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MAGNA CARTA IN THE FOURTEENTH CENTURY: FROM LAW TO SYMBOL?: REFLECTIONS ON THE “SIX STATUTES”

Charles Donahue, Jr.*

Faith Thompson’s 1948 book on Magna Carta from 1300 to 1629 is not cited as often today as is her book on the first century of Magna Carta, which was published twenty-three years earlier.¹ That, in a way, is a shame. Both books are, of course, informed by an overall vision of English constitutional history that modern scholarship would want to qualify. But Thompson was a careful scholar, whose citations are almost always accurate, and who was well aware that the views of the Charter that were promulgated by Sir Edward Coke and John Selden in the seventeenth century were anachronistic.

My concern here is with the fourteenth century. My fourteenth century stretches from 1307 to 1422, that is to say, from the accession of Edward II to the death of Henry V. That is because Thompson counted the number of royal confirmations of Magna Carta for this period.² Without much of a stretch we can say that Magna Carta was probably confirmed at least fifty times over the course of 115 years. After 1422, such confirmations seem to disappear. That fact may or may not be significant; I cannot deal with it here.

The situation at my starting point was determined by two events that happened shortly before it. In 1297, Edward I confirmed the 1225 versions of his father Henry

* Paul A. Freund Professor of Law, Harvard Law School. Magna Carta and the legal history discussed in this Paper use sources that modern citation guides do not adequately represent. Specifically, the use of *supra* in modern citation guides is inconsistent with the Latin significance of the word “*supra*.” *Supra* forms in this Paper, therefore, conform to the author’s citation preference.

¹ FAITH THOMPSON, *MAGNA CARTA: ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION 1300–1629* (1948) [hereinafter THOMPSON, *MAGNA CARTA 1300–1629*]; *cf.* FAITH THOMPSON, *THE FIRST CENTURY OF MAGNA CARTA: WHY IT PERSISTED AS A DOCUMENT* (1925). The 1948 book received a long and favorable review by S. B. Chrimes, 65 *ENG. HIST. REV.* 253 (1950).

² Thompson began by counting the separate royal confirmations of Magna Carta found in both the printed rolls of Parliament and in the statute rolls beginning with the reign of Edward III (1337) and ending with the death of Henry V (1422). That gave her a total of forty-four confirmations. Even this understates the number of such confirmations. Thompson also found a number of confirmations from the reign of Edward II or that were buried in other statutes and not on her original list. The ordinances of 1311 have one, as did, at least in part, a statute in the parliament that repealed the ordinances in 1322. There was another in 1318, yet another in 1339. If we add confirmations that are mentioned in unofficial records that we have no reason to doubt, my estimate of “at least 50” in the next sentence seems warranted. *See* THOMPSON, *MAGNA CARTA 1300–1629*, note 1 *supra*, at 9–23 & nn.1–57.

the Third's Great Charter and Forest Charter, and copies were entered on the statute roll.³ In 1300, the same king once more confirmed the same charters and added to them a number of provisions concerning their enforcement. These "Articles upon the Charters" were also entered on the statute roll, and the Charter itself was entered on the charter roll.⁴ The political events that led to what has come to be known as *Confirmatio cartarum* and *Articuli super cartas* have been the subject of considerable discussion and varying interpretations.⁵ For our purposes we can say that they established the proposition that the charters, as they were worded in 1225, were, indeed, law, at least unless and until they were changed, and that they needed supplementary provisions for their enforcement. That they were regarded as a statute is certainly suggested by their enrollment on the statute roll, but we should be careful not to assume that people at the end of the thirteenth century thought of statutes in the same way that we do.

The provocative title that I have chosen suggests that the charters began the fourteenth century as law and ended up as a symbol. The title does, however, have a question mark after it. I am quite comfortable with the law part of it, though just what contemporaries thought that law was may require explanation.

I am not comfortable with calling the ending point, "symbol." I suspect that contemporaries would have been horrified at the idea. That they would have been horrified is one of the reasons, perhaps the principal reason, for provocatively suggesting it, even though we will need to back off from the idea quite substantially.

One of the reasons why they would have been horrified at the idea that Magna Carta was not law was because it clearly was. Copies of both the Great Charter and the Forest Charter were on the statute roll.⁶ We should also remember that few of the

³ 25 Edw. I (1297), in 1 STATUTES OF THE REALM 114–24.

⁴ 28 Edw. I (1300), in 1 STATUTES OF THE REALM 136–41. For the entry on the charter roll, see Paul Brand's as-yet-unpublished Selden Lecture of 2015: "Magna Carta and its Contribution to the Development of English Law, 1215–1307," at 4 (on file with author). I am grateful to Professor Brand for sharing his draft with me.

⁵ See, most recently, Paul Brand, in PARLIAMENT ROLLS OF MEDIEVAL ENGLAND [hereinafter PROME]: Edward I: Summer 1297; Edward I: Michaelmas 1297; Edward I: Lent 1300, all with further references (I have used the version of PROME in BRITISH HISTORY ONLINE, <http://www.british-history.ac.uk/no-series/parliament-rolls-medieval> (by subscription), both because of the ease of access and because there are some corrections from the printed edition [<https://perma.cc/G22W-DKNU>]. Citations are to the king and the date of the parliament, each of which forms a separate web page, made more precise, where the page is long, by an item or footnote number. This citation is to volume 2 of the printed edition (Paul Brand ed., 2005). Later on there are citations to volume 4 (1327–1348) (Seymour Phillips & Mark Ormrod eds., 2005), volume 5 (1351–1377) (Mark Ormrod ed., 2005), and volume 6 (1377–1384) (Geoffrey Martin & Chris Given-Wilson eds., 2005). For contrasting views of the events of 1297–1300, compare 2 WILLIAM STUBBS, THE CONSTITUTIONAL HISTORY OF ENGLAND 136–56 (3d ed. 1887) with CHARLES T. WOOD, *Edward I and the Confirmation of the Charters*, in JOAN OF ARC AND RICHARD III 63–74 (1988).

⁶ See notes 3–4 *supra* and accompanying text.

clauses of Magna Carta rise to the level of generality of clause 1 (liberties of the church) or clause 29 (“due process”). The vast majority of the clauses in the 1225 Charter make fixes in, or recall already existing, rules, most of which have to do with feudal relations between the king and his tenants-in-chief and/or with parts of the legal process.⁷ The second chapter of Thompson’s book lays out in considerable detail the uses made of a number of these provisions in the fourteenth century. They are found, and at least in some cases implemented, in private petitions in parliament. They were thought to be the basis of a number of writs in common use. They are cited, sometimes speciously but sometimes correctly, in arguments recorded in the Year Books.⁸ I have not examined all of these citations. Some of them may turn out to be questionable,⁹ but there are so many of them that the major point has to be right. Indeed, David Seipp’s database of Year Book cases records seventy citations of Magna Carta in the reigns from Edward II through Henry V, a fact that suggests that the Charter was used in argument even more often than Thompson relates.¹⁰

I. A TYPICAL STATUTORY CONFIRMATION

The argument that the charters became “symbolic” rests on the confirmations. That there were fifty confirmations over the course of 115 years suggests that invocation of the charters had become routine, and, hence, not particularly meaningful. Some of the confirmations come at times of considerable tension, if not crisis. That

⁷ For an introduction to the meaning of the Charter in the thirteenth century and to the large body of literature on the topic, see Charles Donahue, Jr., “*The Whole of the Constitutional History of England Is a Commentary on This Charter*,” 94 N.C. L. REV. 1521 (2016).

⁸ For all of these references to Thompson’s discussion of fourteenth-century uses of charter provisions, see THOMPSON, MAGNA CARTA 1300–1629, note 1 *supra*, at 33–67.

⁹ For example, Thompson’s description of the pleading and result in what she describes as “Y. B. H. 7 Edw. III, no. 3, *wast*,” *id.* at 53 & n.57, does not correspond to the only waste case in that term (no. 13, not no. 3). It corresponds quite closely, however, to the case reported in Y.B. Pasch. 7 Edw. III, pl. 3, fol. 12b–13a. Hence, the point is well enough taken, and all that needs to be corrected is the citation.

¹⁰ David J. Seipp, *Medieval English Legal History: An Index and Paraphrase of Printed Year Book Reports, 1268–1535: Compiled by David J. Seipp (Seipp’s Abridgement)*, LEGAL HISTORY: THE YEAR BOOKS, <http://www.bu.edu/law/faculty-scholarship/legal-history-the-year-books> [<https://perma.cc/A8G7-2MGU>]. A careful examination of all these citations might cast some light on the law/symbol dichotomy that we pose in this Paper. Another way to approach the same problem might be to look at the readings on Magna Carta in the Inns of Court. Both of those approaches are taken by Professor Sir John Baker, the former in *Chapter 29 of Magna Carta in the Fourteenth Century*, in TEXTS AND CONTEXTS IN LEGAL HISTORY 235–75 (John Witte, Jr., Sara McDougall & Ana di Robilant eds., Berkley 2016) the latter in his magisterial volume on readings on Magna Carta: SELECTED READINGS AND COMMENTARIES ON MAGNA CARTA 1400–1604 (Selden Society No. 132, 2015) [hereinafter SELECTED READINGS]. None of the manuscripts of the readings antedates 1400, but Baker argues that the “ordinary gloss” on the Charter goes back to 1340. *Id.* at xl–xlii.

is certainly the case of the confirmation found in the Ordinances of 1311 and in conjunction with their repealer in the Statute of York of 1322.¹¹ The same can probably be said of the confirmation in 1341,¹² and of some of the others. But unless we are to imagine that England was in a perpetual state of crisis throughout the fourteenth century and the early years of the fifteenth, we must find another explanation for what seems to have become an almost routine confirmation of the charters.

The answer that Thompson suggests is that a request for confirmation of the charters became a standard clause in the common petition that began the process of negotiating about a subsidy (a grant of taxation) that featured in most of the parliaments in question.¹³ Let me take a petition, chosen not quite at random, from the parliament of 36 Edward III (1362)¹⁴:

¹¹ CALENDAR OF CLOSE ROLLS 1318–1323, at 557–58 (London 1895) (miscited in PROME, note 5 *supra*, as “537–8”). The specific reference to the Charter is only to the first clause (the liberties of the church).

¹² THOMPSON, MAGNA CARTA 1300–1629, note 1 *supra*, at 11 & nn.8, 15; *see further* notes 69–85 and accompanying text *infra*.

¹³ *See* THOMPSON, MAGNA CARTA 1300–1629, note 1 *supra*, at 14–15.

¹⁴ In the original:

[8]. A lour tresdoute et tresgraciose seignur le roi; supplie son povre et simple commune: qe lui plese de sa graciose et benigne seignurie avoir regarde a les grantz charges et meschiefs qe sa dit commune ad eu et soeffert en son temps pur plere et atteigner a son seignurie, et as diverses meschiefs qe sont avenuz a mesme le commune par diverses pestilences de vent et de eawe, et mortalite des gentz et de bestaille; et granter en eide de relever le povre estat de la dit commune les peticions soutz escrites:

[9]. I. Primerement, qe la grande chartre et la chartre de la foreste et les autres estatutz faitz en son temps et de ses progenitours, pur profit de lui et de la commune, soient bien et ferment gardez et mis en due execucion, saunz destourbance mettre ou arrest faire a l'encontre par especial mandement ou en autre manere.

[editorial note: *Responsio*.]

Nostre seignur le roi, par assent de prelatz, ducs, countes, barons et la commune, ad ordeine et establi qe les ditz chartres et estatutz soient tenuz et mis en execucion, solonc la dit peticion.

PROME, note 5 *supra*, Edward III: Oct. 1362, nos. 8–9.

A brief word is in order here about the legislative process in the reigns of Edward III and Richard II (1327–1399). Most, though not all, of what appears on the statute roll originated in a common petition, nominally put forward in the name of the commons, but actually derived from various sources, most of which can only be suspected. The king responded to the petitions, and the petitions and the response were entered on the roll of the parliament. The drafting of what eventually appeared on the statute roll normally took place after the parliament had departed. Only rarely did the parliament consider the wording of the statute. This process is

[8]. To their most dread and most gracious lord the king; his poor and simple commons petition: that it may please him, of his gracious and kind lordship, to consider the great charges and misfortunes which his said commonalty has experienced and suffered in his time, in order to please and satisfy his lordship, and the various misfortunes which have affected the same commonalty by various pestilences of wind and of water, and the deaths of people and beasts; and to grant the petitions written below in aid to relieve the poor estate of the said commonalty:

[9]. I. First, that the Great Charter and the Charter of the Forest and the other statutes made in his time and that of his progenitors, for the profit of him and of the commonalty, shall be properly and firmly observed and duly executed, without any disruption or prevention being made to the contrary by special command or in other manner.

