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## MAGNA CARTA IN THE LATE MIDDLE AGES: OVER-MIGHTY SUBJECTS, UNDER-MIGHTY KINGS, AND A TURN AWAY FROM TRIAL BY JURY

David J. Seipp\*

What did English lawyers know about Magna Carta in the fourteenth and fifteenth centuries? How did they talk about it? Did they regard the king as above the law or subordinate to it? What did they make of the guarantees that we now think were most important in Magna Carta, the guarantee of judgment of peers or the law of the land, and of speedy justice? The evidence of the Year Books is that Magna Carta was treated as a minor statute, that the king was or ought to be above the law in many respects, and that trial by jury was a risk to be avoided, if possible, because juries could be so easily intimidated.

Surely lawyers held no centenary celebrations of Magna Carta anniversaries in 1315, 1415, or 1515. The charter sealed by King John on June 15, 1215, at Runnymede was almost completely unknown to lawyers in England's royal courts in the decades and centuries afterward. What lawyers and judges of the fourteenth and fifteenth centuries knew as Magna Carta was the third reissue of the charter in 1225, the first by John's son Henry III on his own initiative.<sup>1</sup>

There are about 120 references to Magna Carta in the Year Books, the reports of legal arguments and judgments in England's common law courts from 1268 to 1535.<sup>2</sup> But in none of these reports is there any mention that it was King John who first granted a charter with most of these provisions. There are fifteen cases in the Year Books mentioning other charters of King John.<sup>3</sup> These charters of King John were all specific individual grants of "liberties" in the sense of special privileges or "franchises" to particular towns or religious houses. Often the issue in these cases

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<sup>1</sup> Sir John Baker, *The Legal Force and Effect of Magna Carta*, in *MAGNA CARTA: MUSE & MENTOR* 65, 67 (Randy J. Holland ed., 2014); Sir John Baker, *Introduction* to *SELECTED READINGS AND COMMENTARIES ON MAGNA CARTA: 1400–1604*, 132 Selden Society xxxix–xl (Sir John Baker ed., 2015) [hereinafter *SELECTED READINGS*]. Citations to Selden Society volumes are hereinafter SS.

<sup>2</sup> See *infra* pp. 672–78.

<sup>3</sup> The first such case was the Bishop of Carlisle's Case, Mich. 15 Edw. 2, pl. [34], fol. 453v–454r (C.P.) (1321.098); the last was Anon., Hil. 13 Hen. 4, Fitzherbert Aide de roy 99, fol. 34v (1412.040abr). Year Book citations are to the author's database, <http://www.bu.edu/law/seipp> [<https://perma.cc/HZ8T-DLE3>].

was whether a particular local charter of King John was valid. And often the conclusion was that it was not. For example, in 1346 the bailiffs of a town put forward a charter of their liberties from King John by which John had granted that the townspeople should not be impleaded or implead in respect of contracts, trespasses or tenures anywhere except in the town itself. The Court of Common Pleas held the charter void.<sup>4</sup>

In the London eyre of 1321, a charter that King John had granted in July 1199 putting the sheriffdoms of Middlesex to fee farm was challenged on behalf of Edward II. A lawyer for the City of London argued that “the great charter says that we are to have our liberties and our free customs,” a clear reference to a chapter of Magna Carta.<sup>5</sup> But there was no hint here or in any other case found in the Year Books of any awareness that the “great charter” that this London lawyer or other lawyers and judges were invoking was itself a charter first granted by King John.

Readings at the Inns of Court, lectures on statutes by senior lawyers for law students, showed a slight but growing awareness of events of 1215. A reading on the first chapter of Magna Carta that survives in six manuscripts, probably dating to sometime in the fifteenth century, began by noting that King Henry III made this great charter for the amendment of the realm, before which only common law was used, and a treaty which was made at Runnymede.<sup>6</sup> King John and his barons were at war with each other before and after his grant of the 1215 charter, so it could be characterized as a temporary truce or treaty. Another reading of uncertain date gave a bit more of the history:

Before the making of this statute there was no law except custom and common law . . . King John wanted to destroy the law and have his own will. And for this reason the lords of the lands wished to depose him . . . and because of the fear of these barons and other lords he [John] made this law in writing. And after this King Henry III confirmed this law of his good will without coercion and it was sealed with his great seal.<sup>7</sup>

This mention of King John’s fear of the barons, contrasted with the lack of coercion against Henry III, suggests that lawyers who knew the history of the 1215 events

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<sup>4</sup> Anon., Hil. 20 Edw. 3, pl. 35, RS 117 (1346.035rs).

<sup>5</sup> *R. v. Mayor of London*, 14 Edw. 2, Civil. pl. [81], 86 SS 252, 253–54 (London Eyre) (1321.234ss). Fee farm was a transaction by which an annual fixed rent was paid in return for the right to collect the profits, in this instance, of holding sheriffs’ courts in Middlesex County. *Id.* The lawyer’s reference is to chapter 9 of the 1225 Magna Carta. *Id.* References hereafter to Magna Carta are to the 1225 reissue, unless otherwise noted.

<sup>6</sup> THE RIGHTS AND LIBERTIES OF THE ENGLISH CHURCH: READINGS FROM THE PRE-REFORMATION INNS OF COURT, 129 SS 71 (Margaret McGlynn ed., 2012) (reading two, probably composed sometime between 1409 and 1496) [hereinafter RIGHTS AND LIBERTIES].

<sup>7</sup> RIGHTS AND LIBERTIES, *supra* note 6, 129 SS 82 (reading four, of uncertain date).

would have thought that John's grant of the charter was void for duress. That, at least, provided grounds for Pope Innocent III to declare the 1215 charter null and void a few months after it was sealed.<sup>8</sup> This reading went on to state that Henry III's son Edward I had inspected his father's great charter and made it a statute.<sup>9</sup>

Another reading from the late fifteenth or early sixteenth century said that these ordinances were first made in the time of King John, then were granted by patent by his son Henry III, then were made a statute in 1267.<sup>10</sup> A reading at Gray's Inn, circa 1506, referred to "the charter of Runnymede,"<sup>11</sup> and a reading at Inner Temple in 1511 stated that King John by his charter granted the English church's liberties, "and it was further granted that if he broke any article of this [charter] that certain of the . . . barons could oppose him, and then for breaking the charter they did so[.]" after which Henry III granted this charter again in the ninth year of his reign, 1225.<sup>12</sup> This 1511 passage appears to be the first indication of a lawyer who noticed chapter 61 of the 1215 charter, the security clause, which did not appear in any later version. A Gray's Inn reading of 1522 said that Magna Carta was made by King John and at Runnymede by compulsion, then afterwards by Henry III.<sup>13</sup> A reading of the early 1530s, composed in English, stated that "the statute of Magna Carta" was made in the time of King John.<sup>14</sup> The author of a treatise, circa 1558, mentioned having seen a "statute" of Runnymede that King John was compelled to accept and that differed from the Magna Carta the author knew, that of 1225.<sup>15</sup>

Thus, by the early sixteenth century, there were growing hints of an awareness among lawyers of King John's charter, but also some confusion about whether it bore at its origin the character of a charter, a treaty, or a statute. A century later, Sir Edward Coke, in a passage not published until 1644, showed that he knew that King John in the seventeenth year of his reign had granted a precursor of the great charter

<sup>8</sup> Bulla Innocentii Papae III pro rege Johanne, contra barones (Aug. 24, 1215), in British Library, Cotton MS Cleopatra E I, fols. 155–156 (Etsi Kavissimus) (reciting that "by force and by fear" John "was impelled to enter into" this agreement with his barons, thus making it "as unlawful and unjust as it was base and shameful").

<sup>9</sup> RIGHTS AND LIBERTIES, *supra* note 6, 129 SS 82.

<sup>10</sup> RIGHTS AND LIBERTIES, *supra* note 6, 129 SS 87 (reading six, probably composed after 1483 and before 1509). The Statute of Marlborough, 52 Hen. 3, ch. 5, 1 STATUTES OF THE REALM 20 (Eng.) [hereinafter STAT. REALM], confirmed Magna Carta.

<sup>11</sup> SELECTED READINGS, *supra* note 1, 132 SS xxxix n.5, 362 (reading by Richard Hesketh).

<sup>12</sup> RIGHTS AND LIBERTIES, *supra* note 6, 129 SS 96 (reading seven, by Richard Snede).

<sup>13</sup> RIGHTS AND LIBERTIES, *supra* note 6, 129 SS 128 (reading eight, by Robert Chaloner).

<sup>14</sup> RIGHTS AND LIBERTIES, *supra* note 6, 129 SS 139 (reading ten).

<sup>15</sup> SELECTED READINGS, *supra* note 1, 132 SS xxxix n.5, 366 (treatise probably by William Fletewood). A reading perhaps composed in the 1550s stated that "King John was disliked by his subjects for his tyranny," that "the peers moved civil war against the king, and in the end they compelled him at Runnymede . . . to agree to peace . . . where, at the request of all the realm, he wrote a charter and called this the statute of Runnymede." RIGHTS AND LIBERTIES, *supra* note 6, 129 SS 133 (reading nine). The reader added, "I have seen this charter myself and it differs in many places from Magna Carta[.]" *Id.*

made by Henry III.<sup>16</sup> The source on which Coke relied, however, was Matthew Paris's chronicle. This provided Coke with a text that was closer to the 1225 version than to the 1215 original,<sup>17</sup> so that he did not realize the extent of the differences between the two. Explorations into the 1215 origins of Magna Carta interested only those rare bibliophiles with an antiquarian bent, and were not the concern of the legal profession at large.

Thus the 1215 text with its sixty-three chapters, so much the study of legal historians today and ever since its publication by William Blackstone in 1759,<sup>18</sup> was not the text of Magna Carta that lawyers knew in late medieval and early modern England. Manuscript statute books in the hands of lawyers in England all began with Magna Carta, and the text that nearly all of these statute books contained was the 1225 third reissue of the charter.<sup>19</sup> They knew it only as that charter of Henry III, or as a statute of Edward I, dated 1297. They knew little or nothing about the security clause of the 1215 charter, giving a commission of twenty-five barons the right to seize the king's castles and lands if he failed to observe his charter, which never appeared in any later version. If the original 1215 text had been known to and venerated by lawyers of the fourteenth and fifteenth centuries as it is now by us, England might have had a very different constitutional history. Instead, the few lawyers who knew anything of the 1215 charter seemed to regard it merely as a temporary treaty or a grant made under duress.

