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## THE CHURCH AND MAGNA CARTA

R.H. Helmholz\*

### INTRODUCTION

This Article describes the role the English Church played in the enforcement of Magna Carta. It does not enter into the vexed question of the Great Charter's sources.<sup>1</sup> Nor will it take up the possibility raised by the scholarship of the late John Baldwin: that Archbishop Stephen Langton, a product of the Paris Schools, played a major part in the Charter's formulation, importing ideas drawn from the learning of the schools into its provisions.<sup>2</sup> It also excludes coverage of the Charter's relation with individual religious freedom in the sense we know it today.<sup>3</sup> These are important but different subjects. This Article deals instead about the clergy's reaction to and subsequent use of the Charter, the document as it existed in 1215,<sup>4</sup> as it was amended in 1225,<sup>5</sup> and as it was often reaffirmed by King and Parliament in later years.<sup>6</sup>

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<sup>1</sup> My conclusions on this subject are found in R.H. Helmholz, *Magna Carta and the ius commune*, 66 U. CHI. L. REV. 297 (1999); see also Kenneth Pennington, *The "ius commune", Suretyship and Magna Carta*, 11 RIVISTA INTERNAZIONALE DI DIRITTO COMUNE 255 (2000). They have not, however, been widely accepted. See, e.g., John Hudson, *Magna Carta, the ius commune, and English Common Law*, in *MAGNA CARTA AND THE ENGLAND OF KING JOHN* 99–117 (Janet S. Loengard ed., 2010).

<sup>2</sup> John W. Baldwin, *Master Stephen Langton, Future Archbishop of Canterbury: The Paris Schools and Magna Carta*, 123 ENG. HIST. REV. 811 (2008); see also David L. d'Avray, "Magna Carta": *Its Background in Stephen Langton's Academic Biblical Exegesis and Its Episcopal Reception*, in 38 STUDI MEDIEVALI, 423–38 (1997); Giles Mandelbrote, *King John and Magna Carta: New Discoveries from Lambeth Palace Library*, LAMBETH PALACE LIBR. ANN. REV. 46 (2015); Nicholas Vincent, *Stephen Langton, Archbishop of Canterbury*, in ÉTIENNE LANGTON, PRÉDICATUR, BIBLISTE, THÉOLOGIE ETUDES RÉUNIES 51, 93–97 (Louis-Jacques Bataillon et al. eds., 2010). This conclusion has also not been accepted by all scholars. See, e.g., David A. Carpenter, *Archbishop Langton and Magna Carta: His Contribution, His Doubts and His Hypocrisy*, 126 ENG. HIST. REV. 1041 (2011).

<sup>3</sup> See, e.g., Tore Lindholm, *Magna Carta and Religious Freedom*, in *MAGNA CARTA AND THE RULE OF LAW*, 193–226 (Daniel B. Magraw et al. eds., 2014); Mary Ziegler, *The Conservative Magna Carta*, 94 N.C. L. REV. 1653 (2016).

<sup>4</sup> MAGNA CARTA (1215).

<sup>5</sup> MAGNA CARTA (1225).

<sup>6</sup> See FAITH THOMPSON, *MAGNA CARTA: ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION, 1300–1629*, at 10 (1948) [hereinafter THOMPSON, *MAGNA CARTA*] (noting a total of thirty-seven confirmations by Edward III, Richard II, Henry IV, and Henry V).

This subject has been touched, but only lightly, in the enormous amount of historical scholarship that has been devoted to Magna Carta.<sup>7</sup> There is something to be added to it, but it seems sensible to begin with a summary of what has already been established in the large body of scholarly literature devoted to the subject. That summary can be brief. There are only two points related to the Article's theme—the church's place in the Charter's provisions—that are relevant. First, the great bulk of scholarly attention and analysis has been devoted to Clauses 1<sup>8</sup> and 63,<sup>9</sup> which promised that the English church should enjoy its liberties unimpaired. This is the obvious place to start, and historians have looked unflinchingly at what the clauses accomplished in practice—very little.<sup>10</sup> Second, after the withdrawal of its annulment by Pope Innocent III in 1215, the English clergy enthusiastically supported the Charter.<sup>11</sup> This is certain. The bishops threatened with excommunication anyone, except the King, who violated its provisions.<sup>12</sup> Thus, it was not just the secular barons who sought to secure its regular enforcement in the years after the events at Runnymede. The leaders of the church embraced it—though again, it is thought, without securing results that seem sufficient to have justified their enthusiasm.<sup>13</sup>

The first of these points begins with Clause 1 of the Charter and usually ends there. This Clause was the centerpiece of longstanding efforts to secure the rights claimed by the English clergy.<sup>14</sup> Devoting special attention to this Clause seems reasonable. Designed immediately to secure the English church's freedom in the choice of its own bishops and abbots,<sup>15</sup> the Clause might have extended further. Its wording certainly invited a fuller effect. However, the results of Clause 1 actually turned out to be quite disappointing in practice. Its effectiveness was undercut in fact by the power of kings and popes, who used the system of postulation and royal consultation to make an end run around the electoral rights of the English clerical

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<sup>7</sup> An exception is A. Keith Thompson, *The Liberties of the Church and the City of London in Magna Carta*, 18 *ECCLESIASTICAL L.J.* 271 (2016).

