Medieval Law
and the
Foundations of the State

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his chattels and fine. When burgesses and villeins left their property to sons who were clergy, the latter must not claim immunity from service to the landlords. Bishops should not require burgesses or others to swear that they never lent money in usury. Cases brought by clerks about vines and burgage rights and the ownership of serfs should be heard in the landlords’ courts, not the Church’s. The clergy should not excommunicate people for selling corn and other goods on Sundays, nor for doing business with Jews, though they were welcome to excommunicate Christians who wet-nursed for them. Finally no lord should be excommunicated or have his land placed under interdict for the offence of his servant, or for any offence at all before he or his bailiff had been summoned, and at his first appearance before ecclesiastical justices no one who had not previously defaulted or been excommunicated should be bound by oath to accept the court’s order.\footnote{Recueil des Actes de Philippe Auguste, ii, nos. 899–900.}

\section*{Justice by Royal Writ in England}

In 1166, fourteen years after Frederick Barbarossa’s great \textit{Landfriede} and eleven after Louis VII’s ten-year peace for the kingdom of France, Henry II, king of England (1154–1189), duke of Normandy and Aquitaine and count of Anjou, promulgated the Assize of Clarendon. By the counsel of the archbishops, bishops, abbots, and his other barons Henry ‘decreed for the preservation of the peace and the maintenance of justice’ (\textit{statuit pro pace servanda et justitia tenenda}) that inquiry about notorious murderers, thieves, and those who harboured them should be made in every county, on the oaths of twelve of the more lawful men of each hundred and four lawful men of each township.\footnote{Chronica Magistri Rogeri de Hovedene, ed. William Stubbs, ii (London: Rolls Series, 1869), pp. cii–cv, 248–52: tr. in EHD ii. 407–10.}

The German parallel is clearer if all Henry’s measures to restore stability after the Anarchy of Stephen’s reign are taken into account. ‘For the common restoration of my whole realm’, Henry had promised in his coronation charter, ‘... holy Church and all my earls, barons and vassals’ should have ‘their customs, gifts, and liberties ... as freely and peaceably and fully’ as King Henry, his grandfather, granted and conceded them. This meant first of all a definition of the rights of the Church—and a sharper demarcation of the rights and powers of the king over against the Church. The Constitutions of Clarendon of January 1164 purported to be just such a statement of the customs and liberties of the king’s ancestors with regard to the English clergy.\footnote{Select Charters and other Illustrations of English Constitutional History, ed. William Stubbs (9th edn., Oxford: Clarendon Press, 1913), 158, 163–7: tr. in EHD ii. 407, 718–22.} It is

\begin{thebibliography}{99}
\item Recueil des Actes de Philippe Auguste, ii, nos. 899–900.
\end{thebibliography}
notable that the first and second constitutions, asserting the jurisdiction of the king’s court over disputes about advowsons, even when these were between ecclesiastical lords, and the inalienability of churches on the king’s estates, concerned problems Frederick I had touched on in the seventeenth chapter of his Reichslandfriede, forbidding the abuse of rights of advocacy. Though it was little compared with the German aristocracy’s exploitation of the church lands they ‘protected’, the right of many English landlords to present parish priests to their livings was a valuable sort of real property, and it was important that the king should control it. The third and most celebrated constitution recalls the sixth chapter of the Landfriede which had made clerks who committed crimes against the peace pay fines to the count as well as submit to the discipline of the bishop, and rendered them liable to outlawry if they resisted.\textsuperscript{95} But Henry went further and ordered his justices to ‘send to the court of holy Church to see how the case is there tried. And if the clerk be convicted or shall confess, the Church ought no longer to protect him.’

In chapters 8 and 9 of the Landfriede of 1152 Frederick had dealt with the situation which was most disruptive of a landholding society: conflicting claims to the same pieces of property. If the sitting tenant could bring his overlord before the count to warrant the grant of the tenement and prove ‘by suitable witnesses’ that it had not been unjustly seized, the land should be confirmed to him. If several claimants produced different grantors, the judge should seek a sworn verdict from two men of the area of good repute as to who had possession which was gained without violence.\textsuperscript{96} Henry II also made the protection of just possession or ‘seisin’ a central element of his peace. Probably in 1166, but separately from the main Assize of Clarendon, Henry ordered an inquiry into recent dispossessions, and for a few years fines owed by those found culpable appeared on the pipe rolls of the royal exchequer.\textsuperscript{97} By the Assize of Northampton of 1176, which claimed to reaffirm and revise the assizes made at Clarendon, the king’s justices were again instructed to cause report to be made of disseisins ‘committed against the Assize’ since a new date of limitation: the king’s return from Normandy to England after the rebellion led by his son in 1173–4.\textsuperscript{98}

As well as punishing disseisin, enforcing ‘the assize of wicked robbers

\textsuperscript{95} Constitutiones et Acta Publica Imperatorum et Regum 911–1197, MGH Legum Sectio 4, i. 196–8; cf. B. Arnold, Princes and Territories in Medieval Germany, 167–8, 195–202 on ecclesiastical advocacy in Germany.

\textsuperscript{96} Constitutiones ... 911–1197, i. 197.

\textsuperscript{97} Haskins, Norman Institutions, 129–33; Royal Writs in England from the Conquest to Glanvill, ed. R. C. van Caenegem, Selden Soc. 77 (London, 1959), 284–5.

