original are in all cases retained in the American derivations. So, too, the constitutions vary one from the other in the extent to which they borrow from the Great Charter. Some take more and some less; but in all are to be found, in one phrasing or another, the essence of chapter thirty-nine.1 Thus, to cite only one illustration, in section sixteen of the Constitution of the new State of Oklahoma (1907), chapter thirty-nine of Magna Carta appears in the phrasing, “No person shall be deprived of life, liberty, or property, without due process of law”.2

2. The Federal Constitution of 1789, including the Amendments of 1791 and of later times, is likewise derived in part from the colonial charters and from other constitutional and legal sources of the colonies and of England. In Lord Bryce’s felicitous words: “The American Constitution is no exception to the rule that everything which has power to win the obedience and respect of men must have its roots deep in the past, and that the more slowly every institution has grown, so much the more enduring is it likely to prove.There is little in this Constitution that is absolutely new.There is much that is as old as Magna Carta.”3

The Constitution of 1789 embodies, in one article or another, various declarations of the fundamental rights of men. Thus, for example, it provides for taxation by the legislature only, for the privilege of the writ of *habeas corpus*, for trial by jury in criminal cases, for the prohibition of bills of attainder, *ex-post facto* laws, laws impairing the obligation of contracts, and laws imposing religious tests. These and other provisions, derived in large in large measure from English and colonial precedents, constitute a body of constitutional guaranties of the highest value.

But the absence of a formal Bill of Rights similar to the one included in State Constitutions was at once severely criticized by the people as a feature of the

Constitution dangerous to their liberties.1 In response to persistent demands, ten Amendments, taking effect in 1791, were added to the original instrument. These first ten Amendments, which are to be viewed as a supplement or postscript to the original Constitution, and not as an alteration of it, make up what is called, after the English and earlier American precedents, the Declaration or Bill of Rights. In essence this Bill of Rights secures the rights and liberties of the individual citizens and the separate states against the encroachments of the Federal Government.2 Although each of the Amendments added to the Constitution after 1791 demands separate consideration, both in respect to its general scope and the place it holds in the whole body of the Constitution, yet we may regard the Thirteenth, Fourteenth and Fifteenth Amendments, in certain of their fundamental characteristics, as later additions to the Bill of Rights contained in the first ten Amendments.

It is said that the people regarded the liberties embodied in the first ten Amendments as their own, because they were based on old English law.1 Certainly a study of the Amendments reveals the fact that the origin of some of their features is to be traced to the Common and Statutory Law of England. Certain of their clauses are undoubtedly based directly, or indirectly, through colonial and revolutionary precedents, upon Magna Carta, the Bill of Rights, and other English constitutional documents. Thus, upon Magna Carta rests the provision in the Fifth Amendment that no person "shall be deprived of life, liberty, or property, without due process of law". Similarly, the Fourteenth Amendment (1868), in declaring that no State shall "deprive any person of life, liberty, or property, without due process of law," adopts, like the Fifth Amendment, the thirty-ninth chapter of Magna Carta. The last clause of the First Amendment, which provides that Congress shall make no law abridging the right of the people "to petition the Government for a redress of grievances," seems to go back for its origin—through various American documents—to the English Bill of Rights.So, also, upon the English Bill of Rights is based the Second Amendment, which declares that "a well-regulated militia being necessary for the security of a free state, the right of the people to keep and bear arms shall not be infringed". In the words of judge Cooley: "The amendment, like most other provisions in the Constitution, has a history. It was adopted with some modification and enlargement from the English Bill of Rights...where it stood as a protest against arbitrary action of the overturned dynasty in disarming the people, and as a pledge of the new rulers that this tyrannical action should cease." Again, the Eighth Amendment is almost an exact transcript of the clause in the English Bill of Rights which provides "That excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted". The Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted".1

These and other provisions in the Federal Constitution rest upon the Constitutional Law of England. Magna Carta's contribution to the federal instrument, and to the State Constitutions, consists fundamentally in the adaptation of the famous chapter thirty-nine to meet American conditions. This chapter had been embodied in colonial law. By its incorporation in State Constitutions and in the Fifth and Fourteenth Amendments to the Federal Constitution it still serves as the basis of the rule of law throughout the Republic.

3. Legal and historical accuracy may well be placed in jeopardy by considering the "due process of law" clauses apart from their full setting in the Amendments and in the whole scheme of fundamental law as set forth in the complete federal instrument. But, with this caution, a few words, in explanation of the meaning and scope of the clauses, may be ventured.

The last words of the Fifth Amendment (1791) declare that "no person shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation". The last portion of section one of the Fourteenth Amendment (1868) reads: "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws". American political and constitutional history of absorbing interest and moment surrounds every word of these due process of law clauses.Suffice it here to say that the prohibition of the Fifth Amendment was introduced as a check upon the Federal Government as distinct from the State Governments; while in the Fourteenth Amendment, adopted after the great Civil War between the North and the South, the prohibition is directed against the individual States that compose the Union Thus the two Amendments, under the dual government inseparably incident to American federalism, supplement one the other.Together the Amendments ensure to the people their individual rights to life, liberty, and property under the rule of law as opposed to arbitrary and tyrannical action on the part of either State or Federal Governments.

The due process of law clause of the Fourteenth Amendment represents, therefore, the latest obligation of America to Magna Carta. Indeed, as Judge Dillon, in commenting on the constitutional guaranties of the two Amendments, remarks: "This was not new language, or language of uncertain meaning. It was taken purposely from Magna Carta. It was language not only memorable in its origin, but it had stood for more than five centuries as the classic expression and as the recognized bulwark of the 'ancient and inherited rights of Englishmen' [Burke] to be secure in their personal liberty and in their possessions. It was, moreover, language which shone resplendent with the light of universal justice; and for these reasons it was selected to be put into the Fifth Amendment of the Federal Constitution, as it had already been put into the charters and constitutions of the several States...It was of set purpose that [the prohibitions of the Fourteenth Amendment] were directed to any and every form and mode of State action [as opposed to Federal action]—whether in the shape of constitutions, statutes, or judicial judgments—that deprived any person, white or black, natural or corporate, of life, liberty, or property, or of the equal protection of the laws. Its value consists in the great fundamental principles of right and justice which it embodies and makes part of the organic law of the nation...[It] will hereafter, more fully than at present, be regarded as the American complement of the Great Charter, and be to [America]—as the Great Charter was and is to England—the source of perennial blessings."[1]

The Supreme Court of the United States has never attempted to give a rigid and complete definition of "due process of law". The policy of the Court has been expressed in the recent case of *Twining* v. *New Jersey*:[2] "This Court has always

declined to give a comprehensive definition of it, and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise.There are certain general principles, well settled, however, which narrow the field of discussion, and may serve as helps to correct conclusions. These principles grow out of the proposition universally accepted by American. courts on the authority of Coke, that the words 'due process of law' are equivalent in meaning to the words 'law of the land,' contained in that chapter of Magna Carta which provides that 'no freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or any wise destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers, or by the law of the land'." In *Hagar* v. *Reclamation Dist*.1 the Court had already expressed the view that the meaning of "due process of law" is that "there can be no proceeding against life, liberty, or property which may result in deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights". So, too, in *Bank of Columbia* v. *Okely*2 it was said: "As to the words from Magna Carta, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice".3

Although the due process of law phrase is thus historically derived from and closely related to the phrase *per legem terrae* of Magna Carta, nevertheless, in the application of the clause to the institutions of government in the two countries, there is a marked difference between the Constitution of England and that of America. In England the provisions of Magna Carta, including chapter thirty-nine, were originally intended, and have since been regarded, as a limitation upon the executive and judicature, not upon the legislature. In English law chapter thirty-nine is held to mean that no person is subject to the arbitrary acts of the Crown or its Courts—that no person shall be deprived of his life, liberty, or property unless in accordance with the existing law of the land, whether it be Common Law or Statutory Law. Parliament is not affected by the limitations imposed on the Crown and the Courts. Legally the Parliament is the sovereign power and can at any moment alter the law of the land by its enactments; the rights of the individual are in theory and in practice subject to the supreme legislative power of Parliament.1

As this legislative supremacy of Parliament was fully established by the time of the adoption of the Fifth and Fourteenth Amendments, it might be contended that historically their due process of law clauses were not intended to operate as a limitation upon the powers of the State legislatures and of the Federal Congress. But American Constitutional Government, both State and Federal, is based on written instruments, which, in the sphere of political and legal activity, are fundamental and supreme, though subject, of course, to the principle that they may be amended by the people acting through the machinery which the constitutions themselves provide. In vital differences between the English unwritten Constitution and the American written Constitutions we must seek for the explanation of certain features of American divergence from English precedents. In result the general purpose of written Constitutions in America has gradually come to be entirely different from the purpose of Magna Carta and the other great constitutional documents of England. In America,

to employ Willoughby's careful analysis, "written instruments of government and their accompanying Bills of Rights have for their aim the delimitation of the powers of all the departments of government, the legislative as well as the executive and judicial, and it is, therefore, quite proper to hold that the requirement of due process of law should not only prohibit executive and judicial officers from proceeding against the individual, except in conformity with...procedural requirements...but also operate to nullify legislative acts which provide for the taking of private property without compensation, or life and liberty without cause, or, in general, for executive or judicial action against the individual of an arbitrary or clearly unjust and oppressive character".1

By a long and careful process of judicial construction the prohibitions of the due process of law clauses have thus come to be applied to all three departments of the State and Federal Governments—the legislative no less than the executive and judicial. The Supreme Court of the United States in the leading case of *Hurtado* v. *California*1 decided in 1884, emphasizes the fundamental distinction between the constitutional doctrines of England and of America, and shows that the provision of Magna Carta has been incorporated into American Constitutional Law, but incorporated in a way which brings it into harmony with American notions not only of the supremacy of the written Constitution and of the co-ordination of the three departments of government under that Constitution, but of the great power entrusted to the courts of declaring legislative Acts which conflict with the Constitution null and void. In this case the Court say "The concessions of Magna Carta were wrung from the King as guaranties against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favour of the Commons by limiting the power of Parliament; so that bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land; for notwithstanding what was attributed to Lord Coke in *Bonham's Case*2 the omnipotence of Parliament over the common law was absolute, even against common right and reason. The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the commons. In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Carta, were incorporated into Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial...Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them to the ancient customary English law, they must be held to guarantee, not particular forms of procedure, but the very substance of individual rights of life, liberty and property."1

IV.

The history of Magna Carta in America has a meaning far deeper than the influence of a single constitutional document; for Magna Carta typifies those ideals of law and government which have spread to America and to many other political communities

that lie beyond the four seas encircling the island-realm itself. The world-wide diffusion of those ideals of liberty and justice deserves to be studied in its entirety, as a vast historical process which had its beginnings far back in the middle ages, and which has shaped and is still shaping in modern times the institutions of all the political commonwealths that owe their spiritual inheritance to England. The history of the Charter's influence upon American constitutional development, as one phase of that vaster process, should be illuminating alike to subjects of the Crown and citizens of the Republic. Above all it teaches them that English political and legal ideals lie at the basis of much that is best in American institutions. Those ideals, jealously preserved and guarded by Americans throughout their whole history, still form the vital force in political thought and activity within the Union. As the Americans adapt their institutions to the ever-changing conditions of national and international life, those ideals of liberty and justice, founded upon the Great Charter, will continue to inspire and guide them. The Charter has a future as well as a past in the American commonwealth, for its spirit is inherent in the aspirations of the race.

[Back to Table of Contents]

MAGNA CARTA AND SPANISH MEDIÆVAL JURISPRUDENCE.

By Prof. Rafael Altamira.
(*Translated by* F. A. Kirkpatrick, M.A., F.R.Hist.S.)

I.

To an historian of Spanish Constitutional Law, Magna Carta may offer two fundamental and extremely interesting questions. One is concerned with the analogy between the rights—political and civil—which are defined in Magna Carta, and rights of the same kind which are formulated in contemporary or earlier Spanish legislation; the two pictures may be compared as the results of a process common to all the nations of Europe in the Middle Ages, results produced in two distinct communities which were making their way towards the same end. The other question has to do with the possibility that certain liberties and customs, belonging to Spain and the adjoining lands, may have had some influence in the formation of the programme which was imposed upon King John by the English barons.

This second question has been raised by an English writer, Mr. Wentworth Webster, in his essay on "The Influence of the Pyrenaic *fueros* upon the British Constitution". Mr. Webster believed that such an influence may have been brought to bear through Simon de Montfort, who, during his government of Gascony, not only saw, in actual political working, many of the privileges recognized by Magna Carta, but was also himself obliged to use them and prove their efficacy. It is natural that the continual observation of institutions, tried and proved by use, should impress one closely concerned therein, should guide the direction of his thoughts, and lead him to introduce these institutions into another country when occasion should arise. Thus the suggestion concerning de Montfort is probable enough, although it would still remain to be proved that, in English constitutional experiments, the particular views of Simon de Montfort were actually predominant in guiding the thoughts of the other barons who had not shared his suggestive experiences. In the case of Magna Carta it is permissible to examine the question concerning the influence of the Pyrenaic *fueros* upon that document, through the agency of such men of that generation as might be acquainted with them.

Long before Webster, the Spanish historians Señores Mariehalar and Manrique,[1] put forward the hypothesis of such an influence, not through the agency of a particular person, but through possible knowledge of Spanish twelfth century legislative documents on the part of the English barons. But they did not support this supposition by any historical proof that Spanish precedents were used by those who drew up Magna Carta.

But in fact this question, interesting though it be, depends upon the first question stated above. For it is first necessary to know exactly whether there is a true analogy

between the two sets of liberties and privileges in favour of certain groups of the population, and in limitation of royal power. In proportion, as the analogy proves stronger or weaker, the case becomes stronger or weaker for the possibility of the supposed Spanish influence. Or the solution may be simply a resemblance in the results of two independent movements directed towards the same object.

This investigation will naturally examine several historical problems which form part of the general question. These problems may be thus stated: (1) analogy in respect of the number and amplitude of the rights granted in each case, (2) analogy in respect of their social scope, that is to say the classes or groups to which they extended, (3) their chronological relation.

The analysis of these three points should be completed by a comparative study of the two movements, which in England and in Spain led to the results under examination, or at least a study of their chief features and particularly the main point of Magna Carta, namely the limitation of the absolute power of the monarchy, and the safeguard of the rights and privileges (not always just, it must be admitted) of the people. Such would be the plan of a complete study of the proposed thesis. But the limits of this chapter admit only of a brief summary of each point.

Magna Carta contains some points which specially concern the political situation of England, points which have no parallel in Spain. A priori this was to be expected. Feudal organization was not alike in the two countries, even if the most feudal regions of Spain be considered. Social elements were not alike nor the relations between classes. In England there were also certain circumstances purely connected with the person of King John, abuses committed by that particular King which had to be abolished or restricted in the Charter. We shall not touch these points, since there is nothing corresponding to them in Spanish jurisprudence; and we shall only examine those matters which are in their essence common to both countries.

Here also Señores Mariehalar and Manrique have shown the way. They examine, one by one, most of the chapters of Magna Carta,1 in order to prove, by comparison with Castilian precedents and especially with the dispositions laid down in the Cortes of León in 1188, the priority and in some matters the greater amplitude of Spanish jurisprudence in the points of highest political and civil importance.

The observations of Mariehalar and Manrique, being merely a kind of digression in their book, are brief, and also suffer from the deficiency of concrete studies, from which Spanish constitutional history suffered at that time (1862) in most of the topics which it embraced. Moreover their whole work is marred by a want of organic perception. Nevertheless most of their comparisons are accurate in the main. To avoid repetition, these comparisons may be summarized here: The two authors prove the priority of Leónese and Castilian jurisprudence (in part also of Visigothic jurisprudence, as defined in the "Liber Judiciorum," which during the age of the Reconquest was still in force in Spain) in respect of the rights of widows (Magna Carta, ch. 8), the establishment of a royal tribunal in a fixed place (ch. 17), the provisions concerning judicial process (ch. 39), the judgment of peers (ch. 21), the vote of subsidies demanded by the King (ch. 12) and other provisions.1 They also

indicate certain rights which are set forth in the record of the Cortes of León of 1188, and of other earlier Cortes, and which are not mentioned at all in Magna Carta; for example the right of declaring war and making peace, and the inviolability of the home. On the other hand they recognize that Magna Carta contains some provisions—namely the right of trade and of ingress into the kingdom and egress therefrom—which have no parallel in mediæval Spain.2

But the observations of Mariehalar and Manrique do not embrace all the points of similarity between Magna Carta and Spanish jurisprudence, nor do they touch the principal topic. For the chief topic, in my opinion, is the general system of limitations imposed upon the Crown. On the other hand some of the points mentioned by these authors require further study, which should take into account both the whole body of provisions concerning these points and also the differences of circumstances surrounding these questions in England and in Spain. Thus, with regard to the provisions concerning administration of justice1 (chs. 17, 24, 40, 45), in order to comprehend the true relation between English and Spanish jurisprudence in the thirteenth century, it would be necessary to treat separately some details which form part of the general subject. Thus two jurisdictions expressly mentioned in Magna Carta, that of the King and that of the barons, should be compared with three jurisdictions existing in Spain, that of the King, that of the "concejos" or municipalities (these two working side by side in a relation not yet thoroughly elucidated), and that of the feudal lords, which last had shrunk very much in Castile and León in the thirteenth century. Again the establishment in England of a fixed or stationary Court of Common Pleas and the exclusion of pleas of the Crown from the local courts should be compared with the special cases of royal jurisdiction in León and Castile, the royal power of calling up cases from inferior courts, and the double process—clearly marked in Spain from early mediaeval times—of absorption by the King's Court of seigneurial jurisdiction on the one hand, and the penetration of royal authority into municipal jurisdiction on the other hand.2 In Spain municipal jurisdiction, which was gradually won also by the inhabitants of places subject to feudal lords, subjected to the "fuero" (or local custom) all men of whatsoever social condition, even nobles and ecclesiastics, within the limits of the municipality. This institution, a knowledge of which is necessary to a clear perception of the democratic scope of our jurisprudence, carries the question into a region unknown to English jurisprudence, at the beginning of the thirteenth century. The provisions established by Magna Carta concerning municipalities already existed in Spain; and the existence of municipal jurisdiction in that country represents a distinct element of extraordinary importance.

The subject of guarantees concerning legal process (39) has two parts, first prohibition to arrest, condemn, etc., any "free man"1 contrary to the law of the land, secondly the judgment of peers. As to the first, the Cortes of 1188 establish some provisions either identical with those contained in the text of Magna Carta or else resembling them,2 besides others which are not mentioned in Magna Carta. But the main point, namely freedom from arrest except by competent authority, and freedom from condemnation except according to law and after trial, must be sought in the texts of our municipal "fueros" and in statements to be found "passim" in ordinances of a more general character. With regard to the promise in chapter 40 which so scandalizes

Mariehalar and Manrique who exclaim: “In none of our codes or ancient documents do we find the shameful declaration ’nulli vendemus,’” it should be said that the same abuses are implicitly indicated in Arts. 19, 20, 21, and 29 of the Ordinance of León. The malpractices of administrators of justice in those times were very frequent in all countries. Monarchs continually strove to check these abuses, and Spanish jurisprudence, both before and after 1215, contains very many provisions of this kind.

But apart from the matters studied by Mariehalar and Manrique, matters which, as we see, demand further investigation, there are other points of relation between English practice and the jurisprudence of the various Spanish states. Webster observed particularly the intervention of the popular element and the form of election favoured by de Montfort. As to the first point, two chapters of the Charter demand our attention, the 13th, which affirms municipal liberties, and the 14th which deals with the composition and functions of the “consilium regni”.

As to both these points, Spain was far ahead of England. Independent municipalities were numerous in Asturias, León, Galicia, Castile, Aragon, Catalonia, and also Navarre at the beginning of the thirteenth century; whereas London was not a municipality till 1189; and in several of these countries the towns constituted a considerable political and social force. Their “fueros” were confirmed by every king, and the royal oath in the Cortes embraced the whole body of these “fueros” and of the privileges possessed by every class.1 It seems needless to dwell on this point, since it is recognized by all historians. For the same reason it is not necessary to trace in detail the priority and the greater amplitude of Spanish municipal rights by examining the true significance of the second part of chapter 13—“præterea volumus et concedimus” and the scope of the “liberties” of London at that time.2

As to the composition of the Royal Council, Spain—that is to say León and Castile—shows a decided advance as compared with England. Our Royal Council (Consejo Real) was already in the thirteenth century an organism, precarious indeed and irregular in its functions, yet sufficiently developed and possessing a far wider competence than the baronial system to which the Council seems to be reduced in Magna Carta.1 The Castilian Council included not only the nobles (whose right to be summoned in England is confirmed and defined for the first time by Magna Carta) but also representatives of boroughs and cities, that is to say, a plebeian element, which in the English system had no part whatever in such functions. Their inclusion in the Castilian Council possibly dates from the reign of Alfonso VIII (1158–1214). Moreover, the chief kingdoms of Spain possessed, before 1215, another organism of much greater political and representative significance than the Council, namely the Cortes, which everywhere included representatives of the various classes of the community. The Cortes of León came into being in 1188, and the Cortes of Aragon probably in 1163. Catalonia had Cortes a little later, in 1218. In Castile, 1250 is the latest date assigned to their origin. Nor should it be forgotten that, before the introduction of the popular element, the assembly (“concilium”) which aided the King in legislative functions, was in normal and frequent action from the early ages of the Reconquest. This “concilium” possessed not indeed the power to pass laws, but the right to propose laws, like the Councils of the Visigothic period. The decisive intervention of the Cortes in voting taxation—in which matter they hold distinct

authority—constitutes, in those Spanish countries which possessed Cortes before 1215, a superiority over the limited guarantees provided upon this point in chapter 12 of Magna Carta.

Chapters 28, 29, and 30 find their equivalent in our municipal and general laws concerning protection of private property. There are numerous provisions which check the abuses committed in seizing goods by way of penal or legal process, protect from seizure the instruments of labour and both the objects and the quantities to be assigned to the "yantar y conducho" or feeding and lodging of the King and his suite and of certain other officials. Since these points of our mediæval jurisprudence have not yet been specially elucidated, it is impossible to get a clear and succinct view of all these details, scattered through many constitutional documents. But the complete and organic expression which was soon afterwards given to these points in the "Partidas" (1265) in the "Leyes de los Adelantados," and in other legal texts of Alfonso the Tenth's time, which in great part form a collection of earlier jurisprudence, prove the development which these matters had previously reached.

Finally—to avoid a too lengthy comparison between the chapters of Magna Carta and Spanish jurisprudence—I will indicate the provisions concerning the Jews. Chapters 10 and 11 contain nothing favourable to them; rather, they aim at protecting widows and minors against Jewish usury. Manifestly, the legal position of the Jews in England was inferior to that which they enjoyed at that time in Spain and particularly in Castile. It may be said that the period from the eleventh century to the middle of the thirteenth is the golden age of the Jews in Spain. It is true that *social* opposition to them takes distinct form towards the end of the twelfth century; but persecution started much later, and even then royal protection was not wanting to them.1 The petitions of the Cortes against usury, throughout this period, curiously resemble these two chapters of Magna Carta.

The limited social scope of most of the declarations of Magna Carta must be remembered throughout. The provisions of the Charter do not extend to all Englishmen, but, in most of the chapters, to the nobles only. Those of inferior status have little share in these advantages or—to be more accurate—in the limitations imposed on the royal power. The Charter, even when it does mention "villans," frees them only from some obligations towards the King, not from obligations towards the lords, to whom villans continued to be like chattels. The status which was obtained by the citizens of London cannot be compared with that which was obtained by the barons. Even if we should accept the "democratic" interpretation of chapter 60,1 there still remain many other chapters in which the royal concessions lie out of reach of the mass of the people.

In Spain on the other hand, and chiefly in León and Castile, even the servile classes of earlier ages had attained a great improvement of condition in 1215, and the liberties which were gradually being won, chiefly benefited the people in general, not an oligarchy of nobles. Even in Aragon, where later times were to bring a retrograde movement in respect of some inferior classes, the advantages actually attained were more widely diffused than in England; and we find the position of the lower classes better protected by a legislation in which they were regarded as important factors.

II.

Let us now pass to the most important point of comparison between Magna Carta and Spanish Juris prudence in the thirteenth century, the point which most clearly marks the tendency of political evolution in Europe and which, for that reason, produced most results in the direction of constitutional control. That point is the attitude of the barons towards the despotism of John Lackland and the guarantees with which they surrounded the concessions obtained, lest the King should evade those concessions. In fact, the whole scheme of declarations and promises contained in Magna Carta is valueless apart from security for their accomplishment. Many Spanish kings made identical or similar promises, and the same thing occurred in other European countries which were passing through the same movement. But the real practical problem does not lie in declarations on the part of one section of the community, or of several sections, or of the whole people (whether represented in Cortes or not) that they propose to limit and censure the King's exercise of authority. The point is the possession of power to accomplish that object. One method of doing this was to bind the King with a series of guarantees constituting for him a danger or a considerable difficulty in the ordinary working of his authority and his administration.

In Spain, from the Visigothic period onwards, efforts are clearly visible to check the natural propensity of kings towards abuse of power—a propensity which is found in all authority. But the means chosen are either merely moral definitions—such as maxims declaring the King to be the first subject of the laws—or else legal declarations of guarantees which rest solely on the monarch's good faith, such as limitations of the confiscation of private property. The sole effective counterpoise lies in the King's perpetual apprehension about breaking his formal and legal undertakings, in view of the powerful forces concerned in their enforcement. At a later time, the Cortes constitute a systematized guarantee by means of which the people hold the King in subjection through the power of refusing what the King may require, that is to say supplies; but in all other respects, equilibrium—which was seldom really secured—is produced or attempted through the free play of the two counterbalancing forces. And this is why in Castile the power of the municipalities and the whole body of privileges represented by the municipal "fueros" are so valuable, while in Aragon the social weight of the nobility possesses a similar value.

Magna Carta treats the question in quite another manner. The creation of the committee of twenty-five barons (ch. 61) as a kind of tribunal to judge infringements of privilege and the functions assigned to this committee in chapters 52 and 55, as well as the recognition of the right of insurrection in case of breach of faith on the King's part, constitute guarantees which already assume an almost constitutional form.

