

TRIAL BY PEERS AGAIN

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It is hardly possible to exaggerate the influence in the history of England of the judicial reforms made by Henry II. Not merely does the judicial organization of the present day bear unmistakable evidence of its origin in those reforms, but our common law had its beginning in them also, and their constitutional influence has been even wider, almost world wide.

One phase of this last influence has been seen by some scholars in c. 39 of Magna Carta.¹ This clause is also, because of the later meaning given to it, one of the most famous clauses of the Charter, and it is one of the most difficult to interpret, if we wish to be sure that our interpretation is the same as that of the barons who extorted the Charter from the king. Two of the writers of the *Magna Carta Commemoration Essays* published recently by the Royal Historical Society,² Sir Paul Vinogradoff and Professor F. M. Powicke, deal with this clause, and it was the matter chiefly interesting the reviewer of the volume, Professor Tait of Manchester, in the April number of the *ENGLISH HISTORICAL REVIEW*.³ All three comment to some extent, and the two last named to a large extent, upon the views expressed in note "D" to chapter V. of my *Origin of the English Constitution*, pp. 262-274. One feels a natural temptation not to rest satisfied with even the best results in the interpretation of so important and difficult a passage, and, when also one's own ideas have been misunderstood and misstated, no doubt because of some obscurity in the original statement, the temptation becomes irresistible.⁴

¹ Nullus liber homo capiatur vel imprisonetur, aut disseisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruat, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terre.

No freeman shall be taken or [and] imprisoned or disseised or exiled, or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or [and] by the law of the land.

Text and translation from McKechnie, *Magna Carta* (2d ed.) 375.

² *Magna Carta Commemoration Essays*. With a Preface by the Rt. Hon. Viscount Bryce, O.M. Edited by Henry Elliot Malden, M.A. For the Royal Historical Society. 1917.

³ (1918) 33 *ENGLISH HISTORICAL REVIEW*, 261-266.

⁴ Clause 61 is not directly germane to c. 39, but Professor Tait (*E. H. R.*, l. c. 264) makes so tempting a suggestion—that the pope may have found in that clause a legal right to interfere as suzerain and annul the Charter—that it can not be passed over. The suggestion can hardly be accepted in view of the principle on which c. 61 rests. In the clause the barons were demanding nothing outside

In the interpretation of the clause, there are two points which exceed in importance all others and occasion the most serious differences of opinion: the classes to be included in the words *liber homo* and the meaning of the phrase *per iudicium parium vel per legem terrae*, including the force of the particle *vel*. Of these two the first seems to me of much less importance than the second.

Whatever the barons who framed the Charter may have intended by the words *liber homo*, there can be no doubt but that very shortly they were taken to include all freemen. The effect also of c. 60 upon this clause, as upon the whole Charter, should not be overlooked. If it implies that in the body of the Charter neither barons nor king were thinking directly of the rear vassal who was not at the same time a king's vassal, it also says that the mesne lord must allow him the same rights that he claims for himself, and by inference the king must do so also in the rare cases in which in 1215 the king would come directly in contact with the rear vassal in matters covered by the Charter. The effect of c. 60 would be to extend the benefits of c. 39 to all holders of land by military or serjeanty tenure. If we remember how very few the freemen were, outside these feudal tenants, who would come into direct judicial contact with the king upon the matters specified in c. 39, we shall conclude that c. 60 makes the range of c. 39 practically universal.