\textsuperscript{98} Stubbs, Select Charters, 179–81: tr. EHD ii. 411–13.
and evildoers’ throughout the counties they traversed, reporting on the
custody of castles and making sure that unauthorized castles were razed
to the ground, the justices were also, by the Assize of Northampton, to
determine all suits pertaining to the crown ‘through the writ of the lord
king’ which concerned ‘half a knight’s fee or under’, unless the justices
found the cases too difficult to decide ‘without the lord king’. When a
freeholder died they were to see that his heirs had seisin of his lands and
his widow her dower; if the lord of the fief denied the heirs seisin, what
the deceased held in fee at his death should be established by the inquiry
of twelve lawful men and restored to the person they found to be the
nearest heir. By 1179 the evidence is clear in the Pipe Roll that an heir
could purchase a writ to begin this action or assize of mort d’ancestor
(‘assize’ was applied both to the assembly in which the king made law
and to the form of trial provided), and anyone recently dispossessed of
his tenement without a judgment against him could have a writ to begin
an action of novel disseisin, likewise decided by the ‘recognition’ of a
jury. The first treatise on the common law of England, which claims to
have been written ‘under the direction of the illustrious Rannulf
Glanvill’, Henry II’s justiciar, is essentially an account of the workings
of the ‘petty assizes’ of mort d’ancestor, novel disseisin, darrein
presentment, and utrum (the last two the application of jury trial to
disputes about advowsons, and to the question whether land was held
by a churchman ‘in free alms’ and therefore exempt from feudal
services). ‘Glanvill’ also describes a new Grand Assize. Whereas limited
questions about events such as unjust disseisin in the recent past could
be settled relatively easily by a petty assize jury, the much more difficult
issue of the ultimate right to the land had been resolvable only by the
judgment of God delivered through a battle between the champions of
the claimants to the ‘greater right’, a trial held in an overlord’s court, or
brought by writ into the king’s court. The Grand Assize was provided
as an alternative which took account of ‘human life and civil status’
(defeat in battle could remove both of these). The tenant was now
offered the choice of trial by ‘twelve knights of the neighbourhood who
best know the truth of the matter’ to be elected by four knights brought
to the king’s court by the sheriff. To divert the case from battle to assize
the tenant purchased from the royal chancery a ‘writ of peace’ (breve de
pace habenda). 99

What made Henry II’s peace different from Frederick Barbarossa’s,
and fostered the growth within it of the earliest forms of action of the
common law, was the administrative power of the king’s household,

99 Royal Writs in England, 297–135, 444–66; The treatise on the laws and customs of the
realm of England commonly called Glanvill, ed. and tr. G. D. G. Hall (London, 1965), 1,
26–33, 148–70.
extending to the corners of a land much smaller than Germany or France. This power was expressed in the brutally direct, arenga-less, writs which ordered the fulfilment of a feudal obligation or collection of a fine, and even before the Norman Conquest might order the thegns in the shire court to settle for the king disputes about land-grants.\textsuperscript{100}

Twenty years after the Conquest, the Domesday commissioners were taking from juries assembled by the sheriffs verdicts on conflicting claims to fiefs. Under the authority of the king a set of rules about the holding and inheritance of land was in place by the 1130s and needed neither an Anarchy nor exceptional originality on the part of Henry II to become the basis of the Common Law. What was needed was better means of enforcement. The land actions were the end-product of a persistent royal intervention to enforce the rights and obligations of lords and tenants, especially the obligation of lords to warrant their own and their ancestors’ grants. The king stepped in first to protect the lands of churches, because they had often lost the patronage of (Anglo-Saxon) founding families at the Conquest.\textsuperscript{101}

The earliest orders to overlords or sheriffs to ‘do right’ concerning encroachments on church lands may have followed from specific grants of the king’s peace. The Conqueror thus confirmed to Abbot Aethelwig the lands of Evesham \textit{cum mea bona pace et protectione}: the sheriff was (therefore?) to prevent any injury to the abbot’s property, and ‘if anyone presumes to do him any injustice, let the Abbot complain to me, and I will do him full justice concerning his complaint’.\textsuperscript{102}

The relationship which the king established with ecclesiastical landholders was from the first one of public authority, not private lordship, and this spread by way of dispute-settlement to laymen, who sought writs of right to counter those obtained by churchmen. The right to be done might be the occupant’s return of the property in dispute or an overlord’s hearing of the case in his honour court, but the writ increasingly often ended: ‘unless you do it, my sheriff will’ or ‘my itinerant justices shall do it’.\textsuperscript{103}

‘Glanvill’ knows a formal procedure to prove that the lord’s court did not do right and bring the case into the king’s court; and there the Grand Assize, begun by the writ of peace, was available to settle cases

\textsuperscript{100} EHD i. 379 (cap. 40); F. E. Harmer, \textit{Anglo-Saxon Writs} (Manchester UP, 1952), 160, 183–4.
\textsuperscript{103} H. L. Macqueen, \textit{Common Law and Feudal Society in Medieval Scotland} (Edinburgh UP, 1993), 44 ff. for the early intervention of the king of Scots on behalf of ecclesiastical landlords.
of right to land, advowsons, debt, and dower, ‘avoiding the doubtful outcome of battle’. From the general writ of right there developed the writ ‘praecipe quod reddat’ which, as set out by ‘Glanvill’, instructed the sheriff to ‘order’ a defendant to return a tenement or repay a debt to the plaintiff, and if he refused, to summon him before the king or his justices at a certain date to show why.\textsuperscript{104}

