A STUDY OF LEGAL PROCESS IN MEDIEVAL ENGLAND

Thesis for the Degree of M. A.

MICHIGAN STATE UNIVERSITY

Alan Michael Keller

1963

THESIS

LIBRARY
Michigan State
University

ABSTRACT

A STUDY OF LEGAL PROCESS IN MEDIEVAL ENGLAND

by Alan Michael Keller

In the period from the conquest of England by William the Conqueror to the end of the sixteenth century English law, based on the foundation of Anglo-Saxon legal practices, developed substantively into a relatively well organized and efficient system. One of the major concerns was to insure that persons involved in litigation would appear at court to resolve the issues in which they were involved.

This concern of the common law was well founded due to three primary considerations. The first was that the agents involved in law enforcement and in the apprehension of criminals were few, and these few were not very well organized or equipped to do their jobs. The second was that once a criminal was taken into custody few prisons could house him safely until the time of the trial. The third consideration was that in this period the methods used to solve these problems were just developing, and it

is only at the end of this period of growth that these legal processes really became effective.

The methods and institutions which were tried, used and discarded to solve the problems of coercion may be divided into three general classifications. The first was the development of the process of attachment. This included confiscation of the goods and chattels of the reluctant defendant, followed by the attachment of his body that is arrest.

The second was the development of a system of surety and responsibility to force the accused to appear. This involved the proffering of bail or mainprise by the accused, which would be forfeited upon his failure to appear before the justices on the assigned day.

The third was the use of individuals and groups and especially the institutions of tithing and frankpledge to help the existing peace officers to maintain order and to apprehend fugitives from the law. As time passed and the first two methods developed and became refined, the use of private citizens and frankpledge and tithing in the legal system declined.

Finally, when all other devices failed, the law resorted to the ancient Anglo-Saxon practice of outlawry. This action, originally used as a punitive measure by the

law against those accused of the most serious crimes, was in this period the end result of legal procedure. When all else failed, the recalcitrant defendant was outlawed.

A STUDY OF LEGAL PROCESS IN MEDIEVAL ENGLAND

By

Alan Michael Keller

A THESIS

Submitted to
Michigan State University
in partial fulfillment of the requirements
for the degree of

MASTER OF ARTS

Department of History

1963

Approved ______________________

PREFACE

This work is dedicated to my beloved sister Louise, to my parents who are responsible for my education and any success that I attain and to whom I owe infinite gratitude, and to Dr. Marjorie Gesner, whose patient guidance and encouragement is responsible for whatever merit the work holds.

AMK

In the early period of the development of English law one of the major concerns of those who administered the law was how to compel a man involved in litigation to appear at court. The whole process of adjudication rested on this appearance, for without it the process of rendering justice came to a halt.[1] To avert the danger of the failure to render justice, several legal methods were devised and evolved to deal with the contumacious. These devices were framed within the context of the medieval period, and were usually the logical results of the social conditions in England at this time.

To understand the various contrivances used and the reasons for their use, it is necessary to examine briefly the state of development of the English legal system in the early medieval period. The law in England was a crude and harsh affair following the Anglo-Saxon invasions, and it sought in a relatively unsophisticated way to control an equally harsh and crude community. It was a community

---

[1]W. S. Holdsworth, A History of English Law, 13 vols. (London, 1924), IX, 253. It is an old legal principle that no proceedings were to occur against an absent defendant.

that already had the concept that a legal wrong[2] could be done by one member to another, but the implementation of this concept to the practical resolution of wrongs was a difficult task to accomplish. Legal institutions and process were just not far enough advanced to make easy the settlement of these wrongs.

There were three major considerations which illustrated the defects of the legal system in this period. The first was the lack of an organized police force. In the event of some wrong committed there was no professional agency to bring the defendant to justice. The individuals concerned had to act for themselves as their own policemen. This was the "self-help" system of the Anglo-Saxons. It required that the wronged party deal directly with the alleged defendant in forcing the adjudication of the issue. The family or kin-folk were expected to aid in this process, and in doing so were a major factor in the legal system at this date. Later, just preceding and after the Norman conquest of England, a system of communal responsibility which included the institutions of tithing and frankpledge

---

[2] J. W. Jeudwine, Tort, Crime and Police In Medieval Britain (London, 1917), p. 45. "There was hardly any distinction between civil and criminal law as such. All acts which called for settlement were wrongs--torts, as they were called in English law."

developed, which replaced the "self-help" system and made law enforcement considerably more responsible and efficient.

The second consideration concerned the lack of prison facilities, and the conditions in those prisons which did exist. Once a man had been apprehended there were few places which could effectively hold him in custody until trial and judgment had been completed. This situation was further complicated by the fact that life was so harsh in the few existing prisons that the prisoner often perished while in custody. Prisons also presented a costly and troublesome problem to the gaolers; so much so that it was not common to keep a man in prison. Consequently, other measures had to be devised to overcome the lack of suitable custody.

The measures utilized to deal with the two problems stated above may be considered as a third illustration of the early character of the law. These measures which sought to deliver the defendant for trial and judgment before a tribunal, were called "process." Within the scope of process, a series of steps attempted to bring the accused to court in the absence of an effective police force and suitable custodial facilities. As might be expected, process in the early Anglo-Saxon period did not operate smoothly or with

any great efficiency, but procedures initiated later matured into a working system of enforcement. By the time of the late Anglo-Saxon and early Norman period, the older and more unsophisticated Germanic procedures began to be largely superseded by the developing system of process.[3] The methods evolved out of the mass of early Germanic law slowly grew into an effective system which would be used throughout the medieval period.

From the earliest beginnings in the history of English law, a primary antecedent of medieval criminal procedure resided in the ancient Germanic institution of outlawry. Through the process of outlawry the law could deal with the most serious cases and with those offenders who were fugitives from justice. In the medieval period, outlawry was the ultimate weapon of the law[4]--the last resort against the accused. Upon this man was thrust the sign of the "wolf's head"--the sign of the outlaw.[5] It was a sentence

---

[3]Frederick Pollock and Frederic William Maitland, The History of English Law, 2 vols (Cambridge, 1923), I, 476. Hereafter cited as Pollock and Maitland.

