INTER MAGNALIA FLEETWOODI: RE-EXAMINING WILLIAM FLEETWOOD IN LIGHT OF THE LATE-SIXTEENTH CENTURY LEGAL TREATISE, *A DISCOURSE UPON THE COMMISSION OF BRIDEWELL*

by

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ABSTRACT

In *The Reinvention of Magna Carta* (2017), Sir John Baker argues for William Fleetwood's authorship of *A Discourse upon the Commission of Bridewell* (*c.* 1580s). Examining *A Discourse* and other writings, I wish to qualify two points Baker makes about Fleetwood: that his use of chapter 29 in legal argument was "distinctly old-fashioned," and that "in none of Fleetwood's works is there a discernible theme of constitutional monarchy." I do not entirely dispute Baker's first point, but he does not consider the full implications of Fleetwood's use of chapter 29 in *A Discourse* and in his argument for the *Case of the Tallow Chandlers* (1583). While Fleetwood sometimes exalted the royal prerogative, as Baker does point out, I argue here that he asserted its limitations and restraint by parliamentary authority.

To Baker, Fleetwood is a transitionary figure. While he analyzed, applied, and advocated Magna Carta more than his contemporaries did, he remained steeped in the late-medieval learning of the inns of court and did not "reinvent" Magna Carta as the Jacobean lawyers would soon do. Despite this traditionalism, I argue that Fleetwood's approach to chapter 29 in some ways anticipated how Jacobean lawyers interpreted that statute, and in whose thinking there was a strong sense of the liberty and protection of the subject. With its timely publication in 1643, decades after its original composition, I conclude that *A Discourse* also anticipated seventeenth century arguments for the restriction of royal power.

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LIST OF ABBREVIATIONS

1. *A Discourse*

This refers to my critical edition of *A Discourse upon the Commission of Bridewell* at Appendix I. For the most part, when quoting from *A Discourse*, spelling and capitalization are modernized and punctuation is omitted, added, and/or retained to suit readability. Additionally, in quotations the italicization of supplied letters is not retained, and variant readings were preferred in a few cases. *A Discourse* is cited in footnotes with line numbers.

2. AG

Attorney-General

3. *Apparatus Fontium*

The source apparatus is appended to *A Discourse* and references its text by line numbers.

4. Baker, *Reinvention of Magna Carta*

Sir John Baker, *The Reinvention of Magna Carta, 1216-1616* (Cambridge: Cambridge Univ. Press, 2017). The primary sources which I utilized here include those in the appendices and direct quotations from the main body of the text and in footnotes. Many of these Baker translated into English with modernized spelling.

5. BL

The British Library

6. *Bracton Online*

"Bracton: De Legibus et Consuetudinibus Angliae," Harvard Law School Library, accessed November 14, 2018, http://amesfoundation.law.harvard.edu/Bracton/index.html. This is an online version of G.E. Woodbine and S.E. Thorne, eds., *Bracton on the Laws and Customs of England*, four volumes (1968-77).

7. Bro. Abr.

Sir Robert Brooke, *La Graunde Abridgement*, London, 1573, *EEBO*, accessed November 12, 2018, <http://gateway.proquest.com.databases.wtamu.edu/openurl?ctx_ver=Z39.88-2003&res_id=xri:eebo&rft_id=xri:eebo:citation:99842803>.

8. CBEx

Chief Baron of the Exchequer

9. *CELM*

Peter Beal, ed., "Francis Bacon, Baron Verulam, Viscount St Albans (1561-1626)," *Catalogue of English Literary Manuscripts, 1450-1700*, accessed December 1, 2017, http://www.celm-ms.org.uk/authors/baconfrancis.html. This is an online adaptation of Peter Beal's *Index of English Literary Manuscripts*, vol. 1: *1450-1625*, parts 1 and 2 (London: 1980); vol. 2: *1625-1700*, parts 1 (1987) and 2 (1993). Beal uses the abbreviation "BcF" to identify the works of Francis Bacon by number. The numbers used in this present study to identify manuscripts of *A Discourse* come from *CELM*. Some of these differ from the ones in Beal's *Index*.

10. CJCP

Chief Justice of the Common Pleas

11. CJKB

Chief Justice of the King's Bench

12. Co. Inst.

Sir Edward Coke, *Institutes of the Laws of England*, four volumes (London: 1628-44).

13. Co. Rep.

The Reports of Sir Edward Coke Kt. in English, in Thirteen Parts Compleat (In the Savoy: E. and R. Nutt and R. Gosling, 1738), accessed November 14, 2018, http://lawlibrary.wm.edu/wythepedia/index.php/Reports_of_Sir_Edward_Coke.

14. CUL

Cambridge University Library

15. *Codex*, *Digest*, [or] *Institutes*

Imperatoris Ivstiniani Opera, accessed June 1, 2018, http://www.thelatinlibrary.com/justinian.html.

16. *EEBO*

Early English Books Online: https://eebo.chadwyck.com/home.

17. FBL

Francis Bacon Library

18. Fleetwood, *Statutes*

William Fleetwood's "Instructions, How and in What Manner Statutes Shall Be Expounded." At pp. 97-164, this is printed as the second part of *The Office of a Justice of Peace, Together with Instructions, How and in What Manner Statutes Shall Be Expounded. Written by W. Fleetwood, Esq; Sometime Recorder of London*, London, 1657, accessed June 21, 2017, <http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&res_id=xri:eebo&rft_id=xri:eebo:citation:99867356>.

19. HMSO

Her Majesty's Stationary Office

20. JCP

Justice of the Common Pleas

21. LC

Lord Chancellor

22. LMA

London Metropolitan Archives

23. Lib. Ass.

Liber Assisarum. This is a year book *temp.* Edward III.

24. *ODNB*

H.C.G. Matthew and Brian Harrison, eds., *Oxford Dictionary of National Biography*, sixty-one volumes (Oxford: Oxford Univ. Press, 2004).

25. Patent Rolls

Calendar of the Patent Rolls, 1232-1509, fifty-three volumes (London: Eyre and Spottiswoode for HMSO, 1891-1916); *1547-1582*, nineteen volumes (London: HMSO, 1924-86), accessed November 15, 2018, https://catalog.hathitrust.org/Record/009029274.

26. pl.

placitum: see YB

27. Plowd.

The Commentaries or Reports of Edmund Plowden, parts 1 and 2 (In the Savoy: Catharine Lintot and Samuel Richardson, 1761). The editor and translator of this edition is said to be Mr. Broomly: J.G. Marvin, *Legal Bibliography* (Philadelphia: T. & J.W. Johnson, 1847), 574.

28. Rot. Parl.

John Strachey, ed., *Rotuli Parliamentorum ut et Petitiones et Placita in Parliamento*, six volumes (London: 1767-77), accessed November 14, 2018, http://www.medievalgenealogy.org.uk/sources/rolls.shtml.

29. Sjt.

serjeant-at-law

30. *Statutes of the Realm*

The Statutes of the Realm, twelve volumes (London: Record Commission, 1810-28), accessed November 15, 2018, https://catalog.hathitrust.org/Record/012297566. All statute citations refer to *Statutes of the Realm* except statutes post-1714 for which other editions were referenced. When quoting statutes, spelling was retained and supplied letters were italicized.

31. Stewart, *OFB*

Alan Stewart, ed. with Harriet Knight, *The Oxford Francis Bacon: Early Writings, 1584-1596*, vol. 1 (Oxford: Clarendon Press, 2012).

32. St. German, *Doctor and Student*

"St. German: Doctor and Student," Lonang Institute, accessed November 14, 2018, https://lonang.com/library/reference/stgermain-doctor-and-student. This is based on Christopher St. German, *The Doctor and Student*, ed. William Muchall (Cincinnati: Robert Clarke, 1874). It is cited by dialogue and chapter numbers.

33. *Tallow Chandlers*

This is a semi-diplomatic transcription of William Fleetwood's argument prepared for the *Case of the Tallow Chandlers* (1583) at Appendix II: BL, MS. Hargrave 4, ff. 290v-293v. The same principles for quoting from *A Discourse* apply here, and this is also cited by line numbers.

34. YB

I have referred to David J. Seipp's abridgments of the year books in his online database: "Medieval English Legal History: An Index and Paraphrase of Printed Year Book Reports, 1268-1535," Boston University School of Law, accessed November 23, 2016, https://www.bu.edu/law/faculty-scholarship/legal-history-the-year-books. The year books are cited by case name-the majority of these are taken from Baker, *Reinvention of Magna Carta*, pp. xxi-xxxviii-term, regnal year, monarch, "placitum" or case number, and in parentheses the "Seipp number" of which the first four digits indicate the year of the case (e.g. 1441.028). All English and law French quotes come from Seipp's edition unless indicated that the vulgate edition (1678-80), which Seipp provides, was quoted.

CHAPTER I

INTRODUCTION

In 1643, the second year of the English Civil War, an anonymous legal treatise entitled *Brief Collections out of Magna Carta: or, the Known Good Old Laws of England* was published in London. The author's argument concerns a charter granted to the City of London which outlined the authority of the governors of the house of correction called Bridewell. He argued that Bridewell's charter was repugnant to Magna Carta's chapter 29 and the 1368 statute of due process because it authorized the governors to proceed against malefactors without indictment. By virtue of the provision in Magna Carta's last chapter that anything contrary to the Great Charter shall have no force, the author implied that Bridewell's charter could be repealed.

Bridewell's commission was similar to others in the fourteenth and sixteenth centuries which were found to be contrary to the law because they also proceeded against others without due process. The author pointed out that although the commission of Bridewell referred the examination of offenders to the discretion of the governors, there were numerous statutes granting discretionary authority to justices and commissioners which would have been unnecessary if the king by his prerogative could have granted such authority by charter or commission. Leading up to the censure of Bridewell's charter, the author argued that the king's power was bound by the law. Here he relied

on late-medieval precedent which asserted what the king could not grant by his charter.[1]

This treatise, however, had originated in the previous century. *A Discourse upon the Commission of Bridewell* (hereinafter referred to as *A Discourse*) was composed probably in the 1580s approximately thirty years after Bridewell was founded.[2] A 1553 charter of Edward VI established Bridewell hospital, a former royal palace of Henry VIII, along with the hospitals of Christ and St. Thomas the Apostle.[3] "Hospitals" in the early modern sense were major charitable institutions which were established to confront the growing numbers of the poor and infirm.[4] As Paul Griffiths explains, a "hospital" in London was "an omnibus term that covered caring, teaching, and training, as well as tough work, sharp correction, and confinement." Bridewell encompassed all of these, but its primary function was penal.[5] The governors and Bridewell's other appointed officials were authorized by the charter to apprehend the "idle, lazy ruffians, haunters of stews, vagabonds, and sturdy beggars, or other suspected persons . . . men and women whomsoever, of ill name and fame," and then commit the same to Bridewell "to punish as to them it shall then seem good and lawful."[6]

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[1] Anon., *Briefe Collections out of Magna Charta, or, The Knowne Good Old Lawes of England*, London, 1643, 3-16, *EEBO*, accessed November 19, 2016, <http://gateway.proquest.com.databases.wtamu.edu/openurl?ctx_ver=Z39.88-2003&res_id=xri:eebo&rft_id=xri:eebo:citation:11951326>.

[2] Christopher W. Brooks, "Fleetwood [Fletewoode], William (*c*. 1525-1594)," in *ODNB*, 20: 29.

[3] See also a letters patent bearing the same date: *Apparatus Fontium*, ll. 95-100.

[4] Tim Hitchcock, Sharon Howard, and Robert Shoemaker, "Bridewell Prison and Hospital," *London Lives, 1690-1800*, accessed November 25, 2016, https://www.londonlives.org/static/Bridewell.jsp; For the various causes of poverty during this time see John Pound, *Poverty and Vagrancy in Tudor England*, ed. Patrick Richardson (London: Longman, 1971), 3-24.

[5] Paul Griffiths, *Lost Londons: Change, Crime, and Control in the Capital City, 1550-1660* (Cambridge: Cambridge Univ. Press, 2008), 11-19; See Francis Offley Martin, ed., "Bridewell and Bethlem Hospitals," in *Thirty-Second Report of the Commissioners for Inquiry Concerning Charities* (London: W. Clowes and Sons for HMSO, 1840), 400-01, *s.v.* "Penal Department" for extracts out of the minute books.

[6] John Wrottesley and Samuel Smith, eds., "Christ's Hospital, or the Blue Coat School," in *Thirty-Second Report of the Commissioners*, 84; An early modern distinction was made between those incapable of work-such as children, the aged, sick, and infirm-and were thus deserving of charity, and those who were capable of work but refused to do so and thus were regarded as a source of crime and disorder in society: Pound,

In the first decades of its existence, Bridewell became a leading force in the fight against crime and vice in the capital city. It was a novel invention of the Tudor state aimed at reform and social regulation. Paul Griffiths explains that:

> Bridewell was not just a prison. It also had a courtroom that was tucked away behind its high walls away from the public view, and its governors were formally constituted as a court to hear cases . . . Bridewell was the only institution in sixteenth- and seventeenth-century England that could police, prosecute, and punish in this way without reference to an external monitoring authority, like a justice of the peace . . . No other court anywhere in the land met as often as this, and no other one had higher caseloads. Bridewell prosecuted and punished many thousands of suspects. It was new, very visible, much visited, apparently arbitrary, and openly debated across the city.[7]

Summary justice was a key feature of the metropolis and Bridewell was no exception.[8] A prominent example was a longstanding municipal custom to imprison and punish prostitutes.[9] Although Bridewell began to take steps to legitimize its process in the mid to late-sixteenth century, its summary procedure left it wide open for criticism.[10] Further discussion of Bridewell and how the author of *A Discourse* took part in such criticism will take place in chapter three.[11] Suffice it to say here that the author of *A Discourse* contributed a legal perspective to the dialogue surrounding Bridewell at a time when it was particularly vulnerable in the late 1570s and 1580s.

Poverty and Vagrancy, 26 and Robert Jütte, *Poverty and Deviance in Early Modern Europe* (Cambridge: Cambridge Univ. Press, 1994), 145-46; Griffiths, *Lost Londons*, 460-66, records the various labels that were used for those described in Bridewell's court books from 1559-1658, such as "rogue" or "vagabond."

[7] Paul Griffiths, "Contesting London Bridewell, 1576-1580," *Journal of British Studies* 42 (2003): 286-87, accessed October 4, 2016, http://www.jstor.org/stable/10.1086/374292.

[8] Faramerz Dabhoiwala, "Summary Justice in Early Modern London," *The English Historical Review* 121 (2006): 796-800, accessed October 6, 2016, http://www.jstor.org/stable/3806360; Christopher W. Brooks, *Law, Politics and Society in Early Modern England* (Cambridge: Cambridge Univ. Press, 2008), 417.

[9] Martin Ingram, *Carnal Knowledge: Regulating Sex in England, 1470-1600* (Cambridge: Cambridge Univ. Press, 2017), 360; Baker, *Reinvention of Magna Carta*, 268, n. 100.

[10] Griffiths, "Contesting London Bridewell," 288-90.

[11] See *s.v.* "Date of Composition, Bridewell, and the Recorder of London."

A Discourse was also composed during this time in which Sir John Baker argues that common lawyers began to "reinvent" Magna Carta, more specifically chapter 29. Baker critically refers to the assumption on the part of one twentieth century historian that "the history of Magna Carta ended in 1215."[12] As Baker shows, this was certainly not true. For example, the late-medieval kings-in-Parliament continually confirmed the Great Charter, and by the sixteenth century it was common learning that its confirmation at Marlborough in 1267 had made Magna Carta a statute.[13] Nevertheless chapter 29 remained, prior to the reign of Elizabeth I, virtually absent from law reports[14] and the works of such jurists as John Fortescue and Christopher St. German.

In addition, word-by-word analyses of the readers, or lecturers, in the inns of court limited its provisions to the peerage and did not extend chapter 29 beyond what was already available at common law. The readers focused on the *Statuta Vetera*, legislation prior to Edward III, and so the due process statutes of the fourteenth century were not at all considered in detail. Therefore, "due process" was not given any special attention, and anyway it simply referred to the ordinary procedure of the law which could be altered by statute. Overall, the readers attributed to chapter 29 little or nothing of constitutional importance or a "higher law of liberty." According to Baker, "Magna Carta was just another statute."[15]

Yet the reinvention of Magna Carta in the sixteenth and seventeenth centuries would not have been possible without earlier precedents. In the fourteenth century, parliamentary statute and judicial judgment would have a significant bearing on what was

[12] Baker, *Reinvention of Magna Carta*, 443.
[13] *Apparatus Fontium*, l. 116, ll. 117-18; Baker, *Reinvention of Magna Carta*, 8n46.
[14] An exception is *Valence Mary Hall, Cambridge v. Regem*, YB 43 Edw. 3, Lib Ass., pl. 21 (1369.151ass).
[15] Baker, *Reinvention of Magna Carta*, 51, 92, 95, 109.

to come. The due process statutes of Edward III encapsulated chapter 29 and were an assertion of what is now known as the "rule of law."[16] Some of this legislation was concurrent with complaints in the House of Commons that people were imprisoned without due process contrary to the Great Charter, and the 1368 statute was the result of a petition to confirm Magna Carta generally.[17]

In June of the same year, a commission of oyer and terminer was opened before the chief justices of the King's Bench and Common Pleas, John Knyvet and Robert Thorp, and the Chief Baron of the Exchequer, Thomas Lodelow.[18] The justices ruled that a commission out of the Chancery to Sir John atte Lee "was contrary to the law to take a man and his goods without indictment or suit of a party, or other due process."[19] The judges kept the commission and said that they would show it to the King's Council. According to Baker, it appears that "the justices . . . were simply implementing the recent confirmation of Magna Carta in the context of investigations prompted by Parliament itself."[20] The report does not explicitly mention any laws, but the principle relied upon was that enshrined in the statute of 1354, the very recent legislation of 1368, and chapter 29 of Magna Carta. *Sir John atte Lee's Case* demonstrated that the judges were willing to hold the king's ministers accountable when due process was withheld from private subjects. The case also had lasting effect, for it was interpreted in the sixteenth and seventeenth centuries "to be a direct application of chapter 29."[21] For the author of *A*

[16] 1331, 5 Edw. 3, c. 9; 1341, 15 Edw. 3, stat. 1, c. 3 (repealed by 15 Edw. 3, stat. 2); 1351-52, 25 Edw. 3, stat. 5, c. 4; 1354, 28 Edw. 3, c. 3; 1363, 37 Edw. 3, c. 18; 1368, 42 Edw. 3, c. 3.
[17] Baker, *Reinvention of Magna Carta*, 51, 59n60.
[18] Patent Rolls, 1367-70, 42 Edw. 3, pt. 2, m. 30d, p. 189.
[19] *Sir John atte Lee's Case*, YB 42 Edw. 3, Lib. Ass., pl. 5 (1368.093ass).
[20] Baker, *Reinvention of Magna Carta*, 58-60.
[21] Baker, *Reinvention of Magna Carta*, 68.

Discourse, it was also an example of a commission, like that of Bridewell, which could be rescinded if found to be proceeding without indictment.[22]

Therefore the seeds for reinvention had been planted, but just as in the fourteenth and fifteenth centuries, chapter 29 for most of the Tudor era was given little explicit application in case argument. Perhaps the royal judges were inspired by it, but the principles which would later be associated with chapter 29 were instead common-law developments.[23] For example, in the cases cited by our author, the justices had maintained that the king could not grant or do anything which would harm his people, and yet there appear no references to chapter 29.[24]

Nevertheless, at the beginning of Elizabeth's reign, changes were on the horizon. Baker identifies the lawyer and antiquarian William Fleetwood as being at "the forefront of a new historical movement in the English legal profession, the chief purpose of which was to uncover the origins of the common law from the best available sources."[25] Fleetwood's endeavors in this venture included writing an early Elizabethan commentary on Magna Carta. He discerned the rule of law in chapter 29 when he asserted that what pleases the prince does not have the force of law, and he cited five of the due process statutes from the fourteenth century which confirmed chapter 29.[26] The Elizabethan period was also marked by a claim to prerogative power which was countered by the

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[22] *A Discourse*, ll. 222-28. See also the commission from an obscure case in 1350 found in Robert Brooke's *La Graunde Abridgement* (1573): *Apparatus Fontium*, ll. 229-33; and the indictment of Richard Empson *temp.* Henry VII for executing a commission against the Great Charter: *Apparatus Fontium*, ll. 156-62.
[23] Baker, *Reinvention of Magna Carta*, 150, 214-15.
[24] See discussion in chapter two *s.v.* "Textual Commentary."
[25] Baker, *Reinvention of Magna Carta*, 220.
[26] Baker, *Reinvention of Magna Carta*, 226-32, 463. The "six statutes" of Edward III would also prove to be very important in the seventeenth century: Faith Thompson, *Magna Carta: Its Role in the Making of the English Constitution, 1300-1629* (Minneapolis: Univ. of Minnesota Press, 1948), 86.

appeal to the liberties in chapter 29. For example, it was argued that royal grants of monopolies deprived subjects of their right to freely trade.[27]

Within this context, Baker maintains that Magna Carta's reinvention began in the 1580s. From about thirty years prior there had been scattered applications of chapter 29, but in the late 1580s a concentration of its citation in the courts led Baker to remark that this "was not a quirk of law reporting but some kind of historical event."[28] This was preceded earlier in the decade by Robert Snagge's 1581 reading on chapter 29 in the Middle Temple. Like Fleetwood in his commentary on chapter 29, Snagge approached the subject from a historical perspective. He referred to the circumstances of the 1225 charter ten years after the barons had wrested the original from King John and discerned from this the rule of law. Snagge said that discord had:

> continued until King Henry III, who . . . was content to allow Englishmen their English laws. And thereupon . . . [he] granted under his great seal the great charter, thereby to restore the laws of the land and the liberties of the subjects, and to limit his prerogatives so as they should be prejudicial to neither.[29]

This was new learning and possibly the first reading devoted entirely to chapter 29. According to Baker, Snagge contended that chapter 29:

> embodied law which was firmly rooted in ancient English history, long before the Norman conquest - as old as human reason itself. The myth was beginning to develop. Snagge's history embodied the very sentiments to be made familiar by Coke and others in the parliamentary debates of the 1620s. Chapter 29 was the most important piece of English legislation ever, a guarantee of liberty under the law, a source of national pride and popular reassurance.[30]

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[27] Baker, *Reinvention of Magna Carta*, 151-214; See discussion of the *Case of the Tallow Chandlers* (1583) in chapter three *s.v.* "Fleetwood's Approach to Magna Carta."
[28] Baker, *Reinvention of Magna Carta*, 249-50, 261-62.
[29] As quoted in Baker, *Reinvention of Magna Carta*, 252.
[30] Baker, *Reinvention of Magna Carta*, 253.

Snagge's reading may not have directly caused chapter 29's revival later in the decade, but its influence is certainly plausible and it was definitely a pivotal beginning to the statute's resurrection. Sir Edward Coke would later develop the legal meaning of the words,[31] but for now what Magna Carta had come to represent, its symbolic power, was becoming fixed in the minds of private lawyers, royal judges, and Crown officials. Such use of chapter 29 in *A Discourse* is thus one example of this resurgence which I will examine closely in chapter three.

A closer look at the historiography of *A Discourse* will also take place in chapter three in regards to the disputed authorship, so I will only reflect on it briefly here. *A Discourse upon the Commission of Bridewell* is well known in the scholarship. Since the nineteenth century it has mostly featured in legal studies, but other historians have cited it in their research on crime in English society. While some works have treated *A Discourse* at greater length, others have discussed it only cursorily or referenced it in passing. The general purpose of this study is to provide an in-depth analysis of this document and to frame its discussion within the legal thought of Elizabethan and Stuart England.

Part of accomplishing this goal was to create an edition with an *apparatus criticus* and an *apparatus fontium*. *A Discourse* survives in six manuscripts and the printed edition from 1643. In 1840, transcribed from the manuscript held in the Harley collection at the British Library, *A Discourse* was included as an appendix in Francis Offley Martin's reports on Bridewell hospital. Yet the most familiar amongst scholars has been

[31] See Coke's memorandum on c. 29 (1604) in Baker, *Reinvention of Magna Carta*, 500-10 and Co. Inst. ii. 45-57.

the 1859 edition published in *The Works of Francis Bacon*. Douglas Denon Heath, the editor of Bacon's legal works, used the Harley manuscript as his base text but also incorporated the manuscript held at Cambridge University Library. In 2012 Alan Stewart published a critical edition in *The Oxford Francis Bacon*. Five of the manuscripts and the 1643 edition are collated here. Due to the absence of the Bodleian manuscript in his edition, and for other reasons covered in the subsequent chapter, I have created a new edition collating all six manuscripts, the 1643 publication, and the two nineteenth century editions. Chapter two provides a prolegomena to my critical edition of *A Discourse* which is located in the appendices.

Chapter three is comprised of two main areas of study. The first of these is the disputed authorship. Of the six surviving manuscripts, three are anonymous, two ascribe the work to William Fleetwood (*c.* 1525-94), and the other is ascribed to Francis Bacon (1561-1626).[32] *A Discourse* found its way into the nineteenth century edition of Bacon's works based on the attribution in the Harley manuscript. Since then scholars have regarded Bacon as the author, if tentatively, although in recent years others have recognized Fleetwood's authorship. In the *Reinvention of Magna Carta* (2017), Sir John Baker makes a compelling argument for Fleetwood by examining (*inter alia*) heretofore un-attributed case arguments Fleetwood likely composed. Therefore, while a brief section at the beginning of this chapter will review the historiography of Bacon's authorship, my investigation of this debate centers around the similarities and differences

[32] More ink has probably been spilled over Bacon, but Fleetwood is also very well known in scholarship, especially as parliamentarian and recorder of London. For Bacon's legal thought see e.g. Daniel Coquillette, *Francis Bacon* (Stanford, CA: Stanford Univ. Press, 1992). For biographical accounts of Fleetwood see e.g. M.J. Prichard and D.E.C. Yale, eds., *Hale and Fleetwood on Admiralty Jurisdiction* (London: Selden Society, 1993), xviii-xxvii and Baker, *Reinvention of Magna Carta*, 216n2.

which *A Discourse* has with Fleetwood's writings, speech, and office as recorder of London. In agreement with Baker, I shall argue for Fleetwood's authorship.

The second and principal argument in this chapter, however, is a qualification of Baker's conclusions regarding Fleetwood's conventional approach to chapter 29 in legal argument and the absence of constitutional themes in his writings. My thesis re-evaluates Fleetwood within the narrative that is the reinvention of Magna Carta to show how his legal arguments and constitutional ideas, especially those expressed in *A Discourse upon the Commission of Bridewell*, anticipated seventeenth century thought asserting the authority of law and Parliament in the restriction of state power and the curtailing of royal abuses. Fleetwood's writings reveal a monarchy bound by parliamentary consent and the contention that the king was under the law prior to such assertions under the Stuarts.[33]

Baker attributes the principles that are with us today-the rule of law, natural justice, human rights-to those liberties common lawyers, in the half century before 1616, ascribed to Magna Carta.[34] I do not argue that Fleetwood had a greater role to play in the reinvention of Magna Carta. Nevertheless, in Baker's work the consequence of analyzing Fleetwood within this particular narrative has limited our understanding of his thought. Therefore, I think it important to recognize and not overlook Fleetwood's contribution of ideas during such a critical period which would come to shape future governmental

[33] Baker, *Reinvention of Magna Carta*, 343-44. Upon the accession of James I, Coke had quoted Bracton (*Bracton Online*, ii. 33) in saying that "the king is under no man, but under God and the law, for the law makes the king." The necessity for the consent of Parliament was argued in legal and political debates over impositions and ship-money in the early to mid-seventeenth century. See J.P. Kenyon, ed., *The Stuart Constitution: 1603-1688* (Cambridge: Cambridge Univ. Press, 1966), 70-71, 110-11.
[34] Baker, *Reinvention of Magna Carta*, 450-51.

principles, such as the balance of powers and that *all* should be judged according to the law of the land.

CHAPTER II

PROLEGOMENA TO THE CRITICAL EDITION

This chapter contains an introduction to a critical edition of *A Discourse* which is at Appendix I. This prolegomena will include a justification for a new edition; an overview of the various texts, both manuscript and printed; choice of base text; comparison of the early witnesses and nineteenth century editions;[35] the principles and conventions adhered to in the transcription of the base text and in the *apparatus criticus*; and the principles for the *apparatus fontium* which is followed by a textual commentary.

Why Create a New Edition?

The most recent edition of *A Discourse* was published in 2012 in the first volume of *The Oxford Francis Bacon*. These latest critical editions seek to replace the outdated Victorian ones.[36] Indeed, an edition of *A Discourse* had not been published since Douglas Denon Heath's in the seventh volume of *The Works of Francis Bacon* (1859). For the most part, this current edition is thorough and comprehensive.[37] Nevertheless, after a close comparison with my own edition, I discovered some limitations in this one. Firstly, editor Alan Stewart identifies five manuscript witnesses, though in fact there are

[35] "Early witnesses" refers to the six manuscripts and the 1643 printed edition.
[36] "Oxford Francis Bacon," British Academy, accessed February 11, 2018, http://www.oxfordfrancisbacon.com.
[37] Stewart, *OFB*, 51-62, introduction at 39-50, commentary at 755-61.

six. (Refer to *sigla* below.) A collation and discussion of *Or* is not present.[38] It occupies a significant role in the manuscript family as it was likely the parent manuscript of *Lm* and the 1643 printed edition (*L*), and thus it shares the attribution to Serjeant Fleetwood with the former. Additional text from the eighteenth century accompanies *Or* which demonstrates the interest of later legal professionals.[39] Secondly, a collated manuscript is absent from Stewart's stemma.[40] Thirdly, the commentary to the Oxford edition lacks the identification of some legal sources. Three case reports from the year books and a reference to a statute of Henry VIII are described as "untraced."[41]

There are also some errors in the *apparatus criticus* to the Oxford edition. Due to an imprecise collation of the witnesses, some variances are incorrect, lack certain witnesses that were collated, or are not recorded at all. The first is often the result of incorrect readings of the texts. For example, the word "notable," as in "two notable p*re*sedent*e*s," is read as "noble" in *Hl*, the edition's base text; however, in this case *Hl* does not vary from the other texts because it too reads "notable."[42] Witness *Lm* is not recorded along with *L* in reading "maner *or* order of pleadinge" instead of "*and* order of pleadinge."[43] An example of a variant that is not recorded is the reading "rerum" in *La* in

[38] Stewart, *OFB*, lvi, n. 95, notes the absence in his edition of other "Bacon-related manuscripts" held at various archival locations he was not aware of until just prior to the publication of his edition, one of these being the Bodleian Library.
[39] On a piece of paper attached to the flyleaf (verso), the manuscript's eighteenth century owner, Oliver Acton (see textual introduction for *Or* below), listed names of those who "perused" *Or* and others to whom Acton gave copies of the manuscript.
[40] See below *s.v.* "Comparison of Witnesses."
[41] Stewart, *OFB*, 756-57, 759, 761; For the year books, see as cited in Baker, *Reinvention of Magna Carta*, 44n256, 58n52: *Jurdan's Case* (1375) YB 49 Edw. 3, Lib. Ass., pl. 8; *Chancellor of Oxford's Case* (1430) YB Hil. 8 Hen. 6, pl. 6; 24 Edw. 3 (1350), abridged in Bro. Abr., *Commissions*, pl. 3; Stewart identifies 22 Hen. 8, c. 14 but notes that the phrase "the examination of robberies . . . four justices of the peace" (*A Discourse*, ll. 171-73) is "untraced," although this is found in that statute: *Apparatus Fontium*, ll. 171-75.
[42] Stewart, *OFB*, 52, l. 41; *Hl*, f. 69v.
[43] Stewart, *OFB*, 53, l. 72 (emphasis added); *Lm*, f. 3v, l. 5.

place of "regni."[44] Multiple examples exist for each of these.[45] Although these errors are mostly minor, the frequency in which they occur is not insignificant. Therefore, my overall aim is to provide a more comprehensive and accurate edition through a careful collation of all six manuscripts.[46] Along with *L*, which is collated in the recent Oxford edition, I have also collated the two nineteenth century editions.

Textual Introductions

The following is a list of *sigla*:

C Francis Offley Martin, ed., "Bridewell and Bethlem Hospitals" in *Thirty-Second Report of the Commissioners for Inquiry Concerning Charities,* London, 1840, Part 6, 385-613, at Appendix I, 576-78.

Ca Cambridge University Library, MS Ee.2.30, ff. 1-8.

H Douglas Denon Heath, ed., "Discourse Upon the Commission of Bridewell" in *The Works of Francis Bacon*, ed. J. Spedding, R. L. Ellis, and D. D. Heath, London, 1859, Volume 7, 509-16, with Introduction at 507-08.

Hl Henry E. Huntington Library, Francis Bacon Library MS 30, ff. 69v-71v.

L British Library, Thomason Collection, E.38[12].

La British Library, Additional MS 11405, ff. 41-45.

Lh British Library, Harley MS 1323, ff. 127-137v.

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[44] Stewart, *OFB*, 51, l. 2; *La*, f. 41.

[45] Here are three more representative examples. In the phrase "but this was not by commissio*n*," "but" is recorded as omitted in the Harleian manuscript (Stewart, *OFB*, 58, l. 186) though it is not in *Lh*, f. 135, l. 16; The omission of "like" in "an infinite number of such like p*re*sedent*e*s" does not include witness *La* (f. 42v, l. 1) in addition to *Lm* (Stewart, 54, l. 95); The word "this" in the phrase "yet bye this grant" is read as "his graunte" in *Lm* (f. 2, l. 1) although this is not recorded in the Oxford edition (p. 52, l. 29).

[46] I have not physically viewed these manuscripts and the volumes in which they reside. Instead, I have obtained all of the manuscripts from their corresponding libraries in the form of digital copies.

Lm London Metropolitan Archives *olim* Guildhall Library, CLC/539/MS09384, ff. 1-9v.

Or Bodleian Library, Oxford, Rawlinson MS D. 708, pp. 1-18.

Manuscript Witnesses

Cambridge University Library, MS Ee.2.30, ff. 1-8 (*Ca*)

This volume consists of eighty folios of which fifty-five are blank-they were added by the eighteenth century binders-while the first twenty-five are three separate legal tracts: (1) "A discour[s]e upon the commission of Bridewell"; (2) "Un treatise concernant le ley fait come suppose per D^{r} Zouch"; (3) "30 Queries of Parsons and of Parsonages." According to the catalogue of manuscripts (1857), the volume is "in a clear legible hand of about the middle of the XVIIth century."[47] Peter Beal's online catalogue suggests early seventeenth century for the volume and early to mid-seventeenth century for the copy of *A Discourse*.[48]

Alan Stewart suggests that the identification of Zouch "might throw light on the dating." He indicates that by identifying the "Zouch" in "Un treatise" as Dr. Richard Zouch (1590-1661) one might date the volume to sometime after 1620 when Dr. Zouch, on becoming Regius Professor of Civil Law at Oxford, began writing a series of legal works "intended for students of the civil law and published between 1629 and 1650."[49] The Cambridge catalogue maintains Dr. Zouch to be the likely author even though the

[47] J.T. Abdy, *A Catalogue of the Manuscripts Preserved in the Library of the University of Cambridge*, vol. 2 (Cambridge: Deighton, Bell, 1857), 46. The legal entries for volume two were written by Professor Abdy (d. 1899) of Trinity Hall, Regius Professor of Civil Law: J.H. Baker and J.S. Ringrose, *Catalogue of English Legal Manuscripts in Cambridge University Library* (Woodbridge: Boydell Press, 1996), xi. See pp. 183-84 for volume description.
[48] *CELM*, BcF 201.
[49] Stewart, *OFB*, 45; Peter Stein, "Zouche, Richard (1590-1661)," in *ODNB*, 60: 1010-11.

treatise "does not appear among any of his published works."[50] Sir John Baker, however, has proposed an older cousin and patron of Dr. Zouch, Edward la Zouche, 11th Baron Zouche (1556-1625), who was admitted into Gray's Inn in 1573 from Cambridge. First, "the D of Dr is oddly written and might be read as an S in court hand." Second, Baker points out that Dr. Zouch's published student books, which focused on the civil law, do not appear to be the source of "Un treatise." Third, the treatise is more concerned with the common law than civil as it contains definitions of common-law terms.[51] Yet identifying Edward la Zouche as the author does not guarantee that the volume was written in the early seventeenth century since this copy could have been made after his death. With Dr. Zouch as the author it is more likely that the volume was composed mid-century. Ultimately, however, dating *Ca* based on "Un treatise" is not reliable considering the treatise's disputed authorship and its unknown date of composition, and therefore one is left dating the volume to a general range of early to mid-seventeenth century.[52]

The volume can be traced back to the library of John Moore (1646-1714), bishop of Ely. It was in his possession before recorded in an inventory in 1697. King George I

[50] Abdy, *Catalogue of the Manuscripts . . . University of Cambridge*, 46.
[51] Baker and Ringrose, *Catalogue of English Legal Manuscripts*, 184; Yet Dr. Zouch was among a group of civil lawyers who "displayed an ample, if not commanding, knowledge of the common law": Brian P. Levack, *The Civil Lawyers in England, 1603-1641: A Political Study* (Oxford: Clarendon Press, 1973), 128.
[52] I suppose there is the possibility that neither Zouch is the author. A translation of the title suggests uncertainty whether "Zouch" is the author. See Edward Bernard, ed., *Catalogi Librorum Manuscriptorum Angliae et Hiberniae in Unum Collecti*, vol. 2 (Oxford: 1697), 364: "A discourse of Law, supposed to be made by Dr. Zouch." My own translation suggests a little more certainty: "A treatise concerning the law made as supposed by Dr. Zouch."

purchased Moore's collection and presented the "Royal Library" to Cambridge University in 1715.[53]

Heath was aware of *Ca*: "there is another copy in the Cambridge Library, which is anonymous."[54] Stewart states that *Ca* was "perhaps not collated" in Heath's edition.[55] In the general preface to the "Professional Works," Heath noted that his edition of Bacon's legal writings "results from a careful collation of all accessible MSS . . . with the occasional correction of obvious blunders."[56] Heath's edition of *A Discourse* does not have an *apparatus criticus*, but footnotes to the edition make references to *Ca*.[57] Therefore, using *Lh* as a base text, Heath certainly collated *Ca*. More specifically, as my own collation indicates, Heath used the latter to emend the former.[58]

Henry E. Huntington Library, Francis Bacon Library MS 30, ff. 69v-71v (*Hl*)

A legal commonplace book of about 127 folios (including blanks), this volume is a miscellany of legal records, documents, state tracts, letters, lectures, treatises, opinions, notes, and various "reports relating to civic offices, statutes, felonies, rape, the charge of a court baron, oaths of a constable, etc., some concerning cases in Herefordshire and Buckinghamshire" written in English, Latin, and law French. Beal records that the volume is written "principally in one secretary hand," however, Stewart notes that the

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[53] Baker and Ringrose, *Catalogue of English Legal Manuscripts*, xv-xvi, xlv-xlvii, 184; Bernard, *Catalogi Librorum Manuscriptorum*, 364, no. 128; Baker explains the difficulty in tracing the sources of Moore's manuscripts. While only a small portion of his legal manuscripts were obtained in Norfolk when he was bishop of Norwich (1691-1707), "it seems likely that most of the legal manuscripts were acquired in London, probably in the first ten years after Moore began living there in 1686." A George I bookplate on the inside front cover of the volume indicates that it was in the collection donated to Cambridge in 1715. Cataloguers assigned it to the Royal Library in the mid-eighteenth century.
[54] Douglas Denon Heath, ed., "Professional Works," in *The Works of Francis Bacon*, ed. James Spedding, Robert Leslie Ellis, and Douglas Denon Heath (London: 1859), 507.
[55] Stewart, *OFB*, 46; *CELM*, BcF 201, states that *Ca* was "collated in Spedding."
[56] Heath, "Professional Works," 301.
[57] Heath, "Professional Works," 509n1, 510n2, 516n2.
[58] See below *s.v.* "Nineteenth Century Printed Editions."

various works are written in "non-professional secretary hands."[59] Among its contents, at folios 80-90, is a transcript of William Fleetwood's *The Office of a Justice of Peace*.[60]

Like *Ca*, *A Discourse* here is anonymous. Stewart maintains this to be "the earliest known witness."[61] There is a suggested date of 1593 or earlier based on the possibility that the volume was owned by the judge Gilbert Gerard who died in that year. His name, among five others, is found on covers and endpapers. "Gilbert Gerrarde" is written twice on an end-leaf suggesting his association with the compilation. Yet Stewart asserts that this "in no way guarantees Gerard's ownership of the volume; the name is written in an italic hand, unlikely to be Gerard's, and probably dating from a later period."[62] The Francis Bacon Library finding aid dates the volume to the late-sixteenth century, "ca. 1580-1600?"[63]

The volume was recorded in 1872 as part of the library of Hugh Lupus Grosvenor, 1st Duke of Westminster (1825-99), at Eaton Hall in Cheshire. It was in the Eaton Hall sale at Sotheby's on July 19, 1966 (lot 480), and on July 21, 1981 (lot 436) it was sold to the Francis Bacon Library in Claremont, California. In November 1995 it was donated and transferred to the Huntington Library in San Marino, California.[64] *Hl*

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[59] *CELM*, BcF 201.6; Stewart, *OFB*, 47; Mary L. Robertson and Gayle M. Richardson, "Francis Bacon Library Manuscripts Collection: Finding Aid," Online Archive of California (San Marino: Huntington Library, 2011), 7, accessed December 3, 2017, http://oac.cdlib.org/findaid/ark:/13030/c86115dj/.
[60] Baker, *Reinvention of Magna Carta*, 236n133, see also 236-37. Fleetwood's treatise on justices was printed in 1657. As to its date of composition, internal evidence indicates *c.* 1565, and Baker hypothesizes that a revision of the earlier work was done by Fleetwood in 1577 "probably by the addition of precedents of precepts, warrants and indictments."
[61] Alan Stewart, email message to author, September 5, 2017, said that "the handwriting, in particular, seemed to me likely the earliest."
[62] Stewart, *OFB*, 47-48, see also 47n34. The proposition that the volume may have belonged to Gerard was made by Francis Bacon Library librarian Elizabeth Wrigley in a letter to Bacon scholar and editor Graham Rees in September 1988. The other names appearing with Gerard's are Thomas Martin, John Clarke, W. Davies, Thomas Goodfellowe, and John Elwes.
[63] Robertson and Richardson, "Finding Aid," 7.
[64] *Third Report of the Royal Commission on Historical Manuscripts* (London: Eyre and Spottiswoode for HMSO, 1872), 212; *CELM*, BcF 201.6; Robertson and Richardson, "Finding Aid," 2.

was catalogued in Beal's *Index*,[65] but has been one of the lesser known manuscripts until it was chosen as the base text for Stewart's edition.[66]

British Library, Additional MS 11405, ff. 41-45 (*La*)

This is a large folio volume of 412 leaves written in English, Latin, and French and dated to the Elizabethan period (the recorded years span from 1557-99). Stewart dates *La* to the late-sixteenth century while Beal suggests early seventeenth. Based on this copy, A.L. Beier posits that *A Discourse* is "probably the work of a barrister in the 1590s."[67] Many of the papers have a year attached while others, including *A Discourse*, do not. Stewart detects several hands but notes that a single hand has copied the items from folio 5 recto to 45 recto, the end of *A Discourse*.[68]

Here it is also anonymous and located in a collection of miscellaneous state papers and tracts belonging to civil lawyer Sir Julius Caesar (1558-1636).[69] Caesar's manuscripts remained in the possession of his family at Benington in Hertfordshire until they were sold at auction in 1757. This volume and its contents were recorded as one of the 1838 additions to the manuscripts in the British Museum. From the museum's library the British Library was established in 1973.[70]

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[65] Peter Beal, ed., *Index of English Literary Manuscripts, 1450-1625*, vol. 1 (London: Mansell, 1980), see BcF 201.8; Stewart, *OFB*, 45, 50.
[66] Stewart, *OFB*, 47-48, 50. It is also noted in Griffiths, *Lost Londons*, 225n41, and Baker, *Reinvention of Magna Carta*, 242n170.
[67] A.L. Beier, *Masterless Men: The Vagrancy Problem in England, 1560-1640* (New York: Methuen, 1986), 169.
[68] *CELM*, BcF 200.5; "Miscellaneous Papers of Sir Julius Caesar," British Library, accessed December 18, 2017, http://searcharchives.bl.uk/IAMSVU2:IAMS032-002109169; Stewart, *OFB*, 45.
[69] The papers in this volume are but a small portion of the manuscripts assembled by Caesar throughout his lifetime. See "Caesar, Sir Julius (1558-1636) Knight Judge," The National Archives, accessed January 5, 2018, http://discovery.nationalarchives.gov.uk/details/c/F56331.
[70] *Biographia Britannica: or the Lives of the Most Eminent Persons*, vol. 2 (London: 1748), 1100; J.B. Nichols, *Account of the Royal Hospital and Collegiate Church of Saint Katharine, Near the Tower of London* (London: Nichols and Son, 1824), 47. Nichols traces what are now Caesar's papers in the Lansdowne collection at the British Library from their sale in 1757 to their purchase by the British Museum in 1807, but he makes no mention of the Caesar papers that would become a part of the Additional

La is the only manuscript witness that resides in a collection which is known for certain to have belonged to an individual living their professional life during the late-Elizabethan and early Stuart period. Therefore, it is important to consider Caesar as an audience to this work and offer suggestions as to why *A Discourse* might have been of interest to him. His biographer notes that Caesar "had a keen interest in counsels' technical arguments and in the complex civil and canon law authorities which supported such arguments."[71] Since *A Discourse* is not dependent on these authorities, Stewart concludes that "a position paper such as [*A Discourse*] would therefore be more of interest for its argument than its content."[72] A brief look at Caesar's professional career and his positions on jurisdiction, the royal prerogative, and the civil and common law reveals how *A Discourse* in fact could be just as relevant for its content.[73]

As civil lawyer and Privy Councillor, Caesar defended the royal prerogative and represented the monarch's interests in Parliament.[74] As judge of the High Court of Admiralty (1584-1606), he defended its jurisdiction against prohibitions from the common-law courts. Caesar asserted Elizabeth's prerogative by arguing that prohibitions

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manuscripts; *List of Additions to the Manuscripts in the British Museum in the Years 1836-1840* (London: George Woodfall and Son, 1843), *s.v.* "Table of Reference"; "History of the British Library," British Library, accessed January 26, 2018, http://www.bl.uk/aboutus/quickinfo/facts/history.

[71] Alain Wijffels, "Caesar [*formerly* Adelmare], Sir Julius (*bap.* 1558, *d.* 1636)," in *ODNB*, 9: 438.

[72] Stewart, *OFB*, 45.

[73] A treatise concerning Bridewell may have been of interest to Caesar for he was master of another London hospital, St. Katharine's by the Tower (1596), a royal peculiar. He also served as civil counsel to the City (1583), and sat on the parliamentary committee in 1601 "for confirming the Authority and Government of the Mayor, Sheriffs and Aldermen of the City of London within S^{t} Katherine Christ Church": Andrew Thrush, "Caesar, Sir Julius," History of Parliament: British Political, Social and Local History, accessed January 2, 2018, https://www.historyofparliamentonline.org/volume/1604-1629/member/caesar-sir-julius-1558-1636; Simonds d'Ewes, "Journal of the House of Commons: December 1601," in *The Journals of All the Parliaments During the Reign of Queen Elizabeth* (Shannon, Ire: Irish Univ. Press, 1682), 660-89, British History Online, accessed January 11, 2018, http://www.british-history.ac.uk/no-series/jrnl-parliament-eliz1/pp660-689.

[74] Levack, *Civil Lawyers*, 46-47, 81-85, esp. 83. See also Caesar's opposition to the failed financial settlement of 1610, the "Great Contract": Thrush, "Caesar"; Levack, 216; and Wijffels, "Caesar, Sir Julius," 437.

issued to the Admiralty court were not valid since that court's jurisdiction rested on royal patent.[75] *A Discourse*, however, diminishes the prerogative by criticizing a jurisdiction's criminal procedure established by royal charter and emphasizing the authority of parliamentary statute. Therefore, the evidence suggests that Caesar would oppose the argument in *A Discourse*. Moreover, Daniel Coquillette places Caesar among those English civilians who sought a "comparativist philosophy" which applied Continental law to English.[76] Caesar argued for equality between the common and civil law jurisdictions.[77] Yet he was not a common lawyer and was at times determined deficient in his common-law learning.[78] Therefore, it is possible that *A Discourse* served as a valuable reference because of its application of the common law in argument.[79] In sum, Caesar's possible interest in this treatise demonstrates the significance of *A Discourse* both as an argument considered from an opposing view and for its content as a legal resource.

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[75] Prichard and Yale, *Hale and Fleetwood on Admiralty Jurisdiction*, xcv, see also xlix-li, xciv. During his tenure as master of the Court of Requests, Caesar penned a history of the court, Harding writes, "to defend it against the slight of the common lawyers": Alan Harding, "Caesar, Julius," The History of Parliament, accessed January 2, 2018, https://www.historyofparliamentonline.org/volume/1558-1603/member/caesar-julius-1558-1636.

[76] Coquillette, *Francis Bacon*, 288. Levack, *Civil Lawyers*, 124-30, demonstrates how civil and common-law practitioners were not always opposed but worked together.

[77] Levack, *Civil Lawyers*, 143, and see the passage from Caesar on p. 83. Of course this was with the monarch at the head: each jurisdiction is "to govern by several laws in like immediate degree from the Prince" who also should be, either in person or by appointing commissioners or delegates, "superior and indifferent" to both jurisdictions, the arbiter in jurisdictional disputes.

[78] Baker, *Reinvention of Magna Carta*, 405; Levack, *Civil Lawyers*, 129, 216. Caesar was never called to the Bar, although he was Bencher (1590) and Treasurer (1594) of the Inner Temple. He was denied the office of deputy to the Common Serjeant of the City of London-who was deputy to the recorder-due to a lack of knowledge in the common law. Upon his reversion to the mastership of the Rolls in 1610, judges were appointed to assist him because, even having served in Chancery, there was concern that Caesar was not adequately learned in the common law: Thrush, "Caesar."

[79] Preceding *A Discourse* in this volume are a few other works which deal with the common law and Parliament, including a preface to a reading on the common law by one "Mr. Guyn": "Miscellaneous Papers of Sir Julius Caesar."

British Library, Harley MS 1323, ff. 127-137v (*Lh*)

A Discourse here is in another large folio volume. It consists of various state tracts written in multiple professional hands on 285 leaves.[80] The subject matter ranges from the Elizabethan to the Caroline period.[81] There are forty items and number thirteen is "A briefe Discourse uppon the Commission of Bridewell: written by Sir Frauncis Bacon, Knight."[82] Bacon's knighthood dates this manuscript to post-1603. Therefore, if the papers in this volume are any indication of its date, *Lh* is an early to mid-seventeenth century copy. Beal dates the hand as such.[83] A brief look at a scribe associated with this volume will throw further light on the date of *Lh*, its scribe, and the context in which it was composed.