English land-law was a by-product of the ‘tremendous authority of royal majesty’\textsuperscript{105} over the magnates which Norman kings inherited from their Anglo-Saxon predecessors and applied to the disputes of the knightly society which they transported from France. The assize of \textit{novel disseisin} may have been devised first of all to prevent the lord himself from taking back a tenement for an alleged misdemeanour on the tenant’s part, and \textit{mort d’ancestor} was almost certainly directed first against the lord who tried to keep an heir out of his inheritance.\textsuperscript{106} The king required that lords vouch for (‘warrant’, guarantee) their grants to tenants when outsiders claimed their tenements and, if the claims were successful, that they gave them others of equal value. Such obligations were extended down the generations. ‘Glanvill’ states baldly that ‘the heirs of donors are bound to warrant to the donees and their heirs reasonable gifts’.\textsuperscript{107} Tenants (and virtually all lords were the tenants of others for some of their lands) became eager for the king’s charters and writs. The wealth of the subjects who wanted these favours combined with the financial necessities of the king to give the law what Maitland called ‘its most repulsive features: if anyone has a right in England, that right must be a saleable commodity’.\textsuperscript{108} Of the three thousand or so known grants of Henry II, half were sought in the first few years of the reign, predominantly by monasteries and cathedral chapters, to confirm the landholding situation as it was claimed to have been before the Anarchy. The grants that we have from Henry II were largely preserved by the churches which received them: the almost 500 royal acts recorded in the chancery’s new charter rolls for the first year of King John (1199–1216) suggest that grants had always been more equally split between churches and individual laity.\textsuperscript{109}

Often a royal charter included protection from being sued for a free


\textsuperscript{107} \textit{Glanvill}, 74; Hyams, ‘Warranty and Good Lordship’, 476.


tenement without the king’s express order. By 1200 a maxim was developing into a rule that no one could be made to answer for his freehold, in his lord’s court or anywhere else, except on the authority of a royal writ.\textsuperscript{110} Into the thirteenth century the writs that formed the basis of Glanvill’s treatise were being adapted and supplemented to provide new remedies. Notably \textit{writs of entry} allowed claimants to recover lands which tenants had entered legally but only (for example) by means of leases which had now expired or as the heirs or grantees of now dead disseisors.\textsuperscript{111}

The development of the forms of English law was erratic and improvised. The strength of the law was in its integration, by the king’s will, of communal processes of dispute-settlement in the courts of lordship and shire with the expert jurisdiction of royal and ecclesiastical judges. The king of England did not, like the German emperors, ordain a peace and leave its enforcement to the magnates. Even when they were abroad—and in the twelfth century they spent much time in their French dominions—Norman and Angevin kings continued to institute legal proceedings in English courts by \textit{writs de ultra mare} addressed to their English viceroy, the justiciars, who carried on the process by further writs to the sheriffs.\textsuperscript{112} In the early part of the twelfth century the local public courts reigned supreme. Henry I had asserted, in an edict communicated to the counties by writs, that the king’s shire and hundred courts should be held at the same times and places as before the Conquest (‘and not otherwise’), and be attended by all the men of the shires to hear the king’s pleas and judgments; and he had extended the shire court’s jurisdiction in land cases to cover disputes between the men of two different lords (and not just where these lords were tenants-in-chief), since there were then two competing honour courts.\textsuperscript{113} Probably from the time of the Conquest there was the procedure called \textit{tolt} (set in motion by simple complaint to the sheriff) for demonstrating that there had been a default of right in a seignorial court which justified the shire court in taking over.\textsuperscript{114} Henry I experimented with ‘justices of all England’ (\textit{justitiarii totius Anglie}) to go from his court on a journey (\textit{iter}, ‘eyre’) throughout the counties, to hear a variety of pleas (rather than the single great lawsuits which the \textit{curia regis} had dealt with before), but he also fostered the appointment of justiciars for individual

\textsuperscript{110} Royal Writs in England, 214–25, 496–9.


\textsuperscript{113} EHD ii. 431–4.

counties, to hear in courts of their own the pleas (either criminal or based on royal grants of land or peace) which were reserved to the king. In fact, it seems more and more probable that Henry I only confirmed an office the beginnings of which lay in the reign of William II or even that of the Conqueror himself. It was in the 1070s that a special shire justice with more judicial expertise than the sheriff would have become necessary, for an ordinance of about 1072 reduced the participation of churchmen in shire and hundred courts. At any rate, by Stephen’s reign the office of county justiciar had become an object of ambition for the greatest barons. In Lincolnshire it was granted in 1154 to the third bishop of Lincoln in succession.

In 1166, Henry made a decisive change of direction. There is evidence to suggest that a lost assize first gave to the sheriffs and local justices the task of prosecuting murderers and robbers named by presenting juries, and that the Assize of Clarendon transferred the responsibility to royal justices in eyre when the campaign was already under way. This was the beginning of a phase in the development of English justice lasting almost to 1300, which was dominated by periodic eyres of the country ad omnia placita, that is, with authority to hear all types of pleas, both criminal and civil. The sheriffs continued to deal with lesser crimes on their twice-yearly ‘tourns’ of the hundred courts, and to hear in the shire courts, either on complaint or instructed by royal writs of justiciæ, civil cases of small value but much significance to the local community concerning debt, nuisance, the return of fugitive villeins to their lords, and unjust distraint (the seizure of farm animals and chattels to compel the fulfilment of obligations). The great land cases of the aristocracy were removed from the jurisdiction of the shire court by writs of pone ordering the sheriff to put cases before the king’s justices, and by the new assizes. The whole judicial system nevertheless depended utterly on the administrative zeal of the sheriff, for it was he who acted on the returnable writs which were at the heart of Henry II’s innovations; he who assembled the jurymen, got them to view the land in dispute, and ensured that they and the parties appeared before the justices in eyre.

