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

1. Generalities about the 13th century.
   a. Gothic art and architecture—Rheims, 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/l09_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]

   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
   1264 — Mise of Amiens, Battle of Lewes, Simon de Montfort’s Parliament
   1265 — 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 and chancellor (early Henry III). The former office 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 councillors 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 money. Most if not quite all of these changes can be associated with the ending of Henry III’s minority.

4. Foreign politics and nationalism (Henry III)

5. The “paper constitution” of 1244.

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. Notice also clause 27, the beginning of a development that will end in the statute De Donis (1285).

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.

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)

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 (focusing on Quia emptores [1290] and De donis [1285]).

a. In the later middle ages, the highest estate that one could own in land was called the fee simple. That estate was freely alienable during the owner’s lifetime, but it could not be passed on by will. If the owner died owning the land it went to the donor’s eldest son or his eldest son’s son, if he had one, or his daughters jointly if he did not, and to his collateral heirs if he had no descendants. There are many legal systems that limit testamentary power, particularly of important assets like land. In these systems you can’t totally disinherit your descendants. But systems that do this also limit the power of someone to make gifts while s/he is alive. By and large French customary law in this period operated like this. A landowner could only give away a portion of his land while he was alive, and the same
restriction applied to gifts by will or testament as well. What’s curious about the English system is the total ban on gifts of land by will and the total freedom to make gifts of land inter vivos.

b. 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 heir of the owner could not challenge his ancestor’s gifts because he was bound to warrant them. But he did not have to honor his ancestor’s will because his ancestor had not taken the homage of the person to whom he made the conveyance by will. You can’t give homage to a dead man. The statute Quia Emptores (1290) 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; it did so by abolishing subinfeudation. All conveyances of the fee must be by way of substitution. The lords gave up their now nominal right to object to new tenants.

c. A second kind of estate that one might have in the later middle ages is the fee tail. Unlike the fee simple, this estate could not be alienated inter vivos. It must pass to the lineal descendants of the first donee in tail, and they could recover it if the current holder had alienated the land. This estate is the product of the the statute De Donis of 1285. The statute itself is the product of a complicated development, that begins with the gift in maritagium, the gift by the father-in-law to his son-in-law and his daughter and to the heirs of their bodies jointly begotten. Because no warranty is taken in such gifts, the law must develop rules shorn of the key element that it had used in other areas. First comes curtesy, what would have happened if the lord had taken his son-in-law’s warranty: 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 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 the long the fee tail is to last; that is an issue to which we will have to return.

d. The third type of 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. Once more, the imbalance is curious and has no parallel in contemporary French law. 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 doweress 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. All of this would suggest three points:

i. We now have at least 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 this is the product of warranty, and has nothing to do with the legislation of Edward I.
ii. 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.

iii. The source of English law is not the written law of Rome or 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 it 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 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

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.
enjoy such status and such full power as he enjoyed before the time aforesaid. By the present ordnance, 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.\(^{43}\)

\(^{43}\) 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
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.