As noted above, this volume is in several hands, and Beal identifies one prominent hand as being the work of a prolific, anonymous penman he has christened the "Feathery Scribe."[84] *Lh* is among those papers in the volume Beal does not designate as Feathery's hand, although he does identify an "imitator" of Feathery's style which he notes is present in Harley 1323.[85] Surely one of the works, if the only one, Beal is referring to is "A Breiffe Discourse vppon the Commission of Bridewell" which is most

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[80] *CELM*, BcF 200.
[81] *A Catalogue of the Harleian Manuscripts in the British Museum*, vol. 2 (London: British Museum, 1808), 3-5. Some of the papers are dated. From item 34 (273r) Beal dates these tracts "up to 1624." Yet there are two items (10 and 17) which refer to King Charles I. Moreover, item 1 is a "Declaration of the Lordes & Commons delivered unto his Majestie the 13th of March 1633" (2r). This of course refers to Charles, however, this appears to be an error for by 1633 Charles had dissolved Parliament, and therefore James I makes much more sense in this context. See Peter Beal, *In Praise of Scribes: Manuscripts and Their Makers in Seventeenth-Century England* (Oxford: Oxford Univ. Press, 1998), 242.
[82] See *Catalogue of the Harleian Manuscripts*, p. 4, for the full title.
[83] Stewart, *OFB*, 47.
[84] Beal, *In Praise of Scribes*, 242-44. Beal devotes an entire chapter to the study of Feathery, pp. 58-108. Appendix II (211-68) is Beal's descriptive list of Feathery's manuscripts numbering well over one hundred.
[85] Beal, *In Praise of Scribes*, 84, n. 25, has identified this imitator's hand among other manuscript collections.

certainly in the hand of Feathery's imitator. This became evident after comparing *Lh* with two exemplars of the imitator's script among the Cambridge manuscripts which Beal provides.[86] The letter forms are very similar as in the detachment of the diagonal line ascending from lowercase secretary *a*s and a crescent-shaped mark the imitator sometimes places at the top of or above minuscule *t*s.[87] Moreover, in one of these exemplars, Feathery has written the heading while the body of the text is in the hand of the imitator. As Beal has shown, this was a common practice and an indication that the imitator was working under Feathery in a scriptorium.[88] Additionally, *Lh*'s physical characteristics correspond with those of the paper that Feathery used. These include wide margins[89] drawn "consistently in light red ink" and a fairly common watermark consisting of a "wheel-shaped device comprising quatrefoils within a double circle" present in several folios of *Lh.*[90] In sum, the close imitation of Feathery, their collaboration found in other manuscripts,[91] and the imitator's hand found on the type of paper commonly used by Feathery indicates the considerable extent to which this scribe worked with Feathery.[92]

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[86] This work is a series of essays entitled *Observations Political and Civil* attributed, in Feathery's hand, to "S^{r}. Frauncis Bacon: knight," an attribution Beal says is erroneous: *In Praise of Scribes*, p. 84, plate 48, and p. 215, no. 3.2. Another copy of this very work, written in the hands of Feathery and his imitator, is found at Dublin, Trinity College but without an attribution: p. 222, no. 17A.1.

[87] Beal, *In Praise of Scribes*, 85, plate 49, and 86, plate 50: e.g. "Aristocracyes"; In *Lh*, see e.g. "after" at f. 128v, l. 4.

[88] Beal, *In Praise of Scribes*, 85, plate 49, 72-84. See also p. 107: Beal maintains that Feathery's "centre of production" was within "the vicinity of the Inns of Court."

[89] Beal, *In Praise of Scribes*, 60. See also the Cambridge example, 85, plate 49, 86, plate 50.

[90] Beal, *In Praise of Scribes*, 62, 77, 78, plate 43; A digital image of the watermark was provided by BL Librarian Claire Wotherspoon, email message to author, February 6, 2018.

[91] Besides the Cambridge manuscript discussed above, see also Beal, *In Praise of Scribes*, 214, no. 2 and 222, no. 17A.1. These examples also bear the watermark of quatrefoils within a circle. Another of the imitator's work (BL, Additional MS 11308, see 84n25) also bears this watermark: p. 228, no. 28.

[92] For more similarities between the two scribes see "Editorial Principles and Conventions" below.

This imitator's association with Feathery is important for two reasons. First, Feathery was active in the 1620s and 1630s but "flourished especially between 1629 and 1640."[93] Therefore, it is more likely *Lh* dates from this time period rather than earlier. Second, Feathery's output during these years was varied but dealt predominantly with matters of state and was critical of the government and deemed subversive by the Crown. Beal argues that Feathery, while not consciously or exclusively contributing to this view, catered to a clientele who desired materials, both current and historical, which addressed the legal and political issues of the day, and who were "scrutinizing the system of things."[94] Unlike some of Feathery's copies which were annotated by later readers in the seventeenth century, there is no physical evidence in *Lh* suggesting that it was read by an individual or any evidence as to what extent it circulated during this time. Nevertheless, within the context of Feathery's output, *Lh* can likely be placed among those works read for their contemporary relevance, such as those relating to the topics underlying *A Discourse*: liberty of the subject, limitation of the royal prerogative, authority of Parliament.[95]

As to the provenance, the volume was in the Harleian collection prior to the founding of the Harley Library in 1704. This is known by the presence in Harley MS 1323 of the armorial bookplate of Robert Harley (1579-1656) who was the grandfather of Robert Harley, 1st Earl of Oxford (1661-1724), the library's founder. Therefore, the volume had been in the possession of the Harley family since no later than 1656. Oxford's son, Edward Harley (1689-1741), bequeathed the library to his widow and

[93] Beal, *In Praise of Scribes*, 58, 105.
[94] Beal, *In Praise of Scribes*, 107.
[95] Beal, *In Praise of Scribes*, 104-08. See pp. 96-100 for examples of Feathery's manuscripts which were later annotated.

daughter. In 1753 the government purchased the Harleian manuscripts and four years later they were placed in the library of the British Museum.[96]

Lh served as the base text for both of the nineteenth century editions. It is the only manuscript witness which attributes the work to Francis Bacon. It was on the basis of this ascription that *A Discourse* was placed in *The Works of Francis Bacon* and that the greater part of scholarship has regarded Bacon as the author.

London Metropolitan Archives (LMA), CLC/539/MS09384, ff. 1r-9v (*Lm*)

This is one of the two manuscript witnesses which attribute the work to "Serjeant Fleetwood."[97] *Lm* is the first item in this folio volume of 380 pages. These include various legal tracts, several pertaining to London. Beal records that there are several hands in the volume, though Stewart points out that "most of the pieces are in the same hand," and furthermore they "date from Elizabethan to Caroline texts: it seems likely the copying was undertaken in the Caroline period."[98] One of the papers is dated 1633, and the most recent catalogue description suggests "[1640?]."[99] Beal estimates "*c.* 1630s" for *Lm* itself.[100]

Lm had belonged to the antiquary Joseph Ames (1689-1759). After he died intestate his library was arranged to be sold at auction. At a London sale in May 1760, the discourse "On the extent of the Charter of Bridewell, by Serjt. Fleetwood," along with

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[96] BL Librarian Claire Wotherspoon, email message to author, March 6, 2018; "Harley Manuscripts," British Library, accessed January 14, 2018, https://www.bl.uk/collection-guides/harley-manuscripts; William Younger Fletcher, *English Book Collectors*, ed. Alfred Pollard (London: Kegan Paul, Trench, Trübner, 1902), 155.
[97] Fleetwood became a serjeant-at-law in 1580: Baker, *Reinvention of Magna Carta*, 217.
[98] Stewart, *OFB*, 46.
[99] "CLC/539," LMA: Small National Collections, p. 10, accessed January 15, 2018, https://search.lma.gov.uk/LMADOC/CLC539.PDF; Sir John Baker, *English Legal Manuscripts Formerly in the Collection of Sir Thomas Phillipps* (London: Selden Society, 2008), 5.
[100] *CELM*, BcF 201.3 and 201.8.

other manuscripts in this present volume, were sold to Hewitt.[101] Sir Thomas Phillipps (1792-1872) acquired *Lm* as it was recorded in 1837 in a catalogue of his manuscripts. Number 2898 was "Serjeant Fleetwood on the Validity of Bridewell Charter, &c." The provenance of it and other manuscripts were described as "*Incerti*."[102] At the Phillipps sale in 1895, the present volume was sold to the London bookseller Arthur Reader.[103] It was deposited at Guildhall Library on September 9, 1955.[104] In 2009 Guildhall's manuscript collection merged with the London Metropolitan Archives.[105]

Bodleian Library, Oxford, Rawlinson D. 708, pp. 1-18 (*Or*)

Here *A Discourse* is part of the Rawlinson collection at the Bodleian Library which Richard Rawlinson (1690-1755) bequeathed to the university upon his death. A vast collection comprising texts and artifacts, Rawlinson's donation amounted to more than 4,800 manuscripts. As its former title indicates, Rawlinson D is a "Miscellaneous" consisting of approximately 1,400 manuscript volumes written primarily in English, Latin, and French. Falconer Madan states that this group of Rawlinson manuscripts "cannot be shortly described, but contains many foreign and many Nonjurors' papers."[106]

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[101] Robin Meyers, "Ames, Joseph (1689-1759)," in *ODNB*, 1: 939; Baker, *Collection of Sir Thomas Phillipps*, 4-5. Baker, p. 310, suggests "Hewitt" to be "[?James]" Hewitt, perhaps referring to James Hewitt, 1st Viscount Lifford (1712-89), Lord Chancellor of Ireland from 1768: Andrew Lyall, "Hewitt, James, first Viscount Lifford (1709x16-1789)," in *ODNB*, 26: 925.

[102] *Catalogus Librorum Manuscriptorum in Bibliotheca D. Thomae Phillipps, Bart.* (Typis Medio-Montanis, 1837), 33.

[103] Baker, *Collection of Sir Thomas Phillipps*, 5.

[104] LMA Librarian Louise Harrison, email message to author, January 19, 2018. This was MS 9384.

[105] "Reference Code: CLC/539," LMA, accessed January 16, 2018, https://search.lma.gov.uk/scripts/mwimain.dll/144/LMAOPAC/webdetail/REFD+CLC~2F539?SESSIONSEARCH.

[106] *The Deed of Trust and Will of Richard Rawlinson* (London: 1755), esp. p. 3; William D. Macray, *Annals of the Bodleian Library Oxford*, 2nd ed. (Oxford: Clarendon Press, 1890), 233-35, 241; "Collection Level Description: Rawlinson Manuscripts," Bodleian Library, accessed January 19, 2018, http://www.bodley.ox.ac.uk/dept/scwmss/wmss/online/1500-1900/rawlinson/rawlinsonCLD.html#rawlD; Falconer Madan, *A Summary Catalogue of Western Manuscripts in the Bodleian Library at Oxford*, vol. 3 (Oxford: Clarendon Press, 1895), 179.

Number 708 is Serjeant Fleetwood's treatise on the commission of Bridewell in a bound volume, and while it was formerly foliated it is now paginated and consists of many blanks.[107] In addition to *A Discourse,* there are pages of text written by Oliver Acton (1695-1754) some time after he purchased the manuscript in 1734.[108] These include a flyleaf preceding *A Discourse* (recto and verso), a concluding remark on the last page of the treatise, and six pages of text copied out of Sir Edward Coke's *Institutes*.[109] William Macray's catalogue dates this manuscript to the seventeenth century.[110] *Or*'s role in furnishing the text for *L* would place the manuscript prior to 1643.

Its origins prior to the early eighteenth century are uncertain. The manuscript belonged to the elder brother of Richard Rawlinson, Thomas Rawlinson (1681-1725), who was also an avid book and manuscript collector. After his death, Rawlinson catalogued his brother's manuscripts, and at their sale in 1734 he secured a considerable portion of them.[111] Oliver Acton also purchased a number of manuscripts[112] including *A Discourse* numbered 475.[113] Macray lists Acton's library as one of those "from which

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[107] William D. Macray, *Catalogi Manuscriptorum Bibliothecae Bodleianae Partis Quintae Fasciculus Tertius . . . Ricardi Rawlinson* (Oxford: Clarendon Press, 1893), 454-55.

[108] Acton's signature is found on the flyleaf (recto) and p. 18. On the flyleaf he indicates his purchase of the volume, and on p. 18 he designates himself as "Steward of the same Bridewell Hospital London and of the Society of the Inner Temple, Citizen & Goldsmith, chosen Steward as aforesaid 4 Apr. 1718." See also Nick Kingsley, *s.v.* "Acton, Captain Walter (1651-1718) of London," Landed Families of Britain and Ireland, last revised May 15th, 2014, http://landedfamilies.blogspot.com/2013/03/21-acton-later-lyon-dalberg-acton-of_30.html.

[109] *Or*, pp. 1-6: Co. Inst. ii. 45-47, 479; iii. 165; iv. 163. These passages concern the legality of commissions and are excerpts from Coke's exposition on chapter 29.

[110] Macray, *Catalogi . . . Tertius*, 454.

[111] Madan, *Summary Catalogue*, 177. See also Theodor Harmsen, "Rawlinson, Thomas (1681-1725)," in *ODNB*, 46: 167: "The auction sales of Rawlinson's collections of books and manuscripts took place . . . between 4 December 1721 and 4 March 1734, the last being the sale of the manuscripts."

[112] For other examples of Thomas Rawlinson manuscripts purchased by Acton at the sale in March 1734 see Macray, *Catalogi Manuscriptorum Bibliothecae Bodleianae Partis Quintae Fasciculus Primus . . . Ricardi Rawlinson* (Oxford: Oxford Univ. Press, 1862), e.g. p. 403 *s.v.* 105.

[113] On the flyleaf (recto) he writes, "11. March 1733/4. Bought this Book for 2s. 6d at the Sale of the Manuscripts of Tho: Rawlinson Esq; dece*as*ed vide Catalogue 16th. page 35. No. 475." This appears to be the number assigned by Richard Rawlinson in cataloguing his brother's manuscripts. Harmsen (see note

Rawlinson's MSS. were collected," although he does not provide the year in which Acton's library was dispersed.[114] Therefore, once in the hands of Rawlinson, Acton's manuscripts were among those he bequeathed to the Bodleian Library.[115] However, it would be some time before *A Discourse* was catalogued or even discovered at Oxford. It appears that it was amongst a great number of papers discovered in 1861 hidden in cupboards and under a staircase and which would become the greater part of the class D manuscripts. According to Madan, not until about 1865 were the Rawlinson D manuscripts extended beyond number 412 to 1305, and in 1890 Macray remarked that he was currently cataloguing the papers discovered in 1861.[116] This is in reference to his 1893 catalogue which records 708. As stated above, *Or* is not included in Stewart's edition. Scholars have referenced *Or* but have not considered it at any great length.[117]

Printed Editions

British Library, Thomason Collection, E.38[12] (*L*)

This is the only early printed edition of *A Discourse,* and it is anonymous. *L*, as Stewart says, is "printed unchanged from the circulating manuscript witnesses,"[118] and most closely resembles *Or*. *Brief Collections out of Magna Carta: or, the Known Good Old Laws of England* is sixteen pages including a title page. The eighteen copies which survive today are evidence of its circulation.[119] Copies were printed in 1643 in London

above) notes that copies of the sale catalogues for the auctions of Thomas Rawlinson's library are preserved in the Bodleian Library.

[114] Macray, *Annals*, 249.

[115] See e.g. in Macray, *Catalogi . . . Tertius*, 534 *s.v.* 809, item 44. According to Macray, these papers relating to Bridewell "no doubt came to Rawlinson's hands from the MSS. of Oliver Acton."

[116] Madan, *Summary Catalogue*, 179; Macray, *Annals*, 236, 241.

[117] See Humphry William Woolrych, *Lives of Eminent Serjeants-at-Law of the English Bar*, vol. 1 (London: Wm. H. Allen, 1869), 162-63; Prichard and Yale, *Hale and Fleetwood on Admiralty Jurisdiction*, xxiv, n. 2; Baker, *Reinvention of Magna Carta*, 242n170.

[118] Stewart, *OFB*, 49.

[119] "English Short Title Catalogue," British Library, accessed January 24, 2018, http://estc.bl.uk/R2906.

"for *George Lindsey*, and are to be sould at his Shop over against *London stone*."[120] One of the two exemplars in the British Library bears an annotation with the date "May 19th."[121] This may be the date of publication or acquisition as Thomason often noted either on the title pages of his collected works.[122] George Lindsey was a bookseller in London from 1642-48. He published other political and legal works including a treatise on law reform printed in 1642 and attributed to William Lambarde: *The Courts of Iustice Corrected and amended . . . By W.L. Esquire*.[123] *Brief Collections* was an apt paper to print in early civil-war London when, in the words of Paul Griffiths, "all royal 'arbitrary' institutions/processes were sitting ducks."[124] Also, Bridewell's legal status still remained contested. Up to this point three unsuccessful attempts had been made to confirm Bridewell's charter in Parliament, and a fourth and last one also failed in 1647.[125]

The two copies of *Brief Collections* at the British Library are a part of the Thomason Collection of Civil War Tracts.[126] George Thomason (*c.* 1602-66) was a bookseller and publisher working in London. He began his collection in 1640, and by 1661 it amounted to more than 22,000 printed materials published during this period. He was aligned with the Presbyterian party and supported the parliamentary cause during the

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[120] The "London stone" is a historic landmark in London. See John Stow, *A Survey of London, Written in the Year 1598 by John Stow*, ed. William J. Thoms (London: Whittaker, 1842), 84-85. According to Stow, the London stone was located within Walbrook Ward "nearer unto the river of Thames than to the wall of the city." It was "a great stone . . . fixed in the ground very deep, fastened with bars of iron." The stone was referenced in order to identify a locality.
[121] This is E.102[11].
[122] David Stoker, "Thomason, George (*c.* 1602-1666)," in *ODNB*, 54: 397.
[123] Henry R. Plomer, *A Dictionary of the Booksellers and Printers Who Were at Work in England, Scotland and Ireland from 1641-1667* (London: Blades, East and Blades, 1907), 118. For further discussion of Lambarde's tract see Wilfrid Prest, "William Lambarde, Elizabethan Law Reform, and Early Stuart Politics," *Journal of British Studies* 34 (1995): 474-75, accessed January 24, 2018, http://www.jstor.org/stable/175780.
[124] Griffiths, *Lost Londons*, 227.
[125] Griffiths, *Lost Londons*, 227-29. Attempts were made in 1579, 1601, and 1604.
[126] "Thomason Collection of Civil War Tracts," British Library, accessed January 23, 2018, https://www.bl.uk/collection-guides/thomason-tracts.

war. After Charles I's surrender in 1647, Thomason advocated a personal treaty with the king, he was deprived of his municipal office following Pride's Purge in December 1648, and in 1651 he was arrested and later released for involvement in Christopher Love's plot to restore Charles II.[127]

The story of Thomason's collection after his death is one of unsuccessful attempts by its possessors to sell it until the year 1761. At the time of his death, Thomason's collection was entrusted to Thomas Barlow, Bishop of Lincoln (1675). Shortly after Barlow wrote a letter to Thomason's son in February 1676 explaining his failure to secure the collection for the Bodleian Library, Samuel Mearne, a London bookbinder and publisher, bought the collection at the direction of Charles II. In 1684 the Privy Council granted Mearne's widow, Anne, the right to sell the tracts. In 1745 the collection was in the hands of Anne Mearne's son-in-law, Thomas Sisson, a descendant of Thomason. In 1761 Sisson's granddaughter sold the collection to the Earl of Bute who was acting on behalf of George III, and the following year it was presented to the British Museum.[128] *Brief Collections* was unknown to the nineteenth century editors Martin and Heath. It was recorded in Donald Wing's *Short-Title Catalogue* (Wing B4557).[129]

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[127] G.K. Fortescue, preface to *Catalogue of the Pamphlets, Books, Newspapers, and Manuscripts Relating to the Civil War, the Commonwealth, and Restoration, Collected by George Thomason, 1640-1661*, vol. 1 (London: William Clowes and Sons, 1908), iii-vi, ix-x, xxi. See also the catalogue entries for *Brief Collections* on pp. 206 and 302.

[128] Fletcher, *English Book Collectors*, 100-02; Fortescue, *Catalogue of the Pamphlets,* xiv-xix; For a more recent study tracing Thomason's collection after his death see David Stoker, "Disposing of George Thomason's Intractable Legacy, 1664-1762," *The Library*, 6th ser., 14 (1992): 337-56, accessed January 26, 2018, https://doi.org/10.1093/library/s6-14.4.337.

[129] Donald Wing, ed., *Short-Title Catalogue of Books Printed in England, Scotland, Ireland, Wales, and British America and of English Books Printed in Other Countries, 1641-1700*, 2nd ed. (New York: Modern Language Association of America, 1994).

Francis Offley Martin, ed., "Bridewell and Bethlem Hospitals" in *Thirty-Second Report of the Commissioners for Inquiry Concerning Charities,* London, 1840, Part 6, 385-613, at 576-78 (*C*)

Martin's edition is printed from *Lh*. No other manuscript witnesses were consulted for only *Lh* is cited. The title here is a variation of the title given in the Harleian catalogue.[130] Stewart concludes that Martin "does not attribute the work to Bacon."[131] Martin's reports, however, accept the attribution to Bacon as it is acknowledged that *Lh* is "an opinion of Sir Francis Bacon."[132] Heath acknowledged Martin's edition in the preface but Spedding had already furnished him a copy of *Lh* "not being aware of its having been already printed."[133] Scholars have paid it little attention.[134]

The *Report of the Commissioners* was the result of the 1835 "Act for appointing Commissioners to continue the Inquiries concerning Charities in *England* and *Wales*" which was in force until 1837. The act called for commissioners to investigate and report the current state of charitable institutions and any "Breaches of Trust, Irregularities, Frauds, Abuses . . . or Misconduct" in their management.[135] The detailed reports compiled in the *Report of the Commissioners* include a historical examination of these various charities along with present findings. Francis Offley Martin (1805-78) of

[130] Martin, "Bridewell and Bethlem Hospitals," 576-78.
[131] Stewart, *OFB*, 49.
[132] Martin, "Bridewell and Bethlem Hospitals," 401.
[133] Heath, "Professional Works," 507.
[134] It is referenced in Baker and Ringrose, *Catalogue of English Legal Manuscripts*, 183, but it is cited as the "thirteenth" report instead of the "thirty-second."
[135] "An Act for appointing Commissioners to continue the Inquiries concerning Charities in *England* and *Wales* until the First Day of *March* One thousand eight hundred and thirty-seven," 1835, 5 & 6 Will. 4, c. 71: *The Statutes of the United Kingdom of Great Britain and Ireland, 5 & 6 William IV* (London: His Majesty's Printers, 1835), 368-69.

Lincoln's Inn was appointed one of these "Commissioners of Inquiry."[136] One of Martin's reports cover the hospitals of Bridewell and Bethlem in London. My present purpose is to inquire why Martin appended *A Discourse* in his reports.

Generally speaking, as a historical document concerning Bridewell, it makes sense why Martin added *A Discourse* to his reports. More specifically, Martin's own interpretation of Bridewell's penal history was in agreement with the critical opinion in *A Discourse*, and he also viewed the treatise as contemporarily relevant. Examples of punishment at Bridewell in the sixteenth and seventeenth centuries led Martin to concur with Bacon's opinion: "It is difficult to imagine how the governors could justify these acts of authority. Indeed the powers of police contained in the charter seem to be illegal."[137] Its contemporary relevance for Martin resided in the implication that parliamentary intervention was needed in order to redress Bridewell's illegitimate administration. This, I think, appealed to Martin who also emphasized the desire for legislation in his own time, not to grant parliamentary discretion to the governors whose powers of committal by this time were in the hands of city magistrates, but to improve Bridewell's poor management by its governors.[138] According to Martin, this could be done by terminating the joint governorship of Bridewell and Bethlem:

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[136] *Minutes of Evidence Taken Before the Commissioners*, vol. 6 (London: Eyre and Spottiswoode for HMSO, 1861), 503; John Venn and J.A. Venn, eds., *Alumni Cantabrigienses: A Biographical List of All Known Students, Graduates and Holders of Office at the University of Cambridge, from the Earliest Times to 1900*, vol. 2, pt. 4 (Cambridge: Cambridge Univ. Press, 1951), 341.

[137] Martin, "Bridewell and Bethlem Hospitals," 400-01.

[138] Martin, "Bridewell and Bethlem Hospitals," 402, 574-75. See the statute 1782, 22 Geo. III, c. 77 in Danby Pickering, ed., *The Statutes at Large*, vol. 34 (Cambridge: John Archdeacon, 1782), 124-32. Martin explained that three years after this statute, which confirmed the governors' "rights, powers, and privileges, in the ordering, management, government, and disposition" of Bridewell (and Bethlem and other London hospitals), "an order was made that for the future the porter should not receive any prisoners without a legal commitment under the hand of a magistrate. Even before this time the interior arrangement and management of the prison was all that remained within the scope of the governors' authority, the committals being made exclusively by the magistrates of the city."

> With regard to Bridewell it is submitted that the interference of Parliament is desirable to adapt it to the changes which the introduction of poor laws, and the lapse of nearly three centuries have introduced; severing it from Bethlem, no reason now existing for their union, and placing it in that close connection with the police of the metropolis, which was evidently in the contemplation of the founders.[139]

Therefore, like the position taken in *A Discourse* over two hundred years prior, Commissioner Martin advocated parliamentary intervention in order to correct Bridewell's deficiencies, though obviously in a new context and for different reasons.

Douglas Denon Heath, ed., "Discourse Upon the Commission of Bridewell" in *The Works of Francis Bacon*, London, 1859, Volume 7, 509-16, with Introduction at 507-08 (*H*)

Douglas Denon Heath (1811-97) attended Trinity College, Cambridge and afterward entered the Inner Temple and was called to the bar in 1835. At the request of James Spedding, a colleague at Trinity, Heath edited Bacon's legal works for the seventh volume of the major edition of *The Works of Francis Bacon*.[140] In his own words, Heath's edition of Bacon's works "made many passages of the [manuscript] text intelligible for the first time." Heath also noted that his editions differed "from the common editions by the addition . . . of a paper on Bridewell Hospital, which has been printed in the Reports of the Charities Commission."[141] The works edited here include

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[139] Martin, "Bridewell and Bethlem Hospitals," 575. In 1860, without actually naming the charity, Martin referred to "a very great charity in the metropolis [where] one great foundation is wanted to be set at liberty by an Act of Parliament." In this deposition given for the Education Commission, Martin also emphasized the need for legislation to increase the powers of the Charity Commissioners beyond those of the Court of Chancery which "can only administer the law" not, for example, alter trusts. He maintained that if the commissioners currently possessed the powers of those given by the Statute of Elizabeth ("An Acte to redresse the Misemployment of Landes Goodes and Stockes of Money heretofore given to Charitable Uses," 1601, 43 Eliz. 1, c. 4) such as the power to alter trusts by decree, then "very great good might arise from it": *Minutes of Evidence*, 508-10, min. 4084, 4095.

[140] Thomas Seccombe, "Heath, Douglas Denon (1811-1897)," in *Dictionary of National Biography*, ed. Sidney Lee, vol. 2 (London: Smith, Elder, 1901), 408-09.

[141] Heath, "Professional Works," 301.

several of Bacon's case arguments and other treatises. Heath maintained that one of them, *Use of the Law*, a treatise covering various aspects of English law, was not Bacon's work.[142]

As previously mentioned, Heath used *Lh* as the base text for his edition and collated *Ca*. No other manuscript or printed witnesses were collated. Heath noted of *Ca* that he was "not aware of any circumstances otherwise tending to authenticate it." With two manuscripts in front of him, one attributing the work to Francis Bacon and the other anonymous (*Ca*), Heath accepted the ascription in *Lh* maintaining the legal opinion to be consistent with that of a young Francis Bacon.[143] Until Stewart's recent edition, Heath's has been the dominant authority regarding *A Discourse* in scholarship and the acceptance of Bacon as the author.

Choice of Base Text

This edition has taken *Lh* for its base text primarily out of convenience and due to circumstance. This was the first manuscript I obtained and for a period of time, as all the manuscripts were received electronically and at different times, *Lh* was the only one in my possession, and therefore it was the manuscript I began to read and transcribe for the base text. It was not until later that I became aware of *Hl* and *La*, the earliest dated manuscripts. Maintaining the former to be the earliest witness, Stewart has chosen *Hl* for the base text to his edition.

[142] Heath, "Professional Works," 453-57. According to Heath, a 1630 attribution to Bacon in print was made on some other unknown grounds since two manuscript witnesses are anonymous as are two other publications in 1629 and 1631. As to internal evidence, the style, the manner in which the material was discussed, and contention that the English constitution and laws derived from the Conquest contrasts with Bacon's own views. For Heath, it was certainly not a work of Bacon's later years.
[143] Heath, "Professional Works," 507.

Aside from choosing *Lh* for practical reasons, this choice of base text is apt. I have provided a revised edition to the two nineteenth century ones which also use *Lh* as their base text. Collating Martin's and Heath's transcriptions against my own has revealed their editorial choices and some significant variant readings of *Lh*. This is notable especially in terms of Heath's edition which served for over a century and a half as the primary version for *A Discourse*. Therefore, I have retained *Lh* as the base text in order to supply an updated transcription employing minimal editorial intervention.

Comparison of Witnesses[144]

Early Witnesses

A collation of the manuscripts and the 1643 printed edition demonstrates that the text, on the whole, remains unchanged with no major differences occurring across witnesses. Nevertheless, variant readings point to two distinct families, *y* and *z* below. Some general observations and judicious examples from the *appartus criticus* will highlight the affinities and distinctions between these witnesses.

Hl and *Ca* frequently share readings unique only to them. In place of "Darby" the manuscripts have the initial "S," and both also add an abbreviated form of the law French word for queen, "Roigne," in citing a statute of Elizabeth.[145] Where *Hl* has illegible text, this is reflected in *Ca* with the omission of a word.[146] They also have corresponding marginal notes: the same legal citations are written in the margins in a similar style.[147]

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[144] The following references in this section to Alan Stewart's analysis will be from p. 50 of *OFB* unless otherwise cited.
[145] *A Discourse*, nn. 753, 1165; Among other examples see n. 665 "heneritanus," a modified spelling of "enheritauns," and n. 754 where "dome" is written as an abbreviation for "dominion."
[146] *A Discourse*, nn. 673, 819.
[147] *Ca*, ff. 1-2v, 6, 7v and *Hl*, ff. 69v, 71. The only difference is that *Hl* mistakingly gives "ca 18" for a statute which is cited as chapter 14 in the body of the text (f. 71).

In addition, they have an identical paragraph structure. All this suggests that *Hl* and *Ca* are closely related. Indeed, Stewart concludes that the two manuscripts have "only minimal differences," and since *Hl* is dated earlier than *Ca*, it is likely that the latter is a copy of the former. *La* also shares readings with these two manuscripts and thus is added to family *y*. An Elizabethan commission to examine "lewd persons" was instead to examine "lewd demeanors" in family *y*; and here a charter contrary to the law is to be "repelled" not "repealed."[148] These manuscripts also share the same title and are anonymous.[149]

Some distinctive variances, however, are limited only to *La*. In particular is the alteration or addition of legal references, details which are sometimes correct and other times not. The confirmation of Magna Carta at Marlborough is recorded incorrectly as chapter 1, but the case report in the 6th year of Henry VII is supplied with the correct plea number.[150] As *La* is the only manuscript without marginal text, there are no legal references in the margins. Some words or phrases are also written differently. "Whatsoever can be procured" is "whosoeuer can be protected," and in place of "hoores" is "others."[151] These are substantive differences which change the author's meaning. There are also some omissions, one in particular which is significant. The section regarding "two notable precedents in the time of king Edward the third" is missing.[152]

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[148] *A Discourse*, l. 165 n. 1057, n. 698; Among other examples see n. 793: "p" is actually correct instead of "4" as "p" refers to the case, or plea, number. Also, at n. 777 "not" is omitted.
[149] *A Discourse*, n. 654.
[150] *A Discourse*, l. 116 n. 925; l. 62 n. 797. See Seipp, 1491.020; Among other examples see n. 1175 where only *La* provides the citation "34.H.8.": see *Apparatus Fontium*, ll. 208-10; At n. 963 the 22nd year is erroneously cited instead of the 42nd. *La*, however, is the only witness to give the correct year for the previously cited 42, Edw. 3, c. 1: *A Discourse*, n. 936.
[151] *A Discourse*, nn. 870, 998; Another example, n. 966, has "Controuersie" for "Contencion."
[152] *A Discourse*, ll. 41-49 n. 756; The translation for "quod potestas principis non est inclusa legibus" is also not present: ll. 50-51 n. 762.

This is unlikely to be a scribal error. Therefore, unless *La* was copied from a source which also lacked this passage-and if it was, *Hl* could not have also descended from the same source-the omission appears to be intentional.[153] All this suggests that *La* may descend from a different hyparchetype, or at the least, within family *y*, *La* was written with considerable emendation; in this case, *Hl* would be much closer to its hyparchetype than *La*.

While *Hl* and *La* are dated to the late-Elizabethan period, the manuscripts in family *z* date approximately to the mid-seventeenth century. An example suggesting their later provenance is the reference to "Stacy" instead of "[John] Story"-a civil lawyer and Roman Catholic tried and executed for treason in 1571-which according to Stewart indicates "a lack of knowledge of Elizabethan legal events."[154] It is to these manuscripts that we owe the ascriptions to Bacon (*Lh*) and Fleetwood (*Or* and *Lm*). Moreover, it is within this family of manuscripts, including the 1643 edition, where the presence of *Or* is important.

Or, *Lm*, and *L* often share variant readings suggesting a close relationship between them.[155] Aside from some discrepancies, their paragraph structure and marginalia are the same.[156] The marginal notes also consist of textual references in addition to the numerical, for example "The Customes of the Realme,"[157] and these are

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[153] There is the possibility that it was omitted purposely due to the error in the reference. See *Apparatus Fontium*, l. 41, ll. 44-47.
[154] *A Discourse*, n. 732; Stewart, *OFB*, 50, 755.
[155] While these variances recur, they are not particularly significant. E.g. *A Discourse*, ll. 155-56 n. 1036: the inquiries of Commissioners "ought to be by Iuries and by noe *disscussion*" instead of "discression"; and at ll. 225-26 n. 1210, it was deemed illegal for a commission "to take any *ones* body without Indictmente" instead of "mans body" (emphasis added).
[156] *Lm* and *L* both diverge from *Or* in three of the same instances: they have two paragraphs instead of one, combine two paragraphs, and create a new paragraph where *Or* does not: *Or*, pp. 5, 13, 16; *Lm*, ff. 3, 7, 9; *L*, pp. 6, 12, 15. For discrepancies in their marginalia, see the *Apparatus Fontium*.
[157] *Or*, p. 1; *Lm*, f. 1v; *L*, p. 4.

not found, with the exception of "nota," in the other witnesses. *L*'s title has been considerably revised and lengthened with passages from the text; however, while they vary, the titles in *Or* and *Lm* are still similar in the initial phrase "a brief treatise or discourse of the validity or strength."[158]

All these similarities can be explained by the probability that *Or* serves as the parent manuscript for *Lm* and *L*. Stewart's analysis anticipates such a witness. Significant omissions in *Lm*, due to scribal error, indicate that it descends from *Or* and not vice versa.[159] The attribution to Fleetwood in the former, therefore, derives from the latter. Due to the omissions in *Lm*, *L* is closer to *Or*, and therefore *L* is based on *Or*. Thus, anonymous *L* does not retain the attribution to Fleetwood. Moreover, as Stewart points out, the possibility that the manuscripts are based on *L* is ruled out when considering the reference in the latter to "Queen *Elizabeth* of happie memory" while the manuscripts read "her Majesty that now is."[160]

While *Or*, *Lm*, and *L* share many readings, compared to family *y* these variances are minor in nature, indicating a closer relationship to *Lh*. Also, Stewart's *apparatus criticus* demonstrates that *Lh* is within the same family because it shares many readings with *Lm* and *L*.[161] However, the shared readings between *Or*, *Lm*, and *L* in my edition

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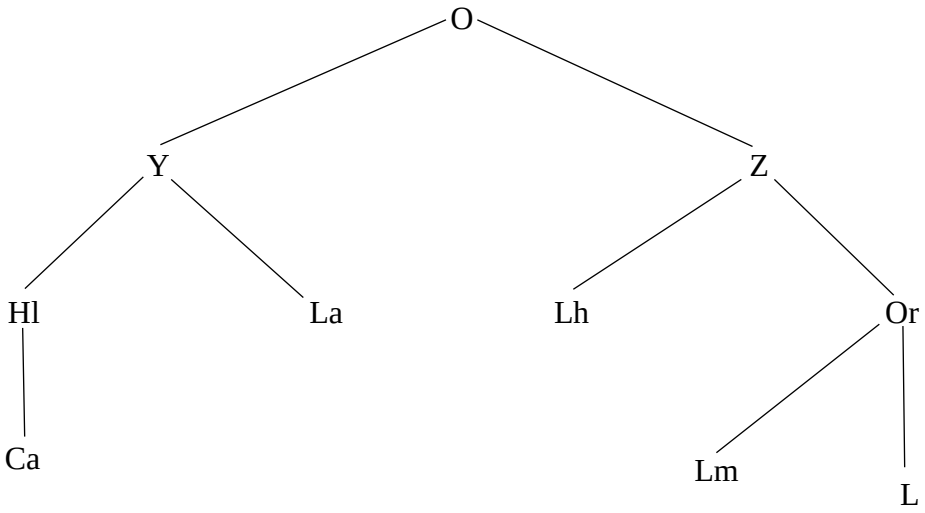
[158] *A Discourse*, n. 654.
[159] See L.D. Reynolds and N.G. Wilson, *Scribes and Scholars: A Guide to the Translation of Greek and Latin Literature*, 3rd ed. (Oxford: Clarendon Press, 1991), 226. There are six instances (*A Discourse*, nn. 827, 847, 958, 978, 1118, 1181) where the scribe "finding the same word twice within a short space, copies the text as far as its first occurrence; then looking back at the exemplar to see what he must copy next he inadvertently fixes his eye on the second occurrence of the word and proceeds from that point. As a result the intervening words are omitted from his copy." This "is sometimes referred to as *saut du même au même*" (jump from the same to the same). One other omission, n. 778, is a *homoioteleuton*. This mistake occurs "if two words in close proximity have the same . . . ending," in this case "Inherite" and "Fee." The scribe also omitted several marginal references in *Or*, though this was probably by choice and not error.
[160] *A Discourse*, n. 1053.
[161] Stewart, *OFB*, 51-60.

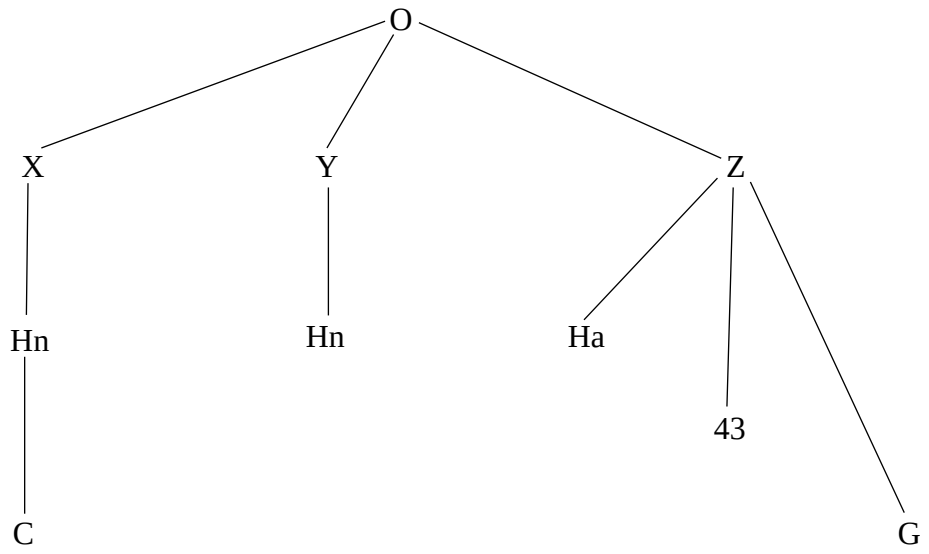
suggest that *Lh* is not related to them lineally. Another reason why *Lh* would not have a lineal relationship with these witnesses is the unlikelihood that an ascription would be altered. Aside from this, there are some readings to note peculiar to *Lh*, or as Stewart describes them, "multiple amendments, most of them clearly erroneous." The surname of the royal commissioner Sir Ambrose Cave is written as "Cape" which Stewart suggests implies a "lack of familiarity with Elizabethan figures."[162] The scribe has also written "discended" and not "defended" in regards to those who defend unlawful grants.[163]

These findings have resulted in the following possible stemma:



[162] *A Discourse*, n. 1054; Stewart, *OFB*, 47.
[163] *A Discourse*, n. 873; Here are two more examples which involve quoting statutes. See 1368, 42 Edw. 3, c. 3. The scribe has written that of "accused persons, some haue *time* taken" instead of "*beene* taken" (emphasis added): l. 136 n. 980; and in a curious but clearly incorrect wording, "unworthy" is given for "worthy" in describing those persons who should make up commissions in a statute from the same year, c. 4 (n. 1024).

Below is Alan Stewart's stemma from the Oxford edition:



The following is a list of the Oxford edition's *sigla*[164] with this edition's equivalent: *Ad=La*, *C=Ca*, *G=Lm*, *Ha=Lh*, *Hn=Hl*, *43=L*. Here you will note the same family groupings in *x* and *z*. There is, however, no explanation for the repeated placement of the Huntington manuscript under a separate hyparchetype (*y*). *La* was collated but is absent from this stemma. *Or* is not included in this edition though Stewart identifies a witness which is "in the same family as" *Lh* and which *Lm* and *L* are based on.

Finally, there are comparisons to draw from some general features found in the handwriting of these manuscripts. Each of the manuscript witnesses is written in a single hand and primarily in secretary script. The writing in *Hl* and *Ca* is in a relatively smaller hand than that of the other manuscripts. Use of the italic hand is found throughout the manuscripts except in *Lh*. Italic script is commonly used for French and Latin phrases

[164] Stewart, *OFB*, 44-45.

and in the abbreviations of monarchs. In *Ca* its use is more frequent, appearing also in the title, the incipit "Inter magnalia Regni," some proper nouns such as "William Montague" and "Isle of Wight," and in "Finis."[165] In *Or* some words are written with both secretary and italic script, such as "Principis" and "Possessio Fratris."[166] An engrossing hand is found among half of the manuscript witnesses. In *Hl* it is used for the beginning words "Inter magnalia regni," and in *Or* for the first three words of the title, "A Briefe Treatise," and in the very first word of the main text, "Inter."[167] *Lh*'s scribe makes more use of engrossing script, it appearing in the first three words of the title, the closing word "Finis," and in six instances for the first word of a new paragraph.[168] Both Roman and Arabic numerals are used in *Ca*, *Hl*, and *Lh*, but only Arabic are utilized in the other three manuscripts. All the manuscripts have a catchword at the bottom of their pages-depending on the witness, not every page-which was a common scribal characteristic during this time. It was, for example, a habit of the Feathery scribe, one he shared "with any printer of the period."[169]

Nineteenth Century Printed Editions

It has already been mentioned that the editions of Martin (1840) and Heath (1859) used *Lh* as their base text. Their revisions have made some considerable changes. Attempts have not been made to transcribe the manuscript text as it appears on the page. Modern conventions in spelling and punctuation are applied along with, at the discretion of the editor, changes in the use of majuscule and minuscule letters, Roman and Arabic

[165] *Ca*, ff. 1, 2, 8.
[166] *Or*, pp. 4, 7.
[167] *Hl*, f. 69v; *Or*, p. 1.
[168] *Lh*, ff. 127, 128-v, 129v, 130v, 135v, 137v.
[169] Beal, *In Praise of Scribes*, 60.

numerals, and paragraph structure. There are, of course, distinctive editorial features from each edition to point out as well as their particular transcriptions of *Lh*, and a comparison of these features and readings will demonstrate the extent to which the editors have revised their base text.

The major difference between the two editions is that Heath's involved the collation of a second manuscript copy. My *apparatus criticus* contains fifteen examples of shared readings between *Ca* and *H*. Second person "ye," as in "here ye see what the words of the said charter are," is instead "we." Within the phrase "trial at the common place or law," the words "place or" are omitted.[170] These examples indicate that readings from *Ca* were preferred to those in *Lh*. Granted these emendations are minor, and since the two manuscripts do not have any significant differences between them, there is no pronounced alteration of *Lh*. Yet the shared readings occur often enough to indicate copy-text editing; thus, Heath's edition is a conflation of the Harleian and Cambridge manuscripts.

Other variants in *H* were not based on readings from *Ca* but were the result of editorial intervention or misreadings of the text. Most of these are inconsequential. All French and Latin phrases are italicized. There are some minor omissions.[171] The abbreviation for "Parkes" was transcribed as "the King's."[172] An abbreviated form of

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[170] *A Discourse*, ll. 100-01 n. 903, l. 178 n. 1086. "Common place" refers to the Common Bench, or Court of Common Pleas. Another example is found in the phrase "but if you search the cause thereof, you shall finde the cause to be done by . . . Parliament" where the latter "cause" is emended to "same" (ll. 180-81 n. 1093); There are also those examples of erroneous readings in *Lh* (see above *s.v.* "Early Witnesses") which Heath clearly emended with readings in *Ca*. E.g. at l. 233 n. 1228 "these" is emended to "thus": Heath, "Professional Works," 516n1. In a notable instance where Heath did not emend a reading in *Lh* with the correct one in *Ca*, he retained the surname "Cape" (n. 1054).

[171] E.g. *A Discourse*, nn. 900, 1161.

[172] *A Discourse*, l. 199 n. 1146. The abbreviated form of "Parkes" (*Lh*, f. 136, l. 20) could have been mistaken for "King's" although the statute phrases it with the former: "An Acte agaynst unlawful hunting in Forestes & Parkes," 1485, 1 Hen. 7, c. 7; Another example is at l. 165 n. 1057 where Heath has "lewd

plural "governors" is read as singular.[173] Some changes were made to emend the text. One of these is a negative Heath has added conjecturally in brackets: "the King may not grant . . . that J.S. shall [not] be sued."[174] *La* is the only witness which offers a negative here, and a reference to the case report shows that this is the correct reading.[175] Heath also emended and supplemented information to legal citations. He corrected the citation of statutes and case reports in those instances where a regnal year or chapter number was incorrect, and for the majority of the year books, when he "succeeded in lighting upon it," he added the folio number(s).[176]

C is appended to Martin's reports of which he is the author and editor. Unlike *H,* Martin's edition does not have an introduction or any additional notes. Quotations are used for citing text from statutes, Latin phrases, and certain words, such as "unworthy" and "discended," which were of concern to the editor, perhaps due to what he considered a peculiar scribal reading or error.[177] Three times parentheses enclose words providing an emendation or an alternate reading.[178] Martin also italicized certain words for no clear reason.[179]

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prisoners" for "lewd persons." This could have been an amendment and not an error. See Patent Rolls, 1560-63, 4 Eliz. 1, pt. 1, m. 2d, p. 237: "costs [are] to be allowed to persons bringing up prisoners and others for examination."

[173] *A Discourse,* n. 889; *Lh,* f. 131v, l. 21. A supra-lineal *rs* is not noticed here.

[174] Heath, "Professional Works," 511n1.

[175] See *Apparatus Fontium*, ll. 70-73; For another example of an emendation see Heath, "Professional Works," 513n and *A Discourse,* n. 987. Heath emends this "clerical error" in quoting from 1368, 42 Edw. 3, c. 3.

[176] Heath, "Professional Works," 509n2; E.g. see Heath, 510n2 where he corrected the regnal year for YB Mich. 37 Hen. 6, pl. 3 (1459.026).

[177] Martin, "Bridewell and Bethlem Hospitals," 576-78. Two other examples are "sett" (577) and "notoriously" (578). For the latter, for which Martin emended the spelling, see *A Discourse*, n. 1223.

[178] Martin, "Bridewell and Bethlem Hospitals," 577. For the emendation see *A Discourse*, n. 980, and for the alternate readings see nn. 955, 1117.

[179] Martin, "Bridewell and Bethlem Hospitals," 576-77: presidents, hoores, sanctuary, preivy, rate, taxation, and counsell.

Since Martin's edition is based solely on *Lh*-and considering also that *The Works of Francis Bacon* probably called for more editorial intervention than Martin's reports where *A Discourse* was merely an appended text-the expectation is that *C* would vary less from its base text than *H*. To some extent this is true. Unlike Heath, Martin has not emended those readings in *Lh* which are clearly erroneous. "Through tolle" is still "trough-toll," and John "Stacy" is not corrected to "Story."[180] Also, incorrect statute and year book citations in *Lh* are not corrected as they are in *H*.[181] Nevertheless, variances in *C*, whether they are clearly erroneous readings of *Lh* or intended as emendations, indicate that Martin's edition diverges from its base text, though still not altering the text to any great extent. As in Heath's edition, here there are some minor omissions.[182] Some of the variant readings are emendations: "royal" for "Regall" and "or" for "and" in "Stacy would have renounced his loyalty and subjection."[183] Others are clearly erroneous or inaccurate readings of *Lh*. The custom of "Burrough English" is transcribed as "Bow English." In the phrase "the proceedings in Bridewell . . . are not sufficient . . . without Indictment," Martin's edition reads "in that indictment."[184]

In sum, the extent of editorial intervention distinguishes each edition. Compared to *C*, Heath's emendation has created a more accurate edition which corrects the flawed readings in *Lh*. In this respect, Martin's edition is a closer representation of *Lh*. Yet, as

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[180] *A Discourse*, l. 59 n. 787, n. 732; See also l. 23 n. 696 where "quo warrant" is not emended to "quo warranto"; and ll. 110-11 n. 919 where the reading "the kinge graunteth *from* him" is not emended in *C* to "*for* him" (emphasis added) which is the reading consistent with the translation of "pro" in the statute: *Apparatus Fontium*, ll. 110-14, 124-27.
[181] E.g. *A Discourse*, nn. 766, 1099.
[182] E.g. *A Discourse*, nn. 907, 1208.
[183] *A Discourse*, n. 723, l. 35 n. 733.
[184] *A Discourse*, l. 56 n. 776, ll. 143-45 n. 1002; Among other examples see ll. 76-77 where the phrase "he hould of the kinge but by posteriority" is instead read in *C* as "he should of the king's but by posteriority" (n. 839) and this in quotations; The first appearance of the initials "J:S:" are written as "F.G." (n. 820).

shown above, it too involves some considerable intervention. Both editions diverge from their base text. Again, no significant changes are made to the text in either edition. Nevertheless, incorrect or altered readings of the base text detract from a more accurate representation of *Lh*. The goal of this edition is to provide a close transcription of *Lh* with correct and unaltered textual readings, little emendation, and an *apparatus criticus* and an *apparatus fontium* which address the flaws and particular readings found in *Lh* and these previous editions.

Editorial Principles and Conventions

Multiple sources, most of them accessed online, were consulted in the creation of this edition. Some were crucial to the process of accurately reading sixteenth and seventeenth century secretary hand.[185] A select few were key in guiding and establishing the editorial policy followed here.[186] As discussed above, the aim of this edition is not to establish a text with the "best" readings, but to preserve the manuscript's text as written. Nevertheless, no attempt has been made to produce a diplomatic transcription; what follows is a semi-diplomatic transcription. The main source for the transcription conventions utilized here is an online English handwriting course edited by Andrew Zurcher of Gonville and Caius College, Cambridge.[187] I have made other editorial

[185] Giles E. Dawson and Laetitia Kennedy-Skipton, *Elizabethan Handwriting 1500-1650* (New York: W.W. Norton, 1966), introduction at 3-26, handwriting exemplars and their transcription at 28-126; Ronald A. Hill, "Interpreting the Symbols and Abbreviations in Seventeenth Century English and American Documents," accessed March 16, 2018, https://bcgcertification.org/wp-content/uploads/2013/05/Hill-W141.pdf; "Common Abbreviations," accessed March 16, 2018, https://emmo.folger.edu/wp-content/uploads/2015/01/Early-Modern_Abbreviations.pdf.

[186] Stewart, *OFB*, lvii-lx; "Text Edition: Supplement to the Guide Sheet for PhD Dissertation Preparation," Centre for Medieval Studies: Univ. of Toronto, last revised January 1, 2012, http://medieval.utoronto.ca/wp-content/uploads/2011/06/editionsguide.pdf.

[187] Andrew Zurcher, ed., "Basic Conventions for Transcription," English Handwriting, 1500-1700: An Online Course, last updated March 11, 2018, https://www.english.cam.ac.uk/ceres/ehoc/conventions.html. Other resources on this website were very helpful both in reading the handwriting and transcribing it, in particular the examples of letter graphs and the sample transcriptions.

choices at my own discretion. What follows in this section are the principles and conventions for transcription, the *apparatus criticus*, and the *apparatus fontium*. Establishing the principles for transcription simultaneously necessitates a discussion of the scribal features of the base text.

Transcription

As previously discussed, Peter Beal has identified the hand of an amanuensis who worked under the "Feathery Scribe" in a professional scriptorium and closely adopted his style. I have shown that this "imitator" composed *Lh*. Although he does not reproduce the finesse and balance of Feathery, the imitator adopts some of Feathery's signature characteristics in his use of engrossing script, textual layout, ornamentation, abbreviation, spelling, and punctuation. These similarities will be highlighted throughout this section as I outline the scribal features in the base text and the editorial choices made to transcribe them.