116 EHD ii. 604–5.
117 Stenton, English Justice, 66.
121 Early Registers of Writs, 16 (53).
when they came to the shire, or (more difficult) in the curia regis, wherever that might be; and he who returned legal writs, with notes of what he had done, to the appropriate justices, thus informed of the nature of the case to be heard.\(^{122}\)

In 1170 there was an Inquest of Sheriffs, followed by a change of personnel which was more sweeping than previous replacements. The purpose of that inquiry was to see that the judicial system centred on the eyres was working properly in such respects as the making of excuses or ‘essoins’ by litigants for non-appearance (cap. xiii), and particularly the custody of the chattels due to the king from the felons convicted under the Assize of Clarendon. The king also demanded to know about persons unjustly accused out of hatred or for reward, and those let off for money (caps. vi, x); and about such misdemeanours not only on the sheriffs’ part, but also on the parts of the king’s foresters and of archdeacons and deans in the exercise of their disciplinary functions (caps. viii, xii). Let it all ‘be accurately and carefully written down’ (cap. iii). ‘And after they have been examined, let my sheriffs and officers go about my other business, and swear that they will attend to the holding of inquisitions on the lands of the barons, according to the law’ (cap. xvii).\(^{123}\)

The Assizes of Clarendon and Northampton, along with the Assize of Arms of 1181 and the Assize of the Forest of 1184 placed tighter controls over the whole populace, and gave extensive powers and responsibilities to the king’s officers in enforcing them. The sheriffs might enter any borough, castle, or liberty, ‘even the honour of Wallingford’, to arrest murderers and thieves, and gaols were to be built in every shire to accommodate the accused until they could be put to the ordeal; even those absolved before the justices, if they had been ‘openly and disgracefully spoken of by the testimony of many and that of lawful men’ were to abjure the realm; a religious house was not to receive a man of the lower orders as a monk until his reputation was known, ‘unless he shall be sick unto death’; no one ‘in all England’ should receive members of the sect of Cathar heretics ‘branded and excommunicated at Oxford’, and any house in which they dwelt should be ‘carried outside the village and burnt’; dogs caught in the king’s forest were to be mutilated.\(^{124}\) For the eyre of 1194 a list of questions


\(^{124}\) EHD ii. 407–13, 416–20 (nos. 24, 25, 27, 28).
was drawn up which the parties of justices were to address to the juries on their circuits. The concerns of the ‘chapters of the eyre’ ranged from the state of the king’s demesne lands, through the affairs of the Jews, to the malpractices of the sheriffs and bailiffs. Confronted by King Richard’s enormous demands from abroad for money, first for his crusade and then to ransom himself from a German prison, and at home by the revolt of Count John, the king’s brother, the justiciar and archbishop of Canterbury, Hubert Walter, turned the eyre into a highly organized political and financial as well as judicial instrument. Justice was *magnum emolumentum*, a great source of profit to the king, and a chronicler described the eyre of 1194 as reducing all England to poverty. The *capitula itineris* were an important new form of law-making—the only form open to Hubert Walter in the absence of the king—and the steady lengthening of the list in the thirteenth century reflects the growing scope of English government.125

Chapter 20 of the instructions of 1194 ordered the appointment of three knights and a clerk in each county as keepers of the pleas of the crown. Their job was to record the initial proceedings in criminal cases: the finding of bodies (‘coroners’ still hold inquests on suspicious deaths); the indictment of the suspected killers by juries of the neighbouring villages; the surviving victims’ exhibition of their wounds and formal commencement of accusations (‘appeals of felony’) in the shire court; and the felons’ confessions or abjurations of the realm or outlawry.126 The king’s justices were asserting control over the established forms of criminal trial, the unilateral ordeals or the judicial duel between the accused and a private appellant.127 Chapter vi of the Inquest of Sheriffs demanded inquiry into accusations made from spite or for reward, and in cap. 36 of Magna Carta King John promised the free granting of ‘the writ of inquisition of life and limb’—that is, to inquire whether an accusation of crime carrying such penalties was brought ‘out of hatred and malice’.128 In this way the jury was being introduced into the criminal process in England before Pope Innocent III, in that same year of 1215, forbade clergy to bless the instruments of the ordeal in order to invoke God’s judgment, so forcing the use of ‘petty’ juries (distinct in concept though not always in membership from presenting or ‘grand’ juries) to decide on the guilt of criminals in

England. Judicial duels continued, though the justices did their best to discourage them, except in the case of ‘approvers’: felons who clutched at the chance of a reprieve if they could defeat and thus convict a number of their accomplices in successive bloody combats. The majority of normal appeals of felony were not prosecuted to the end, but the justices would still take the verdict from a jury and punish the accused for any ‘trespass against the king’s peace’. Trespassers were punished by imprisonment and a fine, but felons convicted by appeal or under the assize of Clarendon lost a foot, to which the Assize of Northampton, ‘for the sake of stern justice’, added the loss of the right hand and abjuration of the realm within forty days. In the course of the thirteenth century hanging became the normal penalty for felony.