David Carpenter has made an exhaustive search for manuscripts containing the text of the original 1215 charter of King John. With the help of Paul Brand, Nicholas Vincent, and Susan Reynolds, Carpenter has identified, besides the four surviving originals, thirty-four manuscripts with complete or partial texts or variations of the 1215 charter, or in two cases, French translations.<sup>20</sup> One of these thirty-four was in the Red Book of the Exchequer, three in London's *Liber Custumarum*, twenty in abbey, priory, or cathedral cartularies or chronicles, and seven in statute books.<sup>21</sup> Statute books were manuscript collections of legislation and other legal texts.<sup>22</sup> Any ordinary lawyer or frequent litigant might possess a statute book, and lend it out to

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<sup>16</sup> EDWARD COKE, *Proeme* to THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (1644), (fourth unnumbered page) (“[I]t was no new declaration: for king John in the 17 yeare of his raigne had granted the like[.]”).

<sup>17</sup> The textual confusion left by Matthew Paris for Coke and others is explained in J. C. Holt, *The St Albans Chroniclers and Magna Carta*, 14 TRANSACTIONS ROYAL HIST. SOC'Y 67–88 (5th ser. 1964).

<sup>18</sup> WILLIAM BLACKSTONE, THE GREAT CHARTER AND THE CHARTER OF THE FOREST (1759).

<sup>19</sup> See Baker, SELECTED READINGS, *supra* note 1, at xxxix–xl.

<sup>20</sup> See MAGNA CARTA PROJECT, [http://magnacarta.cmp.uea.ac.uk/read/magna\\_carta\\_copies](http://magnacarta.cmp.uea.ac.uk/read/magna_carta_copies) [<https://perma.cc/ZUD8-93KU>].

<sup>21</sup> All identified in *id.*

<sup>22</sup> See THE HARVARD LAW SCHOOL'S COLLECTION OF MEDIEVAL ENGLISH MANUSCRIPT STATUTE BOOKS AND REGISTERS OF WRITS, AMES FOUND., <http://amesfoundation.law.harvard.edu/digital/StatsAndRegWrts/> [<https://perma.cc/5CUL-UCMC>].

be copied and passed on. Of the hundreds of statute books surviving from the fourteenth and fifteenth centuries, nearly all began with the usual 1225 charter of Henry III or the 1297 confirmation of Edward I. Carpenter has found seven that began instead with some version of the original 1215 text extorted from King John.<sup>23</sup> At least two of these statute books followed the charter of Runnymede, as they titled the 1215 text, with the more usual charter of liberties based on the 1225 text or a hybrid of the 1225 and 1217 texts.<sup>24</sup>

So a few fourteenth- and fifteenth-century lawyers may have had access to the original 1215 text of Magna Carta, or some garbled version of it, instead of the usual 1225 text or its 1297 statutory form. The indefatigable John Baker has spotted a reading at Inner Temple, delivered in the year 1512, that quoted and discoursed upon a text that appeared only in the 1215 charter and not in the 1225 version that was in the lawyers' books.<sup>25</sup> That such an anomaly could occur should remind us that every lawyer's manuscript statute book differed to one degree or another from every other copy.<sup>26</sup>

#### I. CONFIRMATIONS OF MAGNA CARTA

The story of Magna Carta in the law courts is a story of reception of the 1225 text.<sup>27</sup> How one tells the story of Magna Carta in the fourteenth and fifteenth centuries depends on what sources one uses. This Article focuses on the Year Books, which are the sources that lawyers circulated in greatest numbers. The earliest surviving examples date from 1268.

If a story were focused instead on the Parliament Rolls, it would be a story of political gamesmanship. The 1225 reissue of Magna Carta was wrested from young Henry III in exchange for a one-time concession of tax revenue.<sup>28</sup> Most of the next forty-four royal confirmations of Magna Carta were demanded by the Commons as the price or part of the price of something the king wanted and the Commons could

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<sup>23</sup> Five of these manuscripts are British Library Harley MS 746, fols. 59v–64; Huntington Library California MS H.M. 25782, fols. 1–6v; Cambridge University Library GG 1 12, fols. 21v–25v; Cambridge University Library Ee. 2. 19, fols. 1–5; and British Library Additional MS 62534, fols. 1–5v.

<sup>24</sup> These manuscripts are TNA E 164/ 9, fols. 44–47 and Lincoln's Inn MS, Hale 140, fols. 1–6.

<sup>25</sup> SELECTED READINGS, *supra* note 1, 132 SS 210 n.1 (reading by Baldwin Malet on chapter 27 of the 1215 text on ecclesiastical administration of intestate estates). This chapter is discussed in R.H. Helmholz, *The Church and Magna Carta*, 25 WM. & MARY BILL RTS. J. 425, 431 (2016).

<sup>26</sup> See PETER M. TIERSMA, PARCHMENT PAPER PIXELS: LAW AND THE TECHNOLOGY OF COMMUNICATION 154–55 (2010).

<sup>27</sup> See *id.* at 146–47, 154–55.

<sup>28</sup> After the final chapter of the 1225 charter, Henry III recited that it was granted in return for the grant by the lords and commons of “the fifteenth part of all their moveables.”

refuse to concede.<sup>29</sup> Some of these confirmations, as Faith Thompson showed, were in the statute rolls, some were in the parliament rolls only, some were in both, and a few were documented in other sources.<sup>30</sup> It became customary for the very first petition of the Commons to the king at each new parliament to ask the king to promise that Magna Carta, the Charter of the Forest, and all statutes not repealed should be observed. The king assented, *Le roy le voet*.<sup>31</sup>

For two centuries, confirmations of Magna Carta were a bargaining chip to be grudgingly given up by kings in negotiations with their subjects. But what did Magna Carta mean to these bargainers? Individual petitions to the king in the rolls of parliament and other record sources show that complaints were made that the king had dispossessed or executed individuals or misbehaved otherwise in violation of Magna Carta.<sup>32</sup> The political significance of Magna Carta, a reason why it seemed important to get fresh royal confirmation of it every few years, was surely because it seemed to signal some potential limitations on royal prerogative.

Year Books did not have these expressions of political struggle against the king. This is because complaints about what the king did wrong did not find their way into the reports of proceedings in the king's courts of common law. Instead, in these courts, lawyers and judges were busy building up an idea that we now call sovereign immunity.<sup>33</sup> No one could sue the king in his own courts. The only hope of redress was by humble petition to the king.<sup>34</sup> This did not stop lawyers and judges from recalling that there had been a time, under Henry III and before, when kings did have to answer suits in their own courts, like any common person.<sup>35</sup> As will be elaborated in more detail later in this Article, the overwhelming lesson of the Year Books was that the ordinary rules did not apply to the king.<sup>36</sup>

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<sup>29</sup> Faith Thompson, *Parliamentary Confirmations of the Great Charter*, 38 AM. HIST. REV. 659, 660–72 (1933).

<sup>30</sup> FAITH THOMPSON, *MAGNA CARTA: ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION, 1300–1629*, at 9–19 (1948); Thompson, *supra* note 29, at 660–72.

<sup>31</sup> *E.g.*, 4 ROTULI PARLIAMENTORUM 103a (no. 22) [hereinafter ROT. PARL.], 9 PARLIAMENT ROLLS OF MEDIEVAL ENGLAND 196 (Chris Given-Wilson ed., 2012) (1416) [hereinafter PROME]. An earlier example is 8 Edw. 3 (no. 1), in 4 PROME 197 (Seymour Phillips & Mark Ormrod eds., 2005) (1334) (not in ROT. PARL.).

<sup>32</sup> THOMPSON, *MAGNA CARTA*, *supra* note 30, at 39–67, 70–99. *See generally* Anthony Musson, *The Legacy of Magna Carta: Law and Justice in the Fourteenth Century*, 25 WM. & MARY BILL RTS. J. 629 (2016).

<sup>33</sup> Guy Seidman, *The Origins of Accountability: Everything I Know About Sovereign Immunity I Learned from King Henry III*, 49 ST. LOUIS U. L.J. 393, 423, 427, 43–36 (2005).

<sup>34</sup> *E.g.*, Anon., Mich. 3 Edw. 4, pl. 19, fol. 24b–26a (Exch. Ch.) (1463.020); Anon., Mich. 4 Edw. 4, pl. 3, fol. 25b (Exch. Ch.) (1464.050).

<sup>35</sup> Corbet's Case, Pasch. 35 Edw. 1, pl. [2], RS [467]–471 (C.P.) (1307.039rs) (Sjt. Passelewe); Hadelow v. Rex, Hil. 22 Edw. 3, pl. 25, fol. 3a–3b (K.B.) (1348.025); Rex v. Abbot of W., Trin. 24 Edw. 3, pl. 40, fol. 55b–56a (C.P.) (1350.100) (Willoughby J.C.P.); Rex. v. Prior of Lantony, Trin. 43 Edw. 3, pl. 12, fol. 21b–22b (C.P.) (1369.066) (Sjt. Cavendish).

<sup>36</sup> *See infra* pp. 678–81.

Faith Thompson dated the last confirmation of Magna Carta to 1423,<sup>37</sup> but the last express confirmation in the parliament rolls naming Magna Carta specifically was in October 1416.<sup>38</sup> In subsequent parliaments to 1423, the opening petition of the Commons was more generally that liberties and franchises of the church, of lords spiritual and temporal, of other lieges of the king, and of all cities and boroughs, granted by previous kings, should be enjoyed. The king cautiously agreed as to liberties and franchises that were in use, not repealed, and not capable of being repealed by common law.<sup>39</sup> Thereafter, to at least 1435, the same formula about liberties granted to the church, to the lords, and to the commons, not revoked or revocable by the law of England, was expressed no longer as petition and assent but as the chancellor's statement, in his speech opening parliament, about what the king had reportedly granted in advance.<sup>40</sup> Confirmations that started off as hard-nosed negotiations trailed off into boilerplate petitions, then into pious speeches. Two centuries of confirmations were enough.

It would be nice to suppose that the Commons stopped bothering to seek express royal confirmation of Magna Carta after 1416 because its authoritative role in the English legal system was too secure to need further bolstering. But in the context of the fifteenth century, it would be foolish to suppose this. A decade and a half of weak or absentee Lancastrian rule had left the rule of law a chancy thing. To be sure, the king's courts of common law were open for business. Complaints had been mounting for decades before 1416, however, and would continue to increase, that interference with legal proceedings by powerful lords, the problem of maintenance, was getting worse, not better.<sup>41</sup> If the king was interfering less than were mighty dukes and earls, it was only because the king lacked power to do so.