Lh is the only manuscript witness with a title page (f. 127). The title is centered on the page with right-justification and reads in four lines, "A Breiffe Discourse vppon the Commission of Bridwell, written by Sir Frauncis Knight." The next folio (127v) is blank and has not been retained. The title is repeated as the heading on the first page of text (f. 128) with the addition of "Bacon" in the ascription and ending with an ampersand. The title here is also written in four lines with right-justification. While the lineation of the titles has been retained, their right-justification has not but the text is centered. All twenty folios of text are written with right and left-justification with no indentation. Lines per folio range from seventeen on the last to twenty-three. The last folio of text (137v) ends with "Finis" centered within the margins near the bottom of the page with

ornamentation beneath. The scribe writes in a secretary hand but also uses an engrossed script for "Finis," the words "A Breiffe Discourse" in the title, the first word of the main text ("Inter"), and for five other words at the beginning of new paragraphs. An exemplar of Feathery's title page, end page, and a first page of main text demonstrates how *Lh*'s scribe made identical use of Feathery's title page format and placement of engrossing script.[188]

Yet, while the imitator modeled Feathery's style in many ways, according to Beal the former could not achieve the skill of the latter. Feathery's script has a certain finesse with a light touch which is just not present in the hand of his imitator whose "relatively uneven, unbalanced lettering" is marked more consistently by heavier, thicker strokes.[189] Therefore, the greatest difference between their compositions is in the handwriting itself. That said, *Lh*'s scribe, like Feathery, writes with standard secretary letter forms. A typical example is the use of the varied forms of certain minuscule letters. This includes minuscule *r*[190] and two forms of lowercase *v,* one used initially and the other both medially and initially.[191] The common practice of writing *C* is applied here with frequency appearing in such words as "Cannot" and "Chaunge." As typical in the secretary hand, minuscule *n*s and *u*s are virtually indistinguishable. The times where this presented a problem, consideration of the word's context, the scribe's orthographical habits, and common ways of spelling the word in question prompted a particular spelling in the transcription. Yet even then a word like "amongst" in one case may have been

[188] Beal, *In Praise of Scribes*, 61, plate 26, 64, plate 27, 65, plate 28.
[189] Beal, *In Praise of Scribes*, 84.
[190] Cf. the medial *r*s in "wordes," (*Lh*, f. 132, l. 12) "compare," and "charter" (f. 132v, l. 2). "Charter" has what appears to be the anglicana long "r" used in the early sixteenth century.
[191] Cf. "void" and "avoid" (*Lh*, f. 129, ll. 14, 17) with the strictly initial *v* in "vppon" (f. 128, l. 2).

either “amonngst” or “amoungst.”[192] The two words “see” and “soe” can be indistinguishable due to the similar letter combinations of *ee* and *oe*. In one of these instances, I transcribed what appeared more closely to be “see” while most of the other witnesses give “soe.”[193]

There are some traits to point out distinct to this scribe. A feature in his minuscule *a*s and *t*s has been mentioned above. What resembles a slash ascending from the top of lowercase secretary *a*s is here disconnected from the letter and written consistently above it. Minuscule *t*s, while sometimes consisting only of a body, can be found with a c-shaped head-stroke joined at the top or disconnected above.[194] Minuscule *k*s are only used except for the *K* written in “Knight” on the title page. Lowercase *g*s are written either with a looped descender or descend in a thicker, curved stroke. In one instance, the *g* in “governors” is written in an italic hand, but this has not been rendered as such.[195] The common tall *s*, or “hooked” *s*, while used medially, is not written initially. The scribe uses the typical terminal *s* and initially and medially a *s* with a narrow-looped ascender and a large-looped descender.[196] The two *n*s that are capitalized in the manuscript are written at the start of a new paragraph; one, however, is written in an ornamental fashion which made it difficult to initially identify.[197] The scribe’s ascender in *H*, similar in its shape to a figure eight, closely resembles that of his *L*.[198]

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[192] *Lh*, f. 132v, l. 7. This was transcribed as “amoungst” in *A Discourse*, l. 110.
[193] The “see” in “See thereby it appeareth”: *A Discourse*, l. 67 n. 808 and *Lh*, f. 130v, l. 15.
[194] E.g. “estates” in *Lh*, f. 128v, l. 10.
[195] Cf. the *g*s in “giue” and “graunte” in *Lh*, f. 135, ll. 7, 17; For the italic *g* see f. 135, l. 11.
[196] *Lh*, f. 129v: cf. the *s*s in “was” at l. 2 and in “release” and “subieccion” at ll. 4-5.
[197] *Lh*, f. 132, l. 14.
[198] Cf. “Hen” and “Lawe” in *Lh*, f. 130v, ll. 2, 5.

The scribe capitalizes *R* fairly frequently, as he does with *C,* in words such as "Resolute" and "Referred." Majuscule *V* and *Y* are used only rarely.[199]

A common difficulty in reading secretary hand is distinguishing majuscule and minuscule graphs, and *Lh* was not an exception. In these instances, they often appeared to be lower case and were transcribed as such, though there was cause for uncertainty. Some had distinct majuscule forms, yet variations between the scribe's regular use of a letter's upper and lower case graphs occurred. *L*s were for the most part distinct, but for the commonly capitalized "Lawe" it was ambiguous at times whether the initial was majuscule.[200] For other letters in this category, a distinguishable majuscule was difficult to detect. For example, the *D* in "Darby" appears majuscule but is similar to other lowercase graphs.[201] The only confident example of a *W* is in "Wales." Most other uncertain examples appear more lowercase, even with such proper nouns as "william" and "weight."[202] Finally, spacing between letters and words is unbalanced and inconsistent. Initial, medial, and terminal letters are disconnected from their word where in other places they are not. Two or more words can be joined together and others are difficult to distinguish whether they are one word or two.[203]

Layout

This current transcription is a representation of the text only. Therefore, no attempt has been made to preserve ornamentation. This occurs in three places and

[199] *Lh*, f. 131v, l. 6, "Yett," f. 132, l. 5, "Vagaboundes," and f. 137, l. 5, "Volume." Whether an initial *v* was majuscule or minuscule was sometimes difficult to say with certainty, yet these two examples defined this scribe's majuscule graph which did not occur anywhere else.
[200] E.g. *Lh*, f. 130v, l. 3.
[201] Cf. "Darby" (*Lh*, f. 129v, l. 19) with "dominion" (f. 130, l. 2).
[202] *Lh*, f. 136v, l. 15, f. 129v, ll. 15-16.
[203] At *Lh*, f. 137, l. 12, see a string of four connected words; f. 131v, l. 7: "whatso ever" or "whatsoever"?

includes those embellishments which are characteristic of Beal's Feathery scribe. So much does Feathery's imitator replicate that Beal's description of Feathery's ornamentation can be used to describe those embellishments in *Lh*. On the title page, the title itself is "enclosed within two sets of heavily inked double rules terminating in sinuous, leaf-shaped flourishes at each end, the rules both surmounted and subscribed by circular, spiraling flourishes." The "Finis" on the last page of text is "followed by a double rule with the same terminal leaf-patterns as on the title-page, and similar spiraling beneath." Lastly, this also includes decorative lettering of the engrossed script which is characterized by "wispy, feathery loops and trailers."[204]

Beginning with folio 128 verso, folio numbers are inserted in brackets. Paragraphing in *Lh* has been maintained.[205] Lineation has not been preserved, and so the "=" which functions as a hyphen in indicating the division of a word at the end of a line has been omitted. Line fillers have also been omitted. Catchwords, located in the bottom margins on every page of the text (ff. 128-137), have not been recorded. Marginalia have been recorded in the *apparatus criticus*. The scribe writes in a secretary hand and there is no italic hand, therefore the only script that needed to be distinguished was the engrossing and this is indicated with bold type.

Abbreviation

Lh's scribe writes with a variety of common abbreviations from the time period. These include both contractions and suspensions. Contractions in *Lh* have been

[204] Beal, *In Praise of Scribes*, 63, 84.
[205] The scribe does not indent, so in one instance where the beginning of a new paragraph is not clear because in the line above the statement concludes at the very end of the line, I have not started a new paragraph. The line ends with "soyle" and the next begins with "And": *Lh*, f. 131, ll. 5-6 and *A Discourse*, l. 74.

expanded, superscript letters silently lowered, and supplied letters italicized. Most of these are standard and the supplied letters consistent with the scribe's orthographical habits and other similarly abbreviated forms in the manuscript.

A frequently used mark of abbreviation is the tilde. Like Feathery, his imitator makes use of a looped tilde.[206] This indicates the omission of single letters, here mostly the second *m* such as in "common," but it is also used to omit various letter combinations, some in words terminating in superscript letters. A common example is the omission of *en* in words such as "Parliamente."[207] Another tilde more closely resembles the modern tilde with a forward slash through it. This is often used to omit an *i* in words ending in *-cion* such as "subieccion."[208] Another common contraction is the supra-lineal *r* loop. L.C. Hector describes this as "a backward curve terminating in a bold pendent comma."[209] Here the *r* loop is written medially to indicate an omitted vowel or terminally in conjunction with a superscript *s* in a plural word. In both cases, the *r* is silently lowered.[210] It is employed here in its common use as omitting the *e* in words beginning with *pre* as in "presidentes." It is also used to abbreviate "Sir" and in one instance "Parkes" by omitting the *a*. The scribe uses the *-er* graph less often. This is a hook-shaped upstroke which omits *er* as in "gouernors" and is used once to omit *ar* in "marle bridge."[211] The scribe utilizes the common *p* abbreviations by altering an initial

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[206] Beal, *In Praise of Scribes,* 60, 61, plate 26. For the imitator's use of the tilde see the exemplar on p. 86, plate 50.
[207] *Lh*, f. 128v, l. 8. For "Ten*en*tes" (f. 131, l. 10) it was not clear what the supplied letters should be. Other options included *an* or *aun*, however, I chose *en* because this was a regular omission in other words.
[208] E.g. *Lh*, f. 129, l. 20.
[209] Leonard Charles Hector, *The Handwriting of English Documents*, 2nd ed. (London: Edward Arnold, 1966), 31.
[210] E.g. *Lh*, f. 131, l. 13, "pr*e*rogatiue." For an example of the terminal superscript *rs* see f. 131v, l. 21, "gouernors."
[211] *Lh*, f. 132, l. 2 and f. 132v, l. 18.

p's descender to omit the *ar* in "Parliament."[212] Although the crossbar is convex and not concave in the word "proces," it has been supplied with *ro*.[213]

Italicized letters are also supplied for suspensions and other terminal omissions. The *-er* graph is used once terminally for "comission*er*."[214] The scribe also uses a similar hook-shaped upstroke which instead loops around to the right for the omission of the terminal letter in "nullum" along with the omission of terminal *e* in "Courte" and "Parliamente."[215] Four other words have terminal omissions which were supplied with the appropriate letter.[216] Abbreviations in legal citation have been silently expanded, but if the scribe did not give a tilde or macron, the word was not expanded. These include the abbreviated forms for the following expansions: Anno, Capitulum, Assises, liber, Edward, Henry, and Elizabeth. Unlike other abbreviations, colons are not omitted in these expansions since their stylistic use is a key feature in legal citation. The frequent use of the abbreviation for *et cetera* has been silently replaced by "etcetera." The fossil thorn (þ) and the terminal *-es* graph have been silently expanded to "th" and "es" respectively. Unlike the latter, the former is rarely used.[217] Otiose tildes or macrons used over words which did not require expansion have been ignored.[218]

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[212] *Lh*, f. 133, l. 13 and f. 136v, l. 22.
[213] *Lh*, f. 135v, l. 11; Zurcher, "Basic Conventions for Transcription," *s.v.* "*p* abbreviations."
[214] *Lh*, f. 137, l. 23.
[215] *Lh*, f. 131, l. 18; f. 136, ll. 16-17.
[216] "Same" (*Lh*, f. 137, l. 23) and "the" (f. 131v, l. 10) were terminal *e* omissions; "you" (f. 135v, l. 6) and "although" (f. 137v, l. 7) indicated a terminal omission with a macron. Another terminal omission with no abbreviation was "eyther" (f. 128v, l. 17). See also "que" at f. 128, l. 5 which consists of an upward looped tail on the "q" to omit "ue."
[217] The fossil thorn appears at least four times, thrice as a thorn (*Lh*, ff. 129v, l. 3, 130v, l. 11 and 134, l. 3) and the other time as a "y" (f. 137, l. 9).
[218] Two examples where I did not supply a letter are "warrens" (*Lh*, f. 136, l. 20) and "licences" (f. 136v, l. 20).

Orthography

Feathery's characteristic orthography is reflected in spellings of the base text. Beal maintains that the spellings are "not peculiar to Feathery, nor particularly eccentric" but "do have an element of luxuriance." It is "essentially Elizabethan: the kind of spelling which survives in the early Stuart period . . . but which comes increasingly to be seen as archaic . . . It may well reflect a certain resistance to change which was perhaps a tendency of clerks and scriveners in general." Similar spelling habits found in *Lh* include the liberal use of vowels, particularly the common terminal *e* and the diphthongs *au* and *ou* as in "auncient" and "revoulte"-a spelling which Beal takes as "a phonetic reflection of contemporary pronunciation."[219] Another common characteristic from the time period found here is the doubling of consonants, such as in "yett" and "vppon." There is the typical interchangeability of the endings *y* and *ie*. Repeated words in the manuscript can be spelled in more than one way; for example, "misdemeanors" is also spelled "misdeameanors" and "misdemeannors." Two examples that are peculiar to *Lh* are "tempas," which again may be a phonetic spelling, and what appears to be "notorishedlye" which was emended in this edition.[220]

On the whole, spelling has been retained. The exception is where several emendations were made to spellings in *Lh* for sake of clarity.[221] Also, in the case of non-abbreviated words where a letter was not fully formed-such as in the absence of a minim or an illegible letter-or not written at all, and this often occurs at the end of a line, I have

[219] Beal, *In Praise of Scribes*, 62-63.
[220] *A Discourse*, nn. 852, 1223. For "notorishedlye" in *Lh* see f. 137v, l. 5.
[221] *A Discourse*, nn. 666, 671, 772, 787, 1019, 1072, 1223.

silently supplied the appropriate letter(s) that was needed.[222] The usage of *u*/*v* and *i*/*j* has been retained. Minuscule *v* is used initially and medially while *u* is only found medially. In the three instances where a *J* was written as an initial, this was still transcribed as *I*.[223] The scribe's use of minuscule and majuscule letters has been retained. One exception is where I have supplied periods to mark the end of a sentence; here I have capitalized the first word of the new sentence if its initial letter was minuscule.[224] Proper nouns with initial letters appearing to be minuscule were capitalized. The *ff* form of *F* has not been retained.

Spacing between words has been retained to an extent, for example in the common use of "shalbe." The scribe's word divisions were not always clear in the case of some compound words; these have been joined together.[225] In other instances, joined words have been separated for readability purposes.[226] Numerals have been transcribed as they appear in the base text, whether Roman, Arabic, or mixed. The only use of *j* is as a Roman numeral located terminally in a sequence (e.g. "vij") and by itself denoting the number one. In the latter case, the distinction between a "j" and a "1" was at times unclear.[227] Deleted words in *Lh* are crossed out with horizontal lines in the same color ink as the text. These are indicated in the *apparatus criticus*.[228] Scribal emendation of letters has not been recorded. This refers to any indication where the scribe has made

[222] In more than one place (see *Lh*, f. 135v, l. 18 and f. 136, l. 12) where "Anno" is not abbreviated, it lacks a minim and instead is spelled "Amo." The *ur* in "Canterbury" (f. 136v, l. 22) is not written legibly and the attempt to fit "meaninge" at the end of a line (f. 133, l. 17) resulted in the omission of the second *n*.
[223] *Lh*, f. 130v, l. 21 and f. 131, ll. 2, 4.
[224] E.g. *A Discourse*, l. 137, the *i* in "it" was capitalized.
[225] E.g. *Lh*, f. 131, l. 13: "not withstandinge."
[226] E.g. *Lh*, f. 131v, l. 12: "suchsorte."
[227] E.g. see the statute citation in *Lh*, f. 136, l. 12.
[228] E.g. see the deletion of "Realmes" in *Lh*, f. 128v, l. 16 and *A Discourse*, n. 689.

alterations to a letter, such as when the pen has gone back and traced in the correct letter.[229]

Punctuation

Beal observes that Feathery has a "peculiar, indeed highly idiosyncratic, sense of punctuation . . . [it] is simply an extension of his decorative tendencies-used as yet another form of stylistic flourishing and ornamentation-for visual effect, not for its grammatical significance."[230] Once again, Feathery's imitator adopted this style in *Lh*. He also writes with commas, semicolons, colons, full stops, virgules, and these in combination with each other. Yet it should not be said that this form completely lacks consistency or does not serve grammatical purpose. Therefore, this distinct type of punctuation, for the most part, has been retained. There are a few things to note about its use.

Generally speaking, in some places it was difficult to identify a particular punctuation mark.[231] Commas are used frequently and sometimes they appeared faintly on the page, or the terminal letter of the word preceding a comma interfered with it making it difficult to detect. Nevertheless, an indication of a comma, even if ambiguous, has usually been transcribed as such. However, in some instances where a terminal letter trails downward possibly indicating a comma, these have not been given.[232] The scribe did not always write full stops at the conclusion of a statement; thus for the sake of readability, I have added periods where this occurs and these are enclosed in brackets. A

[229] E.g. *Lh*, f. 132v, l. 12. "Broken" is initially written "brogen" but the scribe has added an ascender to the "g" to make it a "k."
[230] Beal, *In Praise of Scribes*, 62.
[231] E.g. *Lh*, f. 132v, l. 18. There is a marking between "marle" and "bridge" which may indicate hyphenation, but I ultimately had difficulty identifying it.
[232] Examples of these can be found in *Lh*, f. 131.

comma was also added in this fashion to distinguish "Empson" and "Sheffeild" as two different people.[233] Colons are also used frequently, especially in legal citation; here a colon's obscurity, such as when its two points are joined together or when it more closely resembles a semicolon, has not prevented the rendering of a colon for the sake of consistency.[234] I ignored markings which I could not either identify or determine their grammatical function. For example, above several words and adjacent to numbers in legal citation there is a supra-lineal marking which resembles an apostrophe.[235] Feathery uses a similar marking in an example of his engrossed hand which Beal describes as "little flicked inverted apostrophe marks."[236]

Apparatus Criticus

To reiterate, all extant manuscript witnesses, the 1643 print, and the two publications from the mid-nineteenth century are collated in this edition. Each has been identified with a *siglum*. The *sigla* used in the Oxford edition are not adopted here. The choice of *sigla* and collation had well begun prior to awareness of Stewart's edition. Also, in order to distinguish between the printed editions and the manuscripts, I have denoted the former with a one-letter *siglum* and the latter with two letters. *Sigla* for the early witnesses are connected to their archival location, whether that includes city, library, and/or a particular collection within a library (e.g. *La* stands for "London Additional," referring to the manuscripts of the Additional collection at the British Library in London).

[233] *A Discourse*, l. 158.
[234] E.g. *Lh*, 134v, l. 6.
[235] *Lh*, f. 130v. See l. 2 after "49" and l. 18 after "the."
[236] Beal, *In Praise of Scribes*, 60, 61, plate 26.

C Martin, ed., *Thirty-Second Report of the Commissioners,* 1840, 576-78.

Ca CUL, MS Ee.2.30, ff. 1-8.

H Heath, ed., *The Works of Francis Bacon*, Volume 7, 1859, 509-16.[237]

Hl Henry E. Huntington Library, FBL MS 30, ff. 69v-71v.

L BL, Thomason Collection, E.38[12].

La BL, Additional MS 11405, ff. 41-45.

Lh BL, Harley MS 1323, ff. 127-137v.

Lm LMA, CLC/539/MS09384, ff. 1-9v.

Or Bodleian Library, Oxford, Rawlinson MS D. 708, pp. 1-18.

This edition furnishes a comprehensive *apparatus criticus*. A single bank of footnotes contains both substantive and minor variants found across witnesses, deletions and marginalia in the base text, and emendations made to the base text. The following list of abbreviations are used to identify the various types of readings:[238]

1. *ac* (the reading before a correction)

2. *add*. (text that was added after the *lemma*)

3. *add. in marg.* (text that was written in the margins)

4. *conj.* (indicates where a scholar has emended the text based on conjecture)

5. *exp.* (text that has been deleted; here by crossing out the word(s) with the pen)

6. *homoiotel.* ("*Homoioteleuton*: indicates an omission due to the similar endings

[237] I collated a new edition of 1879.

[238] For most of these abbreviations I consulted Karl Maurer, "Commonest Abbreviations, Signs, etc. Used in the Apparatus to a Classical Text," accessed March 15, 2018, http://udallasclassics.org/maurer_files/APPARATUSABBREVIATIONS.pdf.

of successive words, phrases, or sentences; a visual error: the scribe's eye skips from the first to the second, in effect omitting the text between them.")[239]

7. *illeg.* (illegible text)

8. *iter*. (text that was repeated or written twice)

9. *lac.* (indicates a lacuna, or gap, in the text)

10. *om.* (text that was omitted)

11. *pc* (a reading after a correction; the corrections here involve expunged text)

12. *praem.* (text that occurs before the *lemma*)

13. *s.l.* (text written above the line; here with a caret below the line indicating insertion)

14. *transp.* (text that has been transposed)

For the most part, spelling variations have not been recorded. Exceptions included differences in Latin spellings and English ones of earlier French origin, certain proper nouns, singular and plural words, and also where different verb tenses were used.[240] All accidental variations in legal citation have been distinguished. This includes differentiating Roman, Arabic, and written numerals of equal value. I have recorded these accidental variants in order to show stylistic differences across witnesses. Corrections made by deletions or supra-lineal insertion among the manuscript witnesses have been recorded. Illegible script in the early witnesses due to blotting, damage, or otherwise has been noted. Variations between witnesses of capitalization, word division, punctuation, paragraph breaks, italicization, and engrossing script are not recorded.

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[239] "Signs, Symbols and Latin Abbreviations of Nestle-Aland," Reference Charts for New Testament Criticism, accessed March 1, 2018, http://www.viceregency.com/NA27symbolsabbrev.pdf.
[240] E.g. *A Discourse*, nn. 759, 802, 750, 1044, 678.

Eight emendations based on readings from the early witnesses were made to *Lh* and these are noted here.[241] Only the marginal insertions of the base text have been recorded. Supplied letters in the transcription of the base text have not retained their italicization in the *apparatus criticus*. Contracted and un-contracted forms of words have not been differentiated. For those abbreviated words in variant readings, supplied letters have not been italicized; this includes the fossil thorn and the *-es* graph. The ampersand has been rendered as "etcetera" or "and" accordingly.

Differences between witnesses are recorded with footnotes following the word or words included in a particular variant. The *lemma*, or reading from the base text, is recorded in every variant listing. The *lemma* is differentiated by a right square bracket followed by the variant reading, if a particular type of variant the appropriate abbreviation specifying it, and the *siglum* or *sigla* which have that reading. If more than one witness shares a reading, those *sigla* are listed in alphabetical order. Only the abbreviations are italicized. For example:

purpose] proofe Ca

Answere] But *praem.* L Lm Or

Where different witnesses have different readings these are separated by semi colons. The *lemma* is not repeated, but the same one applies to this reading, though in some cases a new *lemma* is introduced. A general rule is to refer to the most recent *lemma* in a variant reading sequence. For example:

enheritance] heneritanus Ca Hl; Inheritance L La Lm Or

x1xth-6th] 19th Hen.V. C; in the x1xth-6th] 19.Hen.6. La

[241] *A Discourse*, nn. 666, 671, 772, 787, 795, 1019, 1072, 1223.

The varying titles of the manuscripts and printed editions have been noted. The variant text for the titles pages of *H* and *L* are recorded on the title page of this edition.[242] Quotations and parentheses in *C*, and the added year book folios and any direct references to footnotes in *H*, are not recorded in the *apparatus criticus*.

Apparatus Fontium

Principles

The source apparatus follows the edition in the form of endnotes. Each entry in the *apparatus fontium* begins by identifying with line numbers and the *lemma*(*ta*) the text in question. The entry includes the location of a source (e.g. Magna Carta, 1225, 9 Hen. 3, c. 29) and any necessary quotation. Material not written in *A Discourse* is also quoted in those circumstances where the author has alluded to the text in the source or where additional quotation provides further explanation and context. Additional commentary is provided to discuss any significant variant readings, some of which supply a correct (or incorrect) citation or an accurate reading that is more consistent with what is written in the source; to clarify where the author was clearly in error or where there is a significant discrepancy between what is written in the text and what is in the source; and generally to elaborate on the source or any other significant point. I have indicated where I was unable to locate a particular source or where a reference was difficult to identify, and in the case of text which does not have some form of citation, I have provided sources for comparison or identified the likely source.

The primary legal authorities cited here are the year books and statutes. All English and law French quotes contained in the former come from David J. Seipp's

[242] *A Discourse*, nn. 652, 654.

online database unless otherwise indicated that the quote derives from the vulgate edition (1678-80) which Seipp provides in a link to its digital format; in this case, letters are supplied in italics for abbreviated words, as they are also in quotes from Sir Robert Brooke's *La Graunde Abridgement* (1573). Folio numbers are provided in the *apparatus fontium* to identify the location of the text in the vulgate edition. All quotes from statutes are given in English as written in the *Statutes of the Realm*; here as well supplied letters are italicized. Quotations from statutes are not supplied if the author's quoting or paraphrasing of the act are consistent with the statute itself. At the end of each entry, citation which varies from the base text is given with the corresponding *sigla*. This includes any marginal writings that vary from those in *Lh* or where witnesses have omitted or added the like; this excludes *C, H,* and *La* which do not have any marginal text. Some entries are written solely for the purpose of indicating where marginal text has been added in *L*, *Lm*, and *Or*.

Textual Commentary

This explanatory section functions as a supplement to the *apparatus fontium*. Its purpose is to provide more context and to clarify any ambiguity in the way the author has referenced the sources. It concludes with an explication of two legal principles applicable to the author's argument that the king is limited by the law. After scrutinizing the sources in the first half of *A Discourse*,[243] I made the decision to end the commentary there so that I could move on to the arguments in the next chapter. Nevertheless, the analysis in chapter three takes the remaining sources into account.

[243] *A Discourse*, ll. 5-85.

Introduction

In the century prior to *A Discourse,* royal judges had spoken of the authority of the law in relation to the king. In the *Rector of Edington's Case* (1441), most of the justices argued for the king's position that a grant in the time of Henry IV discharging the rector's "successors from any tax, tallage, or tithe" was not something within the king's authority at the time of the grant, and therefore the grant was void. In addition, Chief Justice Newton said that it was "against the law that the king will not have a subsidy from his lieges in his necessity." Chief Baron John Fray asserted the king's right to the tithe as a revenue of Parliament which was granted to the king by his clergy in the last parliament (1439). Fray stated:

> Parliament is the king's court, and the highest court he has, and the law is the highest inheritance that the king has, because by the law he himself and all his subjects are ruled, and if there were no law, no king nor inheritance would be: thus by his law he is to have all amercements and revenues of his courts.[244]

This was an assertion of the principle *lex facit regem* (the law makes the king).[245] Fray's statement was utilized later in Elizabethan and Stuart argument. The Puritan barrister Nicholas Fuller alluded to it when he challenged the illegal actions of the High Commission: "the lawes of *England* are the high inheritance of the Realme, by which both the King and the subjects are directed."[246] Chief Justice John Popham quoted Fray

[244] YB Pas. 19 Hen. 6, pl. 1 (1441.028).
[245] *Bracton Online*, ii. 33; Baker, *Reinvention of Magna Carta*, 342-43.
[246] *The Argument of Master Nicholas Fuller, in the Case of Thomas Lad, and Richard Maunsell*, [s.l.] : Imprinted [at William Jones' secret press], 1607, 3, *EEBO*, accessed June 25, 2017, <http://gateway.proquest.com.databases.wtamu.edu/openurl?ctx_ver=Z39.88-2003&res_id=xri:eebo&rft_id=xri:eebo:citation:99838511>.

in *Darcy v. Allen* (1602) or, as Coke called it, *The Case of the Monopolies*.[247] Its reference was an apposite beginning to *A Discourse* as will be shown.

The author of *A Discourse* continues the introduction with a summary of the components that make up the laws of England: maxims, customs, and statutes.[248] Maxims, he writes, are the "foundations of the law, and the full and perfect conclusions of reasons."[249] Serjeant Richard Morgan had already stated this in *Colthirst v. Bejushin* (1550).[250] The phrase was subsequently used by legal writers. In the preface to his late-Elizabethan treatise on maxims, Francis Bacon referred to them as the "conclusions of reason."[251] Coke, in his first *Institutes* (1628), defined a maxim as "a sure foundation or ground of art, and a conclusion of reason," and in *The Lawyer's Light* (1629) Sir John Doddridge refers to "*Morgan* in the Commentaries of *Plowden*" who had defined a maxim as the "foundation of Law, and the conclusion of Reason."[252]

The author concludes the introduction with "the purpose of this discourse" which is that if a king's charter is repugnant to maxims, customs, or statutes it is void in the law

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[247] Baker, *Reinvention of Magna Carta*, 319, 343n46. Popham's quoting of Fray was recorded in Coke's autograph notebook.

[248] Cf. St. German, *Doctor and Student*, Dial. 1, c. 4. Here the Student explains that "the law of England is grounded upon six principle grounds." These are the law of reason, the law of God, maxims, statutes, and customs, both particular and general customs.

[249] *A Discourse*, ll. 12-13.

[250] Plowd. 27. I have not been able to trace an earlier source for this particular statement regarding maxims, although cf. St. German, *Doctor and Student*, Dial. 1, c. 8 on maxims. For this being the source see John Bouvier, *Bouvier's Law Dictionary and Concise Encyclopedia*, vol. 2, 8th ed. (Kansas City, MO: Vernon Law Book, 1914), 2122, and Brian Vickers, *Francis Bacon and Renaissance Prose* (Cambridge: Cambridge Univ. Press, 1968), 276.

[251] Heath, "Professional Works," 320.

[252] Co. Inst. i. 10v-11; John Doddridge, *The Lawyers Light: or, A Due Direction for the Study of the Law for Methode*, London, 1629, 4, *EEBO*, accessed May 9, 2018, <http://gateway.proquest.com.databases.wtamu.edu/openurl?ctx_ver=Z39.88-2003&res_id=xri:eebo&rft_id=xri:eebo:citation:99845411>; See also *s.v.* "Maxime" in Thomas Blount's *Glossographia*, London, 1656, *EEBO*, accessed May 10, 2018, <http://gateway.proquest.com.databases.wtamu.edu/openurl?ctx_ver=Z39.88-2003&res_id=xri:eebo&rft_id=xri:eebo:citation:99872900>.

and can either be repealed by writs of *quo warranto* or *scire facias*. As stated in the *apparatus fontium*, the precedent cited here has proved elusive, though *Bishop of Winchester v. Prior of the Carmelite Priory, Winchester* (1343) is suggested as a possible reference.[253]

Superiority and Subjection: Invalid Grants and *Story's Case* (1571)

Here the author begins his argument that the king is limited by the law. These following examples illustrate that the king cannot grant anything that would jeopardize his superiority or a subject's subordination. In the *Prior of St. Bartholomew's Case* (1435/36), the king demanded a corrody from the prior who maintained that he was discharged from it by letters patent of Henry II.[254] The author quotes from the report the words in the charter which granted that the "prior and his monks should be as free in their church as the king was in his crown."[255] He continues, "yet by this grant was the prior and his monks deemed and taken to be but as subjects, and the aforesaid grant in that

[253] YB Mich. 17 Edw. 3, pl. 58 (1343.198rs). Aside from the vulgate edition (f. 59v) see Luke Owen Pike, ed. and trans., *Year Books of the Reign of King Edward the Third: Years XVII and XVIII*, Rolls Series, no. 31, pt. B, vol. 10 (London: Mackie for HMSO, 1903), 262-65. I would like to thank Professor Seipp for bringing this case to my attention in an email message to the author, May 10, 2018.

[254] YB 14 Hen. 6, pl. 43 (1436.043); See E.A. Webb, *The Records of St. Bartholomew's Priory and of the Church and Parish of St. Bartholomew the Great, West Smithfield*, vol. 1 (London: Oxford Univ. Press, 1921), 150. Webb gives a brief summary of the case dispute and its resolution. He points out that "the fact of the tenure of their [the priory's] lands being in 'frankalmoine' was sufficient reason in itself for discharge of corodies"; See also Anthony Fitz-Herbert, *The New Natura Brevium*, 9th ed. (Dublin: H. Watts, 1793), 525. By "common right" the king was to have a corrody where he founded a religious house.

[255] For a list of all the charters see Webb, *The Records of St. Bartholomew's Priory*, 477-89. Granting that the prior and his canons be as free as the king's crown was stated in the first charter of Henry I (1133) a decade after St. Bartholomew's was founded: Norman Moore, trans., *The Charter of King Henry the First to St. Bartholomew's Priory* (London: 1891), 9. The first charter of Henry II (probably 1173) recapitulated the privileges of the church outlined by his predecessor including that the church "be free from all earthly power and servitude as if my crown." See an *Inspeximus* and confirmation in 37 Hen. 3: *Calendar of the Charter Rolls, 1257-1300* (London: Mackie for HMSO, 1906), 369.

respect to be void."[256] This may be in reference to Justice William Paston who argued for the king's position.

At the end of the report, Paston argued that just as a subject (himself hypothetically) who is granted land and by the words in the patent "shall be as free in that land as he [the king] in his Crown" shall still be fined if he alienates without license, the words stating that the prior and his monks "should be as free in their Church as the King in his Crown" did not deprive the king of a corrody. These were the king's prerogatives vested in him "which cannot pass outside of his person by such general words."[257] Thus, if the king's charter by these general words released the prior from having to pay a corrody[258] thereby extinguishing the king's prerogative, this would be against the law according to Paston's assertion. Therefore, though Paston did not explicitly state that the charter was void, the author of *A Discourse* concluded that the grant was "deemed . . . to be void, for by the law the king may not any more disable himself of his regal superiority over his subjects then his subjects can renounce or avoid their subjection against or towards their king or superior."[259] The prior must grant the corrody upon request or the tenant will pay the fine for alienation unless express words in the king's grant relinquishes the same.

This had occurred in a letters patent in February 1438 where explicit language was used to exempt "the prior and convent . . . and their successors . . . from having to grant corrody or sustenance to any person at the king's request," including the most

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[256] *A Discourse*, ll. 29-32; The commentary in Stewart, *OFB*, 755, includes this statement in the *lemma* but does not identify its source.
[257] Quotations are my own translation of the vulgate edition (ff. 12v-13).
[258] John Hodie maintained this because the charter was written "before time of memory" ("devant temps de memor*ie*").
[259] *A Discourse*, ll. 31-35. See nn. 727 and 729 for using "their" instead of "his."

recent request which was the cause of the suit in the Exchequer Chamber. The reason for the exemption was that "some disputes have lately arisen as to the interpretation of the general words in the said grant of Henry I, which disputes the king desires hereby to settle."[260] Therefore the prior won the case, and the charter of Henry II was reaffirmed two years later and again in 1465 and 1489.[261]

As *A Discourse* states, the king could not disable his royal superiority, and likewise subjects could not renounce their subjection. For this latter reason the justices of the King's Bench would not accept John Story's plea that he was not a subject of Queen Elizabeth but a subject of King Philip. In 1571 the Catholic recusant John Story was arraigned for high treason and subsequently executed.[262] According to the author of *A Discourse*, the court's answer in Story's case rested on the laws of England that the king cannot "release or relinquish the subjection of his subject," nor "may the subject revolt in his allegiance from the superiority of his prince."[263] Although at least the latter part of this statement is implied in the court's decision to enter a *nihil dicit*, this assertion of the law is not directly stated in Sir James Dyer's report, and no specific citation is given. It will suffice to briefly note some examples of source material.

For the subject to revolt in his allegiance or the king to release a subject from his subjection would contravene the law of nature. Edward Coke's report on *Calvin's Case*, or the *Case of the Post-Nati* (1608), approximately two decades after *A Discourse*, explained this principle. The plaintiff Robert Calvin was deprived of lands in England, and when counsel for the defense said that this was acceptable since Calvin was an alien

[260] Patent Rolls, 1436-41, 16 Hen. 6, pt. 2, m. 40, p. 150.
[261] Webb, *The Records of St. Bartholomew's Priory*, 489.
[262] *Apparatus Fontium*, ll. 35-38.
[263] *A Discourse*, ll. 39-40.

having been born in Scotland, Calvin's lawyers countered that since he was born after the union of England and Scotland in 1603, he was an English subject. Therefore, the question came down to whether persons born after the Union of the Crowns were aliens in England or subjects. The defense contended that since Scotland was governed by a different body of laws, and one owed his allegiance to the laws of the kingdom where he was born, Calvin was not a citizen of England but of Scotland. What was the basis of allegiance? As solicitor-general, Francis Bacon argued that it was by the law of nature. He maintained that Calvin was a subject of England because he owed his allegiance to the person of the king-"*our natural liege sovereign*."[264]

Coke elaborated on the considerations in the case regarding the law of nature. It was immutable, existing "before any Judicial or Municipal Law," part of the laws of England, and most importantly for present purposes, the law by which "the Ligeance or Faith of the Subject is due unto the King."[265] Also by this law is the king to protect his subjects, and though one may be attainted of felony or treason and lose the king's legal protection, "such a person . . . hath not lost that Protection which by the Law of Nature is given to the K[ing]," such as the king's pardon.[266] Therefore, for the sovereign to "release or relinquish the subjection of his subject" would be to deprive the latter of the former's protection which by the law of nature the sovereign is obligated to provide.

In addition, by the statutes of the realm, subjects could not deny their allegiance. In Dyer's report, Story's offenses in conspiring to invade England "are holden by the

[264] Heath, "Professional Works," 647; Coquillette, *Francis Bacon*, 156-58.
[265] 7 Co. Rep. 12v; In a treatise attributed to William Fleetwood on the royal succession, it was argued that if no monarch occupied the throne that by the law of nature and nations subjects owed their allegiance to the Crown: Brooks, *Law, Politics and Society*, 76.
[266] 7 Co. Rep. 13v-14.

Justices to be treason: for an invasion with power cannot be, but of necessity it will trench to the destruction or great peril of the person of the prince."[267] The Treason Act of 1351 stated that it was treason "when a Man doth compass or imagine the Death of our Lord the King." The Treason Act of 1571, taking effect a month after Story's execution, reiterated that if any person "compasse imagyn . . . or intend the Deathe or Destruccion . . . of the Royall Person of . . . Queene Elizabeth" then it is high treason.[268] According to Coke, all indictments of treason which "intend or compass *mortem & destructionem Domini Regis*" conclude with the words "*contra (a) ligeantiae suae debitum*."[269] Therefore, for a subject to commit such treason and transgress statute law would be to defy one's allegiance owed to his sovereign.

Although Story's case did not involve a royal grant, it served as another example outlining the legal relationship between subject and sovereign. The king should protect and govern his subjects, though as sovereign he cannot yield up his prerogative. To do so would diminish the king's power and undermine the subject's submission, and a grant conferring the like has no force in the law. According to the author of *A Discourse*, such was the case for two grants in the time of Edward III which conferred the Isle of Wight to Lord William Montagu and the Isle of Man to the Earl of Derby.[270]

The grantees were crowned king of their respective islands, but because they "were subjects and their islands were under the dominion and subjection of the king . . .

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[267] John Vaillant, trans., *Reports of Cases in the Reigns of Hen.VIII. Edw.VI. Q.Mary. Q.Eliz. Taken and Collected by Sir James Dyer*, pt. 3 (London: 1794), 298b.
[268] 1351-52, 25 Edw. 3, stat. 5, c. 2; "An Acte whereby certayne Offences bee made Treason," 1571, 13 Eliz. 1, c. 1; An act in 1397-98, 21 Rich. 2, c. 3, stated similarly and also included rendering up "Homage or Liege" as constituting treason. This was repealed in 1399, 1 Hen. 4, c. 3.
[269] 7 Co. Rep. 10v.
[270] *A Discourse*, ll. 44-47; For the author's error in relating these grants, see *Apparatus Fontium*, l. 41, ll. 44-47.

in that respect were the grants void."[271] What exactly did the author mean when he said they were "crowned king" of these islands? His reasoning for invalidating the grants indicates that to crown a subject king would be to place him as sovereign over a dominion just as the king of England rules over his kingdom. Yet, as discussed above, it would go against the law of nature to release a subject of his subjection. Furthermore, a precedent for the author's argument was when Henry VI crowned Henry de Beauchamp, Earl of Warwick, "King of Wight." No letters patent could be found for this, said Coke, "because (as some doe hold) the King could not by law create him a King within his own Kingdome, because there cannot be two Kings of the same place in one Kingdome."[272] As to the grants themselves, did they create new kings? The three grants that will be considered do not explicitly crown their grantees king. External evidence can be taken into account here, but it is the words of the grants which the author has interpreted.

In 1385 a letters patent granted the Isle of Wight to William Montagu, 2nd Earl of Salisbury. The grant was only for life and the lordship of the isle but to hold it "as fully as the king had the same."[273] Did these words entail that the earl should rule as if crowned a king? Similar phrasing is found in the charter granted to St. Bartholomew's.[274] As previously discussed, it was disputed whether the words "as free in their church as the king in his crown" included a release of all services including a corrody, or, since these were not express words, that they could not be interpreted to release the prior from having to grant a corrody because this was the king's prerogative.

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[271] *A Discourse*, ll. 48-49.
[272] Co. Inst. iv. 287.
[273] Patent Rolls, 1385-89, 9 Rich. 2, pt. 1, m. 36, p. 16.
[274] This phrasing is also found in grants made by the Anglo-Saxon kings. See Webb, *The Records of St. Bartholomew's Priory*, 61n: "King Alfred and Guthred granted that the lands of Durham should be held with the same sovereign power as that by which the demesne of the crown was held."

The latter interpretation was held by Paston who concluded that if the king granted him land and that he "shall be as free in this land as he is in his crown" that he shall still "hold of him by knight's service."[275] In this respect, the grant to Montagu to hold the Isle of Wight as fully as the king could simply have meant the lordship of the island as stated, although a literal interpretation of these words might regard Montagu as king.

The Isle of Wight's medieval history shows it to have always been within the dominion of England. Coke said of Wight that "it is and ever hath been part of Hamshire, and ever governed by the Laws of England, as the other shires have been."[276] Indeed, the survey of Wight in the *Domesday Book* demonstrated that its lands were held of the king.[277] Additionally, lords, not kings, governed the island. From the Norman conquest to the end of the thirteenth century, the heirs of William Fitz Osbern, the first lord of the isle, were titled the "Lords of the Isle of Wight." The last of that line, Isabella de Fortibus, sold it to Edward I after which the government of the island was entrusted to wardens as representatives of the crown.[278] Even when the king attempted to create a "King of Wight" in 1444, this did not pass.[279]

In 1334 Edward III had also "remitted and released, and entirely for us and for our heirs quitted claim, to our beloved and faithful William de Monte Acuto, all our right and

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[275] M. Hemmant, ed., *Select Cases in the Exchequer Chamber Before All the Justices of England, 1377-1461*, Selden Society vol. 51 (London: Bernard Quaritch, 1933), 70. In Nicholas Statham's abridgment (Corodie 3), John Hodie said the same thing: "if the king enfeoff me to hold as freely as he holds his crown, still I shall hold of him by knight's service": Seipp, 1436.043.
[276] Co. Inst. iv. 287.
[277] "Discovering Domesday Wight," Isle of Wight History Centre, accessed June 28, 2018, http://www.iwhistory.org.uk/iwdomesday/; Theodore F.T. Plucknett, *A Concise History of the Common Law* (Indianapolis: Liberty Fund, 1929), 13.
[278] *A Encyclopaedia Britannica: A Dictionary of Arts, Sciences, Literature and General Information*, 11th ed., vol. 5 (New York: The Encyclopaedia Britannica Co., 1910), 337.
[279] Co. Inst. iv. 287.

claim which we have had, or in any manner can have, to the Island of Man."[280] This yielded to Montagu absolute possession of the island. Also, no service was to be rendered to Edward III which if included would have been an indication of subjection.[281] However, the grant did not explicitly crown him king. Therefore, did the quitclaim establish Montagu as an independent sovereign of Man? The king's relinquishment of his right to the island may have done so. External evidence suggests that *de facto* this was not the case since, as the author argued, Montagu was a subject and the Isle of Man was within the king's dominion.

According to his recent biographer, the 1st Earl of Salisbury, shortly after fighting in Brittany in 1342-43, "confirmed his lordship of Man by conquest and was crowned king there, though there is no evidence that he used the latter title outside the island."[282] The title of king had been held by the Norse-Gaelic rulers of the island prior to English dominance.[283] In the mid-seventeenth century, John Selden maintained that although the

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[280] Thomas Rymer, ed., *Foedera, Conventiones, Litterae, et Cujuscunque Generis Acta Publica Inter Reges Angliae et Alios Quosvis Imperatores, Reges, Pontifices, Principes, vel Communitates*, vol. 2, pt. 2 (London: 1821), 868. Translation in J.R. Oliver, ed. and trans., *Monumenta de Insula Manniae, or a Collection of National Documents Relating to the Isle of Man*, vol. 2 (Douglas, Isle of Man: H. Curphey, 1861), 183. See also Patent Rolls, 1330-34, 7 Edw. 3, pt. 2, m. 22, p. 464. The grant was made to Montagu in recognition of his right to inherit the island from his grandfather, Simon de Montagu. For this see James Gell, ed., *An Abstract of the Lawes, Customs, and Ordinances of the Isle of Man: Compiled by John Parr*, vol. 1 (Douglas, Isle of Man: H. Curphey, 1867), 19, 22.

[281] A.W. Moore, *A History of the Isle of Man*, vol. 1 (London: T. Fisher Unwin, 1900), 194-95. See William Blundell and the grants made to the Earl of Northumberland and Sir John Stanley below.

[282] W.M. Ormrod, "Montagu, William [William de Montacute], first earl of Salisbury (1301-1344)," in *ODNB*, 38: 774. See also John Selden, *Titles of Honor*, (1631, 2nd ed.) in Oliver, *Monumenta de Insula Manniae*, vol. 1 (1860), 108: "while also it was in the hands of that William Earl of Salisbury, he titled himself, it seems, only Lord of Man or Seignor de Man."

[283] In his mid-seventeenth century history of Man, William Blundell challenged Coke's assertion that King "Artold," probably referring to Harold, was an absolute king of Man. Blundell maintained that the kings of Man were subject to the Norwegian kings (so did Selden, *Titles of Honor*, 24), and that in the case of Harold the license granting him to come into England to confer with Henry III did not demonstrate Harold's absolute kingship but his subjection to the English king: 7 Co. Rep. 21-v and William Harrison, ed., *A History of the Isle of Man: Written by William Blundell . . . 1648-1656, Printed from a Manuscript in the Possession of the Manx Society*, vol. 1 (Edinburgh: R. & R. Clark, 1876), 106-11.

English "Kings of the Isle of Man" were styled as such,[284] they were subject to the Crown of England. He also stated: "But in the memories which remain of the gifts of this Island made by our Kings, to such as have been since vulgarly styled Kings of Man, the name of King or Kingdom is not found, but only the title of Lord."[285] Therefore, to Selden the ruling capacity on Man was that of a lordship and the title of king did not denote a kingship independent of the dominion of England. Moreover in the late-sixteenth century, around the time of *A Discourse*, the chief justices and lords of the Privy Council resolved a succession dispute amongst the Earls of Derby. They concluded (*inter alia*) that the Isle of Man was no part of the realm or kingdom of England, "nor was governed by the law of this Land, but was like to Tourny in Normandy, or Gascoign in France, when they were in the King of Englands hands."[286] Though like Gascogne, which had been held by the English Crown from 1152-1453, the Isle of Man remained under the dominion of the Crown and its inhabitants the king's subjects.[287]

In manuscript family *z*, the grant of the Isle of Man was made to the Earl of Derby, though this letters patent was in the early fifteenth century and issued to Sir John

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[284] See Selden, *Titles of Honor*, in Oliver, *Monumenta de Insula Manniae*, vol. 1 (1860), 107-08. According to Thomas Walsingham (d. 1422), when William le Scrope purchased the Isle of Man from the 2nd Earl of Salisbury it included the crown of Man: "For the Lord of this island is called king and may likewise be crowned with a crown of gold."

[285] Selden in Oliver, *Monumenta de Insula Manniae*, vol. 1 (1860), 107-08. Coke said similarly that while Man "hath been an ancient Kingdome . . . we find it not granted or conveyed by the name of a Kingdome, sed per nomen Insulae." However, Coke pointed out that the grant of the patronage of the Bishopric of Sodor in Man was "a visible mark of a Kingdome," and Selden stated similarly that it was "a special mark of Royalty in a Subject, as hath not at this day nor divers ages hath had an example in any Territory of the Crown of England"; though both also referred to two "ancient" precedents whereby English subjects were patrons to the Bishopric of Rochester and Landaffe: Co. Inst. iv. 283 and Selden in Oliver, 110.

[286] Co. Inst. iv. 284. Coke himself explained that while the king's writ does not extend to Man, the king can send a commission there to redress any wrong done to his subjects, but the commission must comply with the laws of the isle (285); See also Co. Inst. i. 9.

[287] See Heath, "Professional Works," 672-79. Here in *Calvin's Case*, Bacon argued that those inhabitants of English Gascony were natural subjects of England being under the dominion of the king, though Gascogne was not governed by the laws of England.

Stanley (d. 1414), the ancestor of Thomas Stanley created 1st Earl of Derby in 1485.[288] The 1406 letters patent granted Sir Stanley "his heirs and assigns . . . the island, castle, peel and lordship of Man . . . as fully as . . . any other lord of the island held the same." Again, there is no indication of regal recognition; in fact, the grant commanded Stanley to pay homage and render two falcons unto the king and his heirs upon their coronation.[289] Such a precedent had been established by Henry IV in 1399 when he granted the lordship of Man to Henry Percy, 1st Earl of Northumberland, with the "service of carrying at the left shoulder of the king or his heirs on the days of coronation the sword called 'Lancastreswerd' [Lancaster sword]." According to William Blundell, such services demonstrated the subjection of the lords of Man: "when our English had conquered it afterwards from the Scots, for tho' our king admitted [th]em to be stiled kings, yea, and to be crowned, yet they were obliged, besides their homage and fealty, to perform certain duties and services, a manifest demonstration of their subjection to the crown of England."[290] Though as customary for those who held the Isle of Man, the descendants of Stanley were styled "Kings of Mann" until 1504 when Thomas Stanley, 2nd Earl of Derby, adopted the title "Lord of Mann."[291]

There is the possibility that the Earl of "Darby" was a later amendment to *A Discourse*. It is found in the witnesses dated to the first half of the seventeenth century

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[288] Oliver, *Monumenta de Insula Manniae*, vol. 1 (1860), 85. This is a transcription of a manuscript (1573) in the BL Lansdowne collection; it is a brief history of those who possessed and controlled the Isle of Man.
[289] Patent Rolls, 1405-08, 7 Hen. IV, pt. 2, m. 17, pp. 201-02; See also a charter of the same year: Oliver, *Monumenta de Insula Manniae,* vol. 2 (1861), 235-46, and on pp. 232-34, a similar grant in 1405 for Stanley "to hold [the lordship of Man] for the term of his life."
[290] Blundell in Harrison, *A History of the Isle of Man*, 109.
[291] Oliver, *Monumenta de Insula Manniae*, vol. 1 (1860), 103. This brief history of those who held the Isle of Man came from William Camden (1607); Moore, *A History of the Isle of Man*, 218. Stanley may have preferred to be styled "Lord" than thought of as a petty king, but Moore thought it "more probable that he simply resigned his higher title, either by order of the King of England, or from a politic desire not to give him any cause of offense."

