

THE THIRTEENTH CENTURY: THE BARONS' WARS AND THE LEGISLATION OF EDWARD I

1. Generalities about the 13th century.

- a. Gothic art and architecture—Reims, Notre Dame de Paris, Amiens, Westminster Abbey, Salisbury, and Lincoln
Images: Durham cathedral, Salisbury cathedral, Chapter House at Winchester
http://www.law.harvard.edu/faculty/cdonahue/courses/ELH/lectures/109_cathedrals_1.pdf
- b. The high point of scholastic philosophy and theology—Albert the Great, Thomas Aquinas, Duns Scotus, Bonaventure
- c. New religious orders (Franciscans and Dominicans)
- d. Height of the temporal power of the papacy—Innocent III, Gregory IX, Innocent IV, ending with Boniface VIII at the end of the century
- e. The great glosses of Roman and canon law; *Bracton* and Beaumanoir

Image: Bracton's tomb

<http://www.law.harvard.edu/faculty/cdonahue/courses/ELH/slides/BractonTomb.jpg>

2. English Chronology (*Mats.*, p. V-15).

Henry III — 1216–1272 — 57 years — died at age 65

Edward I — 1272–1307 — 35 years — died at age 68

1232 — End of Hubert de Burgh's justiciarship

1258–59 — Provisions of Oxford, Provisions of Westminster, Treaty of Paris, the dynasty changes its name from Angevin to Plantagenet

1264 — Mise of Amiens, Battle of Lewes, Simon de Montfort's 1st parliament

1265 — Simon de Montfort's 2nd parliament, Battle of Evesham

1266 — Dictum of Kenilworth

1284 — Statute of Wales

1285 — Westminster II, *De Donis*

1290 — Westminster III, *Quia Emptores*

1292 — Judgment for John Baliol, beginning of Scottish wars

1295 — "Model" Parliament

1297 — *Confirmatio cartarum*

1303 — Treaty of Paris with Philip the Fair

3. Developments in governance, chief justiciar, Exchequer, and chancellor (early Henry III). The chief justiciar is converted into the chief justices of the court before the king (*coram rege*) and of the common bench (*bancum commune*). The Exchequer becomes more routine; the barons of the Exchequer become more like judges and less like trusted councilors of the king. The chancellor seems to lose power in this period, and the wardrobe (a household department) emerges as the most important department dealing with king's money. Most if not quite all of these changes can be associated with the ending of Henry III's minority.

- a. Hubert de Burgh, the last of the great justiciars, is firmly associated with the minority of Henry III.

- b. Hubert fell both because Henry becomes sick of his minority and because a group of men from Poitou in France, lead by Pierre des Roches, the bishop of Winchester and a survivor from John's reign, and his nephew Pierre des Rievaulx, gained power.
 - c. Kings that begin as minors don't have a good track record.
- 4. Foreign politics and nationalism
 - a. Henry III, Isabelle of Angoulême, Eleanor of Provence
 - b. Henry III and Gascony
 - c. Edmund and Sicily
 - d. Richard of Cornwall and the Holy Roman Empire
 - e. The barons were chary of these foreign adventures
 - f. Edward I encountered similar difficulties
- 5. Troubles between 1232 and 1258.
 - a. Opposition to the role of the Lusignans and the Savoyards
 - b. Money
 - c. The "paper constitution" of 1244: (i) Magna Carta to be confirmed, (ii) barons to control the chancellor and the exchequer, (iii) regular consultation with a defined great council.
- 6. The Barons' Wars (1258–1266) (*Mats.*, pp. V-15 to V-25): Focus on the council and on the sheriffs. Relationship to parliament problematic. The notion of 'the community of the realm'.
 - a. Henry agrees to reform (1258, *Mats.*, p. V-15): That "the state of our realm (*status regni nostri*) be ordered, rectified, and reformed"
 - b. The Petition of the Barons (1258, *Mats.*, pp. V-15 to V-19). Notice that like Magna Carta the topics that they treat begin with the problem of inheritance. C.1: "In the matter of inheritance, the earls and barons ask that the firstborn son, or daughter, being of full age and having proved his right to do towards his lord what he ought to do, shall have free entry after his father to his father's possessions; and that the chief lord shall have only formal seisin, by one of his bailiffs, whereby nothing may be taken by the bailiff from the profits of the land or from the rents.." Notice also clause 27, the beginning of a development that will end in the statute *De Donis* (1285). C.27: "Further, they seek a remedy concerning alienated marriage portions, as in cases of this kind: if anyone has given to another a carucate of land as a dowry along with a daughter or sister, to have or to hold to them and their heirs issuing from the daughter or sister, provided that if the daughter or sister shall die without any heir of her body, the land and all appurtenances shall revert entirely to him who gave the land as a dowry, or to his heirs; and whereas the gift is not absolute but conditional, nevertheless, women, after the deaths of their husbands, in their widowhood, give or sell the dowries, and enfeoff them as they choose, although they have no heirs of their bodies, and so far enfeoffments of this kind have not been annulled."
 - c. The provisions of Oxford (1258, *Mats.*, V-19 to V-21): "Thus swore the community of England at Oxford" The notion of community, the notion of the chief officers, the wardrobe. The 3 annual parliaments may or not be the ancestor of the modern institution. An elaborate scheme for implementation.