the feudal law, no grant of new principle, nor any addition to the rights which were recognized throughout the feudal world as belonging to the vassal. On the contrary what they were really doing was to put limitations on their right; they were agreeing not to exercise it until after certain expedients of a judicial character had been tried. If the pope were proposing to base his action against the Charter upon his legal rights as suzerain, he could find nothing to justify action in c. 61. Indeed if he were appealed to because of civil war between the barons and the king in which the barons had faithfully observed the clause, he would be obliged, if he acted legally, to interfere in favor of the barons and against the king. Nor would the pope's right to the annual *cens* be in any way affected, nor the responsibility of England to pay it. He might no longer have a claim upon John, if the matter were pressed to an extreme against the king, but he would have a claim on the barons for the same payment under the regular operation of the principle. If the lord lost his rights over his vassal by an act of injustice, he lost his obligations for that fief as well. The vassal became responsible for his share of his lord's obligations to the next higher suzerain, and more also by becoming responsible to him for what he owed his former suzerain. This is the form which confiscation of the lord's rights took, the correlative to confiscation of the vassal's holding. See 2 Viollet, *Etablissements de Saint Louis*, 80 (Bk. I. c. 56 (52)) and notes; 3 *ibid.* 334; and *cf.* 1 *ibid.* 161, and Digby, *Real Property*, 73. It is very likely that the blunt requirements of c. 61 may have excited the anger of John and of the pope, but there was nothing in the clause of which either could complain on the ground of legality. It should be added also that the plain purpose of the clause was to prevent extreme action against the king, and that it would do so if John would keep his promises.

That those who originally framed c. 39 meant only the king's feudal tenants, seems to me still the more probable opinion. The recent arguments to the contrary leave the question in my mind where it was. I understand Professor Powicke to suppose (*Essays*, 108) that one who does not hold that the barons intended to include the common freeman must hold that they intended to exclude him. That in my opinion is not the alternative. The barons were simply not thinking about the common freeman at all. They had in mind only their own class and their sufferings from the illegal or extra-legal action of the king. The common freemen had not suffered in the same way from these things. The king had not the same interest to interfere with their rights that he had in the barons' case.⁵ In framing the clause the barons were thinking only about their own case, but they had no conscious intention of excluding anybody. They merely used the ordinary feudal language of the time with no particular thought of its range of meaning. That the words had a wider connotation even than they had in mind was fortunate. It was still more fortunate that during the next hundred years, from causes that were then just beginning to work strongly in England, the class they overlooked increased in importance in the state with great rapidity, while their own class, as they then regarded it, declined as rapidly in relative importance and lost interest in the things which in 1215 they considered especially important.

I cannot admit that the meaning of *liber homo* is to be determined in this clause by the usage of the Charter. I should say rather that the usage of the time is so various that the meaning of the phrase in every document and every clause is to be determined by its own context. Nor can I accept Professor Powicke's interpretation of the words in some of the other clauses. He believes that *liber homo* in the Charter included the common freeman in all cases, and only admits a doubt as to c. 34. But in c. 15 the non-feudal freeman is by the very terms excluded. The case supposed could arise only in case of a

⁵ After describing briefly the position of the free tenant "in the economy of the manor," which was the position of practically all the common freemen in 1215, Mr. Powicke refers to c. 39 as "protecting them and their tenements against illegal interference from the king and his officials." *Essays*, 110. The evidence that the common freeman was consciously included in c. 39 would be materially strengthened if it were shown specifically that the king had been doing this in the particulars named in the clause, and how he did it in manors not his own and for what reasons. In this connection it must be remembered that c. 20 affords protection in a different case from any mentioned in c. 39. It relates only to the operation of the courts of new procedure. That is conclusively shown by c. 21. The problem of showing how c. 39 applied practically in 1215 to the case of the common freeman as a class, determined in his relations as he was by his position in the economy of the manor, is one that deserves investigation in the further study of this clause of the Charter.

feudal tenant.⁶ That the common freeman was consciously included in c. 27 is highly improbable. The clause was intended to protect tenants in chief against the king in a matter in which protection was very hard to secure. It is identical in meaning with c. 7 of Henry I's Charter.⁷ Clause 34 can refer, I think, only to the possessor of a baronial court in the technical sense, not in 1215 to the possessor of a domanial court.⁸ There are only two clauses in the Charter, 20 and 30, in which the common freeman was consciously included beyond a doubt.⁹

I have attempted no exhaustive study of this point. Such a study

⁶ Cf. 1 Madox, *Exchequer*, 599-600. C. 15 also shows that c. 12 applied to no one but king's vassals. The rear vassal, who would always be a freeman, had to be protected by special mention.

⁷ See Glanvill, vii, 16, 2.