[4]Pollock and Maitland, II, 581.

[5]Select Pleas Of the Crown: 1200-1225(Selden Society), ed. F. W. Maitland (London, 1888), p. 47. Hereafter cited as Pleas of the Crown(Selden Society). Also, Year Books Of the Reign of King Edward the First(Rolls Series), ed. and trans. Alfred J. Horwood, 5 vols. (London, 1863-79), Years 20 and 21, p. 237

dreaded by all men in medieval England, for in it was held the pronunciation of death. The complete destruction of the man was involved; henceforth he would cease to exist as a living member of society.

It is necessary to know and understand the reasons for the proclamation of this ultimate and most dreaded weapon of the law. The law was weak. It lacked the agencies to coerce appearance at trial; it lacked prisons; it lacked executioners to execute. It needed a dire method of punishment for serious crimes[6] and a stronger coercive power to be used against fugitives from justice. Thus, the law had recourse to what Heinrich Brunner describes as, "the sentence of death pronounced by a community which has no police constables or professional hangmen."[7]

On Christmas day in the year 1066, after having defeated the Anglo-Saxon forces at Hastings, William, Duke of Normandy, was crowned king of England at Westminster Hall. As the Duke of Normandy, William was the inheritor and possessor of a political system which made Normandy the

---

[6]The crimes generally considered in this classification were treason, homicide, arson, and rape. Lesser crimes rarely resulted in outlawry unless they were compounded by the flight of the accused.

[7]Heinrich Brunner, Deutsche Rechtsgeschichte (Leipzig, 1887), I, 173.

strongest and most efficiently governed duchy in France. This system he imported into England; and with the combination of his own administrative genius, and the methods that he imported from Normandy, he built upon the base of the best Anglo-Saxon institutions the foundations for an enduring and well governed kingdom.

The government which William left to his heirs had great potential to grow and develop in their hands, and, indeed, the more talented of his successors did foster this potential until the state became more powerful and more systematically organized. Under the impetus of this increased institutional advance, a noticeable change took place in the law in general and in process in particular. To be sure, the law and process had been in an evolutionary flux during the Anglo-Saxon period as the Anglo-Saxons continued to improve their government, but with the advent of the Normans the rate of metamorphosis rapidly increased. The result was a more modern and comprehensive concept of legal institutions. The increased power of the state allowed the law to conceive of a greater variety of more effective weapons to deal with the criminal, and a marked improvement in criminal process followed.

Outlawry could now be an integral and important part in the process of the constraint of the contumacious. With the increased influence of the state in the maintenance of order, the concept of outlawry as a punitive measure rapidly declined. The sign of the wolf's head was no longer widely used as a substantive punishment, but was now considered as part of criminal process. By the thirteenth century, such records as the Year Books, Records of Crown Pleas, Coroners Rolls and Rolls of the Justice in Eyre were filled with examples of outlawry used as process; and one never finds any indication of outlawry used as a punitive measure in this period. What was recorded was the difficulty to compel accused persons to stand trial and to abide by the judgment of the court. Outlawry now emerged as the ultimate in the long and intricate process of criminal procedure. We will now see how outlawry was used in criminal procedure and the other steps in procedure which led to the ultimate proclamation.

In the event of some action involving a litigable matter, English medieval law required that the issue be adjudicated and justice be rendered. As long as the parties involved, especially the defendant, appeared at court to try the issue, it didn't matter whether the verdict

was found for the plaintiff or for the defendant, the law was nevertheless satisfied.[8] But when the accused or suspected failed to appear at court, then the orderly process of the law came to a halt. No further judicial action could be taken against the defendant, and unless the defendant later appeared (voluntarily or under coercion), the law was thwarted. Now the powerful engines of coercion which had been growing up since the first coming of the Anglo-Saxons were mobilized against the fugitive. These engines might function slowly and clumsily by modern standards, but they moved inexorably forward toward the goal of appearance of the accused or ultimately of outlawry.

During the period from William the Conqueror to the sixteenth century, the king's royal officer in the shire (the sheriff), in most cases was made responsible for the appearance of the accused at court. In order for the sheriff to fulfill his duty to present the accused before the justices on the assigned day, the courts issued various writs designed to aid the sheriff in his work. These writs were issued from three sources: the Chancery, from the king's court of Common Pleas, and from the King's Bench court.

---

[8] Henrici de Bracton, De Legibus Et Consuetudinibus Angliae, ed. Travers Twiss, f. 126. Hereafter cited as Bracton.

In purely civil actions, that is, in actions between private parties in which no force or breach of the king's peace is alleged, as well as in actions concerning force and breach, litigation was begun by the suit or purchase of an original or first writ. This writ was sued from the Chancery or from the Chancellor of a county palatine, upon payment of a stated fee.[9] Two cases heard in 1422 illustrate the use of an original writ. In the first, we see that William Chauncellor, the chancellor of Durham, upon the complaint of Hugh Asteley and his wife Agnes, issued the necessary original writ under his seal on 16 September, 1422.[10] In the second, the death of Henry V in 1422, raised a problem of court records in the first year of the reign of his son, Henry VI. The defendant in the case questioned the validity of the proceedings by claiming that the record showed that the plaintiff lacked an original writ. In reply, the plaintiff presented the court records from the reign of Henry V which demonstrated that an original writ had been sued out of the Chancery and that a day for the trial had

---

[9]William Blackstone, Commentaries on the Laws Of England, 19th ed., 4 vols. (London, 1833), p. 56. Hereafter cited as Blackstone.