After 1423, it seems more likely that confirmations ceased because everyone thought of Magna Carta as more of a statute than a charter, despite its name. Kings could revoke charters, as the Virginia colonists knew all too well when their own royal charter was revoked in 1624.<sup>42</sup> Confirmations assured that each new king remained willing to abide by a predecessor's charter according to its terms. But by 1416, lawyers and judges had been uniformly regarding Magna Carta as a statute.<sup>43</sup> It is true that some statutes got confirmed by subsequent acts of Parliament, but these were usually statutes which were so badly enforced that they needed fresh enactment.<sup>44</sup>

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<sup>37</sup> THOMPSON, *MAGNA CARTA*, *supra* note 30, at 19.

<sup>38</sup> 4 ROT. PARL. 103a (no. 22), 9 PROME 196 (1416).

<sup>39</sup> *E.g.*, 4 ROT. PARL. 253a (no. 43), 10 PROME 184–85 (Anne Curry ed., 2005) (1423).

<sup>40</sup> *E.g.*, 4 ROT. PARL. 481b (no. 3), 11 PROME 165 (Anne Curry ed., 2005) (1435).

<sup>41</sup> *See infra* pp. 683–84.

<sup>42</sup> *See* KEN MACMILLAN, *SOVEREIGNTY AND POSSESSION IN THE ENGLISH NEW WORLD: THE LEGAL FOUNDATIONS OF EMPIRE, 1576–1640*, at 102–04 (2006).

<sup>43</sup> *See infra* pp. 672–76.

<sup>44</sup> *E.g.*, 1 Ric. 2, ch. 7, 2 STAT. REALM 3 (1377); 7 Hen. 4, ch. 14, 2 STAT. REALM 155 (1406) (confirming statutes against maintenance and giving of liveries).

Magna Carta, no longer seriously considered a charter, was not seen to need new royal confirmation after 1416, so long as it remained unrepealed as a statute.

## II. MAGNA CARTA IN THE YEAR BOOKS

How did Magna Carta change from a charter to a statute? The slow transition can be seen in the terminology of the Year Books. To set up this part of the story, return to the high politics of the Parliament Rolls, and to the dramatic year 1399.

At the end of September 1399, Richard II was deposed from his throne. The twenty-seventh of thirty-three grievances drawn up to justify his overthrow was that Richard had put subjects on trial in his court of the constable and marshal, exposing them to trial by battle, in violation of Magna Carta's famous chapter 29 (numbered 39 in the 1215 charter). But grievance 27 described Richard's wrongdoing without specifically naming Magna Carta as the source of the prohibition. Instead, the Latin passage stated merely that "although it had been decreed by statute and ordained, and also until now maintained, that no free man should be arrested etc., or in any way destroyed, nor should the king proceed, or order any process against him, unless by lawful judgment of his peers, or by the law of the land"—clearly this could only be chapter 29—"nevertheless by the will, command and ordinance of the said king, a great number of his lieges . . . were seized and imprisoned,"<sup>45</sup> and so forth. Apparently the substance of this charge against Richard II gained nothing by saying that it was Magna Carta that Richard had violated, so those making the case for deposing the king just said, "it had been decreed by statute and ordained," and that Richard had "wilfully violated" this unspecified statute.

Throughout the Year Books, there are about 120 passages in all that definitely or probably refer to Magna Carta. Fully one-third of these, about forty Year Book reports, do not use the words Magna Carta in Latin or *grande chartre* in French, but, like the grievance against Richard II, refer to Magna Carta merely as "the statute." Of these forty cases that refer to Magna Carta as an unspecified "statute," about twenty are before 1399, ranging from 1309 through 1390, and the rest are from 1408 through 1535, the end of Year Book reporting.

One-third of references to Magna Carta in the Year Books refer to it, then, as a statute like any other statute, not worth mentioning its name. Some of these are easy to spot, such as "the statute that common pleas shall not follow our court"<sup>46</sup> (chapter 11, 17 in the 1215 original), or "the statute that women shall have appeals of homicide

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<sup>45</sup> 3 ROT. PARL. 420b (no. 44), 8 PROME 20–21 (1399). In Latin: *quamvis statutum fuerit et ordinatum, aceciam hactenus confirmatum, "Quod nullus liber homo capiatur etc. nec quod aliquo modo destruat, nec quod rex super eum ibit, nec super eum mittet, nisi per legale iudicium parium suorum, vel per legem terre[.]"* A subsequent grievance accused the king of wickedly infringing the liberties of the church approved in the great charter (*in magna carta approbatas*). 3 ROT. PARL. 421a (no. 46), 8 PROME 21 (Chris Given-Wilson ed., 2005) (1399).

<sup>46</sup> *E.g.*, Bowser v. Colins, Mich. 22 Edw. 4, pl. 11, fol. 30a–33b (C.P.) (1482.128).

only for the death of their husbands” (chapter 34, 54 in the 1215 original).<sup>47</sup> Most frequent was reference to “the statute that assizes will be taken in their own county,” that is, where the disputed land was located (chapter 12, 14 in the 1215 original).<sup>48</sup> Others are less certain. References to “the statute against mortmain” might mean chapter 36 of Magna Carta (not in the 1215 original), or might have had in mind a different statute of 1279.<sup>49</sup>

As will be shown, the predominant view in the Year Books was that Magna Carta was an ordinary statute.<sup>50</sup> In two early passages, however, provisions of Magna Carta are not even attributed to some statute but to common law or “manifest law.” About 1304, the opening words of chapter 38, that bailiffs should not put a defendant on his oath upon a plaintiff’s bare accusation, were quoted as “manifest law.”<sup>51</sup> In 1310 it was said that by common law (*de comune ley*) common pleas ought to be held in a certain place (chapter 11).<sup>52</sup> These hinted that Magna Carta might have restated or been incorporated into the common law, a position later taken by Edward Coke.<sup>53</sup>

If this Year Book text of 1310 suggested that a provision of Magna Carta was part of the common law, several passages in later Year Books seemed to ignore this same provision of Magna Carta. In three reports of related cases of 1333 and 1334, it was argued that common pleas were heard sometimes at one place, and sometimes at another place, at the will of the king,<sup>54</sup> unlike assizes, which it seemed, by a different statute of 1285, had to be taken at a certain place.<sup>55</sup> A century later in 1430, Serjeant Rolf argued in Common Pleas that the king could change the place where one must sue or the common day in this court, and could as well alter the judge.<sup>56</sup>

<sup>47</sup> *E.g.*, Brokesby v. Lord of Tiptost, Hil. 21 Hen. 6, pl. 12, fol. 28a–29b (C.P.) (1443.012); *see also* Anon., Hil. 11 Edw. 2, pl. 40, 61 SS 263–264 (K.B.) (1318.040ss).

<sup>48</sup> *E.g.*, Hovel v. Rex, Trin. 19 Edw. 3, pl. 6, RS 139–145 (K.B.) (1345.105rs); THOMPSON, MAGNA CARTA, *supra* note 30, at 59 & n.79.

<sup>49</sup> *E.g.*, Bydyke v. Kilburn, Trin. 4 Edw. 2, pl. 11, 42 SS 39–45, 186 (C.P.) (1311.138ss). The reference could be to the statute *De Viris Religiosis*, 7 Edw. 1, stat. 2, 1 STAT. REALM 51 (1279) or to 18 Edw. 1, ch. 3, 1 STAT. REALM 106 (1290).

<sup>50</sup> *See infra* p. 676.

<sup>51</sup> Anon., Pasch. 32 Edw. 1, App. pl. [22], RS 516 (d) (1304.179rs).

<sup>52</sup> Knoville v. Pluckenet, Mich. 4 Edw. 2, pl. 27, 22 SS 115–123 (C.P.) (1310.168ss) (Sjt. Passelewe). Another passage, that “by common right” a widow ought to be endowed from that of which her husband died seised as of fee, may be a reference to Magna Carta, ch. 7. Outhinby v. Bridlington, Mich. 5 Edw. 2, pl. 11, 63 SS 30–33 (C.P.) (1311.258ss).

<sup>53</sup> COKE, *supra* note 16, *Proeme* (fourth unnumbered page).

<sup>54</sup> *See* Lovel v. Dagworth, Mich. 7 Edw. 3, pl. 47, fol. 57b–58a (C.P.) (1333.172); Anon., 7 Edw. 3, Lib. Ass. pl. 12, fol. 11b–12 (C.P.) (1333.225ass); *see also* THEODORE F. T. PLUCKNETT, STATUTES AND THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY 62 (1922).

<sup>55</sup> *See* Honel v. Dagworth, Hil. 8 Edw. 3, pl. 47, fol. 16a–17a (C.P.) (1334.046). The 1285 statute was Westminster Second, 13 Edw. 1, ch. 25, 1 STAT. REALM 84, referred to assizes for profits, tolls, and such taken at a certain place.

<sup>56</sup> Chancellor of Oxford’s Case, Hil. 8 Hen. 6, pl. 6, fol. 18b–21b (C.P.) (1430.006).

Again in 1443, Chief Justice Newton and Justice Paston supposed that Common Pleas could be removed to York, while Exchequer remained in Westminster Hall.<sup>57</sup> These passages seem to ignore chapter 11, that common pleas should not follow the king, but should be heard at a fixed place.

While forty passages refer to provisions of Magna Carta simply as “the statute,” about eighty passages make express reference to Magna Carta. These are sharply divided between those from 1276 to 1370, about forty in number, which refer nearly always to *la grand chartre* in French, always translated as “the Great Charter,” and those from 1406 to 1535, another forty or so, which refer nearly always to “the statute of Magna Carta.” There are a very few outliers. There is one last reference to *la grand chartre* in 1410,<sup>58</sup> and one redundant invocation of the *grand chartre* of Magna Carta in 1429.<sup>59</sup> There are also marginal references and obvious interpolations introducing citations to Magna Carta in Year Books of 1354 to 1376, one of these in 1366 to *statutum magnae chartae*.<sup>60</sup> Otherwise, in the dialogue and reporters’ notes that make up the Year Books, the terminology is remarkably uniform, referring to “the grand charter” before 1400, and to the “statute of Magna Carta” afterward.