⁸ Sir Paul Vinogradoff says (*Essays*, 82) that c. 34 means only "that when free men had courts they were not to be deprived of their privileges; free men who had no courts were not concerned in c. 34 at all," as if this were opposed to my view. I do not see that it is. I should say that the statement is of course true, but that it is the same as saying that the common freeman is not included. That is, the essential point is that the barons used the words *liber homo* when they knew, if they thought about it at all, as they probably did not, that the common freeman could not have any interest in the provision. All that is asserted of c. 39 is that they used the same words in the same way, not thinking of the application of them to any but their own class. At any rate the new form of statement does not materially advance the discussion, because the meaning of *liber homo* must be independently determined in each separate case, and the question as to c. 39 is who were consciously included in the term. Professor Powicke (*Essays*, 108, n. 1) asks the question concerning c. 34 whether any manorial court could not suffer from the writ and therefore be protected by the prohibition. It is barely possible that it might in 1215, though very unlikely. The vast majority of cases which led to the use of the writ *praecipue* concerned feudal holdings and, though conceivably one might concern a common freehold and might be begun in a domanial court, such cases important enough to lead to the use of the writ would certainly be very rare in those courts down to that date. After the rise of the court baron they might fall into a court which was to all intents manorial. The size of a tenement is of course not a certain indication, but the court records which we have from before 1215 show that cases in the king's courts concerning small holdings, except when parts of larger ones, as in cases concerning dower for instance, are quite uncommon. But in any case the question is not what class of courts were protected, but whether a non-feudal freeman would possess at that date a court of any kind from which cases would be evoked by the writ.

⁹ It should be noticed that c. 20 belongs to that portion of the Charter which relates to the results of Henry II's judicial reforms, in which the common freeman had a well defined place by inheritance from the old county court, and therefore it was impossible not to have him in mind in such an enumeration as that of cc. 20-22. The reference to him here cannot legitimately be used to show that he was consciously in mind elsewhere in the Charter. In c. 30 the tenant in chief certainly had a greater interest than any common freeman, but I think the latter must have been consciously included for it would be through him in some part at least that the tenant in chief would suffer.

would require more space here than its relative importance would justify, especially as the conclusion must always remain largely a matter of opinion. To me the balance inclines decidedly in one way, but the evidence is of such a sort that every re-examination leaves the question enough in doubt to warn against dogmatism.

The interpretation of the *judicium parium* portion of the clause seems to me much more important because it not merely bears more directly upon the intention of the barons in the Charter as a whole but also because questions of procedure are involved in its understanding which have a bearing on the future development of law and which it is important for that reason to keep free from confusion. I must be allowed to say in this connection that I read with a good deal of surprise the statement that I had pushed the baronial interpretation of c. 39 to its logical conclusion,¹⁰ for I never have believed and never have said with reference to this clause that "the barons desired to place themselves beyond the scope of the judicial system elaborated in the reign of Henry II and Richard I."¹¹ The evidence of such a desire must be found outside this clause, and I supposed I had expressed this opinion so that it would be understood in my note on this clause above referred to, particularly on p. 272, where I intended to say that the view I had just stated and illustrated was one with which I did not on the whole agree.¹² I seem to have failed, however, and must try to make my position clearer. The conclusion which Professor Powicke states on p. 103 of his essay is one with which I entirely agree. He says: "The conclusion is forced upon my mind at least that the thirty-ninth clause was intended to lay stress not so much on any particular form of trial as on the necessity for protection against the arbitrary acts of imprisonment, disseisin, and outlawry in which King John had indulged." That is to say, the barons were not thinking in this clause of the judicial system elaborated by Henry II. If they had been, they would neces-

¹⁰ *Essays*, 96.

¹¹ I cannot avoid the feeling that the criticism of my views is due in part to some little lack of clearness regarding judicial procedure and its bearing on the meaning of the clause. I am confirmed in this feeling by the sentence which follows the one cited above (*Essays*, 96). In this sentence the opinion is attributed to me that the barons "meant no particular form of procedure, certainly not the processes of indictment and presentment." This is a correct statement of my opinion, but it should be obvious that to hold it is to maintain that the barons were not thinking of the judicial system elaborated by Henry II and intended no attack upon it. If they had been attacking that system, they would have had procedure most of all in mind.