To which the king replies:

Our lord the king, by the assent of the prelates, dukes, earls, barons and the commons, has ordained and established that the said charters and statutes shall be upheld and executed, according to the said petition.

And this confirmation was duly entered in the statute roll in the preamble and first chapter of the statute of this parliament¹⁵:

reflected in all of the statutes that we will consider in this Paper. For a general introduction, see ALFRED L. BROWN, *THE GOVERNANCE OF LATE MEDIEVAL ENGLAND 1272–1461*, at 207–37 (1989) [hereinafter BROWN, GOVERNANCE].

¹⁵ 36 Edw. III, pmb. & c. 1, *in* 1 STATUTES OF THE REALM 371 (the translation is traditional, a fact that accounts for the archaic language and spelling, but it is still the official one). In the original:

AL honour & pleissance de Dieu, & amendement des outrages grevances & oppressions faitz au poeple, & en relevement de lour estat, le Roi Edward, a son p[ar]lement tenez a Westmonstier a la quinzime Seint Michel, lan de son regne trente sisme, a la requeste de sa co[m]mune p[ar] lour peticion baillez a lui en le dit p[ar]lement, p[ar] assent des Prelatz, Ducs, Countes, Barons & autres g[ra]ntz, au dit p[ar]lement assemblez, ad g[ra]unte p[ur] lui & ses heirs a touz jours les articles souzscriptz:

Prim[er]ement q[ue] la g[ra]nde Chartre & la Chartre de la Foreste, & les autres estatutz, fatz en son temps & en temps de ses p[ro]genitours, soient bien & fermement tenez & gardez, es touz pointz.

To the Honour and Pleasure of God, and Amendment of the outrageous Grievances and Oppressions done to the People, and in Relief of their Estate, King Edward at his Parliament holden at Westminster in the Fifteenth of St. Michael, the Six and thirtieth Year of his Reign, at the Request of his Commons by their Petition delivered to him in the said Parliament, by Assent of the Prelates, Dukes, Earls, Barons, and other Great Men in the said Parliament assembled, hath granted for him and his Heirs for ever the Articles under-written.

FIRST, That the Great Charter and the Charter of the Forest, and the other Statutes made in his Time, and in the Time of his Progenitors, be well and surely holden and kept in all Points.

This parliament is not particularly well documented. Most of what we know about it is what can be derived from the official rolls and the accompanying administrative documents.¹⁶ It passed a statute that pleadings in the courts should be in English,¹⁷ a statute that, so far as we can tell, had little immediate effect in the central royal courts of common law.¹⁸ It also continued the tax (subsidy) on wool that had been adopted during the war with France. The crown was deeply in debt because of that war, but this tax on wool is notable because it was the first such tax adopted in peacetime. The petitions came before the grant of the subsidy, and while we do not know the details of the negotiation, the chronology certainly suggests that the king's openness to accepting the petitions (he accepted all of them with little qualification) was the price that he had to pay for getting the subsidy.¹⁹

There are twenty-six petitions, a good list of the kinds of things that were bothering the top ten percent of the population in 1362. Most of them have nothing to do with any of the provisions of Magna Carta. The England of 1215 was not the England of 1362. A few of them are related to Magna Carta in a general way. The nine petitions after the first one all concern purveyance and prises, the taking of food and other items for the king's household. This was the subject of a brief clause in the 1225 Charter.²⁰ It had also been the topic of a number of statutes since that time, and these petitions became yet another one.²¹

¹⁶ See Ormrod, *Introduction*, in PROME, note 5 *supra*, Edward III: Oct. 1362.

¹⁷ 36 Edw. III, c. 15 (1362), in 1 STATUTES OF THE REALM 375–76.

¹⁸ See the discussion in DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 111–16 (1963), with copious references.

¹⁹ See Ormrod, *Introduction*, in PROME, note 5 *supra*, Edward III: Oct. 1362.

²⁰ MAGNA CARTA (1225) c. 19 (c. 28 in 1215), in J. C. HOLT, *MAGNA CARTA* 386, 424 (3d ed. 2015).

²¹ 36 Edw. III, c. 2–6 (1362), in 1 STATUTES OF THE REALM 371–73. There is only one specific reference to Magna Carta in the remaining petitions; we will deal with it in the text and notes 42–45 *infra*.

In the *Five Knights Case* in 1627, the knights had been imprisoned by special command of the king for failing to make a forced loan to him, and they sought a writ of habeas corpus.²² John Selden and others arguing for the knights mentioned six statutes from time of Edward III.²³ These statutes, as they saw it, interpreted clause 29 of Magna Carta in such a way as to render the imprisonment of the knights at the command of the king unlawful.²⁴ This was not the first time that fourteenth-century statutes had been thought relevant to the interpretation of the clause, but it seems to have been the first time that the number of such statutes was fixed at six. The heart of Thompson's treatment of clause 29 of Magna Carta in this period is organized around these statutes.²⁵ Let us take a look at each of them in chronological order in an effort to see not what they meant in the seventeenth century, but what they might have meant in the fourteenth. Our goal is to determine whether clause 29 was being treated in these statutes as "law" or "symbol," and our answer (outlined in the Conclusion) is going to be that that may not be the right question.²⁶

A. Statute 1

Chapter 9 of 5 Edward III (1331) reads in the standard English translation²⁷:

ITEM, It is enacted, That no Man from henceforth shall be attached by any Accusation, nor forejudged of Life or Limb, nor his Lands, Tenements, Goods, nor Chattels seised into the King's Hands, against the Form of the Great Charter, and the Law of the Land.

There is no surviving common petition to go with this parliament, though the most recent editors of the rolls of parliament speculate that there might have been

²² 3 How. St. Tr. 1 (K.B.).

²³ *Id.* at 7, 16–18.

²⁴ *Id.* at 17–18.

²⁵ THOMPSON, MAGNA CARTA 1300–1629, note 1 *supra*, at 268–93. To these six she adds a seventh, 15 Edw. III, stat. 1, c. 3 (1341), in 1 STATUTES OF THE REALM 295–96. That statute was repealed two years later, but it turns out to be interesting and complicated. We will deal with it after the traditional six.

²⁶ Other approaches to the overall problem are taken by Professor Sir John Baker in the works cited in note 10 *supra*. Hence, the rest of this Paper is confined to the statutes themselves which have not, so far as I am aware, been the subject of a detailed study since Thompson.

²⁷ "Item est accorde & establi q[e] nul ho[m]me soit desore attache p[ar] nul accusation, ne forjuge de vie ne de membre, ne ses t[er]res, ten[emen]z, biens ne chateux seisiz en la mein le Roi, contre la fourme de la g[ran]te Chartre & la lei de la t[er]re." 5 Edw. III, c. 9, 1 STATUTES OF THE REALM 267. Chapter 1 of the statute contains a typical general confirmation: "FIRST, It is accorded and established, That the Great Charter and the Charter of the Forest shall be kept and firmly maintained." 5 Edw. III, c. 1, 1 STATUTES OF THE REALM 265.

one.²⁸ This was the first parliament that Edward III held after the execution of Roger Mortimer, Edward's mother's paramour, and a man who had decidedly gotten too big for his britches during Edward's minority.²⁹ Thompson speculates that this chapter was included in the statute because of Mortimer's violations of due process during his period of ascendancy.³⁰ That is possible. He had been accused of much in the previous parliament. In this parliament, however, all that he was accused of was complicity in the murder of Edward II. Further consideration of what to do about Mortimer's son was postponed to the next parliament.³¹

What later ages found interesting about this chapter is that it seems to expand the reach of clause 29 of the 1225 Charter. That clause read in part³²:

No free man shall henceforth be captured or imprisoned or disseised of any free tenement or of his liberties or of his free customs, or outlawed or exiled or in any way destroyed, nor shall we go against him, nor shall we send against him, except by lawful judgment of his peers or by the law of the land.

By contrast with clause 29 of the Charter, chapter 9 of 1331 is not confined to "free men."³³ Personal property has been added to the items that the king may not seize without proper judgment.³⁴ Some of the specifically "feudal" references are gone ("liberties" and "free customs," "disseised of any free tenement"). The language is less that of a personal promise by the king and more of a commitment as to what the legal system will and will not do. How deliberate these changes are is hard to tell absent a clear idea of the context. Since it was by no means clear that some sort of civil war would not break out at this point, the context may be an attempt by the king to restrain his followers from taking vengeance under the cover of law on the followers of Mortimer.³⁵

²⁸ PROME, note 5 *supra*, Edward III: Sept. 1331.

²⁹ *Id.*

³⁰ THOMPSON, MAGNA CARTA 1300–1629, note 1 *supra*, at 75–79, 90–91, discussed in note 31 *infra*.

³¹ PROME, note 5 *supra*, Edward III: Sept. 1331, no. 17. The son, however, died at the end of 1331, and his son was an infant. See R. R. Davies, *Mortimer, Roger (VI), second earl of March (1328–1360)*, OXFORD DICTIONARY OF NAT'L BIOGRAPHY, <http://www.oxforddnb.com/view/article/19355> [<https://perma.cc/FKV4-GAE8>] (I have used the online edition of the Oxford Dictionary of National Biography, available by subscription, because it contains updatings that are not included in the paper edition. 60 vols., H. C. G. Matthew & Brian Harrison eds., 2004) [hereinafter ODNB].

³² MAGNA CARTA (1225) c. 19, in HOLT, note 20 *supra*, at 425 (the translation is traditional).

³³ 1 STATUTES OF THE REALM 267 ("It is enacted, That no Man . . .").

³⁴ *Id.* ("[N]o Man . . . shall be . . . forejudged of . . . Goods, nor Chattels seised into the King's Hands against the Form of the Great Charter, and the Law of the Land.").

³⁵ Thompson focused on the "trial," if such it can be called, and execution of the earl of Arundel in 1326. THOMPSON, MAGNA CARTA 1300–1629, note 1 *supra*, at 76–77. But when

B. *The Second Statute*

25 Edward III, statute 5, chapter 4 (1352)³⁶:

ITEM, Whereas it is contained in the Great Charter of the Franchises of England, that none shall be imprisoned nor put out of his Freehold, nor of his Franchises nor free Custom, unless it be by the Law of the Land; It is accorded assented, and stablished, That from henceforth none shall be taken by Petition or Suggestion made to our Lord the King, or to his Council, unless it be by Indictment or Presentment of good and lawful People of the

it came to the statute itself, she was cautious: “It has no corresponding petition in the incomplete record of the parliament roll for this session. It may have been prompted by the arbitrary regime of Isabella and Mortimer.” *Id.* at 90. What makes the connection of the statute with the earl of Arundel plausible is that his son’s petition to be restored to his honors, which was probably presented in the same parliament as that which condemned Mortimer to death (November of 1330), begins: “the Great Charter wills that no earl, baron, or any other person of the realm be judged except by process of law before his peers (*come la grant chartre voet, qe nul counte, baroun, ne nul autre du roialme, soit jugge mes par proces de ses peres*),” and then proceeds to impugn the process by which his father was condemned and executed. PROME, note 5 *supra*, Edward III: Nov. 1330, C 65/2, mm.7-5, no. 13. The suggestion in the text is based on the fact, as the son’s most recent biographer notes, that he was restored to his lands and titles but expressly forbidden to pursue his vengeance against the man who betrayed his father to Isabella and Mortimer. Chris Given-Wilson, *Fitzalan, Richard (II), third earl of Arundel and eighth earl of Surrey (1313–1376)*, in ODNB, note 31 *supra*, <http://www.oxforddnb.com/view/article/9534> [<https://perma.cc/4DH5-JUYF>]. If that is the context in which the statute is to be placed, then the difference in the wording of the statute from that in clause 29 loses its significance, unless we are to imagine that someone thought that what happened to the old earl should not happen to anybody.