Both these provisions are known to Spanish jurisprudence, but they only attain a similar constitutional force considerably later than the date of Magna Carta. The first device, that of the committee of barons, as a tribunal to watch over the fulfilment of the "peace and liberties" granted and confirmed in the Charter, in Aragon takes the form of the "Justicia Mayor," in so far as that dignitary, forced upon the King by the nobles, becomes mediating judge or judge of "contrafuero," that is to say, examiner of

infringements of law committed by the King or his officials. This guarantee was initiated in the Cortes of Egea in 1265. Its complete development is found in the "Privilegio General" won from Pedro III in 1283 and is still more marked in the "Privilegio de la Unión" (1287) which forbade the King to take proceedings against any adherent of the Union, whether nobleman or municipality, without the intervention of a judicial sentence by the "Justicia" and the consent of the Cortes. Something in the same direction, but less effective, is to be found in the privilege of the Aragonese and also the Catalonian Cortes that examination should first be made of any grievances against the King.

In Castile there was nothing resembling the committee of twenty-five barons before the Pact ("pacto") of the Hermandad of the nobles and municipalities ("concejos") of Castile, León, and Galicia with the infante Don Sancho, son of Alfonso X (1282). This Pact established the right of the Hermandad to judge the royal officials and even the judges themselves and to inflict upon them punishments, including the penalty of death. This privilege or means of security against the King and his officials finds its culmination in the "Concordia de Medina," which was forced upon Henry IV in 1463: but this latter agreement was short-lived.

The second device, that of insurrection, is more fully represented in Castile. The earliest document which we know concerning this is the above-mentioned Pact of 1282, which assigns to the towns the right of insurrection against royal infringements of the law. The same thing occurs in what may be called political programmes of other Hermandades of the thirteenth century, such as the Hermandades which united the towns of Castile, León, and Galicia in 1295, and which were confirmed by Ferdinand IV. A similar provision is found in the above-mentioned "Concordia de Medina," which establishes the right of making war on the King without incurring penalty, in case the King should proceed against nobles or ecclesiastics in any other form than that formulated in that document. It would be out of place here to discuss the doctrinal development of this right of insurrection in the hands of theologians and political theorists of the sixteenth and seventeenth centuries: this important topic has given rise to an abundant critical literature in recent times.

In Aragon, assertions of the right of insurrection were at least as definite as in Castile, and had wider results in the sequence of political events. The "Privilegio de la Unión" declared that, in case the King infringed its provisions, the leagued nobles and municipalities were free to refuse him obedience and choose another sovereign without being guilty of treason. Notwithstanding the astute government of James II, this privilege was ratified in 1347, when the new King, Pedro IV, was obliged to recognize the power, claimed by the Union, of deposing, banishing, and depriving the King, if he should inflict punishment without the judicial sentence of the "Justicia" and the advice of the "ricos-hombres". But this "Privilegio" was not valid for long in Aragon, since Pedro IV himself annulled it in 1348.

To conclude, it is interesting to compare the very wide character of these securities—that of insurrection and that of a tribunal or judge to examine royal infringements of law—in most of the Castilian and Aragonese documents concerning them, with the very special and limited character which they bear in Magna Carta.

The competence of the tribunal of twenty-five barons and the right of insurrection refer explicitly to the "peace and liberties" granted and defined in Magna Carta, whereas the similar securities embodied in contemporary or slightly later Spanish jurisprudence embrace every possible case of infringement of privilege on the part of the King or of his officials, although these documents sometimes particularly mention irregularities of legal procedure. The greater amplitude which in Spain from the beginning marks the guarantees won by nobles and by the people, may arise either from a natural propensity of the Spanish mind to generalize without giving much importance to the generalization, or else from a complete view of the problem and a desire to solve it entirely once for all. Whichever be the explanation, it is a characteristic trait of our history.

Another characteristic is the constant mixture of noble and of popular elements in these acts of resistance to royal despotism and to arbitrary administration. The joint action of both classes signifies that in Spain the liberties obtained had a very wide social reach, especially in Castile, where popular action had a large share in the movement. But it should not be forgotten that in many cases—especially in Aragon, but also in Castile during the reign of Henry IV—the pressure put upon the King had an oligarchical character, a condition of things which is in fact not less dangerous than royal despotism to public rights. The conflict arises, not always between a despot and a people suffering under his despotism, but sometimes between a despot and other despots who resist a check upon their despotism. That is to say, class privileges are asserted against the authority of one man's will; and this fact should be well weighed—as it has been weighed by modern writers on Magna Carta—in order not to attribute to political development a much more democratic tendency than it really possessed. What did happen was that those who strove to limit the royal will in their own interests were unwittingly furthering constitutional progress on behalf of all. For they were preparing both the minds of men and the machinery of government in such a way that, when the royal power, representing the unity of the State, should rise above the diversity of aristocratic and local authorities, this single power should not be in a position to injure the fundamental rights of the subject.

The dates at which this point was reached and the roads which led to its attainment have varied in all the countries of Europe. Every country has also differed from its neighbours in the vicissitudes of advance and retrogression. In England, apart from some episodes of fluctuating movement, the tendency of national liberties becomes continually more marked from 1215, and soon takes a decisive and progressive direction. In Spain, notwithstanding her priority in this kind of political activity, privileges are lost without any compensating gain to the common rights of subjects; for the absolute power of the King dominates all privileges, and destroys that which had been attained in the Middle Ages; nor is the loss replaced by any analogous guarantees of equal extent. The process is interrupted and is renewed long afterwards, in the nineteenth century, without the attainment of positive advantages until near the end of that century. But the true history of absolute power in Spain, in order to elucidate how far it penetrated civil and political jurisprudence, still remains to be studied; and any generalization would be, at the present time, premature.

[Back to Table of Contents]

FINANCIAL RECORDS OF THE REIGN OF KING JOHN.

By Hilary Jenkinson, F.S.A.

Introductory.

The most superficial study makes it clear that finance played a part of extreme importance in the reign of King John; it is probably not too much to say, considering any of the great crises of his time, that had he commanded even adequate financial resources the other elements in the situation—the personal character of himself and those with whom he came in contact at home and abroad, political influences, national movements—would have worked out to a quite different end. His period, too, after long neglect, has in recent years received considerable attention. It is strange, therefore, that the existing Records which may be either directly ascribed to, or obviously associated with, his financial administration have been to a great extent left aside by historians. It is true that the primary executive instrument of his time was the Chancery and that the Chancery Records have nearly all[1] been published for his reign with Introductions which, in some cases at least,[2] still stand. But even the Chancery Records are comparatively unworked for the financial points—at any rate for the smaller ones—which they contain; partly, no doubt, because (it is the great lack of all the earlier Record publications) they have no subject index. The direct Records of Exchequer administration have, with two exceptions,[1] been left severely alone. Here again there is an obvious reason in an obvious difficulty; the Pipe Rolls (the chief, though not the only, class of direct Exchequer Records for this reign) being so bulky that inquirers have doubtless despaired of making a just use of them.

The Object of the Present Paper.

It would be well if these records could be dealt with in print. Meanwhile the present anniversary seems to offer an opportunity for the survey of such Exchequer Records of King John as remain to us. Having surveyed we may also do good work by endeavouring to place them. We have a good general summary of Exchequer procedure as it was in the twelfth century in the "Dialogus de Scaccario";[2] and we know, in outline at least, what the machinery of it was in the period which first gives us fairly complete manuscript remains of the various departments of Exchequer administration—say the early fourteenth century. It is obvious that the second of these states has grown out of the first, but obvious also that we cannot, without investigation, put down to mere expansion all the changes which we find; there might well have been some violent innovation. Now where do John's Exchequer Records stand in relation to this expansion and, if they took place, to these innovations? The fact that the Chancery Rolls begin with his reign makes it peculiarly desirable to establish at this point some limit between the twelfth and the fourteenth centuries in the matter also of the Exchequer.

Even so we have not exhausted the list of what may properly be considered preliminaries essential to the study by historians of John's finances. All Administrations, perhaps everywhere, certainly in England, have been from the earliest date subject to the mysterious influence of the Legal Fiction; old forms, that is

to say, because they were established and because they had legal sanction, have been adapted to violently new uses: two people play at going to law in order to transfer land with the greater security; the King makes out a receipt for money he has not received from A. in order to have a convenient substitute for cash with which himself to pay B. We have in fact to consider the Records of, for example, the annual Audit in the light of transactions which we know from other sources to have taken place, in order to settle the question whether the Pipe Roll at a given period represents what we should expect it to represent—a survey of the year's income—or whether it is only partially this, or not this at all. Reversing the process we have to test, where possible, our knowledge of the alleged exaction of the King by its representation in Records. Does a statement that the King imposed a talliage of 20,000 marks mean that he obtained 20,000 marks? In the vast majority of cases administrative documents and narrative descriptions have not both survived for any given transaction in early mediæval times. But an examination of the cases where they have will furnish a criterion of value for the large number of cases where only the one or the other remains to us.

To deal with such problems as this is obviously beyond the scope of a single paper; indeed for the most part they must be left till greater facilities in the way of printed and indexed Records are available. At the same time, in view of the wide and unquestioning use which has been made of Chronicle statements, the point is worth raising. Meanwhile, we may attempt perhaps with some profit the survey of the wealth which remains to us; and to a certain extent the classification of the Records from the point of view of the part they played in the administration of the various departments.

A survey of Exchequer processes, and Officials.

For the purposes of a survey it will be convenient to travel backwards. Briefly then to summarize what is well known, the financial documents which remain to us from the time when the "course of the Exchequer" was well established—say at the end of the first quarter of the fourteenth century—are as follows. It may be premised that we are attempting only to deal with those officials who left us Records, i.e. direct Records of the particular processes they controlled; for example, we are to display an interest in the Chamberlains of the Receipt but not in the Tellers, important as the latter ultimately became.

In the early Fourteenth Century. Audit.

To begin with the Exchequer of Audit. This is represented by the two departments of the King's Remembrancer and the Lord Treasurer's Remembrancer. The latter's department is that of final audit represented in Records by the Pipe Roll and the divisions which split off from it.[1] The King's Remembrancer's department—that of preliminary audit—is represented in Records by a mass of vouchers of every shade of variety in point of officiality, provenance, and writing; and by some preliminary statements or summaries of Accounts—Compotuses compiled from the vouchers; these last are closely connected with the Enrolled Accounts mentioned above. All these are in origin part of the "Ancient Miscellanea of the Exchequer, K. R.," and are represented now by a number of classes, principally those known collectively as "Exchequer Accounts".

Memoranda.

The supplementary, interim, or domestic affairs of the Upper Exchequer as a whole, the proceedings of the barons, their Minutes and Correspondence, are represented in the case of both these Remembrancers by a Memoranda Roll in which each of them had noted such of the proceedings as interested his department. In many cases the same information would appear in both rolls. These Memoranda are, of course, the distinctive Records of Remembrancers. At the time we are speaking of they are arrayed in definite divisions including the "Adventus Vicecomitum" and "Dies Dati" (showing the arrangements made for audit), the "Brevia Directa Baronibus" (a section of In-Letters), the "Status et Visus Compotorum," the "Brevia Retornabilia" and "Irretornabilia" (Out-Letters), the "Precepta" (instructions for issue of writs of process), and a section in which private deeds are enrolled; and, most important of all, the very lengthy "Communia," with various sub-sections, the chief of which is that of the "Recorda" of revenue cases which come up for decision before the barons. This last section is intimately connected with the origin of the separate Exchequer of Pleas; but precisely how intimately has not yet been settled.

Receipt and Issue.

Behind or below this Exchequer of Audit, separate from but subject to it, is the Department of the Receipt, represented *qua* Officials by the Treasurer and the two Chamberlains or their Deputies.[1] Speaking broadly, the duties of these three at the "Recepta" are the same, and they are represented in Records by

The Ward-robe.

either a common collection or a triplicate series. They record the operation of receipt by preserving counter-foils of receipts (the foils of tallies or "contratalee," and eventually the stocks of the same when these come in after audit), and copies of the inscriptions of these tallies on rolls (Receipt Rolls): the operation of issue by preserving the original writs for issue, copies of these (Liberate Rolls[1]) or notes of them (Issue Rolls).

Besides the "Recepta" there is another office where receipt and issue go on. When the differentiation of the Exchequer from the "Curia" was complete the result was an elimination of any personal control by the Monarch. The same thing occurred in the departmentalization of the Chancellor, who, with his staff, controlled the Great Seal. In each case the result was the same; under the older Official, or rather body of Officials, there grew up an Official or an Office closely resembling it in functions, and to some extent in methods, but controlled, as itself had originally been, directly by the Sovereign. At its weakest the new body acted as a link between the older one and the King; at its strongest it usurped in his behalf the authority of its prototype. The departmentalization of the "Curia," in fact, brought into existence the "Camera," the household grew up as an administrative organ, beneath the Court. Thus below the process of the Great Seal, preliminary or subsidiary to it, we have that of the Privy Seal; and presently below this in its turn the Signet. Similarly,[2] below the Exchequer (Upper and Lower, Auditing Body and Receipt) we have financial functionaries of a less official character; notably we have, well established long before the fourteenth century, the Wardrobe; taking upon itself to a greater or less extent, according to the relative strength of King and Ministers for the time being, the function of receiving and, more particularly, of spending the King's money. Of the activities of the Officials of the Wardrobe record is preserved to us in the shape of a regular series of

Accounts, with quantities of attendant vouchers, among the Records of the King's Remembrancer.

The Chancery.

Apart from the direct operations thus recorded at the two departments of the Upper Exchequer, at the Receipt, and at the Wardrobe, Record is preserved at the Chancery of the part played by that Executive in originating active financial operations. Writs for Issues and those concerned with the audit process (writs of account, allowance, pardon, etc.), are preserved in copies made as they issue from the Chancery; we have in particular the Chancery Liberate Rolls. Besides these many other letters under the Great Seal must necessarily concern the Exchequer either directly by causing payments in or out,1 or indirectly by modifying the property in respect of which audit takes place. As these letters, unlike the writs mentioned above, are not directed to Exchequer Officials, copies or notes of them extracted from the Chancery Enrolments must be sent over to the Exchequer; where they are preserved in the shape of "Originalia" or Chancery Estreats.

Judicial Records.

Finally, we must give a word in passing to another class of non-Exchequer Records, the rolls of the Justices; full of subjects so interesting to the Exchequer as amercements. As these were preserved at the Treasury of the Exchequer they were presumably available there for reference; but Estreats were also prepared from them, whether by the Justices or the Exchequer Officials, for the information of the Exchequer and its Accounting Officers.

It is to be noted that all the operations which lie at the base of the classes of documents we have touched on are simple ones, which, in a primitive form at least, are going on in the earliest times at which we have details of the organized finance in the King's Courts. To return now to these earliest times.

In the time of the "Dialogus". Upper Exchequer and Pipe Roll.

In the time of the "Dialogus" we have an Upper Exchequer represented in Records by the Pipe Roll, the form of which (a fact confirmed by existing rolls), is essentially the same as that we find later. It is written, we are told, by the Treasurer's scribe from his dictation at the actual time of Audit; and at the same time a copy is taken by the Chancellor's scribe for the Chancellor.1 We may add for completeness a reference to the existing rolls and their publications by the Pipe Roll Society.

Vouchers.

There is evidence of the production of original writs of pardon or allowance at audit time by the Accountant; and of their preservation by the Marshal.2

The Lower Exchequer. Tallies and Words.

At the "Recepta" the Officials are the same as we find there later. The Tallies given out as acknowledgments of sums paid in are also practically the same,3 and the foils, and subsequently the stocks, are preserved in like manner. The writing on them is done by the Treasurer's clerk.4 The same Official also 'deputat scripto" the sums received; possibly this is a reference to the "rotulo receptarum" which is also mentioned.5

Payment out is already dependent on a writ of "Liberate" from the Chancery, which the Officials of the Receipt preserve after it has been honoured.1 Two examples of the Henry II period have survived.2

The Norman Exchequer.

Before going any further we may interpolate here some remarks about the separate financial administration of Normandy—an administration which, of course, was not in existence, so far as concerns this country, at the later date we have been discussing. Stapleton,3 who edited the rolls of this Norman Exchequer for the Society of Antiquaries, quoting allusions made in the "Dialogus" to this "Scaccarium transmarinum," discredits the suggestion4 that the English system was based on the Norman, a position taken also by most modern writers;5 but makes it clear that there was a separate Norman "thesaurus" in 1131:6 and the balance of opinion seems to be in favour of accepting the fact of a "Scaccarium" in session in Normandy as early as 1171.7 It is to be noted that the "Dialogus" expressly describes this overseas Exchequer as essentially different from the English one; and Prof. Powicke8 in describing its functions is, of course, noting some functions and fashions which are certainly not English. The surviving rolls go back to 1184.

The "Camera".

It is further to be noted that in the time of the "Dialogus" we have already allusions to financial transactions carried on by some machinery other than that of the "Scaccarium" and "Recepta"—by the "Camera" in fact—both in England1 and in Normandy.2

The Chancery.

In the Chancery, it appears from the "Dialogus," the Chancellor's clerk keeps a "rescriptum,"33 otherwise called "contrabrevia," of the writs of Liberate, pardon, and allowance issued; and these "contrabrevia" may apparently be produced at the Exchequer Board at Audit just as the "contratalee" are produced for checking purposes by the Officials of the Receipt.

Judicial.

Turning to Judicial Records we find that the "Dialogus" supplies no evidence of the existence of Plea Rolls in its time (the earliest which have survived are of the reign of Richard I): but it is clear that information concerning amercements imposed is furnished by the Justices.

Gaps in the Exchequer of the "Dialogus".

Now it will be noticed, as one compares the twelfth with the fourteenth century, that we have here certain large gaps. At the Receipt we have seen nothing of any "Issue" or "Liberate Roll". In the Chancery there is no preparation of Originalia, though the "Rescriptum" or "Contrabrevia" seem to be used for the same purpose. Finally, we have said nothing, so far, in relation to the twelfth century, of the Remembrancers and of their most distinctive Records, the "Memoranda". I have mentioned these last because we have here a matter which needs rather more detailed discussion.

Memoranda and the Remembrancers.

It is clear, of course, that in the time of the "Dialogus" the business of Audit was not divided up into the preliminary and final department of the King's Remembrancer and Lord Treasurer's Remembrancer or any two Officials under other names. But that does not mean necessarily that there were not at that date Remembrancers, or at any rate some Officials whose successors ultimately became Remembrancers. Moreover, we have yet to mention two more Officers whom the "Dialogus" does chronicle, with their Records—Master Thomas Brown and the Archdeacon of Poitou, Richard of Ilchester, for a short time Seneschal of Normandy.

The Theory of Thomas Brown.

These being two and unplaced in the Exchequer scheme of things, and the later Remembrancers, who are not mentioned in the "Dialogus," being also two, it is naturally tempting to equate the pairs. Thus Dr. Poole "has long been accustomed to see (in Thomas Brown and Richard of Ilchester) the origin of the two Remembrancers who first appear by name under Henry III".1 The position of both at the Exchequer Board is certainly anomalous. Of Thomas Brown we are told2 that at the Court of the Sicilian King, before he came over to that of Henry II, he was "in regis secretis pene praecipuus"; that at the English Exchequer he sits "in quarto scanno quod est oppositum Justiciario";3 that he has a copy made from the Pipe Roll, or parts of it, at the same time as the Chancellor's clerk makes the Chancellor's counter-roll, his own clerk having a special seat given him that he may be able to discharge this duty;1 that he also has a clerk at the Receipt who2 "liberam habet facultatem scribendi...que recipiuntur et expenduntur". Of the Archdeacon we are told3 that his clerk kept "rescripta" of the writs of summons which he used for the purpose of checking them when they were read out at the Audit; we are also given details of his place at the Board. As to the peculiarity of the position of these two Administrators—Thomas Brown's privilege of keeping for his own use a third roll is "preter antiquam consuetudinem," while the Archdeacon's position is4 "ex officio quidem set ex novella constitutione". In the case of this last passage a variant reading would tell us that he sits "non ex officio". The first of the above remarks seems to me to show that Thomas Brown's position was "ad hoc," created not for an office which he filled at the moment but for him. Taking this view I should he disposed to accept the "non" in the second passage, though even without it the remark does not, I think, establish conclusively the officiality of the Archdeacon's position at the Board: "ex novella constitutione" is elsewhere5 applied to Thomas Brown and is there explained as meaning "added by the present King". At this point I come, with great diffidence, into conflict with the view which sees in these two the ancestors of the Remembrancers—officials, be it noted, who are not known to occur under that name before the reign of Henry III.1

The identification of the Archdeacon and the Lord Treasurer's Remembrancer may here be left; it is a matter largely of taste, for it depends almost entirely upon the interpretation put upon the passage quoted above (though there is possibly some force in the fact that the Archdeacon is connected with the function of summons2), together with the fact that if Thomas Brown is the ancestor of the King's Remembrancer, there seems really no reason why the Archdeacon should not foreshadow the Lord Treasurer's Remembrancer. If Thomas Brown's suggested

position be not substantiated then the similar suggestion for his contemporary rather falls to the ground.

Now as to Thomas Brown. Dr. Poole's argument is[3] that the words "quod oportet excipiat," applied to his clerk, imply a selection of topics; and that the "regni iura regisque secreta" contained in his roll are "very nearly what the later Remembrancers wrote in their rolls". In making this point Dr. Poole has to dismiss the statement that any errors made "in excipiendo" can easily be corrected by a comparison with the Chancellor's and Pipe Rolls[4] together with an important comment of "Discipulus" in this connection.[5] This is difficult: and an even greater difficulty is that the same word "excipere" is applied to the work done by the Chancellor's clerk who undoubtedly makes an exact copy from the work done by the Treasurer's clerk.[1] As to the word "secreta," Dr. Poole[2] has already explained its use in connection with Thomas Brown's Sicilian experiences as referring to the "duana de secretis"; and there seems to be no difficulty here in explaining it either, as Prof. Haskins does, as a piece of mere magniloquence or as being borrowed by the writer of the "Dialogus" from his own previous description—the man who was great in the "secreta" of Sicily was great also in our English "secreta," a piece of allusiveness quite in character.

Of course it may be argued that Brown did keep an exact copy but that, in spite of this, he was a Remembrancer. I confess I find it quite easy to suppose that a "restless experimenter," to adopt Prof. Haskins' description of Henry II, temporarily included special members in his Court of Exchequer in order to have the advantage of their advice, and in consideration of their financial experience, which was well known. Elsewhere[3] I have tried to show that so early as the beginning of this King's reign new revenue problems were making the conduct of the Audit upon the old lines by no means a simple matter. It is much more difficult, I think, to suppose a permanent change to have been made by revolutionary innovation at the Exchequer, where, as the "Dialogus" shows, the "ancient course"[4] was already a shibboleth. Such changes are extremely rare in the whole of Exchequer history, and indeed in the whole of English administrative history: it is much easier to suppose[1] that the Remembrancers were merely the evolution into a separate name and recognized office of the simple clerks of one of the original officers of the court; just as was the case with the Chancellor of the Exchequer (originally the Chancellor's clerk) and the Clerk of the Pipe (Treasurer's clerk) at the Upper Exchequer, the Clerk of the Pells (Treasurer's clerk) at the Receipt, and other distinct officials in other courts.

Another Theory.

This is perhaps again very much a matter of taste; but there are other arguments less open to that objection. The nature of the later Memoranda Rolls does not suggest that they originated in copies from the Pipe Rolls; they consist, in fact, largely of things which are not on the Pipe Roll. Again, neither of the later Remembrancers had any function at the Receipt; Thomas Brown kept a clerk there.[2] Final and strongest argument against this derivation of the Remembrancers' Office—the "Dialogus"[3] actually mentions the making of Memoranda, and Memoranda of such a nature as we should expect; very little, it says, is written at the Easter Scaccarium: "tamen quedam memoranda que frequenter incidunt...seorsum tunc scribuntur ut soluto scaccario de hiis discernant maiores que quidem non facile propter numerosam sui multitudinem nisi scripto commendarentur

occurrerent". The volume of business has so increased that many matters (so many that they must be noted in writing) have to be reserved for discussion, so to speak, out of term. We shall have to return to this later. For the moment the interesting point is that this writing is done "a clerico thesaurarii".

In treating, therefore, this section of Records, it is from this view of the Memoranda that we must start; that is from an expectation of finding in the Pipe Roll such a growing unwieldiness and confusion as would necessitate the regular making, not of extracts from it, but of notes of preliminary and interim matters which need not ultimately appear in the Pipe Roll at all; and from a parallel expectation of what, when we find them, the first Memoranda will be. So we may turn, after a rather long digression, to the actual Records of John.

Records of the reign of John. Exchequer.

Pipe Rolls.1 —These exist for every year except the fifteenth and eighteenth, and fragments of the latter are made up in the roll of the seventeenth year. "Chancellor's Rolls" exist for the third, fourth, seventh, tenth, thirteenth and seventeenth years; that for the third year was printed by the Record Commission. There is also a fragment in Exchequer K.R., Miscellanea, 1/6.

Memoranda.—Two rolls are definitely so called though they are not now numbered with the classes of that name; they are Exchequer L.T.R., Miscellaneous Rolls, 1/3 and 1/4.

Vouchers and Miscellanea.—Classed as such, though we may have to bestow some of them elsewhere, are at present one document in Exchequer K.R., Miscellanea, and eleven among the "Exchequer Accounts". Of the latter six are "Mise" and "Imprest Rolls," partly known by the Record Commission publication (Exch. Acc. 349, Nos. 1 B, 2 and 3; and 325, Nos. 1, 21, and 2), and referred to under "Household" below. Of the remaining five, two (Exch. Acc. 505, Nos. 2 and 3) have to be eliminated at once as they belong really to the following reign;2 on the other hand one (Exch. Acc. 349, No. 1A) at present classed as belonging to the previous reign must be assigned to our period. We have therefore to consider under this heading five documents,1 of which one (Exch. Acc. 152, No. 1) has been printed by a foreign student.2

Tallies.—One possibly of this reign has survived.3

Receipt Rolls.—We have one doubtful fragment (Receipt Roll, 2) and one Jewish Roll (Receipt Roll, 1564). For purposes of illustration we may note four earlier fragments: two of Henry II,4 one of Richard I,5 and one (a Jew Roll) of the same reign.6

Issue Rolls.—None survive.

Original Writs of Liberate.—One such has been found in "Ancient Correspondence," vol. 47, No. 2.