¹² After pointing out what the clause would probably mean if the barons were thinking of procedure (see p. 268), I said: "As I have already said, it seems to me more likely that this [procedure] was not what they were chiefly thinking of, that they were here less concerned with the contrast in procedure between the old *curia regis* and the new royal justice than with John's tyrannical treatment of his vassals without any process of law of either kind." *Origin*, 272.

sarily have been thinking chiefly of the new criminal procedure established by the Assizes of Clarendon and Northampton. But why should they be thinking of this? They had not as yet been troubled by it. They never were seriously troubled by it.¹³ They were demanding the traditional *curia regis* trial by judgment of their peers which was still habitual in their case, not as against some other form of trial, but against no trial at all, against condemnation without trial of any kind.

While I agree with the conclusion which Professor Powicke reaches, I cannot agree with the line of argument by which it is reached nor with the important subordinate conclusions of the paper. In order to maintain the disjunctive use of the particle *vel* in the clause¹⁴ and the translation "by the judgment of peers or by the law of the land," Professor Powicke feels obliged, quite correctly I think, to show that a *judicium parium* is not the only way by which a case might be decided in the *curia regis*.¹⁵ In both the necessity of proving this point and

¹³ There was undoubtedly some danger that the barons might lose their ancient right of trial by their peers through the development of the royal justice. The advance in France in this special particular was more rapid than in England, probably because of the institution of the Twelve Peers of France. This fact was no doubt responsible for Peter des Roches's taunt in 1233 that there were no peers in England and that the king decided all cases by his justices. The barons were evidently troubled by the taunt but they did not understand its meaning and did not know what to say. That is, the tendencies of the new procedure were clearer to Peter des Roches than they were to the barons.

¹⁴ There is a possible application of the phrase *vel per legem terrae*, allowing of a disjunctive meaning for the particle, which may be worth considering. In the enumeration in the first part of the clause of the things the king might do, there are some which required no *judicium parium*. *Capiatur vel imprisonetur* certainly did not in every case and going upon one or sending upon him might not. Possibly it was with the intention of making the pledge all inclusive and complete with regard to the acts specified that the phrase was used. The chief objection to this suggestion is that it supposes a refinement of legal care in this particular clause which does not characterize the Charter as a whole nor the group of related documents. Or if we are to suppose such care, there would be no objection to Sir James Stephen's interpretation (*Criminal Law*, I. 162-163; *Origin*, 264) that the king promises judgment by their peers to those who are his vassals and as the law provides to those who are not. This interpretation could also be applied to the letter of May 10 and thus avoid the blunder of putting vassals and non-vassals on the same footing in the king's court. Those who insist on a disjunctive meaning for *vel* in this part of the clause seem always to overlook its probable meaning in the first part. See *Origin*, 262. I understand Professor Tait to hold (*E. H. R.*, I. c. 261-262, 263) that if *vel* is translated conjunctively the clause must be interpreted as an attack on the judicial reforms of Henry II. The opinion must be due, I think, to the belief that the *judicium parium* was not normally a part of the law of the land.

¹⁵ It seems a little unexpected, considering the place which judgment by peers had held in the whole western world for centuries before Magna Carta to have it relegated to such an unusual position in England as is given it in Professor Tait's rendering of Professor Powicke's conclusion: "As an ultimate resort in

the way of proving it, Professor Tait agrees with him. To support this contention several cases are cited which are quite as important with reference to the understanding of procedure in general and the contemporary development of law as with reference to this particular question.