[10]Year Book of Henry VI: I Henry VI, 1422 (Selden Society), ed. C. H. Williams (London, 1933), p. 56. Hereafter cited as Y.B. I Henry VI (Selden Society). The county of Durham had palatine powers.

already been assigned.[11]

In effect this original writ was the selection by the plaintiff of any one of the many various legal formulas available to him for legal redress, and it specifically stated his cause. No action could be taken against the defendant with the wrong writ or formula. In the records of the Hilary Term of 4 Edward II in 1310,[12] we see the results of having proceeded with the wrong one. A certain Alice commenced a civil action against D., and both parties took a prece parcium (both parties prayed justice) on the following day. The next day D. failed to appear, and Alice claimed favorable judgment by default of D. But the judge Stanton, J., reminded the plaintiff, Alice, that she had purchased the wrong original writ and therefore she could not legally proceed; and the two regular clerks of the court Killeby and Langalle affirmed this. His advice to her was to immediately sue out the correct original, in order for her to benefit from the justice of the court.

---

[11] Y. B. I Henry VI (Selden Society), p. 90.

[12] Year Books of Edward II (Selden Society), ed. F. W. Maitland, vols. 1-3, F. W. Maitland and G. J. Turner, vol. 4, F. W. Maitland, L. W. V. Harcourt, and W. C. Bolland, vols. 5, 7, G. J. Turner, vols. 6, 9-10, W. C. Bolland, vols. 8, 11-12, 14 (pt. 2), 15-18, P. Vinogradoff and L. Ehrlich, vols. 13, 14 (pt. 1), G. J. Turner and W. C. Bolland, vol. 19, M. D. Legge and W. Holdsworth, vols. 20-21, J. P. Collas and W. Holdsworth, vol. 22, and J. P. Collas and T. F. T. Plucknett, vols. 23-24, 25 vols. (London, 1903-1953), 4 Edward II: 1310-1311, p. 132.

In addition to the statement of the complaint of the appellor, the original writ directed the sheriff to command the defendant to do justice to the plaintiff, or to appear before the court of Common Pleas at Westminster. In the trial of Bydyke v. The Prioress of Kilburn, heard in the Trinity Term of 4 Edward II in 1311,[13] the plaintiff Bydyke sued out the original writ cuia in uita (a specialized writ of entry) in which the Prioress was accused of illegally holding his land, according to the provisions of the Statute of Westminster (II).[14] The attorney for the plaintiff prayed the court to hear the plea, and to summon Agnes the Prioress to appear at court and answer the charges. In another case in the same term,[15] the record of the court preserves some of the exact wording of the original writ. The cause of the case was partially stated in the words, "whereof such a one [the defendant] deforces him [the plaintiff] of so much." In another part of the record, the justice, Bereford, C. J., asks the defendant, "What does the original writ say? Does it not say: 'We command thee etc.?' Is not this a commandment etc.?"

---

[13]Y.B. 4 Edward II(Selden Society), p. 41.

[14]13 Edward I, s. 2, c.3. All statutes hereafter cited, unless otherwise specified are from Statutes At Large.

[15]Y.B. 4 Edward II(Selden Society), pp. 130-33.

Once the original writ had been purchased, in order to inform the defendant of the charges made against him, two of the sheriff's men called "summoners" were sent to serve notice of the complaint made in the writ.[16] The records of the courts frequently mentioned this part of the process, and in them we can see that the original writ made this duty of the sheriff and his men clear and exact. For example, in the Michaelmas Term, 49 Henry VI in 1470, the record reports,[17] "And be it known that the sheriff was commanded to summon by good summoners the said Ralph, William Skydmore, and Thomas to be here at the appointed day, to wit, the quindene of the feast of St. Martin." Moreover, it was part of the process that the party named in the writ was to be "solemnly summoned," as was the case of Ralph and Katherine West in the Easter Term of 1470,[18] who "being solemnly summoned, did not come." Henrici de Bracton cites a great many writs concerning various causes in which the defendants were to be "solemnly summoned by good summoners."[19]

---

[16] Blackstone, III, 279.

[17] Year Books of Edward IV: 10 Edward IV and 49 Henry VI, 1470 (Selden Society), ed. N. Nielson (London, 1931), p. 118. Hereafter cited as Y.B. 10 Edward IV and 49 Henry VI (Selden Society).

[18] Y.B. 10 Edward IV and 49 Henry VI (Selden Society), p. 13.

[19] Bracton, f. 384.

He also states, that for a summons to be lawful, there must be at least two summoners, and that they must serve their notices fifteen days before appearance should be made.[20]

In the event that the defendant failed to heed the summons and appear at court, a writ of attachment (pone) was duly issued against him by the Common Pleas bench. This writ directed the sheriff to attach the defendant by gages (goods required to be pledged), and safe pledges (sureties who would be amerced upon his failure to appear), as security for his appearance at the next county court. The courts reasoned that if a man showed a lack of respect for its authority or its writs, the situation could be rectified by the application of practical coercive measures. During the Michaelmas Term of 1202, in Suffolk,[21] Peter Walter failed to appear upon legal summons, and the reaction of the court in using such practical measures as it deemed necessary, could be seen in the record of the case. The court said, "Therefore let William [the plaintiff] have a writ to the sheriff to attach Peter by safe pledges that he be at Westminster on the morrow of S. Andrew to answer thereto." In another

---

[20]Bracton, f. 334, and 52 Henry III, c. 26.

[21]Select Civil Pleas(Selden Society), ed. William Paley Baildon (London, 1890), p. 50. Hereafter cited as Select Civil Pleas(Selden Society).

case in 1201,[22] we similarly see that, "The sheriff was commanded to attach Walter de Woodyates and William his son, so that they should be [here] to answer. . . ." Bracton records several writs by which he illustrates the process of attachment in forcing the accused to appear. In one writ, the king greets the sheriff and says, "We enjoin you that you distrain B. [the defendant] by his lands and chattels in your bailiwick [and] that he present himself, &c., on such a day in order to make answer to A. on such a plea, &c."[23] While in another writ, the king similarly greeted the sheriff, but in this case safe pledges were required to insure appearance. The writ read, "Put under bail and safe sureties B. that he should appear before our justiciaries at Westminster on such a day to make answer to A. concerning a plea. . . ."[24]

If at the next meeting of the court, the defendant failed to appear and made default, his gages would be forfeited, or his sureties amerced, and another writ of attachment was issued against him. This was a writ of _distringas_ or _distringas infinite_, in which he would be

---

[22] _Select Civil Pleas_ (Selden Society), p. 44.