(*L*, *Lh*, *Lm*, *Or*). (The earl of "S" is found in the earliest dated manuscript, *Hl*.) The grant was obviously not of Edward III-though neither was the 1385 patent granted to the 2nd Earl of Salisbury-and its reference in these manuscripts may be explained by the fact that in a recent inheritance dispute in 1598 Elizabeth's chief legal advisers resolved that the 1405 and 1406 grants to Sir John Stanley were void, although not for the reason stated by the author in *A Discourse*. It was determined that the patents were granted prior to the attainder of the Earl of Northumberland (d. 1408), and therefore the island was not in the king's hands at the time of the patents and consequently it could not be granted.[292]

In sum, whether the grants to William Montagu I and II crowned them kings of their respective islands is open to interpretation, although it seems unlikely that the grant of the Isle of Wight to the latter did as much because it was only granted for life. It is even more difficult to argue how the grant to Sir Stanley crowned him king of the Isle of Man. Nevertheless, the author has interpreted the grants to mean just that. The grants certainly did not make them kings *de facto*. That the author declares the grants void because the grantees were subjects has already been addressed. Yet his second reason that both islands were under the dominion and subjection of the king perhaps points to the inalienability of crown lands. At least as much can be said about the Isle of Wight which was part of the royal demesne from the *Domesday Book* and thus considered ancient demesne by the thirteenth century. Such lands belonging to the crown could not be alienated in this manner, that is, given up to be ruled as an independent kingdom.[293]

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[292] William Camden (1615), "Contention Respecting the Isle of Man," in Oliver, *Monumenta de Insula Manniae*, vol. 1 (1860), 104-06; Gell, *An Abstract of the Lawes*, 38-39; Co. Inst. iv. 284; Consider the principle *nemo dat quod non habet*. See e.g. *Rector of Edington's Case* (1441.028).

[293] Ernst Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton: Princeton Univ. Press, 1957), 166-67; *Bracton Online*, ii. 58.

Potestas Principis EST Inclusa Legibus

In 1406 William Stourton reiterated the Roman maxim that the prince's power is not bound by the laws.[294] The author of *A Discourse* proceeded to demonstrate how the law, in the form of judicial statements asserting what the king could not grant by his charter, did not agree with this principle. The first report was an anonymous case from 1459. Serjeant Littleton, arguing on behalf of the defendant, had maintained that the king could not grant that which was custom and could be pleaded by prescription.[295] The reason, explained Paul Vinogradoff, was that "custom is the result of traditional growth, and its creation by an act of express authority would be a contradiction in terms."[296] To this case the author appended one from the *Liber Assisarum*. These are year books from the reign of Edward III.[297] Vinogradoff also connected these two cases together, stating that they exhibited the same doctrine that the king could not create custom.[298] In *Jurdan's Case* (1375), Chief Justice Belknap said that "the king could not . . . make tenements devisable by his charter, where they had not been devisable before." Also, without Parliament the king could not grant to the guild of white-tawers in London the ability to make laws whereby the customs of inheritance would be changed.[299] Similarly,

[294] YB Mich. 8 Hen. 4, pl. 12 (1406.111); *Digest*, 1.3.31 *per* Ulpian: "Princeps legibus solutus est."
[295] YB Trin. 37 Hen. 6, pl. 3 (1459.026).
[296] Paul Vinogradoff, "Constitutional History and the Year Books," *Law Quarterly Review* 29, no. 3 (1913): 281-82, accessed April 3, 2018, https://heinonline.org/HOL/P?h=hein.journals/lqr29&i=289.
[297] Henry N. Ess III, "The Sixteenth Century English Lawyer's Library," Harvard Law School, last modified March 17, 2005, http://www.law.harvard.edu/faculty/martin/ess_talk.htm.
[298] Vinogradoff, "Constitutional History and the Year Books," 281-82.
[299] *Jurdan's Case*, YB 49 Edw. 3, Lib. Ass., pl. 8 (1375.048ass). In 1578 James Morice of the Middle Temple made similar points in his reading on Westminster I, 1275, 3 Edw. 1, c. 50: Sir John Baker, ed. and trans., *Selected Readings and Commentaries on Magna Carta, 1400-1604* (London: Selden Society, 2015), lxxxvi.

in the next cited case from 1491, it was held by the King's Bench that the king could not alter the usage of a leet.[300]

The *Chancellor of Oxford's Case* (1430) contains the rule found elsewhere in the year books that the king could not grant that which would cause any harm to his subjects. Plaintiffs brought a suit against the chancellor when the latter had distrained the former for not paving the street in front of their house when it was ruinous. The defendant chancellor pleaded that by a letters patent of Henry IV and Richard II he could not be sued by a writ of trespass, and also that he could have jurisdiction of all pleas when he was one of the parties by virtue of his office. Therefore, a debate ensued among the judges whether the king could grant immunity from suit and make someone a judge in his own cause.[301]

In response to the chancellor's plea that he could not be sued for what he did in his office, Justice Cottesmore said that "the king was bound by his oath to do right to his lieges, and by his grant he could not foreclose me from my action, because if one be indebted to me, and the king grant him that I will not have any action against him, this grant is void." Professor Seipp notes that this judgment was based on the "principal of natural justice or fundamental fairness." Moreover, Chief Justice Babington said that no one could be their own judge except the king, and it was expressed by Justice Strangeways that this could only be granted by explicit language.[302] That a royal prerogative could not pass from the king, at least by general words, was argued by Paston in the *Prior of St. Bartholomew's Case* and was a rule taken from Justice Hill in the "long

[300] YB Trin. 6 Hen. 7, pl. 4 (1491.020).
[301] *Apparatus Fontium*, ll. 70-73.
[302] *Chancellor of Oxford's Case*, YB Hil. 8 Hen. 6, pl. 6 (1430.006); For the principle in Roman law see *Codex*, 3.5.0: "Ne quis in sua iudicet vel sibi ius dicat."

record." It was a lord's right to have the wardship of an underage heir's land and body; although if the heir held land of the king, it was the king's prerogative to have the wardship of his body.[303] According to Justice Hill, a common person would not hold the king's seigniory as he does because "even though the king has a prerogative, that prerogative will not extend to any other person."[304]

To conclude his evidential argument and drive his point home, the author of *A Discourse* listed seven examples of what the king could not grant though without providing any specific citations from the year books.[305] These illustrate what the author has already shown in the previously cited cases. The first exemplified the principle that the king could not grant his prerogative.[306] The remaining demonstrated that the king could not grant that which would harm his subjects, whether that be preventing heirs from obtaining their inheritance by obstructing or contradicting the common law, or granting immunity to one at the expense of another. As Baker points out, "the year books are full of judicial statements about things the king could not do." From these rules developed in the fifteenth century "the fundamentally important principle that the king can do no wrong."[307] These two principles require further attention.

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[303] J.H. Baker, *An Introduction to English Legal History*, 4th ed. (Oxford: Oxford Univ. Press, 2007), 240n71.
[304] *Cors v. Mayner*, YB Mich. 14 Hen. 4, pl. 6 (1412.022). Cf. Paston in *Prior of St. Bartholomew's Case* (1436.043). A grant to hold land as free as the Crown still only meant to possess the land by knight's service and not, in the words of Hill, "in the same position as the king." See A.K.R. Kiralfy, trans., *A Source Book of English Law* (London: Sweet & Maxwell, 1957), 82.
[305] *A Discourse*, ll. 79-85.
[306] This was *nullum tempus occurrit regi*, a prerogative that Hobart AG maintained the king could not grant to another person: YB Mich. 20 Hen. 7, pl. 17 (1504.017).
[307] Baker, *Reinvention of Magna Carta*, 44-45.

The King Cannot Grant His Prerogative

The author references this principle as another limitation on the king's charter. It was said in these cases that the king could not grant that one be his own judge, grant the wardship over his tenant, or that "no time runs against the king." The author of *De Legibus et Consuetudinibus Angliae* (attributed to Henry of Bratton, *c.* 1210-68, hereinafter referred to as "Bracton") spoke of the king's privileges which "though they belong to the crown, may nevertheless be separated from it and transferred to private persons, but only by special grace of the king," that is by a "special grant."[308] In the *Chancellor of Oxford's Case*, Justice Strangeways said that to act as one's own judge was a "most royal power" that could not "pass from the king without special words."[309] The king's right to the wardship of the body of his tenant, namely determining the heir's marriage, was a prerogative outlined in *Prerogativa Regis* which, as stated by Baker, represented in part the ordinary kinds of prerogatives; those which were "justiciable in the courts, and . . . concerned with feudal rights and revenues rather than powers and authorities."[310] Although not an absolute prerogative, according to Coke it could not be transferred to another in its entirety, but particular warships could be granted. As Ernst Kantorowicz has shown, the prerogative of *nullum tempus currit contra regem* (or *occurrit regi*) served to protect inalienable crown lands and rights from the claims of

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[308] *Bracton Online*, ii. 167.

[309] *Chancellor of Oxford's Case* (1430.006), also *per* Martin JCP. According to Bracton, certain of the king's privileges could be granted because they "do not so touch the common welfare that they may not be given and transferred to another" (*Bracton Online*, ii. 58). However, the power to act as one's own judge, which was said could be granted by express words, served the common welfare when the king acted as *iudex in causa propria* in cases that pertained to the public, such as treason; in that sense, according to Bracton, it could not be granted. See Kantorowicz, *The King's Two Bodies*, 168-69.

[310] Baker, *Reinvention of Magna Carta*, 144-45, 145n7; *Prerogativa Regis* (date uncertain), c. 2. It has been dated to the time of Edward I (1272-1307): Plucknett, *A Concise History of the Common Law*, 542n2 and Brooks, *Law, Politics and Society*, 34-35.

prescription by private persons.[311] Such things, as Bracton termed them, were "quasi-sacred" and belonged to the "fisc" which "cannot be given or sold or transferred to another by the prince or reigning king; such things constitute the crown itself and concern the common welfare, as peace and justice." The immunity principle of *nullum tempus* could only apply to the king and could not be granted; otherwise, he would be relinquishing the protection of his claim to crown lands and rights, jeopardizing those things which derived from the *jus gentium* and were essential to the survival of the crown and its preservation of the public welfare.[312]

The constraint on granting the royal prerogative, therefore, was asserted to protect the king's rights, especially those vested in his politic capacity, for the benefit of himself and the commonwealth. What Kantorowicz has termed "minor regalian rights" could be granted by a special grant, according to Bracton, and would "be to the damage of no one except the king or prince himself."[313] But as implicated by the author of *A Discourse*, a generally worded grant relinquishing such a prerogative was not valid because the king could not "disable himself of his regal superiority over his subjects."[314]

But while the doctrine of inseparability protected the king's rights,[315] it had also been used to limit his powers. In a 1465 case, several of the justices contended that the king could not grant his prerogative of the nomination to a corrody. Justice Yelverton

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[311] Kantorowicz, *The King's Two Bodies*, 164-73.
[312] *Bracton Online*, ii. 58, 167, 293.
[313] Kantorowicz, *The King's Two Bodies*, 170; *Bracton Online*, ii. 58.
[314] See above *s.v.* "Superiority and Subjection."
[315] Glenn Burgess, *Absolute Monarchy and the Stuart Constitution* (New Haven, CT: Yale Univ. Press, 1996), 198-99. In the *Case of Non Obstante* (12. Co. Rep. 18), the king's right to dispense with an Act of Parliament *non obstante* the act's restraint on dispensation was upheld because it was a prerogative inseparable to the king; Bacon made the same point in his *Maxims of the Law* (1596-97): Heath, "Professional Works," 370.

said that the king's prerogative "cannot be cut off from the king's person."[316] In 1504 Chief Justice Fyneux deemed the patent void which was alleged to give to the franchise of the Abbey of St. Albans the ability to make justices of the peace. The king could not "grant to anyone to do justice by his patent," and to appoint justices of the peace was "a thing annexed to the Crown, and cannot be severed, as of a grant to arrest felons, or to make denizens."[317] In the later *Case of Penal Statutes* (1604), it was resolved that the king's prerogative to dispense with an Act of Parliament could not be given to a subject. Its inseparability stemmed from the "Confidence and Trust" placed in the king as "Head of the Commonwealth and the Fountain of Justice and Mercy." Therefore, for anybody else to possess such power would be to the disadvantage of the public good. In the *Case of Saltpetre* (1606), it was agreed by all the justices that because saltpeter (potassium nitrate) was a purveyance necessary for the "Defence and Safety of the Realm . . . it is an Incident inseparable to the Crown, and cannot be granted, demised, or transferred to any other."[318]

The *Chancellor of Oxford's Case* was cited in *A Discourse* to make the point that the king could not grant that someone could not be sued or be their own judge. While it was expressed that the latter could be conveyed by a special grant, Babington asserted that only the king could exercise this privilege, and he also said that the king could not grant that the chancellor not be sued "except by Parliament."[319] The underlying rule here

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[316] YB Mich. 5 Edw. 4, *Long Quinto* pl. [45] (1465.171).
[317] YB Mich. 20 Hen. 7, pl. 17 (1504.017).
[318] *Case of Penal Statutes* (1604), 7 Co. Rep. 35v. Cf. the judges' reasoning for the inseparability of this prerogative with *Bracton Online*, ii. 58, 167; *Case of Saltpetre* (1606), 12. Co. Rep. 13. See also Co. Inst. iii. 82-84; Burgess, *Absolute Monarchy*, 151-52; For more examples of inseparable powers see W.S. Holdsworth, "The Prerogative in the Sixteenth Century," *Columbia Law Review* 21 (1921): 558n30, accessed November 24, 2016, http://www.jstor.org/stable/1111147.
[319] *Chancellor of Oxford's Case* (1430.006).

was that the sovereign immunity principle, "no action lies against the king,"[320] could not be transferred to someone else.[321] Therefore, these two prerogatives, while not necessarily described as inseparable, were identified here as exclusive royal powers. They could not be granted on account of this, but also because it would be legally injurious to a subject to bar him from action or access to the judgment of an indifferent arbiter. In this case, royal privileges were limited to the king, the granting of which would result in harm to a subject, something which it was maintained the king could not do.

The King Can Do No Wrong[322]

The origins of this principle goes back centuries before *A Discourse.* It can be traced in the earlier treatment of the antinomy that the king was simultaneously above and under the law.[323] John of Salisbury in *Policraticus* (*c.* 1159) had explained this paradox. While the prince was above the law, his power derived from God and therefore he was bound to serve the law and administer it to the "advantage of the commonwealth." He stated, "it is said that the prince is absolved from the obligations of the law; but this is

[320] See Baker, *Reinvention of Magna Carta*, 48. Inferior lords shared this immunity in their own courts, however, the difference was that the king could not be sued in any superior court. Defendant chancellor was claiming immunity from suit in the Common Pleas where only the king could not be sued. See *Hadelow's Case*, YB Hil. 22 Edw. 3, pl. 25 (1348.025). Thorp CJKB, in Parliament, said that the "king should not be adjudged" by the peers and commons because "he did not have any peer in his own land . . . kings should never be adjudged except by themselves and their Justices." That the king has no peer, see *Bracton Online*, ii. 305; See the principle that no action lies against the king in the following: YB Trin. 35 Hen. 6, pl. 1 (1457.025); YB Mich. 3 Edw. 4, pl. 19 (1463.020); *Tresham's Case* (temp. Edw. 4), YB Mich. 1 Hen. 7, pl. 5 (1485.005); YB Trin. 6 Hen. 7, pl. 4 (1491.020).

[321] This prerogative was similar to that of *nullum tempus* in that they were both immunity principles exclusive to the king for his protection and therefore could not be granted.

[322] This was a maxim of the law: *Rex nulli potest facere injuriam*. See Baker, *Reinvention of Magna Carta*, 322-23; See also *Rex non potest peccare* in Herbert Broom, *A Selection of Legal Maxims, Classified and Illustrated* (London: A. Maxwell, 1845), 23.

[323] See Kantorowicz, *The King's Two Bodies*, 144: "The very belief in a divine Law of Nature as opposed to Positive Law, a belief then shared by every thinker, almost necessitated the ruler's position both above and below the law."

not true in the sense that it is lawful for him to do unjust acts." Though the prince is not permitted to do wrong, as a matter of principle he cannot: "his will is to have the force of a judgment; and most properly that which pleases him therein has the force of law, because his decision may not be at variance with the intention of equity."[324]

Bracton had expounded the subject similarly. The king was bound to the law because the law made him king; but the law also elevated the king above the laws with legislative responsibilities: "the king's power refers to making Law and not Injury. And since he is the *auctor iuris*, an opportunity to *iniuria* should not be nascent at the very place where the laws are born." As long as the king was not a tyrant but ruled according to the law with the power given to him by God, he could bear no injustice.[325] Not long after *A Discourse*, Coke would derive the principle from Bracton in *De Legibus* where it was referred to more explicitly:[326] "And whatever may be said of the king's deed, that he is king and accordingly his deed must not be questioned, it may not be judged nor revoked by anyone when it is rightful, but if it is wrongful it will not then be the deed of the king."[327]

That the king can do no wrong was thus implicit in cases from the fourteenth century,[328] but it was in the fifteenth century that the rule developed as a legal principle

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[324] "John of Salisbury: Policraticus, Book Four (selections)," Fordham University, accessed June 8, 2018, https://sourcebooks.fordham.edu/source/salisbury-poli4.asp; See also Kantorowicz, *The King's Two Bodies*, 94-97.
[325] Quotation from Kantorowicz, *The King's Two Bodies*, 155, and see also 150; *Bracton Online*, ii. 305.
[326] Baker, *Reinvention of Magna Carta*, 323n226. Coke cites ff. 368 and 369 (1st ed., 1569.)
[327] *Bracton Online*, iv. 159; See also 155 and 157 (f. 368, see previous note) where it is stated that the king should not cause injury to others: "for the service of the lord king ought not to be prejudicial to anyone, nor so to his advantage that it is harmful to another . . . And note that neither the lord king nor any other may so warrant a man or cure a default that he may gain something from his adversary by his absence, only that he be saved harmless"; and vol. ii. 168-69: the king could not grant liberties "to the prejudice of others."
[328] *Valence Mary Hall, Cambridge v. Regem* (1369.151ass and 1370.115) in Baker, *Reinvention of Magna Carta*, 61-62; and *Bishop of Winchester v. Prior of the Carmelite Priory, Winchester* (1343.198rs). The

and explicitly stated in the year books.[329] Baker explains that it "had nothing to do with the monarch's personal or political behavior" or immunity from suit, but "it meant rather that the king in his royal capacity could only as a matter of law, do right. He could not lawfully do or command something legally wrong." While the principle was interpreted by some to mean that the king was *legibus solutus*,[330] "it was a major reinforcement of the rule of law."[331] Its application in legal practice resulted in the restriction of the king's power when a royal command brought about some kind of injury against a subject. Since the king could only do right, he could not have lawfully given such a command. The principle is not explicitly mentioned in the reports cited in *A Discourse*, and these judicial statements may simply be an expression of natural justice, but the rule that the king can do no wrong is latent where the justices have placed definite limitations on what the king could not grant, for the granting of such things would cause harm to the subject.[332]

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king's patent was repealed in the Chancery because it granted land that was held by the bishop: the principle that the king cannot be a disseisor (see next note).

[329] The principle was implicit in the contention that the king could not be a disseisor. See e.g. YB Mich. 3 Edw. 4, pl. 19 (1463.020). Perhaps its first explicit mention was in YB Pas. 13 Edw. 4, pl. 1 (1473.001). It was held by the justices that "le Roy per son prerogative ne puit faire tort a un auter." See also YB Trin. 1 Edw. 5, pl. 13 (1483.031): "que le Roy ne poet estre dit un que fist tort." Cf. Danvers JCP in YB Trin. 35 Hen. 6, pl. 1 (1457.025): "the king can do wrong to one as well as another person can do, and against him I will have a remedy by way of petition, as I will have against another person by way of action."

[330] For this interpretation (as well as the one of limitation on royal power) in the Tudor, early Stuart, and Restoration periods see Janelle Greenberg, "Our Grand Maxim of State, 'The King Can Do No Wrong,'" *History of Political Thought* 12 (1991): 210, 212-13, 216.

[331] Baker, *Reinvention of Magna Carta*, 45; See also Broom, *A Selection of Legal Maxims*, 24.

[332] See Baker, *Reinvention of Magna Carta*, 44n256, who groups these cases together as examples of those where justices stated that the king could not do or grant certain things that would harm his people. The principle of natural justice may also be evident here. Seipp noted this principle in the *Chancellor of Oxford's Case*; In *Jurdan's Case* (1375), Belknap said that the king could not make tenements devisable and thereby "take away the inheritance from the heir, where he had the right of inheritance before"; In the *Prior of St. Bartholomew's Case*, the injury to the prior was not done by the king's grant but by the king's request of a corrody. According to the prior, the charter should have released him of it; In YB Trin. 37 Hen. 6, pl. 3, Sjt. Laken for the plaintiff stated that "the king cannot grant . . . that he [defendant] will not be impleaded in another place except there [defendant's vill], without Parliament." Like the *Chancellor of Oxford's Case*, here the immunity from suit was prejudicial to the plaintiff. Furthermore, Littleton maintained that the king could not grant that which is custom because this would interfere with the defendant's right to plead by prescription; In YB Trin. 6 Hen. 7, pl. 4, the defendant could have suffered a more grievous punishment if the king granted that a leet shall have cognizance of felony rape, which it was

Thus, having their origins in an earlier theoretical framework, these judicial limitations on the king's power had significant influence on legal argument in the sixteenth century including that found in *A Discourse*. Baker finds, based on a reading on constitutional law in about 1529, that the doctrine that the king can do no wrong had become common learning. From this came the "golden principle" in Elizabethan cases that "the king could not use his prerogative so as to wrong a subject."[333] This had already been the principle underlying chapter 29 of Magna Carta, but "Tudor lawyers did not at first make the association explicitly. It was, rather, an application of the late-medieval legal principle that the king could do no wrong."[334] By selecting precedents which exemplified this Elizabethan principle, the author of *A Discourse* made the association which earlier lawyers had not. The king could not harm his people by his charter, but in the case of Bridewell, the authority of the governors to seize and punish offenders entailed a deprivation of liberty. Therefore, during the beginning of the Great Charter's reinvention in the 1580s, the author applied chapter 29 in *A Discourse* to counter what was perceived as an injurious royal charter.[335]

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maintained the king could not grant because rape was not felony at common law, and thus such a grant would alter the usage of the leet.

[333] See e.g. *Willion v. Lord Berkeley* (1562) in Plowd. 236: "altho' by the Common Law the King has many Prerogatives . . . yet the Common Law has so admeasured his Prerogatives that they shall not take away nor prejudice the Inheritance of any."

[334] Baker, *Reinvention of Magna Carta*, 106, 150, 150nn34-35, 328n251; See *Case of Saltpetre* (1606), 12. Co. Rep. 12, for an early Stuart example: "the Ministers of the King who dig for Salt-peter, are bound to leave the Inheritance of the Subject in so good Plight as they found it, which they cannot do if they might cut the Timber growing, which would tend to the Disinheritance of the Subject, which the King by Prerogative cannot do; for the King (as it is said in our Books) cannot do any Wrong."

[335] For the "resurgence" of chapter 29 see Baker, *Reinvention of Magna Carta*, 249-75; See also chapter one.

CHAPTER III

THE DISPUTED AUTHORSHIP

Among the six extant manuscripts, one ascribes the work to Francis Bacon and two to William Fleetwood. None of these are contemporary with the original composition in the time of Elizabeth but instead date to the Jacobean/Caroline period in the first half of the seventeenth century.[336] Based on the attribution in *Lh*, *A Discourse* was published in *The Works of Francis Bacon* (1859) where Douglas Denon Heath maintained Bacon to be the likely author.[337] As discussed in the previous chapter, Heath's edition became the primary reference for students of *A Discourse* in place of the manuscripts.[338] For the greater part of the twentieth century, the majority of scholarship concurred with Heath's judgment and referenced *A Discourse* in discussions of Bacon's legal-constitutional thought.

Eventually the awareness of *Lm* became important in terms of identifying Fleetwood's authorship,[339] and therefore, in the 1990s and early 2000s, the growing

[336] See textual introductions for *Lh*, *Lm*, and *Or* in chapter two.
[337] Heath, "Professional Works," 509-10.
[338] Exceptions are Woolrych, *Lives of Eminent Serjeants-at-Law*, 162-63 and A.L. Beier, *Masterless Men*, 169. In his biographical chapter on Fleetwood, Woolrych referred to *Or* and thus Fleetwood's authorship. Beier looks at *La* and ascribes *A Discourse* to a barrister in the 1590s.
[339] Beal, *Index of English Literary Manuscripts*, see BcF 201; Stewart, *OFB*, 45.

discussion concerning *A Discourse*'s varied attribution.[340] Paul Griffiths (2008) and Alan Stewart (2012) were the first to treat the disputed authorship at any length. Both note a lack of evidence for either Fleetwood or Bacon, and Griffiths adds that as recorder of London "it would seem like a colossal own goal" for the former to have authored *A Discourse*, "although he was qualified to do so."[341] Stewart concurs with this point and concludes that "Fleetwood's authorship seems unlikely." But with little to support Bacon's authorship, Stewart's edition only "tentatively claims . . . [*A Discourse*] for Bacon."[342]

More recently, Sir John Baker has made a compelling argument for Fleetwood, noting, among other things, Fleetwood's approach to Magna Carta in writings and legal argument.[343] I agree with Baker, and in light of this recent scholarship, I have conducted a further investigation into this controversy. The majority of this chapter focuses on Fleetwood and argues for his authorship by examining both similarities and contradictions between *A Discourse* and his other writings, professional position, and reported orations. This also has fostered, however, a re-evaluation of some of Baker's assertions regarding Fleetwood's views, and therein lie my primary arguments. These concern a qualification of Fleetwood's approach to Magna Carta's chapter 29 in legal argument and the presence of constitutional themes in his writings. Before proceeding

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[340] Prichard and Yale, *Hale and Fleetwood on Admiralty Jurisdiction*, xxiv, n. 2; Baker and Ringrose, *Catalogue of English Legal Manuscripts*, 183; Christopher W. Brooks, *Lawyers, Litigation and English Society Since 1450* (London: Hambledon Press, 1998), 196n81; Markku Peltonen, "Bacon, Francis, Viscount St. Alban (1561-1626)," in *ODNB*, 3: 125; Brooks, "Fleetwood [Fletewoode], William," in *ODNB*, 20: 29; Dabhoiwala, "Summary Justice in Early Modern London," 797.
[341] Griffiths, *Lost Londons*, 225n41, 226n42; See also Ingram, *Carnal Knowledge*, 359.
[342] Stewart, *OFB*, 43, xxix. Stewart, in an email message to the author, September 21, 2017, stated that he was "still by no means convinced that this tract was by Bacon."
[343] Baker, *Reinvention of Magna Carta*, 216-48 (chapter six, "William Fleetwood and Magna Carta"). The discussion of *A Discourse* and Fleetwood's authorship is at pp. 241-43; See also Brooks, *Law, Politics and Society*, 418n154.

further, however, I would like to briefly treat the scholarship which has regarded Bacon as the potential author.

"If It Be Bacon"[344]

Scholars have quoted the dictum in *A Discourse* that "maxims are the foundations of the law, and the full and perfect conclusions of reasons" in addressing Bacon's jurisprudence.[345] In his *Maxims of the Law* (1596-97), Bacon called them the "conclusions of reasons," and he wrote extensively on the subject in later works.[346] In the beginning of *A Discourse*, maxims are joined together with statutes and customs as elements of the law which direct the king and are a standard by which charters can be determined void. Yet this is the extent of their treatment, the author relying instead on case law and statutes to make his argument.[347] The author's brief reference to maxims is not a solid ground upon which to place Bacon's authorship. The dictum itself was stated in Edmund Plowden's *Reports* (1571) and subsequently cited by other jurists.[348] As the author of the table in part two of Plowden's *Reports* (1578), Fleetwood had indexed the statement in law French: "*Maximes sont foundation del ley, & les conclusions del reason*."[349]

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[344] Thompson, *Magna Carta*, 203.
[345] *A Discourse*, ll. 12-13; Paul H. Kocher, "Francis Bacon on the Science of Jurisprudence," *Journal of the History of Ideas* 18 (1957): 10, accessed July 7, 2018, http://www.jstor.org/stable/2707577; Vickers, *Francis Bacon and Renaissance Prose*, 67; Coquillette, *Francis Bacon*, 29; DeLloyd J. Guth, "Law," in *A Companion to Tudor Britain*, ed. Robert Tittler and Norman Jones (Oxford: Blackwell, 2004), 81; Gary Watt, *Equity Stirring: The Story of Justice Beyond Law* (Oxford: Hart, 2009), 92-93; Silvia Manzo, "Certainty, Laws, and Facts in Francis Bacon's Jurisprudence," *Intellectual Historical Review* 24 (2014): 460, accessed February 9, 2017, http://dx.doi.org/10.1080/17496977.2014.914649.
[346] Heath, "Professional Works," 320; Coquillette, *Francis Bacon*, 28, 325.
[347] These were the authorities upon which Fleetwood relied for part of his argument in a treatise on the succession dispute: Brooks, *Law, Politics and Society*, 76; Yet there are references to two maxims in *A Discourse*: *Apparatus Fontium*, ll. 81, 84.
[348] See chapter two *s.v.* "Textual Commentary."
[349] William Fleetwood, table to *Les Commentaries ou Reportes de Edmunde Plowden*, London, 1578, f. 7, *EEBO*, accessed September 28, 2018, <http://gateway.proquest.com.databases.wtamu.edu/openurl?ctx_ver=Z39.88-

Heath saw "no intrinsic reason for doubting its [*A Discourse*] being Bacon's, of a time when he was a young man." Yet there was no definite evidence proving his authorship, and so Heath could not ascribe with complete surety. "If the paper be really Bacon's," he said, "it appears to me to be very interesting, as it ascertains in the most authentic way the constitutional opinions with which he entered into life."[350] Subsequent scholars concurred,[351] highlighting Bacon's pro-Parliament stance in his early career. This was evidenced by his opposition in 1593 to the "triple subsidy" bill which earned him the disfavor of Elizabeth.[352] Daniel Coquillette points to a tract on crown prerogatives and ownership written around 1587 and in Bacon's own hand which "followed the conventional reliance on yearbook precedents and statutes . . . It also took a conventional, moderate position on the constitutional doctrine."[353] Throughout his whole career and in his writings, Bacon articulated a certain "constitutionalism" consisting of consensual themes, an indication, according to Glenn Burgess, that he was not an

2003&res_id=xri:eebo&rft_id=xri:eebo:citation:99851164>; One manuscript version of Fleetwood's *Statutes* includes Latin maxims: Baker, *Reinvention of Magna Carta*, 234-35.

[350] Heath, "Professional Works," 507-08; Cf. Brooks, *Law, Politics and Society*, 418n154: "It is not clear on exactly what basis the tract was assigned to Bacon by the editors of his collected works."

[351] J.E.G. de Montmorency, "Francis Bacon," *Journal of the Society of Comparative Legislation* 6 (1905): 273, accessed September 9, 2017, http://www.jstor.org/stable/752041.

[352] W.S. Holdsworth, *A History of English Law*, vol. 6 (London: Methuen, 1924), 24; Coquillette, *Francis Bacon*, 29-31; d'Ewes, "Journal of the House of Commons: March 1593," 479-513, accessed September 29, 2018, https://www.british-history.ac.uk/no-series/jrnl-parliament-eliz1/pp479-513; Cf. Bacon's defense of the queen's prerogative and dispensing power in the matter of monopolies in the 1601 parliament: Baker, *Reinvention of Magna Carta*, 197-98.

[353] Coquillette, *Francis Bacon*, 28; *CELM*, BcF 233; Written in law French, a translated excerpt of this work can be viewed in Roland G. Usher, "Francis Bacon's Knowledge of Law-French," *Modern Language Notes* 34 (1919): 30-32, accessed February 5, 2017, http://www.jstor.org/stable/2915784. Although Usher said he was going to publish this, it remains unpublished; Heath, "Professional Works," 305, said that this was "merely a common-place book . . . setting down the ordinary Common Law Prerogatives, and not to contain anything interesting as regards Bacon's opinions on the Constitution."

absolutist: he "emphasized legally restrained and balanced monarchy."[354] Though as advocate under James I, Bacon consistently upheld the royal prerogative.[355]

As discussed earlier, the king's relationship to the law was an important point in English jurisprudence, and this question became heightened in late-Elizabethan and Stuart England. In 1608 Bacon's explanation of the "twofold power of the law" was that it directed the king and in this sense he was under it, but the king was also above the law "for it may not correct him for any offense."[356] In the same year, he stated in his argument for *Calvin's Case* that "although the king, in his person, be *solutus legibus*, yet his acts and grants are limited by law, and we argue them every day."[357] Bacon made use of the ordinary-absolute distinction in the king's power, often arguing that a certain prerogative fell into the latter category. For example, in his 1607 argument regarding the controversy over the jurisdiction of the Welsh Council, Bacon asserted that the king's ordinary prerogatives were "pleadable in his ordinary courts of Justice" and could be disputed there, however the power to erect equitable courts outside the jurisdiction of the common law was an absolute prerogative not derived "mediately from the law, but immediately from God."[358] Basing the authority of the King's Council in Wales on the royal prerogative was contrary to the parliamentary footing given earlier to the Council in *A Discourse*. Coquillette explained this discrepancy by maintaining that Bacon's private

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[354] Burgess, *Absolute Monarchy*, 58, 86-90.
[355] Baker, *Reinvention of Magna Carta*, 440.
[356] Heath, "Professional Works," 778.
[357] Heath, "Professional Works," 646.
[358] Francis Bacon, *The Letters and the Life of Francis Bacon*, ed. James Spedding, vol. 3 (London: Longmans, Green, Reader, and Dyer, 1868), 371. Bacon's opinion in this memorandum of 1607 related the dispute that had recently occurred between the King's Bench and the Welsh Council over claims to jurisdiction in the four English border counties, or the "marches." See e.g. Baker, *Reinvention of Magna Carta*, 302-11 and Coquillette, *Francis Bacon*, 149-50; Cf. Fleetwood's argument in his treatise on the succession dispute that royal prerogatives were created by the common law: see below *s.v.* "Re-Assessing Fleetwood."

opinion expressed in his diary (*Comentarius Solutus*) during the time of his Jacobean argument corresponded with his Elizabethan position in *A Discourse*.[359]

Furthermore, as royal counsel, Bacon contested arguments based on Magna Carta.[360] In 1613 Bacon prosecuted James Whitelocke, a barrister of the Middle Temple, for drafting an opinion criticizing a commission to enquire into abuses in the navy which was charged with the "due punishment of the offenders . . . aggreable to the lawe."[361] Relying on chapter 29 of Magna Carta and *Sir John atte Lee's Case* (1368),[362] Whitelocke maintained that the king could not authorize a commission that was void of due process. Bacon's response to Whitelocke's argument was that the royal prerogative was part of the *lex terrae*[363] and therefore the commission was lawful. He dismissed the case from 1368 because although the judges found the commission to be against the law, the report ended with its fate still to be determined by the King's Council.[364] Bacon was

[359] *A Discourse* and *Apparatus Fontium*, ll. 208-10; Coquillette, *Francis Bacon*, 153; Bacon wrote his *Comentarius Solutus* in 1608 around the same time that as Solicitor-General he gave the argument "The Jurisdiction of the Marches" published in Heath, "Professional Works," 587-611; Heath (p. 508) also distinguished Bacon's argument as Crown advocate from his true opinion expressed earlier in *A Discourse*: "I see no sufficient reason for thinking he ever altered this opinion." Cf. Huntington Cairns, *Legal Philosophy from Plato to Hegel* (Baltimore: Johns Hopkins Press, 1949), 212-13. Cairns maintained that by 1612, referring to *James Whitelocke's Case* (1613), Bacon had changed his view put forth in *A Discourse*. Cf. also Holdsworth, *History of English Law*, 24-26.

[360] See e.g. Bacon, *Letters and the Life* (vol. 3), 384. Bacon asked whether Magna Carta contained "any greater benefit" than the "near and cheap justice" which the Welsh Council provided to the English border counties.

[361] As quoted in Thompson, *Magna Carta*, 282.

[362] See chapter one and *Apparatus Fontium*, ll. 102-07, 222-28.

[363] See below *s.v.* "Fleetwood's Approach to Magna Carta." While Fleetwood also maintained that the "law of the crown" was part of the *lex terrae* and therefore the prerogative would be protected against Magna Carta, *A Discourse* demonstrated that the prerogative was subject to chapter 29.

[364] Bacon, *Letters and the Life* (vol. 4), 353-57; Thompson, *Magna Carta*, 282-83; See accounts in Baker, *Reinvention of Magna Carta*, 400-01 and Burgess, *Absolute Monarchy*, 147-49, and see also 57-58. Bacon emphasized the importance of the king's councillors and that counsel both limited and exalted the king, much like what Bracton said about the law. Cf. Bracton's understanding of *quod principi placuit legis habet vigorem* as it related not to the personal will of the king but was based in the advice of his councillors: Kantorowicz, *King's Two Bodies*, 151-52; *Bracton Online*, ii. 305.

ever ready to discredit Magna Carta in defending the prerogative,[365] although he did acknowledge its due process clause.[366]

Therefore, although Bacon exalted the royal prerogative with arguments contrary to the position in *A Discourse*, he also maintained a degree of constitutionalism that was, in most respects, consistent with it.[367] Nevertheless, Bacon did not analyze, apply, or advocate Magna Carta to the extent that Fleetwood did. Sir John Baker's research includes an analysis of an early Elizabethan commentary on Magna Carta which he attributes to Fleetwood; Fleetwood's application of chapter 29 in a legal argument against a patent of the Tallow Chandlers which also resembles the argument in *A Discourse*; his citing of the charter's provision in the last chapter and subsequent statutory confirmations in other case arguments; and his praise for the Great Charter expressed in court, writings, and Parliament.[368] The use of Magna Carta alone in *A Discourse* is enough to highly doubt Bacon's authorship, and thus perhaps scholars need to rethink the placement of *A Discourse* within the corpus of Bacon's works and its continued citation in examining his legal approach.[369] Attributing this work to Bacon also prevents us from understanding

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[365] For another example see Baker, *Reinvention of Magna Carta*, 422-23, *Brownlow v. Michell and Cox* (1615-16) where, to stay proceedings because the case was in the king's interest, Bacon issued the writ *non procedendo rege inconsulto*. The subsequent complaint was a delay of justice contrary to chapter 29.

[366] See Brooks, *Law, Politics and Society*, 402: "Bacon moderated the more severe views he shared with the Verge court with the observation that the English were lucky in that they could not be deprived of life, lands or goods, by flying 'rumours' and 'slandering fames,' or by the reports of 'secret' or 'privy' inquisitions"; Cf. Bacon's argument concerning the jurisdiction of the Welsh marches in Heath, "Professional Works," 588: "it was not thought reasonable to invest the King with a power to alter the laws, which is the subjects' birthright, in any part of the realm of England."

[367] See de Montmorency, "Francis Bacon," 274; Cf. Perez Zagorin, *Francis Bacon* (Princeton: Princeton Univ. Press, 1998), 272: "*A Brief Discourse upon the Commission of Bridewell* . . . contains opinions and arguments based on Magna Carta which are so much at variance with his other writings that it seems to me most unlikely that he was the author."

[368] See below *s.v.* "Fleetwood's Approach to Magna Carta."

[369] A fairly recent example is Penelope Geng, "Popular Jurisprudence in Early Modern England," Order No. 3644622, University of Southern California, 2014, p. 181, https://login.databases.wtamu.edu/login?url=https://search-proquest-

more about Fleetwood's legal-constitutional thought and that the use of chapter 29 in *A Discourse* is a significant addition to Fleetwood's other applications of Magna Carta in legal argument.

Date of Composition, Bridewell, and the Recorder of London

An examination of Fleetwood's authorship within its historical context should begin with a consideration of the variable dating. As Stewart points out, internal evidence can only suggest a date of composition between 1571 and 1603 since the latest statute cited had been in the thirteenth year of Elizabeth and all the manuscripts refer to the "reign of her Majesty that now is."[370] Nevertheless, some historians have argued for a more precise date.

Heath dated *A Discourse* prior to October 1587 which is the date accepted by most scholarship following his edition.[371] Heath referred to Martin's reports and the fifty-three clause Common Council Act in August 1579 which "professed to give the Governor of the Hospital very arbitrary powers over the rogues and vagabonds of London."[372] To the contrary, Griffiths stated that the act "expressed in simple and straightforward prose the rule that Bridewell's bench should never act above the law."[373] The ordinance stated that anything outside the authority of the alderman, his deputy, or the house of Bridewell should be referred to the mayor, court of alderman, or justices of the peace. Nevertheless, when matters fell within Bridewell's purview, its powers rested on the charter: "such things as be not in the power of the alderman, or his deputy, but in

com.databases.wtamu.edu/docview/1636539014?accountid=7143. Here *A Discourse* is mentioned as an example of Bacon's emphasis on law reform.
[370] Stewart, *OFB*, 41. Also, John Story's trial was in May 1571; *A Discourse*, ll. 163-64, 191.
[371] E.g. Coquillette, *Francis Bacon*, 323.
[372] Heath, "Professional Works," 507.
[373] Griffiths, *Lost Londons*, 227-28.

the power of the house of Bridewell, by virtue of their charter, shall be delivered to the governors of Bridewell, to be by them executed and reformed so far as they may according to the law," and this included the authority to punish at their discretion.[374] Heath fixed the composition of *A Discourse* "without much hesitation as of some time before Oct. 11th 1587" when another city ordinance was confirmed. According to Heath, these provisions were "of a much less stringent character" than the ones in 1579, and therefore he placed *A Discourse* in the time period leading up to the 1587 ordinance which presumably was a consequence of the legal backlash against the charter: thus Heath's *terminus ante quem* of October 1587. He wrote, "nothing seems more probable than that the question had been in the meantime discussed, whether it was quite safe to rely on the charter, and to ground on it such very strong measures as were at first contemplated."[375]

To my knowledge, there is no direct link between *A Discourse* (or any other discourse) and the order of Common Council in 1587. While Heath is accurate to say that this ordinance is less stringent, its language explaining what authority city officials shall have when dealing with "masterless men, vagrants, rogues, vagabonds, [and] idle women and children" had already been expressed before. It provided, among other things, for city officials to search, apprehend, and bring such people to Bridewell where the governors "shall examine [them] . . . and shall by their discretions dispose and sort the said idle persons."[376] Such language was similar to that of Bridewell's charter, letters patent, and the previous ordinance of 1579, and therefore the 1587 act is not necessarily

[374] Martin, "Bridewell and Bethlem Hospitals," 394-97: see clauses 10, 15, 35, 36, and 47.
[375] Heath, "Professional Works," 507-08.
[376] Martin, "Bridewell and Bethlem Hospitals," 399-400.

indicative of any change which resulted from previous discussions about the legality of Bridewell's charter.[377] Thus, it is inaccurate to assume based on this ordinance, which appears, according to Heath, to have moderated its orders as a result of earlier criticisms, that *A Discourse* had to have been written before this time.

This is not to say that *A Discourse* could not have been written prior to October 1587, as will be discussed below, but that Heath's argument is flawed and restricts the possibility of *A Discourse*'s composition after this date. Such is Baker's argument for a *terminus a quo* of late 1588 when a case involving two sheriffs of London was heard in Michaelmas term in the Star Chamber.[378] In July Thomas Skinner and John Catcher arrested two women, Jane Smith (*alias* Nevill) and Jane Newnham-both of whom were married and the former with child (who died following its premature birth shortly after this incident)-imprisoned them at Bridewell, and had them whipped as harlots. They had not been given a trial or any chance to defend themselves, and the sheriffs leveled no formal charges. The defense relied on a municipal custom to imprison and punish prostitutes, but, as Baker puts it, "the court took the view that relying on it as a defense only served to emphasize the sheriffs' malice, and imposed a severe sentence." The sheriffs were imprisoned for three months, heavily fined, and ordered to pay monetary compensation and publicly apologize to the two women.[379] A report of the case noted Lord Burghley's[380] praise of Magna Carta in the Star Chamber:

> this fredome no Countre butt oures (noe not in Fraunce) can challenge by the Lawes of their Realme, and that the procuring of this Statute of Mag[na] Chart[a]

[377] For the words of the charter and the patent see citation in the *Apparatus Fontium*, ll. 95-100.
[378] *Att.-Gen. v. Skynner and Catcher* (1588).
[379] Baker, *Reinvention of Magna Carta*, 212, 266-68.
[380] William Cecil, 1st Baron Burghley, was Lord High Treasurer from 1572 until his death in 1598: Baker, *Reinvention of Magna Carta*, 269n106.

> cost manye a noble mans lyfe, and was the Cause of the Barons warr, and therefore beinge so hardlye gott wee ought not easely to suffer yt to be lost.

The report continues to state that all the court and the Queen's Council agreed:

> That if the Queene graunte a Commission and expresse lycence to punishe any offence in this or that sorte, yet yf the same kynde of punishment bee nott suche as by lawe ought to bee inflicted for that faulte, the partye punished hathe good remedye against them. And to punishe one suspected to bee an harlot by whippinge, as the case was there . . . my Lord Treasurer said that such were often whipped at Westminster, but that it was after they were convicted by an enquest. Also . . . that Imprisonment is noe punishment by the Course of the lawe but onelie a meanes to have the partyes forthcomminge till the tryall be had of that which is layd to their Charge or els till they paye the kinges fyne.[381]

The assertions of Burghley and the court were very similar to the author's argument in *A Discourse*: chapter 29 and the administration of justice only after an official inquiry, a royal commission was liable for inflicting punishment contrary to the law, and by no means could someone be punished with imprisonment but within the bounds of law. These similarities led Baker to conclude that Fleetwood penned *A Discourse* sometime following this incident: "It is not certain whether the opinion preceded the Star Chamber decision or followed it, but the two were clearly in unison."[382]

Despite the relevance between *A Discourse* and the sheriffs' case, the latter is not in any way explicitly referenced in the former. The same goes for Anthony Bate's case which took place in the Star Chamber from 1577-80.[383] Bate filed a complaint in the Star Chamber in early 1577 after he was charged at Bridewell's court for being a serial "whoremonger." Bate's bill focused its attack on one governor in particular, Robert Winch, who denied the accusation that citizens were "called in question of there reporte,

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[381] As quoted in Thompson, *Magna Carta*, 204.
[382] Baker, *Reinvention of Magna Carta*, 269.
[383] Griffiths, *Lost Londons*, 217-19 and 223-24. See a more extensive treatment in Griffiths, "Contesting London Bridewell," 293-310. Bate lost his case and in September 1580 apologized before the Court of Aldermen and Bridewell governors.

fame and credit . . . uppon mere suspition of ther incontinencye or uppon willfull accusacion of dissolute persons."[384] Winch was also accused of conducting private examinations.[385] The author of *A Discourse* leveled similar criticisms. He argued that "the accusation of whores" is not sufficient evidence "to call any man to answer,"[386] words which, Griffiths observes, "echo Bate not long after his case came to an end."[387] Expounding on the 1368 statute redressing commissions which "make their enquiries in secret places," the author of *A Discourse* concluded that "commissioners of enquiries ought to sit in open courts, and not in any close and secret place."[388]

It is not certain whether these allegations against Winch were true.[389] Bate himself was by no means an innocent victim. He bribed witnesses, tampered with evidence, and could be accurately termed a "whoremonger," but in the attempt to restore his reputation he had damaged Bridewell's, revealing defects in its procedure.[390] Outside of the Star Chamber, similar criticisms were aimed at Bridewell in large part responding to its crackdown on sexual transgressions. Concerns for Bridewell's legal standing were reflected in a number of municipal initiatives which, Griffiths contends, were likely in response to the controversy surrounding Bate's case. In 1577 aldermen asked Recorder Fleetwood with legal counsel to go over the charter to determine what the governors

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[384] As quoted in Griffiths, "Contesting London Bridewell," 292-93, 295.
[385] Griffiths, "Contesting London Bridewell," 301; *Lost Londons*, 224.
[386] *A Discourse*, ll. 143-44.
[387] Griffiths, *Lost Londons*, 226.
[388] *A Discourse*, ll. 148-49, 154-55; 1368, 42 Edw. 3, c. 4.
[389] Griffiths, "Contesting London Bridewell," 295-96. He writes, "it matters a great deal whether or not these allegations were true or false, though it matters even more that they could be believed and be so energetically contested both on the streets and inside courtrooms."
[390] Griffiths, "Contesting London Bridewell," 302, 305, 308-09, 311. He concludes, "there was probably more than a grain of truth in the gloomy depiction of Bridewell put forward by a considerable number of prostitutes, pimps, and brothel keepers. Even in the mouths of such slippery characters, stories of gross malpractice were potentially believable because similar claims had circulated at other times and because Bridewell's legal basis and its methods did have real weak spots."

"maye doe by force of the letters patent,"[391] and in 1579 a list of such powers was drawn up (though not written down). In the same year, the governors were told to draft a bill for the ratification of the charters of London's hospitals in Parliament.[392] (This did not reach a first reading.) The Common Council Act in 1579 outlined the extent of Bridewell's authority, and later in the same year it was a requirement for justices to sign governors' warrants.[393] A governor's warrant, according to the author of *A Discourse*, was not adequate to call a man to answer a charge without "indictment or other matter of record."[394]

Griffiths says "there is no direct link" between *A Discourse* and the consultation asked of Fleetwood in 1577 to go over the charter and define what powers were given to Bridewell's bench. Though if Fleetwood composed *A Discourse*, Griffiths argues, it would have been around the late 1570s and early 1580s "when Bridewell's charter was under fire."[395] If that time frame is accepted, age and circumstance do not work in favor of Bacon's authorship. He was admitted into Gray's Inn in late 1576 at the age of 15, but the following year he was in France, attached to the embassy of Sir Amias Paulet, and only upon his return in early 1579 did he take up residence at Gray's Inn to begin serious legal study. Therefore, given his youth it seems unlikely that Bacon composed *A Discourse* during this time. However, a Baconian composition in the late 1580s is another matter to consider. *A Discourse* demonstrates seasoned learning and during this

[391] As quoted in Griffiths, "Contesting London Bridewell," 288.
[392] Cf. G.R. Elton, *The Parliament of England, 1559-1581* (Cambridge: Cambridge Univ. Press, 1986), 78-79. Elton gives the year 1576 as when "the governors of Bridewell were told to get their charter confirmed in Parliament."
[393] Griffiths, *Lost Londons*, 218, 226-28.
[394] *A Discourse*, l. 145.
[395] Griffiths, *Lost Londons*, 226, 228.

time Bacon was only in his late twenties, but perhaps he was capable of writing such a work for by late 1588 Bacon had become bencher at his inn and sat in the House of Commons. He was also appointed to a committee of sixteen lawyers from the Inns of Court to review current statutes. As Jonathan Marwil explains, "Bacon's selection . . . indicates that he had already gained some reputation as a legal mind by the age of twenty-seven, since the other fifteen men were all many years his senior."[396]

Thus, by the late 1580s Bacon may have been qualified intellectually to author *A Discourse*. Nevertheless, he was not affiliated with Bridewell to the extent that Fleetwood had been as recorder of London (1571-91). Griffiths sums up what we know about Fleetwood's position from the letters he wrote to Lord Burghley: "Fleetwood would have been familiar with the nuts and bolts of Bridewell process. He had a seat on the bench and attended court sittings. He was a very active recorder, getting involved in the nitty gritty of policing, going out on searches and traveling deep into London's shady areas."[397] Fleetwood himself placed "rogues" in Bridewell and worked with the governors or "masters" in the examination and punishment of such lawbreakers each "according to his deserts."[398] On the other hand, recent commentators have suggested the unlikelihood that London's recorder would deny the legality of Bridewell's charter, procedure, and commission on paper.[399] This point is well taken, yet some further consideration might help resolve this apparent contradiction.

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[396] Coquillette, *Francis Bacon*, 311-12; Marwil, *The Trials of Counsel*, 65; See also de Montmorency, "Francis Bacon," 265-66.
[397] Griffiths, *Lost Londons*, 225-26.
[398] Thomas Wright, ed., *Queen Elizabeth and Her Times: A Series of Original Letters*, vol. 2 (London: Henry Colburn, 1838), 73, 164-67, 205-06.
[399] See Griffiths (2008) and Stewart (2012) at the beginning of the chapter; Brooks, however, maintained that because he was recorder of London, Fleetwood seemed "the most likely author": *Law, Politics and Society*, 418n154.