The first case cited is a quarrel in 1205 between King John and the Earl Marshal as to the right of the earl to hold lands of the king of France after the loss of Normandy.¹⁶ The marshal offers the judicial duel; the king insists on "the judgment of my barons." Professor Powicke supposes that the duel was offered as an alternative to a *judicium parium* and that therefore there may be trials in the king's court in which there is no judgment by peers, or, as Professor Tait says, that it was "by no means the only form of trial even for barons." This opinion appears to rest upon a misapprehension of the procedure in the *curia regis*. The duel was a form of proof, not a *judicium* or a substitute for a *judicium*. It stood in the same relation to the *judicium* as did the witness proof, compurgation, or the ordeal. What form of proof should be offered and by which party, was always determined by a *judicium parium* and, in theory at least, the proof was always followed by another *judicium* making the final judgment of the court. In practice I suspect that after some forms of proof, especially the duel and the ordeal, the final judgment was more theoretical than actual, very informal at any rate and perhaps taken as logically involved in the medial judgment. In no sense, however, can the duel be said to be an alternative to a *judicium parium*. The particular issue in this case was clearly not between the king and the marshal,

exceptional cases, a special protection against the arbitrary power of the Crown, something superimposed on the ordinary law of the land rather than a rigid alternative to it." (E. H. R. *l. c.* 262.) Of course if *vel* is used conjunctively judgment by peers is not an alternative to the law of the land but a part of it, as historically it undoubtedly was. I cannot avoid the impression from the language used by both writers that they may regard judgment by peers as the thing conceded by the king, as a right granted by him which he might have withheld. That can hardly be the case, however, since it was a right which had everywhere been possessed by feudal vassals from the earliest days of feudalism. What the king granted was that he would not take the right away, that he would respect it.

¹⁶The incident is related in the *Histoire de Guillaume le Maréchal*, ll. 13149-13244. This is the account of a poet not of a lawyer, but it seems correct technically where it can be tested. Professor Powicke cites in a note a case of disagreement between the barons of Poitou and the king related in 4 Roger of Howden, 176. The barons ask for a judgment of peers; the king insists upon a trial by combat. The principle is exactly the same, and the explanation is plainly suggested in the context. King John has brought together a court from his various lands, as was the frequent practice of the Angevin kings in France, and the barons, seeing a foregone conclusion, are objecting, as they were technically quite right in doing, that this is not a court of their peers and demanding one that is.

but between the king and the barons of his court. Apparently they wished to choose a form of proof which would avoid a decision of the question on its merits, while the king was determined they should not do so but should put themselves on record in regard to holding lands of the king of France while vassals of himself.

From the time following Magna Carta, two cases are cited. One is a civil case of 1234 which is printed in *Bracton's Note Book*, No. 1106, a case in which the king admits disseisin *sine summonitione et sine iudicio*. According to the heading of the record, the case is a *coram rege* case before a single justice, and according to the record itself the king was actually present. As I understand Professor Powicke, he thinks that the judgment was rendered in this case by the justice and that no one else had any share in making it, that is, that there was no *iudicium parium*.¹⁷ I sincerely wish that this could be shown beyond question. The year 1234 falls of course near the beginning of the transitional period when the method of making judgment was changing from the medieval method of the *iudicium parium* (*iudicium curiae*) to the modern method of the justice-made judgment,¹⁸ and just how this change was made has never as yet been shown.¹⁹ It may be said, however, that all the *coram rege* cases of

¹⁷ The judgment rendered by the court in this case allowed the plaintiff to proceed to recover by the assize of Mort d'ancestor *vel per breve de recto secundum legem terrae*. *Vel* in this case Professor Powicke translates conjunctively: "by assize of Mort d'ancestor and writ of right," and on the next page he says the decision points "to the legal process by assize and writ, to a possessory and proprietary action." (*Essays*, 104, 105.) I think in this case *vel* must be translated disjunctively. The judgment allows the plaintiff to proceed either by a possessory or by a proprietary action as he pleases, but if he chooses a writ of right the possessory action would be useless. Professor Powicke rightly emphasizes the *secundum legem terrae* of the record. That this phrase is applied to the assize and the writ of right in 1234 is interesting and noteworthy, but by that date the new procedure was so firmly fixed in use that probably it would be looked upon by hardly any one as unusual.

¹⁸ Incidentally I cannot help expressing my surprise at the readiness, it would seem almost without critical examination, with which the theories of M. Fréville in his article in the *Nouvelle Revue Historique de Droit Français et Étranger*, 1912, pp. 714 ff., have sometimes been accepted. (*Essays*, 102, n. 2.) M. Fréville's theory of the transformation of judicial procedure in Normandy between 1150 and 1250, as being from the justice-made judgment to the *iudicium curiae*, implies a process of change the exact opposite of that which had been going on throughout almost the whole of Frankish history, and exactly opposed to the tendencies of Henry II's reforms. Such a thesis requires not merely unusually strong supporting evidence, but evidence gathered and interpreted by the strictest scientific method. Careful examination will show that a large proportion of M. Fréville's evidence cannot be accepted in the use which he makes of it.