<sup>8</sup> MAGNA CARTA (1215) c. 1, *reprinted in* DAVID CARPENTER, *MAGNA CARTA* 38–39 (2015) (translating Magna Carta 1215) (“[T]he English church is to be free, and is to have its rights in whole and liberties unharmed . . .”).

<sup>9</sup> *Id.* at c. 63, at 68–69 (“Wherefore, we wish and firmly command that the English church be free, and that the Men in our kingdom have and hold all the aforesaid liberties, rights and concessions . . .”).

<sup>10</sup> *See, e.g.,* WILLIAM SHARP MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 191–94* (2d ed. Lawbook Exchange 2000) (1914).

<sup>11</sup> CARPENTER, *supra* note 8, at 422.

<sup>12</sup> *Id.*

<sup>13</sup> *See* d’Avray, *supra* note 2, at 432–34 (arguing that the bishops’ enthusiasm may have resulted from a support for limited monarchy rather than self-interest).

<sup>14</sup> CARPENTER, *supra* note 8, at 1050–52.

<sup>15</sup> *See* Carpenter, *supra* note 2, at 197 (“The liberty of elections meant that bishops should henceforth be chosen, without royal interference, by the cathedral monks or clergy, while abbots would be elected by their monks.”).

electors that were supposedly established in the Charter.<sup>16</sup> And as for other canonical liberties that might have been included within its guarantees, Clause 1 suffered from the “deplorably vague” character of its words.<sup>17</sup> What did it actually guarantee beyond free elections? Opinions differed, and when later test cases came along—the Statute of Mortmain<sup>18</sup> or the Statutes of Provisors<sup>19</sup> and Praemunire,<sup>20</sup> for example—the complaints of the clergy were disregarded. Because of the uncertainty of the exact meaning of Clause 1’s words, these anti-clerical statutes could be said to lie outside the scope of the liberties guaranteed in Magna Carta.<sup>21</sup> The new issues were simply not covered by the Clause’s terms.

Despite these disappointments, the clergy did not cease to cite the Charter as a means of stating their own grievances. They did so loudly and repeatedly.<sup>22</sup> The results, however, remained negligible. Only long established legal institutions like benefit of clergy in criminal cases survived.<sup>23</sup> Freedom from taxation by the Crown did not.<sup>24</sup> It is of course a mistake to paint the English bishops as helpless victims of royal aggression during the later Middle Ages. They won some battles.<sup>25</sup> But Magna Carta’s first clause was not what made the difference.

The second point—the clergy’s continuing support for reiteration and enforcement of the Charter’s provisions—is also well established. C. R. Cheney summed it up. Continuing clerical reaffirmations of its terms, he wrote, showed that by the 1290s, “Magna Carta had come to stay, and the English hierarchy was committed to safeguarding it.”<sup>26</sup> Archbishop Pecham’s Council of Oxford (1279) ordered that

<sup>16</sup> See generally WALDO E. L. SMITH, *EPISCOPAL APPOINTMENTS AND PATRONAGE IN THE REIGN OF EDWARD II: A STUDY IN THE RELATIONS OF CHURCH AND STATE* (1938) (providing a lengthy account of royal and papal influence over episcopal elections).

<sup>17</sup> MCKECHNIE, *supra* note 10, at 192.

<sup>18</sup> 7 Edw. I, 1 STATUTES OF THE REALM 51 (1235–1377).

<sup>19</sup> 25 Edw. III, 1 STATUTES OF THE REALM 253 (1235–1377).

<sup>20</sup> 16 Ric. II, c. 5, 2 STATUTES OF THE REALM 84 (1377–1504).

<sup>21</sup> See FAITH THOMPSON, *THE FIRST CENTURY OF MAGNA CARTA: WHY IT PERSISTED AS A DOCUMENT* 71 (1925); THOMPSON, *MAGNA CARTA*, *supra* note 6, at 122–23 (1948); Philippa M. Hoskin, *Introduction to ENGLISH EPISCOPAL ACTA* 38, LONDON 1229–1280, at xlvi–xlix (Philippa M. Hoskin ed., 2011).

<sup>22</sup> See generally W. R. Jones, *Bishops, Politics, and the Two Laws: The Gravamina of the English Clergy, 1237–1399*, 41 *SPECULUM* 209 (1966) (providing an overview of the clergy’s use of the Charter to assert jurisdiction).