Jury-trial instead of the ordeal, and abjuration of the realm rather than exile from the diocese, were examples of a new, secularized, royal justice. The development of a hierarchy of ecclesiastical courts held by bishops and their ‘officials’, archdeacons and commissaries, at the same time as the rapid growth of the king’s courts created tensions between church and state, which showed themselves most dramatically in the murder of Archbishop Becket in 1170. Yet the church courts were indispensable to the whole community, for in them were settled disputes about marriage-contracts, wills (and thus the descent of moveable property), defamation, and a variety of breaches of faith. At the parish level they enforced a moral discipline over clergy and laity. When diocesan statutes became common in the thirteenth century they regularly included the pronouncing of excommunication against those who ‘disturbed the peace of the lord king and the tranquility of the realm’ and also against infringers of the terms of Magna Carta. On the other hand, the bishops depended on the king’s officers for the arrest of people who refused to submit to ecclesiastical jurisdiction, and the clergy, as possessors of a huge share of the land of England, provided much of the civil business of the king’s courts. The Angevin state was an amalgam of royal and ecclesiastical governance, but with the king as its directing force. Bishops were ordered like sheriffs to enforce the rights the king granted to churches, and the Inquest of Sheriffs also targeted extortionate archdeacons and deans. And to a large extent the clergy staffed the king’s households and central courts which crystallized from it.

129 Constitution 18 of the Fourth Lateran Council.
131 EHD ii. 411.
In 1158 Richard of Anstey in Hertfordshire began a suit for estates left by his uncle, William de Sackville, which was to last for five years. First, he had to send one of his men to Normandy to get a writ from the king to take to Eleanor, the queen-regent in England; she issued another writ which Richard delivered to the justiciar, Richard de Lucy, and a hearing was arranged before him at Northampton. There the tenant of the lands, Mabel de Sackville, asserted her right as William’s daughter by his second marriage, and the case was adjourned. In fact, Richard of Anstey had already sent to Normandy for another writ, this time to Archbishop Theobald of Canterbury, to order an investigation of Richard’s claim that Mabel was illegitimate, since her father had not been free to marry her mother. Richard appeared seventeen times in the archbishop’s court and once travelled to Toulouse for another writ, as Mabel delayed the case on every conceivable excuse, and finally in October 1160 he appealed in exasperation to the pope. The necessary letter from the archbishop’s chancery providing Rome with details of the case was obtained with difficulty, and some time in 1161 Richard’s clerks returned with a papal rescript setting out the issues to be decided by judges-delegate in England. But Mabel now appealed to Rome herself, and only in December 1161 did Richard’s clearly more able canon lawyers obtain a papal decretal confirming the tenant’s illegitimacy, so that the case could be taken back to the king’s court. Richard was waiting at Southampton when Henry returned to England in January 1162, but more writs had to be bought from king and justiciar, and he was finally awarded his inheritance at Woodstock in July 1163, after five years of incessant journeying and enormous expense. Contrast with this story the situation by the end of the century, when there were royal courts able to carry cases forward without perpetual reference to the king in person: the court coram rege (the future ‘king’s bench’), first given definition in 1178 when, according to a chronicler, Henry II reduced the number of justices burdening the land from eighteen to five, two clerks, and three laymen, and ordered them to remain with the king’s household wherever it went, to hear the complaints of the people; and the bench of justices at Westminster (the future ‘court of common pleas’) which Archbishop Hubert Walter, Richard I’s justiciar, appears to have separated off from the exchequer board in the 1190s. (It was the


justices of the latter court, supplemented by experienced sheriffs, who
were periodically sent out on eyre.\textsuperscript{134}

From 1194 there are plea-rolls of the justices \textit{coram rege} and the
Bench, necessary to keep track of all the procedural steps and adjourn-
ments in litigation, and sometimes recording final judgments. The plea-
rolls, running on for common pleas and king’s bench to the nineteenth
century, a great wadge of parchment for each of the four terms of each
court in each year, were joined in the second half of the thirteenth
century by reports of the arguments before the king’s justices of a new
class of professional lawyer. English law was essentially the juris-
prudence of the king’s courts.\textsuperscript{135}

\textit{‘Our state and our kingdom’s’}

Angevin justice was impelled by the will of kings who saw no bar to act-
ing ‘without judgment’ themselves, or to delaying and selling justice as
their interests dictated. Men paid to have peace from the royal ill-will
\textit{(malevolentia)}, which was the counterpart of the king’s protection
and openly given as justification for disseising his subjects.\textsuperscript{136} From his
accession King John drove the judicial system hard and effectively, and
the barons generally welcomed the new legal procedures. What the king
was forced to concede in Magna Carta was that he himself should
observe them and refrain from using them as a means of extortion: not
amercing \textit{(fining)} even a villein so heavily that he had to sell his cart, his
means of subsistence \textit{(cap. 20)}; not imprisoning, disseising, or exiling a
free man ‘except by the lawful judgment of his peers or by the law of
the land’ \textit{(cap. 39)}; and not selling or denying to anyone ‘right or justice’
\textit{(cap. 40)}.\textsuperscript{137} John died in 1216 in the middle of a civil war, and it was
left to a papal legate and a group of loyalist barons to safeguard the
succession of Henry III and reconstruct the government. Magna Carta
was reissued late in 1216 and again in 1217, when a Charter of the
Forests was coupled with it. A yet more formidable exchequer machine
was brought out of the financial disruption of the civil war. Judicial
revenues bulked large in the exchequer’s rolls after 1218, when eight
groups of justices were sent out on eyre. The dispensation of justice
according to the principles of the Charter was what the community
looked for. When the baronial council, seemingly for political reasons,

\textsuperscript{134} EHD ii. 482; P. Brand, \textit{The Origins of the English Legal Profession} (Oxford: Blackwell,
1992), ch. 2.