Household or Camera.—Here are to be classed the three "Mise" Rolls and possibly the three "Prestita" already mentioned. Two of them7 were formerly included among the Chancery Rolls and were printed by Hardy:8 they came from the Tower, which

was a repository both of Chancery and Exchequer Records. The remaining four probably came to the Record Office all from the Carlton Ride repository of the Ancient Miscellanea of the Exchequer K.R. Of these four the two Mise are duplicates, the best of which[9] Cole has printed. Cole has also printed[10] one of the "Prestita" but the other has not yet been published. The "Mise" are of the twelfth and fourteenth years of John, the "Prestita" of the seventh, twelfth, and fourteenth to seventeenth years, the last[1] (fourteenth to seventeenth) being unprinted and consisting really of separate rolls for several years.

Some gaps and the Chancery Records.

It will be noticed that we have made so far no reference to "Originalia" or to "Norman Records". Both require some reference to the Chancery as well as the Exchequer; and may therefore conveniently be treated together here.

Originalia.—Actually at the Exchequer there is no trace of these. The classes of Chancery Records from which the Originalia, when they came into existence, were drawn give us in the time of John a varying amount of Exchequer information, and to these we must go direct. We may note them in the Chancery.

Liberate Rolls.—There are three of these belonging to the second, third, and fourth years of John; all were printed by the Record Commission[2] with an introduction by Sir Thomas Hardy; but we shall have a small addition to make to them later.

Close Rolls.—These again were all printed by the Commission with an elaborate introduction, also by Hardy. Including three duplicates they number fifteen rolls covering the sixth to the ninth and the fourteenth to the eighteenth years of the reign. We may add that two fragmentary membranes have been recently discovered and added to the rolls of the sixteenth and seventeenth years;[3] these fragments fill a number of gaps in the printed version.

Fine or Oblata Rolls.—Including three duplicates there are eleven of these covering the first, second, third, sixth, seventh, ninth, fifteenth, seventeenth and eighteenth years of John's reign. These, once more, were all printed by the Commission under Hardy's editor-ship. We shall have later to say a few words with regard to the nature of these Chancery Rolls. For the moment we may leave them, adding, in passing, a mention only of the Patent and Charter Rolls, less directly connected with Exchequer procedure; together with a note that we shall have ourselves a small fragment to add to the Fine Roll class.

Norman Records.

Turning now to Norman Records we have to examine two divisions, Exchequer and Chancery. The first of these, that of the Norman Pipe Rolls, includes duplicates, presumably Chancellor's Rolls though they are not known under that name; it consists now of a collection (formed in 1862) of eighteen rolls, fourteen being of the reign of John and four of an earlier date. These rolls were edited in 1840 and 1844 for the Society of Antiquaries by Stapleton. Unfortunately the later arrangement does not correspond with that of Stapleton and it is a little difficult to decide which rolls he used. It is clear that he collated the duplicates to some extent; but that he had not access to all of them is plain from the

fact that he printed[1] the very fragmentary Roll No. 2 (membrane 16), of which No. 6 is a practically uninjured duplicate. It may be convenient to add here as a footnote a key to the Rolls used by Stapleton.[2] We have to add the fragment discovered and printed by Delisle,[1] though this does not belong to our period. We shall have later to make a small addition ourselves.

We come finally to the Norman Rolls of the English Chancery. These form part of a single series applying in turn to the reigns of John and Henry V. Hardy printed six rolls for the first of these reigns (three of the second year and one each of the third, fourth, and fifth) and one for the second, with an Introduction which is for once, definitely inadequate. He does not consider the question whether a single title is really applicable to the rolls of the two reigns nor, though he gives some faint indication of it, the fact that the rolls of our period are themselves by no means a homogeneous series. His work was continued (for the reign of Henry V) in a calendar in the Appendix to the Deputy Keeper's Forty-second Report without any recognition of the fact that in the meantime an entirely new Norman Roll of John had been added to the series No. 1 (the rolls are now numbered in an order different from that in which Hardy printed them); and that a new membrane had been added to one of the Rolls (No. 6)[2] already published. The extra roll need not, in point of fact, trouble us here as it has in reality nothing to do with Normandy; being a portion of an English Liberate Roll.

In concluding our summary we must add, for completeness a reference to the Plea Rolls of this reign; there are fifty-five Plea Rolls of the King's Court and twelve belonging to the class of "Visitational" jurisdictions; [1] also to the early files of Feet of Fines containing fines of our period, some of which have not been printed.

Unpublished Records.

We have thus, unpublished and unconsidered, besides the Pipe Rolls and all save one of the Chancellor's Rolls, two Memoranda Rolls, five documents in the class of Exchequer Accounts,[2] two in that of Receipt Rolls, one and a fragment in that of the Norman Rolls, one at least in that of Norman Pipe Rolls, and two fragments in that of Close Rolls; together with a tally and an original writ of Liberate. The three last named need not detain us. We have in addition a body of unpublished Plea Rolls and Feet of Fines, the indirect evidence from which might be considerable; but this again is beyond our scope. And we have suggested that the significance of the Chancery Rolls published by the Record Commission has by no means been exhausted as yet. In opening some investigation of these possible sources of information we may conveniently recapitulate one or two points with regard to Exchequer procedure which it is very desirable to remember.

A. *Touching the Relation of the Upper and Lower Exchequer*.—(1) *Receipts* of the King's Revenue do not necessarily all appear on the Pipe Roll. I have noticed elsewhere the cases of Jewish Receipts[3] and the collection of William Cade's debts.[4] Moreover the whole of the revenue of the Crown does not necessarily go through the Lower Exchequer; we have already mentioned the possibilities of the "Camera".

(2) In the case of *Issues* the Pipe Roll is even more incomplete. Essentially it covers only the cases where an official has money paid to him for which he is held to

account; these being generally cases in which the money is not paid out of the Treasury at all but subtracted in advance by the accountant, to meet current expenses, from that which he will be expected to pay in.

It is thus seen that the Pipe Roll is not a guide to receipts and expenditure, and that the only relation between the Upper and Lower Exchequers is that the latter is required to give evidence, not of all its receipts, but of such only as establish or disprove the statements made by an accountant at his Audit.

B. *As to Norman and English Administration*.—Historians have been agreed up to the present that the Norman "Scaccarium" is merely a reproduction in Normandy of the English one, *mutatis mutandis*, made for convenience; similarly a Norman "Thesaurus" reproduces the English "Thesaurus". Since there is no audit of the King's Receipts and Issues as a whole, and Exchequer procedure acts only as a check upon the local accountant, there is no inconvenience in this. Previous writers, however, have taken the existence of a similarity in points of surface procedure between the two rather for granted; in spite of the warning of the "Dialogus". Delisle for instance, in a work1 which still stands so far as regards its survey of the divisions and resources of Normandy as a revenue producing country, treats the actual machinery of the "Scaccarium" in somewhat cursory style, boldly applying the "Dialogus" description of the English institution to its Norman parallel and even importing into the latter, without evidence, a system of "Originalia"2 which did not adorn the English, Exchequer, so far as we know, till a later date. Beyond an inaccurate description of one of Stapleton's Rolls as a Receipt Roll he has not found it necessary to make any serious attempt, nor have his successors Monsieur Valin and Prof. Powicke, to establish the existence and scope of other records or record processes in Normandy;1 nor, though it is agreed that one chief executive office, one chancery, controlled both countries, have they looked very far for any possible special treatment by the Chancery of Norman affairs.

Some Notes on these Records. The Pipe Rolls.

We turn, now, to the "Pipe Rolls" of the reign of John. The bulk of these, as has been said, is so enormous that it would be unwise even to attempt to sketch out all the problems which the student of them will be called upon to discuss when they, with those of Richard I, are in print. It must suffice to venture one or two theories as to the lines upon which growth was going on in the class during our period; growth, that is, away from originally simple essentials into the utter confusion which undoubtedly reigned at the end of the thirteenth century and the highly complicated character which, we know, marked these Records from the latter part of Edward II's reign onwards. It would be particularly unwise since, apart from the bare outlines just suggested, no one has yet made such research as would enable us to get a clear and detailed idea of the state of things which was in existence in these later periods.

Under these reservations we may venture here to put forward the fairly obvious suggestion that later developments of the originally simple Pipe Roll hinge entirely on the attempt to apply this essentially simple machinery either to business for which it was not designed or to business of a bulk so vastly increased that it broke down under the sheer weight. I have suggested1 that as early as Henry II the machinery used for

getting in, or for assuring, what was then the greater part of the King's income was proving quite inadequate to provide him with cash; that so early as 1166 the King was habitually anticipating many and large sums by means of assignments. This alone introduced cross references into the accounting to an extent almost unbearable; and it is to be remembered that the use of these convenient assignments was continually growing. Again the sources of income which figure in our original picture of the "Scaccarium" all increased in bulk; the cases, for instance, which came into the King's Court, and consequently the fines and amercements, alone sufficed by their enlargement to upset machinery based upon an idea that all the accountants could be assembled at the Annual Exchequer in a limited period, their accounts audited and the roll describing the process written up while that process was going on. Besides, the actual numbers of sources of income increased; and though (as in the case of the Jewish talliages) many of them do not come under the Pipe Roll audit, yet we may argue, I think, that Exchequer opinion would be always working up towards a state of affairs when these new sources should be under the same restrictions as the old—throughout its long history the Exchequer was always trying to subordinate the new (whether in material or forms) to the old; not only this, but it would be—we know it was—working up always towards the inclusion of the spending departments in the Audit; that is to the state we find when Foreign Rolls and the like modifications appear. Finally in considering the developments we may expect to find at the Exchequer, or indeed in any administrative department, we have always to reckon with the fact that John's reign followed that of Richard, a period which introduced new elements of confusion while it is scarcely likely to have found time for much rearrangement or reform. The early Pipe Rolls, at least, of John's reign contain references to numerous arrears of the time of his brother; an entertaining instance may be found in the cases of certain people who still owed substantial fines for siding with Count John.[1]

Taking all these considerations into account we may confidently anticipate that the reign of John will find the Exchequer system as it was badly hit at certain definite points. There is a difficulty of getting business through in anything like reasonable time, a tendency of the Audit to spread over a longer and longer period—convention makes its proceedings begin at Michaelmas, but from Michaelmas they extend for an ever-lengthening time. The resulting confusion—since the sheriff of one county accounts in October while he of another is perhaps not dealt with till March—between the accounts of a given year and those of the preceding and succeeding ones is potentially very great; there is confusion also between different kinds of Exchequer records at any given date; for example the Yorkshire *receipts* of March of a given year might belong to the York-shire *audit* of the previous or following year. A Pipe Roll which shall be written up at the actual time of audit becomes, in fact, an impossibility. Further there is a legacy of arrears, and these we may say are increasing. Finally there is a confusion between transactions which go on the Pipe Roll and those which do not, a confusion that is between Treasury, or "Recepta," matters on the one hand and "Camera" matters on the other, which may be productive of extreme inconvenience in public administration.

Audit.

From these facts again we may deduce the probability of an attempt to solve Exchequer problems on certain definite lines. First, we may expect to find preliminary

and supplementary processes of all kinds going on at the Upper Exchequer before and after Audit, all the year round in fact. Secondly, we may deduce a Pipe Roll made up beforehand and consequently having to be either corrected at Audit time or else left blank or incorrect in parts; and again we may expect the beginning possibly of some organized forms of new account—some attempt (it is the obvious remedy for congestion at the final audit) at a preliminary "Compotus" in certain chosen cases; and certainly of the habitual accumulation of a great many vouchers and Memoranda. This last in particular—the extension of the habit of keeping Memoranda—is a fairly certain deduction; the mere lapse of time which may occur between the preliminary interview of the Exchequer officials with an accountant and his final examination, the mere amount of confusion that may be caused in his accounts by the fact that he has paid in money in two or three different ways and places—these and other considerations such as we have adumbrated above must, if anything at all is to be accomplished at the Exchequer, connote some attempt at organized Memoranda of extra-audit transactions. It is to this class of Records therefore that we must turn for indications of the new developments in audit procedure which were produced by the time and circumstances of the reign of John.

The Rolls of the Norman Exchequer.

Before we do this, however, we may perhaps glance at the Norman Exchequer. We know that the two Exchequers are at least closely connected; and we know[1] that Richard of Ilchester was transferred to the Norman Exchequer in 1176, presumably in order to effect changes of some kind whether these were in the direction of differentiation from or approximation to the English model.

In the first place, are these Norman Pipe Rolls so close to the English ones in small surface matters as is assumed by most people and to some extent by Stapleton? The eighteen rolls fall into two groups. The smaller of these, consists of only three rolls. One of these occupies two pages[2] in Stapleton and is fragmentary; we may say at once that most of the missing part is to be found in the unprinted Exchequer Account already referred to[3] which has hitherto been described as a Mise Roll and ascribed to the reign of Richard I; the two fragments form together an almost complete account of the receipts and expenditure of Warin de Glapion, Seneschal of Normandy, in 1200/1. The two other rolls are duplicates and are similar accounts of Robert de Veteri Ponte, then bailiff of the Roumois, in 1203. The larger of the two groups is that of the Norman Pipe Rolls proper; but they differ from the English ones in several important respects. All are of much the same breadth[4] (11 inches) but this is not the same as that of their English contemporaries which are about 15 inches. In length again they vary between 3 and 8 feet, the largest rolls consisting of a number of membranes sewn head to tail (the English rolls practically never exceed two). Another point of difference is found in the way in which they are written.[5] Some[6] are indexed at the tail of the membrane, as all the English ones are, and they have place headings and, after the form, subject headings which correspond, "mutatis mutandis," with those on the English ones. But they impress one rather as having a common tradition with their English contemporaries than as being written by scribes trained in the same school. It is possible that this surface impression is incorrect, but in any case it is not improbable that a palaeographical examination of the two sets of rolls might establish points of importance with regard to the relations of their producers.

But there is one more noticeable difference to be mentioned. We have already alluded to the inclusion in the Pipe Roll of accounts other than those of the normal accounting officials as being one of the obvious results which must spring from the widening of the sources of revenue and as one of the great changes, crystallized in the fourteenth century, of which earlier traces might be found. The distinction of such from the ordinary accounts which appear on the Pipe Roll are, first, the fact that they may be rendered by all kinds of officials; secondly, the fact that they are more marked by division into receipt and expenditure, each of these being usually given a "Summa Totalis"; and finally, the fact that the receipts may represent sums not collected from the King's subjects to be paid into the Exchequer and only expended upon the King's special order, but sums received from the Exchequer expressly for the purpose of definite expenditure. Now the germ of such accounts is to be found in certain early Pipe Rolls and in certain exceptional cases. Thus the Warden of a Mint must necessarily, from the nature of his business, account in some such way as that just described. Besides this, cases will be found such as that of the Sheriff of Kent who was charged with military building on a large scale at Dover in 32 Henry II[1] ; in that case the sheriff renders account, among other matters, "de recepta sua de Thesauro".[2]

The Norman Pipe Rolls seem undoubtedly to carry this principle further and it is possible that we see here Richard of Ilchester adopting at the Norman Exchequer reforms which his English experience had shown him to be necessary, but which, for various reasons, were delayed in England till a later date.

This may lead us to a discussion of the small second group of three Norman Pipe Rolls.[3] These rolls are narrow (8 or 9 inches) and short. They use the phrases of the Pipe Roll—" reddit compotum," "est quietus," and so forth: but they are also distinguished by new ones and they are distinguished particularly by a division into two main parts—Receipts and Expenses with a final balance. Not to linger over the description they are strikingly similar to the later "compotus" of the English Exchequer, the preliminary accounts compiled from vouchers in the King's Remembrancer's department which we noted above or to the final copy of these enrolled among the Foreign Accounts; and they show us first the Seneschal and then Robert de Veteri Ponte expending money received for the purpose from the Exchequer—even from the English "Thesaurus". We have in fact at the Norman Exchequer an anticipation of two most important points in later English Exchequer processes—the auditing of foreign accounts, including a considerable quantity of accounts of expenditure; and the auditing of them apart from the ordinary Pipe Roll process and on a different kind of roll.

This is to say that we have found, if our suggestion is correct, an anticipation of the later attempt to meet difficulties of time and place, caused by increase in the number and size of accounts, by means of a separate audit. Let us turn now to consider the other expedients which, we have suggested, must have grown into a greatly increased use to meet the same difficulties—the Memoranda which, in an embryo form, we saw existing in the time of the "Dialogus".

In this connection we may examine in some detail

The first Memoranda Roll.

the first of the two Memoranda Rolls already noted;1 though it is to be remarked that neither in this case nor in that of many other Records mentioned in this paper can anything approaching exhaustive treatment be attempted; indeed the present roll bristles with points of administrative interest which we cannot even notice here. This roll bears on its first membrane the title, "Communia Memoranda de termino Sancti Michaelis post mortem Regis Ricardi anno regni Regis Johannis primo". It consists of sixteen membranes all of much the same breadth (about 6 inches) with six small pieces of parchment considerably narrower. Membrane 2 is entitled, "Item Communia Memoranda Mich.": and membranes 3, 4 "dorse," 5 "dorse," and 6 are similarly described. Of these membrane 1 has the sub-title, "Isti sunt vice-comites qui venerunt ad Scaccarium in crastino Sancti Michaelis vel pro se miserunt anno regni Regis Johannis primo". Membrane 5 "d" (which is continued by membrane 6) has the sub-title, "de singulis vice-comitibus qui ponunt plura debita super singulos". The meaning of this is made clearer by the form adopted on the next membrane—" de vicecomitibus qui ponunt debita unus quisque super alterum," to which a frivolous scribe has added what is possibly the earliest known official jest.1 The remaining membranes are all of the same kind, each containing matters grouped together under counties. Thus membrane 4 deals with Surrey and Kent, membrane 5 gives us the affairs of Nottingham and Derby, membrane 9 "d" those of Oxford, which are continued on membrane 10; and so forth. Membrane 13 is devoted to Jewish business. The small membranes may be left for the moment.

It is clear that we have here rolls similar to the later series of Memoranda Rolls; the arrangement makes this plain, giving us, as it does, "Adventus Vicecomitum" on the first membrane and so considerable an amount of the well-known later division of "Communia". It is fairly clear also that we have not here the first of the series—it is not sufficiently experimental; and indeed there are definite references to earlier Memoranda. But to consider the "Communia" in rather more detail:—

A large number of the entries under this heading consist of "dies dati"—days assigned to Accountants for their auditing—or respites or adjournments. There are about sixty such entries and roughly speaking they follow a chronological sequence; though to make this nearly perfect we must suppose that membrane 4 "d"2 should properly follow membrane 2. Thus starting with adjournments which are mostly for October or November we work down to those for April. Interspersed with these entries we have about a dozen cases where it is definitely mentioned that so-and-so "venit hic" or "venit coram Baronibus "on a particular day; these again are chronological, extending from October to the end of March. We have thus in the "Communia" a record which is being compiled day by day during the Michaelmas term; but the entries in which never refer to any audit which was actually in hand at the moment of writing. This, however, does not end the contents of the "Communia". Interspersed in this regular chronological sequence are a large number of entries recording that a fine has been made or is due or has been paid, that the King sent his writ "in these words," that so-and-so is not to be summoned on such-and-such an account, that a writ has been sent to the sheriff, that an account is to be transferred from one membrane to another on the Pipe Roll, and so forth. It is to be noted that all "Communia" entries have their counties noted in the margin.

Now this last section of entries is not very different in character from those which appear on the other membranes—those arranged under counties; though these latter tend to be distinguished by the use of such phrases as “loquendum cum...” to introduce them and in a number of cases have notes obviously added to them at a later date (membrane 8 actually has space deliberately left for such notes). On the whole I think there can be little doubt that, while the “Communia” include (1) what are later separate sections in the shape of “dies dati” and various “Brevia,” (2) matters noted for reference when some account, not yet audited, shall come up or in future terms; the county membranes give us matters left unsettled during the auditing of each sheriff’s accounts. This close connection of the county membranes with the actual making of the Pipe Roll is supported by the fact that their entries are found to correspond with cases on the Pipe Roll where the essential words of the entry (the “debet” or “reddit compotum”) are left blank.1

If this explanation be correct we have established the use of the Memoranda in John’s time not only for the noting of calendar arrangements made with accounts but also (1) for recording all kinds of current business which was now too voluminous to be dealt with without some kind of Minutes; (2) the easing of the calls of auditing upon a limited amount of time by the regular reservation of matters which were doubtful or perhaps controversial. This second difficulty—that of time—was met later almost entirely by the expedient of preliminary audit, of which we noticed traces above.

We have not quite exhausted the contents of our first Memoranda Roll: there remain the small membranes and the Jewish membrane. The small membranes include one which again foreshadows a well-known division of the later Memoranda Roll, giving us amercements of sheriffs who had failed to attend at Easter and appointments of days for views of accounts.2 This last is obviously important with regard to the matter of shortening the taking of accounts already referred to; but we have not sufficient details to found suggestions upon it. The remainder of the small membranes are Memoranda giving the details of larger sums for which various persons have to account; in a word they are in the nature of “estreats “or of “particulars,” of which we shall have to say a little later.

The Jewish membrane is headed, “Compotus Benedicti de Talemunt de debitis et finibus Judeorum Anglie a festo purificacionis anni noni regis Ricardi usque ad festum Sancti Hillarii anno Johannis primo”. It is to be noted that this is not the actual “Compotus” of Benedict but Memoranda upon it. It is particularly interesting from many points of view; but the whole question of the administration of moneys paid by the Jews is so complicated that it is difficult to deal with any sections of it within a reasonable space.We may note, however, that the payments for which this Jew was responsible were apparently not intended to appear, and did not appear, upon the Pipe Roll; while on the other hand he apparently did account for them.1 I have endeavoured elsewhere2 to show that later, at any rate, there was a distinction between Receipts from Jewish talliages and Receipts from other Jewish sources; the latter (not the former) being collected by the sheriffs and figuring, though obscurely,3 in their Pipe Roll accounts and in the ordinary Memoranda Rolls; whereas talliage matters did not appear on the Pipe Rolls and, if they required Memoranda, must have had special ones devoted to them. Since the matters here noted are of a very general

character and are yet stated to be the subject of a "Compotus," we may conjecture that we have here traces of an early experimental stage in the Exchequer treatment of Jewish administration.

To sum up, we have in this Memoranda Roll not only interesting foreshadowings of the Memoranda Rolls we know later and indications of earlier ones in the same series now lost; we have also certain definite signs of the result upon Exchequer administration of the increased size and number of accounts. First, the Memoranda of the "Dialogus" developed into "Communia" in which were set out in an orderly fashion the various "notanda" of a busy department; these "Communia," throwing off, as it were, smaller specialized divisions for certain regularly recurrent items, produced the Memoranda Roll as we know that record; and in the example we have been examining may be found in embryo all the varieties of matter which the subsequent rolls contain.1 Secondly, our roll shows us attempts being made to meet the second great difficulty of the period—not only the increased business but the consequent increased demand upon available time. In our roll it is met by the reservation of special points; later it was met by a system of preliminary audits, the adoption of which eliminates the necessity for county membranes which consequently disappear from the later Memoranda Rolls. It is even possible that we have in our roll an indication of the trying of this method of separate audit also in the case of the Jewish matters.2 Finally, the Memoranda Roll of John's first year gives interesting testimony to the fact that all Exchequer development turned on the necessities of the Pipe Roll and its scribes. Elsewhere3 I have suggested that even the early Receipt Rolls, though the "Dialogus" tells us they were made in the lower Exchequer' presumably for the convenience of that office, were conditioned in all the particulars of their form and making by the necessities of the Pipe Roll scribe. The same might be said of the county membranes of the Memoranda which we have been discussing—their arrangement, writing, and form all confirm the inference which may be made from their contents. And in the small membranes which we have noticed what have we but those rolls or notes of particulars the existence of which elsewhere is not infrequently noted1 by the Pipe Roll scribe when he has not time or patience to insert their details in his roll? These are the germs of the collection of vouchers by the King's Remembrancer which has given us our modern class of "Exchequer Accounts, etc."

Other Memoranda and Vouchers.

We have dealt at so much length with this important Record that there is little space left to discuss others like or connected with it. We may take these in conjunction with the vouchers. It will be remembered that we have to deal with three2 documents from the class of "Exchequer Accounts" and one from the "K.R. Miscellanea". To these we may add the companion roll to that just described—L.T.R. Miscellaneous Rolls, 1/4: but we may eliminate the "Miscellanea" document, reserving it for treatment with the Chancery Fine Rolls. Taking first the last of these, a roll of about a dozen membranes with a few smaller membranes or slips, we find we have to notice most of the features which were prominent in the previous example. We have the title "Memoranda" with two interesting variants which suggest a still fluid state—"Memorialia" and "de Memoriis" on membrane 8: and we have apparently "Communia" on membrane 1. We have "Adventus Vicecomitum" (under that title) on membrane 2. We have the same distinction between "Communia" entries

and membranes assigned to particular counties. We have letters from the King to the barons (m. 3). And we have again a special section devoted to the Jews (m. 13), entitled "Compotus," though it is really only a number of Memoranda upon an Account. In this connection we have to note an innovation, for a similar heading on membrane 12 relating to Hugh de Nevill introduces us to an actual rough "Compotus,"1 which seems to take us a step towards the use of preliminary audit. This roll covers the Easter and Michaelmas terms of the tenth year of John, with some reference to the preceding year. The whole appears to be an incomplete set of membranes. Two final points to be mentioned are concerned with the use of the word "Extracta" as a title on a membrane (m. 14) containing lists of debts, and with the nature of the small membranes which are here, as before, to be classed as either "Estreats" or "Particulars".

In connection with this last point it is to be noted that even in later periods it is very frequently impossible to decide whether an isolated list of entries in the form "De Johanne de London v.s." is an "Estreat" from other Records showing amounts which are due, or a "Particular" giving the details of sums actually handled elsewhere (on the Pipe Roll) but handled there only in gross. The presence, of course, of the word "Extracta" makes it certain that we are dealing with a list of debts which are to be exacted; but other of these lists, notably the small membranes on the Memoranda, are more probably Particulars.

This may serve to introduce us to a group of rough rolls giving, under a county arrangement, lists of debts which we may conjecture to have been left over at the end of a term of audit and listed for the purpose of a summons for the next "Scaccarium"; indeed we have, in one or two places, items cancelled with the note "ponitur in submonicione" or "in Rotulo est". This group includes, besides membrane 14 of the roll just dealt with, three documents of the next reign,1 which we may perhaps mention in passing because they correspond so exactly with seven membranes and a fragment out of the twenty-two which make up Exchequer Accounts, 505, No. 4, a roll in very bad condition which is ascribed to our period and may belong to it; though the evidence for the date is not on any of these eight membranes. It is to be noticed that certain membranes are indexed with a county reference at the foot and have added the word "Em'," presumably for "Emendatur" or some other part of that verb; meaning, apparently, that the list has been checked.