<sup>23</sup> See Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 *U. TOL. L. REV.* 511, 514–21 (2002).

<sup>24</sup> David A. Carpenter, *Magna Carta 1253: The Ambitions of the Church and the Divisions Within the Realm*, 86 *HIST. RES.* 179, 180–82 (2012) (stating that Henry III levied an ecclesiastical tax to fund the crusades in 1253).

<sup>25</sup> See, e.g., *id.* at 181.

<sup>26</sup> C. R. CHENEY, *The Church and Magna Carta*, 68 *THEOLOGY* 266, 272 (1965), reprinted in C. R. CHENEY, *at THE PAPACY AND ENGLAND 12TH–14TH CENTURIES*, XV; see also CARPENTER, *supra* note 8, at 446–60 (discussing the enforcement and triumph of Magna Carta).

it be posted in cathedral and collegiate churches,<sup>27</sup> and it came to be the practice that each year for English bishops to issue a formal decree declaring to excommunicate any person who violated the provisions of Magna Carta.<sup>28</sup> According to some accounts, the Charter's provisions were read out publicly twice yearly in all cathedral churches.<sup>29</sup> They were included in episcopal registers.<sup>30</sup> The terms of Magna Carta were also included in instructional manuals used by the parochial clergy to educate and guide the laity.<sup>31</sup> Probably this would have been the most immediate way the laity became familiar with its terms. We know that these things were done in fact.<sup>32</sup> We may wonder at the clergy's enthusiasm for the Charter in light of the apparently meager results of the guarantee of clerical liberties found in Clause 1, but that this renewed and apparently strong support for it existed in 1215 and that it continued after the thirteenth century, there can be little doubt.<sup>33</sup> Too much evidence of long lasting clerical support for the Great Charter's terms exists for that to be denied. Not all historians of Magna Carta have dealt with the church's place in the story, but those who have raised and discussed the question at all have established the existence of clerical support that continued long after 1215.

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<sup>27</sup> COUNCILS & SYNODS WITH OTHER DOCUMENTS RELATING TO THE ENGLISH CHURCH II A.D. 1205–1313, at 851 (F. M. Powicke & C. R. Cheney eds., 1964) [hereinafter COUNCILS & SYNODS].

<sup>28</sup> See, e.g., *Acta 83, Bishop Fulk Basset of London* (May 1253), in ENGLISH EPISCOPAL ACTA 38: LONDON 1229–1280, at 61–62 (Philippa Hoskin ed., 2011); *Sentence of Excommunication* (1254), in 1 CONCILIA MAGNAE BRITANNIAE ET HIBERNIAE, 703–04 (David Wilkins ed., London, 1737); *Sentence of Excommunication* (1298), in 2 CONCILIA MAGNA BRITANNIAE ET HIBERNIAE, 240–42 (David Wilkins ed., London, 1737). For fuller details, see Margaret McGlynn, *From Charter to Common Law: The Rights and Liberties of the Pre-Reformation Church*, in MAGNA CARTA, RELIGION AND THE RULE OF LAW 53, 56 (Robin Griffith-Jones & Mark Hill eds., 2015).

<sup>29</sup> See *Sentence of Excommunication* (1298), *supra* note 28, at 240. Many bishops' records show that this was done in fact, see, e.g., *Acta 94, Bishop Walter de Cantilupe of Worcester* (May 1253) in ENGLISH EPISCOPAL ACTA 13: WORCESTER 1218–1268, at 79 (Philippa Hoskin ed., 1997). A compilation of the evidence on this point appears in *Acta 45, Cormeilles abbey* (May 1247), in ENGLISH EPISCOPAL ACTA 35: HEREFORD 1234–1275, at 48–49 (Julia Barrow ed., 2009).

<sup>30</sup> See, e.g., *Order of Protection for Hugh le Despenser* (Dec. 15, 1321), in 3 REGISTERS OF ROGER MARTIVAL, BISHOP OF SALISBURY 1315–1330, at 87 n.320 (Susan Reynolds ed., 1965).

<sup>31</sup> John de Burgh, *Pupilla oculi*, pt. V, c. 22 (“De sententia lata super magnam cartam et super cartam de foresta Anglie”); see also W. A. PANTIN, THE ENGLISH CHURCH IN THE FOURTEENTH CENTURY 198 n.1 (1st ed. 1962) (treating William of Pagula's *Oculus sacerdotis*); KEITH WALLS, JOHN BROMYARD ON CHURCH AND STATE: THE SUMMA PREDICANTIIUM AND EARLY FOURTEENTH CENTURY ENGLAND 16 (2007).