- d. The reforms of the provisions of Westminster (1258, *Mats.*, V-21 to V-22). Much that has to do with the justices in eyre, and much that has to do with lords' courts. Most renewed in the statute of Marlborough of 1267. A division between public and private law?
 - e. Summoning of knights of the shire for the meeting at Windsor (1261, *Mats.*, pp. V-22 to V-23). Probably not to be connected in any direct way with the shire knights of parliament.
 - f. The mise of Amiens (1264, *Mats.*, pp. V-23). I don't find the document to be as autarchic as some do. (See below for the document where you can make up your own mind.)
 - g. The battle of Lewes, May 1264.
 - h. The first and second parliaments of Simon de Montfort (1264-5, *Mats.*, pp. V-23 to V-24). The second is famous, perhaps too famous, because it contains a summons of the burgesses of the boroughs.
 - i. The battle of Evesham, August 1265. Death of Simon de Montfort.
 - j. Dictum of Kenilworth (1266, *Mats.*, pp. V-24 to V-25). Announcing the principle of no private revenge didn't prevent it from happening, but it did at least establish the principle.
7. The reign of Edward I (1272–1307)
- a. The Welsh wars (culminates in the Statute of Wales of 1284)
 - b. The Scottish wars (begin 1292)
 - c. The French wars (end 1303)
 - d. Statutory and parliamentary activity (throughout the reign)
 - e. *Confirmatio cartarum* (1297)
 - f. *Quo warranto* (1278-1294): the earl of Warenne and the rusty sword
 - g. *Carta mercatoria* (1303)
8. The legislative activity of Edward I. Not all of Edward I's statutes are parliamentary. There are 27 HLS manuscript statute books that contain statutes of Edward I, perhaps an unbiased sample of all such manuscripts. There are some 45 items from the reign of Edward I that someone at some point thought of as statutory and that appear in the printed *Statutes of the Realm*. All but five occur in one or more of the 27 HLS manuscripts that include material dating Edward I's reign. A much smaller group appears in all or most of them. The following table lists the most common items in chronological order with a parenthetical indication of the number chapters that the item contains and the number of manuscripts in which it occurs.
- a. Magna Carta (1225, 1297) (37 c.) (22 ms.; 3 contain 1215 version, 2 have missing quires where it would have appeared).
 - b. Forest charter ([1217], 1225, 1297) (16 c.) (20 ms.; 4 have the 1225 version)
 - c. Provisions of Merton (1235) (11 c.) (26 ms., missing quires in the 27th probably contained it)
 - d. Statute of Marlborough (1267) (29 c.) (26 ms., missing quires in the 27th probably contained it)
 - e. Statute of Westminster I (1275) (51 c.) (27 ms.)
 - f. Statute of Gloucester (1278) (15 c.) (26 ms.)