[23] Bracton, f. 440b.

[24] Bracton, f. 439b.

continuously attached by the sheriff until all his goods and lands were taken; or he appeared at court.[25] In 1310,[26] we see in the case of Spreye v. Ledet a clear illustration of this process against the contumacious. John and Henry Ledet failed to appear upon summons, and were attached by the sheriff; John to the value of twenty shillings and four suretors, and Henry to the value of half a mark and four suretors. They both still failed to appear at the next meeting of the court, and the sheriff was ordered by the court to distrain them further by <u>all</u> their lands, and <u>all</u> their suretors were to be put in mercy. This increasingly stringent pressure applied against the contumacious may also be seen in some of the writs cited by Bracton. In one, the defendant, after he failed to appear before the justices to answer the plea on the assigned day, "as he was attached," was to be placed again by the sheriff under bail and <u>better</u> sureties.[27] In another, we see more clearly that the situation for the contumacious became increasingly more serious and aggravated after each default or failure to appear.

---

[25] <u>Distringas</u> or distress is the act of taking a personal chattel out of the possession of the wrong-doer.

[26] <u>Y.B. 4 Edward II</u> (Selden Society), pp. 8-9.

[27] Bracton, f. 440.

This writ, after it was recited that the defendant had been originally attached to answer the plea, went on to say, "and if he should not have come, the distress ought to be further aggravated, to wit, that the sheriff should distrain him by his lands and chattels that he may be secure of producing him on another day."[28] The writ continued to direct the sheriff further to distrain the accused until all of his property had been taken into the hands of the king and he had nothing left to attach, if he still failed to yield to the summons of the court. Thus, in actions of a civil nature, the process of suing out an original writ, then summons, and finally attachment, was the procedure used by the law in compelling appearance. The procedure ended with the distress of all the property of the contumacious, and at this point the law rested.

In actions other than purely civil cases, that is, in pleas of trespass *vi et armis* (with force and arms),[29] the process against the contumacious was somewhat different. Here, after the original writ was sued out, simple summons was deleted from procedure, and the defendant was automatically

---

[28]Bracton, f. 440b.

[29]The full Latin phrase is: "vi et armis et contra pacem domini regis," by force of arms and against the peace of our lord the king.

put under gages and safe pledges without considering whether he answered the original writ or not. Obviously, trespass by force and arms was considerably more serious than merely purely civil actions, because the courts naturally sought some form of more immediate security that would insure the appearance of the defendant. As soon as a plea of trespass was made before the justices, the court ordered the attachment of the accused. For example, in 1299[30] in Warwickshire, "Robert de Herle was attached to answer the lord king on a plea of conspiracy and trespass." And in Lincolnshire, in 1299,[31] John of Taddington and others, "were attached to answer Nicholas of Thornton on a plea of conspiracy and trespass. . . ." At this point in the proceedings, if such as the above Robert and John did not appear before the justices on the assigned day and if they continued to remain contumacious, the court of Common Pleas issued a writ of distringas to attach and distrain the defendant, until either he appeared or his goods or sureties were amerced and exhausted. Bracton records the wording of one of these writs in an

---

[30] Select Cases In the Court Of the Kings Bench: Under Edward I (Selden Society), ed. G. O. Sayles, 3 vols. (London, 1936-39), III, 84. Hereafter cited as Cases In Court of Kings Bench: Edward I (Selden Society).

[31] Cases In Court of Kings Bench: Edward I (Selden Society), III, 86.

appeal made directly before the king. The writ in part said, "But on that day, if they [the defendants] should not have come, . . . then upon the appellor presenting himself to carry on the suit, let them be attached by better sureties, and then in the end that he [the sheriff] should present their persons, and that the order of attachments be observed. And if they shall have withdrawn themselves, let them be required as aforesaid, and let all his sureties be amerced."[32] In a more practical setting, that of distringas, we can look to a case heard in 1329 at Norfolk.[33] Here, the plea was held before the king's justices, and the record reported that the sheriff, who had already distrained Thomas of Yarmouth and Simon of Dalling once was to do so again. But now he was to distrain them by "all their lands etc., and from the issues etc., and to have their bodies before the king . . . to answer the king concerning various trespasses."

Unlike peaceable civil cases, process in actions of trespass by force and arms did not end with exhaustion of the defendant's goods. Trespass was a very much more serious matter, which included crimes ranging from petty

---

[32] Bracton, f. 149b.

[33] Select Cases In the Court Of the Kings Bench: Under Edward III (Selden Society), ed. G. O. Sayles (London, 1958), p. 21. Hereafter cited as Cases In Court Of Kings Bench: Edward III (Selden Society).

theft to murder or treason. When dealing with the contumacious in this more serious class of litigation, the courts would have been at a considerable disadvantage if they had only the power to attach and distrain the goods and chattels of the accused, or amerce his pledges. So in these pleas involving injuries by force, the justices issued to the sheriff a writ directing him to take personal custody of the body of the defendant, that is, to arrest him and to present him at court to answer the charges of the plaintiff, on the day that the writ was returnable. This was the writ _capias ad respondendum_ (take the body to answer), or as it was commonly known, _capias_. The _capias_ as part of process was of considerable importance as could be seen from the records and documents available. A statute of Edward III[34] provided for the writ, and it carefully specified against whom the _capias_ was to be issued and how it was to be administered. The statute said in part, "That after any Man be indicted of Felony before the Justices in their Sessions to hear and determine, it shall be commanded to the Sheriff to attach his Body by Writ or by Precept, which is called a Capias." The _capias_ was used in every case of trespass against the contumacious, including certain peaceable