<sup>32</sup> See PANTIN, *supra* note 31, at 198 (“It is interesting to see how every parishioner was kept, or supposed to be kept, conscious of Magna Carta . . .”).

<sup>33</sup> See CARPENTER, *supra* note 8, at 420–23; J.C. HOLT, MAGNA CARTA 327–28 (3d ed. 2015).

## I. THE CLERGY'S INTEREST IN MAGNA CARTA

The enthusiasm for the Great Charter long shown by the English clergy invites a further look at the practical effect of those of its provisions that involved them. Scholars have sometimes ignored this subject, concluding that the repeated proclamation of Magna Carta's provisions by the English bishops "remained what it had always been: nothing more than a pious gesture."<sup>34</sup> But this leaves a question. Why should they have been so enthusiastic for so long about a document that brought them so little actual advantage? The combined forces of hope, custom, and provincial legislation may of course explain part of this long-lasting enthusiasm, but surely not all. At some point, reality ought to have set in. In fact, this Article contends, invocation by the English clergy of Magna Carta was more than a fruitless gesture. The Great Charter served the practical interests of the English church in two immediate ways, and both of them went beyond the terms of Clause I.

## II. THE CLERGY AS BENEFICIARIES OF THE CHARTER'S CLAUSES

The first consequence of Magna Carta of special interest to the church carries us beyond the famous Clause I. Several other clauses in Magna Carta safeguarded specific material interests of church and clergy.<sup>35</sup> These Clauses favoring clerical interests have drawn less notice among historians. They were admittedly less dramatic. However, they were more specific. They would have encouraged continuing clerical support for the 1215 Charter, and most of them were repeated in subsequent confirmations.<sup>36</sup> Clause 14, for example, promised that the church's prelates would be summoned to take part in future assessments of taxation imposed on the realm, stating also that they would be given sufficient lead time to arrange their affairs and thus make their attendance possible.<sup>37</sup> Clause 22 [14] limited the power of the Crown to levy amercements—what we would call monetary fines—against the clergy.<sup>38</sup> It also restricted the amount of clerical amercements by eliminating ecclesiastical benefices from the process of calculating how large they would be.<sup>39</sup> Clause 55 guaranteed

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<sup>34</sup> J.W. Gray, *The Church and Magna Carta in the Century After Runnymede*, in 6 HISTORICAL STUDIES: PAPERS READ BEFORE THE IRISH CONFERENCE OF HISTORIANS 23, 35 (T.W. Moody ed., 1968).

<sup>35</sup> MAGNA CARTA (1215) cls. 14, 22, 42, 46, 63, at 137–38.

<sup>36</sup> See COUNCILS & SYNODS, *supra* note 27, at 137–38; Charles Donahue, Jr., *The Whole of the Constitutional History of England is a Commentary on this Charter*, 94 N.C. L. REV. 1521, 1528–29 (2016).

<sup>37</sup> MAGNA CARTA (1215) c. 14.

<sup>38</sup> *Id.* at c. 22. Throughout this Article, reference has been made to the clause numbers in the 1215 version when referring to the Charter; where they existed the numbers used in the later statutory version (1225) have been given in square brackets following the original clause number.

<sup>39</sup> *Id.*



that the archbishop of Canterbury would have the right to participate in the decisions taken by the twenty-five barons in charge of securing royal obedience to the charter—the notorious Security Clause.<sup>40</sup> Clause 60 [37] recognized that the clergy had their own “rights and liberties” under English customary law, and it promised that they would be respected in future practice.<sup>41</sup> Clause 63, the final part in the document, repeated Clause 1’s recognition of the English church’s freedom, here going on to promise that it would be observed “well and peacefully, freely and quietly, [and] fully and completely” in the future.<sup>42</sup>

Moreover, many of the good practices endorsed by the Charter covered both clerical rights and baronial rights. The clergy were, in particular, clearly among the “free men” so frequently mentioned as recipients of respect and rights in the document.<sup>43</sup> These rights were mentioned specifically in Clauses 14, 15 [10], 20 [14], 22 [14], and 39 [29],<sup>44</sup> and although it is true that the clergy were not their sole beneficiaries, the clerical order stood to gain by enforcement of all these clauses. They were among the “free men” whose protection these clauses endorsed. Their rights were also among the good customs of the realm spoken of throughout the document.<sup>45</sup> With some reason, the clergy as a body believed that their own interests would be protected by enforcement of the Charter’s terms. Even those which were limited to “free men” brought a modicum of protection to them.

The clergy also benefitted in indirect ways from enforcement of Magna Carta’s terms. Their personal gain may have been secondary to the recognition of the influence of the substance of the Church’s law, but it would have enlisted the continuing support of influential English clergy nonetheless. A survey of the contents of the clauses from which they benefitted shows why the clergy might have supported its continued importance.<sup>46</sup> Clause 8 [7], stating that widows should not be compelled to marry, saving the feudal lord’s right to consent to a marriage if widows did wish to remarry, contains a statement of the principle of freedom in marital choice.<sup>47</sup> It was a principle of the canon law at the time, and really only of the canon law.<sup>48</sup> Its

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<sup>40</sup> *Id.* at c. 55.