³⁶ 25 Edw. III, stat. 5, c. 4 (1352), in 1 STATUTES OF THE REALM 321:

Estre ceo, come contenu soit en la g[ra]nt Ch[art]re des franchises Denglet[er]req[e] nul soit pris ne emprisonne, ne ouste de son frank ten[ement] ne de ses franchises ne de ses franchises custumes, sil ne soit p[ar] lei de la t[er]re; Acorde est, assentu & establi, q[e] nul desore soit pris p[ar] peticion ou suggestion faite a n[ost]re Seign[ur] le Roi ou a son conseil, sil ne soit p[ar] enditement ou p[re]sentement des bones & loialx du visnee ou tiele fait se face, & en due man[er]e, ou p[ro]ces fait sur brief original a la co[mun]e lei; ne q[e] nul soit ouste de ses franchises ne de son fra[n]kten[ement] sil ne soit mesne duement en respons, & forjugge dyceles p[ar] voie de lei; et si rien soit fait al encont[er] soit redresse & tenue p[ur] nul.

THOMPSON, MAGNA CARTA 1300–1629, note 1 *supra*, at 91:

The second of the *six statutes* (25 Edward III, statute 5, chapter 4) emanated from the same parliament which enacted the famous Statute of Treasons. This act follows almost verbatim one of the commons petitions; it is a clear-cut protest against the practice of accusation by “suggestion” to king and council, and is the most explicit exposition thus far of the “law of the land[.]”

same neighbourhood where such Deeds be done, in due Manner, or by Process made by Writ original at the Common Law; nor that none be out of his Franchises, nor of his Freeholds, unless he be duly brought into answer, and forejudged of the same by the Course of the Law; and if any thing be done against the same, it shall be redressed and holden for none.

The parliaments immediately following the Black Death of 1348–1349 passed some notable legislation of which probably the best known is the Statute of Labourers of 1351.³⁷ The second of the “six statutes” was the fourth chapter of the statute of a parliament that met early in 1352. The parliament that resulted in this statute involved a complicated negotiation between the king and the commons about a subsidy, needed, it was said, because the truce with France was falling apart. The commons granted the subsidy and accompanied the grant with a long list of petitions, including the one that resulted in this statute. Most of the petitions were granted.³⁸ The so-called “Statute of Treasons,” chapter 2 of the parliament’s statute, was a carefully drafted piece of legislation in response to a fairly vague petition.³⁹ By contrast, the language of chapter 4 follows almost exactly that of the petition.⁴⁰

There seems little doubt that chapter 4 was directed, at least in part, at conciliar justice. It is mentioned in both the petition and the statute itself. That may reflect the fact that the council was becoming a more important and regularly sitting body at the time.⁴¹ The statute does not expressly deprive the council of jurisdiction in either

³⁷ 25 Edw. III, stat. 1 (1351), in 1 STATUTES OF THE REALM 311–13.

³⁸ Ormrod, *Introduction*, in PROME, note 5 *supra*, Edward III: Jan. 1352.

³⁹ 25 Edw. III, stat. 1 (1351), in 1 STATUTES OF THE REALM 319–20. Sir William Shareshull, the chief justice of the King’s Bench, whom the roll describes as managing the parliament for the king, may have been involved in the drafting. See BERTHA H. PUTNAM, *THE PLACE IN LEGAL HISTORY OF SIR WILLIAM SHARESHULL, CHIEF JUSTICE OF THE KING’S BENCH, 1350–1361*, at 54, 58, 128 (1950). See generally Richard W. Kaeuper, *Shareshull, Sir William (1289/90–1370)*, in ODNB, <http://www.oxforddnb.com/view/article/25204> [<https://perma.cc/JQ57-2HGA>].

⁴⁰ PROME, note 5 *supra*, Edward III: Jan. 1352, no. 19 (footnotes omitted): [19.] IX. Item, come y soit contenu en la grande chartre des fraunchises d’Engleterre, ‘qe nul soit pris, n’emprisonne ne ouste de frank tenement, ses fraunchises et frankes custumes si ne soit par la ley de la terre’, qe nul desore soit pris par peticion ou suggescion fait a nostre seigneur le roi ou a son conseil si ne soit par enditement ou presentement des bones et loialx de visnee, et en due manere, ou par proces fait sur brief original a la commune ley, ne oustee de ses fraunchises ne de son frank tenement s’il ne soit mesne duement en respons et forsjudge de ycelles par voie de ley. Et si riens soit fait a l’encontre soit redresse et tenu pur nul.

⁴¹ The documentation, as noted below, is skimpy and scattered, but the conclusion suggested in the text seems relatively clear. See BROWN, *GOVERNANCE*, note 14 *supra*, at 30–42, 132–34, with references, including (at 133) one to the 1352 statute.

criminal cases or civil cases involving land. It does require that the council proceed in the former type of case on the basis of indictment or presentment and in the latter on the basis of an original writ.⁴² I know of no original writ concerning land that was returnable in the council, and the mention in chapter 4 of the common law would suggest that conciliar jurisdiction of such cases was not contemplated.⁴³ On the criminal side, we can be less sure. The skimpy and scattered documentation of the council's activities in this period makes it difficult to know just how much it was doing in these areas and whether it changed its practices as a result of the statute.⁴⁴

The most recent assessment of the work of the parliament of 1352 suggests that the chapter on treason was the most important part of its statute in terms of its long-term impact on the law, that the king's concession that he would not expand military service beyond that required by the statute of Winchester of 1285 nor levy a customary feudal aid at a rate higher than that levied in the past without the consent of parliament were the most important "constitutional" issues, and that the economic legislation of this parliament may "have had greatest immediate impact."⁴⁵

C. The Third Statute

28 Edward III, chapter 3 (1354)⁴⁶:

⁴² 25 Edw. III, stat. 5, c. 4 (1352), in 1 STATUTES OF THE REALM 321. I am deliberately avoiding making any suggestion about whether "indictment" or "presentment" are, at least potentially, two different processes in this period or whether they are the same, and the phrase is tautological. For a general introduction to the process and the difficulty of being precise about it, see J. G. BELLAMY, *THE CRIMINAL TRIAL IN LATER MEDIEVAL ENGLAND* 19–56 (1998) (chapter on "Accusation: by Jury and by Appeal").

⁴³ To say that there was no original writ concerning land that was returnable in the council is not to say that there were no writs returnable in the council. Both the writ *sub poena* and that *quibus certis causis* could be, and were, made returnable in the council. *E.g.*, SELECT CASES BEFORE THE KING'S COUNCIL 1243–1482, at 43–44 (*quibus certis causis*, 1359), 77–78 (*sub poena*, probable but not quite certain, 1392), 88–89 (*sub poena*, certain, 1402–03) (I. S. Leadham & J. F. Baldwin eds., Selden Society No. 35, 1918). These examples all postdate the statute, but it is probable that these writs were being used by the council at the time.

⁴⁴ A selection of the records is edited in SELECT CASES BEFORE THE KING'S COUNCIL, note 43 *supra*, with references to other printed records. So far as I am aware, no one has attempted to edit records of cases in the council since then, and a glance at what Leadham and Baldwin had to do to assemble the records that they edited shows why. They are, for the most part, drawn from archival category now known by The National Archives as "C49," and searching that category is not for the faint of heart, to say nothing of the other categories in which such records might be found, *e.g.*, "SC8," "C1." There is a case on the King's Bench rolls that may result from a conciliar action related to one of the later statutes that we will examine in the text and note 60 *infra*. There may be other such cases.

⁴⁵ Ormrod, *Introduction*, in PROME, note 5 *supra*, Edward III: Jan. 1352, nn.23–38.

⁴⁶ 25 Edw. III, stat. 5, c. 4 (1352), in 1 STATUTES OF THE REALM 321:

Item, q[e] nul ho[m]me, de quel estate ou condicion qil soit, ne soit oste de t[er]re ne de ten[ement], ne pris, nemprisone, ne desh[er]ite, ne mis a la mort, saunz estre mesne en respons p[ar] due p[ro]ces de lei.

ITEM, That no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor condemned, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law.

Ringling words, indeed. It is not at all surprising that enthusiasts for Magna Carta from the seventeenth century to the present have put much emphasis on them. It is the first time that the phrase “due process” occurs in a statute in connection with what seems to be fairly obviously an interpretation or extension of clause 29 of the Charter.⁴⁷ It also seems resoundingly to confirm what we had already suspected: that the limitation of clause 29 to free men no longer applied. The subject of the chapter is “no Man of what Estate or Condition that he be”

Closer examination, however, would suggest some caution. This is not a generic commitment to “due process” as that term was later understood, and as it is understood today. It is a rather specific reference to what today we would call “initial process” (“without being brought in Answer by due Process of the Law”). It seems to be connected with a concern that we have already seen about criminal processes begun by means other than indictment or presentment or civil processes begun without a writ.

If we look to the history of the parliament, we discover that legal process was not a major concern. The parliament was summoned to confirm the ordinance of the Staple, a major piece of commercial legislation in Edward the Third’s reign, and much time seems to have spent with proposed amendments to the ordinance. The parliament also dealt with an impending peace with France. It did not grant a subsidy (nor was one requested), so the petitions were not negotiated in the context of an implied: “we will grant this subsidy if you do this.” The request to confirm Magna Carta does not appear until the twelfth item of the petitions, though it was brought to the front when the statute was drafted. Indeed, there is nothing in the petitions that seems to correspond to what ended up in the statute as chapter 3, and the most recent account of the parliament does not even mention chapter 3.⁴⁸

THOMPSON, MAGNA CARTA 1300–1629, note 1 *supra*, at 91 (footnotes omitted):

A similar enactment (1354), much briefer in compass, constitutes the third of the *six statutes*. In this instance Magna Carta is not cited, but the provision follows close upon a confirmation of the Charter (chapter i). In these acts of 1352 and 1354 the *liber homo* of the Charter has become in one case simply “none (*nul*),” in the other “no man of whatever estate or condition he may be (*nul homme, de quel estate ou condicion qil soit*).” The second uses the phrases “in due manner or by process made by writ.” The third is the first instance I have found where “due process of law” occurs in connection with chapter 29.

⁴⁷ The phrase may be, as Thompson seems to suggest, note 46 *supra*, a truncation of *en due man[er]e, ou p[ro]ces fait sur brief original* in the 1352 statute.

⁴⁸ For the whole paragraph, see Ormrod, *Introduction, in* PROME, note 5 *supra*, Edward III: Apr. 1354.

There is, however, a petition in the parliament that may have given rise to this statute. It is directed against false accusations of crimes made either to the king's justices or to the council⁴⁹:

[30.] XIII. To our lord the king and his council; the commons of his realm pray: that whereas our said lord the king sends his justices, sometimes of his bench and sometimes other justices of trailbaston and other inquiries, into the country, and thereupon various people of their own malice and deceit cause bills to be made in destruction of the good people of the area where the sessions are held, pronouncing by the same bills that the aforesaid

⁴⁹ *Id.* at no. 30:

[30.] XIII. A nostre seigneur le roi et son conseil; prie la comune de son roialme: qe come nostre dit seigneur le roi fait envoyer ses justices en pais, ascun foitz son baunk, et ascun foitz autres justices trailbaston et d'autres enquerres, et sur ceo diverses gentz de lour malice et fausyne propre font faire billes en defesance des bones gentz du pais ou les sessions serront, surmettantz par meismes les billes, qe les gentz avantditz sont conspiratours, confederatours et meintenours des touz autres mals; queles billes sont ascun foitz baillez au conseil le roi par tieux fauz procurez, et mandez a meismes les justices en pais d'enquere, et ascunfoitz baillez a mesmes les justices par mesmes les procurez, en quel cas mesmes les procurez des tieles billes font faire panell procurez ou lewe par eux mesmes, ou enemys a ceux qi sont nomez en les billes, d'enditer meismes les gentz. Et puis quant ils sont sur lour mise, font en mesme la manere panell des gentz procurez, ou lewes, ou enemys a les parties, qi ne sont gentz d'estat ne prescheinz a les lieux ou les faitz sont supposez faites; et baillent meismes les panelles a la court sanz estre arraie par viscont, ou autre ministre de countee a ceo jurre ou depute, en defesance des tieles bones gentz, pur eux mesmes vengier.

Qe plese a nostre seigneur le roi et son conseil ordiner qe tieles enquestes ne soient prises a nully devys, mes des meillours gentz, et plus loialx des countees, et plus prescheins a les lieux ou tieles faitz sont supposez estre faites, et arraiez par viscont ou autre ministre le roi a ceo jurrez et deputez. Et qe apres ceo qe ascunes gentz sont sur lour mise, et l'enquete soit charge et jurree, qe totes evidences qe sont a dire soient overtement dites a la barre. Issint, qe apres l'enquete departie ove sa charge, nul justice, n'autre, n'ait parlaunce ovesques eux de mover ou procurer la dite enquete; mes en lour peril, et sur lour sermentz, dient mesmes la verite.