---

[34]25 Edward III, s.5, c.14.

trespasses such as fraud and contempt according to the Statute of Marlborough and the Statute of Westminster(II). In a case heard in 1318,[35] we get a clear illustration of its use. In this case, Richard Hamund was appealed of trespass vi et armis by the prior of Wallingford; and the court records show that "the king's sheriff of Berkshire took Richard by a certain [capias] writ of the king sent to him on that account to take his body." In another case, in the Hilary Term of 13 Edward III in 1339,[36] a woman sued an appeal against three men for the murder of her husband. The coroners of the county were ordered to take the bodies of the accused, and keep them in safe custody so that they could be presented at the next county court. In a rather unusual case in 1470,[37] we see another illustration of the use of capias against the contumacious. Here, the court records show that the sheriff was ordered to take the accused prisoner by writ of capias; but in the process of the arrest, the prisoner was rescued by his friends. Now the

---

[35] Y.B. 12 Edward II(Selden Society), p. 13.

[36] Year Book of the Reign Of King Edward the Third (Rolls Series), ed. and trans. Alfred J. Horwood, vol. 1 and Luke Owen Pike, vols. 2-15, 15 vols. (London, 1833-1911), Years 12 and 13, p. 152.

[37] Y.B. 10 Edward IV and 49 Henry VI(Selden Society), p. 130.

sheriff had to state the particulars of the rescue exactly, in order to justify his failure to carry out the directions of the capias.

This whole process took place under the auspices of the court which issued the writ. The capias was issued under the private seal of the court, and in the name of the chief justice of the particular tribunal. It was purely a judicial expedient adopted by the court to compel appearance; and although in most cases in the thirteenth and fourteenth centuries the process leading to capias was begun by suing out an original writ, the capias, unlike the original writ, itself was not connected with the name of the king, and it lacked the emblem of the great seal of England.[38]

In its order to the sheriff to take the accused into custody, the capias specified the day and place in which the court expected the accused to be presented. For example, in a case in the Michaelmas Term of 12 Edward II in 1318,[39] the sheriff was ordered "to take him [Thomas de Wynterburne] if etc., and saving etc., so that he have his body [before the court] at York on the morrow of All Souls etc." In the same case, but in a different section of the record, we

---

[38]Blackstone, III, 282.

[39]Y.B. 12 Edward II (Selden Society), p. 13.

see another order of the court to take another of the defendants involved in the case into custody. Here, a somewhat fuller directive was given to the sheriff, saying that, "the sheriff is ordered to distrain him [Othuel Purcel] by all his lands etc., and that of the issues etc., and that he have his body here one month from Easter to answer etc." If the sheriff appeared at this specified time and failed to produce the defendant either because he had fled or because he was living in another county, or for another reason such as in one case in 1305,[40] where the accused was reported to be overseas, then the sheriff returned the writ: _non est inventus_, he [the defendant] is not to be found, in the sheriff's bailiwick.

The next step in cases of trespass with force, other than treason or major felony, was the issuance of a second writ, _sicut capias alias_ to the sheriff. This writ repeated the instruction of the first _capias_ for the sheriff to take the accused into custody with the words, "as we have formerly commanded you." If at the return of this writ the sheriff again reported that the accused was _non est inventus_, then a third _capias_ was issued by the court, called a _sicut_

---

[40] _Cases In Court Of Kings Bench: Edward I_ (Selden Society), III, 150.

pluries capias. This instruction of arrest was in the words: "as we have often and formerly commanded you." Process such as this can be discerned in the records of the courts which describe it with varying degrees of completeness. One case before the court in the Hilary Term of 8 Edward II in 1315,[41] gives a particularly clear and complete description. The court record says, "Master Robert of Pickering brought a writ of trespass against two men and a chaplain, laying that by force and arms they had taken and carried away his stored corn. In respect to the two, the Sheriff returned that they had been attached, and that, consequently, he would afterwards be answerable for the issues; and in respect of the chaplain he returned that he was not to be found, and that Robert had therefore sued the *capias*, and afterwards the *sicut alias* and then the *sicut pluries*." The principle of the procedure observed in cases such as this, that is, the issuance of multiple writs of arrest, was later incorporated into a statute of Edward III in 1350.[42] This statute provided that if any man be indicted for felony, his body was to be attached by the sheriff on a Writ or

---

[41] *Y.B. 8 Edward II* (Selden Society), p. 21, and *Y.B. 1 Henry VI* (Selden Society), pp. 36-38.

[42] 25 Edward III, s.5, c.14.

Precept called capias. If the sheriff reported that the accused was not to be found, then another capias followed; and if the sheriff at the return of the second capias reported non est inventus, then the law proceeded to a more stringent writ called a writ of exigent, which will be discussed later. In either the earlier instances as illustrated by the court record above or the later one, the law moved against the contumacious in clearly defined steps and as we shall see with increasing vigor and severity.