\textsuperscript{135} Harding, \textit{Law Courts of Medieval England}, 51, 71; Brand, \textit{Origins of the English Legal

\textsuperscript{136} J. E. A. Jolliffe, \textit{Angevin Kingship} (London, 1955), 64, 68, 76, 94–9, 107.

\textsuperscript{137} Stenton, \textit{English Justice}, ch. 4; Holt, \textit{Magna Carta}, 322, 327.
allowed the reopening of a case of novel disseisin decided against the earl of Aumale in the eyre of Lincoln, the shire rose up in protest and demanded the ‘common liberty of the whole realm granted and sworn’. In the king’s courts peasants learnt to assert their personal freedom or special privileges as villeins of the king; townsfolk claimed their right not to have to plead in most cases outside the borough court; and barons, bishops, and abbots to sue each other for damage to their ‘liberties’ to hold fairs or hang thieves.

A judicial system which was created by the naked will of the king, but made to relate his powers to his people’s rights, provided a fruitful context for the definition of the ‘state of the king’ (status regis) in England. In the twelfth century ‘crown’ was sometimes used as an abstract term for the prerogatives of the king. Criminal pleas were called ‘pleas of the crown’, and the Assize of Northampton instructed the justices in eyre ‘to determine all suits and rights pertaining to the lord king and to his crown through the writ of the lord king’. An ordinance of Henry III in 1256 forbade the alienation without permission of the lands tenants-in-chief held from the king, as intolerably damaging to the ‘crown and royal dignity’. The ‘royal dignity’ was regularly coupled with ‘crown’ to emphasize the king’s public standing, particularly in writs to ecclesiastical authorities. In origin, however, ‘crown’ seems to have pointed to the lord paramount’s rights over his vassals, whereas the earliest reference to the status regis in England is in connection with the king’s power to tax his subjects generally. The dedication to Henry II of the Dialogus de Scaccario, a description of the workings of the exchequer written between 1177 and 1179 by Richard fitz Neal, royal treasurer, judge of common pleas, and at the end bishop of London, argues that the power of rulers comes from God in the form of material wealth, and that ‘we [clerics] ought to serve them by upholding not only those excellencies in which the glory of kingship displays itself but also the worldly wealth which accrues to kings by reason of their state (sui status ratione). Those confer distinction, this gives power.’ In their careful collection, guarding, and distribution of the king’s money, exchequer officials ‘must give account of the state of the realm (debet ... rationem reddituris de regni statu), the security of

140 EHD ii. 412.
141 Ibid. iii. 360.
which depends upon its wealth’. The deployment of resources and the dispensation of justice were combined inextricably in the king’s state. The Assize of Clarendon, ‘made in the interests of peace’ (so says the Dialogue), gives the chattels of condemned villeins to the king, since their lords, if they received them, might connive at the conviction of innocent people. The justiciar presides over both the justices and the exchequer, where the highest skill ‘does not lie in calculations, but in judgments of all kinds’. Only the king’s forests are outside the common law of the realm (communi regni iure), ‘so that what is done in accordance with forest law is not called “just” without qualification, but “just, according to forest law”’.

A ‘constitutional’ idea of the state of the king is implied in a letter from Pope Innocent III to the barons of England in the spring of 1215. The pope wrote that he had instructed John to treat them kindly, and they should know that by divine grace the king was changed into a better state (in meliorem statum esse mutatum): they were therefore required to stop their conspiracies against him and, with their heirs, to pledge obedience to him and his successors. The struggle for liberties at the end of John’s reign and even more the restoration of peace after John’s death were the circumstances in which the ‘unrationalized force’ and ‘sustained uniformity of action’ of Angevin kingship began to acquire the intellectual justification which J. E. A. Jolliffe thought it had previously lacked. The ‘state of the king’ and the ‘state of the kingdom’ were brought into explicit relationship. The interests of king and realm had long been coupled together in royal documents. The Leges Henrici Primi had recorded Henry I’s ordinance that shire courts should be held at fixed places and times, and that the people of the country should not be burdened by extra meetings unless ‘the king’s own need or the common advantage of the kingdom’ required it. Henry II continued the traditional juxtaposition of the salvation of the king’s soul and the advance of the prosperity of his realm as the objectives of grants to churches; and he demanded that the papal messengers who claimed to have come out of concern ‘for our honour and the exaltation of the kingdom’ should reverse Becket’s excommunication of royal supporters. Magna Carta was granted ‘for the salvation of our soul and the souls of our ancestors and successors [‘heirs’ in the original charter],

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144 Foedera, 1 (i), p. 127.
145 Jolliffe, Angevin Kingship, 87.
146 Leges Henrici Primi, ed. Downer, 98–9.
the exaltation of Holy Church, and the reform of our kingdom’. On Henry III’s accession William Marshal, earl of Pembroke, was appointed ‘regent of ourselves and of the realm’; and in the early years of Henry’s reign Pope Honorius instructed his legate to collect an aid from the clergy ‘for the uses of the said king and realm’, and ordered Archbishop Langton not to put himself against the realm or the king so long as they remained faithful to the Roman church. The legate Pandulph demanded that the justiciar Hubert de Burgh redress an injury inflicted on one of his servants contra pacem domini regis et regni, and was himself urged to come to London to deal with ‘the urgent business of king and kingdom’. Peril was seen ‘to the king and his kingdom’, if William Marshal did not surrender certain lands in settlement of Queen Berengaria’s dower, and the justiciar agreed to financial arrangements prescribed by the legate, since they were ‘to the honour of God and the advantage of the lord king and realm’. Pandulph declared robberies near Winchester a reproach to the king and a scandal and hurt to the whole realm. Henry acknowledged debts to Florentine merchants for the use of himself together with his kingdom.