<sup>41</sup> *Id.* at c. 60.

<sup>42</sup> *Id.* at c. 63.

<sup>43</sup> See generally MCKECHNIE, *supra* note 10, 114–20 (discussing the ambiguous definition of “freemen” in Magna Carta).

<sup>44</sup> MAGNA CARTA (1215) cls. 14, 15, 20, 22, 39.

<sup>45</sup> See, e.g., *id.* at c. 13 (declaring London to have “ancient liberties and free customs”); *id.* at c. 60 (preserving customs and liberties of English law).

<sup>46</sup> A further possibility of indirect ecclesiastical influence is the use of a forty-day waiting period before legal consequences followed an act, a period that recurred in clauses 7, 14, 48, and 61 in Magna Carta. *Id.* at cls. 7, 14, 48, 61. It was used in various aspects of contemporary ecclesiastical legislation and practice. See F. DONALD LOGAN, EXCOMMUNICATION AND THE SECULAR ARM IN MEDIEVAL ENGLAND 73–74 (1968).

<sup>47</sup> MAGNA CARTA (1215) c. 8.

<sup>48</sup> See generally Charles J. Reid, Jr., “So It Will Be Found That the Right of Women in Many Cases Is of Diminished Condition”: Rights and the Legal Equality of Men and Women

impact in practice was less than the church desired, and it was limited in this clause to protection of the widow's right *not* to remarry—one of the several examples of compromise between the interests of the church and those of feudal lords found in Magna Carta.<sup>49</sup> That evident compromise being admitted, the clause is best explained by ecclesiastical influence. If the Charter had really been animated simply by baronial self-interest, would this clause have been added? That seems very unlikely.

Clause 27, one that turned out to have lasting consequences in the history of our law, stated that if a man died intestate his chattels were to pass to “his nearest relations and friends, under the supervision of the church.”<sup>50</sup> Behind this clause lay a real problem. Dying without having made provisions for succession to a man's personal property had unleashed what McKechnie accurately described as a “scramble that often took place for an intestate's chattels.”<sup>51</sup> Feudal lords, family members, creditors with claims against the dead man, and even some adventurers did the scrambling.<sup>52</sup> This clause attempted to secure a more orderly and principled disposition of the assets of the estate, and it did so by submitting administration to the supervision of the church.<sup>53</sup> The justification for what might be described as a “power-grab” was pretty thin under the canon law of the time, though it did exist.<sup>54</sup> However, in the course of time this seemingly limited power of supervision turned into the probate jurisdiction that was held by the English church until the mid-nineteenth century.<sup>55</sup> It was the church that administered the law of succession to personal property, and the scope of ecclesiastical administration took a boost from this clause in the Great Charter.<sup>56</sup>

Clause 42 provides another instance.<sup>57</sup> It safeguarded the right of any person (*unicuique*) to leave the realm and return except in time of war and, of course, except for criminals.<sup>58</sup> This had been an urgent and controversial matter during the reign of Henry II. The issue was then raised in the context of appeals to the papal court in Rome. The Constitutions of Clarendon (1164), which purported to state the traditional customs and privileges of the English kings, contained a statement that “it was not lawful for archbishops, bishops and beneficed clergy to depart from the kingdom

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in *Twelfth and Thirteenth-Century Canon Law*, 35 LOY. L.A. L. REV. 471, 491–98 (2002).

<sup>49</sup> Helmholz, *supra* note 1, at 317.

<sup>50</sup> MAGNA CARTA (1215) c. 27.

<sup>51</sup> MCKECHNIE, *supra* note 10, at 327.

<sup>52</sup> *See id.* at 328.

<sup>53</sup> *Id.* at 329.

<sup>54</sup> *Id.* at 327 (stating justification was “to secure the deceased's kinsmen and friends the right to make an equitable division of his chattels”).

<sup>55</sup> 1 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 625–30 (7th ed. 1956).

<sup>56</sup> The process by which the church gained control of this jurisdiction is traced as far as possible in MICHAEL M. SHEEHAN, THE WILL IN MEDIEVAL ENGLAND: FROM THE CONVERSION OF THE ANGLO-SAXONS TO THE END OF THE THIRTEENTH CENTURY 196–211 (1963).

<sup>57</sup> MAGNA CARTA (1215) c. 42.