¹⁹ Sir Paul Vinogradoff in his essay in the Commemoration volume (pp. 87-93) makes an important and interesting contribution to this phase of the subject, upon one part of which the reviewer remarks (*E. H. R. l. c.* 262) that it "hardly seems called for."

that date which can be studied in details of procedure are cases before the Council and Council cases were then and have always continued to be decided by a *judicium curiae*. The naming of the justice in the title of the roll and the title itself at that date say nothing about the particular cases on the roll, either as to whether they are really *coram rege* cases in the later sense, as many of them are not, or as to the method of judgment making, and there is nothing in the record of this case to indicate that the justice made the judgment. The technical phrases used are all quite regular of an ordinary Council case using the old, that is the *judicium parium*, procedure: *per judicium curie sue; in curia sua fiat judicium; consideratum est*.

The second case cited from the later period is the famous case of the outlawry of Hubert de Burgh or rather the two cases, his and that of Gilbert Basset and others, and their reversal in the Great Council on May 23, 1234. The two cases are for the present purpose virtually one and may be so treated. As such it forms a very interesting but a very difficult case. I have said elsewhere that it is not clear what should be said about it,²⁰ and I am still in doubt. My doubt, however, does not involve the question of a *judicium parium*. In that respect the case is quite regular. The difficulty in the case arises from the fact that the original proceedings in outlawry, as given in the earlier records, do not seem to justify the allegations upon which the outlawry was reversed in the Great Council.²¹ Professor Powicke has considered only the record of the reversal and therefore did not notice this feature of the case.²² Outlawry was of course not a punishment for the offense specified in the indictment or appeal, but for contumacy in refusing to appear and answer, though there must be, or must be assumed to be, a presumption of guilt, and it was therefore not a part of the trial originally begun. In the original cases which led to these sentences of outlawry, the king apparently elected to proceed against Hubert de Burgh by inquest before justices specially appointed, as in 1233 he had a right to do,²³ and against Gilbert Basset by appeal and suit. If this is true, it would follow that their claim in these earlier cases to be tried by their peers, though in real justice it met the issue raised by the king, did not do so technically. It was not a demand for a different form of procedure in the cases begun, but for a different kind of case and a different tribunal. They were right in phrasing their demand as for a trial by their peers, because indirectly

²⁰ *Origin*, 289, n. 14.

²¹ *Bracton's Note Book*, case 857.

²² There is a considerable body of material bearing on this case, but reference need be made here only to Close Rolls, 1231-1234, 161, 545. The latter is in 1 Shirley, *Royal Letters*, 429.

²³ In 1189 two methods of outlawry are in recognized use: *per commune rectum comitatus vel hundredi*, and *per appellationem per justitias*. See the proclamation of Queen Eleanor, 2 Benedict of Peterborough, 74-75.

this raised the question of a *judicium parium* to be made in the Great Council, because that was the procedure of the Great Council, but this was not the main issue raised by the demand. That was the kind of court. I do not think that either the barons in their demand in 1233 or the Great Council in its act of reversal in 1234 were thinking directly of c. 39 or of procedure in itself. If they had been, the point would have been made clear in the judgment. The demand in 1233 for a trial by their peers was a form of demanding a Great Council trial and the case being in 1234 before the Great Council for reconsideration, the demand had been conceded. I am inclined at present to think that, whatever might have been true at any date prior to Henry II, the original proceedings in outlawry in these cases in 1233 were quite regular, and that the reasons for reversal were put in the elaborate shape in which they appear in the record of 1234, because the reversal was a foregone conclusion and must be made to appear well founded on some ground or other, or the ground of reversal must be confused.