Norman Memoranda.

We are left with the bulk of the roll last mentioned (Exch. Acc. 505/4) and with Exchequer Accounts, 152, No. 1,2 still to be described. Both are of considerable importance for they are Memoranda of the Norman Exchequer.

The first, a collection of thirteen membranes and a fragment, was joined by accident to the English membranes already noticed (as we may conjecture) during a search for information about forests conducted, as appears by an endorsement, a century or so later. However that may be, they are worthy of more study than we have space to give them here. It must suffice to note summarily a few points. Thus they belong apparently to the year 1201 or 1202. Some of them are similar ("mutatis mutandis") to the English rolls of debts just mentioned, and have references to the (Norman) Pipe

Roll and Audit summonses; we may note in connection with some of these the use of the words “Extracta” and “Extracta Memorandorum”; the last supporting the suggestion made above (in connection with the use of “Extracta” in the English Memoranda) that these lists were made up at the close of a session of the Exchequer from the Memoranda of the term. On another membrane we have Memoranda precisely similar to those in the English “Communia” of terms given for rendering account; and notes beginning “Sciendum” or “...debet respondere”; all annotated in the margin with the names of the districts to which they refer. But perhaps most remarkable are two membranes dealing with Imprests, Receipts in money and kind by Warin de Glapion and others, and expenditure at Rouen and other places over a period named;1 and mentioning the receipt (at the Norman Exchequer) of a “Rotulus de Camera Regis”.The significance of all this information is obscure, but it clearly indicates proceedings both complicated and varied, showing at the same time a close connection with the English Court and distinct individuality at the Norman Exchequer.

The other Norman document of a Memoranda character is a single membrane having no date (Monsieur Legras puts it early in the reign of John). In several places it is entitled, “Extractus Memorandorum”; also it has a note “emend’,” and another “ponitur in rotulo”; all points connecting this with the documents we have been noticing. It has, however, two characteristics of its own. One is a vertical line drawn through the part to which the note “ponitur” appears to relate—a familiar device in later Exchequer procedure. The other is the fact that we have here apparently not so much Memoranda for the use of the Court as instructions to an official who was to collect the debts: “de te ipso” is a frequent entry, and it appears that this official, whoever he was, was personally responsible for a large number of accounts.

Another Voucher.

With this we must leave the question of Memoranda and Vouchers of the two Exchequers, noting only in passing and indenture1 which may be presumed to have been a voucher to some kind of account. This last very interesting document, which I believe has not been printed, gives particulars of the contents and disposal of prizes brought in to Portsmouth by John’s galleys from 25 April to 8 September in his thirteenth year.

The Lower Exchequer Receipts.

This completes, so far as present space and knowledge allow it, our survey of the Upper Exchequer. We turn to the Lower Exchequer, which may be quickly dealt with. Of original Receipts, as we have noticed, there is possibly one.2 The person whose debt is mentioned on this tally, Jordan “nepos Geruasii,” appears in Records from the end of the reign of Henry II to that of John: possibly the writing on the tally makes the later date more probable.

Of Receipt Rolls we have practically nothing. The very interesting roll of the reign of Henry II,3 with a similar one1 of the reign of Richard I which has lately come to light, suggests that the Receipt Roll was in origin closely connected with the processes of the Upper Exchequer; the handwriting, though smaller, is similar, so is the division into counties. The reign of John furnishes us with an important roll showing the development out of this state (as the present writer interprets it) into that which we

find in the early years of Henry III.2 The "John Roll,"3 which is devoted to Receipts from Jews, was prepared in and for the Exchequer of Receipt. In this roll we find the parchment enlarged and the writing made smaller than in the previous examples, so that there is space for two or three columns abreast; though the Pipe Roll habit of noting the contents at the foot of the membrane still persists. It is this type of roll, with its fuller contents, its "summe" added at intervals (a matter which would not concern the Pipe Roll scribe), and its make-up (in many cases) with membranes of Issues, which seems first to show us the idea of a Receipt Roll applied to the convenience of its makers rather than that of the Pipe Roll scribes.4

Before leaving this subject we must mention a small roll5 which has always been classed, in modern times at least, with the Receipt Rolls, though in character it resembles rather the "Particulars" mentioned above and though it came to the Record Office from the Tower of London. It will be convenient, however, to reserve it for illustration of a later point.

Issues.

Turning to Issues we have again to note the preservation of only one original, a writ of "liberate" now among the "Ancient Correspondence".1 It is interesting because there are only two earlier ones known, that printed by Dr. Round2 and that given by Madox. Like Dr. Round's specimen it is sent by the Chancellor, presumably in the King's absence. Of Enrolments of writs we have no example; the earliest is attached to the earliest complete general Receipt Roll belonging to the fourth year of Henry III;3 the earliest example of the later form of roll (which gives only a summary of the writ) belongs to the twenty-fifth year of Henry VI.

Chancery Rolls, Norman and English.

Leaving for the time the question of the Records of financial departments other than the Exchequer we pass to the Records which, though belonging to the Chancery, affect either directly or indirectly the Exchequer processes.

Norman Rolls.

The first question that faces us is that of the connection between the collections of the two countries together with the possibility already referred to that the Norman set are not homogeneous and perhaps not all Chancery Records. As to the nature and number of the Norman Rolls, as that name was understood in the past, we have little to guide us. We have notice4 of the bringing of rolls from Normandy but this does not help us: nor can the conclusions which Hardy5 based upon an indenture of the time of Richard II be relied upon in this particular. In point of fact one of the surviving rolls6 is definitely of Norman Exchequer origin; it begins, "Hic est rotulus cartarum et cyrographorum Normannorum factus tempore Guarini de Glapion' Senescalli Normannie...assistentibus ad Scaccarium Sansone Abbate Cadomi...." This is a roll of fines made at the Norman Exchequer and of private deeds, including some charters from Henry II and Richard and a number from John, enrolled (we may presume) for safety among the records of the King's Court, a function of the Norman Exchequer of which we have little notice elsewhere.1 On the other hand Norman Roll No. 1, which has been added to the series since Hardy's time, is merely the first part (for the month of April) of the first English Liberate Roll; while No. 7, which was printed by Hardy,2

is a roll of the values of the lands of Normans in England after John had lost the Duchy.

Of the remaining four rolls No. 2 (2 John), entitled, "de oblatis receptis," corresponds closely with the English Fine Rolls but relates to Norman affairs; the "et mandatum est," when it appears, is addressed to Norman officials and there are interesting references to summonses to the Norman Exchequer.3 Roll 4, belonging to the same year, is called "Rotulus de Contrabreuibus"; the meaning of this is explained below; for the moment we need only observe that the writs are generally addressed to Norman Officials or else to persons abroad, while on the other hand the dates of the last membrane of the roll suggest that it was made in England. No. 5 (4 John) is a "Rotulus terrarum liberatarum et contrabreuium"; the dating of the writs enrolled here (save at the beginning) is abroad and itself was presumably made abroad, the references, too, are clearly to Norman administration—we have a special note1 of a matter "quod debet scribi in rotulo Anglie". No. 6.(5 John) is a similar roll to No. 5; it is to be noticed that a fragmentary fifth membrane, added in 1838, has never been printed. The addresses of writs on this roll are generally Norman and the dates all Norman save four at the end, corresponding to John's return from Normandy to England in this year. It seems clear that these two English-dated writs are only included on the roll by mistake; a mistake in the other direction has a special note2 —"in rotulo Anglie totum breue".

Now from a later experience of the Gascon Rolls3 and other special Chancery enrolments we may remark that a special roll of this kind may either be (1) a roll of letters dated abroad,4 or (2) a roll of letters referring to foreign matters; whether these appear in other (ordinary) enrolments or not. What is the principle on which the Norman Rolls were made?

There is no serious doubt that at this date the Chancery still, as a rule, followed the King. There is a "prima facie" case therefore for making the Norman Roll a roll written in Normandy. I think this conclusion is made almost certain by the ending, already noticed, of Norman Roll 4. On the other hand, the personal touch of the King being still strong in affairs, it is not unreasonable to suppose that Norman affairs would rather monopolize the attention of his Chancery when he was in Normandy and English ones when he was in England; provided, of course, that he was in any given year dividing his time pretty fairly between the two countries. This probably resulted sometimes, by confusion, in a belief that Norman entries should go on the Norman Roll—resulted, that is, in the interpretation of this Roll's function upon a subject basis; so that we get contemporaneous rolls of English and Norman "Liberate"; find upon an English Liberate Roll Norman entries cancelled "quia in Rotulo Normannie"1 ; and have, as has been seen, one Norman Roll actually compiled in England. The confusion would go so far that the Norman-made rolls, composed, as we shall see, entirely of entries having a financial interest,2 would be preserved in Normandy in the interests of the Norman Exchequer, although, unlike the Exchequer Rolls, they did not owe their existence to a separate body of scribes. This would explain the presence in the modern series of the Norman Exchequer Roll noticed above.

Turning to the question of the contents of these rolls we may say at once that they do not differ generically from the English ones; so that the two sets may be treated together. Taking, then, the Norman and English Chancery Rolls which are of direct Exchequer interest we may divide them into two classes, called for convenience Liberate Rolls and Fine Rolls. The first of these classes contains entries of writs of "Liberate" for payments at the Exchequer, as also some writs of pardon, of "Computate" and of "Allocate" addressed to that department. The Fine Rolls, alternatively called "Oblata" in early times, contain entries of the sums paid to the King—so-and-so "dat domino Regi" so much to obtain various privileges, licences and exemptions (the ways in which the scope of this roll was developed and modified later need not here detain us). Our Exchequer interest in the two classes resolves itself into two questions:—

1. How far do these Rolls relate to the business of the Exchequer and how far to that of the "Camera"?
2. How was the information in them imparted to Exchequer officials?

Fine Rolls.

Let us take the Fine Rolls first. These Rolls are certainly compiled in the Chancery, not the Exchequer; this is made clear by plenty of notes such as "hinc mittendum in Scaccarium".1 It is equally clear that certain entries, at least, have a definite "Scaccarium" interest and we have references to the Pipe Roll.2 It is clear again that the documents used by the Exchequer were not our rolls but copies; for we get3 such a note as this—"finis iste non debet mitti ad Scaccarium hic quia mittitur superius". Moreover, it appears that in spite of the "dat domino" and the title of the earlier rolls—"Rotulus Oblatorum" or "Finium Receptorum"—the money was not always, at any rate, paid on the spot; this appears by the following among a number of entries:4 "Cives London' dant domino Regi tria Millia marcarum pro habenda confirmacione...et carta liberabitur Galfrido filio Petri per sic quod si illa...volunt dare suam cartam habebunt si non autem cartam non habebunt".

On the other hand, the interest of Fine Roll entries is not always for the Exchequer; for we have such notes as "non mittitur quia foresta".1 And if the "dat" or the "Receptorum" ever have a literal meaning it is difficult to see how the Exchequer could need or profit by information concerning the entries on these rolls; unless we are to make the difficult assumption that the Chancery staff were at this date subjected to audit. We may perhaps make tentatively the suggestion that entries upon the Fine Rolls fall into two rough classes of cash payments and promises, only the latter engaging the attention of the Exchequer. This opens up possibilities too wide for discussion here, though we may perhaps say a word on the subject later in connection with the "Camera". Like the other printed volumes of John Records the Fine Rolls offer scope for a careful reading and analysis. In conclusion, we have to add to the known Fine Rolls what is, though rough and written on an unusually narrow membrane, undoubtedly the fragment of a Fine Roll of the twelfth year of John (1210); it came originally from the Treasury of the Receipt, but it is not unknown for Chancery Records to be found in that Repository; it is now among the Miscellanea of the Exchequer, K.R. (I, No. 5).

Liberate Rolls and Close Rolls.

Turning now to the second of the classes of Chancery Rolls to which we alluded above—the Liberate—we have to deal with three Norman Rolls proper, one Norman Roll which forms the April section of the English Liberate Roll for the second year of John, and English Liberate Rolls of the second, third, and fifth years.2 Further, it is generally admitted that this series is continued by the Close Rolls,3 which begin as has been already noticed with the sixth year. It is possible that the loss of Normandy and the elimination of the necessity for a double series of Liberate Rolls, and double reference to two Exchequers, had something to do with the innovation.

If we include the Close Rolls in the division we are now considering, the principal question facing us is what parts of the contents of the rolls would interest the Exchequer. Now the contents of the Liberate Rolls proper are writs of which the originals, by their nature, are bound either to be found in the Exchequer at the time of audit, or to be produced there by accountants; the only use for the Chancery Records of these, so far as the Exchequer is concerned, is that mentioned in the "Dialogus"—the checking of the originals by means of the "Contrabreuia" or "Rescripta"; which themselves (not in the shape of secondary copies) are brought over by the Chancellor or his clerk. It is by no means impossible that (in contradistinction to the Fine Rolls) the actual Liberate Rolls still preserved to us among John's Chancery Rolls themselves visited the Exchequer; certain annotations upon them may even have been made in the Exchequer. If the Chancery Liberate Rolls were periodically sent over in this way it would account for the fact that no Exchequer enrolments of these writs have come down to us for the John period—it was not till the Receipt officials came to make rolls for their own convenience that such an enrolment came to be thought desirable.

The Origin of the Close Rolls.

To the Liberate Rolls, then, representing the "Rescriptum" of the "Dialogus," we see added in our period (e.g. in Norman Roll, 5) entries of "terre liberate"; that is, copies of letters which *indirectly* interested the Norman Exchequer. Similarly in the English Liberate Roll, 3,1 we have the title "Rotulus Terrarum et Denariorum Liberatarum in Anglia".... Once again, then, I think we have here, as in the case of the Receipt Rolls mentioned above, the Exchequer, interest originating the keeping of rolls in another department. This other department speedily finds out the convenience of preserving such records for its own purposes, and we have added to them copies of documents (in the present case other letters close or patent) which are not, in some cases, even indirectly of Audit interest. From this the transition would probably soon be made in the case of the Chancery to an ordered treatment of the subject from a Chancery point of view; and we then get, added, the idea of Originalia or Estreats made specially for the benefit of the Exchequer, and incorporating transcripts from the Fine Rolls, with less numerous items from the Close Rolls and the Patent and Charter Rolls. It is not improbable that the duplicates surviving to us in the classes both of Fine and Close Rolls of the John period are relics of the transition stage; but here again is a subject too detailed to be dealt with in the present paper.

We have in fact in the time of John at first two distinct collections being made by the Chancery: (1) Enrolments of Charters and Letters Patent2 of which letters copies were

preserved for the purposes of the Chancery; (2) Liberate, preserved primarily for Exchequer purposes.

As this second class merged into the Close Rolls the Chancery interest in the preservation of record of letters close became equal, at least, to that of the Exchequer. The stage before this is possibly responsible partly for the lack of exactitude which we some times notice in the early rolls in the assignment of a letter of one or the other kind to its proper class of enrolment.1

The "Camera" and the "Scaccarium".

We have left till the last the most thorny of all the questions connected with early financial records. Contemporary reference gives us, as administrative instruments, the "Scaccarium," the "Thesaurus," the "Recepta," the "Camera," and the "Garderoba". What are all these and what their relations one to another? Various writers have touched upon this one and that, and have even alluded to points in their relationship. Thus Prof. McKechnie suggests that though the Audit was fixed at Westminster the Exchequer (in which he includes, presumably, the Upper Exchequer and the "Recepta") "with much of its impedimenta of writs and tallies would accompany the King":2 Delisle,3 speaking of Norman affairs, says "la Chambre Suivait le prince: le tresor...restait en depôt à un Chateau" ("Falaise or Caen"): Prof. Powicke4 (dealing with the Norman Exchequer) speaks of "the English Exchequer Chamber so far as that did not follow the King".

In dealing ourselves, so far, with existing Exchequer Records we have been able to trace in John's reign a number of the series of Exchequer records which are familiar to us at a later period and to trace, too, something of their relationship to each other and to the most important of all, the Pipe Roll; we have even ventured to suggest what were some of the matters of difficulty, the points of pressure and congestion in the old simple system of receipt, expenditure, and audit (and in the records of these processes) and consequently what signs of development and growth we may look for in our period both in the System and in the Records. We have refrained, however, so far from any attempt to fit King John's known financial transactions (as they are reflected in innumerable instances in, for example, his Chancery Rolls) into this or that part of the machinery we were able to outline. We have been content, that is, to allude to the fact that the Pipe Roll and other machinery does deal with some financial matters while others pass it by, without attempting either to classify the first of these, or to collect concrete instances of the second.

Unfortunately we have financial Records still to deal with which touch the second of these classes—the "Mise" and "Prestita" Rolls which are undoubtedly concerned with some transactions that are outside the normal "course" of the Exchequer and the Normal Pipe, Memoranda, Receipt, and Issue Records. We are driven, therefore, in conclusion to touch upon the Record evidence for the Administration of financial matters which did not come within the influence of the Upper Exchequer. We have already suggested1 that because a matter was not subjected to Audit there is no reason that the receipt and issue side of it should not be controlled by the Lower Exchequer,2 whose business these processes were. Unfortunately the paucity of records of this department for John's reign does not permit us to prove or disprove the suggestion

that the Receipt was still giving itself little trouble over matters of which the Pipe Roll scribes did not take cognisance.

In opening this matter it is necessary to distinguish not so much between the "Camera" and the "Scaccarium," as between the "Camera" and the "Curia". It is to be remembered that the "Curia" is originally the personal entourage of the King; the "Camera" only appears when the "Curia" has been professionalized and departmentalized, supplying that personal element which the "Curia" had lost. Thus in administration when the King's secretary has become the department or Court of Chancery, there arises a new personal secretary, a member, as the Chancellor had originally been, of the King's household staff; similarly the Treasurer, departmentalized, is replaced from the personal point of view by the keeper of the King's private accounts, in the contemporary phrase "keeper of his wardrobe." We have to note first, then, that the "Camera" is not a purely financial affair; it is the successor of the "Curia" in the position of the King's personal entourage. All kinds of duties, certainly secretarial as well as financial ones, may be undertaken by it. The unfortunate anomaly of John's reign is that the Chancellor has not been departmentalized, whereas the Treasurer has; so that we have this member of the "Curia" still following the King and, in effect, a member of the "Camera". Later he will be replaced there by the Keeper of the Privy Seal; but at present that instrument is no more than a signet ring which the King uses, normally, in much the same way as any private person.[1]

The "Camera" and the "Curia".

We may now attempt some distinction between the financial terms mentioned at the beginning of this section. In the first place the "Scaccarium," apart from its literal sense, should undoubtedly be a season, an occasion—the occasion or season of Audit. Unfortunately there seems little doubt that in early times, while this is the generally accepted sense, the word is sometimes used loosely. Madox[1] has collected together several instances of what appear to be local "Scaccaria," according to him "some subordinate *Receipts* or Places of Revenue"; with which he classes the "Scaccarium Redemptionis Regis Ricardi" and the "Scaccarium Aaronis" (which dealt with the debts of Aaron of Lincoln), and also a "Scaccarium Hugonis de Nevill," to which a certain debtor was ordered to pay £700, on the understanding that Hugh de Nevill would account for the sum afterwards at the "Scaccarium Westmonasterii". Most of the instances given might be explained as being special "occasions"; but this last of Hugh de Nevill is difficult. We may add to it a reference to John's "Scaccarium de Merleberg'"[2] at Easter, 1207. The payments which are ordered to be made there appear to some extent in the normal Pipe Roll of the following Michaelmas, so that we might suppose that on this occasion the Easter Exchequer sat, exceptionally, away from Westminster. We have to add to this, however, that a little later (in July, 1215) Hugh de Nevill' was keeper[3] of the King's "Thesaurus" at Marlborough; that the small so-called Receipt Roll mentioned above is a short list of sums received "de ballivis Hugonis de Nevill' unde responsum est ad Scaccarium"; and that in the Pipe Roll of the tenth year we have a "Compotus Hugonis de Nevill' de Recepta sua".[4]

Terminology.

It is possible that we may draw from these passages the inference that yet another expedient was tried during our period for the relief of the overworked Exchequer; an extension of the principle of "Compotus" and "particulars," in the shape of supplementary provincial exchequers whose activities were summarized at the Audit at the "Scaccarium Westmonasterii". Be that as it may, it is clear that we must be prepared for the use of the word "Scaccarium" in exceptional cases in a sense closely similar to that of "Thesaurus".

About the function of the "Thesaurus" there is no ambiguity. Its business is the custody of treasure (including Records). It frequently follows the King, but sometimes he deposits[1] its contents in some place which is considered safe, such as the Abbey of Reading; on the other hand, it sometimes remains apparently in places difficult of access.[2] It is possible that the term was applied to more than one depôt of treasure; for we have reference to the King's receipt at Shrewsbury of a large sum from "our Treasury of Marlborough";[3] but this may have been only a temporary localization. Did the officials of the "Recepta," who nominally controlled the "Thesaurus," follow the King? if not there must always have been a "Thesaurus"—though it might be empty—at West-minster. In any case there is no reason to suppose that the "Thesaurus" (or "Thesauri") though it, or they, certainly should receive moneys paid in and audited in the old, normal way, did not also include any moneys the King might have accumulated by other methods. The "Camera" as well as the "Scaccarium" may have been, so to speak, a depositor.

There is no doubt that the King did receive, irregularly, large sums which were paid over to him wherever he might happen to be. This is to say that he received them "in camera," in his household. Sometimes they were sums which formed part of a regular Pipe Roll account, and the barons of the Exchequer have to be notified of the receipt; sometimes they are "dona" or fines, many of which certainly did not figure in any known audit;[1] sometimes they are sums derived from the "Thesaurus". We have numerous instances of such receipts "in camera"[2] or "in garderoba".[3] Do these two phrases convey the same thing? probably the explanation is that anything paid "in garderoba" was necessarily paid "in camera," of which "garderoba" was only a part.

Prestita and Mise Rolls.

This brings us to the question of the "Prestita" and "Mise" Rolls. Of the contents of these Records we have not space to say much; and indeed their relation and distinction may perhaps be sufficiently illustrated by a single quotation from a "Prestita" Roll:—[4]

"Eadem die ibidem Rogero Wacelin de prestito ad nauem suam omnino parandum...vi marcas...preter donum quod Rex ei dedit de aliis vi marcis que sunt in rotulo Mise."

The interesting point to us is the question of their place in the general scheme of Administration, and (since their relation to the Pipe Rolls, if there is any, cannot be settled with certainty while those Records remain unprinted) this is largely a question of the persons who produced them.

To that question there can, I think, be only one answer. Even if relations can be established later upon some points with the "Scaccarium," it must remain clear that

these rolls were put together in and for the benefit of the King's "Camera". The "Prestita" are really only a development of the expenditure side of the "Garderoba," the more normal manifestation of which are the "Mise".1 Both are part of the King's personal expenditure; and since the King's personal writing officer was still, as we have seen, the Chancellor with his staff, we can hardly avoid the conclusion that Hardy was right in classing the "Mise" and "Prestita" as Chancery Records, and that they are incorrectly placed in the Exchequer because the later "Wardrobe Accounts," which they anticipate, went there as a result of the later arrangement by which the Wardrobe was made subject to audit. In the Chancery they form part of a class, we might conjecture, which on the side of receipts includes the very curious Fine and Oblata Rolls.

In this connection we may conclude with three further citations from the Patent Rolls, which speak for themselves (1) "Sciatis quod quietum clamavimus dilectum et fidelem nostrum Philippum de Lucy de omni prestito quod ei fecimus et de omnibus receptis quas recepit dum esset in camera nostra...."2 (2) "Littere iste" (i.e. originals of enrolments on the Patent Roll) "liberate erant in Camera domini Regis Radulfo Parmentario apud Craneburn...."3 (3) "Sciatis quod...recepimus...per manum R. prioris de Rading.... Omnes rotulos nostros de Camera nostra et sigillum nostrum et rotulos nostros de Scaccario...."1 No doubt the phrase "rotulos de Camera" refers to the "Mise" and "Prestita," but where are the Chancery Rolls, the records of letters which had issued under the "sigillum"? It is tempting to include them also under the same designation; for to the "Camera" at this date they did, in a sense, undoubtedly belong, in as much as we must hold it to have included that "Cancellaria" which still "followed the King".

Conclusion.

A study of the way in which John's cash resources were handled, passing from England to Normandy, from the Exchequer official to the soldier, from the "Camera" to the "Recepta," would reveal, I think, the fact that so far as he had them he disposed of them at his will freely; he may have lacked both money and men, but whatever his servants were they were not his masters. Similarly behind all the administrative confusion of the reign, the loose ends of old processes dying out, new ones beginning and tentative ones lapsing, we seem to see working a single very powerful administrative brain. Was that brain King John's?

[1]P.R. 12 Hen. III, m. 2.

[2]The statement in Manning and Bray, "Hist. of Surrey," iii. 256, that John de Oxenford made Staines bridge in the reign of Henry III, quoting the Escheats of 24 Edw. III, No. 51, is a mistake. It only appears that he made a causeway leading to the bridge.

[1]The thirty-third clause of the Charter, forbidding weirs in the Thames, had been broken in the very home of its birth, for in 1332 Chertsey Abbey had a weir in the Thames at a place called la Huche in Egham, with a fisherman's cottage beside a certain island. This was at the east end of Egham, below Runnymede (Chertsey Abbey, Court Rolls, 6 Edw. III; Lansd. MS. 434, f. 39).

[4]Matt. Paris. “Chron. Majora,” v. 520.

[5]Chart. R. I John m. 7; Cart. Antiq. ss. 8. This is the first extant Charter of Kingston (*anno dom*. 1200). The “liberi homines” were not a new settlement beside the ancient *villani*, for they held the villein-lands.

[2]C. De Vic et J. J. Vaissete, “Histoire Générale de Languedoc,” ed. Dulaurier, etc., vol. vi. 396, etc. We may compare with c. 12 of the Charter that in Languedoc vassals were not tallaged without consent; except in the three cases of ransom of the Lord, marriage of each of his daughters, and an expedition over seas, *sc*. a crusade. “Tallagium” seems here to equate “auxilium” (*ibid*. vi. p. 939).

[1]Holinshed, “Chronicle,” i. pp. 128–9; M. Paris, v. p. 360.

[1]Rymer’s “Foedera” (second edition), i. 135; Bémont, “Chartes des Libertés Anglaises,” 41–4.

[2]“Cum igitur debeamus et libenter velimus...dicti Regis qui vasallus noster existit conservare justitias et injurias propulsare, maxime cum idem propter caracterem crusis assumptum specialiter sub nostra protectione consistat....”—Letter of Innocent III of 18 June, 1215. See also the Bull “Miramur plurimum”. The reference to the vassal relationship in any portion of the Bull of 24 August, except the historical, is only indirect.