[editorial note: *Responsio.*]

Quant a ceste peticion, l'article est bon et resonable et le roi voet q'il soit tenuz.

people are conspirators, plotters and maintainers of all other evils; which bills are sometimes delivered to the king's council by such false procurers and are sent to the same justices of inquiry in the country, and sometimes are delivered to the same justices by the same procurers, in which case the same procurers of such bills cause panels to be procured or hired by themselves or the enemies of those who are named in the bills, to indict the same people. And then when they are on their mise, in the same manner they make panels of procured people, or hired men or enemies to the parties who are not people of substance and do not live near the places where the deeds are supposed to have been done; and they deliver the same panels to the court without being arrayed by the sheriff or other official of the county sworn or appointed to this, in destruction of such good men, in order to have revenge for themselves.

May it please our lord the king and his council to ordain that such inquests shall not be taken at the will of anyone, but only of the better and most loyal people of the counties and who are nearest to the places where such acts are supposed to have been done, and arrayed by the sheriff or other official of the king sworn and appointed to this. And that after any people are on their mise, and the inquest is charged and sworn, that all evidences which are to be given shall be spoken openly at the bar. So that after the inquest has concluded with its business, no justice or other man shall speak with them to move or procure the said inquest; but they shall speak the truth at their peril and on their oaths.

The king replied:

As regards this petition, the article is good and reasonable and the king wills that it shall be upheld.

That something like what is being alleged here happened, at least occasionally, we can have little doubt. How often it happened probably cannot be known. That many people thought that it was common seems clear. Allegations of the abuse of legal process by those who were trying to get back at their enemies are common in this period both in literature and in parliamentary petitions.⁵⁰ It is hard to imagine

⁵⁰ Professor Jonathan Rose is engaged in a massive study of this phenomenon, which is part of a broader phenomenon that goes under the contemporary name of "maintenance." It

that anyone connected with central administration supported such activities. The king answers the petition, by saying basically: “This should not happen, and we’ll try to do something about it.” Normally, that sort of petition and a favorable response would not lead to anything on the statute roll except, perhaps, a renewal of the numerous statutes about maintenance and conspiracy. It is possible that someone in the inner group that was charged with writing the statute after parliament had departed thought of another possibility: take clause 29 of Magna Carta and rewrite it so that it could be applied to this situation. That suggestion, obviously, is speculative, but it seems to be a possible, perhaps even a likely, explanation of why this particular chapter appeared in the context of this particular parliament.

D. The Fourth Statute

We have already discussed the general and typical confirmation of the whole Charter in 1362.⁵¹ The fourth of the six so-called statutes is a petition in the same parliament that did not make it onto the statute roll⁵²:

[20.] XII. Also, whereas it is contained in the Great Charter and other statutes that no man shall be taken or imprisoned by special warrant, without an indictment or other due process to be made at law; and it has often been the case, and still is, that divers people are impeached, taken and imprisoned without an indictment or other process made at law on them, for things done

makes no sense to cite prior literature on the topic, such as PERCY HENRY WINFIELD, *THE HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE* (1921), because Rose’s work has superseded it. I am grateful to Professor Rose for having shared with me his proposed chapters 5, “Efforts to Deal with Corruption of Justice in the Reign of Edward III,” and 7, “Maintenance and Medieval Literature.”

⁵¹ See text accompanying notes 11–21 *supra*.

⁵² PROME, note 5 *supra*, Edward III: Oct. 1362, no. 20 (footnote omitted):
 [20.] XII. Item, come il soit contenez en la grande chartre et autres estatutz, qe nul homme soit pris n’emprisonnez par especial mandement saunz enditement ou autre due processe affaire par la lei; et soventfoitz ad este, et uncore est, qe plusours gentz sont empeschez, pris et emprisonnez saunz enditement ou autre proces fait par la lei sur eux, sibien de chose faite hors de la foreste le roi come pur autre cause; qe plese a nostre dit seigneur commander a delivrer ceux qe sont issint pris par tiele especial mandement, contre la fourme des chartres et estatutz avantditz.

[editorial note: Responsio.]

Il plest au roi; et si nul se sente greve, viegne et face sa plainte, et droit lui serra fait.

outside the king's forest as well as for other reasons; may it please our said lord to command that those who are thus taken by such special warrant, against the form of the aforesaid charters and statutes, be released.

To which the king replied:

It pleases the king; and if anyone shall feel himself aggrieved, he shall come and make his complaint, and justice will be done to him.

The reference in the petition is clearly to clause 29 of the 1225 Charter, the “due process” clause, which the petition calls by its modern name. That name, as we have just seen, was quite new at the time. The king's reply to the 1362 petition is a bit vague, and nothing appears in the statute roll about it. Without knowing just what a “special warrant” is in this context, it is difficult to determine just what the complaint is about. The whole thrust of Thompson's chapter 3 suggests an elaborate argument that connects this petition with similar petitions and arguments about arrests made by royal commissions of inquiry and, indeed, by the council itself, going all the way back to the “Stratford affair” of 1341, and even beyond that.⁵³ That is not impossible. What she is clearly right about is that this particular petition is not connected, except in the most general way, with the first one. That is a standard and routine request for a confirmation of the charters, which is standardly and routinely granted.⁵⁴

In the light of the context that we have been able to develop for the preceding statutory references to clause 29, we can speculate about the reference to clause 29 in this petition. Like the confirmation of Magna Carta generally, which did make it onto the statute roll of this parliament, this would seem to be an almost, if not quite, routine confirmation of the notion that clause 29 of the Charter be interpreted or extended to require that criminal proceedings be commenced by indictment or presentment, and, perhaps, that civil proceedings regarding land be commenced by an original writ. That would seem to be the meaning of the phrase “due process” in the petition.

The only other issue is how it happened that those who devised the notion of the “six statutes” in the seventeenth century managed to include this among them, because this is not a statute. Thompson suggests that this resulted from a confusion, made in the heat of argument in the *Five Knights Case* of 1627, of the general confirmation of Magna Carta in the statute and the specific reference to clause 29 that

⁵³ See THOMPSON, *MAGNA CARTA 1300–1629*, note 1 *supra*, at 68–79.

⁵⁴ *Id.* at 93; quoted in note 55 *infra*.

appears only in the petitions.⁵⁵ That is possible, and we will leave it at that. Our concern is with the fourteenth century, not the seventeenth.

E. The Fifth Statute

37 Edward III, chapter 18 (1363)⁵⁶:

ITEM, Though that it be contained in the Great Charter, that no Man be taken nor imprisoned, nor put out of his Freehold, without Process of the Law; Nevertheless divers People make false Suggestions to the King himself, as well for Malice as otherwise, whereof the King is often grieved, and divers of the Realm put in [Damage,] against the Form of the same Charter; wherefore

⁵⁵ 3 How. St. Tr. 1 (K.B. 1627); THOMPSON, MAGNA CARTA 1300–1629, note 1 *supra*, at 93 (footnotes omitted):

In their selection of a fourth interpretation of chapter 29, counsel for the five knights made a bad blunder. Their 36 Edward III, number 9, is a general confirmation of the Charters and has nothing to do with arbitrary arrest, as Attorney General Heath ably demonstrated. The common lawyers were on surer ground in citing another petition of the same parliament. To be sure, this did not appear on the statute roll, but, as Digby said, it is “the answer to the petition which makes it an act of parliament.” Certainly it must have had an especial appeal in 1627 and 1628 for it protests arrest by special command.

⁵⁶ 37 Edw. III, c. 18, in 1 STATUTES OF THE REALM 382:

Item coment qen la g[ra]nde Chartre soit contenez, q[e] null ho[m]me soit pris, ou emprisonnez, ne oustez de son franc tenement, sanz p[ro]cesse de ley; nientmeyns plusours gentz font faux suggestions au Roi mesmes, sibien p[ar] malice come en autre man[er]e, don’t le Roi est sovent trop grevez, & plusours du Roialme mys en g[ra]nt daunger & pert, contre la forme de mesme la chartre; p[ur] qoi est ordeigne q[e] touz ceux q[e] font tiels suggestions, soient mandez ove les ditz suggestions, devant le Chaunceller Tresorer & son g[ra]nt conseil; & q[e] illeoq[ue]s ils troevent seurte a p[ur]suire lo[ur] suggestions, & dencourer mesine la peyne q[e] lautre av[er]eit sil fut atteint, encas q[e] sa suggestion soit trove malveys; et q[e] adonq[ue]s p[ro]ces de ley soit fait dev[er]s eux, sanz estre pris ou emprisonnez contre la fourme de la dite chartre & autres estatuz.

THOMPSON, MAGNA CARTA 1300–1629, note 1 *supra*, at 93 (footnotes omitted):

Their [i.e., counsel for the five knights] fifth statute, 1363 (again based almost verbatim on a commons petition), not only complains of false suggestions to the king himself, contrary to the process of the law of Magna Carta, but provides that henceforth such accuser find sureties before the council, and “if his suggestion be found evil,” incur the same penalties the accused would have suffered.

it is ordained, That all they that make such Suggestions, be sent with the same Suggestions before the Chancellor, Treasurer, and his Grand Council, and that they there find Surety to pursue their Suggestions, and incur the same Pain that the other should have had if he were attainted, in case that this Suggestion be found evil; and that then Process of the Law be made against them, without being taken [and] imprisoned against the Form of the said Charter and other Statutes.

The parliament of 1363 did not grant a subsidy, nor was it asked to. That issue had been handled in the three-year subsidy granted in 1362. The focus of its activities was economic, the movement of the wool staple to Calais, and two major pieces of economic legislation, one that attempted to control the rise in prices by confining craftsmen to a single trade and another that attempted to control the clothing and diet of various ranks in the society. Neither piece of legislation worked, and both were repealed in 1365. The most recent account of the activities of this parliament focuses almost entirely on those issues and does not mention the petition and statute concerning clause 29 of Magna Carta even in passing.⁵⁷

What became chapter 18 of the parliament's statute is, however, in the petitions, and its wording is almost the same as that of the statute.⁵⁸ The petition and the

⁵⁷ Ormrod, *Introduction*, in PROME, note 5 *supra*, Edward III: Oct. 1363. The closest he comes is "the commons then turned their attention to a range of perennial legal, administrative and economic issues," but the one he focuses on is appointments to peace commissions. *Id.* at n.9.

⁵⁸ It is the last of the petitions, *id.* at no. 37:

[37.] Also, the said commons pray: that whereas it is contained in the Great Charter that no man shall be taken or imprisoned or removed from his freehold without process of law; and many people make false accusations of the same to our lord the king, by malice as well as in other manner, as a result of which our said lord the king is often very aggrieved; and the said commons pray: that all those who make such accusations shall be sent before the chancellor, treasurer and his great council with the said accusations, and that there they shall find security to pursue their accusations, and shall incur the same penalty that the other party would have if he were attainted in the event that his accusation is found to be evil; and that then process of law shall be made against them, without being taken or imprisoned contrary to the form of the Great Charter and other statutes.

The royal response is: "It well pleases the king."

In the original:

[37.] Item, prient les dites communes: qe come il est contenu en la grande chartre qe nul homme soit pris n'emprisonne ne oustez de son frank tenement saunz proces de lei; et plusieurs gentz font faux suggescions a nostre seignur le roi mesmes, sibien par malice come en autre manere,

statute give us a better idea than we had previously as to what the complaint was about. We might even imagine that the previous statutes were about the same topic, though we cannot be completely sure that they were. What is being complained about would seem to be that the commons thought that there were those who were making false, at least in some cases maliciously false, accusations to “the king,” which probably means not necessarily to the king himself but to some royal official fairly high up in the administration. What the commons want to have happen is that these accusations be brought before the council, that the accuser find sureties that he will pursue them, and that the accused not be arrested and put to answer unless and until an indictment is returned or a presentment made. Accusers who made accusations found to be “evil,” presumably maliciously false, are to suffer the same penalty as the accused would have suffered if the accusations had been found to be true.⁵⁹ All of these elements are found in the statute.