Could this consistent pattern be simply a trick of the surviving sources? It seems not. Year Book reports from the fourteenth century and before come equally from scholarly editions of manuscripts and from early printed editions. Those from the fifteenth century and later come almost entirely from early printed editions. There appears to be no reason why copyists or early printers would systematically change “Magna Carta” to “the statute” or change “the grand charter” to “the statute of Magna Carta,” or vice versa. Reference to the grand charter persisted through nearly a century of reports, and then afterwards citation to the statute of Magna Carta for more than a century. Neither could have been the idiosyncrasy of an individual reporter.

The first references to the grand charter were spoken by Serjeant Walkingham in 1276, in some of the earliest surviving Year Book cases. The grand charter provided that no free man was to be ejected from his free tenement except through the law of the land.<sup>61</sup> It provided that no one may get a writ of right in Common Pleas to deprive a lord of his court.<sup>62</sup> In 1311, Serjeant Denum said that the grand charter provided “to no one shall we sell, or no one shall we deny,” etc., so the king’s protection should not delay Denum’s client’s plea.<sup>63</sup> In 1369, the Master and Scholars

<sup>57</sup> *Noris v. Connesbroke*, Mich. 22 Hen. 6, pl. 13, fol. 9b–12a (C.P.) (1443.072).

<sup>58</sup> *Anon.*, Mich. 12 Hen. 4, pl. 6, fol. 3b–4b (C.P.) (1410.130).

<sup>59</sup> *Anon.*, Pasch. 7 Hen. 6, pl. 27, fol. 31b–33b (C.P.) (1429.033).

<sup>60</sup> *Anon.*, Hil. 40 Edw. 3, pl. 11, fol. 5b–6b (C.P.) (1366.011).

<sup>61</sup> *Clerk v. Beauchamp*, temp. Edw. 1, Beds. pl. 2, 122 SS 44–45, also 69 SS 105–106 (*Bedford Eyre*) (1276.012ss); *MAGNA CARTA* ch. 31 (1225).

<sup>62</sup> *Countess of Aumale v. Countess of Gloucester*, (Trin.) 4 Edw. 1, pl. 1, 111 SS 48–50 (C.P.) (1276.002ss).

<sup>63</sup> *Horneby v. Abbot of Croyland*, Mich. 5 Edw. 2, pl. 4, 63 SS 6–8 (C.P.) (1311.251ss). A serjeant of the same name made the same argument in *Anon.*, 14 Edw. 2, Customs pl. [1], 85 SS 54–56 (*London Eyre*) (1321.115ss).

of Canterbury Hall petitioned the king to restore to them an advowson because their ouster was entirely against the grand charter and various other statutes made for this (*purement contra la Grande chartre, & auters divers Statutes de ceo fait*).<sup>64</sup> As mentioned above, forty cases in all between the 1270s and the end of the 1360s used this form of reference to the grand charter. For the remainder of the fourteenth century, provisions of Magna Carta were only described as “the statute.”

When they said *la grand chartre*, did fourteenth-century lawyers mean to be invoking a “great” charter? The word *grand* or *graunt* in French, like the word *magna* in Latin, usually gets translated as “big,” “large,” or, in the context of a written document, “long.” Magna Carta only got its name in 1217 when it had to be differentiated as the “long” charter to contrast with the shorter Charter of the Forest.<sup>65</sup> A town such as Dunmow Magna in Essex got the appellation “magna” not because it was worthier or more noble than Dunmow Parva, but simply because it was bigger.<sup>66</sup> It was Edward Coke who first explained in the early seventeenth century that the charter was called Magna Carta, not because it was great in quantity, but in respect of the great importance, and weightiness of its matter.<sup>67</sup> There is no way of telling how great, weighty, or worthy Magna Carta seemed to lawyers of fourteenth- and fifteenth-century England.

Two early fourteenth-century cases gave Magna Carta the longer name “grand charter of the liberties of England” (*la graunte chartre de la franchise dEngleterre*).<sup>68</sup> Another early fourteenth-century case referred to the charter of liberties (*chartre de franchise*), without the adjective *grand*,<sup>69</sup> as did late thirteenth-century texts such as *Casus Placitorum*, *Brevia Placitata*, and the *Mirror of Justices*.<sup>70</sup> One plaintiff claimed that his writ was given by the grand charter when it was not.<sup>71</sup> This suggests that it may have been invoked to lend some prestige, but no other instance of such

<sup>64</sup> *Master & Scholars of Canterbury Hall v. Rex*, 43 Edw. 3, Lib. Ass. pl. 21, fol. 272a–272b (Chan.) (1369.151ass).

<sup>65</sup> Baker, *SELECTED READINGS*, *supra* note 1, 132 SS lxxv & nn.40–41; A.B. White, *The Name Magna Carta*, 30 *ENG. HIST. REV.* 472, 473 (1915); Paul Brand, *The First Century of Magna Carta: The Diffusion of Texts and Knowledge of the Charter*, 25 *WM. & MARY BILL RTS. J.* 437, 439 (2016).

<sup>66</sup> The place names are taken from Anon., Mich. 8 Hen. 6, pl. 17, fol. 9a (Assize) (1429.101).

<sup>67</sup> COKE, *supra* note 16, *Proeme* (first unnumbered page).

<sup>68</sup> See *Fulk the Butler’s Case*, Trin. 6 Edw. 2, pl. 10, 36 SS 30–31 (C.P.) (1313.097ss); *Walcote v. Pershore*, Mich. 10 Edw. 2, pl. 7, 52 SS 15–20 (C.P.) (1316.053). This formulation is also found in *NOVAE NARRATIONES*, 80 SS 270 (C226) (Elsie Shanks & S. F. C. Milsom eds., 1963).

<sup>69</sup> *Dagworth v. Edmundsbury*, Pasch. 8 Edw. 2, pl. 22, 41 SS 172–173 (C.P.) (1315.060ss).

<sup>70</sup> *CASUS PLACITORUM*, 69 SS 6 (no. 28) (William Huse Dunham, Jr. ed., 1950); *BREVIA PLACITATA*, 66 SS 124 (no. 22) (G. J. Turner ed., 1947); *THE MIRROR OF JUSTICES*, 7 SS 79, 151 (W. J. Whittaker & F. W. Maitland eds., 1893). *Brevia Placitata* also made several references to *chartre de franchise* as a term for grants of manumission or enfranchisement to individual villeins. 66 SS 25, 70, 178.

<sup>71</sup> Anon., Mich. 30 Edw. 3, pl. [51], fol. 25a–26a (C.P.) (1356.097).

an imposture has been found. Most references to the grand charter in fourteenth-century Year Books were made by pleaders in often unsuccessful arguments. Nearly all concerned private disputes between individuals.<sup>72</sup> Apart from the word *grande*, which could mean simply “big” or “large,” they did not portray Magna Carta as a particularly important or authoritative source of law.

In forty further cases, fifteenth- and early sixteenth-century Year Books referred with almost complete uniformity to “the statute of Magna Carta.” One exception was the 1429 statement by Serjeant Fulthorpe that the liberties of London were assured by the “grand charter of Magna Carta.” Fulthorpe added that this meant they were ratified and confirmed by Parliament, thus equating this grand charter with an act of Parliament.<sup>73</sup> In 1475 Justice Littleton said that Magna Carta was not a statute at the beginning, until this was confirmed by the statute of Marlborough in 1267.<sup>74</sup> Chapter 5 of the statute of Marlborough did indeed confirm that Magna Carta should be observed in all its articles, as well in those that pertained to the king as in those that pertained to others.<sup>75</sup> Littleton’s larger point was that Magna Carta, when it did get authority as a statute in 1267, was in affirmance of the common law. For better or worse, in the eyes of fifteenth-century lawyers, Magna Carta was a statute.

Magna Carta got the same sort of treatment that other, later statutes got in Year Book argument, which was pretty rough treatment.<sup>76</sup> Like other statutes, some of its chapters were expanded far beyond their words, a move that lawyers and judges called, “the equity of the statute.”<sup>77</sup> Other chapters of Magna Carta were interpreted extremely narrowly. Fifteenth-century readings at the Inns of Court on chapter 29 of Magna Carta, as well as one Year Book case, show that the words “judgment of his peers” were interpreted to apply only to the peerage of England, members of the House of Lords, and to their privilege to be tried criminally only by their fellow peers.<sup>78</sup> The second part of chapter 29, that the king would not sell, deny, or delay right or justice, was uniformly interpreted in these fifteenth-century readings to apply only to the writ of right, a writ considered outmoded by the mid-thirteenth century and very rare in the fifteenth,<sup>79</sup> and to the writ *justicies* that commissioned

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<sup>72</sup> THOMPSON, *MAGNA CARTA*, *supra* note 30, at 33, 60.

<sup>73</sup> *See* Anon., Pasch. 7 Hen. 6, pl. 27, fol. 31b–33b (C.P.) (1429.033) (chapter 9 of the Magna Carta version).

<sup>74</sup> *Rex v. Bishop of Ely*, Mich. 15 Edw. 4, pl. 17, fol. 11a–14b (Exch. Ch.) (1475.049).

<sup>75</sup> Marlborough, 52 Hen. 3, ch. 5, 1 STAT. REALM 20 (1267).

<sup>76</sup> *See* TIERSMA, *supra* note 26, at 146–47, 154–55.

<sup>77</sup> *E.g.*, Anon., Pasch. 12 Hen. 4, pl. 5, fol. 20a–20b (C.P.) (1411.025).

<sup>78</sup> SELECTED READINGS, *supra* note 1, 132 SS 247 (15th c. ordinary gloss); 132 SS 253 (prob. Lincoln’s Inn, c. 1491/1508); *Preston v. Grey*, Pasch. 10 Edw. 4, pl. 17, fol. 6b–7a; Neilson pl. 16, 47 SS 63 (K.B.) (1470.035ss).

<sup>79</sup> *See* FREDERICK POLLOCK, *LAW OF TORTS* 14 (2d ed. 1890); *see also* PAUL BRAND, *KINGS, BARONS AND JUSTICES: THE MAKING AND ENFORCEMENT OF LEGISLATION IN THIRTEENTH-CENTURY ENGLAND* 11, 405 (2003).

a sheriff to hold pleas in a county court.<sup>80</sup> These were extremely constrained readings that seem now to deny the obvious intention of the chapter.