This is the time when ‘state’ acquires constitutional significance as the term for king and kingdom in relationship to each other. One of the baronial government’s first actions was to write in Henry III’s name to his justiciar in Ireland, informing him of John’s death and the new king’s coronation and confirmation of chartered liberties, and expressing confidence that ‘the state of our kingdom, favoured by divine mercy, will be changed for the better’. In the first reissue of the Charter Henry left aside for fuller discussion and amendment certain ‘weighty and doubtful’ clauses in the original (such as the requirement of the consent of the realm to taxation), as matters concerning ‘the common utility and peace of everyone’ and ‘both our state and our kingdom’s’ (ad communem omnium utilitatem pertinuerint et pacem et statum nostrum et regni nostri). The pruning of the Charter suggests that a conflict was beginning to be discerned between the interests of king and realm, but in writing to foreign powers Henry preferred to identify the two states. In 1217 he explained in a letter to Pope Honorius that heavy expenditure circa statum nostrum et regni nostri prevented his payment of the 1000 marks due to the papacy annually from England. To the

142 Judicial Systems of France and England

148 Holt, Magna Carta, 448–9, 501–2.
150 Ibid. i. 34–5, 79–80.
151 Ibid. i. 70–1.
152 Ibid. i. 167, 403.
153 Though already in the ninth century Hincmar of Rheims could attribute to the king’s council consideration of matters pertaining to the statum regis et regni: see p. 41 above.
154 Holt, Magna Carta, 510 n.
king of Norway in the same year he expressed his willingness for a commercial treaty which would allow their merchants to come and go freely in each other’s countries, and ending with a promise to inform King Haakon further of ‘our state and our kingdom’s’ (using the same phrase as in the reissued Charter).  

The pope had a concern for the peace of kingdoms, not least to release their energies for crusading, and in particular for the tranquillity of the person and realm of ‘his special son’ King Henry, whose natural father had entrusted them to the church of Rome. The legate Gualo was told in 1217 that he had power to do anything for the advantage of that king and kingdom—to impose interdicts, excommunicate, degrade prelates and others who supported Prince Louis’s invasion, and dispense men from vows of fidelity to Louis and even from crusading vows—‘until the state of the kingdom, by God’s grace shall be reformed for the better’. When Henry reached sixteen in 1223, Honorius declared him of an age to have a limited use of the great seal, and the king thanked him profusely: it meant that he was able to take control of his castles and the government of the shires, and he had great hope for the consequent improvement of ‘our state and our kingdom’s’, about which his messengers would inform the pope further. ‘Zealous for the tranquillity of king and realm’, Honorius instructed the English bishops to impose an interdict on the lands of Llywelyn of Wales.  

A decade later, Pope Gregory IX exhorted Louis IX of France to make peace with Henry—this, out of zeal for the state of the French king’s realm, his honour, and the tranquillity of his people, and in order to hasten a crusade; also desiring an increase of ‘the state of peace in the kingdom of England, which the apostolic see especially loves’, the pope instructed the archbishop of Canterbury and his suffragans to excommunicate murderers, arsonists, and all other peace-breakers. In 1235 Henry wished Gregory to know of his prosperous state and the joyful tranquillity of his kingdom: the magnates and clergy were united with each other and with the king in mutual love, and there was hope (once more) that ‘the state of us and our kingdom’ would be reformed for the better.  

The state of the kingdom was being defined in relationship to an increasingly dominant royal state. Henry’s servants and subjects reported on the state of Ireland or Poitou in terms of the preservation of the king’s rights, and asked to be informed of his ‘state and will’ [statum

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155 Royal Letters, i. 6–8; Foedera, 1 (i), 145, 149.
156 Royal Letters, i. 527–9 (no. 1).
157 Ibid. i. 212–14, 430–1; for papal exhortations regarding English affairs, see ibid. 540–1, 557, 558; Rymer, Foedera, 1 (i), 171.
158 Royal Letters, i. 540–1 (no. 31), 554–5 (no. 33), 557–8 (no. 37).
vestrum et voluntatem'.

The king complained to the pope in 1231 of the Irish bishops’ denial of his custody of vacant sees and jurisdiction over their tenants ‘to our grave prejudice and damage to the royal dignity’; in 1232, he commanded the monks of Canterbury not to act on the papal mandate of election to the archbishopric ‘in prejudice of ourselves and our right’; and in 1233 he instructed the archbishop of York not to excommunicate certain nobles judged contumacious in a church court while an appeal was pending in defence of his state and a privilege earlier granted by the pope [pro statu nostro et conservacione ejusdem privilegii]. In 1235 the same archbishop was told by Henry to make ready to escort the king and queen of Scotland (the queen was Henry’s sister) to a great council in London which would deal with certain difficult matters touching ‘our state and the kingdom’s’, and Maurice Fitzgerald, the justiciar of Ireland, was assured in the same year that ‘everything with us and the state of our kingdom is prosperous and pleasing’ and informed that the king wished often to hear similar news ‘of the state of our land of Ireland, along with your state’.