[1]“...ex parte Dei omnipotentis patris et filii et Spiritus sancti, auctoritate quoque beatorum Petri et Pauli apostolorum ejus ac nostra, de communi fratrum nostrorum consilio, compositionem hujusmodi reprobamus penitus....”—Bull of 24 August.

[2]“Roger of Wendover” (ed. Coxe), iii. 364, 365–6.

[3]Rymer, i. III, 115, containing John’s oath of fealty in written form, which was not usual. For another instance see the fealty of Henry II to Louis VII, Bouquet, xvi. 16. That an ecclesiastic had some influence upon the wording of this document seems to be indicated not merely by the phrase “patrimonium beati petri” but also by the other phrase by which fealty was sworn not merely to Innocent III, but also “ejusque successoribus catholice intrantibus,” a specification which would hardly have occurred to an English layman, but which would have seemed very necessary to a Roman having in mind the recent and foreseeing the possible history of the papacy.

[1]See Norgate, “John Lackland,” p. 246.

[2]This depends upon the statement twice made by M. Paris in what appear to be his separate additions to Roger of Wendover (M. Paris (Rolls Series), ii. 606 and 607). John’s request has not been preserved, and the papal confirmation, which is addressed to the English prelates only, does not allude to it. The Confirmation is Potthast, No. 4963, and is printed “from the original” in Rymer, i. 127. Apparently no confirmation was asked of the earlier issue of this grant on 21 November, 1214. Having carefully considered suggestions made to the contrary, I still hold to the opinion expressed in “The Origin of the English Constitution,” p. 258, that it is very doubtful if any heir of

John would have considered himself bound by a grant like this. Henry III certainly did not consider himself bound by what it means, fairly interpreted.

[1]Examples may be found in almost any cartulary. See Ramsey, "Cartulary" (Rolls Series), ii. 146, a confirmation by Innocent III, 1199, of gifts present and future ("auctoritate Apostolica confirmamus"), in which the language with insignificant variations is identical, and the following document (p. 147) a similar confirmation by Alexander III. Some of these phrases occur again in the Bull of 24 August, annulling the Charter.

[2]Potthast, No. 5141; Bouquet, xix. 607; Migne, "Opp. Inn." iii. 992.

[3]Rymer, i. 137; "Rot. Litt. Pat." i. 181–2.

[1]Potthast, No. 3171; Rymer, i. 97.

[2]Rymer, i. 129. The appeal was "contra perturbatores pacis terræ nostræ," no doubt the source from which the Pope obtained this phrase used afterwards in the Bull "Miramur plurimum" ordering the excommunication of the barons. The repetition of phrases from one of these documents to another, and the borrowing—by England of papal phrases, and by the Pope of English phases—is interesting. That John in this letter puts more emphasis on his crusading than on his vassal relationship, may be due to the fact that he is replying to a request from the Pope for a report on his preparation for the crusade. It gives him an opportunity to make clear the effect which the baronial opposition was having upon Innocent's cherished plans which he did not neglect.

[1]Roger of Wendover, iii. 322.

[2]The language on this matter is so nearly alike in Roger of Wendover, iii. 322, and the papal Bull, as to raise the question of their dependence upon one another. Wendover could easily be following the Bull in these particular phrases, but he adds other particulars which could not be so derived, and it is quite possible that he was following a letter presented to the Pope by the envoys, not now surviving, which the Pope also follows, as was his constant practice throughout the struggle—in regard to his information from England. Some confirmation of this may possibly be found in the reference to the occupation of London, of which Wendover says, "quæ caput regni sui est proditione sibi traditam," and the Pope, "que sedes est regni proditorie sibi traditam". Roger of Wendover (iii. 319) says that John sent Pandulf to the Pope against the Charter soon after it was granted, and Walter of Coventry (ii. 222) says that he sent the Chancellor, Richard Marsh (cf. McKechnie, p. 44, who seems from his reference to be following Petit-Dutaillis, "Vie de Louis VIII," p. 59, where it was, I suppose, a misprint). Neither of these statements is correct, and the letter of John to the Pope in regard to a mission of Pandulf's, which is printed in Rymer, i. 135, as if it belonged to this date, must probably be dated *c*. 13 September (cf. "Dict. Nat. Biography," xv. 176). It was entered in the Patent Roll of 17 John (m. 15 d.) in close connection with other letters of that date ("Rotuli Patentes," p. 182).

[1]The offer which most nearly corresponds to this in form is that which John in his letter of 29 May (Rymer, i. 129) says he made to the barons in the presence of brother William, that is on the day the letter was written. He says: “optulimus praedictis baronibus quod de omnibus petitionibus suis, quas a nobis exigunt, in vos benignissime compromitteremus, ut vos qui plenitudine gaudetis potestatis, quod justum foret statueretis”. This offer, however, as stated, does not mean legally what the Pope asserts, and the date seems hardly to agree with the Pope’s implied chronology. Clearly he puts the offer before, and John after, the offer of arbitration by a chosen body of eight.

[1]The technical expression is also correct in the two papal letters of 29 March. For the situation created in the curia when all the barons were against the lord, see Beaumanoir, “Coutumes de Beauvoisis, c. 44 (ed. Salmon), chap. i. 33 (ed. Beugnot). The appeal there referred to is the appeal for default of right.

[1]Of course some lords had a right of judgment in cases arising in their vassals’ holdings “ratione dominii” because of the limited right of jurisdiction of the vassal. But that right could not exist here. All lords had such a right by way of the regular appeals, but that right also could not be in force in this case.

[1]Innocent was dependent for his information as to the facts and merits of the struggle in England mainly upon information given him by John. As stated by the King his case must have seemed very strong to the Pope, who seems to have understood fairly well a good many of the details.

[2]See for example the regulations for the third crusade, in Rigord (ed. Delaborde), i. 85–8. These indicate not merely the privileges granted crusaders in the matter of debts, but also by their limitations on those privileges they show what larger things were popularly expected.

[1]Potthast, Nos. 1848, 1849; Migne, “Opp. Inn.” i. 1178, 1179; Bouquet, xix. 420, 422.

[2]Roger of Wendover, iii. 322, 298, 323 respectively. The Pope in the Bull of 24 August calls the Charter “compositionem...non solum vilem et turpem, verum etiam illicitam et iniquam, in nimiam diminutionem et derogationem sui juris pariter et honoris”.

[3]In “The Origin of the English Constitution,” chap. v.

[1]The legislation upon this question, as far as tenants-in-chief are concerned, is about the oldest in feudal law, and goes back to a point before feudalism in the later sense had been fully established. See “Mon. Ger. Hist.,” “Capitularia Regum Francorum,” ii. 14, c. I, and the references in note I to earlier legislation, and p. 15, c. 5 (A.D. 829). In the intermediate period a great deal of laxness prevailed both in Italy and England in regard to the application of the fundamental principles. In Italy imperial legislation at the middle of the twelfth century endeavoured to check these tendencies and may be supposed to have been within the memory of the papal curia. See the law of Lothar

III of 1136, "M.G.H. Leg. Sec." iv. tome i. 175, and those of Frederick 1 of 1154 and 1158, *ibid*. pp. 207 and 248, c. 3. This legislation was taken up into the "Libri Feudorum". Conrad II's legislation of 1037 has no provisions on the subject. In England the legislation of the thirteenth century, both in regard to mortmain and the principles of the statue of "Quia emptores," shows that the fundamental feudal principles had been consciously recognized, however lax the practice may have been. In the kingdom of Jerusalem peculiar freedom was allowed in the matter of subinfeudation for military reasons. See "Livre de Jean d'Ibelin," c. 182, ed. Beugnot, i. 284, and note b. The fundamental principle is, however, the same. It is the assize, or the local usage, which makes the difference. None of the feudal law codes of the thirteenth century gives any great space to the topic, or particularly emphasizes any part of it, unless it be grants in mortmain. Particularly good discussions of various phases of the subject may be found in Viollet's notes to the "Établissements de S. Louis," i. 30, 163; iii. 104–7, 124–6; iv. 298–303. It is in French feudal law that the principles were finally worked out in the most elaborate way. This may be best obtained from Loysel's "Institutes Coutumières," ed. Dupin et Laboulaye (1846), nowhere in one place, but see the various terms in the Index. The result may be indicated as follows: The general principle covers: (1) Abridgement of the fief; (2) Dismemberment of the fief, or the division of it into a number of fiefs, all holding of the immediate overlord, as results from the statute "Quia emptores," and (3) "Jeu de fief," or subinfeudation. It is under abridgement of the fief that Magna Carta would come, if anywhere. That is again subdivided into: (1) grants in mortmain; (2) emancipation of serfs; and (3) abridgement proper in which certain definite income from the fief, including the relief, is fixed by agreement between lord and man at a sum considerably below the normal value. It is this last arrangement which creates what is known technically in French law as the "fief abrigé," and it is under this only that Magna Carta could be brought, but it is absurd to suppose that any financial provision of the Charter would render uncertain John's ability to pay his annual *cens* of 1000 marks. There are no regulations in any feudal code or law, early or late, concerning customs, services, or relationships, which have not an economic value, or which would justify the statement attributed by Roger of Wendover, iii. 322, to John that he could not "de novo aliquid statuere" without the knowledge of the Pope. The "Tratado de la Regalia de Amortizacion" of Rodriguez Campomanes, Madrid, 1765, reviews the legislation of all the countries of Western Europe on that subject, but traces only partially the earliest forms and does not discuss allied matters. The same is true, with even less on early legislation, of C. 1. Montagnini, "Dell' Antica Legislagione Italiana sulle Manimorte," in "Miscellanea de Storia Italiana," tome xix. Turin, 1880. It deals with the subject in detail only from the fifteenth century.

[1]...."illud ei [Sedi Apostolicæ] constituens in perpetuum censuale."...Letter to Peter II, not dated. Potthast, No. 2322. Text in Jean Dumont, "Corps Universel Diplomatique," i. 132. There was nothing in the fact that John's service was merely a rent payment to make his typically feudal oath of fealty, or the use of the word "vassal" for him, seem out of place. The idea "held of another" was fundamental in feudalism, and from it passed with feudal incidents to relationships not originally feudal and in reality never becoming such. Here it is important to notice that with this idea as a starting-point anything in the way of service could be added or omitted according to individual conditions, and a fee-farm tenure be made clearly feudal, or

clearly a common freehold, and the immense variety of services attached to serjeanty tenures be created at will. That a fee-farm tenure might owe military service is directly stated by Magna Carta, c. 37. Interesting examples of the varieties of this tenure may be found in almost any cartulary. See for reservation of forensic, or royal, service, which might often be military, "Gloucester Cartulary," i. 209, 272 (many others); for service at a free court, *ibid*. i. 333, 385 (many others); wardship, *ibid*. i. 303; "servitium esquierii," *ibid*. i. 336; the ordinary judicial duty of the "advocatus," "Ramsey Cartulary," ii. 260, 265; with "liege fealty," *ibid*. ii. 261; with castle guard, "Testa de Nevill," p. 52b.

[1]March 19. The single reference in these notes must not be understood to mean that it is to the only instance of the use of the phrase.

[2]Cf. Rymer, i. 120. The letters referred to by the Pope are those of 19 March.

[3]5 November, 1214; 19 March.

[4]19 March.

[5]19 March. "em honorem et" written over an erasure.

[6]19 March, I April, 29 May. The reference without doubt is to scutage.

[7]1 April.

[8]19 March. This letter is even more closely followed than these notes indicate.

[9]10 May, 29 May.

[10]End of line 10.

[1]Cf. 29 May.

[1]Cf. 20 May.

[2]Cf. John's letter to the Pope, 13 September, "Rotuli Patentes," i. 182.

[3]Cf. Roger of Wendover, iii. 323, and the "Miramur plurimum".

[4]Cf. the "Miramur plurimum" with 29 May. It was impossible for anyone to interpret the phrase honestly as meaning anyone but the barons.

[5]"Miramur plurimum."

[6]Roughly the period between the exhibition of the letter at the supposed meeting of 16 August and the proclamation of the excommunication at Staines (Walter of Coventry, ii. 223–4).

[1]Selden's position is set forth fully by Hallam in his "Middle Ages".

[2]"Baronia Anglica" (1736), p. 26. So, too, we read that lands were granted by him to be held "in Baronage, in Knight-Service, or in Serjanty," etc. (p. 27).

[1]Maitland, "The Constitutional History of England," pp. 66, 80.

[2]Hallam, "Middle Ages" (1860), iii. 7; Davis, "England under the Normans and Angevins," pp. 325, 380; McKechnie, "Magna Carta" (1914), p. 200: "the great men and the smaller men ('barones' 'majores' and 'minores'). The latter were called knights ('milites')".

[3]E.g. Stubbs, "Constitutional History" (1875), i. 366: "the great distinction of 'majores' and 'minores' which appears in 'Magna Carta'"..."the distinction of 'majores' and 'minores barones'...appears perhaps in legal phraseology first in the 'Dialogus de Scaccario' and 'Magna Carta'"; Gneist, "History of the English Constitution" (1886), i. 289–90; Maitland, "Constitutional History of England," p. 80; Davis, "England under the Normans and Angevins" (1905), p. 380; McKechnie, "Magna Carta" (1914), pp. 251–2: "The Crown tenants on one side of this fluctuating line were 'barones majores'; those on the other 'barones minores'".

[1]"Constitutional History" (1875), i. 565.

[2]The tenants by serjeanty should be named before the socage tenants.

[1]"Constitutional History" (1875), i. 182, note.

[2]This was also observed, I find, by M. Petit-Dutaillis, who wrote: "The French who have kept the 'classical' spirit, and reserve their full admiration for that which is perfectly clear, will doubtless find that his thought is very often obscure and his conclusions undecided" ("Studies supplementary to Stubbs," p. xii.).

[3]"Constitutional History," i. 366.

[13]"Quidam enim de rege tenent in capite que ad coronam pertinent, baronias scilicet *majores seu minores*, etc." (cf. ii. 24).

[14]Ed. 1895, i. 259–60.

[3]"Origin of the English Constitution," p. 226, note.

[4]"Constitutional History" (1875), i. 564–5, 567; ii. 182.

[5]"Constitutional History of England," pp. 65, 80.

[6]"History of English Law" (1895), i. 260.

[7]"English Constitutional History" (1907), p. 30.

[1]See p. 47.

[2]"History of English Law" (1895), i. 289, where it is loosely stated that "The Dialogue on the Exchequer tells us that the relief for the knight's fee is 100s.". It is, we shall find, most important to note that the Dialogue limits its statement to knights' fees held in chief "ratione baronie cujuslibet" or "de eschaeta".

[1]Ed. 1895, i. 289.

[2]*Op. cit*. 1902, pp. 222–3.

[3]"Magna Carta" (1914), p. 197.

[4]"Origin of the English Constitution (1914), p. 214.

[1]"Dialogus de Scaccario" (1902), p. 222. The phrase "Baro minor" is their own.

[2]"Magna Carta" (1914), p. 197, note.

[3]"Exchequer" (1711), p. 216. Cf. "Pipe Roll," 24 Hen. II, p. 75.

[1]"Magna Carta," p. 413, note.

[2]Classes 2 and 3 are distinctly covered by the "Dialogus" in 11, x. E., and class 1 in II, xxiv.

[3]"Magna Carta" (1914), p. 412, note (cf. "History of English Law" [1895], i. 261).

[1]"Pipe Roll," 18 Hen. II, p. 36.

[2]*Ibid*. 21 Hen. II, p. 5.

[3]Again, in 1187, when the Earl of Gloucester's fief was in the King's hands, Henry de Umfraville and Roger de Maisi, each of whom held 9 fees of it, paid respectively £45 on succession.

[4]"Pipe Roll," 17 Hen. II, p. 142.

[5]*Ibid*. 27 Hen. II, p. 105.

[6]"Red Book," pp. 503, 738.

[7]"P. R." 28 Hen. II, pp. 18–19.

[1]"Red Book," p. 182.

[2]*Ibid*. p. 593.

[3]See Tonge's "Visitation of the Northern Counties," ed. W. H. D. Longstaffe (Surtees Soc., vol. 41), p. 7, note.

[4]Op. cit. pp. 411, 413.

[1]Possibly the right conclusion here is one which has not yet been suggested, namely, that the Charter nowhere provides for the case of knights' fees *temporarily* in the King's hand, owing to a wardship or a vacancy, because the rights of their holders had not been encroached upon by the Crown. Escheats, however, seem to have been recognized as a category apart: the reason for this may have been that in early days, e.g. in the case of the forfeited fiefs of the Bishop of Bayeux and the Count of Mortain, the holdings of large under-tenants had actually been converted by the Crown into separate baronies (owing the service of five or ten knights) and appear as such in 1166. These constituted awkward precedents.

[2]Prof. Adams states that "the relief of a single knight's fee as recorded in the Pipe Rolls seems to be frequently 100 shillings when held (*sic*) directly of the king" ("Origin of the English Constitution" p. 214).

[1]"Pipe Roll," 9 Hen. II, p. 31.

[2]"Testa," pp. 87–8.

[3]"Pipe Roll," 32 Hen. II. p. 6.

[4]Neither of them is indexed in the volumes of "Pipe Rolls" issued by the Record Commission.

[3]"Testa," pp. 381–8, 392–3; "Red Book," pp. 436–44, 562–3; "Reports on the Dignity of a Peer," vol. ii. pp. 91–7.

[1]There was another Bertram barony in the county, that of the Bertrams of Bothal (three knights).

[2]"Et sciatis, domine, quod feodum meum non debet vobis servitium nisi tantum de v militibus" ("Red Book," p. 438).

[3]"Pipe Roll," 23 Hen. II, p. 83.

[4]"Rogerus Bertram tenet in capite de domino Rege baroniam (*sic*) de Midford per servicium v militum" ("Testa," p. 392). "Rogerus Bertram baroniam (*sic*) de Mytforde per v feoda" ("Red Book," p. 563). "Baronia de Mitford" ("Testa," p. 383).

[5]In my introductions to the later "Pipe Rolls" of Henry II and to the "Rot. de Dom." (Pipe Roll Soc.).

[6]E.g. McKechnie, "Magna Carta" (1914), pp. 196, 198. So also Petit-Dutaillis, "Studies Supplementary to Stubbs' Constitutional History" (1908), p. 129: "Its most salient characteristic is the restoration of the old feudal law, violated by John Lackland, and perhaps its practically most important clauses, because they could be really applied, were that for example which limited the right of relief...." Also

"History of English Law" (1895), p. 151: "John in these last years has been breaking the law, therefore the law must be defined and set in writing".

[1]"Pipe Roll," 7 Hen. II, p. 23.

[2]"Red Book," pp. 438–9, 443.

[3]*Ibid*. The editor gives (p. 439) the wrong reference for the "carta" of Ralf de Gaugy, and makes the unlucky suggestion (by way of emendation) that Ralf may have been the *son* of the elder sister.

[4]"Pipe Roll," 8 Hen. II, p. II. The fact is obscured by Hugh's name being there printed as "de Clenton".

[5]"Ego teneo dimidiam baroniam" (see, for its constituents, "Testa," pp. 382, 392). Compare with this "dimidia baronia," the "baronia integra" of the Great Charter, and observe that the baronial tenure is not affected by subdivision, though Ralf and Hugh each claim to owe the service of "a knight and a half" (only).

[6]"Testa," p. 392 (cf. "Red Book," p. 439).

[1]"pro feodo et servitio j militis" ("Red Book," p. 440). But see further, below.

[2]See "Testa," p. 385 ("Radulfus super Tayse") and p. 392 ("Ricardus Curtayse" [*sic*]).

[3]"Pipe Rolls," 7 Hen. II, p. 24; 8 Hen. II, p. 10.

[4]*Ibid*. 20 Hen. II, p. 107.

[5]The service is given (apparently in error) as half a fee ("Testa," p. 385) or two-thirds (*ibid*. p. 392).

[6]"feodum j militis" ("Red Book," p. 438).

[7]"Pipe Roll," 23 Hen. II, p. 84.

[8]*Ibid*. 7 Hen. II, p. 24.

[9]"pro j feodo militis" ("Red Book," p. 444).

[10]"Pipe Roll," 25 Hen. II, p. 28 (cf. "Red Book," p. 178).

[1]"Red Book," p. 442.

[2]"Pipe Roll," II Hen. II, p. 27.

[3]*Ibid*. 14 Hen. II, p. 172. The number of fees he assigns to these "barons" and "knights" is Balliol 30, Walter Fitz William 3, Philip de Humez 2, Odinel

d'Umfreville 2, Robert de Bradeford 1, William de (A)mundeville 1. As a matter of fact, Walter Fitz William had duly made his return ("Red Book," p. 436).

[4]"pro relevio feodi j militis" ("Pipe Roll," p. 117).

[5]"servitium dimidii militis" ("Red Book," p. 400).

[1]"Pipe Roll," 21 Hen. II, p. 124.

[1]Vol. i. pp. 325–6 (from "Rot. Parl." Edw. III, p. 263).

[1]"habeo Laventonum, vestri gratia, in dominio pro servitio duorum militum" ("Red Book," p. 246).

[2]*Ibid*. p. 152 (a.d. 1202).

[3]*Ibid*. p. 483.

[4]*Ibid*. p. 481.

[5]Curia Regis Roll, 5 Hen. III. No. 79. See Wrottesley's "Pedigrees from the Plea Rolls," p. 261.

[6]The entries on p. 151*a* are decisive (cf. p. 141*b*., where Peter de la Mare's holding is given as one fee).

[7]"Cal. of Inq." i. No. 927.

[8]*Ibid*. iii. No. 34.

[9]*Ibid*. v. No. 136. There is a paper on this family in "Wiltshire Notes and Queries," Nos. 33, 34 (1901), but, as it ignores the "Red Book" and the "Testa," it only begins the pedigree with the Peter of the earliest Inquisition.

[1]"Willelmus et antecessores sui defenderunt castrum et terram de Brembre pro servicio unius feodi militis."

[2]"Oneretur de relevio suo de Castro prædicto tanquam de relevio Baroniæ." The whole proceedings are printed in Madox' "Exchequer" (1711), pp. 372–4 from the "Plea Rolls". See also "Baronia Anglica," p. 39.

[1]This charter is printed by Madox among the proceedings (*ut supra*), and also in "Calender of Charter Rolls" (1908), iii. 46.

[2]See "Red Book," pp. 197, 198, 235, 247, 311, etc.

[1]See "Testa de Nevill".

[2]*Ibid*. p. 55.

[1]That of Peter Fitz Herbert seems to have been at Woodcote, and that of William de Botreaux was at Longdon. See Eyton's "Shropshire," vii. 153, 165.

[2]Madox' "Exchequer" (1711), p. 218.

[3]"Testa," p. 55.

[4]"Memoranda," 35 Hen. III, Rot. 14*d* (cited in Eyton's "Shropshire," vii. 24, and Madox' "Baronia," p. 129). His son was made to pay £100 relief ("Pipe Roll," 12 Edw. I).

[5]See p. 64 above.

[1]"Baronage," i. 678.

[2]See, for this case, Madox' "Exchequer" (1711), i. 217.

[1]Pipe Roll, 12 Edw. I, cited in Madox' "Baronia," p. 47.

[2]See his "Baronia Anglica" for all this (pp. 45–9).

[1]P. 70 above.

[2]On the death of Robert de Chandos in 1301, his lands (which were in Herefordshire) were found to be "held of the King in chief by barony, by service of two knights' fees" ("Cal. of Inq." iv. No. 158), but the Inquisition is damaged. Roger, his son and heir, seems to have disputed the tenure, but without success, for "compertum est in rubeo libro quod *inter cartas diversorum Baronum annotatas ibidem* continetur quaedam carta Ricardi de Chaundos, antecessoris praedicti Rogeri de diversis feodis suis". The "Carta" will be found on pp. 284–5 of the printed "Red Book," and records prove that the fief paid scutage on over thirteen fees in the twelfth century. Roger thereupon admitted baronial tenure and paid 100 marcs relief accordingly in 1308–1309 (Madox' "Baronia Anglica," p. 127). It was shown above that a "Carta" of 1166, in the "Red Book," was similarly relied on by the Crown in the De La Mare case.

[1]This is also the inference to be drawn from the evidence on the practice under Henry II, given on p. 65 above.

[2]The latest learning insists on the vagueness of this line. In the "Origin of the English Constitution" (1912), p. 227, note, Prof. Adams writes: "As to when and where the line was drawn between the major and minor barons, in either military or court service, seminary work on the available material in two different years, in connection with other topics, leads me to feel sure that, if the statement in Pollock and Maitland, i. 280, 'We shall probably be nearer the truth if, in accordance with later writers, we regard the distinction as one that is gradually introduced by practice, and one that has no precise theory behind it,' is to be modified at all, it must be in the direction of a more unqualified statement that there was no fixed line."

Mr. McKechnie ("Magna Carta," 1914, p. 251) similarly holds that: "A rough division was drawn somewhere in the midst; but the boundary was vague, and this vagueness was probably encouraged by the Crown, whose requirements might vary from time to time. The Crown tenants on one side of this fluctuating line were 'barones majores'; those on the other 'barones minores'."

[1]See, further, for my comments on this point, "Peerage and Pedigree," pp. 350 *et seq*., where I have reprinted a paper which I issued in 1884–1885. I have also commented in the "Commune of London," pp. 252–5, on a charter of 1190, in which Longchamp, as Chancellor, is made to speak of "majoribus baronibus civitatis," a phrase which, I there pointed out, could have "no specialized meaning" and therefore bears on the use of "barones majores" as in the Great Charter.

[2]See pp. 47–53 above. It is essential to keep rigidly to the actual text of the Charter. On pp. 248–9 of *Magna Carta* Mr. McKechnie equates "comites et majores barones" by "earls and 'other greater barons'," where the word "other" is an interpolation, and on p. 251 quotation marks are given to "Minor Barons," a phrase which is not found in the Charter.

[1]"Parliamentary Debates" (Lords), 4 February and 11 March, 1915 (pp. 443, 444, 687).

[1]Vinogradoff, "Villainage in England," pp. 77, 78.

[1]Leges Henrici Primi, VIII. 2; Liebermann, "Gesetze der Angelsachsen," i. 554: "Communis quippe commodi prouida dispensacione statutum est, ut a duodecimo etatis sue anno et in hundreto sit et decima uel plegio liberali quisquis were uel wite uel iure liberi dignus curat estimari...."