The 120 cases that mentioned Magna Carta dealt with twenty-five of the thirty-seven chapters of the 1225 charter. The most frequently referenced provision was chapter 12, that assizes be taken in the counties where they arose. This would be invoked in disputes about jurisdiction, as would two other provisions that were among the seven most frequently invoked: chapter 24, that the writ *praecipe* not be issued to deprive a lord of his court, and chapter 11, that common pleas be held in a fixed place. The prohibition against mortmain in the 1225 charter (chapter 36), the prohibition on waste by guardians (chapter 4), the guarantee of London's liberties (chapter 9), and one due process provision, chapter 14 on proportionate amercements, round out the list of frequently cited provisions.

Year Book reports that mentioned Magna Carta are not particularly interesting as a group. They arose nearly always in private litigation, individual against individual, unrelated to any limitations on the king's power.<sup>81</sup> The charter was usually cited by pleaders, not judges. Pleadings' arguments based on Magna Carta were sometimes second or third tries against an opponent's position, often unsuccessful.<sup>82</sup> By comparison, Year Book reports contain ten times as many references to the statute of Westminster Second (1285). As a statute, Magna Carta was not a notably important one.

The chapter of Magna Carta that became the best known in later centuries is almost missing from the Year Books. Chapter 29 provided that the king would not proceed against any free man without judgment of his peers or the law of the land, and would not sell, deny, or delay right or justice (chapters 39 and 40 of the 1215 charter). It was invoked in only four Year Book reports. One of these,<sup>83</sup> in *Casus Placitorum*, got fairly wide circulation, though it did not appear in Statham's, Fitzherbert's, or Brooke's Grand Abridgements. Two more, from Year Books of Edward II, were unsuccessful or inconsequential arguments to avoid delays.<sup>84</sup> Year Books of this reign did not circulate widely and did not appear in any printed edition until 1678.<sup>85</sup> The final chapter 29 case, dated 1470, circulated widely and was excerpted in the Abridgements. In

<sup>80</sup> SELECTED READINGS, *supra* note 1, 132 SS 248 (15th c. ordinary gloss); 132 SS 251 (another 15th c. reading).

<sup>81</sup> *See supra* p. 676.

<sup>82</sup> *E.g.*, *Horneby v. Abbot of Croyland*, Mich. 5 Edw. 2, pl. 4, 63 SS 6–8 (C.P.) (1311.251ss) (attempt to avoid delay unsuccessful); *Anon.*, Mich. 12 Hen. 4, pl. 6, fol. 3b–4b (C.P.) (1410.130) (described in THOMPSON, *MAGNA CARTA*, *supra* note 30, at 61, as a “frivolous exception[.]”); *Loveney's Case*, Pasch. 12 Hen. 4, pl. 5, fol. 20a–20b (C.P.) (1411.025) (third argument against removal of an assize to Westminster).

<sup>83</sup> *Clerk v. Beauchamp*, temp. Edw. 1, Beds. pl. 2, 122 SS 44–45, also 69 SS 105–106 (Bedford Eyre) (1276.012ss).

<sup>84</sup> *See Horneby v. Abbot of Croyland*, Mich. 5 Edw. 2, pl. 4, 63 SS 6–8 (C.P.) (1311.251ss); *Anon.*, 14 Edw. 2, Customs pl. [1], 85 SS 54–56 (London Eyre) (1321.115ss).

<sup>85</sup> *See* WILLIAM CRADDOCK BOLLAND, *THE YEAR BOOKS* 44 (1921); F. W. Maitland, *Introduction* to 1 YEAR BOOKS OF EDWARD II: 1 & 2 EDWARD II A.D. 1307–1309, 17 SS xxi (1903).

it, Justice Littleton stated that judgment of peers applied only to members of the nobility tried by their fellow lords.<sup>86</sup> The single briefest, clearest message imparted from the Year Books is this: lawyers made Magna Carta boring. Based upon the Year Books, one would not have predicted that Magna Carta would become a memorable or important aspect of English law.

### III. THE KING ABOVE THE LAW

How did Year Book lawyers treat some of the ideas that would later be found essential to Magna Carta? Was the king above the law, or was he subject to the law? Famous and much disputed passages in the thirteenth-century Bracton treatise put the king under God and under the law, because law makes the king.<sup>87</sup> But in the next two centuries, two or three judges and lawyers in the Year Books can be found taking the opposite view, that the king was above the law. Chief Justice Bereford said in 1315 that one could not rely on legal principles against the king because he was above the law.<sup>88</sup> In the same case, a lawyer said that the king's charter could be judged only by the king, because he was without peer and above all law.<sup>89</sup> In 1456, a king's serjeant argued that the king was above the law, and that no one could have correction of the king.<sup>90</sup> And in a standard early fifteenth-century reading on Magna Carta, a lawyer repeated this commonplace that the king was above the law.<sup>91</sup>

Only once do we hear the rare echo of Bracton's view that the king was ruled by law, and that without law there would be no king. Chief Baron Fray said in 1441 that the law was the highest inheritance that the king had, because by the law he himself

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<sup>86</sup> Preston v. Grey, Pasch. 10 Edw. 4, pl. 17, fol. 6b–7a; Neilson pl. 16, 47 SS 63 (K.B.) (1470.035ss).

<sup>87</sup> 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 33 (George E. Woodbine ed., Samuel E. Thorne trans., 1968) (fol. 5b, "*rex . . . debet esse . . . sub deo et sub lege, quia lex facit regem*"); cf. 2 *id.* at 110 (fol. 34, "*Rex habit superiorem, . . . legem per quam factus est rex*"); *id.* at 306 (fol. 107b, "[N]ihil tam proprium est imperii quam legibus vivere, et maius imperio est legibus submittere principatum . . . facit enim lex quod ipse sit rex.").

<sup>88</sup> Rex v. Prior of Hospital of St. John, Hil. 8 Edw. 2, pl. 33, 41 SS 73–76 (C.P.) (1315.033ss) (Bereford C.J.C.P.: "*deuers le Roy vous nauez nul fondement de ley qil est sur la ley*"); see also Knoville v. Plukenet, Mich. 4 Edw. 2, pl. 27, 22 SS 115–123 (C.P.) (1310.168ss). In a King's Bench plea roll of 1292, it was argued that the king himself was above all law. SELECT CASES IN KING'S BENCH, 57 SS 68 (no. 33) (G. O. Sayles ed., 1938), Coram Rege roll, no. 130 (Hilary 1292), m. 6.

<sup>89</sup> Rex v. Prior of Hospital of St. John, Hil. 8 Edw. 2, pl. 33, 41 SS 73–76 (C.P.) (1315.033ss) (Sjt. Toutheby: "*la chartre le Roy ne put estre iugge par autre qe du Roy et pur ceo est il sanz piere et passe tote la ley*").

<sup>90</sup> Rex ex rel. Grimsby v. Eyre, Mich. 35 Hen. 6, pl. 33, fol. 25b–29b, 51 SS 118, 120 (Exch. Ch.) (1456.087) (Sjt. Hindstone: "*le Roy est desus la Ley . . . il est desus Ley, & nul home ne poit aver correccion de luy*").

<sup>91</sup> SELECTED READINGS, *supra* note 1, 132 SS 92 ("ordinary gloss" on ch. 11: *rex est supra legem*).

and all his subjects were ruled, and if there were no law, there would be no king and no inheritance.<sup>92</sup> Then Chief Justice John Fortescue, in writings composed when he was in exile in the 1460s and not circulated until long after his death, took the position that England's king could not alter or add to the law without the consent of his subjects.<sup>93</sup>

All of these statements were made in the context of particular disputes, and all could probably be reconciled by an ingenious lawyer of the time. A much larger volume of Year Book arguments, also in disparate contexts, sent a strong message that many rules of law did not apply to the king. There was a big distinction, it was often said, *un grande diversite*, between the king and a common person.<sup>94</sup> As a lawyer said to his companions in 1292, "We cannot plead with the King in the same way as we can with another person."<sup>95</sup> And the distinction between the king and everyone else was always in the king's favor.

It was reasonable, said Justice Choke in 1468, that the king be preferred over any common person.<sup>96</sup> Lawyers said in 1493 and 1497 that the king would be more favored than any private person.<sup>97</sup> The king could not be said to do wrong,<sup>98</sup> nor to be a disseisor nor a disturber, nor did time run against the king.<sup>99</sup> The king could sue in any court he pleased.<sup>100</sup> Statutes, grants, patents, and charters were construed most

<sup>92</sup> Rex v. Rector of Edington, Pasch. 19 Hen. 6, pl. 1, fol. 62a–65a (Exch. Ch.) (1441.028) (Fray C.B. Exch.: "*par la Ley il meme & tous ses subjects sont rules, & si s' Ley ne fuit, nul Roy, ny nul' inheritance sera*").

<sup>93</sup> SIR JOHN FORTESCUE: *DE LAUDIBUS LEGUM ANGLIE* 25 (S. B. Chrimes ed. & trans., 1949). On the consistency of Fortescue's thought in this regard, see John Guy, *The Henrician Age*, in *THE VARIETIES OF BRITISH POLITICAL THOUGHT, 1500–1800*, at 13, 28 (J. G. A. Pocock, et al. eds., 1993). Chief Baron Illingworth and Chief Justice Danby made a similar point in 1465 that everyone had inherited the common law and that the king had no right to defeat without parliament a law by which everyone had advantage. Rex v. Anon., Pasch. 5 Edw. 4, Long Quinto pl. [27], fol. 32b–34a (Exch. Ch.) (1465.059).

<sup>94</sup> *E.g.*, Rex v. Bishop of D., Hil. 38 Edw. 3, pl. [14], fol. 3b–4a (C.P.) (1364.014) (Thorp C.J.C.P.); Abbot of Liral v. Dean of K., Trin. 38 Edw. 3, pl. [32], fol. 18b–19a (C.P.) (1364.084) (Sjt. Fyncheden); Ferrers v. Cotton, Pasch. 7 Hen. 4, pl. 8, fol. 41b–43b (K.B.) (1406.058) (Gascoigne C.J.K.B.); Anon., Pasch. 15 Edw. 4, pl. 2, fol. 23a–23b (C.P.) (1475.008) (Bryan C.J.C.P.); Anon., Mich. 26 Hen. 8, pl. 4, fol. 8a (C.P.) (1534.045) (Shelley J.C.P.).