There is a case on the rolls of King’s Bench in Michaelmas term of 1372 that may refer to a proceeding under this statute as it was modified in 1364.⁶⁰

de quoi nostre dit seigneur le roi est soventfoitz trope grevez; et prient les dites communes: qe touz ceux qe font tieux suggescions soient mandez ove les ditz suggescions devant le chancelier et tresorer et son grant conseil, et qe illoeqes ils troevent seurte a poursuivre lour suggescions, et d’encoure mesme la peine qe l’autre averoit s’il feust atteint en cas qe sa suggescion soit trove malveis; et qe adonqes proces de lei soit faite devers eux, saunz estre pris ou emprisonnez contre la fourme de la grande chartre et autres estatutz.

[editorial note: *Responsio*.]

Il plest bien au roi.

⁵⁹ Such a penalty for false accusation is found in the Bible. *Deuteronomy* 19:16–21; *Daniel* 13:62 (Jerusalem Bible). It did not last long in England. In the next parliament it was amended to imprisonment until the false accuser compensated the accused for the damages that the latter had suffered. 38 Edw. III, c. 9 (1364), in 1 STATUTES OF THE REALM 384.

⁶⁰ For the modification, see note 59 *supra*. I am grateful to Professor Jonathan Rose for calling my attention to this case. It is found in The National Archives, KB27/447 m.79r, and is here transcribed from http://aalt.law.uh.edu/AALT2/E3/KB27no447/aKB27no447fronts/IMG_0165.htm [<https://perma.cc/E6A8-V5A8>]:

Hunt’] Nicholaus de Stynecle qui tam pro domino Rege quam pro ipso sequitur per attornatum suum optulit se quarto die versus Willelmum Somershale de Hirst [long erasure with a cross-out; it looks as if the name of another defendant has been taken out, perhaps Joan, who is mentioned below] de placito quare cum idem Rex nuper auditis et diligenter examinatis coram concilio Regis diversis querelis et suggestionibus per predictum Willelmum et Johannam uxorem eius coram eodem concilio versus prefatum Nicholaum propositis ibidem compertum extiterit quod querele et suggestiones predicte false et minus vere fuerunt. Et idem Rex ad supplicacionem ipsius Nicholai asserentis ipsos Willelmum et

Huntindonshire] Nicholas de Stynecle who sues both for himself and for the king presented himself on the fourth day against William Somersshale of Hirst about a plea why whereas the king having recently heard and carefully examined before the council of the king various claims and suggestions proposed by the aforesaid William and Joan his wife found⁶¹ that the aforesaid claims and suggestions were false and quite untrue, and the same king at the request of the same Nicholas, who asserted that the same William and Joan had often made various scandals and wicked complaints about the same Nicholas, had strictly ordered the same William and Joan that they henceforth not make such scandals and complaints about the same Nicholas in any way, nonetheless the aforesaid William and Joan often made scandals and wicked complaints about the same Nicholas and continue to do so daily in contempt of the king and to the grave harm of Nicholas, and against the mandate of the king. And the aforesaid Nicholas did not come and the aforesaid Joan came in her own person. And the sheriff was ordered as before to arrest William. And the sheriff returned that he was not found. [There follows a routine order to arrest William, and Joan is ordered to appear on the next return day.]

This is the only record of this case that has been found, and it records only mesne process, not a full pleading, much less a judgment. Ordinary defamation was not actionable in the central royal courts until much later,⁶² and the fact that Nicholas is bringing a *qui tam* action suggests that his action has a statutory basis. It seems

Johannem diversa scandala et clamores iniquos super ipsum Nicholaum ex causa predicta plur[i]es fecisse eisdem Willelmo et Johanne per breve Regis districte preceperimus [we would expect *preceperit*] ne scandala seu clamores huiusmodi super ipsum Nicholaum extunc facerent quoquo modo; predicti tamen Willelmus et Johanna scandala et clamores iniquos super ipsum Nicholaum pluries fecerunt et indies facere non desistunt in Regis contemptum et ipsius Nicholai grave dampnum et [interlined]contra mandatum Regis etc.[end interline] Et predictus Willelmus non venit et predicta Johanna in propria persona sua venit. Et preceptum fuit sicut alias vicecomiti quod caperet Willelmum etc. Et vicecomes retornavit quod ipse non est inventus etc. Ideo sicut plures preceptum est vicecomiti quod capiat eum si etc. et salvo etc. Ita quod habeat corpus eius coram domino Rege a die sancti Martini in xv dies ubicumque etc. Idem dies datus est prefate Johanne per man[ucaptors] quam alias etc.

⁶¹ The Latin is in the passive: "it was found."

⁶² See J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 438 (4th ed. 2002) [hereinafter BAKER, INTRODUCTION].

likely that his report of what the council did does reflect some action that the council took. If it had no basis in fact, the Somershales would presumably have appeared and gotten the action dismissed and Nicholas penalized for a false claim. That the council's warrant for what it did was the statute is at least possible, perhaps even likely.⁶³

F. The Sixth Statute

Chapter 3 of the statute of 42 Edward III (1368) is quite similar to chapter 18 of the 1363 parliament without some of its specificity⁶⁴:

⁶³ The parties have not been identified. They certainly do not seem to be of particularly high station. Identification will not be easy. Nicholas's probable toponym is hard to believe. There is Stonely in Huntingdonshire, but the usual spellings of that name are far from "Stynecle." There are a number of places named Hirst or Hurst, but none in Huntingdonshire. There is a Somersham in Huntingdonshire, but the only Somershall that I know of is in Derbyshire.

⁶⁴ 42 Edw. III, c. 3, 1 STATUTES OF THE REALM 388:

Item a la requeste de la co[mun]e p[ar] leur peticion mis avant en ce p[ar]lement, p[ur] ouster meschiefs & damages, faitz as plusieurs de sa dite co[mun]e p[ar] faux accusours, q[ue] sovent ont fait leur accusementz plus p[ar] vengeance & singulere p[ro]fit q[ue] p[ur] p[ro]fit du Roi ou de son poeple, queux accusez ont este aucuns pris & autres faitz venir devant le conseil le Roi p[ar] brief, & autrement, s[ur] greve peine, & encontre le leye; est assentu & accorde p[ur] le bone gov[er]nement de la co[mun]e q[ue] nul home soit mis arespondre sanz p[re]sentement devant Justices, ou chose de record, ou p[ar] due p[ro]cesse & brief original, solonc launcien leye de la t[er]re; et si rien desore enavant soit fait al encontre soit void en leye & tenez p[ur] erreur.

THOMPSON, MAGNA CARTA 1300–1629, note 1 *supra*, at 93–94 (footnotes omitted):

It is interesting to find that the last of the *six statutes*, 42 Edward III, chapter 3, was cited in cases of the nineteenth and twentieth century. "This is treated by the Supreme Court of New Zealand as a statutory prohibition of commissions of inquiry as to offenses committed; and is also relied on by the counsel for the University of Oxford." Actually here the commons were not complaining of commissions but of false accusers who made their accusations rather for vengeance or their own profit than for that of the king or his people, and that persons thus accused were brought before the council by writ or other command of the king under heavy penalty (*sur grief peine*), apparently the writ of subpoena. Following a summary statement of the grievance, the statute proceeds in the identical words of the last part of the petition:

"It is assented and accorded, . . . [etc. as above]."

Neither petition nor statute cites Magna Carta, but both follow almost immediately after a confirmation of the Charters, and are followed (chapter 4) by a regulation as to irresponsible and abusive commissions of inquiry. In the parliament roll the king's answer reads: *pur ce qe*

ITEM, At the Request of the Commons by their Petitions put forth in this Parliament, to eschew the Mischiefs and Damages done to divers of his Commons by false Accusers, which oftentimes have made their Accusations more for Revenge and singular Benefit, than for the Profit of the King, or of his People, which accused Persons, some have been taken, and [sometime] caused to come before the King's Council by Writ, and otherwise upon grievous Pain⁶⁵ against the Law: It is assented and accorded, for the good Governance of the Commons, that no Man be put to answer without Presentment before Justices, or Matter of Record, or by due Process and Writ original, according to the old Law of the Land: And if any Thing from henceforth be done to the contrary, it shall be void in the Law, and holden for Error.

The purpose of the parliament of 1368, in addition to keeping the king's promise of annual parliaments, was the renewal of the wool subsidy and the consideration of various legal and economic matters. Among the former were the confirmation of the general pardon that the king had given in 1362, the extension of the inheritance rights of those born abroad to those born in the king's lands around Calais, making more precise the qualifications of escheators, and the relationship between the peace commissioners and the justices of laborers. A former steward of the household was also tried for malfeasance in office in connection with this parliament.⁶⁶

Although the petition that lead to chapter 3 is among the common petitions, it is not mentioned in the most recent account of the parliament.⁶⁷ The petition is very close to the statute in its wording and the king's reply makes clear its connection with the Charter and the confirmation of the Charters that he had just conceded.⁶⁸

ceste Article est Article de la Grand Chartre, le Roi voet qe ceo soit fait come la Petition demande. What more did the seventeenth-century interpreters of "law of the land" in Magna Carta need than this?

⁶⁵ This is probably a reference to the writ *sub poena*. See note 32 *supra*.

⁶⁶ Ormrod, *Introduction*, in PROME, note 5 *supra*, Edward III: May 1368.

⁶⁷ *Id.*

⁶⁸ *Id.* at no. 12:

[12.] Also, because many of your commonalty are ruined and destroyed by false accusers who make their accusations more for their revenge and individual profit than for the profit of the king or his people; and of those accused by them, some have been taken, and some are made to come before the king's council by writ or other order of the king, upon severe penalty, contrary to the law. May it please our lord the king and his good council, for the just government of his people, to ordain that henceforth if any accuser proposes any matter for the king's profit, this matter shall be sent to his justices of either bench or of assizes to inquire

II. THE PARLIAMENT OF 1341 AND THE “STRATFORD CRISIS”

Between the first and the second statutes of the “six,” there is a statute about Magna Carta in the parliament of 1341 that Thompson treats as another “interpretation” of clause 29⁶⁹:

and determine thereon according to the law; and if it is to the profit of the accuser or party, he shall have his suit at common law. And that no man shall be put to answer without presentment before justices, or matter of record, or by due process and original writ, according to the ancient law of the land; and if anything henceforth shall be done to the contrary, it shall be void in law and treated as being in error.

The royal response is: “Because this article is an article of the Great Charter, the king wills that it be done as the petition requests.”

In the original:

[12.] Item, purce qe plusours de vostre comune sont anientiz et destruitz par faux accusours, queux font lour accusementz plus pur lour vengeance et singulers profitz qe pur le profit de roi ou de son poeple; et les accusez par eux, ascuns ont este pris, et ascuns sont fait venir devant le conseil le roi par brief ou autre mandement de roi, sur grief peine, encontre la ley. Plese a nostre seignur le roi et son bon conseil, pur dreit gouvernement de son poeple ordeigner qe si desore ascun accusour purpose ascune matire pur profit de roi, qe celle matire soit mandee a ses justices del un bank ou del autre ou d’assises d’ent enquere et terminer solom la ley; et si ce touche l’accusour ou partie, eit sa seute a la commune ley. Et qe nul homme soit mys arespoundre sanz presentement devant justices, ou chose de record, ou par due proces et brief original solom l’ancienne ley de la terre; et si rien desore enavant soit fait al encontre, soit voide en ley et tenu pur erreur.

[editorial note: *Responsio*.]

Purce qe ceste article est article de la grande chartre, le roi voet qe ceo soit fait come la petition demande.