[2]See Stubbs, "Constitutional History of England," i. 86–9; Morris, "The Frankpledge System," "Harv. Hist. Stud." xiv. 84. Bearing in mind exemptions made on account of rank, order, property, disability, or connection with a responsible householder, one may say that persons of all other classes were in frankpledge. These constituted the great body of Englishmen below the rank of nobility or of knighthood who were neither clerks nor freeholders; cf. *ibid*. 85. See also Liebermann, "Ges. der Angels." ii. 745 and 746, s.v. "Zehnerschaft," No. 10, 11, 16.

[1]Otherwise G. B. Adams, "Origin of the English Constitution," 233, 239–40.

[2]*Sic* already, "Articles of the Barons," c. 29.

[1]"Registrum omnium brevium," ed. 1531, fol. 78*b:* "Nota que anno VIII. regis Henrici quarti III. homines suerent bryefe de homine replegiando, ou le viscount retourne que les defendaunt eux claime come sez villeins regardantz a son maner &c. issint quil ne puit repleuin fair, & le retourne aiuge bon & le viscount nient amercie, Tamen contrarium adiudicatur anno XXXII. E. tertii...."

[2]Rymer, "Foedera," i. 128: "Sciatis nos concessisse baronibus nostris qui contra nos sunt, quod nec eos nec homines suos capiemus nec dissaisiemus, nec super eos per

vim vel per arma ibimus, nisi per legem regni nostri, vel per judicium parium suorum in curia nostra, donec consideratio facta fuerit per quatuor quos eligemus ex parte nostra, & per quatuor quos eligent ex parte sua & dominum Papam, qui superior erit super eos; & de hoc securitatem eis faciemus quam poterimus & quam debebimus per barones nostros. Et interim volumus quod episcopi London' Wygorn' Cestrens' Roffens' & W. comes Warren' eos securos faciant de predictis."—Quoted by Adams, "Origin," p. 266.

[1]Rymer, "Foedera," i. 136: "Litterae Innocentii III. Papae baronibus Angliae.... Praesertim cum in causa ipsa vos judices et executores feceritis; eodem Rege parato, in curia sua, vobis, per pares vestros, secundum consuetudines et leges regni, justitiae plenitudinem exhibere: vel coram nobis ad quos huius causae judicium, ratione dominii, pertinebat; aut etiam coram arbitris eligendis hinc inde, una nobiscum in ipso negotio processuris."

[2]Cf. Adams, "Origin of the English Constitution," pp. 266, 267.

[1]Cf. e.g. Y.B. 30 and 31 Edw. 1 (R.S.), 531–2: "Hugo. Domine, per illos sum accusatus; ideo in eis non consentiam. Item, domine, ego sum miles, et non debeo judicari nisi per meos pares.—'Justiciarius.' Quia vos estis miles, volumus quod vos sitis judicati per vestros pares.—Et nominabantur milites. Et querebatur si volu-erit aliquas calumpnias contra eos proponere.—'Justiciarius.' Si vos velitis legem communem refutare, vos portabitis poenam inde ordinatam, scilicet 'uno die manducabitis et alio die bibebitis; et die quo bibitis (*sic*) non manducabitis, et e contra; et manducabitis de pane ordeaceo et non salo, et aqua, etc.,' multa exponens sibi unde non esset bonum morari per ibi sed melius valeret consentire in eis.—Hugo. In pares meos consentiam, sed non in duodecim per quos sum accusatus, unde adversus eos audiatis meas calumpnias.—'Justiciarius.' Libenter...."

Cf. also 37 Edw. III, cap. 18: "Item coment qen la grande Chartre soit contenuz, qe null homme soit pris, ou emprosonez, ne oustez de son franc tenement, sanz processe de ley; nientmeyns plus ours gentz font faux suggestions au Roi mesmes, sibien par malice come en autre manere, dont le Roi est sovent trop grevez, et plus ours du Roialme mys en grant daunger et pert, contre la forme de mesme la chartre; par qoi est ordeigne qe touz ceux qe font tiels suggestions, soient mandez ove les ditz suggestions, devant le Chaunceller Tresorer et son grant conseil; et qe illeoqes ils troevent seurte a pursuire lour suggestions, et dencourer mesme la peyne qe lautre avereit sil fut atteint, encas qe sa suggestion soit trove malveys; et qe adonqes proces de ley soit fait devers eux, sanz estre pris ou emprisonez contre la fourme de la dite chartre et autres estatuz."—"Statutes of the Realm," i. 382. 42 Edw. III, cap. 3: "Item a la requeste de la commune par leur peticion mis avant en ce parlement, pur ouster meschiefs et damages, faitz as pluseurs de sa dite commune par faux accusours, qe sovent ont fait leur accusementz plus pur vengeance et singulere profit qe pur profit du roi ou de son people, queux accusez ont este aucuns pris et autres faitz venir devant le conseil le Roi par brief, et autrement, sur greve peine, et encontre le leye; est assentu et accorde pur le bone governement de la commune qe nul homme soit mis arespondre sanz presentement devant Justices, ou chose de record, ou par due processe et brief original, solonc launcien leye de la terre; et si rien desore enavant

soit fait al encontre soit voide en leye et tenuz pur errour." —"Statutes of the Realm," i. 388.

[1]"Monumenta Germaniae Historica," Legum Sect. iv. i. 90: "Precipimus et firmiter statuimus: ut nullus miles episcoporum, abbatum, abbatissarum aut marchionum vel comitum vel omnium, qui benefitium de nostris publicis bonis aut de ecclesiarum prediis tenet nunc aut tenuerit vel hactenus iniuste perdidit, tam de nostris maioribus valvasoribus quam et eorum militibus, sine certa et convicta culpa suum beneficium perdat, nisi *secundum consuetudinem* antecessorum nostrorum *et iudicium parium suorum*."

[2]"Acts of the Parliaments of Scotland, I: Assise Regis David," cap. v. p. 6: "Quod per parem iudicabitur. Statuit similiter dominus rex quod nullus debet recipere iudicium neque iudicari a minori persona quam a suo pari scilicet comes per comitem, baro per baronem, vavassor per vavassorem, burgensis per burgensem, sed minor persona potest iudicari a maiori." Ibidem, "Leges Quatuor Burgorum," cap. vii. p. 22: "De querelis extra burgum. Si burgensis appelletur de aliqua querela non placitabit extra burgum nisi ex defectu curie, nec debet respondere sine die et termino nisi prius inciderit in stultam responsionem exceptis illis que ad coronam domini regis pertinent. Et tam de illis que ad coronam regis pertinent quam de aliis iudicari *debet per suos pares et hoc secundum leges et assisas burgorum*." Cf. Harcourt, "His Grace the Steward," p. 207; Pollock and Maitland, "History of English Law," i.2 173, note 3.

[1]See Round, "Peerage and Pedigree," i. 338, 344, 345; Adams, "Origin of the English Constitution," p. 267.

[2]Matthew of Paris, "Chron. Maj." iii. 252. "...Ad haec respondens P(etrus) Wintoniensis episcopus dixit, quod non sunt pares in Anglia, sicut in regno Francorum; unde licet regi Anglorum per justitiarios, quos constituerit, quos libet de regno reos proscribere et mediante judicio condempnare...." See Pollock and Maitland, "History of English Law," i.2 410, note 2; McKechnie, "Magna Carta,"2 p. 390.

[1]Bracton, "De Legibus," i. cap. ii. par. 7...: "Si autem aliqua nova et inconsueta emerserint, et quae prius usitata non fuerint in regno, si tamen similia evenerint, per simile judicentur, cum bona sit occasio a similibus procedere ad similia. Si autem talia nunquam prius evenerint, et obscurum et difficile sit eorum judicium, tunc ponantur judicia in respectum usque ad magnam curiam, ut ibi per consilium curiae terminentur." Cf. as to the judgment of the Court of Peers in case of high treason, f. 119: "Quis ergo judicabit? Videtur, Sine prejuditio melioris sententiae, quod curia et pares judicabunt....Cum ipse rex pars actrix esse debeat in iuditio....Si autem levis fuerit transgressio quae poenam inflegat pecuniariam tantum, bene possunt iustitiarii sine paribus iudicare...." It is to be noticed (1) that the functions of the justices and of the peers are characterized by the same expression—"judicare" and differ only in degree and application; (2) that the verdict of peers applies not only to the higher grades of society, but to all freemen worthy of trial by the country.

[2]Beaumanoir, “Coutume de Beauvaisis,” cap. 31: “Pour ce que mout seroit longue chose et chargeant as hommes qui font les jugemens de metre en jugement tous les cas qui vienent devant le baillif, li baillis doit metre grant peine de delivrer ce qui est pledié devant lui, quant il set que l’en doit fere du cas selonc la coustume et quant il voit que la chose est clere et aperte. Mes ce qui est en doute et les grosses quereles doivent bien estre mises en jugement; ne il ne convient pas que l’en mete en jugement le cas qui a autre fois esté jugiés, tout soit ce que li jugemens soit fes pour autres persones, car l’en ne doit pas fere divers jugemens d’un meisme cas.”

[1]See McIlwain, “High Court of Parliament,” pp. 24, 25, 28, 29, 31, 32. Cf. Baldwin, “The King’s Council,” p. 68.

[2]McKechnie, “Magna Carta,”2 pp. 270, 271. Cf. Pollock and Maitland, “History of English Law,” i.2 202.

[3]“Rotuli Parliamentorum,” ii. 54, No. 6 (4 Edw. III): “...Et qe les avantditz Jugementz ore renduz ne soient tret en ensaumple n’en consequencie en temps a venir, par qoi les ditz Peres puissent estre chargez desore a jugger autres qe lur Peres, contre la Lei de la terre si autiel cas aveigne, que Dieu defend.” Cf. Harcourt, “His Grace the Steward,” pp. 336–7. See also Y.B. 48 Edw. III, 30*b*.

[1]See “Placitorum Abbreviatio,” 201; McKechnie, “Magna Carta,”2 p. 379; Pollock and Maitland, “History of English Law,” i.2 410, note I.

[2]Y.B. 30 and 31 Edw. I (R.S.), 531. The case is not traceable in the original rolls, but there are indications that it was tried before W. St. Quintin or R. Becard at York.

[1]See Pike, “Constitutional History of the House of Lords,” pp. 169–70.

[1]Bigelow, “Placita Anglo-Normannica,” 7: “et etiam a toto comitatu recordatum atque judicatum”. *Ibid*. 24: “eligantur plures de illis Anglis qui sciant quomodo terræ jacebant præfatæ ecclesiæ die qua rex Edwardus obiit, et quod inde dixerint ibi jurando testentur”.

[2]“Bracton’s Note-book,” iii. case 1730 (Lincolnshire): “...uice-comes...dixit omnibus senescallis, militibus et aliis de comitatu ut summo mane conuenirent et querelas audirent et inde iudicia facerent. Mane autem cum uenirent, uicecomes assedit et interrogauit querelas et querentes et iudicia, etc., et mandauit militibus et senescallis qui extra domum fuerunt ut intrarent et querelas audirent et iudicia inde facerent. Et cum hoc audirent, ipsi qui in domo erant exierunt et qui extra erant abierunt dicentes quod non debuerunt comitatum tenere nisi per unum diem, unde quia uicecomes non potuit solus querelas audire nec iudicia facere dixit querentibus et reis...”

[1]See 2 Inst., Proem; for a list of statutes of confirmation, see *ibid*. p. 1. Traces of special proceedings arising out of infringements of the Great Charter are preserved in references to Pleas concerning transgressions of Magna Carta, and the Great Charter is not unfrequently quoted in Patent Rolls in order to explain the appointment of

justices in special cases. See, e.g., C. Pat. R. *a*. 1247–1258, p. 229; *a*. 1261–1272, p. 630; *a*. 1272–1281, p. 327.

[1]"Rotuli Parliamentorum," ii. 297–8 (42 Edw. III, Nos. 20–8), esp. at p. 297*b* (No. 22).

[2]*Ibid*. 3–5 (I Edw. III).

[3]*Ibid*. 173*a* (4 Edw. III, No. 3); cf. Vinogradoff, "Constitutional History and the Year Books" (Creighton Lecture), L.Q.R. 1913, pp. 277, 278.

[4]Cal. Pat. 1292–1301, pp. 515–17; Pat. 28, Edw. I, m. 14. List of justices appointed to hear and determine complaints of transgressions against Magna Carta and the Forest Charter of Henry III as received and confirmed by the King, and especially of transgressions where heretofore no remedy existed at common law, as well of the King's Ministers *extra placeas suas* as of all others without allowing the delays which are allowed at the common Law; and to punish offenders by imprisonment, ransom, or amercement.

[1]See 37 Edw. III, cap. 18; 38 Edw. III, cap. 9 (stat. I); 42 Edw. III, cap. 3; Y.B. 6 and 7 Edw. II, vol. ii. (S.S.), p. 36.

[2]See the case of the Countess of Albemarle, as related by Bereford, C.J., Y.B. 3 Edw. II (S.S. iii.) 196.

[3]Cf. Vinogradoff, "Constitutional History and the Year Books" (Creighton Lecture), L.Q.R. 1913, pp. 279, 280.

[1]"Origin of the English Constitution," p. 266.

[2]On the procedure in these trials see Adams in the "Columbia Law Review" for April, 1913.

[1]Of course, if we accept the fourteenth-century view (the references are in McKechnie's "Magna Carta," first edition, pp. 441–2), the "lex terrae" would cover the jury of presentment or grand jury, and also the jury which superseded the ordeal, when the accused put himself "super patriam". The "judicium parium" could not mean a jury.

[2]"Origin of the English Constitution," p. 268.

[1]The corresponding clause in the Articles of the Barons (§ 29) reads: "ne corpus liberi hominis capiatur nec imprisonetur nec dissaisietur".

[2]Pat. 16 John m 3d. Hardy, "Rotuli litterarum patentium," p. 141.

[1]This is admitted by Prof. Adams, p. 266, although his reasoning in the context is not very clear to me.

[2]"Dialogus," ii. I. The editors of the Oxford edition (p. 207) have explained that it is the disjunctive use of "et," not, as the ordinary text at first sight suggests, of "uel," which is the theme of this passage.

[1]"Histoire de Guillaume le Maréchal" (ed. Meyer), ii. 109–12, II. 13149–13244. Four years earlier the King had acted in an exactly contrary way. The Poitevin barons asked for a judgment of peers; John had tried to insist upon a trial by combat against picked champions of his own (Howden, iv. 176).

[2]McKechnie, "Magna Carta" (first edition), pp. 103, 441.

[1]"Très ancien coutumier" (ed. Tardif), chaps. xv. 3; lxxxii. 9.

[2]Prof. Adams has advanced the interpretation of the clause by bringing together examples of the more general use of "lex terrae"; op. cit. p. 267.

[3]In Germany "terra" (land) was sometimes used of the Empire as a whole, but more commonly of a political district. See especially von Below, "Der deutsche Staat des Mittelalters," i. 131–4. It is used of England and of Normandy as a whole in Bracton's phrase "donec terrae fuerint communes".

[4]The customs of Kent are well known. For a Herefordshire custom which made the judges pause, see Bracton's "Note Book," iii. 407, case 1474, of the year 1220.

[5]See the cases discussed below.

[1]A comparison of John's charter to the Jews ("Rotuli chartarum," p. 93) with a case of the year 1224 in Bracton's "Note Book," ii. 706, case 918, makes this clear.

[2]"Très ancien coutumier," chap. xxvi. On the nature of these assizes, see chaps. xxviii. 1; xliv. 2; lv. 1, 2; lvi. 1. The change introduced by Philip Augustus has been worked out by Freville in the "Nouvelle revue historique de droit français et étranger," 1912, pp. 714 ff.

[1]Magna Carta, § 52; cf. §§ 55, 56, and Articles of the Barons, § 25. The phrase "per judicium parium secundum legem" does not mean that judgment of peers is according to law, but that the judgment by peers must be in accordance with the law. Those writers who identify the phrase with the phrase "per judicium parium uel per legem terrae," seem to have overlooked this distinction.

[1]"Note Book," iii. 123–5, case 1106; briefly noticed by Adams, op. cit. p. 273. Other references bearing on this case will be found in the "Excerpta e rotulis finium," i. 249, 259, 309. For Cottingham, see "Red Book of the Exchequer," p. 490; "Rotuli Chartarum," 12*b*, 54*b*, and Lewis, "Topographical Dictionary," s.v. In 1241, shortly before his death, Eustace de Stuteville was appointed one of the four knights to inspect the royal castles in Yorkshire ("Close Rolls," Henry III, 1237–1242, p. 354).

[1]"Excerpta e rotulis finium," i. 309.

[2]"Note Book," ii. 664–7, case 857.

[1]The phrase is explicitly used in another outlawry case, "Note Book," ii. 75, case 85, of the year 1220. Certain persons who had refused to answer a suit and whose guilt was clear were condemned, if they continued to resist the royal officials, to be outlawed in "comitatu secundum legem terre".

[1]"Note Book," ii. 667, note.

[2]Pollock and Maitland, second edition, ii. 581.

[3]The famous case of the division of the Chester palatinate produced a situation of this kind. ("Note Book," cases 1217, 1227, 1273; especially the passage in case 1227, iii. 243).

[1]The only argument in favour of exclusion is that, in the thirty-fourth clause, where the freeman's court is protected against the writ "praecipe," only a baron's court could be intended. But could not any manorial court suffer through the writ?

[1]See, for example, Miss Archibald's paper on the "Serfs of Sainte-Genevieve" in the "English Historical Review," xxv. p. 25. On the difference between England and Germany cf. Vinogradoff, "Villainage in England," pp. 179, 180. G. von Below, on the other hand, insists on the economic and political significance of the development of the free element in Germany; "Der deutsche Staat des Mittelalters," i. chap. iv., e.g. pp. 119, 128.

[2]Vinogradoff, p. 181, and *passim*. Cf. Magna Carta, 19, for the free tenants required during the holding of possessory assizes.

[3]A freeman could hold by base tenure. At this time, however, the phrases "liber homo," "liber tenens," were not carefully distinguished. Cf. the treaty with William Longchamp in 1191, quoted below, and Magna Carta, §§ 15, 19.

[1]An interesting case is the family of Simon of Alverton, whose sons were enfranchised. See Prof. Stenton's paper, "Early Manumissions at Staunton, Nottinghamshire," in the "English Historical Review," xxvi, 96–7.

[2]"The Domesday of St. Paul's" (Camden Society) *passim*. The free tenants, tenants "ad censum," tenants at a rent of new essarts divided by the farmers of the manors (e.g. pp. 12, 36) are as numerous as the other tenants. A forester, a smith, a merchant, and a Templar's "relicta" were among the tenants of the essart at Wickham (p. 37).

[3]"Note Book," case 857, quoted above.

[4]Howden, iii. 299–300; "Select Charters" (ninth edition), p. 264, (tenth edition), pp. 257–8.

[1]Cf. Morris, "The Frankpledge System," pp. 126–7.

[2]Howden, iii. 300.

[1]Morris, op. cit. pp. 93 ff.

[2]For the restriction on bail cf. “Note Book” iii. 471, 556, cases 1600, 1716.

[3]Assize of Clarendon, § 12.

[1]Pollock and Maitland, ii. 587.

[2]*Ibid*. ii. 585, on the writ “de homine replegiando”.

[1]Offenders against the law of the forest, it will be remembered, were not repleviable. They were kept in prison pending trial (Pollock and Maitland, ii. 585).

[2]Benedict of Peterborough, ii. 74.

[1]Howden, iii. 136.

[2]Charter of 1217, § 35.

[1]McKechnie, p. 442.

[2]“Close Rolls,” Henry III, 1237–1242, p. 356.

[1]“Select Charters” (ninth edition), pp. 411, 412; (tenth edition), p. 400.

[2]“Note Book,” ii. 366, 542, cases 465, 705. In the latter case a sheriff was declared “in misericordiam” for wrongful imprisonment, even although the sheriff “eos cepit eo quod fama patriae, scl. xl homines,” said that if murder had been committed, the accused were the guilty persons.

[1]“Close Rolls,” Henry III, 1237–1242; pp. 76, 356, 412, 482.

[2]Morris, “The Frankpledge System,” p. 106.

[3]“Close Rolls,” p. 484.

[4]“Constitutional History,” ii. 285–6, 236; “Select Charters” (ninth edition), p. 263; (tenth edition), p. 257.

[1]Crump and Johnson in “English Historical Review,” xxvii. 233; Prothero, “Statutes and Constitutional Documents” (third edition), p. 144.

[2]Holdsworth, “History of English Law,” i. 131–2.

[3]“English Historical Review,” xxvii. 227, 233–4.

[1]The judicial powers of the Council were asserted in 1242, when drastic punishment was threatened “per consilium” in the case of those who abetted or permitted the escape of malefactors. This passage in the writ (“Close Rolls,” Henry 111, 1237–1242, pp. 483–4) marks a transition to later ideas.

[1]Magna Carta, § 45.

[1]“Law Quarterly Review,” vol. xxi. p. 257.

[1]“Statutes of the Realm,” i. 123; Bémont, “Chartes des Libertés Anglaises,” p. 96; Stubbs, “Select Charters” (ninth edition), p. 490; Blackstone, “Magna Carta,” lxxiv.

[2]“2 Inst.” 526.

[3]“A First Book of Jurisprudence,” p. 4.

[1]“Code,” 8, 52, 2: “Consuetudinis ususque longaevi non vilis auctoritas est, verum non usque adeo sui valitura momento, ut aut rationem vincat aut legem”.

[2]“Legum autem Romanorum non est vilis auctoritas, sed non adeo vim suam extendunt, ut usum vincant aut mores. Strenuus autem jurisperitus, sicubi casus emerserit, qui consuetudine feudi non sit comprehensus, absque calumnia uti poterit lege scripta.”—“Libri Feudorum,” Lib. ii. Tit. i.; Lehmann, “Das Langobardische Lehnrecht,” pp. 114–15. See the interesting commentary of Cujas on these two passages, in his edition, “De Feudis” (1566), pp. 72-4. For a modern discussion see Savigny, “System des Heutigen Römischen Rechts,” vol. i. chap. iii. section 25; also note ii. at the end of volume one.

[3]The customary law, “consuetudo,” he also calls “jura regni,” but he will not admit a sharp distinction between it and “lex,” though it is mainly unwritten, for he is not ignorant of the popular origin of “lex” even in Rome—“Leges namque Anglicanas, licet non scriptas, Leges appellari non videtur absurdum (cum hoc ipsum lex sit, ’quod principi placet, legis habet vigorem’) eas scilicet, quas super dubiis in consilio definiendis, procerum quidem consilio, et principis accedente authoritate, constat esse promulgatas.”—“Tractatus de Legibus et Consuetudinibus Regni Angliae, Prologus.” Cf. Justinian, “Inst.” 1, 2, 3, with which Glanvill, in common with nearly all the mediæval English juristic writers, prefaces his treatise.

[4]“Proemium.”

[5]“Cum autem fere in omnibus regionibus utantur legibus et jure scripto, sola Anglia usa est in suis finibus jure non scripto et consuetudine. In ea quidem ex non scripto jus venit, quod usus comprobavit. Sed absurdum non erit leges Anglicanas (licet non scriptas) leges appellare, cum legis vigorem habeat quicquid de consilio et de consensu magnatum et reipublicae communi sponsione, authoritate regis sive principis praecedente, juste fuerit definitum et approbatum. Sunt autem in Anglia consuetudines plures et diversae, secundum diversitatem locorum. Habent enim Anglici plurima ex consuetudine, quae non habent ex lege; sicut in diversis comitatibus, civitatibus, burgis et villis, ubi semper inquirendum erit quae sit illius

loci consuetudo, et qualiter utantur consuetudine qui consuetudines allegant" (folio 1 A).

"Videndum est etiam quid sit lex; et sciendum, quod lex commune praeceptum virorum prudentum consultum, delictorumque quae sponte vel ignorantia contrahuntur coertio, rei publicae sponsio communis" (folio 2 A; "Digest," i. 3, 1).

"Consuetudo vero quandoque pro lege observatur in partibus, ubi fuerit more utentium approbata, et vicem legis obtinet, longaevi enim temporis usus et consuetudinibus non est vilis authoritas" (folio 2 A).

[1]P. 126, note 3.

[1]Bémont, "Chartes des Libertés Anglaises," p. 72.

[2]Selden Society, vol. vii. 184.

[3]"Rot. Parl." ii. 41–42, no. 52.

[1]"Rot. Parl." ii. 131*a*, no. 42. For the controversy, see Stubbs, "Constitutional History," ii. (fourth edition) pp. 407–10. Rymer gives one of the writs for the publication of this revocation, addressed to the Sheriff of Lincoln, dated 1 October, 1341 ("Foedera" (Record Commission) vol. ii. pt. ii. 1177). In it the King declares that since the provisions complained of "(quidam articuli) legibus et consuetudinibus regni nostri Angliae, ac juribus et praerogativis nostris regiis, expresse contrarii praetendantur per modum statuti per nos fuisse concessi"; therefore, "considerantes qualiter ad observationem et defensionem legum, consuetudinum, jurium et praerogativarum hujusmodi, astricti sumus vinculo juramenti," he desires that the said statute be revoked, even though "dissimulavimus sicut oportuit et dictum praetensum statutum sigillari permissimus illa vice". But he hastens to add—and this is also significant—"volentes tamen quod articuli, in dicto praetenso statuto contenti, qui per alia statuta nostra vel progenitorum nostrorum Regum Angliae sunt prius approbati, juxta formam dictorum statutorum, in omnibus, prout convenit, observentur". By his own admission the King's action seems to warrant Stubbs's characterization of it as "a piece of atrocious duplicity," but the reasons he finds necessary to assign for it are none the less instructive. This revocation was made, however, without consulting the Commons—"volentes ea...ad statum debitum revocare, super hoc cum comitibus et baronibus, ac peritis aliis, dicti regni nostri consilium habuimus et tractatum";—and therefore, as an enactment of common law, had eventually to be put in form of a new statute with the assent of the lower house. This assent was not given until the next Parliament, which met in 1343, two years later. It is an assent only in form then, for the Commons were dissatisfied. They petitioned for the observance of recent statutes, especially for those made in return for their grants. The only satisfaction they got was the royal response. "Il plest au Roi qe les Estatuts soient veuz et examinez, et ceux qe sont d'amender soient amendez, et les bons estoisent en lour force." In respect to the statute annulled two years before the King answered, "Le Roi nadgairs apperceivant qe le dit Estatut feust contre son Serement et en blemissement de sa Corone et sa Roialtee, et contre la Ley de la terre en plusours pointz, si fist repeller meisme

l'Estatut. Mes il voet qe les pointz du dit Estatut soient examinez, et ceux qe serront trovez honurables et profitables pur le Roi et son people soient ore faitz en novel Estatut, et gardez desore.";—"Rot. Parl." ii. 139, nos. 1–4. No corresponding enactment is to be found on the Statute Roll of that year.