- g. 'Exposition' (*explanationes*) of statute of Gloucester (1278) (not capitulated) (20 ms.)
 - h. *De viris religiosus* (Statute of Mortmain) (1279) (not capitulated) (24 ms.)
 - i. Statute of Merchants (Acton Burnell) (1279) (not capitulated) (10 ms.)
 - j. Statute of Westminster II (1285) (50 c., the first of which is *De donis*) (27 ms.)
 - k. Statute of Winchester (1285) (6 c., instructions to the sheriff about criminal matters) (24 ms.)
 - l. Statute of Merchants (1285) (not capitulated) (16 ms.)
 - m. *Circumspecte agatis* (1285) (not capitulated, deals with the jurisdiction of the ecclesiastical courts) (22 ms.)
 - n. Statute of Westminster III (1290) (3 c., the first of which is *Quia emptores*) (26 ms.)
 - o. *Statutum de Quo warranto* (1290) (not capitulated) (15 ms.)
 - p. *Statutum de Quo warranto novum* (1290) (not capitulated) (10 ms.)
 - q. Statute of waste (1290) (not capitulated) (1292) (10 ms.)
 - r. *Statutum de presentibus vocatis ad warrantum* (Statute concerning calling to warranty those who are present) (1292) (not capitulated) (14 ms.)
 - s. Statute of waste (1290) (not capitulated) (1292) (not capitulated) (10 ms.)
 - t. *Statutum de illis qui debent poni in iuratis et assisis* (Statute concerning those who ought to be put on juries or assizes) (1293) (not capitulated) (13 ms.)
 - u. *Statutum de finibus levatis* (Statute of [Levying] Fines) (1299) (4 c.) (20 ms.)
 - v. *Statutum de coniunctis feoffatis* (Statute of Joint Tenants) (1306) (not capitulated) (16 ms.)
9. What might we make out of list like this?
- a. First, what is not there. Of the five statutes that appear in the *Statutes of the Realm* and do not occur in any of our manuscripts the only one that could be regarded as major is the Statute of Wales. The reason for its omission would seem to be that our makers of statute-books were concerned only with England. The fact that they also omit the fairly important set of Statutes for the city of London of 1285 suggests that they were concerned only with statutes that were thought to apply to England as a whole.
 - b. Second, 22 out of the 45 possibilities appear in 10 or more of the 27 manuscripts that contain statutes of Edward I. The number, however, that occurs in all, or virtually all of them, is much smaller: Magna Carta (always at the beginning), Merton, Marlborough, Westminster I, Gloucester, Westminster II, and Westminster III. Not far behind are the Forest Charter (which will follow Magna Carta), Mortmain, and Winchester, with 24 examples, *Circumspecte agatis*, with 22, and Fines and the exposition of Gloucester, with 20.
 - c. These numbers are probably a pretty good indication of what the makers of our statute books thought was important. They also give some hints of their sense of chronology. Their story begins with Magna Carta. None of our books includes any of the assizes of Henry II. Their story does, however, include Henry III. Merton is there, even though it was not promulgated in anything that looked to them like a parliament, as well as Marlborough, which was.