<sup>58</sup> *Id.*



without the lord king's leave."<sup>59</sup> Its evident purpose was to restrict papal jurisdiction over disputes that arose in England.<sup>60</sup> This was one of the several issues that had divided Henry from his archbishop, Thomas Becket, and it was not forgotten.<sup>61</sup> The clergy had a long memory. In 1215, they did not want this restriction to freedom of movement to appear again, and they meant Clause 42 to make sure that it did not.<sup>62</sup>

Clause 55, which dealt with the difficult problem of the twenty-five barons assigned to oversee the king's obedience to Magna Carta's terms, contains a term to ensure that the church would have some say in the process.<sup>63</sup> Its main point was to allow this baronial council to remit or reduce illegal fines and amercements imposed by the king, but it added that the archbishop was to take part in the process if he desired.<sup>64</sup> This was probably meant to temper the harshness of this most controversial part of the Charter, for amercement by the baronial council took out of the king's hands something that had been a traditional royal prerogative.<sup>65</sup> Offenders against the law were said to be *in misericordia domini regis*—in the mercy of the lord king—and here the Charter empowered the baronial council to upset that principle.<sup>66</sup> The barons must have realized this, and in Clause 55, they sought to take a little of the sting out of their effort by adding an ecclesiastical voice to the process.

### III. VIOLATION OF ECCLESIASTICAL LIBERTIES

The second sort of consequence of the Great Charter's existence that worked in the clergy's favor was that it was employed in practice to create a disciplinary action or *causa ex officio* in the ecclesiastical courts. This cause of action served widely to protect clerical interests. It was used frequently enough to have been given a specific name in the court records: the *causa violationis ecclesiasticae libertatis*,<sup>67</sup> as if it were the ecclesiastical counterpart of a common law writ designed to protect the freedom of the church. Although its source in Magna Carta was noted in episcopal registers,<sup>68</sup> and also in the works of English ecclesiastical lawyers—as by William

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<sup>59</sup> CONSTITUTIONS OF CLARENDON ch. IV (1165), reprinted in WILLIAM STUBBS, SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY FROM THE EARLIEST TIMES TO THE REIGN OF EDWARD THE FIRST 165 (H. W. C. Davis ed., 9th ed. 1913).

<sup>60</sup> FRANK BARLOW, THOMAS BECKET 101 (1986) (noting that travel restrictions limited judicial appeals to Rome).

<sup>61</sup> See generally *id.* at 107–16.

<sup>62</sup> See CARPENTER, *supra* note 8, at 351–52.

<sup>63</sup> MAGNA CARTA (1215) c. 55.

<sup>64</sup> *Id.*

<sup>65</sup> HOLT, *supra* note 33, at 38.

<sup>66</sup> See, e.g., CONSTITUTIONS OF CLARENDON ch. X (1165), reprinted in STUBBS, *supra* note 59, at 166.

<sup>67</sup> See, e.g., Wise C. Ashton (Lichfield 1464), Joint Record Office, Lichfield, Act book B/C/1/1, fol. 7v.

<sup>68</sup> See, e.g., Register for Diocese of Carlisle, (2nd half of fourteenth century), Cumbria R.O., MS DRC 1/2, p. 393 (stating the remedy available against those who impeded

of Pagula in the fourteenth century<sup>69</sup> and William Lyndwood in the fifteenth<sup>70</sup>—little if any notice has been taken of this remedy by most legal historians who have examined the Charter’s later history.<sup>71</sup> At least some account of its existence should be taken, if only as a help in explaining clerical enthusiasm for Magna Carta in the later Middle Ages.

The ecclesiastical remedy in fact served several purposes. The act books of the ecclesiastical courts turn up quite varied examples of the ways it was used in practice. If the surviving records give a fair sample of the reality, many and perhaps most of the cases brought before them were begun to recover dues or other customary payments allegedly owed to the clergy—the mortuary fee, for example, the payment in goods or money that was due at every person’s death.<sup>72</sup> Admittedly it requires a stretch of the imagination to suppose it had been the barons’ intention at Runnymede to define the church’s liberties as applying principally to clerical claims to small sums of money to be collected from the laity, but their words were often so interpreted in ecclesiastical court practice.<sup>73</sup>

The reach of Magna Carta’s guarantee of ecclesiastical liberty was not, however, fully confined to securing collection of these monetary claims. The remedy was sometimes used more widely; for example, to seek redress from those who had invoked the aid of secular courts to prevent what the clergy considered the rightful exercise of canonical jurisdiction.<sup>74</sup> It was invoked against defendants who, it was alleged, had “extracted” a man who had taken sanctuary within a parish church, thus

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ecclesiastical jurisdiction, thus violating the “*liberates tam regni quam ecclesie concessas per cartam domini regis tam de foresta quam de regni libertatibus*”).

<sup>69</sup> See L. E. Boyle, *The Oculus Sacerdotis and Some Other Works of William of Pagula*, 5 TRANSACTIONS ROYAL HIST. SOC’Y 81, 87 (1955).

