

Winchelsea, who had resisted him over the taxation of 1297, over the claims to Scotland, and over the Confirmation of the Charters in 1301. Winchelsea was a man of the firmest principle and a man of the European Church, one who refused to compromise with his conscience in matters of the Church's independence and the pope's authority, the last in the tradition of Becket, Langton, and Pecham, and very different from some of the accommodating primates from the royal household in later years. The ground was cut from under his feet when a Gascon bishop willing to be pliable to Edward was elected as Pope Clement V in 1305, and in the next year was persuaded to release the King from his confirmation of the Charters and to suspend the Archbishop. His exile, however, did not last long. Edward died little more than a year later. In some ways he was the greatest of medieval English kings, a commanding character at the time when the medieval monarchy reached the height of its power in Britain both in territorial conquest and in the comprehensiveness of its government. But though his grim abilities coincided with an auspicious age in the history of monarchy, Edward's ambitions in Scotland and France, surpassing even his capacities, made him ultimately an overreacher.

## F. BRACTON ON KINGSHIP

BRACTON, DE LEGIBUS ANGLIE, fols. 7a, 34a-34b, 55b-56a, 107a-107b  
in *Bracton on the Laws and Customs of England* II:33, 109-10, 166-67, 304-6  
(S. Thorne trans., Cambridge, 1968) [footnotes renumbered])

*The king has no equal.*

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

<sup>1</sup>*Supra* i, 117-19 (full collation); F. Schulz in *E.H.R.*, lx, 143-4, 172-3; in *L'Europa e il diritto romano: Studi in memoria Paolo Koschaker*, i, 23

<sup>2</sup>'inferiores ... potentiori (for 'potentioribus')' from line 8: D.4.7.3.pr.: 'potentiori pares non possumus'; Drogheda, 13, 43; cf. Schulz, 172

<sup>3</sup>Drogheda, 310; Schulz, 138 (11); *infra* iv, 156

<sup>4</sup>Glanvill, vii, 10: 'Quia dominus rex nullum potest habere parem, multo minus superiorem'; *infra* 157, 253, 305, iv, 159, 281, *B.N.B.*, no. 1108

<sup>5</sup>*Infra* 110, 308; Cortese, i, 152-4, ii, 223-5

<sup>6</sup>Azo *Summa Cod.* 1.14, no. 16, as *infra* 306

<sup>7</sup>*Supra* 20, *infra* 166, 305

<sup>8-9</sup>Leo Magnus, in *P.L.*, liv. col. 196: 'Verax namque misericordia Dei, cum ad reparandum humanum genus ineffabiliter ei multa suppeterent, hanc potissimum consulendi viam elegit, qua ad destruendum opus diaboli non virtute uteretur potentiae sed ratione iustitiae.'

<sup>10-11</sup>I owe this identification to Peter Kelly, S.J. Epist. ad Galatas, 4:5: 'sub lege, ut eos qui sub lege erant redimeret.'

<sup>12</sup>'privilegio'

<sup>13</sup>*Infra* 110, 305

<sup>14</sup>'regno'

<sup>15</sup>'in iustitia exhibenda,' 'in iustitia suscipienda,' as *infra* 305

<sup>16</sup>'tantum,' as *infra* iii, 43

<sup>17</sup>But see *infra* 110, iii, 43, iv, 159

<sup>18</sup>The two supplementary paragraphs which once followed here now appear *infra* 109, n. 18 to 110, n. 15

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

[fol. 34a-34b]<sup>1</sup>Private persons cannot question the acts of kings,<sup>2</sup> nor ought the justices to discuss the meaning of royal charters: not even if a doubt arises in them may they resolve it; even as to ambiguities and uncertainties, as where<sup>3</sup> a phrase is open to two meanings, the interpretation and pleasure of the lord king

must be awaited, since it is for him who establishes to explain his deed.<sup>4</sup> And even if the document is completely false, because of an erasure or because the seal affixed is a forgery, it is better and safer that the case proceed before the king himself.