In his twenty years as recorder, Fleetwood's judicial career centered on criminal law, but during this time he also remained an advocate. Baker has attributed to him a series of case arguments located in the British Library's Hargrave collection. At least fifteen of these Fleetwood is known to have argued in, and of these almost all are from the 1580s after he became a serjeant-at-law.[400] It is reasonable to argue then that Fleetwood's position as recorder did not conflict with Fleetwood the lawyer taking a critical approach to Bridewell purely from a legal standpoint.[401] If this is true, to challenge the validity of what had become one of London's key penal institutions might require anonymity on the part of the city's leading magistrate. When considering the anonymous *Ca*, Heath thought that "a name must from the first have been attached."[402] While it is all possible that earlier manuscripts which have not survived bore an ascription, it is important to notice that the other two anonymous manuscripts, *Hl* and *La*, are dated to the late-sixteenth century, possibly as early as the 1590s. Only the later seventeenth century witnesses have attributions.[403] Thus anonymity from the first is plausible and could help explain the recorder's authorship.[404]

Furthermore, under what circumstances would Fleetwood have composed *A Discourse*? Two possibly related cases have been discussed above. The court in the sheriffs' case and Anthony Bate in his own leveled criticisms against Bridewell which are also present in *A Discourse*. Prior to receiving corporal punishment at Bridewell, the

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[400] Baker, *Reinvention of Magna Carta*, 239n150.
[401] See below *s.v.* "Fleetwood's Constitutional Ideas." Here I suggest that *A Discourse*, although stylistically resembling a legal brief, was a commentary not written for a client or intended for argument in court.
[402] Heath, "Professional Works," 507.
[403] See textual introductions in chapter two.
[404] Cf. an anonymous treatise also dated to the 1580s and attributed to Fleetwood in Brooks, *Law, Politics and Society*, 75.

sheriffs had seized Nevill and Newnham as they were walking in the streets of London after dark. The court determined that the sheriffs had not afforded the women any due process.[405] A decade earlier Bate had written that citizens should be allowed to defend their reputation and reason for appearing in suspect places. However, while the author of *A Discourse* attacked Bridewell's charter, Bate acknowledged Bridewell's role, in the words of its charter, to apprehend suspect persons and try them accordingly. His primary grievance was that a defamatory statement had been made about his character.[406] In the case of the sheriffs, on the other hand, the charter was challenged in that the counsel for the sheriffs relied on it to justify the punishments.[407] The queen's own attorney-general (John Popham) led the prosecution, and in conclusion the court asserted the rule of law. Any hesitation on the part of the recorder of London to pen such a treatise might have dissipated at the Lord Treasurer's approval of this new learning.[408] Griffiths has determined that by 1587 "the fuss about Bridewell's shaky foundations had settled down a little."[409] But certainly this singular, shocking occurrence would have reignited Bridewell's legal shortcomings, including those expressed in Bate's case. Bate's complaint was not only a personal censure of the governors but also a questioning of Bridewell itself.[410]

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[405] Brooks, *Law, Politics and Society*, 402-03.
[406] Griffiths, "Contesting London Bridewell," 292, 295.
[407] Brooks, *Law, Politics and Society*, 403.
[408] See Baker, *Reinvention of Magna Carta*, 269: "The espousal of the new learning by Lord Burghley was of immense significance. It could hardly be criticized as subversive or disloyal if it was approved by the queen's chief minister." Fleetwood enjoyed the patronage of Burghley, was a regular correspondent of his, and a "promoter of his policies in Parliament": P.W. Hasler, "Fleetwood, William I," History of Parliament, accessed November 11, 2016, https://www.historyofparliamentonline.org/volume/1558-1603/member/fleetwood-william-i-1525-94.
[409] Griffiths, *Lost Londons*, 228.
[410] Griffiths, "Contesting London Bridewell," 297.

Despite the links between these cases and *A Discourse*, the author makes no express references to them, and thus it cannot be said with certainty that *A Discourse* is directly related to either of them. For example, there is no mentioning of the unlawful punishment of women or prostitutes. But it can be said with surety that this is the context in which this work was produced. Taking into account the arguments of Griffiths and Baker, *A Discourse* can confidently be placed between 1577, the beginning of Bate's case and when Fleetwood was asked to review the charter, and sometime during or shortly after the case of the sheriffs of London in late 1588.[411] And yet, the connection *A Discourse* shares with the latter case is notable.[412] Baker's argument for this relation also takes into account Fleetwood's use of Magna Carta during the resurgence of chapter 29 in the 1580s, particularly in the latter half of the decade.

Fleetwood in Legal Argument

Sir John Baker's recent attribution of a number of case arguments to Fleetwood has given great insight into his use of law as an advocate. Baker points to the *Case of the Tallow Chandlers* (1583) for which Fleetwood employed a very similar argument as that in *A Discourse*.[413] In 1577 a royal charter authorized the commission of the Tallow Chandlers of London "to be searchers, weighers, examiners, viewers, and triers" of various products of the trade, and not until after inspection and approval could merchants sell their goods upon pain of forfeiture. The commission was also allowed to impose

[411] It is tempting to suggest a *termins a quo* of 1582 due to the quoted passage from the charter being much closer to the words in John Howes' manuscript (1582) than to the charter itself: *Apparatus Fontium*, ll. 95-100.
[412] See further discussion below *s.v.* "Fleetwood in Legal Argument."
[413] Baker, *Reinvention of Magna Carta*, 238-41, 243, 245; BL, MS. Hargrave 4, ff. 290v-293v. See Appendix II.

fines on the owners for the "trying and marking" of the various commodities.[414] Fleetwood argued that for someone to be seized of their goods without "lawful trial" or "due inquest" was against chapter 29 of Magna Carta. Chapter 37 guaranteed that "if any grant be made by the King or his heirs" against the Great Charter, then it "shall be utterly void and of none effect."[415] The Tallow Chandlers' commission was analogous to earlier ones which were found to be contrary to the law: a commission in 1350 to apprehend certain malefactors who had not been indicted and in 1368 a commission authorizing Sir John atte Lee to seize the body and goods of a man and have him imprisoned without indictment.[416] Thus Fleetwood found the charter to be against common and statute law and therefore "utterly void and not meet to be put in execution."[417]

In 1582, however, Fleetwood defended a royal charter upon which the Joiners' Company of London justified their power to imprison without judicial judgment.[418] As Baker explains, Attorney-General John Popham issued a *quo warranto* in the King's Bench against the joiners "to show by what warrant they claimed the power to make bye-laws giving powers of search, forfeiture, and imprisonment against joiners who were not members of the corporation . . . The company relied on a charter of Queen Elizabeth"

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[414] Patent Rolls, 1575-78, 19 Eliz. 1, pt. 6, m. 29-30, pp. 345-46. See also MS. Hargrave in previous note; Together with Robert Snagge and one other, Fleetwood opposed a bill in the 1572 parliament which penalized the corrupt making of wax and gave authority to the masters and wardens of the company "to searche within fortie miles of London" for such wax: T.E. Hartley, ed., *Proceedings in the Parliament of Elizabeth I, 1558-1581*, vol. 1 (Leicester Univ. Press, 1981), 313. See "An Acte for the true melting and making and working of Waxe," 1580-81, 23 Eliz. 1, c. 8. See also Baker, *Reinvention of Magna Carta*, 245n192 and Elton, *The Parliament of England*, 236-37.

[415] *Tallow Chandlers*, ll. 60-62, 65-67, 73-76, 130-31.

[416] *Tallow Chandlers*, ll. 80-85, 86-98, 110-11; *Apparatus Fontium*, ll. 222-28, 102-07, 110-14, and 229-33. Fleetwood also relied on 1472, 12 Edw. 4, c. 8 (repeal of patents for searching and surveying of victuals); Magna Carta, 1225, 9 Hen. 3, c. 14 (concerning amercements); Statute of Westminster I, 1275, 3 Edw. I, c. 6 (reasonable fines); YB 42 Edw. 3, Lib. Ass., pl. 12 (1368.100ass).

[417] *Tallow Chandlers*, ll. 136-38.

[418] *Att.-Gen. v. Joiners' Company* in Baker, *Reinvention of Magna Carta*, 472-76.

granted in 1571.[419] Popham, on behalf of the Crown, constructed an argument similar to the one in *A Discourse*.[420] He maintained that chapter 29 forbade the imprisonment without due process, and he referred to the commission in *Sir John atte Lee's Case* (1368) to argue that joiners "ought to be punished by way of indictment, which is the ordinary course of the law."[421] Fleetwood's response was that the law of the land allowed this so long as joiners were imprisoned on reasonable grounds.[422] Bridewell's charter gave the governors the power to punish "by any other ways or means,"[423] whereas the letters patent granted to the Joiners' Company permitted the master and wardens of the corporation the power to punish, not by their discretion, but specifically by "fines, imprisonment and other *reasonable* ways."[424] Besides his position as an advocate in this case, the difference in the wording of the grants might help explain Fleetwood's rebuke of Bridewell's charter in *A Discourse*[425] and the opposite argument by which he defended the charter of the Joiners' Company.

In *Collett v. Webbe* (1587) Fleetwood also expounded against chapter 29 when he asserted the legitimacy of imprisoning without ordinary process in accordance with local custom. In an action of false imprisonment, Fleetwood argued on the side of the defendants, bailiffs of Shrewsbury, who pleaded a custom "to arrest anyone behaving contemptuously towards themselves . . . and to imprison them without mainprise for a day or more (or less) at their discretion, according to the seriousness of the offense."[426]

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[419] Baker, *Reinvention of Magna Carta*, 468.
[420] E.g. see *Apparatus Fontium*, ll. 219-21.
[421] Baker, *Reinvention of Magna Carta*, 470, 472.
[422] Baker, *Reinvention of Magna Carta*, 475.
[423] *A Discourse*, l. 99.
[424] Patent Rolls, 1569-72, 13 Eliz. 1, pt. 3, m. 36, pp. 211-12 (emphasis added). I have not been able to locate the charter itself.
[425] See below *s.v.* "Bridewell's Charter and Commission."
[426] Baker, *Reinvention of Magna Carta*, 476.

The commissions reported in 1350 and 1368 were certainly against the law proceeding without indictment, but in this case, Fleetwood maintained, the custom for the bailiffs to arrest someone at their discretion was good even though this was against chapter 29. Magna Carta, like any other statute, should be expounded against the letter rather than an inconvenience be suffered,[427] and this would be the case "in cities, where great mischiefs and outrages might easily be stirred up on the sudden, if the magistrates did not have sufficient power to imprison persons disobeying their orders."[428]

Perhaps few would understand the necessity to deal summary justice better than London's recorder. In Hilary term 1588, responding to Edward Coke's argument that a custom of Salisbury to call a person to answer without process was against chapter 29, Fleetwood said that if Magna Carta was followed to the letter "no felon is duly handled at Newgate."[429] Based on the account in his letter, a woman appears to have been punished at Bridewell without formal charge. Fleetwood had examined a "carrier's wife of Norwich" who had hidden away a bag of money entrusted to her, and upon the recorder's examination she denied that she ever had the money and gave no further answer. At this point Fleetwood "used my Lord Maior's advise, and bestowed her in Bridewell, where the masters and I saw her punished, and being well whipped" the woman confessed.[430] This is not to say, of course, that London's recorder did not adhere to procedure as evidenced in his letters;[431] and besides, to imprison without due process was very much

[427] Cf. Fleetwood, *Statutes*, 155-62 *s.v. Contra verba Statuti*, esp. 161-62.
[428] Baker, *Reinvention of Magna Carta*, 477-81.
[429] Baker, *Reinvention of Magna Carta*, 262-63. The case was *Jerome v. Neale and Pleere* (1588) at pp. 481-84.
[430] Wright, *Queen Elizabeth and Her Times*, 166-67.
[431] Wright, *Queen Elizabeth and Her Times*, e.g. 230: "a dweller in Flete Street . . . who had robbed one of my Lord of Bedford's gentilmen, was brought unto me. My Lord Malvesour sent unto me for hym, and said he wold do justice upon hym hymself. I told the messenger what the lawe was, and wylled hym to bring me sureties, and he should be bailed, untill the Lords were certified thereof."

grounded in the law, in chapter 29 itself. In 1582 Fleetwood argued that "imprisonment . . . without a judicial judgment" is permitted if it is within reason, "for *lex terrae* is reason, and when an imprisonment is upon a reasonable cause, the imprisonment is *per legem terrae*."[432]

So, taking into account the view that one could expound against chapter 29 to uphold imprisonment without indictment and that this was necessary in large cities, how does one explain Fleetwood's use of chapter 29 in *A Discourse* to assert the necessity for indictments in calling "any man to answer" a charge at London Bridewell? The simple explanation is that he was a skilled advocate.[433] Otherwise, he defined those conditions which warranted such practice. Whether a party could lawfully imprison without process depended on the circumstance and if there was precedent for such an action. Examples included "felony (upon a warrant for suspicion)" or "misbehaviour in forests."[434] But imprisonment upon mere accusation or suggestion was not valid: "by hearsay, or upon report of others, that a certain person has so misbehaved in the forest, the forester may not imprison."[435] Thus the "proceedings in Bridewell" were not sufficient "upon the accusation of whores."[436] In *Collett v. Webbe*, Fleetwood argued that commissions, like the two in the fourteenth century, are against the law when "the offense does not appear to them who have the commission. It is otherwise where the fact appears to them who have such authority, for there they may inflict punishments at their discretion."[437] In this

[432] Baker, *Reinvention of Magna Carta*, 475. This was in *Att.-Gen. v. Joiners' Company* (1582).
[433] In 1585 Fleetwood said that he had been "a mote [moot] man 30 year together": T.E. Hartley, ed., *Proceedings in the Parliament of Elizabeth I, 1584-1589*, vol. 2 (London: Leicester Univ. Press, 1995), 127.
[434] Baker, *Reinvention of Magna Carta*, 464 (Fleetwood's commentary on c. 29, *c.* 1558).
[435] Baker, *Reinvention of Magna Carta*, 479 (*Collett v. Webbe*). Citing c. 29, Coke made the same point in *Jerome v. Neale and Pleere* (p. 482).
[436] *A Discourse*, ll. 143-44.
[437] Baker, *Reinvention of Magna Carta*, 479.

case, the bailiffs of Shrewsbury possessed this authority because the plaintiff's misdemeanor "appeared to themselves and was committed against them."[438] Thus, they could prescribe against chapter 29 since their power to imprison "without ordinary and lawful conviction"[439] lay in custom which was but one aspect of the *lex terrae*.[440]

To sum up, the authority to proceed against someone without due process was lawful but only within certain bounds. For example, the offense would have to fall under a certain category, such as felony, and a seizure could not be based on the accusation of others, but there should be sound proof of the offense and this known firsthand to those making an arrest. Therefore, commissions could not be issued to seize one's body or goods without cause. Any power to summarily punish might violate the law if these conditions were not present, and if they were not, the absence of an indictment was particularly repugnant to the law.

In order to further elucidate Fleetwood's authorship, it again will be helpful to place these legal arguments in the context of the prosecution of the two sheriffs in 1588. As Baker says of the case, "the facts were not disputed" and the sheriffs had apprehended the women "without any good reason," and Brooks writes that the "counsel for Skinner and Catcher argued that they had ordered the punishments in accordance with the

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[438] Cf. Popham in *Att.-Gen. v. Joiners' Company*. Baker, *Reinvention of Magna Carta*, 470: "a constable is like a judge, and if [he] sees an affray he may arrest the parties and imprison them, just as judges who see an affray in their presence may command the parties to prison without process."

[439] Baker, *Reinvention of Magna Carta*, 478-79. Fleetwood lost the case and judgment was given for the plaintiff. The justices determined that the custom was not a reasonable one for the bailiffs "to imprison anyone at their discretion." In *Att.-Gen. v. Joiners' Company*, Fleetwood had cited precedent for a constable to imprison outside the regular bounds of law "at his discretion": pp. 475-76 and 476n31 for year book citations.

[440] Charles Beem and Dennis Moore, eds., *The Name of a Queen: William Fleetwood's Itinerarium ad Windsor* (New York: Palgrave Macmillan, 2013), 28. Among the other kinds of laws in England were "Customary Lawes": "Sometimes by the private custumarie lawes of citties and antient burroughes."

customs and Charter of the City of London."[441] According to Fleetwood in *Collett v. Webbe*, the bailiffs of Shrewsbury possessed the authority to punish at their discretion because the plaintiff's offense had appeared to them, and this authority entailed a custom to imprison without the regular process of law. The key difference in the case of the sheriffs of London was the absence of any reason for proceeding against Nevill and Newnham. Therefore, the sheriffs had no authority to punish at their discretion and so could not rely upon a custom to incarcerate and punish prostitutes. Since they could not show that any offense had been committed, how could a plea of prescription stand up against chapter 29 and its confirmation in the 1368 statute of due process?[442]

Once at Bridewell, the sheriffs and governors oversaw the whipping of Nevill and Newnham.[443] If their offense was not known to the governors, they also did not have the authority to punish at their discretion, and their discretion in this case went beyond what the law allowed. As Griffiths notes, "discretion is a keyword in Bridewell's charter," and the author of *A Discourse* "zoomed in on it with pin-point precision."[444] He questioned discretionary authority deriving from royal charters and commissions and suggested that the governors' power to punish would rest more soundly on an Act of Parliament.

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[441] Baker, *Reinvention of Magna Carta*, 266-67; Brooks, *Law, Politics and Society*, 403.
[442] Fleetwood's "wife of Norwich" was brought to Bridewell and whipped summarily on suspicion of theft, but her offense had appeared to the recorder upon his examination (see above); It had always been understood that *homo* applied to both sexes as Fleetwood noted in his commentary on c. 29: Baker, *Reinvention of Magna Carta*, 34, 463. *Judicium parium*, or trial by peers, however, did not extend to women until the statute of 1441-42, 20 Hen. 6, c. 9, but this only including "Ladies of great Estate . . . that is to say, Duchesses, Countesses, or Baronesses"; 1368, 42 Edw. 3, c. 3. Fleetwood noted this statute among others *temp.* Edward III which confirmed c. 29: Baker, 463.
[443] Griffiths, *Lost Londons*, 224-25; Ingram, *Carnal Knowledge*, 359.
[444] Griffiths, *Lost Londons*, 230.

Bridewell's Charter and Commission

What was repugnant to chapter 29 of Magna Carta were the "words, sense, matter, and meaning of the said Charter of Bridewell," and the author asks the reader to "compare the said Charter of Bridewell with the great Charter of England both in matter, sense, and meaning" in order to uncover their repugnancy.[445] Such was the manner for interpreting statutes as stated by Fleetwood in his discourse on the subject: "For the further Exposition of an Estatute, there is well to be considered the Words, the Sense, and the Meaning thereof."[446] In addition to Fleetwood's treatise, Plowden's *Reports* contain a similar application of statutory exposition.[447] In *A Discourse*, the charter clearly lacks an articulation of due process as stated in chapter 29.[448] But the author invites the reader to apply this method of statutory interpretation to Bridewell's royal charter in order to uncover its contradiction with chapter 29.

In most cases ascertaining the sense, matter, and meaning of a statute takes precedence over the letter.[449] "The Matter comprised within the Statute ought to rule the Letter," and expositors should "frame the words to the meaning then the meaning to the

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[445] *A Discourse*, ll. 108-09, 127-28.

[446] Fleetwood, *Statutes*, 120. For the twentieth century edition see Samuel E. Thorne, ed., *A Discourse upon the Exposicion & Understandinge of Statutes with Sir Thomas Egerton's Additions: Edited from Manuscripts in the Huntington Library* (San Marino, CA: Huntington Library, 1942), 123. Baker, *Reinvention of Magna Carta*, 232-37, considering two other versions in manuscripts known to have belonged to Fleetwood, makes a very strong case for Fleetwood's authorship. Baker dates the first draft to the 1550s. Later in his career (1590) Fleetwood added passages out of Plowden's *Reports* (see next note).

[447] The opening pages from Fleetwood's *Statutes* (98-116) are taken from six cases in Plowd: *Reniger v. Fogoffa* (1550) 13-14; *Wimbish v. Tailbois* (1550) 53-54, 57-59; *Partridge v. Strange* (1553) 82; *Fulmerston v. Steward* (1554) 109-10; *Hill v. Grange* (1556) 178; *Stowel v. Lord Zouch* (1563) 363. For pp. 116-20, the seventeenth century printer/editor (Ralph Wood) provided the folios from Plowden's *Reports* in the margins; and on p. 117, Fleetwood himself cites *Wimbish v. Tailbois* (1550) 42; Cf. Francis Bacon's method for exposition in his *Reading Upon the Statute of Uses* (1600) in Coquillette, *Francis Bacon*, 54, which "followed the outline of the fifteenth-century readers" (76n140).

[448] *A Discourse* contains a paraphrased extract from the charter very similar to what John Howes wrote in 1582, although the charter itself also lacks such provision. See *Apparatus Fontium*, ll. 95-100.

[449] An exception is where a statute is penal: Fleetwood, *Statutes*, 150-52 and Beem and Moore, *The Name of a Queen*, 26-27.

words."[450] The "Letter without the Sense does not make Law," and Fleetwood writes that the sense is "that which riseth of the words being weighed together, wherein it is to be seen, the relation of words, the coupling of the same, what may be gathered of them by implication."[451] According to *A Discourse*, Bridewell's governors were given the authority "by any other ways or means to punish or correct."[452] What is implied in these words is understood through the comparison of the charter with chapter 29, and that is that the governors were permitted extralegal powers to punish as they deemed necessary. To punish "by any other ways or means" might not accord with any aspect of the *lex terrae*.[453] According to the author, it most notably did not with the 1368 statute of due process. He remarks that if this statute "be well compared with the said Charter of Bridewell, it will make an end of this contention."[454]

The governors were to administer punishments "as shall seem good to their discretions."[455] The author challenged the legality as well as the basis for such discretionary authority. He expounded the 1368 statute to reform commissions beyond

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[450] Cf. *Argument of Master Nicholas Fuller*, 20: the "meaning of the Act is the life of the Act, and not the letter of the Act."

[451] Fleetwood, *Statutes*, 97, 99, 125, 144. Cf. pp. 136-37: "when a sense m[a]y be gathered by Implication, howbeit it is sometimes true, and most times false"; In Elizabeth's third Parliament of 1571, Fleetwood stated that "the wordes of an act of Parliament are not ever to be followed, for that sometyme the construccion is meere contrarye to what is written": Hartley, *Proceedings in the Parliament* (vol. 1), 236.

[452] *A Discourse*, ll. 99-100; The charter states that the governors shall punish "in any other manner . . . as to them it shall then seem good and lawful": Wrottesley and Smith, "Christ's Hospital," 84. Cf. a similarly worded indenture dated June 12, 1553 at pp. 76-79, esp. 79; Cf. also the wording of the commissions to Sir Ambrose Cave and others, particularly the commission issued in 1563: *Apparatus Fontium*, ll. 163-65. As the author informs us, the commissioners yielded up the commission when it was found to be against the law: *A Discourse*, ll. 165-69. In 1562 the King's Bench discharged a gentlemen committed to custody by Cave: Baker, *Reinvention of Magna Carta*, 158.

[453] In *Itinerarium ad Windsor*, Fleetwood defined twelve types of laws by which the king's "dome [dominion] is conducted": law of God, spiritual law, civil law, martial law, forest laws, laws of Oleron or *lex mercatorum*, laws of wardonry against Scotland (*leges trevgarum*), customary laws, law of the lord steward at coronations, law of parliament, common law, laws of the Crown: see Beem and Moore, *The Name of a Queen*, 27-29. From his argument in *Jerome v. Neale and Pleere*, add to this list the natural law (*jus naturale*): Baker, *Reinvention of Magna Carta*, 484.

[454] *A Discourse*, ll. 130-41.

[455] *A Discourse*, l. 100.

the letter when he wrote that the inquiries of commissioners "ought to be by juries and by *no discretion* or examination."[456] Clearly the discretion of commissioners was not reliable when it came to lawful procedure. This was evident from examples where royal commissions had breached the law,[457] and although Bridewell's commission referred the examination of offenders "to the wisdom and discretion of the governors,"[458] the author found that in many instances Parliament had delegated discretionary powers, including to the commission for bankrupts and the High Commission. Prior to the composition of *A Discourse*, almost forty Acts of Parliament "refer the examination and punishment of offenders to the wisdom and discretion of the justices."[459]

In the 1571 parliament, an anonymous diarist recorded Fleetwood's concern for the meaning of the word "discretion":

> Hee sayd hee had read it oft, and that hee had beene troubled with it, as in this: 'the Queene is sworne to minister justice with mercy and discretion.' What mercy is (hee sayd) hee knewe, but what discretion was hee would gladly learne. Hee sayth it cometh of the word *discerno*, to see, but that is uncertaine. Hee sayd that a good corner of England was governed by wisdome and discretion: hee sayd the lawe is it should bee soe, but when the execucion[er]s of this statute[460] are to deale to their likings, if a poore man have lawe on his side then they say their discretions will not serve them, and when conscience doth give it him then they say the lawe is against them.

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[456] *A Discourse*, ll. 155-56 (emphasis added).
[457] Other than the two from the fourteenth century, the author also cited the commissions executed by Richard Empson *temp.* Henry VII, which were found to be contrary to Magna Carta, and another *temp*. Elizabeth I: see *Apparatus Fontium*, ll. 156-62, 163-65, 222-28, 229-33.
[458] *A Discourse*, ll. 170-71.
[459] *A Discourse*, ll. 217-18.
[460] "An Acte for the exone*r*acion frome exaccions payde to the See of Rome," 1533-34, 25 Hen. 8, c. 21; Fleetwood's speech here was part of the debate over George Carleton's bill reversing this statute which, for Carleton, gave the Archbishop of Canterbury popish powers in granting various ecclesiastical privileges. See J.E. Neale, *Elizabeth I and Her Parliaments, 1559-1581* (New York: St. Martin's Press, 1958), 209-11; This statute is cited in *A Discourse*, ll. 211-13, as another example where Parliament has delegated discretionary authority.

In a critical response, someone addressed Fleetwood by name and said "you are a lawyer but I am a judge." Fleetwood answered, "this man . . . might have witt, but hee nether had lawe, wisdome or discretion, other than in his owne judgment."[461] Here Fleetwood judged the term "discretion" ambiguous,[462] criticized the "executioners" of the statute for exercising discretion contrary to the law, and indicated that using one's own judgment was not the same thing as applying discretion. In the preface to his treatise on justices of the peace, Fleetwood focused on the lack of learning among the holders of that office, noting Bracton's opinion on judges unlearned in the law "who decide cases according to their own will rather than by the authority of the laws."[463] For Fleetwood, judicial discretion lacked a consideration of what the law was, and this anticipated the similar views of Coke in the following century.

Coke addressed this concern when he argued that the words in the commission of sewers gave "Authority to the Commissioners to do according to their Discretions, yet their Proceedings ought to be limited and bound with the Rule of Reason and Law . . . and [they ought] not to do according to their Wills and private Affections."[464] He criticized the 1495 statute by which "Empson and Dudley did commit upon the Subject

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[461] Hartley, *Proceedings in the Parliament* (vol. 1), 223.

[462] In this debate, Christopher Yelverton, responding to the previous argument by Francis Alford-that dispensations had to be left to the "discretion of some body, and not soe presisely, or with soe possitive a lawe to bee ruled that there should never bee varience from the written word"-knew not what discretion meant but that Alford's speech was not an example of it: Hartley, *Proceedings in the Parliament* (vol. 1), 222. See also Neale, *Elizabeth I and Her Parliaments*, 210.

[463] *Bracton Online*, ii. 19; *The Office of a Justice of Peace*, London, 1657, *EEBO*, accessed June 21, 2017, <http://gateway.proquest.com.databases.wtamu.edu/openurl?ctx_ver=Z39.88-2003&res_id=xri:eebo&rft_id=xri:eebo:citation:99867356>. Challenging the notion that elder officers were "too old to learn" the laws, Fleetwood said because of this they have "more discretion" and therefore were "more apt to learn the Laws of this Realm. For the Law is founded upon the grave and deep Reason of learned Fathers, sought out by long Experience, which is not easily perceived by yong wits." Cf. Coke in note below.

[464] *Rooke v. Withers* (1598) 5 Co. Rep. 100.

unsufferable pressures and oppressions." The act gave justices of peace and assize "full power and authority by their discretion to hear and determine all offences and contempts."[465] According to Coke, the purview of this act was to "the utter subversion of the Common law," for it authorized justices to proceed by their discretion and not by the laws and customs of England. To exercise discretion properly was "to discern by the law what is just."[466]

The author of *A Discourse* had not attempted to define the term nor identify any statutes which authorized or resulted in the arbitrary use of discretion, but he instead emphatically asserted Parliament's role in granting lawful discretion. He took this critical approach towards discretion as it was articulated in Bridewell's charter and given by its commission to the governors. As Fleetwood had said, the law had it that discretion governs "a good corner of England," but in *A Discourse* discretionary authority was founded on a solid parliamentary footing and not derived precariously from a charter or commission.[467]

Fleetwood's Approach to Magna Carta

Baker has attributed to Fleetwood a commentary on Magna Carta, written in law French, and likely composed sometime between 1557 and 1569. Extracts from the commentary were published in Baker's *Selected Readings and Commentaries on Magna*

[465] Co. Inst. iv. 40-41; "An Acte agaynst unlawfull Assemblyes and other offence*s* contrary to former Statut*es*, 1495, 11 Hen. 7, c. 3.
[466] Co. Inst. iv. 39-41. Coke wrote: "A good caveat to Parliaments to leave all causes to be measured by the golden and streight metwand of the law, and not to the incertain and crooked cord of discretion"; Cf. Coke's corresponding assertion regarding reason. Just as discretion is discerned by the law and not solely by one's own judgment, an "artificial reason" is obtained "by long study, observation and experience and not of every man's natural reason" (spelling modernized): Co. Inst. i. 97. See a similar statement Coke made to James I in a heated interchange as translated in Baker, *Reinvention of Magna Carta*, 367.
[467] See below *s.v.* "Fleetwood's Constitutional Ideas."

Carta (2015).[468] It followed the late-medieval learning of the inns of court. These readings of the fifteenth century had demonstrated that Magna Carta was not an entrenched statute for its provisions had clearly been altered over time. To an extent Magna Carta had become obsolete, as Baker points out: "Far from asserting its inviolability, readers in the inns of court regularly took the position that provisions of the charter had been repealed, even impliedly repealed, by later statutes."[469] In similar fashion, Fleetwood did "not hesitate to point out where provisions in the charter are void, repugnant, incomprehensible, ambiguous, impliedly repealed, riddled with exceptions, or unenforceable."[470] This approach appears to be at variance with a statement in *A Discourse*: "Hitherto ye see it very plainly, that neither procurement nor act done either by the king or any other person or any act of parliament or other thing may in any ways alter or change any one pointe contained in the said great Charter of England."[471] Again, taking a further look at this seeming contradiction will help demonstrate Fleetwood's varied approach to Magna Carta.

The assertion in *A Discourse* would seem to conflict with Fleetwood's contention that the passage of time had altered Magna Carta. In his discourse on statutes, he wrote that despite the 1368 confirmation which stipulated that any statute contradicting the Great Charter would be void, "yet hath Age . . . taken away that [Magna Carta] in many things." He gave as an example chapter 7 which had been made in a time of war but "at this day nothing is more common, but that Widows do marry without the consent of their

[468] Baker, *Reinvention of Magna Carta*, 226-29; Sir John Baker, ed. and trans., *Selected Readings and Commentaries on Magna Carta, 1400-1604* (London: Selden Society, 2015).
[469] Baker, *Reinvention of Magna Carta*, 87.
[470] Baker, *Reinvention of Magna Carta*, 244.
[471] *A Discourse*, ll. 124-27.

Lords."[472] Because Magna Carta "did but affirm and confirm the Common Law," it would change over time as common reason changed and reshaped the common law[473] for "the Common Law is grounded upon Common Reason."[474] Such changes were not deliberately made by written law but occurred naturally as time passed.

The claim in *A Discourse* also contradicted the assertion that statutes had revoked provisions in Magna Carta. Fleetwood had noted that a 1275 statute repealed the provision in chapter 19 that gave a constable forty days respite to make payment for a purveyance,[475] and he attributed the repeal of the writ of inquisition (*de odio et atia*), confirmed by chapter 26 of Magna Carta, to a 1278 statute.[476] The fifteenth century readers had also noted the repeal of the writ of inquisition at Gloucester in 1278, but a statute in 1300 was also credited with its repeal. In addition, two of the readings cited Gloucester's repeal without mentioning the writ's explicit provision at Westminster in 1285.[477] In the early seventeenth century, Coke would attribute its repeal to Gloucester

[472] 1368, 42 Ed. 3, c. 1; Fleetwood, *Statutes*, 159-60; The same point regarding chapter 7 was made in the "Ordinary Gloss" of the early fifteenth century (readings in the inns of court): Baker, *Selected Readings on Magna Carta*, 22.
[473] This point was articulated in Fleetwood's commentary on c. 3: Baker, *Reinvention of Magna Carta*, 245n190; Baker, 41n237, notes Fleetwood's argument in *Earl of Pembroke v. Earl of Hertford* (1591) that the effect of the Edwardian confirmations was that "Magna Carta shall be guided according to the course of the common laws."
[474] Fleetwood, *Statutes*, 143.
[475] Statute of Westminster I, 1275, 3 Edw. 1, c. 32; Baker, *Selected Readings on Magna Carta,* 381: "a statute in the affirmative may take away another statute . . . But the reason is because this statute [Westminster, c. 32] is so inconsistent with the other [chapter 19] that it cannot be observed unless the other is undone, for the person who ought to pay forthwith ought not to have forty days' respite"; Fleetwood, *Statutes*, 131-32.
[476] Baker, *Selected Readings on Magna Carta,* 382; Statute of Gloucester, 1278, 6 Edw. 1, c. 9.
[477] Baker, *Selected Readings on Magna Carta*, 232-36; Statute of Westminster II, 1285, 13 Edw. 1, c. 29; *Articuli Super Cartas*, 1300, 28 Edw. 1, c. 9 (see Baker, *Selected Readings on Magna Carta,* 232n4).

and then later to a statute in 1354,[478] though none of these statutes repealed the writ's provision in chapter 26 explicitly by name.[479]

Thus there was a consensus that this provision was void, but it was not based on any single, express alteration. As Baker remarks, in the fifteenth century "parts of Magna Carta could be treated as 'void' without any sign of an explicit intention to abrogate them."[480] Rather the asserted repeal of these provisions could come down to a matter of interpretation. Fleetwood did not hold chapter 8 to contain a repugnancy as earlier readers maintained,[481] and although the provision in chapter 3 that a lord shall not have the wardship of an heir until after he received his homage was considered void, Fleetwood argued that "various constructions have been made to make the statute good."[482] In case argument, Fleetwood maintained that Magna Carta and "every law, be it by statute or common law, is void if it is against the law of God, or the law of nature, or the common weal." He therefore suggested that chapter 29 might be expounded as void if it were found to be repugnant to the common weal, which it would in those cases where it disallowed summary powers needed to "preserve such large places and cities in peace,

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[478] Baker, *Reinvention of Magna Carta*, 509. This is Coke's memorandum on c. 29 (1604); Co. Inst. ii. 42-43. 1354, 28 Edw. 3, c. 9. He maintained that Magna Carta's 1368 confirmation voided this statute and revived the writ.

[479] Yet the Statute of Gloucester, c. 9, clearly referred to such writ: "no Writ shall be granted out of the Chancery for the Death of a Man to enquire whether a Man did kill another."

[480] Baker, *Reinvention of Magna Carta,* 91. Magna Carta was unique in this respect, for although it was regarded as any other statute, it was never expressly repealed prior to the nineteenth century despite provisions which were clearly invalid. See "An Act for consolidating and amending the Statutes in *England* relative to the Offences against the Person," 1828, 9 Geo. 4, c. 31 in *The Statutes of the United Kingdom of Great Britain and Ireland, 9 George IV* (London: His Majesty's Printers, 1828), 97. This statute explicitly repealed Magna Carta, 9 Hen. 3, c. 26.

[481] Fleetwood, *Statutes,* 135-36.

[482] As quoted in Baker, *Reinvention of Magna Carta*, 88n85; Cf. his construction in *Collett v. Webbe* (pp. 477-78). Chapter 3 would not be good in those instances where the heir was too young to do homage; Cf also *Jerome v. Neale and Pleere* (p. 482): "the statute of Magna Carta says that the lord shall not take homage before the heir is in ward, and yet this is not now law."

which are so populous."[483] Yet this would be a necessary exception due to specific circumstances and not any kind of permanent revocation or alteration of Magna Carta.

Therefore, despite the author's statement in *A Discourse* that nothing could "change any one point," Magna Carta had clearly been altered; but the assertion would not conflict with Fleetwood's approach in so far as it meant that the Great Charter could not be expressly changed by a governing body. However, it could not be said that Parliament was unable to repeal specific provisions in Magna Carta. According to Coke, this could be done with explicit language for "a general law shall not take away any part of Magna Carta."[484] Nevertheless, a provision within the charter and a confirmation in the time of Edward III had expressly forbidden anything procured to the contrary. Baker points out that from the viewpoint of Parliament, the provision in Magna Carta's last chapter that anything done contrary to the charter should be void could only apply to the king and his ministers, "not to legislative acts by the king in Parliament." The 1368 confirmation, however, expressly stated that statutes could not contradict Magna Carta. Baker asserts that the confirmation "presumably applied only to changes detrimental to the liberties granted by the charter, for improvements in the wording, or the addition of new remedies, could not be said to contradict it."[485] The liberties in chapter 29 can be given particular emphasis in the context of the 1368 parliament for the statute of due process (c. 3) was assented by the king on the grounds that it was an article of Magna Carta.[486] In sum, the author's statement in *A Discourse*, based on the last chapter's

[483] Baker, *Reinvention of Magna Carta*, 479-80.
[484] As quoted in Baker, *Reinvention of Magna Carta*, 24, n. 128.
[485] Baker, *Reinvention of Magna Carta*, 21-22.
[486] Rot. Parl. ii. 295, no. 12.

provision and the 1368 confirmation,[487] may be better understood as a broad claim of the unassailability of the liberties in the charter; a rhetorical rather than strictly legal assertion[488] and one which implicates a reverence for the Great Charter.

In 1585 Fleetwood spoke in the House of Commons of the "Great Charter, confermed with bloud, redemed with 5000 mark, confermed by generall counsell, no parlyment ever broke it."[489] Before he proceeded to qualify his position in *Collett v. Webbe*, Fleetwood made the point that his opponent (Serjeant Thomas Walmsley) ought to base his argument on chapter 29, the reporter noting that Fleetwood "would not omit to show this, even though it seemed to make against him." Fleetwood said that he had "never read any case which impugned" chapter 29, and did not hesitate to point out the inviolability predecessors ascribed to Magna Carta: "This statute has always been in the greatest of reverence, so much so that Roger [of] Wendover . . . wrote that no one could write against the statute, which was made and written with the blood of the subjects. And he [Fleetwood] stood long in proving that it was a sacred statute."[490] Fleetwood referenced the provision in the last chapter when he argued in 1590 that London had the power to make bylaws because the city's customs had been confirmed by chapter 9.[491] Here he also noted Magna Carta's many parliamentary confirmations including the

[487] *Apparatus Fontium*, ll. 124-27.
[488] Cf. Coke in the words of Baker, *Reinvention of Magna Carta*, 22: "When it suited him, as when speaking in the House of Commons in the 1620s, Coke would make very broad claims for the statute of 1368; but it has been persuasively argued that these claims were rhetorical rather than legal. He was not maintaining that Parliament was legally unable to repeal provisions in Magna Carta, only that it could not be done without great danger."
[489] Hartley, *Proceedings in the Parliament* (vol. 2), 122-23; See also Baker, *Reinvention of Magna Carta*, 260nn58-60.
[490] Baker, *Reinvention of Magna Carta*, 477, 479.
[491] He also quoted this provision in the *Case of the Tallow Chandlers* (1583): *Tallow Chandlers*, ll. 73-79.

Statute of Marlborough in 1267 and the one in 1368.[492] While Fleetwood noted the latter's ineffectiveness in his treatise on statutes, he wrote in his commentary that it was enacted for "so much was the said statute revered."[493] Citing these confirmations no doubt suited his case when relying on Magna Carta in legal argument; but more than this, the Great Charter was sacrosanct to the extent that Parliament had safeguarded its liberties.

In addition to acknowledging its historical significance and broadly asserting its immutability, Fleetwood applied Magna Carta in legal argument. The authority granted to the Tallow Chandlers' commission to seize goods was contrary to chapter 29 as was the governors' authority to administer penal justice as described in Bridewell's charter. By virtue of the provision in Magna Carta's last chapter, the commission and charter in these two instances could be rescinded. Here chapter 29 provided due process for the seizure of possessions and bodily punishment. In his commentary on chapter 29, Fleetwood identified the remedies for each of these: "if someone is imprisoned or disseised contrary to law, no one has remedy by this statute other than what was at common law, namely the assize [of novel disseisin] or false imprisonment."[494]

Baker highlights this conclusion as indicating a lack in Fleetwood's commentary of "any sense that it effectively protected the liberties of the subject."[495] For example, *habeas corpus* was not identified as a remedy provided by the statute. Coke would make

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[492] Baker, *Reinvention of Magna Carta*, 29, 243-44, 244nn181-82, 247-48, 248n210, 264n80 and see *A Discourse*, ll. 110-23. The case was *Brandon v. Morist*, or *The Chamberlain of London's Case* (1590-91). Here Fleetwood noted that the Statute of Marlborough, 1267, 52 Hen. 3, c. 5, confirmed Magna Carta as a statute. As to the number of confirmations, see *Apparatus Fontium*, ll. 117-18. Fleetwood may have numbered the confirmations up to fifty-two, and he inspired Coke's frequent reference to the over thirty Acts of Parliament confirming Magna Carta: Baker, 264, 350n86 and e.g. Co. Inst. ii. proeme.
[493] Fleetwood, *Statutes*, 159; Baker, *Selected Readings on Magna Carta*, 367.
[494] Baker, *Reinvention of Magna Carta*, 464 (bracketed text added by Baker).
[495] Baker, *Reinvention of Magna Carta*, 246-47.

this connection in his memorandum on chapter 29 (1604).[496] Like his commentary on the other statutes of Magna Carta, Fleetwood's exposition on chapter 29 drew from the standard learning of the fifteenth century readings. *Judicium parium* was confined to the peerage, or the temporal lords of Parliament.[497] Not until the seventeenth century would it be asserted that all subjects were entitled to a trial by their peers.[498] His interpretation of the words "shall be imprisoned" was that it did "not mean that a man shall not be imprisoned without process . . . For the law allows this, and the statute affirms" this with its provision "except by the law of the land."[499]

This was his position in cases from the 1580s.[500] According to Fleetwood, chapter 29 was subject to judicial qualification. For example, in *Collett v. Webbe* he said it should be "expounded as void" if it was found to be repugnant to the law of nature or "construed against the letter rather than an absurdity should be committed."[501] One could prescribe against Magna Carta to uphold a punishment without ordinary process,[502] and

[496] Baker, *Reinvention of Magna Carta*, 503. The absence of it in Fleetwood's commentary may be explained by the fact that at this time (*c.* 1558) the writ had not yet become a common remedy in the courts. By the end of the sixteenth century, *habeas corpus* was a firmly established and expansive remedy. The first known explicit association of *habeas corpus* with chapter 29 was not until 1572 by Edmund Anderson of the Inner Temple: Baker, 168-69, 250.
[497] Baker, *Reinvention of Magna Carta*, 464. Baker identifies one anomalous fifteenth century reader who maintained that "everyone, whether of greater estate or lesser, shall be adjudged by his peers according to this statute" (p. 452).
[498] Baker, *Selected Readings on Magna Carta*, xcii (Francis Ashley's reading on c. 29 in the Middle Temple in 1616); *Reinvention of Magna Carta*, 517 (Nicholas Fuller in *Maunsell's Case*, 1607).
[499] Baker, *Reinvention of Magna Carta*, 464.
[500] See *Att.-Gen. v. Joiners' Company* (1582), *Collett v. Webbe* (1587), and *Jerome v. Neale and Pleere* (1588) above *s.v.* "Fleetwood in Legal Argument."
[501] Baker, *Reinvention of Magna Carta*, 477.
[502] Cf. Coke in his memorandum on c. 29 (1604): "And it should be observed . . . that in some cases a man may be taken and imprisoned without answer, notwithstanding the said act of Magna Carta": Baker, *Reinvention of Magna Carta*, 502.

this included, in one example, "execution by prescription" according to the Halifax gibbet law of Yorkshire.[503]

Thus, within the context of chapter 29's resurgence in the late 1580s, Baker describes Fleetwood's "measured view" of chapter 29 as "distinctly old-fashioned."[504] This present study does not entirely dispute this assertion but endeavors to qualify Fleetwood's position on this matter, for Baker does not consider the full implications of Fleetwood's use of chapter 29 in *A Discourse* and in his argument for the *Case of the Tallow Chandlers* (1583). The general application of due process in these arguments has already been noticed, but a further look at these legal briefs will demonstrate a utilization of chapter 29 that corresponds with contemporary applications asserting the liberty of the subject and the rule of law.

Fleetwood explicitly applied chapter 29 to the injury caused by the patent in his argument prepared for the *Case of the Tallow Chandlers*. After reciting most of the statute with a focus on the disseisin of one's freehold, liberties, or free customs, he argued that "if this patent take place, that all the freemen of this city are disinherited forever of their lawful trial." This was "directly against the liberties granted by the great Charter of England."[505] Fleetwood concluded his brief stating:

> it is directly against the law that men should be restrained from their free marts etc. Or that they ought to forfeit their goods, no law set down against them. Or that their goods should be seized without due inquest. Or that any imposition

[503] Baker, *Reinvention of Magna Carta*, 478. A few years earlier, William Daniel of Gray's Inn had argued to the same effect as Fleetwood in defending the joiners' right to imprison without due process (p. 472). He cited the same precedent of Halifax gibbet law which allowed for the summary execution of someone who committed a felony (p. 471).
[504] Baker, *Reinvention of Magna Carta*, 261-66. Baker suggests three reasons for Fleetwood's "immunity to the current epidemic of enthusiasm" surrounding c. 29: since 1559 he had been a member of the High Commission whose authority was being challenged by common lawyers such as James Morice (see *Selected Readings on Magna Carta*, lxxxvii-lxxxviii); his knowledge of history; and having "been imbued with the cautious common learning of the late-medieval inns of court."
[505] *Tallow Chandlers*, ll. 60-67.

> should be set upon their goods being *liberi homines de regno* as Magna Carta termeth them.[506]

This argument should be placed within the context of the Elizabethan legal disputes over the restraint of trade, from which, Baker notices, the concept of the "liberty of the subject" was first expressed.[507] Monopolies were a particular grievance in Elizabethan England and a case in the early part of her reign was highly influential. In 1561 Christopher Wray of Lincoln's Inn argued that a Marian patent to restrict all imported malmseys to the town of Southampton upon pain of paying treble customs was an infringement of Magna Carta, chapters 30 (concerning merchants) and 29. The judges deemed the patent void, and this ruling became a significant precedent against restraint of trade.[508] In 1582 Popham cited it against the Joiners' Company.[509] Here Fleetwood accepted the case but only attributed it to merchants who by the law of nations and "for the general benefit of the common weal" could trade freely, and "if he is hindered he is wronged."[510]

A year later, Fleetwood extended this freedom beyond just merchants. The patent granted to the Tallow Chandlers placed a hold on the sale of any merchandise until permitted by the commission and set impositions "upon the goods of those whom they

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[506] *Tallow Chandlers*, ll. 128-32.
[507] Baker, *Reinvention of Magna Carta*, 311, 155 (see examples at n. 59). E.g. Gilbert Gerard AG in *Att.-Gen v. Donatt* (1561): "it is the liberty and part of the inheritance of every subject to be of what mystery he will."
[508] Patent Rolls, 1554-55, 1 and 2 Phil. & M., pt. 10, m. 12, p. 191; *Att.-Gen v. Donatt* (1561). See Baker, *Reinvention of Magna Carta*, 190-92, 250; In 1571 Popham said in the Commons that the granting of monopolies was prohibited by this case and contrary to Magna Carta: Hartley, *Proceedings in the Parliament* (vol. 1), 211; See also Co. Inst. iii. 182.
[509] Baker, *Reinvention of Magna Carta*, 472. In defending the Joiners' Company, William Daniel of Gray's Inn said that Popham cited this case, and Daniel accepted it.
[510] Baker, *Reinvention of Magna Carta*, 474-75.

give allowance to."[511] Fleetwood challenged this on the grounds that it was contrary to the laws of the realm which provided that:

> all the subjects of the realm, as well strangers as denizens, both by the great Charter of England, by the general custom of the realm, and by sundry statutes, and especially by the law of tonnage and poundage, may freely mart, traffic, retail, barter, or put to sale their merchandise and other things vendable without any restraint or imposition.[512]

While chapter 29 played a significant role in denying the validity of the patent, it was not expressly named or singled out in this argument for unrestrained commerce. Earlier in his argument, Fleetwood had also cited chapter 14 of the Great Charter in asserting the necessity for amercements of the "reasonable and merciful sort."[513] Nevertheless, by citing Magna Carta here, Fleetwood implicitly invoked chapter 29 to articulate the liberty of the subject within the economic sphere. According to Baker, the only exception for a restraint of trade was argued by Fleetwood in defending the monopoly of the Joiners' Company whose patent was good, he said, because it tended to the benefit of the commonweal.[514]

Contrary to the argument against the Tallow Chandlers, in *A Discourse* Fleetwood did not expressly explain how or why chapter 29 was repugnant to the royal charter in question. It was rather the 1368 statute of due process which required the governors of Bridewell to proceed by indictment or matter of record when calling a man to answer a charge.[515] Nevertheless, the 1368 statute was a confirmation of chapter 29 and it was

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[511] *Tallow Chandlers*, ll. 108-09.
[512] *Tallow Chandlers*, ll. 99-103.
[513] *Tallow Chandlers*, ll. 68-71.
[514] Baker, *Reinvention of Magna Carta*, 196, 473-74.
[515] Cf. Coke in *Jerome v. Neale and Pleere* (1588) where he was more explicit in his application of c. 29. Baker, *Reinvention of Magna Carta*, 483: "it is against the statute of Magna Carta, c. 29, and against the law of the land that anyone should be imprisoned by anyone, or brought in to answer for any offense, except by due course of the law and process of the law awarded."

"the law of the land," therefore Bridewell's charter was repugnant to chapter 29 in the same way in that it authorized proceedings without indictment. Thus the *lex terrae* provision was very relevant here. On the other hand, the author did not indicate how *legale judicium parium suorum* might be applied in this case. According to Fleetwood and the common learning, this provision only included the peerage and so many of the malefactors brought to London Bridewell would presumably not have the privilege of trial by peers. At Bridewell trials consisted of being brought before its court where the governors gave judgments at their discretion.[516] The author concluded, upon the 1368 statute specifying that commissions be made up of justices, that the inquiries of commissioners "ought to be by juries."[517] Fleetwood, who did not refer to trial by jury in his commentary, utilized this statute instead of chapter 29 to implicitly correct the procedure of Bridewell's commission which lacked a jury.[518]

Therefore Fleetwood asserted the principles of liberty and due process underlying chapter 29, but at times he accomplished this either by citing other laws or without explicit reference to the statute. The significance of chapter 29 in *A Discourse* is understood through the consideration of the argument preceding its citation. Leading up to the censure of Bridewell's charter, the author identified one of the ways in which the king was bound by the law. This was the underlying rule derived from the year books and explicitly stated in Elizabethan cases that the king could not harm his subjects by his prerogative.[519] The author's apparent connection of chapter 29 with this principle points to the statute's protection against abuses of royal power. If injury occurred as the result

[516] Griffiths, "Contesting London Bridewell," 286-87.
[517] *A Discourse*, l. 155.
[518] Baker, *Reinvention of Magna Carta*, 247; Griffiths, *Lost Londons*, 226.
[519] See chapter two *s.v.* "The King Can Do No Wrong."

of a royal charter and commission, as in the case of Bridewell, chapter 29 could be invoked to protect the subject from further harm by appealing to its due process provisions. Although the royal prerogative would be protected against Magna Carta since, according to Fleetwood, the "law of the crown" was part of the *lex terrae*,[520] Fleetwood's use of chapter 29 in *A Discourse* demonstrated that the royal prerogative was accountable to that statute. Whereas the use of chapter 29 in legal argument had remained largely dormant, it was now, as Baker observes, "beginning to have practical consequences."[521]

The prerogative was also subject to chapter 29 in a ruling from the King's Bench around the same time. In 1587 Chief Justice Wray, while confirming that absolute prerogatives were indisputable, nevertheless rejected a writ of protection from suit, stating that "the justices . . . ought to consider the true prerogative, so that it should not be allowed to the prejudice of the subjects."[522] Wray likely alluded to chapter 29 when he argued that "by the law of the land" such a prerogative protection was not allowed.[523] The author of *A Discourse* similarly argued that "the king cannot grant . . . that any subject shall be under protection from arrests and suits."[524]

The Prince Is Bound by the Law

The author of *A Discourse* was applying what is now called the "rule of law" inherent in chapter 29 and particularly, as Baker explains, in the *lex terrae* provision.