<sup>70</sup> GULIELMO LYNWOOD, PROVINCIALE (SEU CONSTITUTIONES ANGLIAE) 259, v. *ecclesiae* (Oxford 1679).

<sup>71</sup> Attention has been focused on the existence of sentences of excommunication. See, e.g., J. ROBERT WRIGHT, *THE CHURCH AND THE ENGLISH CROWN 1305–1334*, at 199–202 (1980). A second possible exception is ROBERT RODES, JR., *ECCLESIASTICAL ADMINISTRATION IN MEDIEVAL ENGLAND: THE ANGLO-SAXONS TO THE REFORMATION* 129, 132 (1977).

<sup>72</sup> Fuller treatment of this controversial subject is found in R.H. HELMHOLZ, *THE IUS COMMUNE IN ENGLAND: FOUR STUDIES* 135–86 (2001).

<sup>73</sup> One should distinguish these cases from *ex officio* prosecutions begun to protect geographical liberties. See, e.g., *Ex officio c. Wady* (York, 1467), in *ACTS OF CHAPTER OF THE COLLEGIATE CHURCH OF SS. PETER AND WILFRID, RIPON, A.D. 1452 TO A.D. 1506*, at 129 (J. T. Fowler ed., 1875).

<sup>74</sup> *Ex officio c. Heyround* (Canterbury, 1305), Lambeth Palace Library MS 244, fol. 42v (invoking royal jurisdiction in a plea that “*iuxta libertatem ecclesie*” had begun properly before the court of the bishop elect of Lincoln); see also *Ex officio c. Bonn* (Canterbury, 1469), Canterbury Cathedral Archives, Act book Y.1.11, fol. 40 (“*violavit ecclesiasticam libertatem in arrestando Johannem Symond venientem ad curiam consistorii Cantuariensis*”); *Ex officio c. Randall* (Norwich, 1509), Norfolk RO, ACT/1, fol. 11 (for causing arrest of witnesses in ecclesiastical court and thus breaching “*libertas ecclesiastica*”).

acting contrary to the liberties of the church.<sup>75</sup> It was applied against a man who had cut down some trees on property allegedly attached to a prebend in the cathedral church of York.<sup>76</sup> It was called upon to discipline a London man who had allegedly slandered the clergy by saying they kept “as evil a rule and worse” than all other orders of men.<sup>77</sup> It was even used to remedy a wrongful entry of a stranger into a house within what appears to have been within the cathedral close.<sup>78</sup> In cases like these, the “deplorably vague” nature of the language in Magna Carta’s first Clause actually turned out to be an advantage for the clergy. If ecclesiastical officers could define the language in that Clause for themselves, as they normally could within their own tribunals, they enjoyed a freedom to use it to their own advantage. So defined, Clause 1 did serve to protect their interests more widely than has been suspected. It protected clerical privileges, some of them controversial and some of them unpopular with the laity—the kind of protection every bishop could endorse.

However, there were limits. Magna Carta did not provide the church with an all-purpose remedy. It was not used to reach all kinds of speech or action that seemed to threaten the medieval church’s interests. Prosecutions for heresy, blasphemy, and sacrilege,<sup>79</sup> for example, were brought in fact, and they appeared in court books, but not under the rubric of violation of ecclesiastical liberty.<sup>80</sup> Nor was Magna Carta invoked in routine prosecutions for interference or contempt of ecclesiastical jurisdiction.<sup>81</sup> Perhaps more surprisingly, disciplinary actions for assaulting a cleric were

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<sup>75</sup> Ex officio c. Smyth (York, 1519), Borthwick Institute, York, Act book D/C.AB.2, fol. 226v (said to be “*libertatem ecclesiasticam in hac parte violando, sententiam excommunicationis maioris in ea parte incurrando*”); see also Ex officio c. Vaughan (London, 1497), in A SERIES OF PRECEDENTS IN CRIMINAL CAUSES, 1475–1640, no. 170 (William Hale ed., 1847, reissued 1973). Another example is Ex officio c. Archer et al. (Canterbury, 1308), Lambeth Palace Library MS 244, fol. 93v.

<sup>76</sup> Ex officio c. Baxby (York, 1323), Borthwick Institute, York, Cause papers CP.F.135. The judge stated that he intended to proceed “*in presente negotio pretense violacionis ecclesiastice libertatis ex mero officio suo*.” *Id.* This was probably an effort to avoid a writ of prohibition for invoking ecclesiastical jurisdiction in a case involving real property.

<sup>77</sup> Ex officio c. Ashford (London, 1494), London Metropolitan Archives, Act book 9064/6, fol. 38.