- d. Parliamentary statutes dominate. Marlborough, Westminster I, Gloucester, Westminster II, and Westminster III are all parliamentary statutes, and they take up most of pages. The two charters, however, Merton, Mortmain, Winchester, Circumspecte agatis, Fines, and the exposition of Gloucester are not parliamentary statutes, and there is no suggestion that they are any less authoritative than the parliamentary statutes.
 - e. The level of detail is quite staggering. The number of chapters give some sense of it: Westminster I (51 c.), Westminster II (50 c.) Magna Carta (37 c.), Marlborough (29 c.), and so on. This may be one reason that these statutes get copied so often.
 - f. But more broadly, what did these statutes do? They made fixes, many fixes, in existing intuitions. Some of the fixes were quite clever and lasted for a long time. There was little, however, that these statutes did that was truly innovative. They took the system as it was and tweaked it to make it work better. They did not rethink the system.
10. What did the legislation of Edward I do? (focusing on *Quia emptores* [1290] and *De donis* [1285], as in the previous lecture)
- a. It is sometimes said that the statute *Quia Emptores* in 1290 made the fee simple in land freely alienable. The same ill-considered statements about the fee simple will sometimes add that it took until the Statute of Wills of 1540 to make the fee simple devisable by will or testament. The implication of the statement, however, is correct. As of 1300 the fee simple was freely alienable inter vivos but not devisable. The question is whether the free alienability of the fee simple inter vivos is the result of the statute *Quia emptores*.
 - b. It is not. The reason that the fee simple is freely alienable and not devisable was because of the logic of warranty. The development had already taken place around the beginning of the 13th century. The statute *Quia Emptores* simply put an end to a practice whereby lords were being deprived of the feudal incidents, the only thing about lordship that was worth much any more. The statute did so by abolishing subinfeudation. All conveyances of the fee must now be by way of substitution. The lords gave up their by-now nominal right to object to new tenants.
 - c. The fee tail more the product of the statute *De donis* of 1285 than the fee simple is the product of *Quia emptores*. *De donis*, however, is the product of a complicated development that begins with the gift in *maritagium*. Because no homage is taken in such gifts, the law must develop rules shorn of the key element that it had used in other areas, warranty. First comes curtesy, what would have happened if the lord had taken his son-in-law's homage: the son-in-law gets a life estate if the daughter dies before the son-in-law. Then comes a curious rule that upon the birth of issue the couple have the right to alien the fee simple. This rule is reversed by the statute *De Donis* that says that if this happens the heirs of the body of the couple may bring what is called a new form of action, formedon in the descender, to get it back. The statute is remarkably unclear about how long the fee tail is to last; that is an issue to which we will have to return.
 - d. The third type of freehold estate that one may have in the later middle ages is an estate for life only. Most of the later medieval life estates were held by widows or widowers. The widow got dower, a life estate in one-third of her husband's lands. The widower got curtesy, a life estate in all of his wife's lands. Dower is treated only in passing in Edward's legislation, curtesy not at all. Both are also rather old consequences of the logic of warranty, the first from the extension of warranty to benefit the widow/dowager and the second the

logical consequence of the fact the lord will normally take the homage of the husband for the wife's land, and, by extension, what would have happened had he taken the husband's homage even though he did not.

- e. The bottom line is that the legislation of Edward I made fixes in the fee simple and the fee tail and did little or nothing with dower and curtesy. The system of estates in land was somewhat reformed but the system as a system remained basically unchanged.

11. All of this would suggest three points:

- a. We now have an answer to some very curious aspects of English land law both the fact that most freehold tenures are freely alienable inter vivos and not devisable and that the widower gets a life estate in all his wife's land but the widow only 1/3. In both cases these oddities are the product of warranty, and have nothing to do with the legislation of Edward I.
- b. The legislation of Edward I must be seen for what it was, fixes. Taken together the fixes were important. They were still lecturing on the legislation of Edward I in the Inns of Court in the 17th century. It was not, however, legislation in the modern sense. No one in the time of Edward I thought that the whole system could be reformed by legislation.
- c. The source of English law is not the written law of Rome or that of the church. This is not to say that both were unimportant, but that is not where law comes from. The source of English law is custom, and custom means a lot of things. It can refer to ideas that develop over centuries, such as, that a widow is entitled to a life interest in some of her husband's lands, or it can refer to the practice of a particular court (and the central royal courts are clearly the courts whose practices are becoming dominant), but it can also refer to what is right. There are those who argue that the legislation of Edward I is not conscious of innovation. I'm not sure that that is quite right. There are too many references to what the law was before the statute and what the law was after the statute to make us believe that people simply thought that the highest court in the land was making a judgment about what the law always was. It might be better to imagine the legislation as innovative, but innovative within a rather narrow context.