<sup>95</sup> Rex v. Baskyvile, Trin. 20 Edw. 1, pl. [78], RS 113–115 (Hereford Eyre) (1292.127rs) (Sjt. Kyngesmede).

<sup>96</sup> Anon., Pasch. 8 Edw. 4, pl. 8, fol. 4a (C.P.) (1468.015) (Choke J.C.P.).

<sup>97</sup> Abbot of Tewksbury's Case, Trin. 8 Hen. 7, pl. 1, fol. 1a–5a (C.P.) (1493.011) (Sjt. Kebell & Sjt. Fyneux); Burnly v. Halewel, Mich. 9 Hen. 7, pl. 5, fol. 8b–10b (Exch. Ch.) (1493.016) (Boteler, Hobart A.G., Sjt. Rede, King's Sjt. Wode, & King's Sjt. Fysher); Dormer v. Rex., Trin. 12 Hen. 7, pl. 1, fol. 19a–22a (Exch. Ch.) (1497.005) (Hobart A.G. & Sjt. Kebell).

<sup>98</sup> Anon., Trin. 1 Edw. 5, pl. 13, fol. 8a (Chancery) (1483.031); see Baker, *Legal Force and Effect*, *supra* note 1, at 81–82.

<sup>99</sup> Rex v. Radclif, Trin. 35 Hen. 6, pl. 1, fol. 60a–63b (C.P.) (1457.025) (Moyle J.C.P.); Anon., Mich. 3 Edw. 4, pl. 19, fol. 24b–26a (Exch. Ch.) (1463.020).

<sup>100</sup> Greneville v. Bishop of Exeter, Mich. 17 Edw. 3, pl. 21, RS 95–117 (C.P.) (1343.161rs) (Hillary J.C.P.); see *SELECTED READINGS*, *supra* note 1, 132 SS 106.

beneficially in favor of the king.<sup>101</sup> A presumption resolved any uncertainties in the king's favor.<sup>102</sup>

Most of these pro-king passages are from the 1460s onward, but more than sixty Year Book cases evenly spread between 1310 and 1500 document instances in which courts were urged or moved to take some step “for the king’s advantage,” “to the king’s advantage,” or “in the king’s advantage.”<sup>103</sup> Sometimes the king’s advantage coincided with one party’s interest, but in other instances both sides wanted to settle their dispute but the court pursued it for the king’s advantage, whether that be payment of a fine, outlawry of a defendant, or keeping the peace.<sup>104</sup>

The privileged position of the king as litigant or interested bystander in his own courts drew only rare criticism. In 1481, when Nottingham, Chief Baron of the Exchequer, argued that it would be to the king’s better advantage to disallow a charter, Serjeant Starkey rebuked the Chief Baron and the Justices, “Sir, you are not to come here to argue to enrich the king (*pur le lucre le Roy*), but to administer justice between the party and the king[.]”<sup>105</sup> Then again, how could the king’s justices decide fairly between the king and any ordinary litigant? It was a longstanding principle in the courts that one could not be a judge in one’s own cause.<sup>106</sup> In 1430, half a century before Starkey’s outburst, the king’s Justices of Common Pleas grappled with the implications of this principle for their own adjudication between their king and ordinary litigants. Chief Justice Babington contended that an abbot’s bailiff could properly judge disputes between the abbot and his tenants because the

<sup>101</sup> *Duchess of York’s Case*, Trin. 9 Hen. 6, pl. 30, fol. 27a–28b (Exch. Ch.) (1431.086) (Cheyne C.J.K.B.: “the king’s grant . . . shall be interpreted to the king’s greatest advantage”); *Rex v. Quatermain*, Pasch. 37 Hen. 6, pl. 9, fol. 21a–22b (Exch. Ch.) (1459.016) (Nottingham A.G.: every charter will be construed most strongly to the king’s advantage); *Anon.*, Mich. 21 Edw. 4, pl. 28, fol. 55b–59b (C.P.) (1481.096) (Catesby J.C.P.: “this grant . . . will be interpreted strictly for the king’s advantage”); *Anon.*, Mich. 10 Hen. 7, pl. 24, fol. 10a–10b (Chan.) (1494.064) (Fairfax J.K.B.: the king’s patents will be taken strictly, and the better for the king); *Anon.*, Trin. 12 Hen. 7, pl. 1, fol. 19a–22a (Exch. Ch.) (1497.005) (Sjt. Mordaunt: “the king will not be bound . . . by [a] statute, unless he be named in [it] . . . but where a statute is made that [is] beneficial for the king, notwithstanding that the king is not named in the statute, yet the king will have avail of this statute”).

<sup>102</sup> *Anon.*, Mich. 5 Edw. 4, Long Quinto pl. [41], fol. 116b (C.P.) (1465.167); *Dormer v. Rex*, Mich. 13 Hen. 7, pl. [3], fol. 4a–9b (Exch. Ch.) (1497.014) (Sjt. Kingsmill).

<sup>103</sup> The first such case was *Box v. Palmer*, Pasch. 3 Edw. 2, pl. 14, 20 SS 91–92 (C.P.) (1310.049ss), and the last was *Anon.*, Hil. 14 Hen. 7, pl. 5, fol. 15a–16b (C.P.) (1499.005).

<sup>104</sup> *E.g.*, *Anon.*, Pasch. 6 Edw. 3, pl. 4, fol. 12a (C.P.) (1332.032); *Anon.*, Trin. 13 Edw. 3, pl. 7, RS 303–305 (1339.122rs); *Sutton’s Case*, Mich. 21 Hen. 6, pl. 43, fol. 21b–22a (C.P.) (1442.139); *Anon.*, Mich. 4 Edw. 4, pl. 19, fol. 36b–37a (C.P.) (1464.066).

<sup>105</sup> *Rex v. Abbot of Waltham*, Mich. 21 Edw. 4, pl. 6, fol. 44b–49b (Exch. Ch.) (1481.074) (Sjt. Starkey).

<sup>106</sup> *E.g.*, *Verdun’s Case*, Trin. 21 Edw. 1, pl. 3, RS 155–57 (C.P.) (1293.204rs); *Abbot of Battle’s Case*, Hil. 35 Hen. 6, pl. 18, fol. 54a–55a (C.P.) (1457.018).

law presumed that the abbot's bailiff would be an impartial judge, "as we are between the king and others . . . , and yet we are judges by the king's authority[.]"<sup>107</sup> Chief Justice Thirning had made the same point twenty years before Babington did, that an abbot's bailiff could do right between his master and the tenant, the same as Thirning and his fellow justices could do between the king and another of his people.<sup>108</sup> A lawyer made the point again in 1496 that the Court of Common Pleas was indifferent between the king and a common person.<sup>109</sup> But this was impartiality in a system of rules that already gave heavy weight to the king's interest, and had king's serjeants in attendance to watch for and to grasp any advantage.<sup>110</sup>

While the distinction between the king and every other person loomed large in the Year Books, there was almost no acknowledgment of different legal rules for lords and for commoners. The only instance found was Justice Littleton's statement in 1470 that Magna Carta chapter 29 gave lords a trial by their peers, and not as a common person would be tried.<sup>111</sup>

In the Year Books, the king was above the law more often than he was subject to it. The king got the benefit of exceptions, presumptions, and advantages that systematically put his interest above that of every common person. It was good to be the king. All the king's subjects were lumped together as common persons who had to play by the ordinary rules and didn't get the benefit of the king's many advantages. Lawyers seemed to have abandoned the spirit of Magna Carta, or at least the spirit that Magna Carta was to take on a century later, of law as a check on royal power. Instead, lawyers lined up on the king's side.

#### IV. OVER-MIGHTY SUBJECTS, UNDER-MIGHTY KINGS, AND THE PROBLEM WITH TRIAL BY JURY

Thus, the story told by the Year Books, especially in the fifteenth century, was that lawyers and judges treated Magna Carta as a statute, and not a particularly important statute. If the idea of Magna Carta was that the king was subordinate to the law and must follow the same rules applicable to everyone else, Year Book lawyers and judges for the most part opposed this. They tried in many ways to enhance the power of the king in his law courts and to create exceptions for the king from the

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<sup>107</sup> Chancellor of Oxford's Case, Hil. 8 Hen. 6, pl. 6, fol. 18b–21b (C.P.) (1430.006).

<sup>108</sup> Abbot of Glastonbury's Case, Hil. 12 Hen. 4, pl. 3, fol. 12b–13b (C.P.) (1411.003) (Thirning C.J.C.P.).

<sup>109</sup> Brook v. Latimer, Mich. 12 Hen. 7, pl. 7, fol. 11a–13b (C.P.) (1496.052) (Sjt. Mordaunt).

<sup>110</sup> MARGARET HASTINGS, *THE COURT OF COMMON PLEAS IN FIFTEENTH CENTURY ENGLAND* 78–79 (1947).

<sup>111</sup> Preston v. Grey, Pasch. 10 Edw. 4, pl. 17, fol. 6b–7a, Neilson pl. 16, 47 SS 63 (K.B.) (1470.035ss) (Littleton J.C.P.).

ordinary rules of law. There was a big distinction between the king and everyone else, who were all common persons, and that distinction was that the king, in many respects, was above the law.

Why didn't fifteenth-century lawyers and judges embrace the spirit of Magna Carta? Why didn't they understand that their legal system needed to constrain the authority of the king and to guard continuously against the king's tendency to expand his power? The answer, it would appear, lies in the political history of Lancastrian and Yorkist England.

In 1399, Richard II was not strong enough or popular enough to keep Henry IV from usurping his throne.<sup>112</sup> Henry IV exhausted himself fighting off rebellions for much of his reign. Next, Henry V was popular as a military leader, but as a military leader he spent most of his reign fighting in France or preparing to fight in France. His son Henry VI was king at nine months of age, a helpless infant, then an ineffectual king, easily manipulated, then a king beset by mental illness. Civil war ensued, and Edward IV seized the throne from Henry VI, restoring Richard II's rightful heir after sixty years of usurpation. Edward was more competent, but he too needed support from his former enemies to keep his throne. Then Edward lost his throne for almost a year to former allies who brought old Henry VI back in his place. Finally, Richard III, another usurper, also faced immediate rebellion and remained insecure and increasingly reckless during his short reign.