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[520] Baker, *Reinvention of Magna Carta*, 245-46; Beem and Moore, *The Name of a Queen*, 28.
[521] Baker, *Reinvention of Magna Carta*, 269.
[522] As quoted in Baker, *Reinvention of Magna Carta*, 178.
[523] Baker, *Reinvention of Magna Carta*, 177-78, 266. *Waram's Case* (1587). Richard Waram, a merchant, received a writ of protection under the Great Seal after having suffered substantial losses at sea.
[524] *A Discourse*, ll. 80, 84-85. The author does not provide a specific citation here but consider the *Chancellor of Oxford's Case* (1430.006).

The understanding was that "governments were not to act arbitrarily, disregarding or changing the law as they pleased, but had to operate within the law as it stood."[525] Fleetwood asserted the rule of law in his commentary on chapter 29 when he wrote that Magna Carta was "enacted [so] that the pleasure of the prince should not thereafter be taken as law, but that justice should be used, and that . . . all should be adjudged by the law of the land."[526] In 1582 before the King's Bench, he denied the validity of "*quod placuit regi legis vigorem habuit*,"[527] saying that it was "no rule for judges in our law to follow."[528] Baker notes the significance of Fleetwood's assertion:

> The principle was nowhere stated in Magna Carta, and it did not extend to the exercise of the absolute prerogative, but it rested on the same foundation: that the king was subject to the law of the land. Fleetwood had managed to read this into Magna Carta. But it was not a common-place of legal argument for most of Elizabeth's reign.[529]

It was already common learning that royal prerogatives existed in two distinct types, ordinary and absolute, but not until the end of the sixteenth century were these expressed openly in relation to the reigning monarch.[530] For example, in 1600 Coke would explain that the queen's ordinary prerogative "may be disputed, for it is to be decided by the laws of the realm."[531] On the contrary, absolute prerogatives, such as conducting war and setting value to money, were not to be contested or directed by the common law, and here what pleased the prince had the force of law.[532] The dispute over the classification of a

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[525] Baker, *Reinvention of Magna Carta*, 16.
[526] Baker, *Reinvention of Magna Carta*, 463.
[527] "What has pleased the king has had the force of law."
[528] Baker, *Reinvention of Magna Carta*, 473; See *Digest*, 1.4.1 and *Institutes*, 1.2.6; Cf. *Bracton Online*, ii. 305. What pleased the prince was in accordance with the law upon consultation with his council and not "anything rashly put forward of his own will." See Kantorowicz, *The King's Two Bodies*, 151-52.
[529] Baker, *Reinvention of Magna Carta*, 147.
[530] Burgess, *Absolute Monarchy*, 81.
[531] As quoted in Baker, *Reinvention of Magna Carta*, 145.
[532] See Sir Thomas Smith, *De Republica Anglorum: A Discourse on the Commonwealth of England*, ed. L. Alston (Cambridge: Cambridge Univ. Press, 1906), 58-60.

particular prerogative would be determined by the judges, as it was for impositions in *Bate's Case* (1606).[533]

When addressing the King's Bench in 1582, Fleetwood did not articulate the absolute/ordinary distinction but expressed the justices' role in assessing royal prerogatives: "the kings of England . . . wish their grants and prerogatives to be directed and adjudged according to the law . . . and you who are judges so adjudge them."[534] Whether a king's grant or a prerogative granted by the king was good or not rested on the authority of the judges, and the grant of a king was "not allowable if it has no law to warrant it to be good."[535] The author's central argument in *A Discourse* is comparable: "That a king's grant either repugnant to law, custom, or statute is not good nor pleadable in the law, see what precedents thereof have been left by our wise forefathers."[536]

Thus, the king's grant was subject to judicial determination according to the law, and this approach in *A Discourse* was supported by the law's challenge to the Roman maxim which asserted that the power of the prince was not bound by the laws. On the authority of the late-medieval cases he cited, the author emphasized the extent to which the king's granting power was restricted in order to challenge, at the least, the maxim's absolute meaning. These limitations in the year books were expressed in negative

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[533] *Att.-Gen. v. Bate*: Baker, *Reinvention of Magna Carta*, 328-30. Counsel for the defense argued that impositions were of the limited or ordinary kinds of prerogatives bound by the common law. Yet the Exchequer ruled that an imposition on foreign imports was an absolute prerogative. See Chief Baron Fleming's argument in Kenyon, *The Stuart Constitution*, 62-64; See also *Waram's Case* (1587) in Baker, 147, n. 20 and above *s.v.* "Fleetwood's Approach to Magna Carta."

[534] Cf. *Bracton Online*, ii. 109-10, *s.v.* "That the justices must not question royal charters nor pass upon them." Bacon referred to this passage in his argument in *James Whitelocke's Case* (1613): see above *s.v.* "If It Be Bacon."

[535] Baker, *Reinvention of Magna Carta*, 472-74.

[536] *A Discourse*, ll. 25-27; Cf. Fleetwood's reverence for the decisions made by the justices *temp.* Edward III. *Tallow Chandlers*, ll. 115-16: "It is most notable to behold the grave judgments given in E. 3. days and how deeply did those honorable judges conceive of such matters."

statements; for example, the king could not grant his prerogative or that which would harm his subjects.[537] The author quoted Brooke's *Abridgement* of the year books when he wrote that "the king by his charter cannot change the law."[538] Also, in a late-fifteenth century case, the King's Bench had agreed that because rape was not felony at common law but only so by statute, the king could not grant for this offense to be heard in a leet court. He could only grant this court in accordance with its usage.[539] From this case the author concluded, "the king may not either alter the nature of the law, the form of a court, or the manner and order of pleading."[540]

James Morice articulated a similar constitutional view in his 1578 reading in the Middle Temple on chapter 50 of Westminster I. This was a savings clause inserted at the end of the 1275 statute concerning the rights of the Crown, though Morice used the occasion to qualify monarchical rule. The prince, of course, ruled as the head of the commonwealth with undoubted prerogatives which Morice exalted and considered at length; however, he asserted the rule of law, maintaining that:

> an other State of kingdome and better kind of monarchy hath been by common Assent ordayned and establyshed, wherein the Prince (not by Lycentious will and Immoderate affections, but by the Lawe, that is by the prudent Rules and Precepts of Reason agreaed upon and made [in] the Covenant of the Comon Wealth) may Justly governe and commande, and the People in one obedience saflie lyve and quyetly enioye their own.[541]

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[537] See chapter two *s.v.* "The King Cannot Grant His Prerogative" and "The King Can Do No Wrong."
[538] See Ess III, "The Sixteenth Century English Lawyer's Library." The first edition was published posthumously in 1568; *A Discourse*, l. 79; *Apparatus Fontium*, ll. 74-79.
[539] *Apparatus Fontium*, ll. 61-67.
[540] *A Discourse*, ll. 67-69; In 1610 James Whitelocke referred to "this maxim of ours, that the King cannot alter the law" when he argued against the absolute power of the king to levy impositions: Kenyon, *Stuart Constitution*, 71.
[541] As quoted in Brooks, *Law, Politics and Society*, 79-80.

A few of Morice's limitations on the king's power corresponded with the author's position in *A Discourse*. As Baker summarizes, the king "could not by letters patent, or charter, make new law injurious to the lives and lands of his subjects." Neither could he "alter the common-law rules of ownership," for example, by "making land devisable by will."[542] He could create jurisdictional franchises, although they had to operate according to the common law.[543]

While Morice's reading is a much more expansive treatment aimed at identifying the king's prerogatives, their limitations, and England's form of government, it shares the basic constitutional principles with *A Discourse* that the king was bound "with rules or limits of the law," and that he could not change the law.[544] This challenges Baker's conclusion that "in none of Fleetwood's works is there a discernible theme of constitutional monarchy." It is true, as Baker discusses, that Fleetwood exalted the royal prerogative and this will be considered next to clarify his constitutional position.[545] But a further look at *A Discourse* and another treatise attributed to Fleetwood, dated as well to the 1580s, will reveal elements of "constitutionalism" in Fleetwood's thought.

Fleetwood's Constitutional Ideas

I shall begin with a comparison between *A Discourse* and Fleetwood's argument for the *Case of the Tallow Chandlers* so as to identify some distinct arguments contained in the former. The latter is found in a collection of arguments prepared for about thirty cases between 1584 to 1591. Fleetwood is known to have argued in at least fifteen of

[542] See chapter two *s.v.* "*Potestas Principis Est Inclusa Legibus*"; *A Discourse*, ll. 53-55; *Apparatus Fontium*, ll. 52-58.
[543] Baker, *Reinvention of Magna Carta*, 255-57; *Selected Readings on Magna Carta*, lxxxv-lxxxvi.
[544] *A Discourse*, l. 51.
[545] Baker, *Reinvention of Magna Carta*, 245-46.

these including the *Case of the Tallow Chandlers*.[546] *A Discourse*, on the other hand, has survived in several copies all composed roughly between the late-Elizabethan and early Caroline periods. The contents of the volumes in which it appears do not include case arguments but various kinds of state and municipal papers and other works on the law.[547] Still, as Stewart observes, *A Discourse* is written in the style of a legal brief.[548] Yet the author himself refers to the work as a "discourse,"[549] and while it may have been prepared for a case, its contents suggest that it was more likely a commentary not intended for argument in court but perhaps for consultation by a learned lay or professional audience.

Both *A Discourse* and the *Case of the Tallow Chandlers* asserted that a charter or commission was void and revocable if it was found to be contrary to the laws of the realm. However, the argument against the Tallow Chandlers explicitly declared that their patent had no force in the law and should be revoked.[550] The author in *A Discourse* challenged Bridewell in the same manner, but he did not expressly assert that Bridewell's charter or commission was null and should be repealed, although this was his general argument regarding royal charters repugnant to the law. In fact, the author concluded that the commission of Bridewell was learned in the law sufficiently enough to defend itself against any action.[551] This argues against *A Discourse* being written on behalf of a client,

[546] Baker, *Reinvention of Magna Carta*, 238-39.
[547] See textual introductions in chapter two.
[548] Stewart, *OFB*, 43.
[549] *A Discourse*, l. 21.
[550] *Tallow Chandlers*, ll. 111-14.
[551] *A Discourse*, ll. 233-38; Cf. Griffiths, *Lost Londons*, 226-27. He interpreted the author to mean that "not even someone with 'great knowledge of law' had a leg to stand on if he tried to 'defend' Bridewell's commission." In the mid-eighteenth century, Oliver Acton similarly concurred that the author "had a deep ironical meaning in concluding as he has done": *Or*, p. 18; I tend to agree with Heath, "Professional Works," 516n2: "I take the general meaning to be, that though he has given reasons for doubting the validity of the Charter, yet it may be that the City counsel may be able to defend it."

suggesting instead a composition independent of any advocacy. Moreover, the objections against Bridewell were broadly extended. For example, despite the many precedents limiting the king's charter, in the author's opinion illegal grants were still being issued at the present time:

> Yet do not we see daily in experience that whatsoever can be procured under the great seal of England is taken *quasi sanctum*; and although it be merely against the laws, customs, and statutes of this realm, yet it is defended in such sort that some have been called rebellious for not allowing such void and unlawful grants.[552]

We do not find in Fleetwood's argument against the Tallow Chandlers an explication of the constraints on royal charters, a criticism of charters which had contravened the laws, or the assertion of Parliament's prerogative in the delegation of discretionary authority.

In *A Discourse* the author's solution for Bridewell was for Parliament to pass legislation giving discretionary powers to magistrates.[553] This resolution was put forth with the assertion that the authority to examine and punish offenders derived from Parliament.[554] The powers of discretion granted in a charter or referred by a commission had proved unlawful as significant precedents demonstrated.[555] He concluded, "if the king by prerogative might have done all things by commission or by charter, that it had been in vain to have made so many laws in parliament for the same."[556] Popham made a similar remark in his argument against the Joiners' Company on behalf of the Crown, so this was not necessarily a contentious statement.[557] But the author's assertion in *A*

[552] *A Discourse*, ll. 86-90.
[553] Brooks, *Law, Politics and Society*, 418.
[554] The primary focus is on discretionary powers to punish, however, the cited statutes also refer to the discretion, for example, to admit one to make attorneys or grant religious privileges: *A Discourse*, ll. 182-86, 211-13.
[555] See above *s.v.* "Bridewell's Charter and Commission."
[556] *A Discourse*, ll. 219-21.
[557] *Apparatus Fontium*, ll. 219-21. Plowden made the point in 1559.

Discourse is indicative of a notable stance on this issue. Much parliamentary legislation had challenged the right of royal commissions to delegate discretionary authority.[558] Thus, the author strongly implied that the authority to grant discretionary powers lay exclusively with Parliament.

This was an attempt to curb the ordinary power of the king. In 1606 Chief Baron Fleming (in one reported version) would describe the king's ordinary prerogative in his ruling on *Bate's Case*: "the ordinary power . . . is executed by the common law, and he may not execute this power except in the form which the common law has appointed to him, or by Parliament by consent of the subjects, who have an inheritance in this law."[559] During this time, Bacon noted that royal grants were limited by the law and thus among the king's ordinary prerogatives,[560] and Coke would also take a position similar to that in *A Discourse*:

> Commissions are legal, and are like the Kings Writs, and none are lawful but such as are allowed by the Common Law, or warranted by some Act of Parliament: and therefore Commissions of new Inquiries, or of novel invention are against the Law, and ought not to be put in execution.[561]

Prior to all this, the author of *A Discourse* had already applied the restrictions of law on the king's power to grant charters and commissions. He implicitly placed the delegation of discretionary authority into the ordinary category because such power could only be granted by Parliament.

Fleetwood stated in his argument for the *Case of the Tallow Chandlers* that no restraint or imposition could be leveled against a subject's goods unless it "be specially

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[558] *A Discourse*, ll. 170-218.
[559] As quoted in Baker, *Reinvention of Magna Carta*, 146n13.
[560] *Calvin's Case* (1608) in Coquillette, *Francis Bacon*, 160. See above *s.v.* "If It Be Bacon."
[561] Co. Inst. iii. 165.

established by parliament."[562] This same condition is found in the year books cited in *A Discourse*. The king could not change the laws of inheritance or grant that someone shall not be sued except through Parliament.[563] The supremacy the author of *A Discourse* ascribed to Parliament in terms of granting discretionary powers might be viewed as an assertion of parliamentary sovereignty in general,[564] but this was still a Parliament "established by the king."[565] It was understood that statutes only had the force of law by the royal assent and subjects could not change the law without this assent.[566] Yet, unlike charters and commissions, statutes were created "with the common consent of three estates who do represent the whole and entire body of the realm of England."[567] According to Morice, the king was bound to govern by the laws set down by "so grave a Counsel, uppon so great deliberatcon, and by the Common assent of all."[568] The king was a maker of laws through Parliament, but outside this body he could not make laws. When Fleetwood said that "her Majestie had authority to execute lawes, but not to make lawes," this was understood as the queen outside of Parliament.[569] Furthermore, the

[562] *Tallow Chandlers*, l. 103; The same point was made about impositions in the parliamentary debates in 1610 following *Bate's Case* (1606): Baker, *Reinvention of Magna Carta*, 331-34.
[563] *Jurdan's Case* (1375.048ass); *Chancellor of Oxford's Case* (1430.006); YB Trin. 37 Hen. 6, pl. 3 (1459.026).
[564] Coquillette, *Francis Bacon*, 60; Cf. Montpensier, "The British Doctrine of Parliamentary Sovereignty," 762, who notes that aside from an assertion of parliamentary sovereignty, the author of *A Discourse* (in this case Bacon) was "talking about separate Parliaments, or sessions of Parliament, and not Parliament as a continuum with some personality."
[565] *A Discourse*, l. 19.
[566] Baker, *Selected Readings on Magna Carta*, lxxxvi (Morice's 1578 reading).
[567] *A Discourse*, ll. 19-20.
[568] As quoted in Brooks, *Law, Politics and Society*, 80.
[569] Hartley, *Proceedings in the Parliament* (vol. 1), 223. Cf. Popham in *Att.-Gen. v. Joiners' Company* (1582) in Baker, *Reinvention of Magna Carta*, 472: "No one by the common law may make laws, for that belongs to the king alone." Popham was clearly referring to the king-in-Parliament. See his earlier comment in *Apparatus Fontium*, ll. 219-21.

prince of his or her own accord could not simply overthrow the "resolute decrees and absolute judgments" of Parliament.[570]

In another treatise, "Certaine errors upon the statute made the xxvth yeare of King Edward the third of children borne beiond the sea, conceived by Serjant Browne and confuted by Serjant Ferefax in maner of a dialogue," Fleetwood also attributed to Parliament the power to determine the succession to the Crown in the event that Elizabeth died without an heir. Fleetwood's authorship is regarded as likely and it is dated to sometime around the 1570s or early 1580s. To date Christopher Brooks has provided the best account.[571]

"Certain errors" was written as a rebuttal against the arguments put forth by Sir Anthony Browne and Edmund Plowden in favor of the succession of Mary Stuart to which Fleetwood was opposed politically and religiously.[572] As a foreigner, Mary could not succeed to the English throne based on the common law, but according to Browne this was not a hindrance because the common law concerned only men's private causes and therefore it could not be a determinant in the succession.[573] Fleetwood argued to the contrary, maintaining that the Crown and its prerogatives derived from the common

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[570] *A Discourse*, l. 18; Brooks, *Law, Politics and Society*, 80.

[571] Brooks, *Law, Politics and Society*, 74-78; See also Baker and Ringrose, *Catalogue of English Legal Manuscripts*, 652-53 and Baker, *Reinvention of Magna Carta*, 231-32. As in *A Discourse*, this could not have been written prior to 1571 since there are references to Elizabeth's parliament in her thirteenth year. Brooks suggests its completion in the early to mid 1580s in connection with the "Bond of Association," an agreement to avenge Elizabeth in the event of an attempted or successful usurpation or assassination, "with an implication that the future disposition of the crown would be in the hands of parliament" (p. 71). "Certain errors" survives in twelve known copies, one of which belonged to Coke. The copy at CUL MS. Add. 9212 is a corrected autograph with an italic hand that resembles Fleetwood's. Fleetwood also composed his *Itinerarium ad Windsor* in the form of a dialogue.

[572] Beem, "William Fleetwood and *Itinerarium Ad Windsor*," in *The Name of a Queen*, 70-71.

[573] Brooks, *Law, Politics and Society*, 73-74. Brooks notes that Plowden's constitutional argument left open the possibility that Parliament might determine the succession.

law.[574] The former was a corporation created by the common law, and to say that determining the succession was a prerogative unique to the Crown would essentially be asserting that the monarch was not bound by the law and that the Crown's prerogatives were "bastards" by denying their common-law parentage. Fleetwood also used this familial metaphor in his argument on behalf of the Joiners' Company:

> Every prerogative granted, or custom, participates with the reason of the general law and is incorporated to some extent in the reason of the general law. And there are no contrarieties or absurdities between the general law and prerogatives granted, or customs, for there is no bastardy between them. The general law is the mother and the others are her children dependent on her.[575]

The author maintained, according to Brooks, that the "prerogatives had been gradually annexed to the crown over the course of time. Although the crown existed before the prerogatives, both the highest and lowest of them were created by the law and were subject to regulation by it."[576] Moreover, Parliament's ability to determine the succession in the absence of a king or queen to call a parliament rested on the law of God and nature which allowed for an assembly of people to choose a new ruler. Since a "consent of voices at the first produced the political head out of the political body,"[577] Parliament remained in force even if the monarchy was taken away, for England was a mixed commonwealth consisting of monarchy, aristocracy, and democracy.

In sum, Fleetwood's purpose for writing "Certain errors" stemmed from a political concern he shared with contemporaries about the resolution of a potential governmental crisis. It also yielded some significant constitutional ideas. The necessity

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[574] Cf. *Case of Saltpetre* (1606), 12. Co. Rep. 13. It was said of the purveyance to take saltpeter that "only the Law gave to the King this Prerogative." Cf. also *Willion v. Lord Berkeley* (1562) in Plowd. 236.
[575] Baker, *Reinvention of Magna Carta*, 72; Cf. Sjt. Morgan in Plowd. 27: "Reason . . . is the Mother of all Laws."
[576] Brooks, *Law, Politics and Society*, 77.
[577] As quoted in Brooks, *Law, Politics and Society*, 78.

of relying on the law of nature and nations in the absence of monarchy was warranted. The *ius gentium* did not recognize that the king was above the law since examples from classical history demonstrated otherwise.[578] Yet the work was not attempting to diminish royal power by asserting its common-law origins. It was crucial that the Crown's prerogatives derived from the law, "thereby taking away all manner of exceptions that man may object to impune or disobey any of them."[579]

Unlike the *ius gentium*, the English legal tradition had maintained, as early as Bracton, that while the king was under the law he was also above the law.[580] This was asserted in the year books and stated in the fifteenth century gloss on Magna Carta.[581] According to Bracton, the king's supra-legal status entailed certain rights and privileges which could not be alienated, and Elizabethan jurists placed the king's power to dispense with statutes in this category.[582] Referring to this prerogative in his discourse on statutes, Fleetwood noted the king's status "above his Laws."[583] Fleetwood may have referred to the dispensing power when he argued in *Buttell v. Wilford* (*c.* 1580) that the king might by his patent expound a statute in favor of a "particular part of the realm" which might otherwise suffer a mischief by its general wording.[584] In his treatise on statutes, he

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[578] Brooks, *Law, Politics and Society*, 77: e.g. "Tacitus showed that many Roman kings were subject themselves to the laws they made."
[579] As quoted in Brooks, *Law, Politics and Society*, 77.
[580] See chapter two *s.v.* "The King Can Do No Wrong."
[581] YB Hil. 8 Edw. 2, pl. 33 (1315.033ss), *per* William Bereford CJCP: the king "est sur la ley"; YB Mich. 8 Hen. 4, pl. 12 (1406.111), see *Apparatus Fontium*, ll. 49-50; YB Mich. 35 Hen. 6, pl. 33 (1456.087), *per* Sjt. Hengeston: "le Roy est desu[i]s la Ley"; The Ordinary Gloss declared that the king was above the law-*Rex est supra legem*-and "therefore not bound by chapter 11 with respect to his own pleas": Baker, *Reinvention of Magna Carta*, 86, n. 76.
[582] Kantorowicz, *The King's Two Bodies*, 149-50; See chapter two *s.v.* "The King Cannot Grant His Prerogative."
[583] Fleetwood, *Statutes*, 161.
[584] As quoted in Baker, *Reinvention of Magna Carta*, 246. Baker notes that this "might be seen either as an exercise of the dispensing power or as a form of Aristotelian equity."

reiterated the learning that the king was not bound by any Act of Parliament "onlesse he be named," and he "shall take advantage of an estatut thoughe he be not named."[585] He argued in favor of the royal prerogative when he wrote that, just as a statute abridging the common law shall be taken strictly, a statute abridging the king's prerogative shall also be construed as such.[586] And it might be worthy to note that the Roman maxim quoted in *A Discourse*, that "the power of the prince is not bound by the laws," was not absolutely disputed but only that "the law agreed to the contrary."[587] Therefore, in addition to the regulation of the royal prerogative in *A Discourse* and "Certain errors," elsewhere Fleetwood maintained the king's authority.

His approach to the dialectical relationship between the prince and the law is recognizably Bractonian. The king was above the law possessing certain prerogatives, but this was contingent on his acknowledgement that he was "himself bound by the laws" which granted to him those very prerogatives. Bracton wrote:

> The king must not be under man but under God and under the law, because law makes the king, [Let him therefore bestow upon the law what the law bestows upon him, namely, rule and power.][588]

According to Fleetwood, since the king was above the law, he "may dispense with his Laws."[589] He noted the limitation established in the late-fifteenth century that this only extended to *mala prohibita*. Those offenses which were *mala in se* could not be

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[585] Thorne, *Exposicion & Understandinge of Statutes*, 110, n. 15. See e.g. YB Trin. 12 Hen. 7, pl. 1 (1497.005), *per* John Mordant King's Sjt.
[586] Thorne, *Exposicion & Understandinge of Statutes*, 159-61; Fleetwood, *Statutes*, 154-55. Here the author gives cc. 27 and 31 of Magna Carta as examples of statutes which abridge the royal prerogative. On the contrary, at the beginning of the century (*c.* 1506), Richard Hesketh expounded the *Carta de Foresta* against the crown: Baker, *Reinvention of Magna Carta*, 96, 246; For the strict construction of statutes which curtail the common law see, e.g., YB Mich. 18 Edw. 4, pl. 18 (1478.089), *per* Sjt. William Hussey: "cest statut restreint le commen ley, le quel serra pris *stricti juris.*"
[587] *A Discourse*, ll. 50-52.
[588] *Bracton Online*, ii. 33, 305-06 (brackets in edition); Kantorowicz, *The King's Two Bodies*, 157-58.
[589] Fleetwood, *Statutes*, 161.

dispensed in advance,[590] though of course the king could pardon these after the fact.[591] But penal laws aside, statutes which "have the force of a Law, and binde all men generally, and every man especially . . . that are made, as you would say, for a Common Wealth; with such things he cannot dispense."[592] Therefore, while the dispensing power demonstrated that the king was above the law, its scope was also limited.

Fleetwood argued in "Certain errors" that even the highest of the prerogatives were subject to regulation by the law. Absolute prerogatives were immune from legal direction, although William Holdsworth has qualified this by asserting that "the term 'absolute' when applied to the king does not mean that he is freed generally from legal restraint," but referred to the king's absolute discretion in determining whether or not or how he will execute such power.[593] The assertion in "Certain errors" may point to judges' authority in deciding whether certain prerogatives were absolute. In any event, Fleetwood maintained that the king's prerogatives were dependent on and bound by "the reason of the general law" since they themselves derived from that law. Therefore the law was paramount, but the exaltation of the royal prerogative followed from this origin.

In "Certain errors" Fleetwood rooted England's government in classical antiquity. To justify Parliament's intervention in the absence of a royal successor, he argued that "aristocratia and democratia, that is the nobility and commons," would still remain in force.[594] In conjunction with Morice's reading on the rights of the Crown, Brooks

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[590] Fleetwood made the same point regarding usury: Hartley, *Proceedings in the Parliament* (vol. 1), 236.
[591] YB Mich. 11 Hen. 7, pl. 35 (1495.113), *per* John Fyneux CJKB.
[592] Fleetwood, *Statutes*, 161; Thorne, *Exposicion & Understandinge of Statutes*, 168-69, see nn. 206-07. Fleetwood referred to the Statute of Gloucester, 1278, 6 Edw. 1, c. 3, which enabled heirs to demand the mother's inheritance despite the father's alienation of it with warranty, as an example of a statute with which the king could not dispense.
[593] Holdsworth, "The Prerogative in the Sixteenth Century," 561.
[594] As quoted in Brooks, *Law, Politics and Society*, 78.

concluded that there is "little reason to doubt that the essentially mixed-monarchical interpretations of the English constitution that they put forward would have been both instantly recognized and considered fairly conventional." Fleetwood was among many other Elizabethan jurists who incorporated classical learning into their writings on English legal and constitutional subjects.[595] As a classical scholar, Sir Thomas Smith did as much in his *De Republica Anglorum*, composed in 1565 but not published until 1583. Smith placed "the most high and absolute power of the realme" in Parliament which demonstrated England's mixed form of government. The prince was "the head, life and governor" of the commonwealth and Parliament was "the whole and universall and generall consent and authoritie aswell of the prince as of the nobilite and commons." Parliament's authority included setting taxes, such as impositions, and giving "formes of succession to the crowne."[596] In his discourse on statutes (*c.* 1550s), Fleetwood had asserted similarly:

> The moost auncient court & of greatest authoritye ys the kynges hyghe court of Parlyament, the authorytie of which ys absolute & byndethe all maner of persons bycause that all men are pryvie & parties therunto.[597]

Yet the sovereignty attached to the monarch-in-Parliament was not absolute in regards to the king's own authority and immunities. An Act of Parliament could not bind the king and he could dispense with penal statutes. Fleetwood also noted that "the kinge maie charge his demesne tenauntes without anie Parlyament."[598] But certain things had to be

[595] Brooks, *Law, Politics and Society*, 81-82.
[596] Smith, *De Republica Anglorum*, 9, 14, 48-49, 63.
[597] Thorne, *Exposicion & Understandinge of Statutes*, 108. He emphasized the importance of the lower house (p. 113): "it ys saide that the kynge with his commonaltie maie kepe the Parlyamente alone, for the Commons have everie of them a greater voice in Parlyament then hathe a lorde or bysshoppe."
[598] Thorne, *Exposicion & Understandinge of Statutes*, 111.

established through Parliament such as, according to Smith, weights and measures.[599] In *A Discourse*, the author applied this constitutional restraint on the king's prerogative to grant discretionary powers.

Re-Assessing Fleetwood

For late-medieval jurists, parts of Magna Carta had seemingly become obsolete. Its primary use was in the field of what is now called private law and little indication was given of its constitutional significance.[600] Baker has effectively demonstrated how jurists in the late-sixteenth and early seventeenth centuries then gave new meaning to Magna Carta. The story of this transformation focuses especially on chapter 29. Whereas one fifteenth century interpretation had confined its due process provision to the peerage,[601] Francis Ashley's reading in the Middle Temple in 1616, a culmination of the new learning, stated that by chapter 29 "every free subject may have remedy for every wrong done to his person, lands or goods."[602] Magna Carta's due process clause was no longer limited in its scope or residing in obscurity but now viewed as the utmost assertion of the liberties guaranteed to the subject under English law.

As Baker has shown, William Fleetwood played a significant role in this renewal: he "took more interest in Magna Carta than any of his contemporaries, and did all he could to promote its reputation."[603] Nevertheless, Fleetwood remained steeped in the late-medieval learning of the inns of court. This was reflected in his commentary on the Great Charter. While he perceived in chapter 29 the rule that what pleased the prince

[599] Smith, *De Republica Anglorum*, 60.
[600] Baker, *Reinvention of Magna Carta*, 86-95.
[601] Baker, *Reinvention of Magna Carta*, 92.
[602] As quoted in Baker, *Selected Readings on Magna Carta*, xci.
[603] Baker, *Reinvention of Magna Carta*, 247.

would not have the force of law, his commentary on the statute did not extend its provisions beyond what was at common law or drawn from earlier readings. Later in his career as a serjeant-at-law, he viewed chapter 29 not as an infallible remedy but subject to other laws which were part of the *lex terrae* and which validated summary judgment contrary to chapter 29.

Thus, Fleetwood was a transitional figure in the period of Magna Carta's reinvention. Baker concludes that he "lived long enough to observe the first strides on the new journey, but he did not himself lead the expedition or provide the map."[604] I do not disagree with Baker's overall interpretation but nevertheless question to some extent the placement of Fleetwood within his narrative. Despite his traditionalism, Fleetwood was forward-thinking in his approach to chapter 29, the liberty of the subject, and limited monarchy.

First of all, when compared to his later Jacobean counterparts, there is no doubt that Fleetwood's approach to chapter 29 was quite measured, and this distinction aids in our understanding of Magna Carta's transformation between the start of the Elizabethan age and the Stuart period. For example, Baker notes the absence of *habeas corpus* in Fleetwood's commentary on chapter 29.[605] Coke would later assert that this remedy was available "by force of this Statute."[606] The use of chapter 29 in *A Discourse* was to demonstrate in what way Bridewell's royal charter was contrary to Magna Carta and thus void. Yet no other remedy was attributed to that statute. In 1616 Ashley proclaimed that not only did chapter 29 "give recompense," but it "also prevents wrongs."[607] The author

[604] Baker, *Reinvention of Magna Carta*, 248.
[605] Baker, *Selected Readings on Magna Carta*, lxxxv.
[606] Co. Inst. ii. 55.
[607] As quoted in Baker, *Selected Readings on Magna Carta*, xci.

of *A Discourse* had objected bitterly to the granting of what he viewed as unlawful charters, but he did not think to argue that chapter 29 might put a stop to such grants.

And yet the comparison between Fleetwood and later jurists can also yield an incomplete representation of his thought, for his application of chapter 29 in legal argument actually anticipated, in a general way, how Jacobean lawyers applied or interpreted that statute. He concluded in his argument against the Tallow Chandlers that it was contrary to chapter 29 for a subject's goods to be taken without due process, and that by the Great Charter and other laws of the realm all subjects possessed the freedom to trade without any restraint or imposition. A debate over impositions would later take place in the House of Commons in 1610 where James Whitelocke argued that impositions could only be levied by the king-in-Parliament. According to Baker, although chapter 29 was not explicitly referenced, Whitelocke was clearly drawing from the new learning on Magna Carta when he argued that it was against the law for the king to "take his subjects' goods from them without assent of the party," or to "give his own letters patent the force of a law to alter the property of his subjects' goods."[608] Several years later Ashley asserted that monopolies violated chapter 29 of Magna Carta since it was the liberty of every subject to freely trade.[609]

In 1607 Nicholas Fuller wielded a very similar argument to that in *A Discourse*. The ecclesiastical High Commission imprisoned Richard Maunsell, a minster, and two Yarmouth merchants for attending conventicles and then refusing to answer questions put to them under the oath *ex officio*. Commissioners conducted such examinations without

[608] Kenyon, *Stuart Constitution*, 71; Baker, *Reinvention of Magna Carta*, 331; See Co. Inst. ii. 47: "no forfeiture can grow by Letters Patents. No man ought to be put from his livelihood without answer."
[609] Baker, *Selected Readings on Magna Carta*, xciii; See also Co. Inst. ii. 47.

showing the accused the questions in advance.[610] According to Fuller, by this oath "a man shall thereby be compelled to accuse himself."[611] His argument before the King's Bench was published in the same year, without Fuller's permission, and although it was not printed verbatim, Baker regards the publication has representing "the general effect of his argument."[612] Fuller maintained that the High Commission did not have authority by the 1559 statute[613] to fine or imprison subjects and generally relied on chapter 29 to protest what was, in his view, unlawful imprisonment:

> For the lawes of England did so much regard and preserue the liberty of the subjects, as that none should be imprisoned, *nisi per legale iudicium parium suorum*[614] *aut legem terrae*, as it is sayd in Magna Charta cap. 29. which Charter, by divers other statutes after, is confirmed, with such strong inforcements in some of them, as to make voyd such statutes, as should be contrary to Magna Charta.[615]

Fuller's argument also included the 1368 statute of due process-the statute's reference to chapter 29, "the old law of the land," is especially noted-and the commission judged void in the same year for an imprisonment without indictment.[616]

Thus the argument against royal charters and commissions in *A Discourse* continued with Fuller who maintained that:

> such grants, Charters, and Commissions, as tend to charge the body, lands, or goods of the subjects, otherwise then according to the due course of the lawes of the Realme, are not lawfull, or of force, unles the same Charters and Commissions, doe receaue life and strength, from some Act of Parliament.[617]

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[610] Baker, *Reinvention of Magna Carta*, 356, 136.
[611] *Maunsell's Case* (1607) in Baker, *Reinvention of Magna Carta*, 518.
[612] Baker, *Reinvention of Magna Carta*, 355n111, 356n114.
[613] *Apparatus Fontium*, ll. 214-15.
[614] See the case report in Baker, *Reinvention of Magna Carta*, 517: "Every subject . . . is to have his lawful and honorable trial by a jury of his peers . . . and a subject out not to be imprisoned before such lawful trial. This is by the statute of Magna Carta, [chapter 29]."
[615] *Argument of Master Nicholas Fuller*, 4-5.
[616] *Argument of Master Nicholas Fuller*, 10, 16. See *Apparatus Fontium*, ll. 132-41, 222-28 (*Sir John atte Lee's Case*).
[617] *Argument of Master Nicholas Fuller*, 3. In the sixteenth century, the author of *A Discourse* was not necessarily advocating for the statutory confirmation of Bridewell's charter which was attempted in the late-sixteenth and early seventeenth centuries. According to the author, as it stood the charter was

Fuller was gravely concerned that if the authorization in the 1559 statute to erect ecclesiastical commissions by letters patent was taken by intendment that an "arbitrarie governement at the discretion of the Commissioners . . . directly contrary to Magna Carta" would be established.[618] Fleetwood himself had been an ecclesiastical commissioner from the beginning of Elizabeth's reign to the end of his life, though as a Protestant he was more concerned with investigating Catholics than Puritans.[619] In *A Discourse*, Fleetwood had objected to the discretion exercised by a commission under a royal charter. His last example of statutes which assigned discretionary authority was the 1559 statute authorizing the royal creation of ecclesiastical commissions. This does not give us much in terms of Fleetwood's interpretation of the statute. Fleetwood died in 1594, and it was at this time that it was debated whether the powers of the high commissioners rested on the statute or the royal prerogative. In *Cawdray's Case* (1594-95) the justices agreed that the High Commission's authority was not grounded solely on the statute.[620] Although the authorship of *A Discourse* occurred prior to this case, it is curious that as ecclesiastical commissioner Fleetwood asserted that "the dealings and examinations of high commissioners are authorized *all together* by Parliament."[621]

The emphasis Fleetwood placed on parliamentary authority exemplified a contemporary constitutional interpretation. England was a mixed monarchy since it had a

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repugnant to the law and so he argued for a parliamentary confirmation of discretionary powers to be given to city officials.

[618] *Argument of Master Nicholas Fuller*, 29.

[619] E.g. in 1576 Fleetwood spent a short time in the Fleet Prison after having entered into the Portuguese ambassador's chapel to arrest English Catholics at mass: Wright, *Queen Elizabeth and Her Times*, 37-43; See also Baker, *Reinvention of Magna Carta*, 263, 129-30; Beem, "William Fleetwood and *Itinerarium Ad Windsor*," 68-69.

[620] Baker, *Reinvention of Magna Carta*, 243n175, 141-43. The ecclesiastical commissioners had deprived Robert Cawdray, a Norfolk minister, of his living in 1587 for questioning the Book of Common Prayer and omitting the cross in baptism and the ring at weddings.

[621] *A Discourse*, ll. 214-15 (emphasis added).

legislative body consisting of Lords and Commons. The implication in *A Discourse* is that parliamentary consent was necessary for the granting of discretionary power, and this to the exclusion of the royal prerogative to do the same by charter or commission. While the ordinary prerogative was restrained by Parliament, it was also limited by the common law. Fleetwood understood the common law to be immemorial. In his thinking, the common law, Parliament, and the central royal courts predated the Norman conquest, and the common law existed as well before Edward the Confessor.[622] This presence of an "ancient constitution" within Fleetwood's "Certain errors" requires further study.[623] He argued in that treatise that the highest prerogatives descended from the common law and were directed by it. In his 1582 argument before the King's Bench, Fleetwood said that "every prerogative granted, or custom, participates with the reason of the general law," and "the general law is the mother and the others are her children dependent on her."[624] Reason, which Fleetwood said was "the very Law it self"[625] and which Serjeant Morgan had said was "the Mother of all Laws,"[626] therefore guided and bound all other laws including the king's prerogatives. According to Fleetwood, the king's judges were to determine whether a prerogative was good, that is if it was grounded in reason.[627]

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[622] Baker, *Reinvention of Magna Carta*, 223-24, 226.
[623] J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge: Cambridge Univ. Press, 1957), e.g. p. 46.
[624] Baker, *Reinvention of Magna Carta*, 472.
[625] Fleetwood, *Statutes*, 145: "the Reason of the Law is the Soul and Pith of the Law"; See also Francis Rodes' reading in Gray's Inn (1576) as quoted in Baker, *Reinvention of Magna Carta*, 86n74: "The common law is defined to be nothing else but pure and tried reason." Therefore the common law was immemorial because it had existed as long as man was capable of rational thought; Co. Inst. i. 97: "for reason is the life of the Law, nay the Common Law it selfe is nothing else but reason"; Bacon, "Reading on the Statute of Uses," in Heath, "Professional Works," 415: "For as Fitzherbert saith in the 14 H. VIII. 4. common reason is common law."
[626] *Colthirst v. Bejushin* (1550) in Plowd. 27.
[627] Baker, *Reinvention of Magna Carta*, 473. This was his argument in *Att.-Gen. v. Joiners' Company* (1582): "*Privare legem* has the sense of taking away the course of the general law; but the judgment of the law-the life, soul or sense of the law-is not taken away, for whether it is a good custom or not, by the understanding of the general law, is for you to judge"; See e.g. YB Mich. 35 Hen. 6, pl. 33 (1456.087).

In short, we find in *A Discourse* and "Certain errors" a discernible theme of the supremacy of the law[628] and the constraint of the royal prerogative. This was obviously contrary to Jacobean absolutism in arguments from the seventeenth century. For example, while "Certain errors" said that the prerogatives were created by the common law, Bacon would support James I's theory of the divine right of kings when he maintained that the king's absolute prerogatives came directly from God.[629]

Although Fleetwood's constitutional position was not confined to the exaltation of the royal prerogative, at times he upheld it.[630] For example, in 1571 he argued in the Commons that Parliament should not consider a bill to dissolve Bristol's corporation of merchants because it touched the queen's prerogative which was "perrilous" to discuss "*Rege non consulto*."[631] He also upheld the queen's power to imprison members of Parliament. When William Strickland was imprisoned by the Privy Council for introducing a bill to reform the Book of Common Prayer, Fleetwood argued from the parliament rolls that no demand should be made for him but that the House should be "humble suitors to her Majestie."[632] These arguments are consistent with Fleetwood's

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Justices argued that a custom of the City of London was void because it was against reason; Consider Wray's judgment in *Waram's Case* (1587) above *s.v.* "Fleetwood's Approach to Magna Carta."

[628] Cf. Richard Hooker in Holdsworth, "The Prerogative in the Sixteenth Century," 566-68.

[629] Baker, *Reinvention of Magna Carta*, 305, 339-40, 351. Cf. Lord Ellesmere's words in addressing the judges in 1605, as quoted on p. 345: "the king's majesty, as it were inheritable and descended from God, hath absolute monarchical power annexed inseparably to his crown and diadem, not by common law nor statute, but more anciently than either of them."

[630] See above *s.v.* "Fleetwood's Constitutional Ideas."

[631] Hartley, *Proceedings in the Parliament* (vol. 1), 210. This was the queen's prerogative by her letters patent to incorporate a town, of which Fleetwood said "noe man but with reverence and submission may speake thereof."

[632] Hartley, *Proceedings in the Parliament* (vol. 1), 239. Cf. p. 480 and Neale, *Elizabeth I and Her Parliaments*, 335-36. In 1576 Fleetwood cited precedents to assert the parliamentary privileges of being set free from imprisonment and debt. This was concerning the arrest of member Arthur Hall's servant, Edward Smalley. Fleetwood also supported freedom of speech in the Commons: Hartley, 327, 360 and Elton, *The Parliament of England*, 345-46.

position in Parliament as a supporter of the queen's ecclesiastical supremacy and promoter of the interests of the Privy Council.[633]

This thesis is cautious to depict Fleetwood as a progressive figure. He does not stand out as an ardent and outspoken supporter of individual liberties under the common law, and in a sense Fleetwood's approach to chapter 29 was old-fashioned. It would not seem to him to be, as Ashley would soon put it, the "Law of Lawes."[634] He argued that chapter 29 "ought to have reasonable intelligence; for every law, be it by statute or common law, is void if it is against the law of God, or the law of nature, or the common weal."[635] The two opinions examined in *A Discourse* and the *Case of the Tallow Chandlers* were legal arguments. They were not extensive jurisprudential works or based in any deep-seated ideology. *A Discourse* may have only come about at the instance of an appalling use of punitive measures without the ordinary course of law as discussed above in the case of the sheriffs of London.

Despite all this, however, the way Fleetwood applied chapter 29 in these arguments demonstrated a strong sense of the liberty and protection of the subject he also expressed elsewhere. In 1571 Fleetwood recalled the proviso in Henry VIII's Statute of Proclamations (1539). This statute allowed royal proclamations to have the force of an Act of Parliament, but Fleetwood said "with this caution, that it should not extend to touch the life, landes or goodes of any man."[636] A hunting bill in the parliament of 1585

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[633] Hartley, *Proceedings in the Parliament* (vol. 1), 201-02; Beem, "William Fleetwood and *Itinerarium Ad Windsor*," 71-72; John Guy, *Tudor England* (Oxford: Oxford Univ. Press, 1990), 320, 324-25.
[634] As quoted in Thompson, *Magna Carta*, 288.
[635] Baker, *Reinvention of Magna Carta*, 479-80; Cf. St. German, *Doctor and Student*, Dial. 1, c. 2: "against this law [of nature], prescription, statutes nor customs, may not prevail: and if any be brought in against it, they be not prescriptions, statutes nor customs, but things void and against justice. And all other laws, as well the laws of God as to the acts of men, as other, be grounded thereupon."
[636] Hartley, *Proceedings in the Parliament* (vol. 1), 207. "An Acte that P*r*oclamac*i*ons made by the King shall be obeyed," 1539, 31 Hen. 8, c. 8. The act was repealed in 1547, 1 Edw. 6, c. 12, sect. 4; In his

was thought by Francis Alford to encroach upon the liberties of the subject. Fleetwood opposed the bill as well and responded with general praise for the Great Charter.[637] Morice elicited a reaction from Fleetwood in his 1578 reading when he argued that the king could not grant monopolies but with few exceptions. Baker sums up Fleetwood's response:

> He said he once been about to argue a demurrer on the footing that the queen could not bind a subject by ordinances, but had been 'called a fool for his labor' by the queen's counsel. There were many cases, he said, where the queen could make ordinances touching the persons of her subjects, albeit not their inheritances. The reporter of the proceedings thought this was not his true opinion-which he had not dared to express-as came out in a private discussion with the students afterwards.[638]

Fleetwood's opinion after the reading appears to have been that the queen could not make ordinances touching either the persons of her subjects or their inheritances, but a previous check by the Queen's Council had caused him to give the moderated view expressed during the reading.

As suggested above, *A Discourse* was a private opinion and possibly anonymous from the first. In this regard, it is a significant addition to the corpus of Fleetwood's works for it reveals a unique position which is not only contrary to some of his other views upholding royal privilege, but it also comprises concepts found in other sources: the judicial scrutiny of the king's grants, the regulation of the prerogative, and the application of due process in chapter 29. The author is overall critical, not just of

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discourse on statutes, Fleetwood wrote of proclamations that "the readers affirme that by the commen lawe yf the ordynaunce that was made had bene in supplement or declaracion of a lawe, that that had bene good . . . But for anie thinge that is in alteracion or abrydgement they have no power": Thorne, *Exposicion & Understandinge of Statutes*, 105, 107; Baker, *Reinvention of Magna Carta*, 151-54.

[637] Hartley, *Proceedings in the Parliament* (vol. 2), 122-23; See above *s.v.* "Fleetwood's Approach to Magna Carta."

[638] Baker, *Selected Readings on Magna Carta*, lxxxvi.

Bridewell, but of the misapplication of royal power. These implied criticisms included the lack of accountability in the granting of unlawful charters and the exercising of the prerogative at the expense of undermining parliamentary authority.

Conclusion

Brief Collections out of Magna Carta was published more than fifty years after *A Discourse* had been composed. While no major changes were made to the body of the text from manuscript to publication, a new title was created. This lengthy title, which includes passages taken directly from the treatise, highlighted the author's argument that if a king's "charter, grant, or patent be repugnant to the said laws and statutes," it is void. It references, in much smaller print, the charter of Bridewell as one of other charters that "cannot be good" if found contrary to the law.[639] The author of the title is clearly emphasizing what he deems to be the most relevant aspect of *A Discourse,* which is not the illegality of Bridewell's charter, but the overarching argument that the laws of the realm circumscribe the king's power.

Yet this is not to say that a tract questioning Bridewell's legality would have no relevance in 1643. Granted there had been a decrease in anti-Bridewell sentiment in the first half of the seventeenth century. Griffiths suggests that while Bridewell was a symbol of "royal prerogative justice" like that of the Star Chamber and the High Commission, it was immune to the abolishment as happened to those courts because of the key role it played in curbing the growing vagrancy in London.[640] In addition, from

[639] *A Discourse*, n. 652.
[640] Both the Star Chamber and the Court of High Commission were abolished by statute: "An Act for [the Regulating] the Privie Councell and for taking away the Court commonly called the Star Chamber," 1640, 16 Car. 1, c. 10; "An Act for repeal of a branch of a Statute primo Elizabethe concerning Commissioners for causes Ecclesiasticall," c. 11.

the previous century Bridewell's officials had taken efforts to keep their process above board. However, Griffiths notes that "doubts about Bridewell's legal status still lingered."[641] Three prior attempts to confirm Bridewell's charter in Parliament had failed.[642]

Still, the title of *Brief Collections* was not focused on Bridewell. By 1643 the legal and political controversies that had plagued English governance under the Stuarts had erupted into a civil war which pitted Parliament against King Charles I.[643] Thus, copies of *Brief Collections* were made available to the public of parliament-controlled London. The subject matter in *A Discourse* would certainly be applicable during this time, but changes had occurred. Historians have noted that by the time of the Civil War, references to Magna Carta were diminishing, although it had previously been invoked in significant cases: the *Five Knights' Case* (1627), the Petition of Right (1628), and the challenge to ship money in the late 1630s.[644] In his 1640 speech on grievances, John Pym said that Privy Councillors "by Magna Carta are to do justice," and in the same year the Great Charter was cited along with its confirmatory statutes in the preamble to the act abolishing the Star Chamber.[645] Furthermore, whereas in the sixteenth century absolute authority was understood to reside in Parliament with the king at the head of the Commons and Lords spiritual and temporal, parliamentarians on the eve of the Civil War subscribed to the theory that the king shared law-making power equally with Parliament as one of the three estates. Thus sovereignty was vested in the trinity of king, lords, and

[641] Griffiths, "Contesting London Bridewell," 314; *Lost Londons*, 231-52.
[642] Griffiths, "Contesting London Bridewell," 288-89.
[643] See e.g. Brooks, *Law, Politics and Society*, 162-240.
[644] Baker, *Reinvention of Magna Carta*, 448-49, n. 23; Kenyon, *Stuart Constitution*, 83, 107.
[645] Kenyon, *Stuart Constitution*, 202; 16 Car. 1, c. 10.

commons, and this argument by two historians identifies a "co-ordination principle . . . [which] permitted the two houses in practice to assert a superiority to the king in governing the kingdom."[646] Therefore, in the political climate of the 1640s, the argument in *Brief Collections* would bear greater weight in terms of the new definitions of parliamentary sovereignty.

So far as I know, there are no sources which point to contemporary reactions to *Brief Collections*,[647] but many copies were printed. Manuscript *Or* (or one identical to it) probably served as the copy which was used to produce *Brief Collections*, and thus the attribution to Fleetwood was likely omitted from this publication.[648] Fleetwood's *The Office of a Justice of Peace*, printed in 1657 with his discourse on statutes, would appear with his name. However, since *A Discourse* was likely re-purposed in 1643, one can fairly assume as a work of polemical commentary, an ascription in *Brief Collections* was not necessary. The message was more crucial: the law was a force by which arbitrary executive power could be suppressed. And the rule of law expressed in *A Discourse* was heightened in the contentious atmosphere of the mid-seventeenth century.[649] This theme in *Brief Collections* then undoubtedly resonated with readers at this time. If Magna Carta had experienced a downturn as a legal and political authority prior to 1643, during the

[646] Weston and Greenberg, *Subjects and Sovereigns*, 35-52.
[647] *A Discourse* grabbed the interest of the lawyer and MP Sir William Drake (1609-69) who copied passages "out of a Discourse vppon the Commission of Bridewell"-and added a couple of his own comments-in an autograph commonplace and account book attributed to him and dated 1631-44: Folger Shakespeare Library, Washington D.C., MS V.b.331, f. 24r. It appears he was consulting a manuscript copy and one which bore an attribution to Fleetwood.
[648] See the textual introduction for *L* in chapter two.
[649] See e.g. Holdsworth, "The Prerogative in the Sixteenth Century," 563. In the sixteenth century, "no controversy had as yet arisen as to the extent of the powers of the king or the powers of Parliament."

war the Great Charter's symbolic power remained embedded in the popular conscience and the assertion of its liberties re-emerged as they had in *Brief Collections*.[650]

As this thesis has attempted to show, Fleetwood had expressed these ideas over fifty years earlier. It is true that he was more conservative than some of his contemporaries, but as a liminal figure he must not be confined to the learning of the late-medieval past but recognized as an important participant and forerunner in this seminal period of legal and political change.[651] *A Discourse* demonstrates this and embodies a notion which was notable during Fleetwood's time and powerful in subsequent centuries including the present: the assertion of individual liberties amidst oppressive state power. For this declaration truly is *inter magnalia regni*.