[The so-called "Addition about Charters"]

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

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

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

[fol. 55b-56a] We have explained above how rights and incorporeal things are transferred and *quasi*-transferred, how they are possessed or *quasi*-possessed, and how retained by actual use. Now we must turn to liberties [and see] who can grant liberties, and to whom, and how they are transferred, how possessed or *quasi*-possessed, and how they are retained by use. Who then? It is clear that the lord king [has all] dignities,<sup>1</sup> [It is the lord king] himself who has ordinary jurisdiction and power over all who are within his realm.<sup>2</sup> For he has in his hand all the rights<sup>3</sup> belonging to the crown and the secular power and the material sword pertaining to the governance of the realm. Also justice and judgment [and everything] connected with jurisdiction, that, as minister and vicar of God,<sup>4</sup> he may render to each his due. Also everything connected with the peace, that the people entrusted to his care may live in quiet and repose, that none beat, wound or mistreat<sup>5</sup> another, [or] steal,<sup>6</sup> take and carry off by force and robbery another's property, or maim or kill anyone. Also coercion, that he may punish and compel wrongdoers,<sup>7</sup> <sup>8</sup>[He in whose power it is to cause<sup>9</sup> the laws, customs,<sup>10</sup> and assizes provided, approved and sworn in his realm to be observed by his people, ought himself to observe them<sup>11</sup> in his own person.] for it is useless to establish laws unless there is someone to enforce them.]<sup>12</sup> <sup>13</sup>rights or jurisdictions in his hand. He also has, in preference to all others in his realm, privileges by virtue of the *jus gentium*. [By the *jus gentium*] things are his which by the *jus naturale* ought to be the property of the finder, as treasure trove,<sup>14</sup> wreck, great fish, sturgeon, waif, things said to belong to no one.<sup>15</sup> Also by virtue of the *jus gentium* [things] which by natural law ought to be common to all, as wild beasts and undomesticated birds, which by natural law ought to be acquired<sup>16</sup> by apprehension and capture or fowling, [or] by occupation and apprehension, [as] of another's property, as where a thing is cast away and taken to be abandoned.<sup>17</sup> Those concerned with jurisdiction and the peace [Those connected with justice and the peace belong to no one save the crown alone and the royal dignity, nor can they be separated from the crown, since they constitute the crown [For to do justice, [give] judgment and preserve the peace is the crown.] <sup>18</sup>without which it can neither subsist nor endure.]<sup>19</sup> <sup>20</sup>cannot be transferred to persons or tenements, neither the right nor the exercise of the right,<sup>21</sup> nor be possessed by a private person unless<sup>22</sup> it

was given him from above as a delegated jurisdiction, nor can it be delegated without ordinary jurisdiction remaining with the king himself. Those called privileges, however, though they belong to the crown, may nevertheless be separated from it and transferred to private persons, but only by special grace of the king himself;<sup>23</sup> if his grace and special grant do not appear time does not bar the king from his action. Time does not run against him here since there is no need for proof.<sup>24</sup> For it ought to be apparent to all that such things belong to the crown unless the contrary can be shown by a special grant.<sup>25</sup> In other matters, however,<sup>26</sup> where proof is needed, time runs against him just as against all others.<sup>27</sup>

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

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

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

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

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

*Of the oath the king must swear at his coronation.*

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

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

<sup>7</sup>To this end is a king made and chosen, that he do justice to all men [that the Lord may dwell in him, and he by His judgments] may separate]<sup>8</sup> and sustain and uphold what he has rightly adjudged, for if there were no one to do justice peace might easily be driven away and it would be to no purpose to establish laws (and do justice) were there no one to enforce them. The king, since he is the vicar of God on earth, must distinguish *jus* from *injuria*,<sup>9</sup> equity from iniquity,<sup>10</sup> that all his subjects may live uprightly, none injure another, and by a just award each be restored to that which is his own.<sup>11</sup> He must surpass in power all those subjected to him, [He ought to have no peer, much less a superior,<sup>12</sup> especially in the doing of justice,<sup>13</sup> that it may truly be said of him, 'Great is our lord and great is his virtue etc.,'<sup>14</sup> though in suing for justice he ought not to rank above the lowliest in his kingdom.]<sup>15</sup> nevertheless, since the heart of a king ought to be in the hand of God,<sup>16</sup> let him, that he be not unbridled, put on the bridle of temperance and the reins of