All of these kings were chronically short of money to pay soldiers, to run the royal establishment household, and to buy much-needed support.<sup>113</sup> They only kept precarious hold on their throne by keeping a preponderance of magnates on their side, and they could only do this by granting concessions, paying retainers, and pardoning the flagrant wrongdoings of these magnates.<sup>114</sup> In the 1460s, Chief Justice Fortescue wrote a book in praise of the laws of England, without a single word about Magna Carta.<sup>115</sup> In his other book about the governance of England, Fortescue admitted that the king needed a more secure source of revenue. In particular, he wrote about the danger of "over-mighty subjects" with resources and retinues that rivalled the king's own.<sup>116</sup> This was a recipe, Fortescue said, for rebellion. Fortescue's "over-mighty subjects," the powerful magnates, were descendants and successors

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<sup>112</sup> The account in this paragraph could be drawn from any standard history of the period. The Author consulted entries in the OXFORD DICTIONARY OF NATIONAL BIOGRAPHY. See generally GERALD HARRISS, *SHAPING THE NATION: ENGLAND, 1360–1461*, at 405–639 (2005); E. F. JACOB, *THE FIFTEENTH CENTURY: 1399–1485*, at 406–62 (1961).

<sup>113</sup> HARRISS, *supra* note 112, at 19–21, 28–30; JACOB, *supra* note 112, at 437–46.

<sup>114</sup> See HELEN LACEY, *THE ROYAL PARDON: ACCESS TO MERCY IN FOURTEENTH-CENTURY ENGLAND* 100 (2009); J. R. Lander, *Attainder and Forfeiture, 1453 to 1509*, 4 *HIST. J.* 119, 125 (1961) (focusing on political use of pardons to consolidate support).

<sup>115</sup> See generally FORTESCUE: *DE LAUDIBUS LEGUM ANGLIE*, *supra* note 93.

<sup>116</sup> SIR JOHN FORTESCUE, *THE GOVERNANCE OF ENGLAND: OTHERWISE CALLED THE DIFFERENCE BETWEEN AN ABSOLUTE AND A LIMITED MONARCHY* 127–30 (Charles Plummer ed., 1885).

of King John's barons of 1215. But now, in the vacuum left by weak kings, these over-mighty magnates were acting as if they themselves were above the law.

This was a problem long in the making. In the fourteenth century, some royal justices took annual "retainers," payments from magnates to look after their interests.<sup>117</sup> Some members of the nobility engaged in repeated, violent crimes with impunity, a phenomenon memorably dubbed "fur-collar crime" by Barbara Hanawalt.<sup>118</sup> These highborn felons could count on pardons from the king, who needed their and their families' support.<sup>119</sup>

To a greater extent than in previous centuries, fifteenth-century kings delegated or abdicated local administration to these powerful local lords.<sup>120</sup> With kings so weak, the rule of law was not well-observed. These dukes, earls, barons, and other powerful lords, Fortescue's "over-mighty subjects," kept private armies, took what they wanted, and attacked their enemies with impunity. They settled disputes among their own tenants, supporters, and friends, often without resort to the king's law courts, and they interfered with legal proceedings whenever they liked.<sup>121</sup>

When one of their own people sued or was sued in the king's courts, the most powerful of these lords made sure that their tenant won. Magnates would do this by threatening or bribing jurors, or the sheriffs who summoned jurors, or the lawyers or judges themselves. It was enough if a powerful man merely came into court and stood next to one party in a trial.<sup>122</sup> The jury would be too afraid to decide against a litigant with powerful friends. The word for this kind of interference with legal proceedings was "maintenance."

Maintenance had been a problem long before the fifteenth century. Statutes condemned it ever since 1275. A steady succession of statutes thereafter down to 1429 repeated the condemnation of maintenance.<sup>123</sup> Petitions in the Rolls of Parliament

<sup>117</sup> See generally J. R. MADDICOTT, *LAW AND LORDSHIP: ROYAL JUSTICES AS RETAINERS IN THIRTEENTH- AND FOURTEENTH-CENTURY ENGLAND* (1978).

<sup>118</sup> Barbara A. Hanawalt, *Fur-Collar Crime: The Pattern of Crime Among the Fourteenth-Century English Nobility*, 8 J. SOC. HIST. 1, 1–17 (1975).

<sup>119</sup> See MICHAEL HICKS, *THE WARS OF THE ROSES 1455–1485*, at 34 (2003), and sources cited *supra* note 114.

<sup>120</sup> See Edward Powell, *Law and Justice, in FIFTEENTH-CENTURY ATTITUDES: PERCEPTIONS OF SOCIETY IN LATE MEDIEVAL ENGLAND* 29, 35 (Rosemary Horrox ed., 1994) (stating that the crown relied heavily on local society to enforce the law and maintain public order).

<sup>121</sup> Charles Plummer, *Introduction to FORTESCUE, GOVERNANCE OF ENGLAND*, *supra* note 116, at 19–20. For a case of such maintenance, see David J. Seipp, *Jurors, Evidences and the Tempest of 1499*, in "THE DEAREST BIRTH RIGHT OF THE PEOPLE OF ENGLAND": THE JURY IN THE HISTORY OF THE COMMON LAW 75, 80, 83 (John W. Cairns & Grant McLeod eds., 2002).

<sup>122</sup> Seipp, *supra* note 121, at 75, 80, 83; see also *May v. Fogge*, Mich. 22 Hen. 6, pl. 43, fol. 24a–24b (C.P.) (1443.102) (suggesting that mere presence in court was maintenance).

<sup>123</sup> See A. H. Dennis, *The Law of Maintenance and Champerty*, 6 LAW Q. REV. 169, 170–73 (1890); Percy H. Winfield, *The History of Maintenance and Champerty*, 35 LAW Q. REV. 50, 51–53, 56–67, 69–70 (1919) (citing a variety of such statutes).

and resolutions of the king's council in the fifteenth century continued the steady and mounting stream of complaints about maintenance and maintainers.<sup>124</sup> Year Books show something of a peak of maintenance, or at least of courtroom discussion about maintenance, in the 1440s and 1450s. Lawyers and judges openly discussed in these mid-fifteenth-century cases how their courts should respond to open, public, brazen threats to jurors, attorneys, Justices of the Peace, and others.<sup>125</sup>

Charles Plummer, in 1885, condemned the behavior of these powerful magnates as "bastard feudalism."<sup>126</sup> The label has proved difficult to define or to confine chronologically or geographically. K. B. McFarlane provided the inevitable correction in the mid-twentieth century. He wrote that magnates were merely modeling "good lordship," merely doing what their tenants and society at large expected of them.<sup>127</sup> McFarlane memorably flipped Fortescue's diagnosis of the problem: "It is only under-mighty kings who have over-mighty subjects."<sup>128</sup> Lawyers and judges administering the common law in the courts of these under-mighty kings would not have the same regard for Magna Carta that we have today.

In the fifteenth century, most lawyers and judges would have felt a need to empower their king, to assert advantages, privileges, and prerogatives for him,<sup>129</sup> not to hedge him about with restrictions and limitations. They may well have been wrong about this. Even weak kings would oppress their enemies and give their favorites unfair advantages, when they could get away with it; and they would use their courts to do so.<sup>130</sup>

But Year Book lawyers and judges were more worried about over-mighty magnates disrupting their orderly proceedings than about their under-mighty king doing so. They expected that their king would view interference with his law courts as an affront to his dignity. They wanted their king to be strong enough to be capable of punishing such contempt. In later decades, of course, they got what they

<sup>124</sup> *E.g.*, 5 Hen. 6, no. 16, 5 ROT. PARL. 408b (no. 16) (1426); 8 Hen. 6, 4 ROT. PARL. 344a (no. 16), 10 PROME 394 (1429); 11 Hen. 6, 5 ROT. PARL. 434b–435a (no. 19) (1433).

<sup>125</sup> *See, e.g.*, Anon., Mich. 19 Hen. 6, pl. 60, fol. 31b (1440.078) (in which the plaintiff alleged that a servant of the defendant threatened three jurors so that these and other jurors were put in fear if they gave a verdict against the defendant). *Compare* Mich. 32 Hen. 6, pl. 14, fol. 9a (1453.027) (noting that a "large [and] unruly crowd" caused a "fear of intimidation"), *with* Anon., Pasch. 36 Hen. 6, Fitzherbert Maintenance [22], fol. 65r (C.P.) (1458.066abr) (in which Prysot C.J.C.P. said that for a powerful man to pronounce that a litigant's charters were good was grave maintenance).

<sup>126</sup> Plummer, *supra* note 121, at 15.

<sup>127</sup> *See generally* K. B. MCFARLANE, THE NOBILITY OF LATE MEDIEVAL ENGLAND (1973).

<sup>128</sup> *Id.* at 179.

<sup>129</sup> *See supra* pp. 678–81.

<sup>130</sup> *See* B. C. Keeney, 8 U. TORONTO L.J. 150 (1949) (reviewing MARGARET HASTINGS, THE COURT OF COMMON PLEAS IN THE FIFTEENTH CENTURY: A STUDY OF LEGAL ADMINISTRATION AND PROCEDURE (1947)).

wished for. Henry Tudor and his son Henry VIII swung the balance of power sharply in the other direction.<sup>131</sup> The Tudors reminded lawyers how much they needed checks on royal power, and slowly during the sixteenth century, Magna Carta again began to be seen by lawyers and judges as a much-needed counterweight against the power of the king.<sup>132</sup>

Fifteenth-century lawyers and judges made other attempts to counter over-mighty magnates who interfered with legal proceedings, attempts that show another reason why in that century Magna Carta lacked the impact that it would later have. Three important legal developments in the fourteenth and fifteenth centuries can be seen as efforts to turn away from the traditional process of trial by jury. Magna Carta had promised “the law of the land or judgment of one’s peers.”<sup>133</sup> But the problem of maintenance in fourteenth- and fifteenth-century England meant that ways had to be found to take cases out of the king’s ordinary courts of law and away from trials by juries, or at least away from those juries most susceptible to local magnate intimidation.

First, staying within the common law, lawyers and judges expanded the traditional scope of some writs, and at the same time relaxed their rules about venue and jurisdiction, all in ways that seem to have been intended to avoid local intimidation of juries. Second, when their clients faced magnate opposition in the ordinary courts of common law, lawyers petitioned to the chancellors’ new court of equity. And third, they made frequent use of arbitration, again thought to be safer from magnate interference.