⁶⁹ 15 Edw. III, stat. 1, c. 3, *in* 1 STATUTES OF THE REALM 296 (footnote omitted; the section numbers in brackets in the translation are mine and will be used later):

Item p[ur] c[eo] q[e] les pointes de la G[ra]nt Chartre sont blesmys en moutz maneres, et meinz bien tenuz qestre ne deussent, a g[ra]nt p[er]ile & esclaundre du Roi & damage de son poeple; especialment en taunt q[e] Cler, Piers de la t[er]re, & autres frans ho[m]mes sont arestutz & emp[ri]sones, & de lour biens & chateux houstez, queux ne furent appelez nenditez, ne seute de p[ar]tie dens eux affermez; acordez est et assentuz, qe desore tieles choses ne soient faites. Et si nul les face, Ministre le Roi ou autre p[er]sone de quele condicion qil soit, ou viegne contre nul point de la G[ra]nt Chartre, autres estatuz ou les leis de la t[er]re, respoigne en p[ar]lement, auxibien a la seute le Roi come a seute de p[ar]tie, la ou remedie ne punisement ne fuit ordeine avant ses

ITEM, [1] Because that the points of the Great Charter be blemished in divers manners, and less well holden than they ought to be, to the great peril and slander of the King, and damage of his People, especially inasmuch as Clerks, Peers of the Land, and other free Men be arrested and imprisoned, and out of their Goods and Cattels, which were not appealed nor ended, nor suit of the

heures, tant avant ou il le fait p[ar] Co[m]mission ou comandement du Roi, come de sa autorite demeisne; nient contresteaunte lordenaunce avant ses heures fait a Norh[a]mpton, la quele p[ar] assent du Roi, Prelatz, Countes, & Barouns, & la Co[mun]e de la t[er]re, cy en ce p[ar]lement est repelle & de tut anienty. Et qe le Chaunceller, Tresorer, Barouns & Chaunceller de Eschequer, Justic[es] del un banc & del autre, Justic[es] assignez es pays, Seneschal et Chamberlein del hostiel le Roi, Gardein del p[ri]vee seal, Tresorer de la Garderobe, Countroulour, & ceux qe sount chiefs deutez a demorer pres du fuitz [an odd spelling; *fitz* in the parliament roll] le Roi Duk de Cornewaille, soient ore Jureez en ce p[ar]lement, & issint desore a toutes les foiths qils s[er]ront mys en office, de garder & myntenir les p[ri]vileges & les fraunchises de seint esglise, les pointes de la G[ra]nt Chartre, Chartre de la Forest, & toutz les autres estatutz sauncz nul point enfreindre.

THOMPSON, MAGNA CARTA 1300–1629, note 1 *supra*, at 90–91 (footnotes omitted):

Had it not been repealed, the statute of 15 Edward III might well have served as the second in this series. The circumstances which produced it have been described above. Against the commissioners authorized to hear and determine oppressions and extortions by the king's ministers it was alleged that they had imposed exorbitant fines without regard to the degree of the offense; that sheriffs were charged to return all free men, whether resident or nonresident, to serve on juries and to seize the lands of those who failed to appear; that persons were convicted by their indictors, whom they were not allowed to challenge. Judge Willoughby, arraigned at the bar at Westminster, objected "that he ought not to be tried without indictment or suit of party, and that the 'plusours billes' which were produced were not affirmed by pledges in the usual manner." In fact, the commission to try Willoughby and the other great officials based charges of their misconduct in office on the "common report and clamour of the people and divers petitions shown before him [the king] and the council against some of them." Professor Plucknett concludes that here notoriety served as a substitute for indictment, and was technically correct.

Such was not the view of the April parliament, which protested these abuses, secured repeal of the Ordinance of Northampton, and in 15 Edward III, chapter 3, sought security for the future. Though short-lived, it must have crystallized and expressed popular opinion. The commons were not entirely silent in the next few years. The parliament rolls record two petitions, one for 1347 and one for 1351, which protest some aspect of the council's procedure, but neither cites the Charter.

Party against them affirmed: It is accorded and assented, That from henceforth such things shall not be done. [2] And if any Minister of the King, or other Person, of what condition he be, do⁷⁰ or come against any point of the Great Charter, or other Statutes, or the Laws of the Land, he shall answer in the Parliament as well at the King's Suit, as at the Suit of the Party, where no remedy nor punishment was ordained before this time, as far forth where it was done by Commission or Commandment of the King, as of his own authority, notwithstanding the Ordinance made before this time at Northampton, by assent of the King, the Prelates, Earls, Barons, and the Commonalty of the Land, in this present Parliament is repealed and utterly adnulled. [3] And that the Chancellor, Treasurer, Barons, and Chancellor of the Exchequer, the Justices of the one Bench and of the other, Justices assigned in the Country, Steward and Chamberlain of the King's House, Keeper of the Privy Seal, Treasurer of the Wardrobe, Controllers, and they that be chief deputed to abide nigh the King's Son Duke of Cornwall, shall be now sworn in this Parliament, and so from henceforth at all times that they shall be put in Office, to keep and maintain the Privileges and Franchises of Holy Church, and the points of the Great Charter and the Charter of the Forest, and all other Statutes, without breaking any point.

The literature on this parliament is large indeed, and much of it is devoted to its statute.⁷¹ The king was sufficiently annoyed with it that he repudiated the statute as having been forced upon him. The events that surrounded this parliament did, as a practical matter, establish the proposition that peers were to be tried in parliament,

⁷⁰ THOMPSON, *MAGNA CARTA 1300–1629*, note 1 *supra*, at 91 n.69, points out that the official translation does not take into account *nul les* in the French and proposes that the phrase *nul les face* be translated “do thus.” The point is well taken. The French clearly refers back to section [1] before proceeding to deal with violations of the Charter. One might also note that the final clause in the same sentence does not parse as English. One needs to add, as the French and one of the English manuscripts does, “which” between “Northampton” and “by.” Both corrections are to be found in the version of the statute that appears on the parliament rolls: PROME, note 5 *supra*, Edward III: April 1341, no. 52.

⁷¹ See, most recently, Scott Waugh, *Success and Failure of the Medieval English Constitution in 1341*, in *LAW, GOVERNANCE, AND JUSTICE: NEW VIEWS ON MEDIEVAL CONSTITUTIONALISM 121–60* (Richard W. Kaeuper ed., 2013), with an extensive bibliography in PROME, note 5 *supra*, Edward III: Apr. 1341, no. 52; see also ROY MARTIN HAINES, *ARCHBISHOP JOHN STRATFORD: POLITICAL REVOLUTIONARY AND CHAMPION OF THE LIBERTIES OF THE ENGLISH CHURCH CA. 1275/80–1348*, at 278–327 (1986). Waugh's focus is on the money-raising aspects of the inquests, and for him the most important provision of Magna Carta that was at stake was clause 14 (proportionality of fines) and not clause 29. Haines, as one would expect in a biography of Stratford, focuses on the proceedings against Stratford.

though it is not clear that the invocation of Magna Carta at the beginning of the statute had much to do with it.⁷² The question then becomes what is this statute about? The statute was entered on the roll of the parliament, and the wording is, for all practical purposes, the same.⁷³ Thompson, and a long line of predecessors and successors, connects it with the king's behavior upon his return from Flanders in November of 1340.⁷⁴ As Mark Ormrod has recently described the events⁷⁵:

On 30 November 1340 Edward III had returned unannounced from the Low Countries to London, frustrated by the failure of his administration to deliver the funds needed to prosecute the war on the Continent and angered at what he saw as the betrayal of his chief minister, John Stratford, Archbishop of Canterbury. In scenes reminiscent of his coup at Nottingham Castle a decade earlier, the king summarily dismissed the chancellor and treasurer and various members of their clerical staffs, arrested five of the justices of king's bench and common pleas, imprisoned several prominent financiers, and even seized one member of the regency council, Sir Thomas Wake. He then issued elaborate instructions to the sheriffs to institute far-reaching inquiries into maladministration and corruption in central and local government during his recent absence from the realm. Strikingly, he chose not (as Edward I had done in similar circumstances) to use parliament as the tribunal in which such complaints might be received and (if necessary) tried; instead, he appointed special commissions at the county level to deal with the flood of complaints that he confidently expected to arise from his oppressed subjects.

The argument, then, (which Ormrod does not make) is that the statute concerns those non-parliamentary proceedings. That the parliament was concerned about these proceedings is clear enough. One of the common petitions asks⁷⁶:

⁷² See THOMPSON, *MAGNA CARTA 1300–1629*, note 1 *supra*, at 79–86, 88; references given in note 71 *supra*.

⁷³ PROME, note 5 *supra*, Edward III: Apr. 1341, no. 52. The relationship between what ultimately emerged as the statute and the petitions is complicated. We deal with only one petition that may be related to the statute, in the text and notes 75–76 *infra*. For others see *id.* at nos. 9–10, 13, 15, and the king's answers in *id.* at nos. 35, 37, 39.

⁷⁴ See note 72 *supra*.

⁷⁵ Ormrod, *Introduction*, in PROME, note 5 *supra*, Edward III: Apr. 1341, 301 & n.3 (footnote omitted).

⁷⁶ *Id.* at no. 14 (footnote omitted):

[14.] Item, pri la dite commune qe par la ou diverses commissions sont issues d'enquer des chaunceller, tresorer et autres grantz officers, piers

[14.] Also, the said commons pray that whereas various commissions are issued for inquiring into the chancellor, treasurer and other great officers, peers of the land, and also for inquiring into other various points of the general eyre, these commissions have not been seen to be granted without the assent of parliament before this time, to the very great burden of the commonalty. And the said justices appointed to the said commissions have set very grievous fines on various officers attainted before them, having no regard for the seriousness of their crimes. And they have also charged the sheriff to return all freemen, lords of villis and others, having no regard for residence or non-residence, and have charged the sheriff to answer concerning issues which do not come to the value of their lands, as if they were resident there, contrary to the law of the land and the statute made thereon. And the said justices have also ordered lands to be seized for the offences of those who did not break the law. And also those indicted before them cannot have their acquittal through others but only through their indicator, without being allowed to challenge the same indicator. May it please his highest lordship to repeal such things done against the law and practices observed before this time, and to redress what the same commissions did contrary to the law. And may it please him to issue other lawful commissions by the assent of his parliament, since they feel themselves aggrieved by his ministers or others, so that men of law and others of the region

de la terre, et auxint d'enquer des autres diverses pointz de eire generalx, les queux commissions n'ont pas este veues estre grauntees avant ces heures sanz assent du parlement, a si graunt charge de la commune. Et les ditz justicz en les dites commissions assignez ont mys divers officers atteintz devant eux a si grevouses fyns, nient eant regard a la quantite de lour mesprisions. Et auxi ont chargez le viscont de retourner touz les fraunks, seignurs des villes et autres, nient eant regard a resseantz ou de nient resseantz, et ont chargez le viscont de respondre des issues de ce q'ils ne vindrent pointz a la value de lour terres coment q'ils ne feurent resseantz, contre la lei de la terre, et estatut de ce fait. Et auxint ont les ditz justicz comandez de seisser terres pur defaut des ceux qi ne vindront point contre la lei. Et auxi les enditez devant eux ne pont par autres passer en lour acquittance mes par lour enditour, sanz allower a eux lour chalenges de meismes les enditours. Q'il pleise a sa treshaute seigneurie qe tieles choses faites contre la lei et usages avant ces heures usez, repeller, et ce qe par les dites commissions contre la lei est fait redrescer. Et s'il plect a lui d'autres commissions droitureles par assent de son parlement isser, selonc ce q'il se sent par ses ministres ou autres estre grevez, qe gentz de lai et autres du pays q'ont conussance du port et de les condicions de les officers en diverses parties soient assignez.

who have knowledge of the behaviour and conditions of the officers in various parts shall be assigned.

The king's response seems to concede that something might be amiss⁷⁷:

[40.] As regards the article touching the commissions to inquire into the king's officers, it pleases the king that the commissions shall be examined in his presence before the great men and certain members of the commons. And if anything shall be found to be erroneous or evil, it shall be corrected and amended by the advice of his good council.

Quite unusually, there is a Year Book report of the proceedings against one the king's justices, Sir Richard Willoughby, who served as Chief Justice of King's Bench (probably temporarily, because the regular Chief Justice, Geoffrey le Scrope, had gone with the king to Flanders).⁷⁸ The proceedings would seem to have been by commission of oyer and terminer and took place in Hilary term, just before the parliament met. Willoughby made a spirited defense. This is the one that later authors, included many modern ones, focused on⁷⁹:

And when the Commission of Oyer and Terminer, &c., was read, *Willoughby* said that he was Chief in the highest Court of the land, wherefore they ought not, in a lower Court, to take cognisance of trespass done there. PARNING. You say truly as to error in such a matter; but if you have trespassed against the King you

⁷⁷ *Id.* at no. 40 (it will be noted that the response appears a long way after the petition; footnote omitted):

[40.] Quant al article touchant les commissions d'enquer de ministres le roi, il plect au roi que les commissions soient examinees en sa presence devant les grantz et certeynes personnes des communes. Et si rien soit trovez erroigne ou demaudre, soit corrigez et amendez par l'avys de son bon conseil.

⁷⁸ S. J. PAYLING, *Willoughby, Sir Richard (c.1290–1362)*, in ODNB, note 31 *supra*, <http://www.oxforddnb.com/view/article/29601> [<https://perma.cc/8R7N-JHYG>].