Two other points of importance in regard to the writ of capias remain to be considered. The first is the action taken by the court upon issuance of the original capias, when the accused lived or traveled in another country. In English law in the medieval period, as is true today, the trial of an action had to take place in the county in which the act was committed, and the original capias was usually issued for that county.[43] But if it was known that the defendant was in another county, a writ testatum capias was issued to the sheriff of that county, reciting the

---

[43]Since a man could be outlawed for failing to appear at trial in only a county court, in the county in which the act was committed, it seems logical to assume that the trial of the action could likewise occur only in a county court in the same county. See Cases In Court of Kings Bench: Edward I (Selden Society), I, 30.

original _capias_ and informing him that the accused "lurked or wandered" in his bailiwick; and that he should take him.[44] In due time, the original _capias_ came to be merely supposed, by the court, in order to avoid the trouble of issuing two separate writs saying the same thing; and the action taken against a defendant in another county was thus begun by _testatum capias_. For example, in a case heard in 1470, a man who was known to be living in Sussex was wanted by the justices sitting in Gloucester, to testify in a case of outlawry concerning an alleged mistake in the identity of the outlawed person. No orders were addressed to the sheriff of Gloucester on this matter; but the sheriff of Sussex received directions to have the body of the witness in question before the court on the assigned day.[45] The courts so feared that a man would circumvent the cause of justice by fleeing to another county that a statute of Edward III specifically stated the procedure to be taken in such cases. The statute said: "Where in Times past some persons appealed or indicted of divers Felonies in one County, or outlawed in the same County, have been

---

[44]Blackstone, III, 283.

[45]_Y.B. 10 Edward IV and 49 Henry VI_(Selden Society), p. 110.

dwelling or received in another County, whereby such Felonious Persons indicted and outlawed have been encouraged in their Mischief, because they may not be attached in another County; it is enacted, That the Justices assigned to hear and determine such Felonies, shall direct their Writs to all the Counties of England, where need shall be, to take such Persons indicted."[46]

The second remaining point concerned indictment for treason and the major felonies such as rape, arson, homicide, assault and robbery. For these acts, excluding treason, a statute of Edward III[47] entitled "What Process shall be awarded against him that is indicted of Felony" provided for a lesser number of writs of capias to be issued; that is, instead of three writs (capias, capias, alias, and capias pluries), two were specified as legal procedure. Blackstone says, that in practice, even the two writs called for in this statute fell into disuse, and eventually only one capias was required to be issued to take legally the body of the accused.[48] While there were several statutes which defined treason and provided for the forfeiture of the

---

[46] 5 Edward III, c.11.

[47] 25 Edward III, s.5, c.14.

[48] Blackstone, IV, 319.

traitor's lands to the king,[49] no specific provisions of the law indicated how the traitor was to be taken. But Bracton, in a discussion of high treason, indicated that in practice one accused of treason should be seized immediately after being appealed or indicted. This seems to imply a single order for arrest.[50] From the records of the courts, the idea of a single order for arrest (capias) seems to be reinforced. For example, in a plea heard during the Trinity Term in 1214,[51] the sheriff of the county of Cornwall was "commanded to have the body of Baldwin Tyrel before the king . . . to answer" a charge of high treason. The language of this and other cases indicates only one issuance of capias,[52] rather than two or three orders for arrest. Treason and felony were so serious that the courts probably felt that the extra time used in suing out the alias and/or pluries writs, gave the accused undue opportunity to make good his escape.

---

[49] 25 Edward III, s.5, c.2; 34 Edward III, c.12; 21 Richard II, c.3,4 and 12.

[50] Bracton, f.119.

[51] Pleas of the Crown(Seldon Society), p. 67.

[52] Cases In Court Of Kings Bench: Edward III(Selden Society), p. 61.

We have seen how procedure against the contumacious went, as directed from the court of Common Pleas. The court records indicate that until the fifteenth century this court heard a majority of the cases which could be adjudicated by royal justice. Certain statutes in the thirteenth and fourteenth centuries were in large measure responsible for the development of the two major royal courts; the King's Bench and the Common Pleas. For example, a statute of Henry III, in 1225[53] established the court of Common Pleas in fixed chambers at Westminster, where it remained until it was abolished in 1875, while a statute of Edward I in 1300,[54] caused the justices of the Kings Bench to follow the king, "so that he may have at all Times near unto him some Sages of the Law." The advantage of knowing where a royal court was at all times in seeking justice, was as obvious to plaintiffs in the middle ages as it is today. In addition, another statute of Edward I in the same year, 1300,[55] greatly limited the scope of jurisdiction of the justices travelling with the kings, so that they could hear pleas of actions which occurred only within close proximity

---

[53] 9 Henry III, c.11.

[54] 28 Edward I, s.3, c.5.

[55] 28 Edward I, s.3, c.3.

of the royal person. All other pleas by this statute were left for adjudication by the court of Common Pleas.

But in the fifteenth century, after the King's Bench court had acquired jurisdiction in all matters which affected the king through its long association with him, we see it begin to hear many of the pleas which would formerly have been heard in the court of Common Pleas. In the scheme of procedure against the contumacious, this development of the King's Bench was important. The King's Bench in the fifteenth century had developed a relatively advanced and sophisticated procedure as compared to the Common Pleas. Instead of the long and complicated process of suing out the original writ, attachment, and _capias_, which the Common Pleas used to proceed against the accused, the King's Bench used just one writ to accomplish the same thing. This was the bill of Middlesex. It acted in effect, as a _capias_ to attach the body without the preliminaries of a _capias_ in the Common Pleas. It directed the sheriff of Middlesex[56] to take the body of the accused into custody, and to present him before the court to answer the trespass on the day that the writ was returnable. In the trial of Skypwythe v.

---

[56]The bill got its name from the King's Bench sitting in Middlesex. Had the court sat in another county, such as Gloucester, it might have been called the bill of Gloucester.

Gouselle in the Michaelmas Term of 49 Henry VI in 1470,[57] we see that the plaintiff, Skypwythe, had sued out a bill from the King's Bench to cause the defendant to appear. No original writ was needed according to the court record, and the defendant was placed in the safe custody of the marshal (custodian) of the King's Bench prison, according to the instructions usually given in such a bill. In another case in 1422,[58] the sheriff of Sussex was commanded to present John Giles before the court by a bill of Middlesex. The accused failed to present himself before the justices, and the sheriff reported that he was non est inventus. The court could then proceed to a more stringent measure of coercion.

At this point in the long process which the common law used to compel appearance, more persuasive measures were interpolated into the procedure. Following the return of non est inventus by the sheriff on a writ of capias or bill of Middlesex, the law continued to move by measured and well defined steps to its final and most effective action, the proclamation of outlawry.