moderation, lest being unbridled, he be drawn toward injustice. For the king, since he is the minister and vicar of God on earth, can do nothing save what he can do *de jure*,<sup>17</sup> [despite the statement that the will of the prince has the force of law,<sup>18</sup> because there follows at the end of the *lex* the words ‘since by the *lex regia*, which was made with respect to his sovereignty’; nor is that anything rashly put forward of his own will,<sup>19</sup> but what has been rightly decided with the counsel of his magnates, deliberation and consultation having been had thereon, the king giving it *auctoritas*.] His power is that of *jus*, not *injuria*<sup>20</sup> [and since it is he from whom *jus* proceeds,<sup>21</sup> from the source whence *jus* takes its origin no instance of *injuria* ought to arise,<sup>22</sup> and also, what one is bound by virtue of his office to forbid to others, he ought not to do himself.]<sup>23</sup> <sup>24</sup>as vicar and minister of God on earth, for that power only<sup>25</sup> is from God, [the power of *injuria* however, is from the devil, not from God, and the king will be the minister of him whose work he performs,] whose work he performs.<sup>26</sup> Therefore as long as he does justice he is the vicar of the Eternal King, but the devil’s minister when he deviates into injustice,<sup>27</sup> For he is called *rex* not from reigning but from ruling well, since he is a king as long as he rules well<sup>28</sup> but a tyrant when he oppresses by violent domination the people entrusted to his care.<sup>29</sup> Let him, therefore, temper his power by law, which is the bridle of power,<sup>30</sup> that he may live according to the laws, for<sup>31</sup> the law of mankind has decreed that his own laws bind the lawgiver,<sup>32</sup> and elsewhere in the same source, it is a saying worthy of the majesty of a ruler that the prince acknowledge himself bound by the laws.<sup>33</sup> Nothing is more fitting for a sovereign than to live by the laws,<sup>34</sup> nor is there any greater sovereignty than to govern according to law,<sup>35</sup> and he ought properly to yield to the law what the law has bestowed upon him,<sup>36</sup> for the law makes him king.<sup>37</sup> And since it is not only<sup>38</sup> necessary that the king be armed with weapons and laws but [with wisdom],<sup>39</sup> let the king learn wisdom that<sup>40</sup> he may maintain justice, and God will grant wisdom to him,<sup>41</sup> and when he has found it he will be blessed if he holds to it,<sup>42</sup> <sup>43</sup>for there is honour and glory in the speech of the wise and the tongue of the imprudent is its own overthrow;<sup>44</sup> <sup>45</sup>the government of the wise man is stable, and the wise king will judge his people, but if he lacks wisdom he will destroy them,<sup>46</sup> for from a corrupt head corruption descends to the members, and if understanding and virtue do not flourish in the head it follows that the other members cannot perform their functions.<sup>47</sup> A king ought not only to be wise but merciful, his justice tempered with wisdom and mercy. Yet though there is greater safety in having to render a final account for mercy rather than judgment,<sup>48</sup> it is safest that [a judge’s] <sup>49</sup>eyes precede his steps,<sup>50</sup> that judgment not become uncertain through unconsidered discretion nor mercy debased by indiscriminate application, for mercy is indeed unjust when it is extended to the incorrigible.<sup>51</sup> Nor does the grace of our august liberality extend to those who, having been pardoned an earlier offence, take it to be approved by custom rather than deserving of punishment.<sup>52</sup> And when a judge is indulgent to the unworthy, does he not expose all to the infection of regression?<sup>53</sup> Let him therefore be merciful to the unworthy in this way, as always to feel compassion for the man. And let him not in judgment show mercy to the poor man,<sup>54</sup> that is, the mercy of remission, though to him there ought to be shown, as to all men, the mercy of compassion. And to whom and in what fashion a judge<sup>55</sup> should be merciful, the merits or demerits of persons shall instruct him.

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