⁷⁹ Y.B. 14 & 15 Edw. III (Oyer & Terminer 1341), in YEAR BOOKS OF THE REIGN OF KING EDWARD III: YEARS XIV AND XV 258–59 (Luke Owen Pike ed., Rolls Series London 1889):

Et la commission lieu doier et terminer, &c., *Wilby* dit qil fust mestre en la plus haut place de la terre, par quei de trespas fait illoeqes en place plus bas il ne doivent conustre.—PARN. Derrouer en tiele chose vous dites verite; mes si vous eiez trespase au Roi vous respondrez ou lui plerra.—*Wilby*, Le Roi ne voet estre resceu sans [estre] apris par enditement ou par suyte de partie atache par plegge.—PARN. Il est apris par clamour de poeple.—*Wilby* ad conseil par livre de COURT.

shall answer where he pleases.—*Willoughby*. The King will not be admitted without having been informed by indictment or by suit of a party with pledges to prosecute.—*PARNING*. He is informed by the clamour of the people.—*Willoughby* had counsel, by assignment of the Court.

That is all that is said about the matter, though the case goes on for a page and half more until finally Willoughby puts himself on the king's mercy. A lay lord who was sitting with the commissioners says that that was the wisest plea that he had made.⁸⁰

A couple of things seem clear. First, Willoughby thought that it was a plausible argument that he need not answer without an indictment or suit by a party. Second, Parving (misspelled in the report), who had replaced Willoughby as Chief Justice of King's Bench and had just become Lord Treasurer, did not think that this was a plausible argument but allowed Willoughby to take counsel, a fact that may indicate that he thought that the argument reached the level of being a "legal" one. The case then proceeded with a number of bills brought against Willoughby accusing him of a number of misfeasances. It is specifically said that the bills were without pledges or suit.

There is a third issue, less often noted: Willoughby argues that a court of oyer and terminer cannot take cognizance of a "trespass" (wrong) done in King's Bench because King's Bench is the highest court of the land. Parving concedes that a writ of error about a proceeding in King's Bench would not lie at oyer and terminer but argues the king can have wrongs against him prosecuted wherever he will. Neither argument is airtight because both ignore a third possibility, that parliament is the place where wrongs committed in King's Bench might be tried. Our statute may be asserting this third possibility.

It will be noted that neither the petition nor Willoughby's pleading makes any reference to Magna Carta. Willoughby is clearly arguing that the proceedings were illegal, though we do not have to believe an argument made by a lawyer in his own defense. The petition also alleges illegality, but it does not seem to be directed to the same issues as those about which Willoughby is arguing.

The question then becomes whether we can move from the petition and Willoughby's case to the statute, the language of which is not derived from the petition, and argue that the citation of Magna Carta in the statute is a reference to Willoughby's argument in the case. That is to say, can we argue that the reference in the statute is a reference specifically to clause 29 of the 1225 Charter and that the statute is asserting that the commissions were a violation of that clause because Willoughby was proceeded against by "clamour of the people" or by bills presented on behalf of the commonalities of various counties without pledges to prosecute or suitors?

⁸⁰ *Id.* at 260–63 ("Le seignur de WAKE lui dit qe ceo fust le plus sage plee qunqes mes Wilby pleda.").

It is not impossible. The language of the statute “Clerks, Peers of the Land, and other free Men be arrested and imprisoned, and out of their Goods and Chattels, which were not appealed nor endited, nor suit of the Party against them affirmed” does suggest Willoughby’s argument, and clause 29 would seem to be the provision that backs up this argument. The connection is not, however, open and shut. Today we would say that the “clamour of the people” might be enough to give probable cause to arrest someone, and whether a complaint needs to be supported by pledges or suitors seems like a technicality that might not today rise to the level of a constitutional objection.

The history of the parliament, moreover, suggests a somewhat different context. A major legal issue in the parliament was the proceedings against John Stratford, the archbishop of Canterbury and formerly the king’s chief minister, and a number of others who had been the king’s ministers until his dismissal of them in the previous November, including Stratford’s brother who was also a bishop. Trial by secular authorities of clerks was, of course, a long-standing issue. Trial of peers in parliament became one at this time. Stratford accepted that he could be tried in the High Court of Parliament, a secular court but one in which clerics (the bishops and abbots) participated in the judgment. That proposition the king ultimately accepted.⁸¹ It will be noted that the language of the statute begins by focusing on the two major statuses that were at stake in the Stratford affair: “Clerks,” and “Peers of the Land.” The statute then goes on to attempt to establish a proceeding in parliament for cases in which Magna Carta had been violated, a proceeding that will proceed “at the king’s suit or at the suit of the party.”

The statute also repeals an ordinance made at Northampton in 1338 that had enacted measures for keeping the peace during the king’s absence. The ordinance apparently had authorized the arrest of notorious malefactors without there being any previous proceedings against them. Perhaps the parliament thought that this was the ordinance that the king had used to proceed against his ministers.⁸²

⁸¹ A detailed account may be found in HAINES, note 71 *supra*, at 312–23. That both the king and Stratford ultimately agreed to proceedings that would be reviewed in parliament is suggested in *id.* at 322, but no trial in parliament actually took place.

⁸² So far as I am aware, the ordinance of Northampton has never been edited. It is calendared in 4 CALENDAR OF THE PATENT ROLLS: EDWARD III, 1338–1340, at 141–42 (London 1891–1916). It is basically a list of commissioners (not justices of the peace) to deal with criminal activity in various counties. They have very broad powers (as calendared): “to array the men of those counties and to keep the peace there in keeping the peace [sic], as it is reported that there are many disturbers thereof and suspected persons who run from county to county and cannot be apprehended and brought to justice by the commissioners. Appointment of them also to arrest and keep in the king’s prisons all such persons with all speed, to make inquisitions in the said counties touching all felonies, trespasses and misdeeds committed by them, and to hear and determine these.” For the significance of these commissions and of the powers of the commissioners, see A. J. Verduyn, *The Selection and Appointment of Justices of the Peace in 1338*, 68 HIST. RES. 1, 10–11 (1995).

The statute further attempts to require that the king's ministers swear to uphold the Charter by taking an oath in parliament. The background for this is somewhat different from that of the first two parts of the statute. The parliament wanted to have the king's major ministers appointed in parliament. The king refused to concede this; it would have substantially interfered with his prerogative to appoint whom he chose as his ministers. The parliament lost the war on this one, but they tried to win the battle by having an oath to uphold Magna Carta taken in parliament.⁸³

The statute, then, when taken in context, is something of a mess. It seems clear that the first section is, at least in part, directed against the proceedings that had taken place against the king's ministers in the previous months. That the citation of Magna Carta at the beginning is a reflection of the argument that Willoughby is said to have made is certainly possible, but granted the prominence of "clerks" and "peers" in that part of the statute, it also may be a reference to clause 1 of the Charter, the provision about the liberties of the church. The middle part of the statute requiring that violations of the Charter be heard in parliament has a relationship with the first part that is more poetic than legal: parliament will proceed against such violators by suit of the king or of a party—what we have previously imagined was a requirement of clause 29. Rather than specifying how such proceedings might be conducted in the future, it offers a kind of poetic justice. Those who have violated the Charter are themselves to be proceeded against according to the Charter. The section, moreover, is quite unrealistic. There is no way in which parliament could have heard all the allegations of violations of the Charter that might be alleged. The final section, the oath in parliament to adhere to the statute, is hardly related to the first section at all. It is more closely related to the second section in that parliament would have heard the defaulting minister swear not to violate what he is now being accused of having violated.

That the issues addressed by this statute were "constitutional" in some sense seems reasonably clear. That Magna Carta has much to do with this statute is less clear, though we will concede Thompson's argument that Magna Carta in general, and perhaps even clause 29, does play a role, perhaps more political than legal, in the unfolding of the whole affair.⁸⁴ That we should see the objection of Willoughby as being one to "French" as opposed to "English" methods of criminal prosecution, as is argued by Luke Owen Pike in his introduction to the Year Book of 14 & 15

If we are reading the statute correctly as an indication that the parliament thought that the ordinance of Northampton was the authorization for the king's action, that does not seem to have been the king's view. The proceedings against the ministers were authorized by a writ sent out under the king's privy seal, a writ that does seem to be in the official records. It is described in detail (but not edited) on the basis of a cartulary copy in Natalie Fryde, *Edward III's Removal of his Ministers and Judges, 1340–1*, 48 BULL. INST. HIST. RES. 149–61 (1975).

⁸³ See Ormrod, *Introduction*, in PROME, note 5 *supra*, Edward III: Apr. 1341, at nn.19–23.

⁸⁴ See THOMPSON, MAGNA CARTA 1300–1629, note 1 *supra*, at 80–84.

Edward III, seems fanciful.⁸⁵ Putting this all together it would seem that the focus of the concerns expressed in this statute is principally on the jurisdiction of parliament as a court. That, of course, could not have been a concern in 1225, because there was no parliament at the time.

III. OTHER PARLIAMENTARY REFERENCES TO CLAUSE 29

Clause 29 continued to be cited in petitions in the reign of Richard II and in those of Henry IV and V, but these are the only statutory references in our period, and one, as we have seen, was not a statute.⁸⁶ Writing before Thompson, and quoted by her, Sir William Holdsworth had opined⁸⁷:

These statutes did not succeed in making any essential alterations in the procedure of the Council; but they had one very important result. They prevented the Council from dealing with questions of freehold that were properly determinable by the common law courts by the machinery of the real actions; and they prevented it from dealing with questions of treason or felony, a conviction for which involved the death penalty and the escheat or forfeiture of freehold.

He then goes on to connect these limitations to the limitations on the jurisdiction of the Star Chamber in the Tudor period.⁸⁸

Holdsworth also examines a couple of other petitions and the royal responses from this period and comes to the conclusion that the king's government was willing to concede that civil land cases should be tried by the processes of the common law, but had more doubt about criminal cases, particularly those involving the powerful.⁸⁹

Because Holdsworth was not particularly interested in tracing the interpretation of Magna Carta, he is able to give us some help in interpreting the statute of 1352, by citing a petition and the royal response in the previous parliament that did not result in a statute⁹⁰:

⁸⁵ Y.B. 14 & 15 Edw. III, note 79 *supra*, at xxv. See generally *id.* at xxi–xlviii, for a quite detailed account of the proceedings and the many legal issues that it raises.

⁸⁶ See text accompanying notes 52–55 *supra*.

⁸⁷ 1 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 488 (6th ed. 1938) (footnotes omitted) (same page in the 7th, and most recent, edition of 1956).

⁸⁸ *Id.* at 503–04.

⁸⁹ *Id.* at 504–07.

⁹⁰ PROME, note 5 *supra*, Edward III: Feb. 1351, no. 16:

[16.] VI. Item, qe nul franc homme ne soit mys a respondre de son franc tenement, ne de riens qe touche vie et membre, fyns ou redempcions, par appossailles devant le conseil nostre seignur le roi, ne devant ses

[16.] VI. Also, that no free man shall be put to answer for his freehold, nor for anything which touches life and limb, fines or redemptions, by questioning before the council of our lord the king, or before any of his officials whatsoever, unless process of law has already been instigated in this case.

The king replied:

It pleases our lord the king that the laws of his realm shall be held and kept in their force, and that no man shall be held to answer for his freehold, except by process of law; but concerning matters which touch life or limb, contempts or excess, it shall be done as previously.

Holdsworth suggests that the response indicates that at this point the king and those around him were willing to accept that civil cases involving land should be handled by the common law. They had more doubts about criminal matters, particularly those involving the powerful.⁹¹ He reinforces his argument about the powerful with another petition and royal response from 1378, very early in the reign of Richard II.⁹²

ministres quecumqes, si noun qe proces de ley de cea en arere use.

[editorial note: *Responsio*.]

Il plect a nostre seignur le roi, qe les leies de son roialme soient tenuz et gardez en lour force, et qe nul homme soit tenu a respondre de son frank tenement, si noun par processe de ley; mes de chose qe touche vie ou membre, contemptz ou excesse, soit fait come ad este use cea en arere.

⁹¹ HOLDSWORTH, note 87 *supra*, at 489 & n.4.

⁹² PROME, note 5 *supra*, Richard II: Oct. 1378, no. 49:

[49.] Item, supplient les communes qe nul brief isse hors de la chancellarie, lettre de prive seal ne secret, direct a nully pur luy faire venir devant le conseil du roi, ou d'autre, a respondre a son frank tenement, ou choses appartenantz a ycelle, come ordene estoit avant ces heures; mais soit la commune loy de la terre maintenu d'avoir son droit cours.