---

[57] Y.B. 10 Edward IV and 49 Henry VI(Selden Society), p. 115.

[58] Y.B. 1 Henry VI(Selden Society), p. 21.

Up to this time, the defendant was still a man with certain rights before the law. But now if he failed to respond to the summons of the court, he faced the prospect of losing these rights and protections and of consequently being put outside of the law. The vicissitudes of the man who incurred this sentence of outlawry were great. As an outlaw he lost all his legal standing in the community; that is, the community put him outside of its protection. He was consequently at war with the law which had banished him. Since this "lawless" creature lost all standing in the community, he forfeited all of the contractual rights which he formerly possessed and at the same time all of the bonds of feudal homage which were owed to him and which he owed to others were dissolved.[59] By statute of Edward II,[60] his property and his goods and chattels were forefeited to the king who could waste them for one year and a day, and following this they would escheat to the "chief Lord of the same Fee." Worst of all was the position of vulnerability in which his person was placed. Not only was it everyone's duty to capture the outlaw, but everyone was authorized to

[59]Bracton, f. 129.

[60]17 Edward II, c.16.

slay him if he resisted capture.[61] If one was caught harboring the outlaw with knowledge of his condition, he was considered to have committed a most serious crime. Indeed, in a case in 1201,[62] two people, suspected of having received such a person, were immediately taken and remanded to the custody of the sheriff for further action. The outlaw was a completely friendless and solitary man, just as a wolf is friendless and solitary. He consequently bore the appellation of the "wolf's-head," which name is mentioned in Bracton and in a case in 1202, in Northamptonshire.[63] Such were the conditions of the outlaw's life and the reasons for the dread of the proclamation.

Because of the serious nature of outlawry the common law moved slowly in the steps taken against the recalcitrant. When the sheriff returned that the person named in the writ of _capias_ was _non est inventus_, the court issued a writ of _exigent_ (_exigi facias_) as provided by a statute of Edward III in 1350.[64] The statute said, "And if the Sheriff return,

---

[61]Bracton, f. 129.

[62]_Pleas Before the King Or His Justices: 1198-1202_ (Selden Society), ed. Doris Mary Stenton, 2 vols. (London, 1952-53), II, 71. Hereafter cited as _Pleas Before the King Or His Justices_(Selden Society).

[63]Bracton, f. 128; _Pleas Of the Crown_(Selden Society), pp. 21-23.

[64]25 Edward III, s.5, c.14.

that the Body is not found, and the Indictee cometh not, the Exigend shall be awarded." The issuance of the writ of exigent began legal motions against the accused which would last for five months. The sheriff was directed to begin the process of "exacting" or "demanding" the fugitive to appear at the county or shire court in order to render justice or "stand to right."[65] In the practice of the law during this period, the act of "exacting" or "demanding" was merely a public summons of the accused made at a duly constituted county court. The language of the writs of exigent was varied, but each writ informed the sheriff what actions he should take against the contumacious. In one writ that Bracton records, the text reads, ". . . if the viscount shall send that the appellee has not been found, but that he has withdrawn himself, then let it be enjoined (as before) that he should attach him, [his body] if he should be found, but if not, that he should cause him to be sought for from county to county, until he shall be outlawed by the law of the land. . . ."[66] This writ directed the sheriff to cause the accused to be "sought."

---

[65] This phrase is used in a case in 1293 in Middlesex, Cases In Court Of Kings Bench: Edward I (Selden Society), II 145-146.

[66] Bracton, f. 142, emphasis inserted.

But in another writ cited by Bracton, we see that the "man appealed ought to be interrogated at four shire courts, from shire court to shire court until he be outlawed."[67] Here the word "interrogated," means "summoned." The writ might have said that the fugitive should be "demanded," "exacted" or "summoned" and have meant the same thing as "sought" or "interrogated." In fact, there are countless cases in the extant records of various courts which illustrate the varied and frequent use of such proclamations. For example, in 1201 in Cornwall,[68] Wulward of Lanhydrock fled, and the record says, "let Wulward be interrogated." In 1221, at Worcester,[69] Nicholas Walensis escaped from custody and the court proclaimed "Therefore let him be exacted and outlawed." In Norfolk in 1198,[70] Gilbert fled after having stabbed Jordan Bete, and the record reads, "Let him be summoned etc." Whatever form was used in the particular

---

[67]Bracton, f. 125b, emphasis inserted.

[68]Pleas Before the King Or His Justices (Selden Society), II, 81, emphasis inserted.

[69]Rolls Of the Justices In Eyre: Being the Rolls Of Pleas For Lincolnshire (1218-1219) and Worcestershire (1221) (Selden Society), ed. Doris Mary Stenton (London, 1934), p. 545, emphasis inserted. Hereafter cited as Justices In Eyre: Lincolnshire and Worcestershire (Selden Society).

[70]Pleas Before the King Or His Justices (Selden Society), II, 12, emphasis inserted.

exigent, the law was giving to the defendant, to the best of its ability, the information that he faced charges in court and that if he failed to answer them he would be outlawed by the law of the land.

From the time that the exigent was awarded by the court until the actual proclamation of outlawry was made, a period of five months usually elapsed. In this time the accused would be "exacted" or "summoned" five separate times at five successive county courts, held once each month in the county where the deed was committed. Bracton states, however, that there may be an interval of time between the award of exigent and outlawry greater than five months or that the county courts need not be successive under certain circumstances (such as war). These variations were permissible as long as the total number of exactions at county courts was the legal number.[71] But in a case in Worcester in 1221,[72] the justices ruled to the contrary in an extended case of outlawry, as any interval in the process was considered too long, and it would set a bad precedent. There was some question as to what is a legal number of exactions at the successive county courts. After the justices

---

[71] Bracton, f. 126.