[1]"Rot. Parl." ii. 173, no. 65.

[2]*Ibid*. iii. 367 A.

[1]"Rot. Parl." iii. 434, no. 108.

[2]*Ibid*. iv. 169 B.

[3]2 Hen. VI, cap. i.

[4]*Ante*, p. 126, note 5.

[5]Folio 129 B.

[6]*Ibid*. 316 A.

[7]*Ibid*. 307 A.

[1]Folio 417 B. He here refers to the famous "nolumus".

[2]*Ibid*. 312 B.

[3]Folios 29 A, 32 A.

[4]Folio 169 B. By this "constitutio" Bracton means the provision which appeared first as article 39 of the second reissue of Magna Carta and was re-enacted as article 32 in the reissue of 1225: "Nullus liber homo de cetero det amplius alicui vel vendat de terra sua quam ut de residuo terrae suae possit sufficienter fieri domino feodi servitium ei debitum quod pertinet ad feodum illud". He cites the case of Robert de Toteshall *v*. the Prior of Bricksite in 23 Henry III. This case is given in Bracton's "Note Book," No. 1248.

[5]Folio 168 B.

[6]*Ibid*. 110 B. He also speaks of a woman's having a dower greater than is proper "secundum legem et consuetudinem regni" folio 314 A).

[1]Folio 108 A.

[2]*Ibid*. 133.

[3]Folios 17 B, 19 B.

[4]Folio 316 B.

[5]*Ibid*. 17 B.

[6]*Ibid*. 19 B.

[7]Selden Society, vol. vii. 5.

[8]"Year Book," 20 & 21 Edw. I (Rolls Series), p. 99.

[9]"Rot. Parl." iii. 23, no. 96 (1377).

[1]Thus a litigant was told in I Edward II: "You are not aided by the common law nor by special law" ("par la commune ley ne par ley especial").—"Year Book," 1 & 2 Edw. II (Selden Society), p. 31. In the next year another was informed that he must rely either on common law or on special law ("par la commune ley ou par ley especial". Variant: "par aunciene ley ou par novele ley"), and that neither the common law nor "la novelle ley" will help him.—*Ibid*. p. 60. In 1377 the Commons petitioned for the observance and confirmation of "la commune Loy et auxint les especialx Loys, Estatutz et Ordinances de la terre" made for the common profit and good governance of the realm in the times preceding.—"Rot. Parl." iii. 6, no. 20.

[2]In 1350 the King responded to a petition of the Commons against the extortion of the clergy in taking fees for proving wills, "Soit la Ley sur ceo use come devant, si bien la Ley de Seinte Eglise come la Ley de la terre.—"Rot. Parl." ii. 230, No. 35.

[3]See Mr. G. J. Turner's introduction to "Select Pleas of the Forest" (Selden Society); Petit-Dutaillis, "Études Additionelles," in Stubbs, "Constitutional History," French translation, vol. ii.

[4]The "Pronunciatio" of the Parliament in 2 Richard II, declares that "les Loys de la terre et les Loys d'armes doivent estre come relatives, l'une Loy tout dys aidant a l'autre en tous cas busoignables".—"Rot. Parl." iii. 33, no. 8.

[5]Statute, 13 Rich. II, stat. i. cap. ii. confines his jurisdiction to cases not triable "par la commune ley du Roialme".

[6]The Statute of the Staple (27 Edw. III, stat. ii.) provides for the trial of merchants' cases "solonc la leie de lestaple et nemie a la commune ley" (cap ii.). All things touching the staple in the staple towns were to be determined "par la lei marchant...et nemie par la commune lei de la terre, ne par usages des Citees Burghs nautres villes" (cap. viii.).

[7]"Rot. Parl." iii. 244, No. 7. In this Parliament the lords, both spiritual and temporal, claimed it as their privilege that all cases touching them "serroient demesnez, ajuggez, et discus par le cours de Parlement, et nemye par la Loy Civile, ne par la Commune Ley de la Terre, usez en aut res plus bas Courtes du Roialme". See also *ibid*. iii. 236.

[1]Much material is found in various volumes of the Selden Society Publications, such, for example, as the volumes edited by Miss Bateson on "Borough Customs". Many local peculiarities in the towns affecting tenure have been collected in

Hemmeon's "Burgage Tenure in Mediæval England" ("Harvard Historical Studies," no. xx.).

[2]"Year Book" 2 & 3 Edw. II (Selden Society), p. 60.

[3]*Ibid*. 33–35 Edw. I (Rolls Series), 457.

[4]*Ibid*. 20 & 21 Edw. (Rolls Series), pp. 327, 329. See also *Ibid*. 33–35 Edw. I (Rolls Rolls), p. 351; also the so-called Statute de Praerogativa Regis ("Statutes of the Realm," i. 227) cap. xviii. See further, Somner, Robinson, or Sandys on Gavelkind.

[1]Stubbs "Select Charters" (ninth edition), p. 300.

[2]"Abbreviatio Placitorum" (Record Commission), p. 108.

[3]Rymer, "Foedera" (Record Commission), vol. i. part II, 593.

[4]12 Edw. I

[5]"Plac. Abb." p. 286.

[6]*Ibid*. p. 231.

[7]"Rot. Parl." i. 397, no. 59.

[1]Nicholson, "Leges Marchiarum," p. 1 *et seq*.

[2]*Ante*, pp. 124–5.

[1]Liebermann, "Gesetze der Angelsachsen," i. 553.

[2]Stubbs, "Select Charters" (ninth edition), p. 163.

[3]*Ibid*. p. 173.

[4]*Ibid*. p. 186.

[5]*Ibid*. p. 292.

[6]*Ante*, p. 132.

[7]Folio, 96. See also Bracton's "Note Book," i. 89.

[8]"Plac. Abb." pp. 146–7.

[9]*Ibid*. p. 187.

[10]Selden Society, vol. vii. 48. See also *ibid*. p. 28; "Plac. Abb." p. 171.

[1]"Plac. Abb." p. 144.

[2]*Ibid*. p. 168.

[3]Selden Society, vol. vii. 8.

[4]"Plac. Abb." p. 268.

[5]*Ibid*. p. 209.

[6]"De Asportatis Religiosorum" is referred to as "statutum" in 16 Edw. 11. "Plac. Abb." p. 341. Examples in writ form are "Circumspecte Agatis, De Finibus Levatis," etc. These and a number of others are in Latin, the language of royal writs, instead of French, which was becoming the usual medium of parliamentary enactment at this time.

[1]"English Historical Review," no. xxviii. p. 118 *et seq*. This view seems also to be accepted by Prof. Tout. The "Place of Edward II in English History," pp. 150–1.

[2]"Control by National Assemblies of the Repeal of Legislation in the Later Middle Ages," "Mélanges d'Histoire offerts a M. Charles Bémont" (1913), p. 437 *et seq*.

[1]"Pronunciatio" of the Parliament of 13 Henry IV (1411), "Rot. Parl." iii. 647.

[1]See "Rot. Parl." iv. 130, no. 10.

[2]For repeal, see "Rot. Parl." iii. 352 A; *ibid*. pp. 425 A-B; 426 A, 442 A; stat. i. Hen. IV, cap. iii.; stat. ii. Hen. IV, cap. xiii.; 'Rot. Parl." v. 374 A-B; stat. 39 Hen. VI, cap. i.; "Rot. Parl." vi. 191 A. See also "4 Inst." p. 52.

[3]*Ante*, p. 126, note 5.

[1]This famous sentence appeared in the writs of summons to the clergy for the model Parliament of 1295 ("Parl. Writs," vol. i. p. 30). The writs begin as follows: "Sicut lex justissima, provida circumspectione sacrorum principum stabilita, hortatur et statuit ut quod omnes tangit ab omnibus approbetur, sic et nimis evidenter ut communibus periculis per remedia provisa communiter obvietur". The "lex" here referred to is probably from Justinian's "Code," 5, 59, 5, where nothing of a political character is referred to, but only the common action of several "co-tutores" appointed under a will or otherwise. The original words are, "ut, quod omnes similiter tangit, ab omnibus comprobetur". It is interesting to note that in the supplementary title "De Regula Juris" at the end of the "Sext," published three years after Edward's writs, in 1298, Boniface the Eighth includes this maxim as regula xxix., "Quod omnes tangit, debet ab omnibus approbari".

[1]"Annals of Burton," p. 471, quoted in Stubbs. "Select Charters" (ninth edition), p. 331.

[2]*Ibid*.

[1]The enactments of the Statute of Westminster First (3 Edw. I, 1275) are said to be made because the King desired "to redress the state of the realm in such things as required amendment, for the common profit of holy Church and of the realm; and because the state of the holy Church had been evil kept, and the prelates and religious persons of the land grieved many ways and the people otherwise intreated than they ought to be, and the peace less kept and the laws used and the offenders less punished than they ought to be, by reason whereof the people of the land feared less to offend".

The Second (13 Edw. I, stat. i. 1285) is in some respects more explicit, as is also the Statute of Gloucester (6 Edw. I, 1278), and many others of this reign, so remarkable in this respect. Edward's preambles are much more instructive than later, when parliamentary enactment had become a matter of course, prefaced by stereotyped phrases or by none at all.

[1]Selden Society, vol. vii. 189, 8.

[2]"Rot. Parl." iii. 417 B. See also Legge, "English Coronation Records," pp. xxvii, 88.

[1]"Rot. Parl." i. 285 A.

[2]*Ibid*. ii. 139, no. 23.

[3]*Ibid*. 139–40, no. 27.

[1]"Rot. Parl." ii. p. 166, no. 13.

[2]*Ibid*. p. 203, no. 30.

[3]*Ibid*. 231, no. 41. See also stat. 25 Edw. III, stat. i. In this connection the proceedings in Parliament leading up to the Statute of Provisors are also interesting. They are found in the same words, in both the Parliament Roll and the Statute Roll ("Rot. Parl." ii. 232–3, stat. 25 Edw. III, stat. iv.).

[1]*Ibid*. "Rot. Parl." ii. 237 A.

[2]3 Rich. II, *ibid*. iii. 71, no. 3.

[3]13 Rich. II, *ibid*. 257, no. 1.

[4]5 Hen. IV, *ibid*. p. 529 A.

[5]*Ibid*. p. 80, no. 1; p. 321, no. 44, etc.

[6]Folio 1 B. Mere interpretation, in the fourteenth century, belonged to the Council. When a solemn affirmance by "novel Estatut" was necessary in matters of common law, this could only be done in a Parliament of which the Commons were a part.

[1]Folio 414 B.

[2]"Rot. Parl." ii. 283 A. See also, *ibid*. ii. 341, no. 119; *ibid*. iii. p. 43, no. 46; p. 97 B.

[3]On this, it is unnecessary to do more than refer to a few of the chief authorities. E.g. Broom, "Constitutional Law" (second edition), p. 492 *et seq*.; Anson, "Law and Custom of the Constitution," vol. i. (fourth edition), p. 326 *et seq*.; Maitland, "Constitutional History of England," pp. 302–6; "Thomas *v*. Sorrell, Vaughan's Reports," p. 330; "Godden *v*. Hales," "11 St. Tr." 1165, with the various contemporary tracts appended to the report; W. Petyt, "Jus Parliamentarium"; Luders's "Tracts," Tract V.

[1]See, for example, the brief but excellent reference to this as a precedent for later consent in legislation, in Pike, "Constitutional History of the House of Lords," p. 310 *et seq*.

[1]Folio 1 B.

[2]*Ibid*. 227 A.

[3]Bémont, "Chartes des Libertés Anglaises," pp. 73–4.

[1]*Ante*, p. 148.

[2]"Rot. Parl." ii. 284*b*–285, no. 9.

[1]"Rot. Parl." ii. 257, no. 16.

[2]*Ibid*. 280, nos. 38–40.

[3]*Ibid*. 308, no. 41.

[4]*Ibid*. 368, nos. 44–6.

[1]"Rot. Parl." iii. 100, no. 13.

[2]*Ibid*. p. 266, no. 30.

[3]Bémont, "Chartes des Libertés Anglaises," p. 82.

[4]*Ibid*. p. 99.

[5]"Calendar of Patent Rolls," 1272–1281, p. 104.

[6]"Rot. Parl." ii. 237 A.

[1]"Rot. Parl." iii. 32 A.

[2]*Ibid*. p. 347, A-B.

[3]*Ibid*. iv. 15 B.

[4]*Ibid*. ii. 128, no. 9.

[5]*Ibid*. p. 295, no. 10.

[6]*Ibid*. p. 300, no. 14.

[7]*Ibid*. iii. 427, no. 79. See also *ibid*. p. 243 A; also the King's answer to the famous petition of 1414 in which he promises that no enactment shall bind the Commons without their assent ("Rot. Parl." iv. 22, no. 22).

[1]*Ibid*. ii. 180 A–B.

[2]*Ibid*. p. 62, no. 9.

[3]*Ibid*. 367, no. 35.

[4]*Ibid*. iii. 264, no. 24.

[5]*Ibid*. p. 341, no. 22.

[1]"Rot. Parl." iii. p. 340, no. 21.

[2]*Ibid*. 372, no. 87.

[3]*Ibid*. iv. 454, no. 63. See also *ibid*. p. 490, No. 19.

[4]See, among others, "4 Inst." 25; Prynne, "Irenarches Redivivus; Animadversions on Coke's Fourth Institute," p. 13; Whitelocke, "Notes upon the King's Writt," chaps. xc., xcviii., xcix.; Ruffhead's Preface to his edition of the statutes; Introduction by the Commissioners to the "Statutes of the Realm," section v. (also reprinted in Cooper's "Public Records," i. 163 *et seq*.); Hargrave and Butler's notes to "Coke on Littleton," p. 159 B, note 292; Amos's notes to Fortescue's "De Laudibus Legum Angliae," pp. 59–61; Gneist, "English Constitutional History" (English translation), ii. 22 *et seq*.; Maitland, "Constitutional History," pp. 256–8; Hatschek, "Englisches Staatsrecht," i. 114; Anson, "Law and Custom of the Constitution," i. (fourth edition) 243–9.

[1]See the treatises above mentioned, among which the Introduction to the "Statutes of the Realm" is the most important. It cites and analyses most of the entries in the Rolls of Parliament important for this subject.

[2]17 Edw. II, stat. 3.

[3]I Edw. III, "Rot. Parl," ii. II, no. 3

[4]10 Edw. III, stat. 2.

[1]"Rot. Parl." ii. 113, nos. 7, 8.

[2]*Ibid*. p. 133, no. 61.

[3]*Ibid*. 153, no. 33.

[4]*Ibid*. p. 167, no. 22.

[5]25 Edw. III, stat. 4.

[1]"Rot. Parl." ii. 254 A.

[2]*Ibid*. iii. 17, no. 56.

[3]"Bill" is the term generally used on the rolls for petitions urged by others than the Commons as a whole—"par diverses persones; Bille especialle de singuler persone"—and not "pur le commun profit du people e du reaume". The Commons frequently show hostility to these. For references to such "billes," see "Rot. Parl." iii. 61, no. 28; *ibid*. pp. 105–6; ii. 360 A–B; iii. 60–1; *ibid* ii. 203, no. 30; p. 368, no. 46; iii. 321, no. 44. See also the Introduction to the "Statutes of the Realm" (reprinted in Cooper's "Public Records" i. 171–2, note, with references there quoted). These are the origin of private bills. See further, Clifford, "History of Private Bill Legislation," vol. i. chap. iii.

[1]"Rot. Parl." iii. 61, no. 28.

[2]*Ibid*. p. 86, no. 46.

[3]*Ibid*. p. 419, no. 34. See also generally, stat. 14 Edw. III, Stats. 1 and 4, 11 Rich. II, cap. 11; 4 Hen. VI, cap. 2; "Rot. Parl." iii. 87, no. 50; *ibid*. p. 115, no. 74; *ibid*. p. 138, no. 34; *ibid*. p. 354, no, 32; *ibid*. iv. 128, A–B; *ibid*. p. 35, no. 12; stat. 21 Rich. II, cap. 12; stat. 1 Hen. VI, cap. 6; 18 Hen. VI, cap. 4, 13; 27 Hen. VI, cap. 5; 29 Hen. VI, cap. 2; "Rot. Parl." iv. 327–8; *ibid*. p. 328, no. 29; *ibid*. iii. 580, no. 60.

[4]For example, stat. 4 Hen. IV, cap. 35; 13 Hen. IV, cap. 2; 9 Hen. V, stat. 2; 8 Hen. VI, preamble; 20 Hen. VI, cap. 6; 29 Hen. VI, cap. 2; "Rot. Parl." iv. 352, no. 48; *ibid*. p. 354 A; *ibid*. iii. 661, no. 34.

[1]"Rot. Parl." ii. 280, nos. 38–40.

[1]Op. cit. i. pp. 241–3.

[2]It is given above, pp. 161–2.

[3]Pp. xii-xiii.

[1]Sealing seemed to be necessary. See "Year Book" (Hilary Term), 8 Edw. II, pp. 264–5 (edition of 1678); "Rot. Parl." ii. 113, nos. 7, 8.

[2]*Ibid*.

[3]For publication, see introduction to "Statutes of the Realm"; "2 Inst." 526; "3 Inst." 41; "4 Inst." 26; "12 Rep." p. 56. Instances are very frequent in contemporary records. The writs for publication are frequently found with the statutes in the modern printed collections, and a few of the early statutes are known only from these writs. See also, for example, "Calendar of Close Rolls," 1234–1237, p. 353; *ibid*. 1302–1307, p. 396; "Calendar of Patent Rolls," 1272–1281, p. 335; Rymer, "Foedera" (Record Commission) ii. pt. i. p. 275; pt. ii. PP. 745, 753, 828, 937; iii. pt. i. p. 272; "Placitorum Abbreviatio," pp. 332, 339, 340–1, 348; stat. 23 Edw. III, cap. 7; stat. 34 Edw. III, preamble; stat. 7 Rich. II, cap. 6; "Rot. Parl." ii. pp. 10; 62, no. 10; 113, nos. 7, 8; 254 A; iii. p. 370 A–B; 478, no. 114.

[1]Section V, ii. 2.

[2]For example, "Istud statutum [De Quo Warranto] fuit editum in Parliamento Regis...anno regni suo decimo octavo."—"Plac. Abb." p. 225 (Hilary Term, 19 Edw. I). See also *ibid*. 226, 321, 334; "Liber Albus" (Rolls Series), p. 441; Rymer, "Foedera" (Record Commission), vol. iii. pt. i. p. 217.

[3]For example, "Rot. Parl." i. 217 B (1306); stat. 43 Edw. III, cap. 2; stat. 9 Rich. II, cap. 1.

[1]"Year Book," Pasch. 39 Edw. III, p. 7. See also Coke's commentary, "4 Inst." p. 26.

[2]I have treated this point more fully elsewhere. See "Due Process of Law in Magna Carta," "Columbia Law Review," January, 1914.

[1]Powicke, "The Loss of Normandy," particularly chap. x.

[2]P. 93 ("Annales Monastici," Rolls Series), quoted in Stubbs, "Select Charters" (ninth edition), pp. 322–3. With this compare the ratification of the sentence of excommunication in 1253, containing a protest against any additions to or changes in it, by the King, all the magnates, "et communitas populi" (Bémont, "Chartes," p. 74). Also the writ of Edward I in 1297 ordering the publication of the Charter there declared to be made in "relevacionem omnium incolarum et populi regni nostri" (*ibid*. p. 92).

[1]Bémont, "Chartes des Libertés Anglaises," p. 72.

[2]Folio 168 B.

[3]*Ibid*. 169 B.

[4]*Ante*, p. 136.

[5]P. 151 (Selden Society).

[6]Bémont, op. cit. pp. 82, 83. See also p. 99.

[7]*Ibid*. pp. 90, 92; in the "inspeximus" of the same year.

[8]Bull annulling the Charter in 1305, Bémont, "Chartes," p. 110.

[9]E.g. "Year Book," 11 & 12 Edw. III, p. 63 (Rolls Series); "Rot. Parl." ii. 265, No. 12, where Magna Carta and the Charter of the Forest are spoken of as "ditz Estatutz"; stat. 38 Edw. III, stat. i. mentions the two charters et "les autres Estatutz" faitz in past times. This expression is very common. See, for example, "Rot. Parl." ii. 269; iii. 647 B; iv. 403, no. 36.

[1]"Rot. Parl." ii. 128, no. 9.

[2]*Ibid*. iv. 403, no. 36.

[3]*Ante*, p. 172.

[4]*Ante*, p. 152.

[1]P. 175 (Selden Society).

[2]"Rot. Parl." iv. p. 176.

[3]*Ibid*. pp. 179, 180, 181, 199–200.

[4]*Ibid*. p. 182.

[5]"Liber Custumarum," p. 410 (Rolls Series).

[6]Bémont, "Chartes," pp. 88–9.

[7]*Ante*, p. 123.

[1]Bémont, "Chartes," p. 109.

[2]"Rot. Parl." ii. p. 24 A-B (1328).

[1]"Rot. Parl." i. 285, no. 31.

[2]*Ibid*. ii. 295, no. 10.

[3]Stat. 42 Edw. III, cap. I.

[4]"Rot. Parl." ii. 331 A.

[5]*Ibid*. 364.

[6]*Ibid*. iii. 61, no. 27.

[7]*Ibid*. 443 A.

[8]*Ibid*. 365 A.

[9]*Ibid*. ii. 127 B to 131.

[1]"Rot. Parl." iii. 116, no. 88.

[2]*Ibid*. ii. 128, no. 10.

[3]*Ibid*. 129, no. 20.

[4]*Ibid*. p. 259, no. 28.

[5]Stat. I Rich. II, cap. I.

[6]"Rot. Parl." iii. 88 A.

[7]*Ibid*. i. 286, no. 38. See also *ibid*. ii. 7, nos. 1, 3.

[1]"Rot. Parl." iii. 15, nos. 44–5.

[1]Dicey, "Law of the Constitution" (seventh edition), p. 196.

[1]Lowell, "Government of England," ii. 472, expresses this forcibly when he says: "American institutions are still in some respects singularly like those of England at the death of Queen Anne...Thereafter the changes in the British Constitution found no echo on the other side of the Atlantic, largely no doubt because taking the form of custom, not of statute, they were not readily observed."

[1]In claiming the Common Law as their own the colonists were but applying Coke's doctrine (12 Rep. 29) that "the law and custom of England is the inheritance of the subject".

On the extension of the Common Law to the American colonies, see Reinsch, "English Common Law in the Early American Colonies"; Sioussat, "Extension of English Statutes to the Plantations"; Andrews, "Influence of Colonial Conditions as Illustrated in the Connecticut Intestacy Law" (all three papers in "Essays in Anglo-American Legal History," 1907, i. pp. 365–463); Pound, "Readings on the History and System of the Common Law" (second edition), 1913, pp. 262–304; "Two Centuries' Growth of American Law, 1701–1901" (Yale Essays, 1901); Stevens, "Sources of the Constitution of the United States," 1894, chaps. i., ii., viii.; Warren, "History of the American Bar," 1912, pp. 1–208; Andrews, "Colonial Period," 1912, pp. 182–5.

On the diffusion of English law throughout the world, see Pollock, "Genius of the Common Law," 1912, especially chap. vi.; Bryce, "Roman and British Empires," 1914, pp. 79–133.

[1]Reinsch, op. cit. i. 414, 415; Hallam, "Constitutional History of England," iii. 1906, p. 338: "In quitting the soil of England to settle new colonies, Englishmen

never renounced her freedom. Such being the noble principle of English colonization, circumstances favoured the early development of colonial liberties."

[2]Channing, "History of the United States," i. 1905, p. 529.

[3]*Ibid*. op. cit. ii. 1908, chaps. vi.–viii.

[4]On the claim of the colonists to the benefits of Magna Carta and other constitutional statutes of England, see Osgood, "American Colonies in the Seventeenth Century," 1904, i. 258 *et seq*.; iii. 11, 14; Channing, op. cit. i. 528, 529; ii. 222–5; Warren, op. cit. p. 103; Story, "Constitution of the United States," § 149; Cooley, "General Principles of Constitutional Law in the United States of America" (second edition), 1891, pp. 5–8.

[1]For the text of the first Virginia Charter, see Macdonald, "Select Charters and Other Documents Illustrative of American History, 1606–1775," 1910, pp. 1–11. Other colonial charters will be found in the same volume.

[1]On the royal charters as grants to the colonists of the constitutional rights of Englishmen, see Channing, op. cit. i. 157–62, 308, 309; Stevens, op. cit. pp. 1–34; Egerton, "Short History of British Colonial Policy" (second edition), 1908, pp. 17–19, 70 (cf. pp. 508, 509). On the charters as the earliest American constitutions and as the foundation of the constitutions of the national era, see Thayer, "Legal Essays," 1908, pp. 3, 198.

[2]For the text of the Massachusetts Charter of 1691, see Macdonald, op. cit. pp. 205–12.

Similar provisions are inserted in the commissions and instructions issued to provincial governors. See Greene, "The Provincial Governer," 1907, pp. 93–7, 162–5, 207–70.

[1]The remarks of Merriam, "History of American Political Theories," 1910, pp. 4,5, might well serve as the starting-point in a detailed study of the laws of the Puritan colonies.

[1]See, further, Osgood, op. cit. i. 180, 181, 193–5; Warren, op. cit. pp. 63, 64. For the text of the Body of Liberties, see Macdonald, op. cit. pp. 72–91.

[1]For further details of this controversy, see Reinsch, op. cit. i. 380.381; Osgood, op. cit. i. 256 *et seq*.; Stevens, op. cit. p. 15; and the authorities cited in these works.

[1]Reinsch, op. cit. i. 388, 389; Osgood, op. cit. i. 357; Stevens, op. cit. p. 17.

[2]Warren, op. cit. p. 91; Osgood, op. cit. ii. 165–8. But, see Stevens, op. cit. p. 20, note 1.

[1]Channing, op. cit. ii. 223, note 1; Stevens, op. cit. p. 18.

[2]Reinsch, op. cit. i. 407–8; Warren, op. cit. p. 119.

[3]Reinsch, op. cit. p. 406.