[editorial note: *Responsio*.]

Il ne semble mye resonable qe le roi nostre seignour feusse restreint q'il ne purroit pur resonable cause envoier pur ses liges, mais ceux qe serront envoiez devant le conseil, a lour venue ne serront mye compellez a y respondre finalement de lour frank tenement, einz serront d'illoeqes convoiez as places ou la loy le demande, et le cas requiert, et mis en le droit cours. Purvez toutes voies qe a suite de partie, ou le roi et son conseil serront creablement enformez qe pur maintenances, oppressions,

[49.] Item, the commons request that no writ or letter of privy or secret seal be issued from the chancery, instructing anyone to appear before the council of the king or any other, to answer for his free tenement, or things pertaining to the same, as was ordained in the past; but that the common law of the land should be left to take its proper course.

To which the king replied:

It does not seem reasonable that the king our lord should be so restrained that he is unable to send for his lieges on good grounds, but those who shall be sent before the council shall not, on their arrival, be compelled to give their final answer there for their free tenement, but they shall be taken from there to such places as the law prescribes, and as the cause requires, and put into the appropriate court. Provided always that at the suit of the party, where the king and his council are credibly informed that for maintenances, oppressions and other outrages committed by anyone in the counties, the common law cannot take its proper course, that in such a case the council may send for the person about whom the complaint has been made, to make him answer for his crime: and also, at their good discretion, to compel him to give a guarantee, on oath and in other ways, of his good behaviour, and that he shall not himself, or through another, commit maintenance or anything else which might disturb the course of the common law and oppress the people.

By the end of Richard's reign this concern about the powerful being able to subvert the ordinary processes of the law was to give rise to a separate court under the direction of the Chancellor.⁹³ That court ultimately developed the principle that its jurisdiction could be invoked only in the absence of a remedy at common law.

et autres outrages [d'aucuns] en pais le commune loy ne purra avoir duement son cours, qe en tieu cas le conseil purra envoier pur la persone de qi la pleinte est faite, pur lui mettre a respons de sa mesprission: et enoultre, par lour bone discrecion de lui compeller a faire seurtee par serement, et en autre manere, sicome semblera mieltz affaire, de son bone port, et q'il ne ferra par lui ne par autre maintenance, n'autre riens, qe purra destourber le cours de commune loy, en oppression du poeple.

⁹³ The importance of this concern in the early development of the Chancellor's Court can be seen in the petitions edited in *SELECT CASES IN CHANCERY, 1376–1471* (William Paley Baildon ed., Selden Society No. 10, 1896).

Whether that principle can be seen as a result of an understanding of clause 29 of the Charter that seems to have developed in the fourteenth century cannot quite be proven, but, as we have said a number of times in this Paper, it is not impossible.⁹⁴

CONCLUSION

Have we said anything different from what has been traditionally said about the “six statutes”? I said at the beginning that I thought that Thompson did a good job. One has to stay up late at night to beat her at her own game. What I have done is to put the so-called “six statutes”—which turn out to be seven, one of which turns out not to be a statute but a petition that was granted and one of which turns out to be a statute that was repealed two years later—more firmly into the context of the parliaments in which they were passed. What that has shown is that they were probably not central to the concerns of those parliaments, with the possible exception of the parliament of 1341, and there it takes quite a bit of doing to see how the citation of Magna Carta was to be related to the concerns of that parliament.⁹⁵ That we were able to do this without months of research is largely the result of the fact that we were working with a twenty-first century edition of the rolls of parliament, rather than the eighteenth-century edition with which Thompson was forced to work.

We probably should qualify what Thompson did: Thompson may have had a somewhat anachronistic notion of a statute. Centuries of literal interpretation of statutes, particularly in England, made her think that the same focus on the *ipsissima verba* of the statute that characterizes modern interpretations of statutes also characterized statutory interpretation in the fourteenth century. It did not. They were much freer, applying statutes to situations that were not covered by the words and refusing to apply them to situations that were covered by the words. This is what is called the “equity of the statute;” the phenomenon is well known, and I need say little about it here.⁹⁶ Statutes were applied. Paul Brand’s recent work has shown that quite dramatically for the late thirteenth century, and that application continued in the fourteenth.⁹⁷ It is not whether they were applied but how they were applied that was different from what we or the English (particularly the English) do today.

Connected with this qualification is one more specific: Thompson in a number of places treats the “six statutes” as “interpretations” (her word) of the “law of the land” phrase in clause 29.⁹⁸ They can be viewed this way, but it is interesting that none of the petitions and none of the statutes says this. Indeed, they cite the Charter

⁹⁴ Suggestions of this argument may be found in BAKER, INTRODUCTION, note 62 *supra*, at 97–99.

⁹⁵ See Part III *supra*.

⁹⁶ See BAKER, INTRODUCTION, note 62 *supra*, at 208–12, and references given in *id.* at 221.

⁹⁷ PAUL BRAND, *KINGS, BARONS AND JUSTICES: THE MAKING AND ENFORCEMENT OF LEGISLATION IN THIRTEENTH-CENTURY ENGLAND* (2003).

⁹⁸ *E.g.*, THOMPSON, *MAGNA CARTA 1300–1629*, note 1 *supra*, at 68–69.

generally, sometimes drawing words from it, sometimes not, and it is left to us to determine that it is clause 29 that they have in mind, though it is usually pretty clear that it is. Nothing would tie us to a specific phrase in clause 29. Indeed, the very fact that in mid-century the phrase “due process” can be used in the context of clause, words that are emphatically not found in the clause, indicates how free fourteenth-century interpretation could be.

We can even question how important clause 29 was for the doctrine about initial process that seems to have gradually emerged from the “six statutes.” The clause is cited either in the petition or in the words of the six, but, as both Thompson and Holdsworth showed, similar concerns are also reflected in petitions that were granted and that do not cite clause 29.⁹⁹

Perhaps overly influenced by what was to happen in the seventeenth century, Thompson’s generalizations about the effect of the statutes focuses on attempts to limit non-common-law procedures and, particularly, conciliar and prerogative jurisdiction.¹⁰⁰ That generalization sits uneasily with the statute of 1331. Conciliar jurisdiction was not well developed at the time,¹⁰¹ and nothing about the context of the statute points to that connection. Thompson herself argues that the object of the 1341 statute was not conciliar jurisdiction.¹⁰² It may be about special commissions of oyer and terminer, but not even that is certain.

Leaving aside the 1331 statute, and keeping in mind that one is simply an accepted petition, the remaining five of the six “statutes” probably do concern, at least in part, conciliar jurisdiction. It is explicit in a number of them and, granted the context, can probably be surmised in the others.¹⁰³ That they express a preference for “common-law” procedures, both civil ones involving land and criminal ones, seems clear. The focus, however, is on the initiation of the procedure, a writ, an indictment, a presentment. There is no suggestion that once the procedure is initiated trial must be by jury. Perhaps that is to be inferred, but it is not what the statutes say.

We may also doubt how literally the references to arrest can, or should, be taken. If we take literally the proposition that might be derived from the statutes that

⁹⁹ For Thompson, see note 69 *supra* (at the end); for Holdsworth, text and notes 89–91 *supra*. Thompson and Holdsworth both cite the petition of 1351 (text and note 90 *supra*). Thompson’s reference to a petition of 1347 is probably a reference to the petition in the parliament of January 1348: PROME, note 5 *supra*, Edward III: Jan. 1348, no. 28.

¹⁰⁰ *E.g.*, THOMPSON, MAGNA CARTA 1300–1629, note 1 *supra*, at 69:

[During the fourteenth century t]he phrase *per legem terrae* was interchanged with the magic formula *due process of law*; it was made to cover the indicting jury and procedure by original writ; it was believed to limit the jurisdiction of the council, other prerogative courts, and commissions armed with special powers; and it was supposed to insure trial in common-law courts by common-law procedure.

¹⁰¹ This is the negative inference of the text and note 41 *supra*.

¹⁰² See THOMPSON, MAGNA CARTA 1300–1629, note 1 *supra*, at 87–88.

¹⁰³ See Part I *supra*.

no one was to be arrested until he had been indicted or presented, much of fourteenth-century common-law procedure would have had to have been changed. Virtually every civil action of trespass began with the arrest of the defendant, simply on the strength of the writ.¹⁰⁴ (The defendant was, however, allowed to post bond.) Many of those accused of crimes were arrested before they were indicted or before a formal presentment was made. Indeed, had they not been, the fourteenth-century criminal process would have been even more ineffective than it was.

The focus of a number of statutes is on malicious accusations of criminal wrongdoing. People, they allege, were being accused of crimes when they should not have been so accused. There was another problem with fourteenth-century crime, at least as serious, and perhaps more serious, than someone being wrongfully accused. Far too many people committed crimes that were never prosecuted because the criminals were so powerful, or had friends that were so powerful, that those charged to indict or present did not do so.¹⁰⁵ A system was needed to deal with the powerful. That system was devised at the end of the fourteenth century in the development of the Chancellor's court. It is generally thought that that court developed out of the jurisdiction of the council when there came to be too many of such matters for the council to deal with effectively. The Chancellor's court, however, only dealt with what we would call "civil" matters.¹⁰⁶ What we do not know is how the council dealt with what we call "criminal" matters prior to the establishment of Star Chamber. The date of that establishment is controversial, but it clearly postdates our ending point of 1422.¹⁰⁷

Those who work in the legal history of the later Middle Ages have an embarrassment of riches: actual records of cases in real courts, tens of thousands of them, and reports in many cases that go beyond what is in the records. It is perhaps not surprising that the relatively few people who work in the legal history of this period have focused on those records and not on the council from which few formal records survive and none, so far as I am aware, that deals specifically with the issue that the petitions seem to be raising. It might not be impossible to find out more than we know now.¹⁰⁸ As it is, we know that, among other things—actually among a large number of other things—there were complaints about conciliar procedure in the middle of

¹⁰⁴ BAKER, INTRODUCTION, note 62 *supra*, at 64; *see also* Baker's note in SELECTED READINGS, note 10 *supra*, at 247 n.3.

¹⁰⁵ Of a large literature, a good introduction to this problem may be found in RICHARD W. KAEUPER, WAR, JUSTICE, AND PUBLIC ORDER: ENGLAND AND FRANCE IN THE LATER MIDDLE AGES (1988). ANTHONY MUSSON, PUBLIC ORDER AND LAW ENFORCEMENT: THE LOCAL ADMINISTRATION OF CRIMINAL JUSTICE, 1294–1350 (1996) takes a more upbeat view.

¹⁰⁶ On the development of the Chancellor's Court, *see* BAKER, INTRODUCTION, note 62 *supra*, at 97–105, and bibliography in *id.* at 115–16.

¹⁰⁷ *Id.* at 117–19.

¹⁰⁸ A suggestion as to how it might be done may be found in note 44 *supra*. The King's Bench case quoted in the text and note 60 *supra* is some evidence that the statutes were being implemented by the council, but it is, of course, not a council record, and that it involves an application of the statutes is not certain.

the fourteenth century. That the king said that he would do something about it suggests either that there was some truth to the complaints or that he did not care. Both are possible, and the two are not mutually exclusive. Whether there really was something to it, and what the council did about it if there was, we do not yet know, if we ever will.

That, in turn, brings us back to the “law versus symbol” dichotomy with which we began this Paper. That the general confirmations of the Charter in the fourteenth century were largely symbolic seems likely. Much that was in the Charter had either been so firmly embedded in the law as not to need confirmation or so unrelated to the world of the fourteenth century as to make confirmation an exercise in atavism. The problem, however, of procedures not those of the common law that could result in the punishment or loss of property of those who were subject to them seems to have been a real problem, one that could be perceived as being related to clause 29 of the Charter, but one that required something more specific to solve. This seems to have been particularly the case with the extraordinary jurisdiction of the council. The various, and in some cases quite inconsistent, solutions proposed in the statutes all seem to be influenced by the existence of clause 29 without being, in any real sense, dictated by it. Whether the same statutes would have been adopted had there been no clause 29 is a counterfactual that the historian cannot answer. Clause 29 was there, and it was not going to go away. Conciliar jurisdiction, however, was also there, as it had not been in 1215 or 1225, and it, too, as it turned out, was not going to go away. We might be able to say more about the effect of the statutes if we could find out more about whether and how the council implemented them. Even if we did, however, that would not shed much light on the effect of clause 29, because that clause, as I think I have shown, is, at least, at one remove from the statutes themselves.