The first development reconceived lawsuits and rules about venue and jurisdiction. In a Year Book report of 1413, Chief Justice Thirning of Common Pleas made a very revealing comment. He said that in Assizes—in those trials that Magna Carta’s chapter 12 required to be held in the county where the land in dispute was located—there was so much maintenance in the countryside that plaintiffs had to be able to use writs of trespass to contest freehold title to land.<sup>134</sup> The premise of the Chief Justice’s observation was that in 1413 a jury from the locality where the land in dispute was located could not be expected to give an honest verdict. There was too much maintenance. With a writ of trespass, however, a plaintiff could lay the venue fictitiously in some other, distant county where there was less danger of intimidation of the jury. This 1413 passage was also a remarkably perceptive realization about

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<sup>131</sup> Joel Hurstfield, *Was There a Tudor Despotism After All?*, 17 *TRANSACTIONS ROYAL HIST. SOC’Y* 83, 101, 105–08 (5th ser. 1967).

<sup>132</sup> *SELECTED READINGS*, *supra* note 1, 132 SS lxxvi, at 362–63 (identifying Richard Hesketh of Gray’s Inn in 1506 for the reading: “this royal charter which grants liberties to all subjects for their common wealth shall be construed more strongly against the king and more beneficially for his subjects, in favour of liberty”).

<sup>133</sup> *MAGNA CARTA* ch. 29 (1225).

<sup>134</sup> Anon., Hil. 14 Hen. 4, pl. [53], fol. 35a–36b (C.P.) (1413.053). Thirning C.J.C.P. added that one could sue in a writ of Debt for rent, which would also permit a plaintiff to lay the venue in another county to avoid maintenance. *Id.*

a major change that was happening at the time in substantive law, the trend of using personal actions to replace real actions.<sup>135</sup>

The broader idea was that a plaintiff should be able to move the venue of an action away from the place where traditional rules of common law would have put it, if traditional venue was a place where a jury would be bribed, threatened, or simply overawed by “a powerful man.” This broader idea was discussed in cases of 1440, 1441, 1453, and 1455.<sup>136</sup> Chief Justice Newton said in 1441 that if you took his goods with force in Middlesex, and because you were a powerful man in the same county, he would doubt that the truth would be found there, then he was going to bring his writ at York.<sup>137</sup>

The Bill of Middlesex, that famous fifteenth-century fiction which expanded the jurisdiction of King’s Bench,<sup>138</sup> may also have begun as a means to shift the venue away from the home county of a powerful defendant or his powerful backer. In this world of over-mighty magnates, maintenance was real, and it impinged most directly on the weakest spot of common law procedure, trial by jury. Lawyers and judges facilitated alternatives to the traditional scope of writs and to venue rules for jury trial, rules and doctrines that had been developed back in thirteenth-century England. Magna Carta, with its guarantees of the law of the land and judgment of peers, did not stand in the way.

Second, the Chancellor’s court of equity provided an alternative to jury trial. We think of the equitable jurisdiction of the court of Chancery as limited to petitions in which there was no remedy at common law, no remedy because of jurisdictional, evidentiary, or substantive limits of the ordinary rules of common law.<sup>139</sup> But a large proportion of the petitions that came to the Chancellor in the late fourteenth and fifteenth centuries were for ordinary assaults and batteries, disseisins, and other wrongs for which there were regular, ordinary remedies at common law, but not for these petitioners, because of maintenance by powerful lords.<sup>140</sup> Sheriffs would not

<sup>135</sup> See, e.g., SELECTED READINGS, *supra* note 1, at 236; Charles Donahue, Jr., *What Happened in the English Legal System in the Fourteenth Century and Why Would Anyone Want to Know?*, 63 SMU L. REV. 949, 963 (2010) (discussing the change of focus from real actions to personal actions).

<sup>136</sup> Anon., Mich. 19 Hen. 6, pl. 38, fol. 17b–18b (C.P.) (1440.056) (Newton C.J.C.P.); Hoton’s Case, Hil. 19 Hen. 6, pl. 3, fol. 48b (C.P.) (1441.003) (Newton C.J.C.P.); Cromwell v. Duke of Exeter, Mich. 32 Hen. 6, pl. 14, fol. 9a (C.P.) (1453.027) (Sjt. Billyng); Anon., Trin. 33 Hen. 6, pl. 4, fol. 24b (C.P.) (1455.056) (Prysot C.J.C.P.).

<sup>137</sup> Hoton’s Case, Hil. 19 Hen. 6, pl. 3, fol. 48b (C.P.) (1441.003) (Newton C.J.C.P.).

<sup>138</sup> The origins of the fictitious Bill of Middlesex are most fully considered in MARJORIE BLATCHER, *THE COURT OF KING’S BENCH, 1450–1550: A STUDY IN SELF-HELP* 111–37 (1978).

<sup>139</sup> See Patrick Devlin, *Jury Trial in Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43, 52 n.26 (1980); *Chancery Jurisdiction*, 2 AM. JURIST & L. MAG. 314, 315 (1829).

<sup>140</sup> William Paley Baildon, *Introduction to SELECT CASES IN CHANCERY, A.D. 1364 TO 1471*, at 10 SS xxii (London, Bernard Quaritch 1896) (listing a dozen representative petitions that stated that the plaintiffs could not proceed at common law because of power and

serve their writs on well-connected defendants, and juries could not be found who would convict the guilty. So petitioners begged the Chancellor to intervene. The Chancellor could order persons to appear before him and explain themselves, and could back up his orders by imposing large fines. The petitioner hoped that maybe the Chancellor, the most powerful of the king's officers of state, would override even a very powerful lord and do some kind of justice in the case, without the need to try to wrest a fair decision from an impressionable, easily intimidated jury.

At the end of the fifteenth century, the king's council began sitting as another court, called Star Chamber, again without juries, set up specially to discipline the nobility, those whom ordinary courts and ordinary legal proceedings could not reach.<sup>141</sup> Later, under strong kings like Henry VIII and his successors, Star Chamber was used against those who opposed the king and his ministers.<sup>142</sup> Its name became the symbol of an evil, tyrannical court. In the seventeenth century, Englishmen waving copies of Magna Carta abolished Star Chamber and stopped just short of abolishing the Court of Chancery.<sup>143</sup> One of their complaints was that Star Chamber and Chancery deprived Englishmen of their right to trial by jury, a right guaranteed by Magna Carta.

Third, arbitration replaced jury trial. Litigation in the courts of common law risked large sums of money, vast tracts of land, personal liberty, or life itself on a winner-take-all pleading strategy or a jury's verdict. Arbitration risked losing half or more of what litigation might give you and accepting instead a split-the-difference award from the arbitrators.<sup>144</sup> Edward Powell, in the second of his excellent 1983 and 1984 articles about arbitration in fifteenth-century England, showed that lawyers and judges did not view arbitration as an enemy of the common law. Instead, he wrote, "[t]he two were used in conjunction, and often simultaneously, as alternative means to the same end of securing the favorable resolution of a dispute."<sup>145</sup> There

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violence exerted by or on behalf of the defendants); see Melville M. Bigelow, 2 AM. HIST. REV. 718, 718–19 (1897) (reviewing SELECT CASES IN CHANCERY, *supra*).

<sup>141</sup> The statute *Pro Camera Stellata*, 3 Hen. 7, ch. 1, 2 STAT. REALM 509 (1487) specified unlawful maintenance as the first of the offences over which the Court of Star Chamber would have jurisdiction. See I. S. Leadem, *Introduction* to 2 SELECT CASES BEFORE THE KING'S COUNCIL IN THE STAR CHAMBER, A.D. 1477–1509, 16 SS lxx–lxxvi (I. S. Leadem ed., 1903).

<sup>142</sup> See J. A. GUY, *THE CARDINAL'S COURT: THE IMPACT OF THOMAS WOLSEY IN STAR CHAMBER* 76–78 (1977); Henry E.I. Phillips, *The Last Years of the Court of Star Chamber 1630–41*, 21 TRANSACTIONS ROYAL HIST. SOC'Y 115, 120–23 (4th ser. 1939); Daniel C. Vande Zande, *Coercive Power and the Demise of the Star Chamber*, 50 AM. J. LEGAL HIST. 326, 334–35 (2010).

<sup>143</sup> The statute abolishing Star Chamber, 16 Charles 1, ch. 10, 5 STAT. REALM 110 (1641), began with an invocation of Magna Carta, chapter 29. On how close Parliament came in 1653 to abolishing Chancery, see Stuart E. Prall, *Chancery Reform and the Puritan Revolution*, 6 AM. J. LEGAL HIST. 28, 30, 35–37 (1962).

<sup>144</sup> See Edward Powell, *Settlement of Disputes by Arbitration in Fifteenth-Century England*, 2 LAW & HIST. REV. 21, 36 (1984).

<sup>145</sup> *Id.* at 38; see also Edward Powell, *Arbitration and the Law in England in the Late Middle Ages*, 33 TRANSACTIONS ROYAL HIST. SOC'Y 49, 64 (1983) (on resort to Chancery).

was certainly a lot more talk about arbitration. Roughly one in thirty fifteenth-century Year Books mentioned arbitration, compared to roughly one in 400 fourteenth-century Year Books. Lords and royal justices were often asked to act as arbitrators.<sup>146</sup> A small, well-chosen group of prominent arbitrators were far less susceptible to intimidation and manipulation than a jury.

In the lawless fifteenth century, Magna Carta played a limited role. One reason was that Magna Carta was meant to restrain a powerful king. For most of the fifteenth century, England's legal system had the opposite problem, a succession of weak or ineffectual kings who needed to be empowered by the law, not thwarted by it. The second reason was that Magna Carta entrusted the liberty of the king's subjects to the law of the land and judgment of their peers, but powerful magnates had made such protections far too insecure in too many cases. The law of the land had come to mean the ordinary rules of common law. Judgment of one's peers would soon come to mean trial by jury. These were only guarantees of right and justice so long as no powerful lord sought to interfere with legal proceedings, or so long as the king was powerful enough to prevent such interference. Trial by jury and kings securely under the thumb of the law were not the answer to fifteenth-century problems in England's legal system. For the time, Magna Carta was in eclipse.

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<sup>146</sup> See, e.g., Joseph Biancalana, *The Legal Framework of Arbitration in Fifteenth-Century England*, 47 AM. J. LEGAL HIST. 347, 351, 357 (2005); M. A. Hicks, *Restraint, Mediation and Private Justice: George, Duke of Clarence as Good Lord*, 4 J. LEGAL HIST. 56, 63, 68 (1983).