TWO 13TH-CENTURY 'CONSTITUTIONAL' DOCUMENTS

1. The Mise of Amiens (Louis IX of France; 1264).

In the name of the Father and the Son and the Holy Spirit. By our [present] decision or ordinance we quash and annul all the aforesaid provisions, ordinances, statutes, and obligations,¹—however called, and whatever has followed from them or by occasion of them especially since it appears that the supreme pontiff by his letters has proclaimed them quashed and annulled; ordaining that as well the said king as all the barons and others who have consented to the present arbitration, and who in any way have bound themselves to observe the aforesaid [provisions], shall be utterly quit and absolved of the same. We likewise add that, by virtue or force of the aforesaid provisions or obligations or ordinances, or of any authority already granted by the king on that account, no one shall make new statutes or hold or observe those already made; nor ought any one, through non-observance of the aforesaid [provisions], to be held the enemy, either principal or otherwise, of any

¹ The Provisions of Oxford, concerning which the French king had been called upon to arbitrate the quarrel between Henry III and the opposing party of the baronage.

one else, or for that reason incur any penalty. ... We also decree and ordain that the aforesaid king at his own volition may freely appoint, dismiss, and remove the chief justice, chancellor, treasurer, counsellors, lesser justices, sheriffs, and any other officials and ministers of his kingdom and his household, as he was used and able to do before the time of the provisions aforesaid. Furthermore, we repeal and quash the statute made to the effect that the kingdom of England should henceforth be governed by natives and that all aliens should leave the kingdom, never to return, except those whose residence the faithful men of the kingdom commonly agreed to, ordaining by our decision that aliens may safely remain in the said kingdom, and that the king may safely call to his counsel such aliens and natives as shall seem to him useful and loyal, just as he was able to do before the time aforesaid. Likewise we declare and ordain that the said king shall have full power and unrestricted rule within his kingdom and its appurtenances, and shall in all things and in every way enjoy such status and such full power as he enjoyed before the time aforesaid. By the present ordinance, however, we do not wish or intend ill any way to derogate from royal privileges, charters, liberties, establishments, and praiseworthy customs of the kingdom of England existing before the time of the same provisions. ...

2. *Confirmatio cartarum* (1297).

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

And whereas some people of our kingdom are fearful that the aids and taxes (mises), which by their liberality and good will they have heretofore paid to us for the sake of our wars and other needs, shall despite the nature of the grants, be turned into a servile obligation for them and their heirs because these [payments] may at a future time be found in the rolls, and likewise the prises that in

our name have been taken throughout the kingdom by our ministers: [therefore] we have granted, for us and our heirs, that, on account of anything that has been done or that can be found from a roll or in some other way, we will not make into a precedent for the future any such aids, taxes, or prises. And for us and our heirs we have also granted to the archbishops, bishops, abbots, priors, and other folk of Holy Church, and to the earls and barons and the whole community of the land, that on no account will we henceforth take from our kingdom such aids, taxes, and prises, except by the common assent of the whole kingdom and for the common benefit of the same kingdom, saving the ancient aids and prises due and accustomed.⁴³

And whereas the greater part of the community all feel themselves gravely oppressed by the maltote on wool—that is to say, 40s. from each sack of wool—and have besought us to relieve them [of the charge], at their prayer we have fully relieved them, granting that henceforth we will take neither this nor any other [custom] without their common assent and good will, saving to us and our heirs the custom on wool, wool-fells, and hides previously granted by the community of the kingdom aforesaid.⁴⁴

In testimony whereof we have caused to be written these our letters patent. Given at Ghent, November 5, in the twenty-fifth year of our reign.

(French) Stubbs, *Select Charters*, pp. 490 f.

⁴³ Cf. the first article in what used to be called the Statute *De Tallagio non Concedendo* but which seems rather to have been a petition drawn up by the parliamentary opposition during the crisis of 1297: “No tallage or aid shall henceforth be imposed or levied by us or by our heirs in our kingdom except by the will and common assent of the archbishops, bishops, and other prelates, and of the earls, barons, knights, burgesses, and other freemen in our kingdom.” On this subject see especially Pasquet, *Origins of the House of Commons*, pp. 109, 237 f. See below, p. 166, n. 6; and cf. no. 56, art. 10.

⁴⁴ See no. 49B.