In fact, Henry had just had a painful lesson in kingship, in an episode affecting Ireland. The king had emerged from his years of tutelage determined to assert his authority and seemed in 1232 to threaten the liberties of the barons, who resisted under the leadership of Richard the Marshal, earl of Pembroke, son of the great rector regis and regni. The Marshal’s death in Ireland at the hands of Henry’s servants was an enormous blow to the king’s reputation and self-esteem. In letters to the emperor Frederick II, Henry put the blame on others for attributing to ‘the fullness of royal power’ the freedom of a king to do any injury he willed, and asked for the emperor’s help in coming to terms with the Marshal’s family, ‘for the conservation of the royal state and the happiness of our land of Ireland (ad conservacionem status regii et felicitatem terre nostrae Hibernie)’.

For the pope the essence of the royal state was the inalienability of the rights and possessions of the Crown. In 1233 Gregory reminded Henry of his coronation oath to preserve such rights: the king’s promises not to recall his grants were therefore invalid, and Henry might reincorporate what he had granted ‘into the right and property of the crown and kingdom’. In stronger language the pope expressed in

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160 Royal Letters, i. 72–3, 82–6, 126–8, 177–8, 338–9; cf. ibid. 123 for statum Walliae used by Llywelyn, Prince of North Wales.
161 Royal Letters, i. 399–400.
162 Ibid. i. 406.
163 Ibid. i. 464, 484–5.
164 Ibid. i. 464, 484–5.
165 Ibid. i. 437, 467–9; Treaty Rolls, i. 35–6; F. M. Powicke, King Henry III and the Lord Edward (Oxford: Clarendon Press, 1947), 144–6.
1238 his grave disquiet that, ‘on bad advice and with an improvident liberality’, the king had been ‘dispersing to prelates, churches, and other magnates of England, liberties, possessions, offices and many other things which belonged to the right and state of the crown [quae ad jus et statum [et] coronae spectabant], to the great prejudice of the Roman church, to which the realm of England is known to pertain, and the enormous damage of that realm’. The papacy seems at this time to have been expecting from kings the same public responsibility in the use of their property which it had been impressing on archbishops.166

Yet the king of England’s state was surely more home-grown. In his letters it may mean no more than ‘state of health’, but in 1236 Henry assured Hugh de Lacy of the ‘prosperity of our state’ in addition to ‘the healthiness of our body’ and ‘the tranquillity of our realm’.167 It is clearly the constitutional status of the king which is discussed in the summa of The Laws and Customs of England traditionally attributed to the clerk and judge coram rege Henry de Bracton, a book which may have been substantially put together in the 1230s. In the opening tractate ‘Of Persons’, in the middle of a discussion of free and unfree status which is the normal content of the Roman law title De Statu Hominum (Digest, i. 5), Bracton suddenly remarks that God is no respecter of persons yet with men there is a difference between them, ‘for there are some of great eminence who are placed above others and rule over them’: a hierarchy of pope, archbishops, and lesser prelates in spiritual matters, and ‘in temporal matters which pertain to the kingdom, emperors, kings and princes, and under them dukes, earls and barons, magnates or vavasours and knights, also freemen and bondmen. Various powerful persons are established under the king, namely earls who take the name “comites” from “comitatus” . . .’ Later in the discussion de statu personarum Bracton continues: ‘The king has no equal within his realm . . . The king must not be under man but under God and under the law, because law makes the king.’ Since no writ runs against the king, he can only be petitioned for remedy against his own justices, and ‘if he does not it is punishment enough for him that he awaits God’s vengeance’.168

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166 Royal Letters, i. 51 (no. 30); Foedera, 1 (i), 234; the second et appears redundant; H. G. Richardson, ‘The English Coronation Oath’, Speculum, 24 (1949), 54ff.; P. N. Riesen- berg, Inalienability of Sovereignty in Medieval Political Thought (New York: Columbia UP, 1956); Kantorowicz, The King’s Two Bodies, 347–56.

167 Royal Letters, i. 478-80, and cf. 135, 166, 178, 279, 283, 378, 478, 496 for reference to the king’s and others’ personal ‘state’.

Bracton appears confused about whether the king is above or under the law only if he is seen as attempting to construct a political theory with Roman law and Canon law maxims, rather than going about his actual business of describing the king’s relationship to the judicial system in England. In the tractate ‘Of Acquiring Dominion’ he says that no one may question the meaning of the charters granted by a king who has above him only God and ‘the law by which he is made king’. But an injurious grant may be referred to the king for amendment in his court, where, ‘if he is without bridle, that is without law’, the earls and barons ‘ought to put the bridle on him’. The king ‘has ordinary jurisdiction, dignity and power over all who are within the realm’, because he has ‘the material sword pertaining to the governance of the realm’ and is responsible for the peace, so that ‘the people entrusted to his care may live in quiet and repose’. He is above the law to the extent that, possessing the sanctions, he alone can correct himself, but the person with the power to cause the laws to be observed ought himself to observe them. The most resounding statements about the king are significantly in the tractate ‘Of Actions’, where the different legal procedures and the courts which handle them are described. The king who is chosen to do justice to all men ‘must surpass in power all those subjected to him’, for ‘it would be to no purpose to establish laws . . . were there no one to enforce them’. But again the king is seen to need a ‘bridle’: although the law is formally what ‘pleases the prince’, it has to be ‘rightly decided with the counsel of his magnates, deliberation and consultation having been had thereon’. Bracton does not speak of the status regis et regni, but he describes the relationship which lay behind this concept: the king doing justice to all within the realm with the concurrence of his barons.


Bracton on the Laws and Customs of England, ii. 109–10 (f. 34), 166–7 (f. 55b).

Ibid. 305 (f. 107).