[650] E.g. see such Leveller works as William Walwyn's *England's Lamentable Slaverie* (1645): British Civil Wars, Commonwealth and Protectorate 1638-1660, last updated July 5, 2009, http://bcw-project.org/texts/englands-lamentable-slaverie; and John Lilburne's and Richard Overton's *The Out-Cryes of Opressed Commons* (1646): *Tracts on Liberty by the Levellers and Their Critics*, ed. David M. Hart and Ross Kenyon, vol. 3 (Indianapolis: Liberty Fund, 2014-18), accessed November 3, 2018, http://oll.libertyfund.org/titles/2596.

[651] In the 1621 parliament, Fleetwood's eldest son "was the principal promoter of the bill to confirm the 29th chapter of Magna Carta, the clause protecting subjects from unlawful imprisonment." It had at least two readings but did not reach consideration by the Lords: Ben Coates, "Fleetwood, Sir William II (*c.* 1566-1630)," History of Parliament, accessed July 4, 2017, https://www.historyofparliamentonline.org/volume/1604-1629/member/fleetwood-sir-william-ii-1566-1630; Moreover, the similarities between Fleetwood and Coke deserve further study.

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APPENDIX I

A DISCOURSE UPON THE COMMISSION OF BRIDEWELL
EDITED BY PAUL TODD

A Breiffe: Discourse

vppon the Commission, of Brid-

well, written by S*i*r Frauncis

Knight;[652]

[652] A Breife-Knight] Discourse Upon The Commission Of Bridewell H; Briefe Collections OUT OF Magna Charta: OR, The Knowne good old LAWES OF ENGLAND. Which sheweth; That the Law is the highest Inheritance the King hath; and that if His Charter, Grant, or Pattent, be repugnant to the said Lawes, and Statutes, cannot be good, as is instanced in the Charter of Bridewell, London, and others. By which it appeares; That the King by His Charter may not alter the Nature of the Law, the Forme of a Court; nor Inheritance lineally to descend; nor that any Subject be protected from Arrests, Suites, &c. Printed at London, for George Lindsey, and are to be sould at his Shop over against London stone. 1643. L

A: Breiffe: Discourse:[653]

vppon the Commission of

Bridewell written by S*i*r Frau*n*cis

Bacon knight, etcetera./[654]

Inter: magnalia regni[655] amongst[656] the[657] greatest, and most hautie[658] thinges[659] of this kingdome as it is affirmed in the x1xth.[660] yeare of Henry the .6th:,[661] le[662] ley est[663] pluis haut[664] enheritance[665] q*ue* le roy[666] ad etcetera., That is[667] the Lawe is the most[668] highest inheritance,[669] that the kinge hath; for by the Lawe, both the kinge, and all his Sub*iec*tes are[670] ruled,[671] and directed etcetera.[672]

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[653] Discourse] discoure Ca; discurse Hl

[654] A: Breife-etcetera] Brief discourse by Sir Francis Bacon upon Commission of Bridewell, that proceedings in Bridewell upon accusation of whores taken by the governors, not sufficient without indictment or other matter of record, according to old law of the land C; A discourse vpon the Commission of Bridewell Ca Hl La; etcetera] *om.* H; A: Breife-etcetera] Collections out of MAGNA CHARTA: OR, The knowne good old Lawes of ENGLAND L; A Breife Treatise or discourse of the Vallidity, Strength, and Extent of the Charter of Bridewell, and how farr Repugnant both in Matter, sence, and meaninge to the great Charter of England Worthily Composed by Master Serieant Fleetwood Somtymes Serieant at Lawe Lm; A Briefe Treatise or discourse of the validitie or strength of the Commission of Bridewell. By Master Serjeant Fleetwood Serjeant at law Or

[655] regni] rerum La

[656] amongst] amongest Hl; Amonge La

[657] the] *iter.* Lm

[658] most hautie] haughtiest C; haultiest La

[659] thinges] *om.* Lm

[660] x1xth] 19th H

[661] x1xth-6th] 19th Hen.V. C; 19th. yeare of king hen: the vjth. Ca; xixth yere of kinge henry the vjth Hl; 19.H.6. L; in the x1xth-6th] 19.Hen.6. La; x1xth-6th] 19 Hen: 6th: *add. in marg.* Lh; the x1xth-6th] 19:H:6: Lm Or

[662] le] la Ca H Hl La

[663] est] la *add.* Ca H Hl La; le *add.* L Lm Or

[664] haut] haute Ca H Hl; hault L Lm Or; haulte La

[665] enheritance] heneritanus Ca Hl; Inheritance L La Lm Or

[666] que le roy] et le ley C; roy] loy Lh

[667] is] to saie *add.* La

[668] most] *om.* L La Lm Or

[669] inheritance] heneritance Ca; heneritaunce Hl

[670] are] bene Hl

[671] ruled] luled Lh

[672] etcetera] *om.* C L La Lm Or

The maximes, and[673] Rules, whereby[674] the kinge is directed are[675] the auncient Maximes,[676] Customes, and Statutes,[677] of this Land/

The maximes are[678] the foundacons of the Lawe, and the full, and perfect, conclusions of Reasons./[679]

The Custome[680] of the Realme are properly [128v] such thinges, as through, much,[681] often, and longe vsage, eyther of simplicity, or of[682] Ignorance, gettinge once an entrie, are entred and hardened by succession, and after[683] be defended, as firme, and Staple[684] Lawes,/

The Statutes of the Realme, are the Resolute decrees, and[685] absolute Iudgementes[686] of the Parliam*en*te established by the kinge with the Com*m*on[687] Consent of[688] three[689] estates who doe represent[690] the whole and entire body of the Realme of England./

To the purpose[691] of this discourse. The Lawe is, if any Charter be graunted, by a[692] kinge the which is repugnate,[693] to the maximes, Customes, or[694] statutes, of the Realme,

673 and] *om.* Ca; maximes and] maxim[*illeg.*] Hl; *om.* La
674 whereby] by which H
675 are] beene Ca Hl; be La
676 Maximes] and *add.* L
677 Statutes] States L
678 are] and C; beene Ca Hl; be La
679 Reasons] reason C Ca H Hl L La Lm Or
680 Custome] Customes C Ca H Hl L La Lm Or
681 much] *om.* La
682 of] *om.* L
683 after] afterward La
684 Staple] Stable Ca H Hl L La Lm Or
685 and] the *add.* L
686 Iudgementes] Iudgment Ca Hl
687 Common] *om.* La
688 of] the *add.* L La Lm Or
689 three] realms *add.* C; Realmes *add.* Lh^{ac}, *exp.*^{pc}
690 represent] present Lm
691 purpose] proofe Ca
692 a] the L Lm Or
693 repugnate] repugnant C Ca H Hl L La Lm Or
694 or] and Ca

then is the Charter voyd, and it[695] is eyther by quo warrant,[696] or by scire facias, (as learned men,[697] haue left presidentes,) to be repealed[.][698] Anno:[699] 19:[700] Edward: 3:/[701]

That: a[702] kinges graunte,[703] eyther repugnant [129r] to lawe custome, or statute,[704] is not good, nor pleadeable in the lawe:, see what[705] presidentes, thereof, haue binne left by our wise fore[706]fathers[.] It is sett downe in the 14th: of[707] Henry the 6th:[708] that kinge Henry the second,[709] had by his Charter graunted, to[710] the Prior, and Mounkes, of S*ain*te Barthollomewes[711] in[712] London, that the Prior and[713] his[714] Mounkes should be as free in their Church,[715] as the kinge was in his Crowne,[716] yett by this[717] graunte was the Prior and his[718] Mounckes, deemed, and taken to be but as Sub*iec*tes, and the afforesaid[719]

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695 it] *om.* La
696 warrant] warranto Ca H Hl L La Lm Or
697 men] by *add.* Lm^{ac}, *exp.*^{pc}
698 repealed] repelled Ca Hl La
699 Anno] as in *praem.* L Lm Or
700 19] 5 La
701 3] III C; 19-3] 19 Edward: 3: *add. in marg.* Lh
702 a] the La
703 graunte] which is *add.* L Lm Or
704 statute] Statutes La
705 see what] Soe that Ca
706 fore] *s.l.* La
707 of] *om.* H
708 14th-6th] 19th Hen.VI. C; of Henry the 6th] yeare of king Henery the vjth. Ca; 14th-6th] xiiijth yere of kinge henry the Sixt Hl; the 14th-6th] 13:H:6: L Lm Or; 14th-6th] 13. yeare of Henry. 6: La; 14th: of Hen: 6th: *add. in marg.* Lh
709 kinge Henry the second] Hen.II. C; second] 2d H; Henry the second] H.2. L Lm; kinge Henry the second] Hen:2. La; K:H:2: Or
710 to] vnto La
711 Barthollomewes] Bartholomewe C La
712 in] *om.* C
713 and] the *add.* Or^{ac}, *exp.*^{pc}
714 his] *om.* La; *s.l.* Or
715 their Church] the Charter La
716 Crowne] Corone Hl
717 this] his Lm
718 his] *om.* C
719 afforesaid] foresaid Ca Hl

graunte, in that respecte, to be[720] void, for[721] by the Lawe, the kinge may not any[722] more disable himselfe, of his Regall[723] superiority, over his Sub*iec*tes[724] then his Sub*iec*tes[725] cann, renounce or avoid[726] his[727] subiecc*i*on against, or towardes[728] his[729] kinge, or[730] superior, you knowe,[731] Stacy,[732] would haue renounced, his loyallty, and[733] subiec*i*on, to[734] the Crowne[735] of England, and would haue adopted, him selfe, to haue bin a[736] sub*iec*te [129v] to[737] kinge Philipp:/.[738]

Answere:[739] was made by the Courte for[740] that by the Lawes of this[741] Realme, neither may[742] the kinge, release, or[743] relinquish the subiecc*i*on of his sub*iec*te:[744] neither may[745] the subiect, revoulte, in his alleageance from the superiority, of his Prince,/

[720] be] but *add.* La
[721] for] that *add.* La
[722] any] *om.* Lm
[723] Regall] royal C
[724] Subiectes] subiecte Hl
[725] Subiectes] subiecte H Hl
[726] avoid] the *add.* Hl^{ac}, *exp.*^{pc}
[727] his] theire L Lm Or
[728] towardes] toward La
[729] his] the^{ac}, his^{pc} Ca; theire L Lm Or
[730] or] and La
[731] knowe] that *add.* Ca Hl L La Lm Or
[732] Stacy] Story Ca H Hl La
[733] and] or C
[734] to] vnto Ca Hl La
[735] Crowne] Corone Hl
[736] a] *om.* La
[737] to] vnto La
[738] kinge Philipp] of Spaine *add.* L La Lm Or; the *praem.* Lm
[739] Answere] But *praem.* L Lm Or
[740] for] *om.* L La Lm Or
[741] this] the La
[742] may] might La
[743] or] nor C
[744] subiecte] subiectes C H La
[745] may] might La

There are two notable pr*e*sidentes, in the tyme of kinge Edward, the third,[746] the which although they take[747] place in some, one respecte; yet were they not adiudged of, accordinge to the minde of the kinge, beinge[748] the graunter,/

That is the kinge, graunted, vnto the[749] Lord William Mountaigue,[750] the Isle of Weight,[751] and that he should be Crowned kinge of the same,:

And he alsoe graunted, vnto[752] the Earle of Darby[753] the Isle of Man, and that he should be Crowned kinge of the same, yett these two personages, notwithstandinge [130r] the said grauntes were subiectes, and their Iselandes, were, vnder the dominion,[754] and subiecc*i*on of the kinge, and in that respect[755] were the grauntes, void,[756] It was spoken in the .8th: of Henry the[757] 4th:[758] : Quod potestas. principis.,[759] non est inclusa, legibus, that is a Princes power, is not bounded, with[760] Rules, or lim*m*ittes of the[761] Lawe,[762] howsoever[763] that sentance, is soe[764] the Lawe, agreed to[765] the Contrary, the 31th:[766] of

[746] kinge Edward the third] Ed.III. C; third] 3d H; the third] 3 L; Edward the third] Ed:3: Lm
[747] take] took C
[748] beinge] *om.* Or
[749] the] *om.* C
[750] Mountaigue] Montaigne C; Montague Ca H Hl; Mountague L Lm Or
[751] Weight] Wight C Ca H Hl L Or; White^{ac}, Wighite^{pc} *s.l.* Lm
[752] vnto] *om.* Ca Hl; to Or
[753] Darby] S. Ca Hl
[754] dominion] dome Ca Hl
[755] respect] respectes Hl^{ac}, respect^{pc}
[756] There are two-void] *om.* La
[757] the] *om.* H
[758] of Henry the 4th] Hen.IV. C; yeare of king.h. the iiijth. Ca; 8th-4th] viijth yere of kinge harry the iiijth Hl; 8:H:4 L Lm Or; in the 8th-4th] 8.Hen:4. La
[759] princepis] Principis C Ca H Hl L Lm Or; Principi La
[760] with] by H
[761] the] *om.* Ca Hl
[762] that is a-Lawe] *om.* La
[763] howsoever] how Ca Hl; Howe trewe La
[764] soe] see Ca H Hl La
[765] to] vnto La
[766] 31th] 37th H

Henry the[767] 6th:[768] whereas[769] it is agreed for Lawe. that it is, not in[770] the kinges power,[771] to graunte by his Charter[772] that a man[773] seased of Landes,[774] in fee simple, may devise by his last will, and testam*en*te, the same Landes to another,: or that the youngest sonne by the Custome[775] of Burrough[776] English, shall not[777] Inherite,: Or that Landes beinge Francke Fee,[778] should[779] be[780] of the nature of, Auncient demeasne or that in[781] a newe, Incorporated[782] Towne, that[783] an Assise, of fresh, force should[784] be vsed;[785] Or that they shall haue tolle [130v] trauers,[786] or through[787] tolle, or such like etcetera:/[788]

[767] the] *om.* H
[768] 31th-6th] 31st Hen.VI. C; of Henry the 6th] yeare of king hen the vjth. Ca; 31th-6th] 3i yere of kinge henry the vjth Hl; 31:H:6: L Lm Or; the 31th-6th] 32.H.6. La
[769] whereas] where La
[770] in] *illeg.* Ca
[771] power] *illeg.* Ca
[772] Charter] Carter Lh
[773] a man] *illeg.* Ca
[774] Landes] Land L Lm Or
[775] Custome] of by the Custome *add.* Hl^{ac}, *exp.*^{pc}
[776] Burrough] Bow C
[777] not] *om.* Ca Hl La
[778] Or that-Fee] *om.* Lm *homoiotel.*
[779] should] shall H
[780] should be] shalbe La
[781] in] *om.* L Lm; *s.l.* Or
[782] Incorporated] Corporated Lm
[783] that] *om.* H La
[784] should] shall Ca Hl La
[785] vsed] sued La
[786] tolle trauers] toll, trades La
[787] through] trough C Lh
[788] etcetera] *om.* C

In the:[789] 37. Hen: 8:[790] et[791] 49 assises:[792] 4:[793] 8:[794] See alsoe a noteable case[795] agreed: for lawe in the 6th. of Henry[796] the vijth:[797] where the Iustices doe[798] affirme, the Lawe to be that[799] Rape is made Fellonie, by statute,[800] that the same by the[801] Lawe, is not inquirable, but before Iustices, that haue authority[802] to heare, and determine of[803] the same: in this Case, the kinge, cannot, by his[804] Charter make the same offence, to be enquired of, in a Lawe day, nor the kinge cannot graunte that a Leete shalbe, of any[805] other nature, then it is by[806] course, of the[807] Com*m*on Lawe. See[808] thereby it appeareth, that the kinge may not eyther[809] aulter, the nature of the Lawe.[810] The forme of a Courte,[811] or[812] the manner, and[813] order of[814] pleadeinge./

[789] In the] *om.* Ca Hl L La Lm Or
[790] 8] 6 La
[791] In the-et] *om.* H
[792] assises] libr: assis: La
[793] 4] p Ca Hl La
[794] 8: et-8] VIII., ch. 49, ap. 48 C; 37-8] 37 Hen: 8: et. 49: assises: 4: 8: *add. in marg.* Lh
[795] case] *om.* Lh
[796] 6th. of Henry] vjth. yeare of king h. Ca; vjth yere of kinge henry Hl
[797] of Henry the vijth] Hen. VII C; the vijth] 7th H; the 6th-vijth] 6:H:7. L Lm Or; 6th-vijth] 6. yeare of king H.7.p.4. La
[798] doe] done Hl
[799] that] where *add.* La
[800] statute] and *add.* L Lm Or
[801] the] *om.* La
[802] authority] auctority Hl; aucthoritie La
[803] of] *om.* La
[804] his] *om.* La
[805] any] an La
[806] by] the *add.* Ca Hl L La Lm Or
[807] the] *om.* L
[808] See] Soe C Ca Hl L La Lm Or; so that H
[809] eyther] *om.* Lm
[810] Lawe] laws C; neither *add.* La
[811] Courte] cort^{ac}, court^{pc} *s.l.* Ca
[812] or] nor La
[813] and] or L Lm Or
[814] of] the *add.* Lm

And: in the 8th: yeare of[815] Henry the[816] 6th:[817] it is[818] agreed for Lawe, that the kinge may not[819] graunte, to I:S:[820] : that I.S: maybe[821] Iudge [131r] in his owne proper Cause., nor[822] that I:S: shalbe[823] sued, by[824] any[825] Acc*i*on at the Com*m*on Lawe, by[826] any other person,[827] nor that I:S: shall haue, a Markett[828] a[829] Fayer, or a[830] Free warren,[831] in an other mans soyle: And in[832] the Longe record,[833] by Hyll the Reverent[834] Iudge, it is said for, Lawe; That whereas the kinge hath a pr*e*rogatiue, that he shall haue, the ward shipp[835] of the body of his Ten*en*tes[836] although[837] he hould[838] of the kinge[839] but[840] by posteriority,[841] yett if the kinge graunte[842] his Signeory[843] vnto another. w*i*th[844] like

[815] 8th: yeare of] viijth. yeare of king Ca
[816] yeare of Henry the] of Henry H
[817] yeare-6th] Henry VI. C; 8th-6th] viijth yere of kinge henry the vj Hl; the 8th-6th] 8:H:6 L Lm Or; 8th-6th] 8.of k.H.6. La; 8th. Hen: 6th: *add. in marg.* Lh
[818] th: it is] *illeg.* Hl
[819] not] *om.* Ca; may not] ma[*blot*] Hl
[820] I:S:] F.G. C
[821] maybe] should be La
[822] nor] or Ca La
[823] shalbe] shall not be *conj.* H; shall not be La
[824] by] for La
[825] any] an C L Or
[826] by] for C
[827] nor that-person] *om.* Lm
[828] Markett] marketes Ca
[829] a] or La
[830] a] *om.* La
[831] warren] Warrant L
[832] in] *om.* Ca
[833] record] recordare Ca Hl; in the Longe record] 34.H.6. La
[834] Reverent] Reverend C Ca H Hl L La Lm Or
[835] ward shipp] worship L
[836] Tenentes] tenant La
[837] although] that *add.* Ca Hl; albeyt La
[838] hould] held La
[839] hould of the kinge] should of the king's C
[840] but] *om.* H
[841] posteriority] posteritie La; The prerogatiue *add.* Lm^{ac}, *exp.*^{pc}
[842] graunte] over *add.* Ca Hl L La Lm Or
[843] Signeory] signorie C H La; Segniory Ca Hl; Seigniory L; Seignoritie Lm; Seignorie Or
[844] another with] and therewith C; with] *lac.* the Ca; the *add.* Hl La

pr*e*rogatiue, notwithstandinge, any posteriority,[845] the[846] pr*e*rogatiue,[847] shall not passe for saith the booke, the kinge by his Ch*art*re Cannot, Chaunge the Lawe;[848] The same[849] Lawe[850] is that the kinge cannot graunte vnto[851] another the pr*e*rogatiue, of nullu*m* tempas,[852] occurrit regi,[853] not[854] that a discent shall not take[855] away,[856] an entrie, nor[857] that[858] a Collaterall, warranty[859] shall not binde nor[860] that possessio, fratris, shall not [131v] take place, nor that the wife shall not be endowed, of her husbandes, landes,[861] nor that inheritance,[862] shall lyneally assende,[863] nor that any subiect shalbe vnder protecc*i*on, from Arrestes,[864] and[865] suites, and[866] such like etcetera/.[867]

Yett doe not[868] we[869] see dayly, in experience that whatsoever can be procured,[870] vnder

[845] posteriority] posteritie La
[846] the] this Ca H Hl La
[847] notwithstandinge-prerogatiue] *om.* Lm
[848] Lawe] Lawes L Lm Or
[849] same] like La
[850] Lawe] *iter.* Ca
[851] vnto] to La
[852] tempas] tempus C Ca H Hl L La Lm Or
[853] regi] etcetera Ca Hl; etcetera *add*. La
[854] not] nor Ca H Hl L Lm Or; neither La
[855] take] t[*blot*] Hl
[856] away] *om.* Ca Hl
[857] nor] neither La
[858] that] *om.* L Lm
[859] warranty] warrant Ca Hl L; garancie La
[860] nor] neither La
[861] of her husbandes landes] with the landes of her husband La
[862] inheritance] heneritance Ca Hl
[863] assende] discend L Lm Or; inheritance shall lyneally assende] the inheritance shall not descend lineally La
[864] Arrestes] arrest C
[865] and[1]] *om.* L Lm Or; or La
[866] and[2]] or La
[867] etcetera] *om.* C La
[868] doe not] *om.* La
[869] not we] wee not *transp.* Ca
[870] whatsoever can be procured] whosoeuer can be protected La

the greate Seale of England, is taken quasi sanctu,[871] and although[872] it be, meerely against th*e* Lawes; Custimes; and Statutes of this Realme, yett it is discended[873] in such sorte that, some haue been called rebellious;[874] for not alloweinge,[875] such void, and vnlawfull grauntes[.][876] And[877] an[878] Infinite number of such like[879] pr*e*sidentes, I could[880] sett downe, to maintaine the aforesaid[881] Argument, but theis[882] fewe[883] examples shall serue, for[884] this time, etcetera/[885]

But nowe haue we[886] to see, if the said Charter graunted to[887] the Cittie, Concerninge the Authority[888] of the, gouernors[889] of Bridwell, stand with the Lawes, Customes, and Statutes[890] of this Realme, or not, the effect of which Ch*art*re, in one place is, that the gou*er*nors, haue authority,[891] to search, enquire, and seeke out[892] Idle Ruffeins;[893] Taverne hunters,[894] Vagaboundes;[895] Beggers, and all persons, of evill name, and fame, [132r]

[871] sanctu] sancta C; sanctium Ca; sanctum H Hl La; sanctim? L; sanctim Lm Or
[872] although] albeyt La
[873] discended] defended Ca H Hl L La Lm Or
[874] rebellious] rebells La
[875] alloweinge] of *add.* La
[876] grauntes] ? *add.* H
[877] And] *om.* Ca Hl
[878] And an] As La
[879] like] *om.* La Lm
[880] could] might La
[881] aforesaid] foresaid Ca Hl; said La
[882] theis] the *add.* Lm^{ac}, *exp.*^{pc}
[883] fewe] four C
[884] for] at La
[885] etcetera] *om.* C L La Lm Or
[886] haue we] we haue *transp.* L La
[887] to] vnto La
[888] Authority] aucthoritie Ca La; auctority Hl
[889] gouernors] Governor H
[890] Customes and Statutes] statutes and customes *transp.* La
[891] authority] aucthoritie Ca La; auctoritie Hl
[892] search, enquire, and seeke out] seeke, enquire and search out *transp.* La
[893] Ruffeins] Ruffians C H L La Lm Or; Ruffins Ca; Ruffens Hl
[894] hunters] haunters C H La Lm
[895] Vagaboundes] vacabondes La

whatsoever, they be,[896] men, or[897] women; And them[898] to apprehend, and the same to[899] send, and[900] Com*m*itt to Bridwell, or by any other waies,[901] or meanes, to punish or[902] Correct them, as shall seeme good to their discrescions, here ye[903] see what the wordes of[904] the said Charter are:/

Nowe are we to[905] Consider, what the wordes of the Lawe[906] be see[907] Magna charta, of the Liberties of England; Capitulum: the[908] 29:[909] noe free man shalbe taken, or[910] imprisoned, or be disseised, of his freehould, or liberties, or free Customes, or to[911] be out Lawed, or exiled, or any other way[912] distroyed, nor we shall not[913] passe vppon him nor Condemne[914] him, but by Lawefull Iudgement, of men [132v] of his degree or by[915] the Lawe, of the Land,

Now if we[916] doe compare the said Charter of Bridwell, with the greate Charter of[917] England, both in matter, sence, and meaninge you shall finde them meerely repugnant,[918] in the said greate Charter of England, in the last Chapter amoungst other thinges, the

[896] they be] be they *transp.* Ca Hl
[897] or] and Or
[898] them] then H L
[899] to apprehend-same] *om.* L Lm Or
[900] send and] *om.* H
[901] waies] way H
[902] or] and Ca Hl La
[903] ye] wee Ca H; you L La; you May Lm
[904] of] *om.* Lm
[905] to] see and *add.* Lm
[906] Lawe] lawes Ca Hl
[907] see] *om.* C
[908] the] *om.* C Ca H Hl L La Lm Or
[909] Capitulum: the 29] 29. Chap: *transp.* La
[910] or[1]] and Lm
[911] to] *om.* Ca H Hl La
[912] other way] other wayes Ca L Lm Or; otherwise Hl La
[913] not] haue *add.* Lm[*ac*], *exp.*[*pc*]
[914] Condemne] condempne Ca Hl Or
[915] by] *om.* H
[916] we] yee Ca Hl; you La
[917] Bridwell with-of] *om.* La
[918] repugnant] repugnan[*illeg.*] Hl

kinge graunteth from[919] him, and his heyres, that neither he nor his heyres, shall procure or doe any thinge, whereby the Liberties,[920] in[921] the said Charter conteyned, shalbe, infrenged, or broken; And if any thinge[922] be procured, or done, by any person, Contrary to the pr*e*mises, it shalbe had, of noe force, nor[923] effect,/

115 Here must you[924] note alsoe that the said greate Charter of England, is not onely Confirmed by the statute, of m*ar*le bridge, Capitulum: 5:[925] but alsoe by many other statutes made in the times[926] of kinge Edward the third,[927] kinge Richard the secound,[928] Henry the 4th.[929] Henry the .5th:[930] and Henrye the vjth:[931] [133r] amongst sundry of which Confirmac*i*on[932] I doe[933] note one aboue the rest, the[934] which is Anno: 43:[935]

120 Edward: 3: Chapter: j:[936] The wordes are these[.][937] Itt is assented, and accorded, that the greate Charter, of England, and[938] the[939] Charter, of the forrestes,[940] shalbe[941] kept, in,

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[919] from] for Ca H Hl L La Lm Or
[920] Liberties] of *add.* Ca^{ac}, *exp.*^{pc}
[921] in] *s.l.* Ca; of Lm
[922] thinge] things C
[923] nor] or C H L Lm Or
[924] must you] you must *transp.* C; you] yee Ca Hl
[925] 5] *illeg.* L; Capitulum: 5] the first Chapter La
[926] times] time H L Lm Or
[927] the third] 3rd H
[928] the secound] 2nd H
[929] 4th] fowerth Ca; iiijth Hl
[930] 5th] vth Hl
[931] Edward-vjth] Ed.III., Rich.II., Hen.IV., Hen.V., and Hen. VI C; Henry the 4th-vjth] Henry 4th, Henry 5th, and Henry 6th H; Edward-vjth] Edw.3. King R.2. Hen.4. Hen.5. and Hen.6. L; kinge Edward-vjth] Ed.3. Rich.2. Hen.4. Hen:5. and Hen.6. La; Edward-vjth] Edw:3: K:R:2: H:4: H:5: and H:6: Lm; kinge Edward-vjth] k:Ed:3: k:R:2: Hen:4: H:5. and H:6: Or
[932] Confirmacion] Confirmacions C Ca H Hl L La Lm Or
[933] doe] *om.* H
[934] the] *om.* Ca La
[935] 43] 34 Lm; 42 H
[936] 3: Chapter: j] III., cap. 1 C; Chapter: j] Cap.1. Ca Hl L Lm Or; j] 1 H; Anno-j] 42.Ed.3.ca.primo. La; Anno: 43: Edward 3: Capitulum: 1: *add. in marg.* Lh
[937] these] viz *add.* L; vizt *add.* Lm Or
[938] and] so La
[939] the] great *add.* Hl^{ac}, *exp.*^{pc}
[940] forrestes] forestes^{ac}, forrestes^{pc} *s.l.* Hl
[941] shalbe] houlden and *add.* Ca Hl La

all pointes, and if any, statutes,[942] be made to the Contrary, that[943] shalbe houlden for none;/

Hither to[944] ye[945] see it very plainely,[946] that neither[947] procurement[948] nor acte done, eyther by the kinge, or[949] any other person, or[950] any acte of p*ar*liament, or other thinge may in any waies,[951] alter, or chaunge any one pointe, Conteyned in the said greate Charter of England, but if you[952] will[953] note the wordes, sence, matter, and meaninge, of the said Ch*art*re, of[954] Bridwell, he[955] shall finde it all[956] merely Repugnant to[957] the said greate Ch*art*re of England,[958] I doe note one speciall[959] statute, made in the said,[960] 43:[961] of[962] Edward the third,[963] the[964] which [133v] if it be well Compared, with[965] the said Ch*art*re of Bridwell, it will make an end of this Contenc*i*on,[966] the wordes are[967]

[942] statutes] Statute Ca H Hl L La
[943] that] they L Lm Or
[944] Hither to] Hereto La; Now *praem.* Lm
[945] ye] you L La Lm Or
[946] plainely] plaine La
[947] neither] *om.* L
[948] procurement] procurements C
[949] or] by *add.* Ca Hl
[950] or[2]] in C
[951] waies] wise Ca Hl La; *text add. et exp.*[pc] Lm
[952] you] doe *add.* La
[953] will] well Ca Hl La
[954] of[2]] England *add.* Lh[ac], *exp.*[pc]
[955] he] we or ye C; yee Ca H Hl; you L La Or
[956] all] in all *add.* La
[957] to] vnto La
[958] but if you-Chartre of England] *om.* Lm
[959] one speciall] an especiall La
[960] said] Statute *add.* Lm[ac], *exp.*[pc]
[961] 43] 42nd H
[962] of] yeare of king Ca Hl
[963] 43-third] 43rd Ed.III. C; third] 3rd H; of Edward the third] yeare of Kinge Edw:3: L Lm Or; in the said-third] 22.Ed.3. La
[964] the] *om.* La
[965] with] to L Lm Or; vnto La
[966] Contencion] Controuersie La
[967] are] be La

these[.][968] Item at the request,[969] of the Com*m*ons by[970] the[971] Petic*i*on put forth, in this[972] parliam*en*te to eschewe the mischeifes,[973] and damage[974] done to diuers., of the Com*m*ons; by false accusers, which often times, haue made their accusementes,[975] more for[976] vengeance, and[977] singuler profitt; then for the profitt[978] of the kinge, and his people of[979] which accused persons, some haue time[980] taken and caused to come etcetera[981] Against the Lawe[.] It[982] is assented, and[983] accorded[984] for the[985] gou*er*ment of the Com*m*ons, that noe man be put to answere w*i*th out, pr*e*sentment, before[986] Iustices, of the kinge[987] of[988] Record,[989] by due proces, as by[990] writt originall, accordinge to the ould[991] Lawe of the Land, and if any thinge from[992] henceforth, be done[993] to the Contrary, it shalbe void, in the[994] Lawe, and houlden for error [134r] as I said before,

[968] these] viz *add.* L; vizt *add.* Lm Or
[969] request] requestes Ca; requestes^{ac}, request^{pc} Hl
[970] by] *om.* La
[971] the] their Ca Hl La
[972] this] *text add. et exp.*^{pc} Lm
[973] mischeifes] mischief H La
[974] damage] damages L; Daungers Lm
[975] accusementes] accusacions La
[976] for] theire *add.* La
[977] and] for *add.* Lm
[978] then for the profitt] *om.* Lm
[979] of] *om.* Ca Hl
[980] time] beene Ca H Hl L La Lm Or; qy. or been *add.* C
[981] etcetera] *iter.* C
[982] it] Item *praem.* Lm
[983] and] *iter.* Lm
[984] accorded] accordinge^{ac}, accorded^{pc} *s.l.* Lm
[985] the] *om.* C; good *add.* La
[986] before] the *add.* L Lm Or
[987] of the kinge] or thing H; Iustices of the kinge] Iustice or matter La
[988] of] vpon L Lm Or
[989] Record] or *add.* H
[990] as by] or by Ca Hl; and by La; as Lm
[991] ould] auncient La
[992] from] *om.* La
[993] from henceforth be done] be done from henceforth *transp.* Ca
[994] the] *om.* La

soe[995] say[996] I still., if this statute be in force, as I am sure it is, then is the Lawe Cleare that the proceedinges in Bridwell, vpon the accusation,[997] of hoores,[998] taken by the gouernors of Brydwell, aforesaid,[999] are not sufficient, to call any man to answere, by any[1000] warrant by them made[1001] without[1002] Indictment or other matter of Record, accordinge to the ould Law of the Land, such like Com*m*issions as this of Bridwell, is were graunted, in the time of kinge Edward, the third,[1003] by esspeciall procurement, to enquire of speciall,[1004] articles the which Com*m*issions[1005] did make their enquiries,[1006] in secrett places, etcetera.[1007] It was therefore[1008] enacted,[1009] Anno[1010] 42 Edward: 3:[1011] Capitulum: 4:[1012] that from[1013] hence forth,[1014] in all enquiries,[1015] within the Realme Commissions should be[1016] made, to some[1017] Iustices, of the[1018] one[1019] bench, or

[995] soe] *om.* Lm
[996] say] said La
[997] accusation] accusations Ca Hl La
[998] hoores] others La
[999] aforesaid] is *add.* Ca^{ac}, *exp.*^{pc}; of Brydwell aforesaid] *om.* La
[1000] any] *om.* La
[1001] made] w *add.* Lm
[1002] without] in that C
[1003] kinge-third] Ed.III. C; Edward the third] Ed:3: L Lm; kinge-third] Ed.3. La; k:Edw:3: Or
[1004] speciall] certeine especiall Ca Hl
[1005] Commissions] Commissioners Ca Hl L La Lm Or
[1006] enquiries] inquires Lm
[1007] etcetera] *iter.* C
[1008] therefore] there La
[1009] enacted] in *add.* Hl La
[1010] Anno] in Ca
[1011] 3] III C
[1012] 4] 40 La; Anno-4] Anno: 42: Edward: 3: Capitulum: 4: *add. in marg.* Lh
[1013] from] *om.* H
[1014] hence forth] thenceforth Ca Hl Lm
[1015] enquiries] of Assise or Iustices of the Peace *add.* Lh^{ac}, *exp.*^{pc}; inquires Lm
[1016] should be] shalbe Ca Hl La
[1017] some] of the *add.* La
[1018] the] *om.* L
[1019] the one] thone Lh

other,[1020] or Iustices[1021] of Assise,[1022] or Iustices of the[1023] peace w*i*th other of the most vnworthy,[1024] of the Country[.][1025] By this Statute[1026] we may learne that [134v] Com*m*ission*er*s[1027] of enquiries, ought, to sett in open Courtes,[1028] and not in any[1029] Close, and[1030] secrete place,[1031] and that[1032] there[1033] enquiries[1034] ought to be by Iuries, and by noe[1035] discression,[1036] or examminac*i*on; if you looke vppon the statute of, Anno:[1037] 1:[1038] Hen: 8:[1039] Capitulum 8:[1040] you shall there perceiue the very cause, why Empson[,][1041] Sheiffeild, and others were, quite over throne,[1042] the which was as by the[1043] Indictme*n*t[1044] especially[1045] appeareth[1046] for executeinge, Commissions, against[1047] due course, of the Com*m*on Lawe, and in that they did not proceed in Iustice,

[1020] other] th'other Ca; the *praem.* Hl; of the *praem.* La
[1021] Iustices[2]] *om.* Lm
[1022] Assise] Assises Ca Hl
[1023] the] *om.* Hl La
[1024] vnworthy] worthy Ca H Hl L La Lm Or
[1025] Country] county C; County etcetera L Lm Or; etcetera *add.* La
[1026] Statute] estat Ca Hl
[1027] Commissioners] commissions C H
[1028] Courtes] Courte Ca La
[1029] any] *om.* La
[1030] and[1]] or H L Lm Or
[1031] place] places La
[1032] that] *om.* Lm
[1033] there] their C H L La Lm Or
[1034] enquiries] Inquirie L Or; inquire Lm
[1035] by noe] not by Ca Hl La
[1036] discression] disscussion L Lm Or
[1037] Anno] *om.* La
[1038] 1] *om.* L
[1039] 8] VIII C
[1040] Anno-8] Anno: 1: H: 8: Capitulum: 8: *add. in marg.* Lh
[1041] Empson] and *add.* H
[1042] over throne] ouerthrowe Ca Hl
[1043] the] their Ca Hl La
[1044] Indictment] Indictmentes L La Lm Or
[1045] especially] dothe speciallie La
[1046] appeareth] appeare Ca Hl La
[1047] against] the *add.* Ca Hl La

accordinge to the Lib*er*ties, of the greate[1048] Ch*art*re, of[1049] England; and of other Lawes, and statutes, Provided for the due executeinge[1050] of Iustice;/

There was a[1051] Comission graunted forth in the begininge, of the Raigne of her Ma*ies*tie[1052] that nowe is,[1053] vnto S*i*r Ambrose Cape,[1054] S*i*r Richard, Sackvile, and[1055] others for the examinac*i*on,[1056] of Fellons, and of other lewd persons,[1057] it soe fell out that [135r] many men, of good calleinge were impeached by the accusac*i*on,[1058] of fellons, some greate men and Iudges, alsoe entred into[1059] the validity, of the[1060] Commission[.] It[1061] was thought, that[1062] the Comission was against, the Lawe, and therefore did the Commissioners, giue over the Commission, as all men knowe, and whereas the exam*m*inac*i*on is by the Commission referred, to the wisdome,[1063] and discression,[1064] of the gouernors of Bridwell, as touchinge this pointe, I finde[1065] that the examinac*i*on, of Robberies[1066] done by sanctuary men, was appointed vnto[1067] the

[1048] greate] *om.* La
[1049] of] or H
[1050] executeinge] execucion La
[1051] a] *om.* La
[1052] Raigne of her Maiestie] Queenes Maiesties Raigne La
[1053] her Maiestie that nowe is] Queene Elizabeth of happie memory L
[1054] Cape] Cave Ca Hl L La Lm Or
[1055] and] to *add.* Ca Hl
[1056] examinacion] examinacions La
[1057] persons] demeanors Ca Hl La; prisoners H
[1058] accusacion] accusations Ca H Hl La
[1059] into] consideracion of *add.* La
[1060] the] *text add. et exp.*[pc] Ca
[1061] it] and *praem.* L Lm Or
[1062] that] *om.* La
[1063] wisdome] wisdomes La
[1064] discression] discretions Ca Hl La
[1065] finde] said Lm
[1066] Robberies] robberie La
[1067] vnto] to L Lm Or

discression,[1068] of the Counsell, or vnto[1069] fower[1070] Iustices of the[1071] peace, but this was not, by Commission, or by graunte, but[1072] by acte of Parliament made Anno[1073] xxii[1074] Hen: 8:[1075] Cha.[1076] Capitulum 14: the Iustices, of both the[1077] Binches haue vsed[1078] to examine, the abillities, and Disabillities, of[1079] atturnes, and by their discressions,[1080] to place, or[1081] Remoue, the same,[1082] [135v] vppon their misdeameanors[1083] without any solemnity,[1084] of tryall at the Com*m*on place[1085] or[1086] Lawe, And that[1087] is, and haue[1088] bin done, by the Treasuror and Barrons of the Exchequor touchinge their[1089] Attornies;/

But: if you[1090] search the cause, thereof,[1091] yo*u*[1092] shall finde the cause[1093] to be done by authoritye[1094] of Parliament,[1095] Anno the 4th:[1096] of Henry[1097] 4:[1098] Capitulum: 1:[1099]

[1068] discression] discretions Ca Hl La; of two *add.* La
[1069] vnto] to L
[1070] fower] iiij Ca Hl
[1071] the] *om.* La
[1072] but] by Lh
[1073] Anno] *om.* La
[1074] xxii] 22 C Ca H Hl L La Lm Or
[1075] 8] VIII C; Anno-8] Anno: xxii Henry: 8: *add. in marg.* Lh
[1076] Cha.] *om.* C Ca H Hl L La Lm Or
[1077] the] *om.* La
[1078] vsed] *iter.* C
[1079] of] *om.* C
[1080] discressions] discretion C H
[1081] or] and La
[1082] the same] them L Lm Or
[1083] misdeameanors] misdemanor La
[1084] solemnity] Sollempnitie Ca Hl La Lm Or
[1085] place] Pleas L Lm Or
[1086] or] in C; place or] *om.* Ca H Hl La
[1087] that] the like La
[1088] haue] has C; hath Ca H Hl La
[1089] their] the H
[1090] you] yee Ca Hl
[1091] thereof] *om.* H
[1092] thereof you] hereof yee Ca Hl
[1093] cause] same Ca H Hl La
[1094] authoritye] the authoritie L Lm Or; auctoritye Hl; aucthoritie La
[1095] Parliament] in *add.* Ca Hl
[1096] the 4th] 4 H
[1097] the 4th: of Henry] 4.H. Ca Hl L Lm Or
[1098] the 4th: of Henry 4] 4, Hen.IV. C
[1099] 1] 18 H; Anno-1] 4.H.4.cap.18 La; Anno: 4 Henry. 4: Capitulum: 1: *add. in marg.* Lh

and where as sundry men are arrested, by Latitat Capias,[1100] attachmentes,[1101] and such like, p*ro*ces whereof[1102] their Corporall presence is required; yett vppon infirmities, and other malladies, the Iustices haueinge examined the matter, mayby their discressions[1103] admitt them[1104] to make Atturnies, but note you,[1105] in this Case,[1106] that all this[1107] is done, by authority,[1108] of parliam*en*te[.][1109] Anno:[1110] 7: Hen: 4:[1111] Capitulum: 13:[1112] **The:** Commission of Bankerouptes giueeth[1113] power to the[1114] Commissioners, to take, [136r] order by their[1115] discressions both with the body and goodes of the bankerupte, and to[1116] sett[1117] the bankeroupte[1118] out of his house, and him to imprisson,./[1119] And all this is referred to[1120] the discression[1121] of the Commissioners, but this is[1122] by authority[1123] of parliament[.][1124] Anno:[1125] 13: Eliz: Cap: 7:[1126]

[1100] Capias] copias C; Latitat Capias] latitaches capiasses Ca Hl
[1101] attachmentes] Attachement La
[1102] proces whereof] processes whereby Ca H Hl; whereof] wherin La
[1103] mayby their discressions] by their discrecions may La
[1104] them] *om.* Lm
[1105] you] yee Ca Hl; yet La
[1106] in this Case] *om.* H
[1107] in this Case that all this] that all this in this case *transp.* La
[1108] authority] auctority Hl; aucthoritie La
[1109] parliamente] in *add.* Ca H Hl
[1110] Anno] *om.* La
[1111] 4] IV C; 46 H
[1112] Anno-13] Anno: 7 Hen: 4: Capitulum: 13 *add. in marg.* Lh
[1113] giueeth] gives L Lm Or
[1114] the] theire L Lm Or; Com *add.* La
[1115] their] *text add. et exp.*[pc] Lm
[1116] to] *om.* L
[1117] sett] or sell *add.* C; fett Ca Hl; and to sett] and also to fetche La
[1118] and to sett the bankeroupte] *om.* Lm
[1119] him to imprisson] Commytt him to prison La
[1120] to] vnto La
[1121] discression] discretions Ca Hl La
[1122] is] *om.* Ca Hl
[1123] authority] auctority Hl; aucthoritie La
[1124] parliament] in *add.* Ca Hl
[1125] Anno] *om.* La
[1126] 7] 1 Ca; Anno-7] Anno: 13: Elizabeth: 7: *add. in marg.* Lh

The punishment, and examinac*i*on, of such as counterfeit L*ett*res of[1127] preivy tokens, is referred[1128] to the discression[1129] of the Iustices of peace,. in[1130] every County, but this is by Parliament, Anno:[1131] 33: Hen: 8:[1132] Capitulum: 1:/[1133]

The examinac*i*on of Riouttes Routtes, and such like misdemeannors, in the starr Chamber is refferred to the discression of the Iudges, of the[1134] Court*e,*[1135] but this is by Parliament*e,* Anno: 3: Hen:[1136] 7:[1137] Cap: i:[1138] et[1139] Anno:[1140] 2:[1141] Hen: 8:[1142] Capitulum: 20:/[1143]

The examinac*i*on, of[1144] vnlawfull huntinge[1145] in P*a*rkes[1146] warrens, et/cetera: is referred to the discrescion,[1147] of the Iustices, of[1148] Peace, as[1149] if the [136v] Offender[1150] deny

[1127] of] or Ca H Hl La
[1128] referred] reserved Ca
[1129] discression] discretions H
[1130] in] of Ca Hl La
[1131] Anno] *om.* C La
[1132] 8] VIII C
[1133] Anno-1] Anno the: 33: Hen: 8: Capitulum: 1: *add. in marg.* Lh
[1134] the] that La
[1135] Courte] Courtes Lm Or
[1136] Hen] 6 *add.* Or^{ac}, *exp.*^{pc}
[1137] 7] VII C; 1 *add.* Or
[1138] i] 1 C Ca H Hl L Lm Or
[1139] et] and C
[1140] Anno] *om.* C H
[1141] 2] j Ca; 21 H
[1142] 8] VIII C
[1143] Anno: 3-20] 30.H.7. et 21.H.8.cap:20 La; Anno: 3: Hen: 7 Cap: 1. Anno: 2. H: 8: cap: 20: *add. in marg.* Lh
[1144] of] *iter. Lm*
[1145] huntinge] huntinges Ca Hl
[1146] Parkes] the King's H
[1147] discrescion] discrecions La
[1148] of] the *add.* C L Lm Or
[1149] as] and Ca H Hl L La Lm Or
[1150] Offender] doe *add.* Ca Hl La

his huntinge, then it is[1151] Fellonie, this alsoe is[1152] by[1153] Parliament, Anno:[1154] j[1155] Hen: 7:[1156] Capitulum: 7:/[1157]

The rate Taxac*i*on, and punishment, of servantes,[1158] Laborers, and[1159] of their wages, is referred to the discression of the Iustices of[1160] Peace, in every County, and Cittie, but[1161] this alsoe[1162] is[1163] by Parliament, Anno: the:[1164] 5: Elizabeth:[1165] Cap: 4./[1166]

The examinac*i*on of Roges, and vagabondes, with the forme[1167] of their punishment,[1168] is referred to the Iustices[1169] but[1170] by Parliamente/

The determinac*i*ons,[1171] of all Causes, in Wales, is referred to be ended, by the kinges Counsell, their[1172] established, by their wisdomes,[1173] and discressions, but yett[1174] this is by Parliament;/[1175]

[1151] it is] is yt *transp.* La
[1152] alsoe is] is alsoe *transp.* Ca Hl L La Lm Or
[1153] by] a *add.* La
[1154] Anno] *om.* La
[1155] j] 1 C Ca H Hl L La Lm Or
[1156] 7] VII C
[1157] Anno-7] Anno: j: H: 7: Ca. 7: *add. in marg.* Lh
[1158] servantes] and *add.* La
[1159] and] etcetera L Lm Or
[1160] of] the *add.* C
[1161] Cittie but] *om.* H; but] *om.* Lm
[1162] alsoe] *om.* L
[1163] is] *om.* Ca Hl; alsoe is] is alsoe *transp.* La Lm
[1164] Anno the] *om.* C La; the] *om.* Ca H Hl L Lm Or
[1165] Elizabeth] Roigne *add.* Ca Hl
[1166] 4] 40 La; Anno-4] Anno: 5: Elizabeth: Capitulum: 4: *add. in marg.* Lh
[1167] forme] forms H
[1168] punishment] punishmentes Ca Hl
[1169] Iustices] etcetera *add.* Hl; of peace *add.* La
[1170] but] it is *add.* La
[1171] determinacions] determinacion C Ca H Hl L La Lm Or
[1172] their] then C
[1173] wisdomes] wisdom C
[1174] yett] *om.* La
[1175] Parliament] 34.H.8. *add.* La

The graunte of the[1176] Plurallities,[1177] tot quotes,[1178] quallificac*i*ons, dispensac*i*on,[1179] licences; and tolleraci*o*ns is Referred, to the discression of the[1180] Archb*isho*pp of Canterbury, but this is by p*ar*liam*en*te./[1181] [137r]

The dealinges,[1182] and examinac*i*ons,[1183] of[1184] high Commissioners,[1185] are authorised,[1186] all[1187] togeather by Parliament/[1188]

And[1189] to be shorte, ye[1190] shall finde in the greate[1191] Volume of the statutes, nere[1192] the number of xltie[1193] A*c*ttes of Parliam*en*te that doe[1194] referre the examinac*i*on, and[1195] punishm*en*te of offenders to the wisdome, and discression,[1196] of the[1197] Iustices, wherevpon I doe[1198] note, th*a*t if the kinge by[1199] pr*e*rogatiue, might haue done, all thinges by Commission or by Charter, that it had bin in[1200] vaine, to haue made soe many Lawes in parliament for the same, etcetera/[1201]

[1176] graunte of the] graunting of La
[1177] Plurallities] of *add.* Ca
[1178] quotes] quote C; quot H
[1179] dispensacion] dispensacions C Ca H Hl L La Or
[1180] discression of the] *om.* Ca
[1181] The graunte-parliamente] *om.* Lm
[1182] dealinges] dealing C
[1183] examinacions] examinacion Ca Hl
[1184] of] the *add.* La Lm
[1185] Commissioners] Comissions Ca La; commissions^{pc} Hl
[1186] authorised] aucthorised Hl
[1187] all] *om.* Lm
[1188] Parliament] The Graunt of the Pluriallities Tot quottes, Qualificacions, Dispencacions, Licenses, and tolleracions, is referred to the discretions of the Archbishopp of Canterbury, but this is by Parliament *add.* Lm
[1189] and] The dealings and examinaciones of *praem.* Lm
[1190] ye] you L La Lm Or
[1191] greate] greatest La
[1192] nere] vpon *add.* La
[1193] xltie] 40 C La; fortie Ca H L Lm Or
[1194] doe] done Hl
[1195] and] or H
[1196] discression] discressions Hl
[1197] the] *om.* La
[1198] doe] *om.* H
[1199] by] his *add.* La Or
[1200] in] *om.* H
[1201] etcetera] *om.* L Lm Or

And to make the Lawe, more manifest, in this question,[1202] Anno:[1203] 42:[1204] Ed: 3: liber Assises:[1205] 11°:[1206] 5[1207] A Commission was sent out of the Chauncery to one I.S: and others to Arrest the body,[1208] and goodes of[1209] A:B: and him to imprisson, and the Iustices gaue Iudgement,. that this Comission, was directly against the Lawe, to take any mans[1210] body without Indictm*en*te, and therefore he[1211] tooke the Comission from the Comission*er*[1212] to thentent[1213] to deliu*er* the sam*e*, to the [137v] kinges Counsell, quod nota/.