<sup>78</sup> Ex officio c. Knight (York, 1397), Borthwick Institute, Act book D/C.AB.1, fols. 4, 9 (“[S]ententiam excommunicationis contra omnes violatores ecclesiastice liberatis notorie incurrando.”); see also Ex officio c. Ancel et al. (Rochester, 1348), in REGISTRUM HAMONIS HETHE, DIOECESIS ROFFENSIS, A.D. 1319–1352, at 1025 (C. Johnson ed., 1948).

<sup>79</sup> See, e.g., Ex officio c. Feynt (Canterbury, 1399), Canterbury Cathedral Library, Act book X.8.1, fol. 26v (“*notatur quod commisit sacrilegium asportando furtive lapides . . . a cimiterio et ecclesia ibidem*”).

<sup>80</sup> See, e.g., Ex officio c. Lankiston (London, 1492), London Metropolitan Archives, Act book 9064/5, f. 29v. Lankiston was cited to answer “*certis articulis crimen heresis tangentibus*.” *Id.* On this subject, see IAN FORREST, THE DETECTION OF HERESY IN LATE MEDIEVAL ENGLAND 14–19 (2005) (noting that heresy was an act of turning away from the Church and God, rather than encroaching on its liberty).

<sup>81</sup> See, e.g., Ex officio c. Kyte (London, 1522), London Metropolitan Archives, Act book

not swept within this rubric; instead, they were brought under an enactment of the Third Lateran Council, called *Si quis suadente*.<sup>82</sup> Actions to recover unpaid tithes were also brought under a separate heading in the medieval act books; apparently they were not regarded as infringing upon the freedom of the church.<sup>83</sup> They occupied a category of their own.

The extent to which this clerical use of Magna Carta continued after the English Reformation is unfortunately not a question that can be answered. My impression—and it is no more than that—is that there were fewer invocations of the Charter in the diocesan courts than there had during the Middle Ages. The church’s courts were not moribund during the years before the outbreak of the Civil War in 1640.<sup>84</sup> In fact, in terms of volume of *ex officio* cases brought before them, they flourished, and occasional mentions of the Charter’s protection of the church’s liberties are found in the court records.<sup>85</sup> Henry Swinburne, the greatest of the late sixteenth-century civilians, also cited the Great Charter with the expectation that it would be of service to the church.<sup>86</sup> As is well known, England under the Stuart monarchs witnessed a revival of interest in Magna Carta’s terms, a revival led by Sir Edward Coke.<sup>87</sup> To all appearances, nothing like that revival took place during these years within the ecclesiastical forum. Archbishop Laud’s policies seem not to have extended that far.

#### CONCLUSION

A word in conclusion. In what has just been described, little or nothing has been said about the possibility that the English bishops supported the continued existence and enforcement of the terms of Magna Carta for altruistic reasons. This may be too cynical an approach. The bishops may have wished to promote the cause of good

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9065/J/1 (recording that the defendant “*notatur officio super contemptu eo quod procuravit et fecit apparitorem reverendi patris impediri*”).

<sup>82</sup> See generally R.H. Helmholz, *Si quis suadente (C.17 q.4 c.29): Theory and Practice*, in 8 PROCEEDINGS OF THE SEVENTH INTERNATIONAL CONGRESS OF MEDIEVAL CANON LAW 425–38 (Peter Linehan ed., 1988).

<sup>83</sup> RODES, *supra* note 71, at 50–51 (describing the development of the legal doctrine of tithes from “feudal dues (*dominicae*) out of land” to “a share of the increase given to God because God has bestowed it”).

<sup>84</sup> See generally R. B. OUTHWAITE, *THE RISE AND FALL OF THE ECCLESIASTICAL COURTS, 1500–1860* (2006).

<sup>85</sup> See, e.g., *Ex officio c. Dicson* (Durham, 1593), Durham University Library, Act book DDR IV/3, fol. 96; see also *Clement Colmore’s Book* (Durham ca. 1600), Durham University Library, DDR/EJ/CCA/1/7, fol. 245v.

<sup>86</sup> See HENRY SWINBURNE, *A BRIEF TREATISE OF TESTAMENTS AND LAST WILLS* Pt. II, § ix, no. 22, at 51 (Garland Publishing 1978) (1590) (citing Magna Carta’s provisions on wills and testaments).

<sup>87</sup> See generally EDWARD COKE, *SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* (1642), reprinted in *THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE* 746–914 (Steve Shepard ed., 2003).

government for the same reasons that motivate any public spirited group today—as “the right thing to do.” They may have looked beyond their own interests. One should not deny this possibility. This Article has simply followed the more common and the safer path. The habitual cynicism of our own century all but mandates this approach. This may not be right or fair. But of course, it is true that the English clergy had a propensity to equate good government with the recognition of their order’s privileges. In that sense, this Article has simply followed their lead.