Whether this is true or not, it is certainly true that this case can be made to show no alternative to trial by peers, and no violation of that principle except as that may be involved in the original trial of Hubert de Burgh by inquest before justices, that is by the new procedure. If that point be insisted upon here in his case, it would seem to prove too much. For it would show that in 1233 and 1234 the barons in making their demand thought c. 39 to be a declaration against the new procedure and an attack upon the judicial system elaborated by Henry II. As I have said above I do not think this was the case, and I do not think c. 39 was in mind at either date. There can be no question, however, but that before very long the progress of the new procedure in criminal cases raised this issue consciously and that then c. 39 was regarded as a protection for the baronage against the newer forms of trial. It was a hundred years after 1234 before the issue was so raised as to be settled, and when it began to be consciously formulated as an issue, is doubtful.

Professor Powicke has much to say about administrative or prerogative arrest and punishment which is of interest and value. The passage could profitably be extended into a special study of the subject, for it has never been thoroughly investigated. In the meantime there is nothing in the evidence cited, nor in any evidence so far as I know, to indicate that administrative arrest or administrative punishment were ever recognized as a legal alternative to a *judicium parium*, or to any form of trial. In his interpretation in this matter of the *Edictum regium* of 1195, which may be taken as typical of the evidence cited, Professor Powicke sees in it a more decided departure from the system of criminal justice established at Clarendon than I can. It seems to me plainly to relate to extraordinary cases, and I can find nothing in it to show any contemplated change in the

ordinary trial procedure of the courts.²⁴ There are new regulations as to arrest, emphasis is somewhat different, and there is no direct reference to action before itinerant justices nor in form to the jury of presentment, but it should be remembered that every itinerant justice was a special commissioner, and the action provided for is to take place before special commissioners according to the Edict, and that the *per sacramentum fidelium hominum de visnetis* of Howden is the action of the jury of presentment. So far from making any change, the document seems to me to indicate that the Clarendon procedure was working on the whole very well when the criminal could be got hold of. That is the difficulty to which the Edict is directed—the difficulty of arresting the suspected man. To the same purpose is a writ of 8 Nov. 9 John, not cited in the *Essays*,²⁵ and also the passage cited on p. 116 of the *Essays* from the *Calendar of Close Rolls, 1237-42*, 356. This was one of the great practical problems of the time, to get the accused man arrested and before the court, and this fact explains largely the toleration of administrative arrest and imprisonment in this sphere.

I understand, however, that Professor Powicke considers also that the operation of administrative arrest under such measures as the Edict of 1195 created a situation affecting the common freeman, depriving him of a *judicium parium*, and that c. 39 was consciously intended to restore his right in this particular. If the fact can be established with a good degree of probability, it will be an important contribution to the subject, for it will furnish what does not now exist, an adequate reason for including the common freeman among those to be protected by the clause. There can be no doubt of the prerogative punishment of barons which deprived them of their right to a *judicium parium*; complaints of John's action in this regard are well enough known, and to my mind without a doubt this abuse is the chief explanation of c. 39. But I understand the prerogative action contemplated in the Edict of 1195 to be something quite different in purpose and form, intended to enforce the law in a point which experience

²⁴ 3 Roger of Howden, 299-300. Those named in the Edict to carry its provisions out are *milites ad hoc assignati*. In his account of what followed Howden says: "Ad haec igitur exsequenda missi sunt per singulos comitatus Angliae viri electi et fideles qui per sacramentum fidelium hominum de visnetis multos ceperunt et carceribus regis incluserunt." In saying that those arrested *non deliberandos nisi per regem aut ejus capitalem justitiam*, the Edict is using the ordinary formula for the suspension of bail. See the regular practice in the cases of treason and homicide, Bracton, ff. 119, 121b.