And I doe[1214] alsoe finde,[1215] in the[1216] 24:[1217] Edward: 3:[1218] this pr*e*sident, that a Commission, was graunted, vnto[1219] certaine persons for[1220] to indicte[1221] all those that[1222] were, notoriously[1223] slaundered, for any fellonies,[1224] trespasses, or for any other misdemeanors, yea[1225] althoug*h* they were[1226] Indicted for the same and it was

[1202] question] In *add.* Ca Hl L Lm Or
[1203] Anno] *om.* La
[1204] 42] xliij^{ac}, xlij^{pc} Ca
[1205] 3: liber Assises] III, app. C; Assises] assisam Ca Hl
[1206] 11°] N° H; Num: La
[1207] Anno-5] 42. Edward: 3 liber: Assises: 11: 5:/ *add. in marg.* Lh
[1208] the body] *om.* C
[1209] of] S *add.* Ca^{ac}, *exp.*^{pc}
[1210] mans] ones L Lm Or
[1211] he] they Ca H Hl L La Lm Or
[1212] Comissioner] Comissioners C Ca H Hl L La Lm Or
[1213] to thentent] when sent C; thentent] th'intent Ca Hl; the intent H L La Lm Or
[1214] doe] *om.* La
[1215] alsoe finde] find also *transp.* H
[1216] the] *om.* La
[1217] 24] of *add.* Ca; yeare of Kinge *add.* Hl L Lm Or
[1218] 3] III C; the third Hl
[1219] vnto] to Ca L La Lm Or
[1220] persons for] *om.* La; persons L Lm Or
[1221] indicte] take La
[1222] that] who L Lm Or
[1223] notoriously] notorishedlye Lh
[1224] fellonies] fellons^{ac}, fellonies^{pc} *s.l.* Lm
[1225] yea] yet C
[1226] were] neuer *add.* La

adiudged[1227] that this Comission was directly, against the Lawe, And these[1228] I doe conclude vppon the whole matter, that the Comission of Bridwell, would be well Considered of, by the Learned Counsell, of the Cittie, for I doe not thinke[1229] the contrary, but that there be learned,[1230] that by their greate knowledge, in the Lawe are well able; either in, a quo warranto or any other Acc*i*on, brought, to defend the same etcetera/[1231]

/ **Finis**[1232]: /.

[1227] adiudged] Iudged Lm
[1228] these] thus Ca H Hl L La Lm Or
[1229] thinke] to *add.* L Lm Or
[1230] learned] men *add.* La
[1231] etcetera] *om.* C L La Lm Or
[1232] Finis] *om.* C La

Apparatus Fontium

ll. 1-3: A: Breiffe: Discourse: vppon the Commission of Bridewell – Cf. the similar title in the witnesses from family *y*: *A Discourse,* n. 654.

ll. 3-4: written by S*i*r Frau*n*cis Bacon knight – Consider the context in which this manuscript was produced as discussed in the textual introduction for *Lh* in chapter two.

l. 5: magnalia regni – Cf. William Fleetwood's opinion of the speech given by Vice Chamberlain Christopher Hatton in Parliament on November 28, 1584 in a letter from Fleetwood to Lord Burghley dated November 29th of the same year: "his speeche tended to particularities, and speciall actions, and concluded upon the Quene's Highnes' savetie. Before this time I never heard in Parliament the lyke matters uttered, and especially the thinges contayned in the latter speeche. They were *magnalia regni*" (Wright, *Queen Elizabeth and Her Times,* 244). – Magnalia Regni *add. in marg.* L Or

ll. 6-7: affirmed in the x1xth. yeare of Henry the .6th . . . ad etcetera – *Rector of Edington's Case,* YB Pas. 19 Hen. 6, f. 63, pl. 1 (1441.028) *per* John Fray CBEx: "la Ley est le plus haute inheritance que l' Roy ad: car par la Ley il meme & touts ses subjects sont rules." "Etcetera" (l. 7) refers to "car . . . rules" which is included in the author's translation with the addition of "and directed" after "ruled." – 19th Hen.V. C; 19 Hen: 6th: *om. in marg.* Lm

ll. 10-11: The maximes, and Rules . . . of this Land – The Maximes to direct the King *add. in marg.* L Or

ll. 12-13: The maximes are the foundacons of the Lawe, and the full, and perfect, conclusions of Reasons – Sjt. Morgan in *Les Comentaries ou les Reportes de Edmunde Plowden,* London, 1571, f. 27v, *EEBO*, accessed June 30, 2018: "lez maximes sont lez

foundacions del ley, et sont les conclusions del Reason." – The Maximes *add. in marg.* L Or

ll. 14-17: The Custome of the Realme . . . Staple Lawes – The Customes of the Realme *add. in marg.* L Lm Or

ll. 18-20: The Statutes of the Realme . . . Realme of England – The Statutes of the Realme *add. in marg.* L Lm Or

ll. 21-24: The Lawe is . . . repealed – A Kings Grant repugnant to Statutes &c. not good *add. in marg.* L Or; A graunt Repugnant to the Statute &c. not good *add. in marg.* Lm

l. 24: Anno: 19: Edward: 3: – *La* cites the 5th year. This is not traced in Stewart, *OFB*, pg. 755, and I have had difficulty in identifying the exact reference, though the author is clearly referring to some judicial precedent. Cf. *Bishop of Winchester v. Prior of the Carmelite Priory, Winchester*, YB Mich. 17 Edw. 3, f. 59v, pl. 58 (1343.198rs). A *scire facias* was sued in the Chancery by the Bishop of Winchester (Adam Orleton) to recover lands that had been granted to the Carmelite Brethren by the king's charter. Robert Sadyngton LC "said that the king had sent him the bishop's petition; so he adjudged that the land be seized into the king's hand, and the charter revoked." Although this case has a different regnal year, and granted it is not stated in the report in what way the charter was "repugnant to the maxims, customs, or statutes of the realm" (*A Discourse*, l. 22), it qualifies as a possible reference since the king's charter, which granted lands seized of another, was repealed as a result of a *scire facias*.

ll. 27-30: It is sett downe in the 14th: of Henry the 6th . . . in his Crowne – *Rex v. The Prior of St. Bartholomew's*, YB 14 Hen. 6, f. 11v, pl. 43 (1436.043) *per* Alexander Anne (recorder of London). Henry II by his letters patent granted to the prior and convent of

St. Bartholomew's "that they should be as free in their church as the king was in his crown" ("que ils seroient si free en l'Eglise come le Roy en son Crown"). Some manuscripts identify this case as Mich. 1435 which would explain the reference to the 13th year in the following witnesses. – 19th Hen. VI. C; 13:H:6: L Lm Or; 13:H:6: *in marg.* L Lm Or; H:2: *add. in marg.* L Lm Or; 13. yeare of Henry. 6: La

ll. 30-35: yett by this graunte . . . kinge, or superior – Cf. William Paston JCP in *Prior of St. Bartholomew's Case*, YB 14 Hen. 6, ff. 12v-13, pl. 43 (vulgate edition): "Mettons q*ue* a cel' jour le Roy p*er* ses L*ettre*s patent*e*s don*e* terre a moy et a mes heirs, et il grante par meme la Patent que jeo serai si free en cel' terre come il en sa Corone, jeo aliene sans licence; n'aurai le Roy un fine? Cel' certes; car ceo est veste en luy p*er* cause de s*on* p*re*rogative, q*ue* ne peut passer hors de sa person*e* p*er* tiels parols generals. Issint icy, com*en*t q*ue* le Roy voulet q*ue* ils seront free en Egl*ise* come le Roy en s*on* Croone [*recte* Corone], uncore c*eo* q*ue* est vestu en luy p*er* cause de s*on* Prerogative ne passa, et ceo est le corody."

ll. 35-38: Stacy, would haue . . . by the Courte – John Story (d. 1571) was indicted on three causes of treason for conspiring outside of the realm (Antwerp) to invade England. He was arraigned of high treason in the King's Bench in Pas. 13 Eliz. 1, pl. 38: Vaillant, *Reports of Cases . . . by Sir James Dyer*, 298b, 300b. See James Dyer, *Cy Ensuont Ascuns Nouel Cases*, London, 1585, f. 300v, *EEBO*, accessed March 28, 2018: "Doctor Story, qui notorie dignoscitur esse natus in Anglia . . . & per hoc subditus & ligens Regni Reginae Angliae . . . plede al indictment, que il ne voile responder a ceo, car il fuit subiect et Serieaunt a Roy Phillippe de Spaine, et nemy subiect a nostre Seigneoresse le Roygne Elizabethe . . . Sed Curia noluit hoc allocare, mes recorder vn Nihil dicit, sil ne

voile auterment pleader, qui noluit aliter dicere, per que iudgement de Treason fuit done generalment etc." – Stacyes Example *add. in marg.* L Lm Or

ll. 38-40: by the Lawes . . . superiority, of his Prince – Cf. Sir Edward Coke's report on the *Case of the Post-Nati*, 1608, Trin. 6 Jac. 1, see 7 Co. Rep. For the king or subject to commit the like would violate "the mutual Bond and Obligation between the King and his Subjects" established by natural law; for "by this Law of Nature is the Faith, Ligeance, and Obedience of the Subject due to his Sovereign or Superior," and by this law also is the king to protect his subjects (ff. 5, 13-14). Coke also alludes to certain statutes-see 1351-52, 25 Edw. 3, stat. 5, c. 2 and "An Acte whereby certayne Offences bee made Treason," 13 Eliz. 1, c. 1-defining acts of treason which if committed by a subject would constitute a breach of one's allegiance: "In all Indictments of Treason, when any do intend or compass *mortem & destructionem Domini Regis* . . . the Indictment concludeth, *contra (a) ligeantiae suae debitum"* (f. 10v).

l. 41: There are two notable pr*e*sidentes . . . Edward, the third **ll. 44-47:** That is the kinge, graunted . . . Crowned kinge of the same – For the first grant, Stewart suggests that the author erred in not putting instead the Isle of Man in reference to a grant of Edward III made to William Montagu (de Montacute) who was granted by "Quit-claim . . . the king's right in the Isle of Man" in 1333 (Patent Rolls, 1330-34, 7 Edw. 3, pt. 2, m. 22, p. 464); and that the "Isle of Wight was similarly granted to a subject, but by Henry VI, not Edward III" (*OFB*, 755-56). Henry did crown the Earl of Warwick king of Wight in 1444, although no letters patent confirmed this (Co. Inst. iv. 287). Though not under Edward III but Richard II, Stewart overlooks a letters patent in 1385 granting Montagu's son of the same name, the 2nd Earl of Salisbury, the Isle of Wight (Patent Rolls, 1385-89,

9 Rich. 2, pt. 1, m. 36, p. 16): "Grant, for life, to William de Monte Acuto, earl of Salisbury, of the Isle of Wyght, the castle of Karsbroke therein and all the lordship belonging to the said isle and castle, as fully as the king had the same." With regard to the second grant cited, *Hl* and *Ca* refer to the earl of "S." As Stewart suggests, this may refer to the grant to Montagu senior who became 1st Earl of Salisbury in 1337. However *Lh* and others (*L, Lm, Or*) read "Darby." The "Earl of Darby" may refer to Thomas Stanley, created 1st Earl of Derby in 1485, who inherited from his great-grandfather, Sir John Stanley, the lordship of Man. In 1406 Henry IV granted to Sir Stanley and his heirs the said lordship "as fully as . . . any other lord of the island held the same" (Patent Rolls, 1405-08, 7 Hen. 4, pt. 2, m. 17, pp. 201-02). Aside from the grant to Montagu in 1333, the author's error here is referring to grants not issued in the time of Edward III. – K:Ed:3: The lord Mountague. The Earle of Darby. *add. in marg.* L Lm Or

ll. 49-50: It was spoken in the .8th: of Henry the 4th . . . legibus – YB Mich. 8 Hen. 4, f. 9, pl. 12 (1406.111) *per* William Stourton: "potestas Principis non est inclusa sub Legibus." – 8:H:4: *add. in marg.* Ca Hl L Lm Or

ll. 52-58: the 31th: of Henry the 6th . . . Auncient demeasne – *La* cites the 32nd year and the remaining witnesses, excluding *H*, cite the 31st. Heath referred the reader to the 37th. See YB Trin. 37 Hen. 6, f. 27, pl. 3 (1459.026) *per* Sjt. Thomas Littleton: "the king cannot make nor grant ancient demesne at this day . . . the king cannot make lands devisable at this day, and likewise the youngest son can inherit as it is there in the vill, and yet the king cannot grant this at this day." The witnesses in family *y* read the following statement without the negative (*A Discourse*, n. 777): "the youngest son by the custom of borough English shall inherit." According to the report, this is the correct

reading. Littleton's point was that the king could not grant that which was already custom, and in this case the custom was that the youngest son by borough English will inherit. Heath noted that "the MSS have 31 Hen. 6. but a reference to 37 Hen. 6th is annexed, which is clearly the true one" ("Professional Works," 510n2). For Heath what is "annexed" may be "37.Hen: 8" (*A Discourse*, l. 61) and the "8" was misread as a "6" for neither *Lh* nor *Ca* have 37 Hen. 6 in the text or margins. This would then explain Heath's omission of "37.Hen: 8" (*A Discourse*, n. 791). – 31:H:6: *add. in marg.* Ca Hl L Lm Or

l. 61: 37. Hen: 8: – *Non inveni. La* reads "37.H.6." which may be a correct reference to YB Trin. 37 Hen. 6, pl. 3 (see above). – 37.Hen: 8: *om.* H; 34.H.8. *in marg.* L; 37 Hen: 8: *om. in marg.* Lm

l. 61: 49 assises: 4: 8: – *Jurdan's Case*, YB 49 Edw. 3, Lib. Ass., f. 321v, pl. 8 (1375.048ass). Here Robert Belknap CJCP made the similar assertion as Littleton above regarding devise: "the king could not . . . make tenements devisable by his charter, where they had not been devisable before." The "4" here may have been the result of misreading the "p" for plea. Family *y* reads "p[lea]" (*A Discourse*, n. 793). – ch. 49, ap. 48 C; 49: Assises. 8: *in marg.* Ca Hl; 39. Ass. 4. 8. *in marg.* L; 49: assises: 4: 8: *om. in marg.* Lm

ll. 61-67: a noteable case agreed: for lawe in the 6th. of Henry the vijth . . . Com*m*on Lawe – YB Trin. 6 Hen. 7, ff. 4v-5, pl. 4 (1491.020). The author's statement that rape is only to be inquired of by justices who "have authority to hear and determine of the same" derived from the court's consensus that a leet does not have the authority to hear felony rape: "Et fuit agre per Tout le Court, que coment que un ad un Leet del' grant le Roy,

uncore il il ne poit enquerir del' Rape, pur ceo que n'est deins l'usage estre enquerir deins un Leet . . . Et pur ceo que al' Common Ley Rape ne fuit felony, pur quel cause n'est enquerir come felony, car ceo est fait felony per le Statut Westminster 2. & Ric. 2. que donq n'est enquis, come felony." It is further stated in the report that "the king can grant cognisance of all manner of actions to come," but in this present case the grant must comply with the customary practices of the local court. Therefore, a grant would not be good if it required felony rape to be heard in a leet: "Mes icy Roy ne poit grante un Leet forsque come le Court de Leet est use, & ad este use, car il mesme ne poit aver Leet, & cest user auterment que add este use." – 6. yeare of king H.7.p.4. La; 6.H:7. *add. in marg.* Or

ll. 70-73: in the 8th: yeare of Henry the 6th . . . any other person –*Chancellor of Oxford's Case*, YB Hil. 8 Hen. 6, ff. 19-v, pl. 6 (1430.006). *Ca* reads this statement in the positive: "the king may grant to J.S. that J.S. maybe judge in his own proper cause." While this is consistent with Serjeant Thomas Rolf's position, it is not so with the one the author is taking. The omission of "not" in *Ca* may have been due to blotting in *Hl* which renders the negative illegible (*A Discourse*, n. 819). The question whether the current Chancellor of Oxford, Thomas Chase, could be his own judge was extensively argued. Rolf maintained that it was "not impertinent" for the Chancellor to be his own judge and that the king could "alter the judge [or judgement] . . . as his pleasure." Other justices argued that one could not be his own judge; for example, *per* William Babington CJCP: "nul sera Juge demene forsque le Roy." It was stated (*per* John Martin JCP and James Strangeways JCP) that the king may grant this as long as it is expressly written in his charter. The initials "J.S." must refer to "J," the former Chancellor of Oxford mentioned

in the report who by letters patent of Henry IV was granted immunity from being sued by writ of trespass. Therefore, it was disputed whether the king could grant that someone not be impleaded. *Per* Babington: "en le cas cy il ad grant que il ne sera jamais enplede, le quel ne peut estre grant si non par Parliament." See also John Cottesmore JCP: "le Roy ne peut grante a nulluy que il ne sera enplede." The concern here was whether or not the king could grant that a person shall not be sued, and therefore the only reading consistent with the case report is that in *La* (*A Discourse*, n. 823). – 8th. Hen: 6th: *om. in marg.* Ca Hl

ll. 74-79: in the Longe record, by Hyll the Reverent Iudge . . . Chaunge the Lawe – In place of "in the long record" *La* reads "34.H.6." Heath has identified the correct source ("Professional Works," 511n2). *Cors v. Mayner*, YB Mich. 14 Hen. 4, ff. 8-9v, pl. 6 (1412.022), *per* Robert Hill JCP (vulgate edition): "le grauntée le Roy ne s*er*ra de m*esme* la condition q*ue* la Roy fuit, car le Roy ava*ra* le garde de so*n* tenan*t*, com*en*t q*ue* il tient de luy p*er* posteriority. Mes si le Roy graunt*e* m*esme* le S*eignio*rie a un auter com*m*on p*er*son, il ne *ser*ra de m*esme* la condic*ion* q*ue* le Roy fuit." Hill stated the reason for this earlier in the report: "Com*en*t que le Roy ad p*re*rogative, cel p*re*rogative ne sestendra my a nul aut*er* p*er*son." See also Bro. Abr., *Prerogatiue le roy*, f. 145v, no. 18: "Recordare, fuit dit per *Hill* iustice que le roy ad prerogatife que il aua*ra* le gard de corps son t*enant* com*en*t que il tient de luy per posterioritie, et uncore il ne poet graunt ceo a vn autre p*erson* graunt del seignorie a vn subiect, car il naua*ra* le prerogatife et le roy per son graunt ne poet alter vn ley ne chaunge vn ley." This is actually closer to what the author has written, in particular the concluding statement, "the king by his charter cannot change the law," which Hill was not reported as saying. Prior to this the author writes, "for saith

the book," presumably alluding to Sir Robert Brooke's *Abridgement*. – Hill Justice *add. in marg.* L Lm Or

ll. 79-81: The same Lawe . . . occurrit regi – See YB Mich. 20 Hen. 7, f. 6, pl. 17 (1504.017). James Hobart AG asserted that the king could not grant to someone the power to make their own justices, "car ceo est le prerogative le Roy, & il ne peut grant s*on* prerogative; Come il ne poit grante Quod nullum tempus occurrit ei." See also YB Mich. 35 Hen. 6, f. 27, pl. 33 (1456.087) *per* Sjt. Littleton: "nullum tempus occurrit Regi . . . & issint n'est d' un autre persone."

ll. 79-80: The same Lawe is that the kinge cannot graunte **l. 81:** that a discent shall not take away, an entrie – That a descent shall take up his or her legal right to property is a maxim of the law. See St. German, *Doctor and Student*, Dial. 1, c. 8.

ll. 79-80: The same Lawe is that the kinge cannot graunte **l. 84:** that inheritance, shall lyneally assende – For the king to grant that inheritance should lineally ascend would be to violate a maxim prohibiting this. See Co. Inst. i. 10v-11. Witnesses *L*, *Lm*, and *Or* have "descend" in place of "ascend." This reading indicates the granting of custom, something which Littleton said the king could not do (see 1459.026 above). *La* states that the king cannot grant that "inheritance shall not descend lineally" which would clearly go against custom.

ll. 93-94: the Authority of the, gouernors of Bridwell – The authority of the Governours of Bridewell. *add. in marg.* L Or

ll. 95-100: the effect of which Ch*art*re, in one place is . . . discrescions – These words are expressed in the charter of Edward VI (June 26, 1553), printed in the *Thirty-Second Report of the Commissioners* (pp. 79-84, see p. 84) and in a letters patent: Patent Rolls,

1547-53, 7 Edw. VI, pt. 13, m. 13, p. 285. What is written in the text is closer to that which John Howes wrote in 1582: "This noble prince Edwarde the sixte did allso gyve to the L. Maior & Cyttezens in the said fowndac*i*on power & aucthoretie to searche enquyre & seke owte in London & Myddellsexe all ydell Ruffians & taverne haunters vagabonds beggers & all persones of yll name & fame bothe men & woemen & them to apprehende sende & comytte to Bridewell & by any other waies or means to punyshe or correcte as shall seme good to their discreations." *John Howes' MS., 1582, Being "a Brief Note of the Order and Manner of the Proceedings in the First Erection of" the Three Royal Hospitals of Christ, Bridewell and St. Thomas the Apostle,* ed. William Lempriere (London: privately printed, 1905), 56-57.

ll. 102-107: Magna charta, of the Liberties of England; Capitulum: the 29 . . . the Lawe, of the Land – Magna Carta, 1225, 9 Hen. 3, c. 29. As printed in Thompson, *Magna Carta*, p. 380: *Nullus liber homo decetero capiatur vel imprisonetur aut disseisiatur de aliquo libero tenemento suo vel libertatibus vel liberis consuetudinibus suis, aut utlagetur, aut exuletur aut aliquo alio modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terre.* Cf. George Ferrers' translation in *The Boke of Magna Carta with Diuers Other Statutes . . . Translated into Englyshe*, London, 1534, ff. 7r-v, *EEBO*, accessed April 13, 2018. The translation reads "his peers" in place of "men of his degree." – Magna Charta Cap: 29. *add. in marg.* L Lm Or

ll. 110-114: in the said greate Charter of England, in the last Chapter . . . noe force, nor effect – Magna Carta, 1225, 9 Hen. 3, c. 37. As printed in Thompson, *Magna Carta*, p. 382: *Concessimus etiam eisdem pro nobis et heredibus nostris quod nec nos nec heredes*

nostri aliquid perquiremus per quod libertates in hac carta contente infringantur vel infirmentur; et, si de aliquo aliquid contra hoc perquisitum fuerit, nichil valeat et pro nullo habeatur. Cf. Chrisopher Barker's translation in *The Whole Volume of Statutes at Large . . . Since Magna Charta, Vntill the XXIX. Yeere of the Reigne of Our Most Gracious Souereigne Ladie Elizabeth*, London, 1587, p. 4, *EEBO*, accessed April 13, 2018. From Barker's translation Stewart states that this passage from chapter 37 is "quoted verbatim" in *Hl* (*OFB*, 758). However, the author's translation here differs from Barker's, for example, in its use of third person "king" instead of the royal "we."

l. 116: the statute, of m*ar*le bridge, Capitulum: 5: – Statute of Marlborough, 1267, 52, Hen. 3, c. 5, as the author states, is a confirmation of Magna Carta: "The Great Charter shall be observed in all his Articles." *La* cites "the first Chapter" which instead concerns distraint. – Stat. of Malb. cap. 3. *add. in marg.* L; Stat: of Marlebridge cap: 5. *add. in marg.* Or

ll. 117-118: statutes made in the times . . . Henrye the vjth – Faith Thompson (*Magna Carta*, 10n4) has recorded a total of thirty statutory confirmations of Magna Carta for Edward III, Richard II, Henry IV, and Henry V. (From both the statutes and parliament rolls she has counted a total of forty-four separate confirmations made under these monarchs.) There are two confirmations during the reign of Henry VI: 1423, 2 Hen. 6, c. 1 and 1429, 8 Hen. 6, c. 5. This makes for thirty-two statutory confirmations from Edward III through Henry VI. This is the number Coke gives in Co. Inst. ii. proeme. – Ed:3: R:2: H:4. H:5: H.6. *add. in marg.* L Or

ll. 119-123: Anno: 43: Edward: 3: Chapter: j . . . houlden for none – 1368, 42 Edw. 3, c. 1. *La* is the only early witness which supplies the correct regnal year. The others also

give the 43rd year while *Lm* gives the 34th. Martin did not emend the year though Heath did. – Anno: 43: Edward 3: Capitulum: 1: *om. in marg.* Ca Hl

ll. 124-127: Hither to ye . . . greate Charter of England – Cf. Magna Carta, 1225, 9 Hen. 3, c. 37: "And we have granted to them for us and our heirs, that neither we nor our heirs shall procure or do any thing, whereby the Liberties in this Charter contained shall be infringed or broken; and if any thing shall be procured by any person contrary to the premises, it shall be had of nor force nor effect." For the translation see Richard Thomson, *An Historical Essay on the Magna Carta of King John: to Which Are Added, the Great Charter in Latin and English* (London: 1829), 142. Cf. also 1368, 42 Edw. 3, c. 1: "It is assented and accorded, That the Great Charter and the Charter of the Forest be holden and kept in all Points; and if any Statute be made to the contrary, that shall be holden for none."

ll. 129-130: statute, made in the said, 43: of Edward the third **ll. 132-141:** Item at the request, of the Com*m*ons . . . houlden for error – 1368, 42 Edw. 3, c. 3. None of the early witnesses identify the correct year. Again, Heath emended the regnal year while Martin's edition retained the 43rd year. – 22.Ed.3. La; 43. Ed: 3: *add. in marg.* Lm Or

ll. 146-153: such like Com*m*issions . . . of the Country – 1368, 42 Edw. 3, c. 4 – 42. Ed. 3. cap. 40 La; Anno: 42: Edward: 3: Capitulum: 4: *om. in marg.* Ca Hl

ll. 156-162: if you looke vppon the statute of, Anno: 1: Hen: 8: Capitulum 8 . . . due executeinge of Iustice – 1509-10, 1 Hen. 8, c. 8: "An Acte agaynst Escheators and Comyssioners for makinge false retornes of Offices and Com*m*yssions." This statute, along with c. 12, sought remedy for the abuses committed by Richard Empson and Edmund Dudley, both councillors to Henry VII and executed for treason in 1510. The

mischief in c. 8 was the harm done to the king's subjects "by Escheatours and Com*m*yssyoners causying untrue offices to be founden, and sometyme retornyng into the Courtes . . . offices and inquisici*o*ns that warre never founde, And sometyme changyng the mater of the Offices that were truly founden." Cf. Co. Inst. iv. 197: "by the Preamble and other parts of this Act . . . the sinister and unjust dealing of the said Empson and Dudley, concerning the finding of Offices, are portrayed out." The indictment of Empson is excerpted in Coke (Co. Inst. iv. 198-99) and given in J.P. Cooper, "Henry VII's Last Years Reconsidered," *The Historical Journal* 2 (1959): 120, accessed April 20, 2018, http://www.jstor.org/stable/3020534. As stated by Cooper, the indictment alleged that Empson acted "against the common law of the realm, Magna Carta and other statutes" by, for example, summoning "men to London by writs of privy seal containing heavy penalties for disobedience and without warrant, or any legal authority." Stewart suggests that the absence of naming Dudley in *A Discourse* may be "because Dudley's grandson Robert was now the powerful earl of Leicester" (*OFB*, 759). Leicester was one of Fleetwood's patrons to whom he owed his position as recorder of London. (See Jacqueline Vanhoutte, "*Itinerarium Ad Windsor* and Robert Dudley, Earl of Leicester," in *The Name of a Queen,* 85-104.) Baker notes that the author's mention of Sheffield "was a slip" (*Reinvention of Magna Carta*, 242n174). Sir Robert Sheffield was charged with negligence as a JP and accused by Cardinal Wolsey of having given asylum to two murderers. Sheffield had fallen out with Wolsey by supporting a bill denying benefit of clergy to non-clerics. He was kept in the Tower until his death in August 1518. See Baker, *Reinvention of Magna Carta,* 157-58 and A.D.K. Hawkyard, "Sheffield, Sir Robert," History of Parliament, accessed April 20, 2018,

https://www.historyofparliamentonline.org/volume/1509-1558/member/sheffield-sir-robert-1462-1518. – Anno: 1: H: 8: Capitulum: 8: *om. in marg.* Ca Hl

ll. 163-165: There was a Comission . . . lewd persons – See Patent Rolls, 1560-63, 4 Eliz. 1, pt. 1, m. 2d, p. 237. Sir Ambrose Cave, chancellor of the duchy of Lancaster, and Sir Richard Sackville, under-treasurer of the Exchequer, with many others were granted a commission in May 1561 to "search out persons breaking the law by counterfeiting money and committing 'sundrye horryble murdres, felonyes, burglaryes and other grevouse offences'. . . for their more speedy and certain trial and punishment; power to search out and examine offenders and suspects, to issue warrants for arrest, to commit for trial . . . also to do everything at their discretion for the due execution of the commission." The examinations were "to be certified to the justices of assize and gaol delivery or the justices of oyer and terminer of the proper circuits or to the chief justice of the Queen's Bench" and "costs to be allowed to persons bringing up prisoners and others for examination." Like commissions were also issued in June 1563 (Patent Rolls, 1560-63, 5 Eliz. 1, pt. 3, m. 2d-3d, p. 523) and February 1565 (Patent Rolls, 1563-66, 7 Eliz. 1, pt. 5, m. 2d, p. 257). The charge in the latter is identical to the original commission, though the former additionally describes the power to "apprehend, examine (by ordinary or by 'compulsarye wayes or meanes') . . . persons suspect or indicted of . . . grievous offences in any part of the realm."

ll. 171-175: the examinac*i*on, of Robberies . . . xxii Hen: 8: Cha. Capitulum 14 – "An Acte conc*er*nyng Abjuratyons into Seyntuaryes," 1530-31, 22 Hen. 8, c. 14, sect. 4. The statute provides that if any sanctuary person is indicted of a felony, he or she will "be examyned therof by two of the Kynges most honorable Counsaille or by foure Justices of

Peace." *La* is the only witness which states the number of councillors who are to examine offenders residing as sanctuary persons (*A Discourse*, n. 1068). – 22. h. 8. ca 18. *in marg.* Hl

ll. 175-181: the Iustices, of both the Binches . . . 4th: of Henry 4: Capitulum: 1: – 1402, 4 Hen. 4, c. 18. The first chapter of this Parliament is a confirmation of liberties, charters, and statutes. Again, *La* is the only early witness which gives the correct chapter. Heath emended the text as such, though Martin did not. According to the author, the statute allows for attorneys to be removed "without any solemnity of trial at the common place or law." It is said that "Attornies shall be put out by the Discretion of the said Justices" and that those "found in any Default of Record . . . shall forswear the Court, and never after be received to make any Suit in any Court of the King," but there is no explicit statement that attorneys shall be removed without trial.

ll. 183-186: yett vppon infirmities . . . 7: Hen: 4: Capitulum: 13: – 1405-06, 7 Hen. 4, c. 13. This statute gives to "every Justice of the one bench and of the other, and also the Chief Baron of the Exchequer" the power to admit attorneys to those who have been "outlawed . . . by erroneous Process" and whose infirmity prevents them from attending the court in person. This with the provision that "in the Writ of Capias ad satisfaciendum, the common Law shall hold Place," namely that those to whom this writ has been issued shall not take advantage of the statute. This condition is actually given by the author to be an instance where the judges may allow attorneys to appear in place of their clients, thereby contradicting the proviso in the statute: "and whereas sundry men are arrested by latitat, capias, attachments, and such like process whereof their corporal presence is required . . ." (*A Discourse*, ll. 182-83). Heath's edition collated

here contains the obvious error of citing Henry the "46" (*A Discourse*, n. 1111). – Anno: 7 Hen: 4: Capitulum: 13 *om. in marg.* Ca Hl

ll. 187-191: The: Commission of Bankerouptes . . . 13: Eliz: Cap: 7: – "An Acte touchyng Orders for Banckruptes," 1571, 13 Eliz. 1, c. 7, sect. 2. *Ca* cites chapter one. Likely this was due to reading the "7" in *Hl* as a "1." – Anno: 13: Elizabeth: 7: *om. in marg.* Ca Hl

ll. 192-194: The punishment . . . 33: Hen: 8: Capitulum: 1: – "An Acte concerninge Counterfeyt Letters or Privie Tokens to receyve Money or Goodes in other Mens names," 1541-42, 33 Hen. 8, c. 1, sect. 3. – Anno the: 33: Hen: 8: Capitulum: 1: *om. in marg.* Ca Hl

ll. 195-198: The examinac*i*on of Riouttes . . . 3: Hen: 7: Cap: i: et Anno: 2: Hen: 8: Capitulum: 20: – "An Acte geving the Court of Starchamber Authority to punnyshe dyvers Mydemeanors," 1487, 3 Hen. 7, c. 1 and "An Acte that the p*re*sidente of the Kynges Counsaile shalbe associate with the Chauncellor Treasourer of Englonde and the Keper of the Kinges Privie Seale," 1529, 21 Hen. 8, c. 20. *La* does not mistake the regnal year in the latter statute, as do the other early witnesses (*Ca* gives the 1st year), but gives the 30th year for the former. While Heath emended the latter regnal year, Martin did not. Neither statutes actually name the Star Chamber. The title of the former act is found in Rot. Parl. vi. 402, no. 17. Here in the margins it is written, "Pro Camera Stellata." Historians agree that this was a later addition and that the acts do not concern the Star Chamber. For example, Baker explains that the 1487 act "empowered a smaller body, effectively a sub-set of the Council, to deal with various forms of disorder and overbearing": *The Oxford History of the Laws of England, 1483-1558*, vol. 6 (Oxford:

Oxford Univ. Press, 2003), 196. – Anno: 3: Hen: 7: Cap: i: et Anno: 2: Hen: 8: Capitulum: 20: *om. in marg.* Ca Hl

ll. 199-202: The examinac*i*on, of vnlawfull huntinge . . . j Hen: 7: Capitulum: 7: – "An Acte agaynst unlawfull hunting in Forestes & Parkes," 1485, 1 Hen. 7, c. 7 – Anno: j: H: 7: Ca. 7: *om. in marg.* Ca Hl

ll. 203-205: The rate . . . 5: Elizabeth: Cap: 4. – "An Acte towching dyvers Orders for Artificers Laborers Servantes of Husbandrye and Apprentises," 1562-63, 5 Eliz. 1, c. 4 – 5.° Elizab. ca. 40. La; Anno: 5: Elizabeth: Capitulum: 4: *om. in marg.* Ca Hl

ll. 206-207: The examinac*i*on of Roges . . . but by Parliamente – None of the witnesses provide a citation here. Throughout the Tudor period, national legislation was passed to curb the growing problems surrounding vagrancy and the suffering poor. The following, including an act of Richard II, are some examples of statutes from this time period which, as the author states, gives power to justices ("Justices of peace" in *La*) to examine vagabonds or rogues and punish them accordingly: 1383, 7 Rich. 2, c. 5; "An Acte conc*er*nyng punysshement of Beggers & Vacabundes," 1530-31, 22 Hen. VIII, c. 12; "An Acte towchyng the Punyshment of Vacabondes and other ydle Parsons," 1549-50, 3 & 4, Edw. 6, c. 16; "An Acte for the Punishement of Vacabondes, and for Releif of the Poore & Impotent," 1572, 14 Eliz. 1, c. 5 (this act repealed the last two and "An Acte for the Releife of the Poore," 1562-63, 5 Eliz. 1, c. 3).

ll. 208-210: The determinac*i*ons, of all Causes, in Wales . . . by Parliament – *La* is the only witness that provides a citation: "34.H.8." This must refer to "An Acte for certaine Ordinaunces in the Kinges Majesties Domynion and Principalitie of Wales," 1542-43, 34 & 35 Hen. 8, c. 26, sect. 3.

ll. 211-213: The graunte of the Plurallities . . . but this is by p*ar*liamente – This appears to be in reference to "An Acte for the exon*er*acion frome exaccions payde to the See of Rome," 1533-34, 25 Hen. 8, c. 21, sect. 2.

ll. 214-215: The dealinges . . . by Parliament – See "An Acte restoring to the Crowne thau*n*cyent Jurisdiction over the State Ecclesiasticall and Sp*irit*uall, and abolyshing all Forreine Power repugnaunt to the same," 1558-59, 1 Eliz. 1, c. 1, sect. 8. This statute authorized the formation of royal commissions "texercise use occupie and execute . . . all manner of Jurisdicc*i*ons Privileges and Preheminences in any wise touching or concerning any Sp*irit*uall or Ecclesiastical Jurisdicc*i*on."

ll. 219-221: wherevpon I doe note . . . for the same – Cf. Edmund Plowden's argument for the *Case of Impositions on Cloth* (1559) Hil. 1 Eliz. 1, pl. 5, reported in Dyer, *Cy Ensuont Ascuns Nouel Cases*, ff. 165v-66. As stated by Baker, "Plowden also argued that the various statutes approving new imposts would have been unnecessary if the king could have introduced them without Parliament" (*Reinvention of Magna Carta*, 185). Here Plowden refuted the justification for an export duty on cloth made under Queen Mary without the assent of Parliament. Cf. also John Popham AG in *Att.-Gen. v. Joiners' Company of London* (1582): "And he [Popham] said that if the queen by her letters patent could make new laws, what would be the purpose of so great an assembly of barons, bishops and commonalty at the Parliament?" See Baker, *Reinvention of Magna Carta*, 468. – Nota *add. in marg.* L Lm Or

ll. 222-228: Anno: 42: Ed: 3: liber Assises: 11°: 5 . . . quod nota – I do not know what the number eleven may indicate here. In place of eleven, *La* and Heath's edition have an abbreviation for "number," thus indicating plea number five. *Sir John atte Lee's Case*,

YB 42 Edw. 3, Lib. Ass., f. 258v, pl. 5 (1368.093ass). See *Reinvention of Magna Carta*, 58-60, where Baker discusses the case at length, and from the Cambridge manuscript (see 58n53) identifies those individuals whose names are incorrectly (and correctly) abbreviated in the vulgate edition as they are here in *A Discourse*. Seipp's translation: "And it was presented that one J. C. of E., [John Clerk of Ewell] with the assent and aid of Monseigneur J. at Lee, had taken and imprisoned T. S. of S. [Thomas "Scuryngge" of "Toll"] with certain goods and chattels, and brought him to the castle of Gloucester, [*recte* Colchester] and there imprisoned him . . . and he said that a commission came from the Chancery to him and to the others, that is, J.S., [Sir John atte Lee] to take T. and his goods and chattels, and to bring him to the castle of G., by force of which he had taken him and had brought him there . . . And the Justices said that this commission was contrary to the law, to take a man and his goods without indictment, or suit of a party, or other due process. Therefore they kept the commission with them, and said that they would show this to the council of the lord [i.e. the King's Council]." – 42. Edward: 3 liber: Assises: 11: 5: *om. in marg.* Ca Hl Lm Or; Nota *add. in marg.* Ca Hl L Lm Or

ll. 229-233: in the 24: Edward: 3: this pr*e*sident . . . against the Lawe – 1350, 24 Edw. 3, Bro. Abr., *Commissions & Commissioners*, f. 149, no. 3: "Nota q*ue* co*m*issio*n* al certain p*erson*s de p*re*ndre tou*t*s q*ui* so*n*t notoriousm*en*t sclau*n*ders pur felonies et t*ransgressio* [i.e. trespass] com*en*t q*ue* ils ne fuer*unt* endites hoc est co*ntra* lege*m*." *La* is the only witness with a correct translation in two key areas of this brief report, thus accurately relating the circumstances of the case (see *A Discourse*, nn. 1221, 1226). The commission was granted to "take" or arrest (*prendre*) those notoriously slandered, not to

indict them. The problem was that these individuals were not indicted, yet all the witnesses except *La* do not have a negative here. – 24: Ed: 3. *add. in marg.* L Lm Or

APPENDIX II

ARGUMENT PREPARED FOR THE *CASE OF THE TALLOW CHANDLERS* (1583) ATTRIBUTED TO WILLIAM FLEETWOOD[1233]

[1233] BL, MS. Hargrave 4, ff. 290v-293v; Baker, *Reinvention of Magna Carta*, 238-41; Here I followed the same principles and conventions for transcribing the base text for the edition of *A Discourse* which were outlined in chapter two, although there are a few exceptions to note. Due to a scribal lack of full stops, I have silently supplied periods in some cases, and in three places I added colons. Ampersands were transcribed as "&" or "&c." Supra-lineal insertions were simply incorporated into the text, and two words crossed out with the scribe's pen were insignificant deletions and thus were not transcribed. Marginal text has not been recorded. See *s.v.* "Fleetwood in Legal Argument" for citations of the sources cited here.

The Queenes Ma*ies*tie by her highnes le*ttr*es patentes bering Date at westm*inster* the xxth of Aprill the xixth yere of her Ma*ies*tes raigne & hath named aucthorised and apointed the Maister wardens and Cominaltie of the arte and misterie of tallow Chaundelors of London and their Successors and Deputies To be searchers examiners vewers and tryers of all Sope Vineger Butter & hoppes and Oyles And allso in the Patent be these wordes. We graunt the office of Searching of the [291r] Premisses w*i*thin London, Southwarke, S*ain*t Katherines, white Chappell, Shordiche, westm*inster*, S*ain*t Iohnes, Clarken well and S*ain*t Giles in the feild. And allso pr*ovic*on is given that no man shall put to sale any of the pr*e*misses before they be searched &c vpon the paine of forfeiting the one Mortie of the forfeitures to the Queene and the other to the said searchers. And for the paines of the searchers there is an imposic*i*on sett vpon eu*er*y barrell of good Sope iid and for euerie tunne of vineger viiid. Et sic de similib*u*s secundu*m* rata. W*i*th an Eo q*uo*d Expressa mentio &c. And allso w*i*th a Clawse of revocac*i*on of the le*ttr*es patentes for misvser.

A Gen*er*all reason sett downe why the said le*ttr*es patentes should be vtterlie void and not meete to be put in Execuc*i*on. First that the said le*ttr*es patentes made to the tallow Chaundelors should be both void by the Co*mm*en lawe and allso by acte of p*ar*liam*en*t provided for in this very Case. Se the statute of a° 12 E 4 Cap 8 the tenour whereof ensueth. It*e*m whereas the gou*er*nors that is to say Maiors Bailifes and other like gou*er*nors of eu*er*ie Citie Burgho and Towne of Substance w*i*thin this Realme of England for the most p*ar*te haue Co*u*rtes of Leetes and Veiwes of frankpledge: holden yearely w*i*thin the same Cities burghes and Townes and surveying of all victuelers there Correction and punishm*en*t of the said offendors and breakers of the assise of the same to

be pr*e*sented and amerced yf any default be found in the said Co*u*rtes or by their surveying, w*hi*ch by reason ought not to be Contrared nor the victuelors there by the lawe ought not to be surcharged or oppressed as now of late divers p*er*sons daylie intendinge their sing*u*ler availe and profitt to oppresse the said victuelors and to enter and breake the libertie of divers places in this Realme, having franchises and surveiing of all victuelors and correction of the same: haue purchased le*ttr*es patentes of o*u*r soueraigne Lo*rd* the Kinge to be s*u*rveiors and Correctors of all such victuelors w*i*thin divers Cities borowes and other places of this realme of England as of [291v] Ale, beare, wine, & of other such victuells by w*hi*ch pr*e*tence and vnlawfull office they do Com*m*it many and divers extorc*i*ons and oppressions amonge the Kinges leige people takinge of them vnlawfullie divers great fines and ransomes to the great damage of the Kinges leige people and allso great derogac*i*on of the liberties and Franchises of divers of the said Cities borouges & townes. Our said sou*er*aigne Lo*rd* the Kinge the pr*e*misses Considering by the advice and assent of the Lo*rds* spi*ritu*all & temporall and at the request of the Com*m*ons in the said p*ar*liam*en*t assembled and by aucthoritie of the saide p*ar*liam*en*t hath ordained and established that all the le*ttr*es patentes graunted by him to any p*er*son or p*er*sons of any office of searching or surveying of wine, ale beare or any other vittaile shalbe vtterlie void & of none effecte. And that no p*er*son other then such gou*er*nors before rehearsed, or other intitled by point of Ch*art*re, from the feast of Easter next Coming, by Colour of such le*ttr*es patentes so obtayned, or afterwardes to be obtayned as before is said shall vse or exercise any such office vpon paine of forfeiture for eu*er*y default xl li. The one halfe thereof to o*u*r sou*er*aigne Lo*rd* the Kinge, to be ymploied only to the vse of his house the other halfe to him that in this behalfe will sue for the same by acc*i*on of debt wherein like

p*ro*ces rule & demeanor shalbe had as is Comonly vsed in other acc*i*ons of debt at the Co*mm*en lawe. And that the def*endan*t in any such acc*i*on shall not be received or admitted to his lawe. Nor that any p*ro*tecc*i*on or essoine of the Kinges s*e*rvice be to him in any wise allowed./

Observac*i*ons

vpon the le*ttr*e of this statute I do obserue these thinges viz that of Com*m*on righte and by the lawes of the Realme that the surveying of all victuelors And the Correction and the punishm*en*t of the offendors and breakers of the assise of the same are to be pr*e*sented and amerced in the law daies Leetes and veiwes of frank pledge And that the Lo*rd* of the said Co*u*rtes are inheritable to the same amerciam*en*tes of the w*hi*ch by this Ch*art*re made to the tallowe Chaundelors they are to be disinherited forever. And in London the Lo*rd* Maior for the time being doth vpon search made and fault found Charge an Enquest of office for the findeing of such offences to the w*hi*ch the [292r] offendor may take his trau*er*s yf he will. And thus ye see that by this Ch*art*re the subiect is likewise disinherited of his lawfull tryall directly against the liberties graunted by the great Ch*art*re of England Ca: 29. The effect whereof is that no free man shalbe disseised or put from either his frehold or his liberties or his free Customes. Nor yet the Kinge nor any other shall go nor sitt vpon him but by the lawfull iudgm*en*t of his peeres or by the Lawes of the Land & there ye see it Clere that yf this patent take place that all the freemen of this Citie are disinherited for euer of their lawfull tryall in these pointes whereunto the said Ch*art*re is referred.

And further where there is any default pr*e*sented in a Leete the p*ar*tie shall receive punishm*en*t according to his deseete by way of amerciam*en*t and that is to be affered

vpon him by two afferers or mor and that in a reasonable and mercifull sort and not otherwise. And that the lawe is thus see Magna Carta Cap: 14. and westm*inster*. 1. Cap 6. &c./

And further it is established by the great Ch*art*re of England Ca: 37. The Kinge doth graunt by these wordes following: That yf any grau*n*t be made by the Kinge or his heires against any of the liberties of the said great Ch*art*re That the same shalbe vtterlie void and of none effecte. The wordes are these: Concessimus etiam p*ro* nobis et hered n*ost*ris q*uo*d nec nos nec hered n*ost*ri aliquid p*er*quiremus p*er* quod libertates in hoc Carta contente infrengantur vel infirmentur. Et has aliquo contra hoc aliquid p*er*quisit*um* fuerit nihil valeat et p*ro* nullo habeatur.

And that Comissions graunted out that haue beene to the like effecte as this is w*hi*ch is made to the tallowe Chaundelors haue beene revoked and Called in I finde in o*u*r bookes sundrie precidentes as in 24 E 3 there went out a Comission to Certain p*er*sons to apprehend all those that were notoriousle slaundered for felonies and trespasses allthough they thereof were never indicted. And the iudgment of the booke is q*uo*d hoc fuit contra legem and therefore it was Called in./ [292v]

And 42 Assizar*um* pl*ac*ito 5. before the Iustices of Oier & determiner in Essex. It was presented that one I C had imprisoned T S and taken Certain of his goodes and Chattells &c. And the p*ar*tie that was presented pleaded in barre that the Kinge had graunted to him and to others a Certain Com*m*ission out of his Co*u*rt of Chauncerie to apprehend the said T S and to ymprison him in the Castell of Glouc*ester* and allso to take & cease his goodes and Chattells all w*hi*ch he did p*er*forme accordinge to the said Comission And demaunded iudgem*en*t yf he should be therefore impeached and shewed forth to the

Iudge the said Comission And the Iustices saied that this Comission was against the Lawe that is to apprehend any man and to cease his goodes w*i*thout any Indictm*en*t Or els by suite of the p*ar*tie or by other due p*ro*ces of the lawe./ For all w*hi*ch Causes the said Iustices of Oyer and Determiner did retaine w*i*th themselves the said Comission and declared openly that they would present the same to the Kinges Councell as a Comission against the Lawe./

And whereas all the Subiectes of the Realme as well straungers as denisons both by the great Ch*art*re of England by the gen*er*all Custome of the Realme and by sundry statutes And especially by the lawe of Tonnage and Pondage may freely marte traffique retaile barter or put to sale their merchandise and other thinges vendable w*i*thout any restraint or imposic*i*on Vnles such restraint or imposic*i*on be specially established by p*ar*liam*en*t.

Yet haue the Tallow chaundelors procured by their Ch*art*re a com*m*aundem*en*t that eche man shall forbeare to vtter or put to sale &c any manner of Sope vineger, barrell*ed* butter Oyle or hoppes vntill the same be allowed of by virtue of the said Comission./ vpon paine of forfeiture the one moitie to her Ma*ies*tie and the other moitie to the said tallow chaundelors. And nevertheles the said Tallow chaundelors haue p*ro*cured an imposic*i*on to be set vpon the goodes of those whom they giue allowance to viz/ [293r] . . .[1234]

And now Comparing the said Ch*art*re of the Tallow chaund*elors* to the last recited pr*e*sidentes there will little or no difference be founde betweene them. And therefore as the said former presidentes were against the lawe and for that Cause revoked even so is

[1234] What follows at the top of f. 293 is a list of seventeen items and their quantities in two columns. Next to each item is the fee to which owners would be charged for the trying and marking of their products. See Patent Rolls, 1575-78, 19 Eliz. 1, pt. 6, m. 30, p. 346.

this Ch*art*re of the tallow chaundelors (being likewise against the Lawe) most meete to be revoked for the sorte[1235] same reason.

It is most notable to beholde the graue iudgem*en*tes geven in E. 3. daies and how deepely did those honourable Iudges conceiue of such matters as this is.

You see that the Tallow chaundelors by that Comission w*i*thout any Enquest will Cease mens goodes as forfeite and that done take the moitie thereof to themselves. And in 42. Assisar*um* pl*ac*ito 12. there falleth out a goodlee pr*e*sident to prooue this Comission to be vtterlie void. The wordes of the booke are: A writt was awarded out of the Chauncerie vnto the Iustices of the Labourors in the Countie of B to enquire of all manner of Champ*er*tres Conspiracies Confederacies and ambidexters by force of w*hi*ch writt one T S was indicted of divers pointes &c. And the Enquest was returned into the Chauncerie and from thence the recorde was sent into the Kinges benche. And there the Lo*rd* Knevet Cheife Iustice of England affirmed that the said writt [was] yssued out against [293v] The lawe and by thadvice of all the Iustices the same Inditement and all the recorde thereof was dampned and made frustrate and void. For such pointes were not to be inquired of but by a solemne Comission of Oyer & determiner. And even so I Conclude that it is directlie against the Lawe that men should be restrained from their free martes &c. Or that they ought to forfeite their goodes no lawe sett downe against them. Or that their goodes should be seased w*i*thout due Enquest. Or that any Imposic*i*on should be sett vpon their goodes being *Liberi homines de regno* As Magna Carta termeth them.

[1235] "Sorte" was the most logical read, but the "t" much more resembles an "f."

And by the auncient lawe it is sett downe by p*ar*liam*en*t tempore E.1. *Quod nihil capiatur de cetero nomine vel occasione de mall temt*:[1236] That is nothing shalbe taken from the Kinges subiectes by reason of any ymposic*i*on sett downe against the Lawe./

Hitherto haue I travayled[1237] to proove that by the co*mm*en lawes of this Realme that the said Ch*art*re made to the said Tallow chaundelors shalbe vtterlie voide and not meete to be put in execuc*i*on either in London, westminster, Southwarke S*ain*t Katherines or in any other of the places expressed in the same Comission. For in euery of the said places The L*ords* of the liberties haue Leetes or lawe daies To whom by reason of the same liberties The scruteny and search of the pr*e*misses doth iustlie[1238] and of right apertaine. In Southwarke the Lo*rd* Maior and Com*m*ons haue a Leete or a Lawday. In westm*inster* the Deane & Chapter In S*ain*t Katherines the Maior & Confriors. white Chappell the Lo*rd* wentworthe. Shordiche the Deane & Chapter of Powles. Clerkenwell the Queene And S*ain*t Giles in the feilde and in High Holburne the Lo*rd* Mountioy.

So that now it app*er*eth that there is no place left where the tallow chaundelors may exercise their office of searche But where other men ar*e* iustlie inheritable to the same &c.

[1236] Letters were supplied for the abbreviations "noie" i.e. "nomine" and "occone" i.e. "occasione"; See William Stubbs, ed., *Select Charters and Other Illustrations of English Constitutional History*, 6th ed. (Oxford: Clarendon Press, 1888), 498.
[1237] "Travayled" appears to be the word, but I could not clearly detect the "v" and the second "a."
[1238] "Iustlie" is given here, but I still could not confidently discern the two initial and terminal letters.