[1]On Somers' opinion, see Channing, op. cit. ii. 223, note 1.

[1]See Channing, op. cit. ii.,. 241, 242. Bancroft, in his "History of the Colonization of the United States" ("History of the United States," Edinburgh [1840], i. 417), remarks: "If the declaratory acts, by which every one of the colonies asserted their right to the privileges of Magna Carta, to the feudal liberty of taxation except with their own consent, were always disallowed by the crown, it was done silently, and the strife on the power of parliament to tax the colonies was certainly adjourned".

[2]On the exercise of the royal veto in the colonies, see, further, Andrews, "Colonial Period," pp. 175–8; Channing, op. cit. ii. 240–5; iii. 6. The disregard of the royal veto by the colonists is an excellent illustration of the way in which Englishmen in America, following the example of their kinsfolk at home, were "acquiring a 'constitution' by robbing the crown of its prerogatives". See Andrews, op. cit. pp. 243, 244.

[1]On the Instructions of 1618, see Channing, op. cit. i. 203.

[1]Channing, op. cit. ii. 16,17.

[2]For further details, see Osgood, op. cit. ii. 192–3; Channing, op. cit. ii. 46, 56.

As William Penn seems to have had a hand in the framing of all these documents which embody the phrases of Magna Carta, it is instructive to observe that in 1670, when he was indicted in an English court for being present at an unlawful and tumultuous assembly in Gracechurch Street, and there addressing the people in contempt of the King and of his law and against his peace, Penn claimed for himself the rights of Englishmen as set forth in Magna Carta and its confirmations. Penn's case may be studied in the sixth volume of Howell's "State Trials". Channing, op. cit. ii. 105, 106, gives a short account of it.

[3]Channing, op. cit. ii. 330, note 2, refers to a "Petition of Right" in colonial Pennsylvania.

[1]See Warren, op. cit. p. 11.

[1]For an instance of this, see Channing, op. cit. ii. 479.Cf. also p. 487.

[2]On political and constitutional controversy in the colonies, see Greene, op. cit. chaps. viii.-xi.; Channing, op. cit. ii. chaps. x., xi.

[1]On the Dyer case, see Greene, op. cit. p. 38; Osgood, op. cit. ii. 130, 131, 163, 164; Channing, op. cit. ii. 60.

[1]On the salary controversy in Burnet's time, see Channing, op. cit. ii. 292–4.On the salary question in the colonies generally, see Greene, op. cit. pp. 59–64, 78, 79, 117, 118, 167–76.See also *ibid*. pp. 119–121, on the part played by Magna Carta in the colonial regulations of officials' fees.

[2]Nearly all the law books of the colonists were imported from England; only thirty-three were printed in America before 1776.

[1]Full details of the importation and colonial publication of English legal texts and treatises will be found in Warren, op. cit. chaps. ii.-vi., viii., ix., xiv.See especially chap. viii.

[2]"Two Centuries' Growth of American Law," p. 13, note 3; Warren, op. cit. p. 71.

[1]Osgood, op. cit. ii. 253; Warren, op. cit. p. 103.

[2]On the history of the legal profession in America before 1789, see Warren, op. cit. pp. 1–238; "Two Centuries' Growth of American Law," pp. 13–17, 265, 266.

[1]Op. cit. p. 188.

[1]Op. cit. p. 211.

[1]For the texts of these documents, see Macdonald, op. cit. pp. 330–5, 356–61, 374–81.

[2]The text will be found in Macdonald, "Documentary Source Book of American History, 1606–1898," 1908, pp. 190–4.

[3]On the political and constitutional controversies of the revolutionary epoch, see, further, "Cambridge Modern History," vii. 1905, chap. v.: "The Quarrel with Great Britain 1761–1776," (Doyle), chap. vi."The Declaration of Independence, 1761–1776" (Bigelow), chap. viii. "The Constitution, 1776–1789" (Bigelow); Channing, op. cit. iii. (1912) "The American Revolution, 1761–1789" (also Channing, "The United States of America," 1896, chap. ii.); Stevens, op. cit. chap. ii.; "Two Centuries' Growth of American Law," pp. 9–47; Merriam, op. cit. chap. ii., iii.

The American theory was summed up by Otis in one of the earliest (1764) political pamphlets of the Revolution: "Every British subject, born on the continent of America, is, by the laws of God and Nature, by the Common Law, and by Act of Parliament entitled to all the natural, inherent, and inseparable rights of our fellow subjects in Great Britain" (see Channing, "The United States of America," p. 45). To what extent, if any, Magna Carta alone and of itself gave the colonists a basis for their version of the principle that there should be no taxation without representation may be seen by a perusal of McKechnie, "Magna Carta" (second edition), 1914, pp. 231–40.

[1]See, further, McIlwain, "High Court of Parliament and its Supremacy," 1910, p. 366; Channing, "History of the United States," iii. 1, 12; Merriam, op. cit. chap. ii.

[1]Bryce, “American Commonwealth,” 1910, i. 426–63, gives a summary account of State Constitutions and their history. On p. 438 he says: “The Bill of Rights is historically the most interesting part of these [State] Constitutions, for it is the legitimate child and representative of Magna Carta, and of those other declarations and enactments, down to the Bill of Rights of the Act of 1 William and Mary, session 2, by which the liberties of Englishmen have been secured”. Bryce refers (p. 447, note 1) to a remarkable decision of Chancellor Kent of New York, in which the great jurist proceeded upon the broad general principle which he found in Magna Carta.Dicey, “Law of the Constitution”, 1915, p. 195, note 1, contrasts the English and American Bills of Rights with similar declarations in continental countries.

[1]See Dillon, “Laws and Jurisprudence of England and America,” 1894, p. 207.

[2]The text of the Constitution of Oklahoma will be found in Bryce, op. cit. i. 718–41. See the comments of Frankfurter (“Harvard Law Review,” xxviii. 790–3) on the Bill of Rights of the State of New York in the light of present judicial and legislative tendencies.

[3]Bryce, op. cit. i. 28.

[1]Some of the leading statesmen held the same view. Thus, Jefferson said: “I hope that a Declaration of Rights will be drawn up to protect the people against the Federal government, as they are already protected in most cases against the State governments”. Jefferson seems to have had in mind the Bill of Rights embodied in State Constitutions.

[2]Stevens, op. cit. pp. 211–14; Bryce, op. cit. i. pp. 27, 367. The text of the Federal Constitution, including all the Amendments, will be found in Bryce, op. cit. i. 706–18; Macdonald, “Documentary Source Book of American History, 1606–1898,” pp. 216–32, 494, 536–8, 546, 547.

[1]Stevens, op. cit. pp. 213, 214.

[1]See, further, Cooley, op. cit. p. 281; Stevens, op. cit. pp. 222–4, 230, 232,233. Some of the American precedents of the colonial and revolutionary periods will be found in Macdonald’s collections of sources.

[1]Dillon, op. cit. pp. 208–12.Adams, “Origin of the English Constitution,” 1912, p. 243, in commenting on chapter thirty-nine of Magna Carta, remarks: “What was then [1215] demanded was a trial according to law and securing to them [the barons] their legal rights. Taken in this sense clause 39 of Magna Carta would correspond somewhat closely to the general prohibition included in Amendment XIV to the Constitution of the United States: ’nor shall any State deprive any person of life, liberty, or property without due process of law’.”

[2](1908) 211 U.S. 78, 100, 28 Sup. Ct. 14.

[1](1884) 111 U.S. 701, 708, 4 Sup. Ct. 663.

[2](1819) 17 U.S. 235, 244.

[3]The literature upon the due process of law clauses is very voluminous. The main points are considered by Cooley, op. cit. pp. 229–38; Willoughby, "Constitutional Law of the United States," 1910, ii. §§ 460–76; Hall, "Constitutional Law," 1911, §§ 144–9; Guthrie, "Magna Carta and other Addresses," 1916, pp. 1–26. See also the addresses before the New York State Constitutional Convention in 1915 ("Exercises in Commemoration of the Seven Hundredth Anniversary of Magna Carta," Albany, 1915).

[1]See Willoughby, op. cit. ii. § 469.

[1]Willoughby, op. cit. ii. §§ 469, 470. On the general character of the American Written Constitution, see Bryce, "Studies in History and Jurisprudence," 1901, i. 145–254. See also Bryce, "American Commonwealth," i. pt. i. ; and Dicey, op. cit. pp. 134–76, on the American doctrine of the supremacy of the Written Constitution. On English constitutional history in its relation to the American limitation of the powers of legislative bodies and to "that peculiar feature of the American unwritten constitution, the power of the judiciary to declare laws regularly adopted to be void because unconstitutional," see the suggestive comments of Adams, op. cit. p. 42. On this power of the American courts, see, further, Kent, "Commentaries on American Law," 1896, i. 448–54; Thayer, "John Marshall," 1901, pp. 72 *et seq*., and "Legal Essays," 1908, pp. 1–41. Dicey, op. cit. p. 196 note, has only one of the three departments of government in mind when he remarks that the American Bills of Rights have the "distinct purpose of legally controlling the action of the legislature by the Articles of the Constitution".

[1](1884) 110 U.S. 516, 4 Sup. Ct. 111.

[2]8 Rep. 115, 118*a*.

[1]Hall, op. cit. p. 133; Willoughby, op. cit. ii. § 470. For further views of the Supreme Court in regard to the "law of the land" of Magna Carta and the "due process of law" clauses of the Amendments, see Hall, op. cit. p. 132. A recent decision of the Supreme Court upon due process of law (*Frank* v. *Magnum* (1915) 237 U.S. 309, 35 Sup. Ct. 582), which promises to become a *cause célèbre*, is discussed in the "Harvard Law Review," xxviii., 1915, pp. 793–5.

[1]"Historia de la legislación y recitationes del derecho civil de España," by D. Amalio Mariehalar, Marqués de Montera, and Cayetano Manrique, Advocates. Madrid, 1861. Tome ii. 433. "We are not so blinded by Spanish sentiment as to suppose that the insurgents of Runnimede had before their minds the Ordinance of León in drafting the conditions imposed upon John Lackland. But when it is considered that the lapse of time between the two events was long enough to enable the English to know the Ordinance of León, and not long enough to permit them to forget it, perhaps it may not be impossible that, in discussing the means of restricting royal authority (which was almost the sole object of Magna Carta) they may have had in mind all the instruments, facts, and agreements between kings and peoples, in order

to consider precautions taken against tyranny in other countries, and that, upon this supposition, they may have also taken into account the Ordinance of León."

[1]"Historia de la legislación y recitationes del derecho civil de España," by D. Amalio Mariehalar, Marqués de Montera, and Cayetano Manrique, Advocates. Madrid, 1861. Tome ii. 426–34. In fact, Mariehalar and Manrique, although they are unaware of the fact, examine the text not of the Magna Carta of 1215, but of the Charter granted by Henry III in 1225. Hence come certain differences in the paragraphs which they quote, and also a mistaken reference to a provision non-existent in the Charter of 1215—a provision prohibiting the granting of land in mortmain to religious houses.

[1]The references to the chapters are not from Mariehalar and Manrique, who give no numbers. The references are here given according to the text of Magna Carta in Stubbs' "Select Charters".

[2]Yet attention should be drawn to the limitation of these rights in respect of foreign and unassociated merchants (ch. 41, cf. ch. 13, and see McKechnie, 2nd edition, pp. 247–8).

[1]These should be distinguished from the provisions concerning judicial process (ch. 39).

[2]Another important point would be the comparison of the Castilian *Cort* or royal Curia with the English royal Court in respect of their composition and the extent of their jurisdiction. See Hinojosa, "El derecho en el poema del Cid"; also Altamira, "Hist. de España," tome i. núm. 294.

[1]As to the limited meaning of "liber homo," which does not signify what a student of Spanish jurisprudence might suppose, see McKechnie, ch. 1. As to the vagueness of the phrase, "legem terrae," see his ch. 39.

[2]Arts. 13 and 14 of the Spanish text in Mariehalar and Manrique.

[1]See the general lines of this social and political constitution in my "Historia de España y de la civilización Espanola," tome i. (third edition), paragraphs 275, 283, 289, and 290–2; also Hinojosa, "Estudios sobre Historia del derecho Español".

[2]McKechnie, 2nd edition, pp. 241–8.

[1]McKechnie, 2nd edition, p. 253.

[1]See my "Hist. de Esp." i., paragraphs 279, 311, 320; ii. 443, 467, 479, 490.

[1]See McKechnie.

[1]I propose to call attention below to some exceptions. There are unpublished fragments or rolls of Close Rolls, Liberate, Fine, Norman, and Prestita Rolls.

[2]Notably in that of the "Rotuli Cartarum," edited for the Record Commission by Sir Thomas Hardy.

[1]"The Norman Exchequer Rolls," printed by Stapleton, and the "Chancellor's Roll," printed by the Record Commission.

[2]I refer throughout to the pages of the Oxford edition by Messrs. Hughes, Crump, and Johnson.

[1]The documents now known as Foreign Accounts and Enrolled Accounts.

[1]Ultimately the Clerk of the Pells and the two Chamberlains of the Receipt.

[1]They had a number of other names in their own time.

[2]Another instance might be taken from the comparative growth of Parliament and Council.

[1]E.g. by way of fines, on the one hand, or salaries, on the other.

[1]"Dialogus," p. 81.

[2]*Ibid*. p. 83.

[3]See a note on the subject of Exchequer Tallies in "Archæologia," lxii. Later these two duties belonged to distinct Officials, the "Scriptor Talliarum" and "Clericus Pellium".

[4]"Dialogus," p. 62.

[5]*Ibid*. p. 107.

[1]"Dialogus," pp. 62, 107.

[2]One printed by Madox ("Exchequer," chap. x. § 13, note) and one by Dr. Round (Pipe Roll Society, "Ancient Charters," p. 96). See below, p. 285.

[3]I, xxii.

[4]Made by Madox (chap. iv.) among others.

[5]Delisle, in "Bibliotheque de I'Ecole des Chartes," x. 174, etc.; Poole, "The Exchequer in the Twelfth Century"; Valin, "Le Duc de Normandie et Sa Cour; Haskins, in "English Historical Review," xxiv., and "American Historical Review," xx.; Powicke, "The Loss of Normandy".

[6]I, xxiii.

[7]Valin's theory that it started later, with Richard of Ilchester, is discredited by Powicke (p. 85) and Haskins.

[8]Loc. cit.

[1]"Dialogus," p. 122: "Cum ex regis mandato vel in camera curie vel operationibus vel quibuslibet aliis firmam Comitatus (vice-comes) expenderit...."

[2]Delisle, p. 279.

[3]"Dialogus," pp. 82, 83.

[1]Poole, op. cit. p. 119.

[2]"Dialogus," p. 84.

[3]*Ibid*. p. 70.

[1]"Dialogus," p. 70, "Cum enim sic disposite essent sedes ab initio ut scriptor thesaurarii ad latus suum resideret...et item scriptor cancellarii ad latus scriptoris thesaurarii ut fideliter exciperet quod ille prescribebat...non superfuit locus in quo scriptor ille (Thomas Brown's clerk) resideret...set datus est ei locus in eminenti ut prospiciat et immineat scriptori thesaurarii qui primus scribit et ab ipso quod oportet exciperet."

[2]*Ibid*. p. 84.

[3]*Ibid*. p. 117.

[4]*Ibid*. p. 69.

[5]*Ibid*. p. 70.

[1]Madox, "History of the Exchequer" (quarto edition, ii. 263).

[2]Even so it is difficult to see exactly what part of the later Remembrancer's duties is here foreshadowed. Something in connection with the "Adventus Vicecomitum," but that is a matter which concerns the King's Remembrancer equally.

[3]P. 120.

[4]"Dialogus," p. 70.

[5]"...Licet enim (clericus Cancellarii) non prescribat conscribit tamen"..."*Discipulus:* Veri simile etiam videtur custodem tertii rotuli eadem scripture lege constringi." "*Magister:* Non est veri simile tantum set verum."...[*ibid*. p. 71].

[1]"Item scriptor Cancellarii ad latus scriptoris Thesaurarii ut fideliter exciperet quod ille prescribebat (*ibid*.).

[2]P.119.

[3]"Eng. Hist. Rev." xxviii. 209. Richard of Ilchester became Seneschal of Normandy in 1176, and I have suggested below that he may have introduced there certain reforms which his English experience showed to be desirable.

[4]This phrase of the seventeenth century apologists comes very near to rendering the "antiqua consuetudo" of the "Dialogus".

[1]Cp. Madox, *loc. cit*.

[2]"Dialogus," p. 84.

[3]P. 115.

[1]This description and the division between the classes of Chancellor's and Pipe Rolls are the accepted Record Office practice.

[2]The first is of the year 3 Henry III and the second well after 24 Henry III.

[1]Exch. Acc. 3/1, 152/1, 349/1A, 505/4; and K.R. Misc., 1/5.

[2]Henri Legras, in the "Bulletin des Antiquaires de Normandie," xxix., 21.

[3]See "Proceedings of the Society of Antiquaries". 2nd Ser. xxv., 29.

[4]Exch. L.T.R., Misc. Rolls, 1/1, 2.

[5]Receipt Rolls, 1.

[6]Exch. Acc. 249/2.

[7]*Ibid*. 325/21 and 349/1B.

[8]"Rotuli de Liberate ac de Misis et Prestitis."

[9]"Documents illustrative of English History"...p. 231.

[10]*Ibid*. p. 270.

[1]Exch. Acc. 325–2.

[2]"Rotuli de Liberate ac de Misis et Prestitis."

[3]Close Rolls, 10 and 12.

[1]i. 109.

[2]

Stapleton, i. 1–106 = Norman Pipe Rolls, 10.
109–123 = ” ” ” 1.
127–288 = Norman Pipe Rolls, 18.
ii. 289–497 and 512–530 = Norman Pipe Rolls, 2 and 6.
501, 502 = Norman Pipe Rolls, 5.
505–511 = ” ” ” 9 and 3.
[512–530, see above.]
531–537 = Norman Pipe Rolls, 4 and 11.
538–548 = ” ” ” 7 and 8.
549–560 = ” ” ” 16 and 15.
560–568 = ” ” ” 14.
568–571 = ” ” ” 13 and 12.
572–574 = ” ” ” 17.

Nos. 5, 12, and 13 are small rolls (see below, p. 272). Of the remainder all save Nos. 1, 2, 10, and 18 are now single rotulets; but it seems clear that in Stapleton’s time they were fastened together to some extent (see his Introduction, p. ix.).

[1]“Recueil des Actes de Henri II,” p. 334.

[2]It was added in 1838.

[1]See, for example, the “Roll of the Bedford Eyre of 1202,” printed by the Bedfordshire Hist. Records Society.

[2]One being the “Prestita” Roll.

[3]“Jewish Hist. Soc. Proc.” viii.

[4]“English Hist. Rev.” xxviii., quoted above.

[1]In “Bibliothèque de l’Ecole des Chartes,” quoted above.

[2]P. 274.

[1]Prof. Powicke has of course referred to other administrations. besides the financial one in Normandy; for instance (p. 85) that of the holding of “Common Pleas at the Norman Exchequer”; cf. Valin, p. 250 and Haskins (“American Hist. Rev.”), p. 279.

[1]“English Hist. Rev.” loc. cit.

[1]“Quia fuerunt cum comite Johanne;” cf., e.g., “Chancellor’s Roll,” 3 John (Record Commission), p. 18.

[1]Valin, p. 123.

[2]ii. 501, 502.

[3]Exch. Acc. 349/1 A.

[4]Rolls 10 and 18 (especially 10) are slightly broader.

[5]Cf. Haskins ("American Hist. Rev."), p. 279.

[6]Rolls 2, 10, and 18.

[1]"Pipe Roll Soc." p. 293: cf. Pipe Roll, 58, m. 5, the account of the archbishopric of Canterbury.

[2]Probably the "compotus de receptis suis" will be found to occur fairly frequently under John when the Pipe Rolls of this reign are printed.

[3]I.e. Rolls 5, 12, and 13 (Stapleton,pp. 501, 502, and 568–71).

[1]L.T.R., Misc. Rolls, 1/3.

[1]"Alter alterius honera portate et sic adimplebitis legem scaccarii."

[2]There is nothing in the contents of the face of the membrane to preclude this.

[1]It is perhaps worth noting in this connection that membrane 9 of our roll is annotated at the foot, Pipe Roll fashion, with the names of the counties which appear on it.

[2]Also foreshadowed in the Memoranda described in the "Dialogus" (p. 115).

[1]Cf. the Oxford membrane of the Pipe Roll of this year where various Jewish debts are mentioned but have a note added: "Set Benedictus de Talemunt respondet...in compoto suo".

[2]"Jewish Hist. Soc. Proc.," already quoted.

[3]They may be disguised, for instance, in the phrase, "de pluribus debitis".

[1]Including even pleadings: see membranes 2*d*,3.

[2]On one or two later occasions (cf. "Jewish Hist. Soc." loc. cit. p. 37) we have Jewish accounts for no particular reason coming to normal audit and appearing among the Foreign Accounts. Generally speaking, however, the King was content with receipts from them and controlled these absolutely.

[3]"Jewish Hist. Soc. Proc.," quoted above.

[1]Dr. Round has referred to one or two in a note in the "English Hist. Rev."(vol.xxviii., p.525). See also p. 280 below.

[2]See above, p. 260. One of the four documents from this class there mentioned we eliminated subsequently (p. 270) as being a fragment of a Norman Exchequer Roll.

[1]Cf. other remarks relating to this rather mysterious accountant, below, p. 296.

[1]Exch. Acc. 505/2 and 3, already mentioned as having been ascribed, wrongly, to the reign of John; and L.T.R. Misc. Rolls, 1/5. The first and last of these are early in the reign of Henry III (about the third year); the second is later (after the twenty-fourth year).

[2]Monsieur Legras in printing this document has commented on a number of subjects of interest connected with it, but not to any extent upon its administrative significance.

[1]I have not been able to make this correspond with the itinerary of King John at any time in Normandy.

[1]Exch. Acc. 3/1.

[2]Described in "Proc. Soc. Antiq.," 2nd series, xxv. 29.

[3]Printed in facsimile by the London School of Economics.

[1]Receipt Rolls, 1.

[2]*Ibid*. 3 and following. This point of view with regard to the early Receipt Rolls has been developed in a paper in "Jewish Hist. Soc. Proc." viii.

[3]*Ibid*. 1564.

[4]See also above, pp. 278–279.

[5]Receipt Rolls, 2

[1]A.C. 47 (No. 2).

[2]Pipe Roll Society, "Ancient Charters," p. 96.

[3]Receipt Rolls, 3.

[4]Safe conduct for Peter de Leon, "Rot. Lit. Claus." (Record Commission), p. 3.

[5]*Ibid*., Introduction, p. iii.

[6]Norman Roll, 3. It may be convenient here again to equate the printed references with the modern references to the rolls. Hardy's page 1 is Norman Roll, 3; p. 22, Norman Roll, 4; p. 37, Norman Roll, 2; pp. 45, 98, and 122, Norman Rolls, 5, 6, and 7 respectively.

[1]The enrolling of private deeds on the English Pipe Roll was not unknown: a fee was, of course, paid for the privilege. The present roll, however, may prove on investigation to have been put together rather for the benefit of the Exchequer than of the persons concerned in the deeds.

[2]"Rotuli Normannie," p. 122.

[3]*Ibid*. pp. 37, 38, 40, 41.

[1]P. 77.

[2]P. 107.

[3]See the edition of these by Francisque-Michel and Bémont in the series of "Documents Inédits".

[4]Cf. for example the Gascon Rolls of Edward II.

[1]Liberate Roll, 2, m. 5.

[2]We never get separate Norman Patent or Charter Rolls in our period, but there are plenty of entries of letters patent on the Norman Rolls when they concern financial matters.

[1]"Rot. de Fin." (Record Commission), p. 115; cf. pp. 76, 222, 228, 239, etc.

[2]E.g. an entry (p. 277) cancelled "quia ponuntur in Rotulo".

[3]P. 296.

[4]P. 11.

[1]P. 293.

[2]The dates of these may be compared with those of the Norman Liberate enrolments already mentioned for the years 1200 and 1203.

[3]Later the writs of Liberate were separated off from the Close Rolls and the Chancery Liberate Rolls resumed as a separate series.

[1]Liberate Rolls 1 and 2 have no titles; only later endorsements.

[2]The Patent and Charter Rolls date from the beginning of the reign.

[1]Cf. Hardy, Introduction to "Rot. Norm.," p. xi.

[2]"Magna Carta," 2nd edition, p. 268.

[3]P. 279.

[4]P. 85. I am not quite sure how far in another place (p. 349) Prof. Powicke distinguishes “Camera” and Exchequer.

[1]Above, pp. 264–265.

[2]In later times receipts from the Jews were so controlled though the Pipe Roll seldom touched them.

[1]“...per paruum sigillum quia magnum non erat presens...” (“Cal. Rot. Pat.” p. 66): the use is evidently not normal.

[1]“Exchequer,” chap. iv. § vii.

[2]“Cal. Rot. Pat.” p. 170.

[3]*Ibid*. p. 147. I am indebted to my wife for this reference.

[4]Quoted by Madox, loc. cit.

[1]“Cal. Rot. Pat.” p. 145.

[2]Thus we find in one instance instructions given to Peter de Cancell’ to go with four others and break the locks in order to obtain a sum of money for the King (*ibid*. p. 136): again Peter de Maulay is to take out of it 10,000 marks, keep 1000 for expenses, and send the balance to the King (*ibid*. p. 161). It does not appear that de Maulay was normally connected with the Administration of the Treasury.

[3]*Ibid*. p. 88. This is possibly identical with the “Scaccarium” which gave us trouble above.

[1]See above, p. 289, on the subject of the Oblata and Fine Rolls.

[2]“Rot. Pat.” pp. 61, 70, 166. We have also record of moneys. paid “de Camera” (*ibid*. p. 185).

[3]*Ibid*. pp. 168, 169, 170, 174, 187, 194.

[4]“Rot. de Liberate...” (“Prestita” section), p. 175.

[1]It is to be observed that both, in the matter of their dates, follow the King, so far as we can judge. Part of the unpublished “Prestita” Roll is abnormal in form, containing only lists of prests to soldiers, and has no dates: but the last membrane (the roll for 16 and 17 John) has the dates; and they conform, as do those in the printed rolls, to the King’s Itinerary.

[2]*Ibid*. p. 74.

[3]*Ibid*. p. 73: cf. a precisely similar entry, *ibid*. p. 91.

[1]"Rot. de Liberate..." ("Prestita" section), p. 145, already cited above.