²⁵ A mandate directing the suspension of bail. Rex etc. Justiciariis et omnibus fidelibus suis salutem. Prohibemus districte ne quis appellatus de morte hominis replegiatur vel in custodia tradatur vel ostagietur nisi per speciale praeceptum nostrum, sed in gaola firmiter teneatur donec coram justiciariis judicium suum habuerit. T. Domino J. Norwicensi apud Wudestok, viii die Novembris. *Pat. 9 J. m. 4*. From 1 Madox, *Exchequer*, 494, n. u.

had shown to be very difficult to enforce, not to violate it, and meeting with the general approval of all but criminals. It will be necessary to show that this was not the case, but that the law-abiding common freeman was directly affected in his right to the ordinary trial, or subjected to oppressive action by the king in this respect.²⁶

In the study of the operation of the judicial system as affecting the interpretation of this clause, there seems to be some difficulty in distinguishing the old procedure from the new, that is, from the procedure introduced by royal innovation after 1066: royal commissioner, jury, indictment or presentment, writs, assizes, etc. It is important to be able to distinguish the one from the other if we are to consider c. 39 as involving a question of judicial procedure. Indeed otherwise comment may go decidedly astray. In its simplest form the distinction is easy to make, but it is complicated in the study of cases with another problem which is not at all easy—the problem of determining just what the relation was between the new and the old in the actual operation of the courts in the period from the Assize of Clarendon to the virtual disappearance of the old—say roughly to the end of the thirteenth century. The subject has never to my knowledge been investigated. Primarily of course the new procedure belonged to the new courts and should not appear in the old courts at all, but it gets an entry into county and hundred courts through the sheriff's relation

²⁶ There seems to me to be a tendency in the arguments I am considering to overestimate the public importance of the common freeman in 1215. I have no doubt there were at this date, and had been very likely from the Conquest, individual cases of such men who held a considerable local place. I think it likely that already members of the class had begun to improve their position economically and in local standing. But certainly the evidence of such a process is greater for the fourteenth century than for the thirteenth. Cases must have been rare at the date of the Charter, of non-feudal freemen not living in manorial or borough relations. And yet these would be the only men whom the king could touch in the ways specified in c. 39, except in his own manors, without a violation of property or other rights similar to those protected by c. 34. I do not know of evidence to show that the king had done anything of this kind. Even in the local juries of the new judicial system, where was used the machinery of the county court in which the common freeman had his peculiar field of public action, knights seem always to have been preferred to freemen if there were knights enough. Certainly no evidence has yet been produced to show that in the opening years of the thirteenth century the common freemen occupied such a place in the community, either as a class or as individuals as to call down upon themselves the oppressive acts of John which he is required to abandon by c. 39, or to lead the barons naturally and consciously to reason that they ought to be included with themselves in the protection demanded. There is one way in which some light may be thrown upon this question without much difficulty. The amount and character of the litigation which this non-feudal class furnished to the royal courts of the time could be easily studied and ought to show us something of the relative position, compared with other classes, which this class occupied in the community life.

to pleas of the crown and when he is acting as a royal commissioner, and before long not merely these courts but baronial and even domanial are using all the new forms so far as their needs required. On the other hand the old procedure, appeal, foreoath, *judicium curiae*, witness proof, compurgation, ordeal, etc., had always belonged just as normally in the king's special local courts as in the central *curia regis* or in the old county court, and had been used in them from 1066 on, so that here again new and old appear side by side as normal procedure. Accordingly we have in the same series of records pleas wholly of the new procedure (*Select Pleas of the Crown*, Selden Society, Nos. 5, 6, 12); partly new and partly old in the same case (Nos. 8, 13, 16, 39, 40); and wholly old (Nos. 4, 11). It is not the place here to enter further into this subject, particularly as I do not think that the barons had directly in mind any contrast between new and old procedure in c. 39.

In closing I must allow myself to say that the interpretation of c. 39 appears to me one of those historical problems from which it is almost impossible to exclude the subjective element. The weight of the later interpretation still rests unconsciously on our minds. We cannot bring ourselves to believe—it is I am tempted to think more largely a matter of belief, than of proof—that is, we refuse to believe that the people were not then in existence in something like the later sense, or that the barons did not feel an obligation to include them in the details of the “constitutional” guarantees which they secured. *Liber homo* must have included intentionally every free man because we cannot believe otherwise, and our minds revolt emotionally from a cold and hard interpretation of the charter as a legal document rigorously out of the legal ideas and facts of the time. I am afraid I think that it must be so interpreted, if our purpose is to find out what it meant in 1215.