[72] Justices In Eyre: Lincolnshire and Worcestershire (Selden Society), pp. 581-82.

received a return of non est inventus on the capias or bill of Middlesex, the exigent was, of course, awarded against the contumacious. According to Bracton, at the first county court following the award, the accused received his first exaction. Bracton calls this exaction a "simple calling,"[73] implying an informal summons of the defendant. Exaction at this first county court was not to be included in the total number of formal interrogations. At the next four meetings of the county, the defendant was more formally exacted four times, and if he still failed to appear after the fourth formal summons, he was then proclaimed an outlaw by the writ of capias utlagatum. Thus, after a total of five county courts, which included a simple calling of the accused and four formal exactions, the sheriff was commanded by capias utlagatum, "to take the outlaw" and to present him before the justices to deal with his contempt. And it must be noted, that this method of counting the number of formal exactions by Bracton, is confirmed in several cases, with a good example in a case heard at Worcester in 1221,[74] where the record specifically indicated that the defendant

---

[73] Bracton, f. 125b.

[74] Justices In Eyre: Lincolnshire and Worcestershire (Selden Society), p. 540.

ought to be outlawed at the fourth shire court.

But in two cases in the Coroners Rolls[75] which describe the exaction process in detail, five rather than four specific exactions in each are mentioned, with no implication that the first exaction made at the first county court was in any way different or less formal than the others, as Bracton indicates. In one of the above cases heard in Northamptonshire,[76] the defendants were "exacted for the first time and did not appear," on Thursday, August 18, 1323. And those named in the writ of exigent were, "exacted for the fifth time" on Tuesday, December 8, 1323. Nowhere in the record of this case is there any suggestion that anything other than five formal exactions, in five months, at five county courts had occurred, and although the results of four or five formal exactions were the same, the method of accounting can be confusing.

Each step taken in this process of exaction moved the contumacious one step closer to the loss of the "king's peace," or outlawry. The law made every effort to see that

---

[75]Select Cases From the Coroners Rolls: 1265-1413 (Selden Society), ed. Charles Gross (London, 1896), Northamptonshire, pp. 77-78, Bedfordshire, pp. 32-35. Hereafter cited as Coroners Rolls(Selden Society).

[76]Coroners Rolls(Selden Society), pp. 77-78.

there were no procedural errors of any kind. A proclamation of outlawry in 1221 was voided because of one such procedural error. In this case, the outlawry of one John le Waller was reversed as he was exacted one more time (six times) than the law allowed.[77] In another question of procedure, we see that the county court in which the outlawry was produced had to be a legally constituted tribunal. The proper royal representatives had to be present. In a case concerning this question, an outlawry was annulled because the sheriff was not present, as he was attending another county court at the same time.[78] Furthermore, the writ of exigent had to be very exact in its wording in naming the one to be "demanded" or outlawed. In 1470, one J. Boteler, yeoman, was mistaken for the outlawed J. Boteler, gentleman, and was captured. Upon inquest by the judges, the innocent yeoman was, of course, set free, and the sheriff was amerced for false arrest.[79] Because women and children were not considered within the law, due to their

---

[77] Justices In Eyre: Lincolnshire and Worcestershire (Selden Society), p. 540.

[78] Cases In Court of Kings Bench: Edward I (Selden Society), II, 41-43.

[79] Y.B. 10 Edward IV and 49 Henry VI (Selden Society), pp. 140-41.

inability to participate in frankpledge and tithing,[80] they were not to be "outlawed" for failing to appear at court; they were rather to be "waived." In a case in 1323, heard in Northamptonshire,[81] ". . . John of Langley, and John of Gloucester were outlawed, and the said Matilda [of Drayton] was waived." If at any time during exaction or during any part of procedure an error was made, the whole action to the point of error was annulled, and the process had to be begun again.[82] Finally, the law had to deal with the fugitive, whether outlawed or not, who had successfully gained sanctuary in a church. So long as he remained in the environs of the church, up to a period of forty days,[83] his body was free from seizure by the authorities. Bracton maintains, however, while taking cognizance of the Assize of Clarendon, that for a layman to enter the church even after the period of forty days had elapsed to seize the fugitive, would be "horrible and unhallowed."[84] His remedy for this matter was not for the clerics of the church to use physical force

---

[80] Bracton, f. 125b.

[81] Coroners Rolls (Selden Society), pp. 77-78.

[82] Y.B. 8 Edward II (Selden Society), pp. 21-22.

[83] Assize of Northampton (1176); Bracton, f. 136.

[84] Bracton, f. 136.

to drive the fugitive from sanctuary, but rather to "deny such a person victuals" to accomplish this task.[85] Another alternative to rid society of the dangerous fugitive in sanctuary was also available to the law. This was to allow the beseiged defendant to abjure the realm if he steadfastly refused to face the charges levied against him. If the defendant chose to leave England, a statute of Edward II[86] provided for the safety of his person while still in the church or on the road toward the assigned port of exit. So long as the abjurer continued on the road with no diversions and if he left the realm on the assigned day, he was in the king's peace and protection. In 1276, we see that Eustace Putthe of Tilbrook, who had escaped from the king's prison and gained sanctuary in the church of Spaldwick, there "abjured the king's realm according to the custom of England."[87] And similarly, in 1318, Walter Alway of Thropston, who took refuge in the church of Saint James in Thropston, confessed to the slaying of Robert Alway; "and he abjured the realm of England . . . and the port of Dover was assigned to him."[88]

---

[85] Bracton, f. 136.

[86] 9 Edward III, s.1, c.10.

[87] Coroners Rolls (Selden Society), p. 36.

[88] Coroners Rolls (Selden Society), p. 67

This process of compulsion was well summed up in verse in the Pleaders Guide 56-58:

> But first attach him, and attend
> With Capias ad Respondend.
> Let loose the Dogs of War and furies,
> TESTATUM, ALIAS, PLURIES;
> But if at length non est invent,
> At him again with Exigent.
> Proclaim him by the Act's direction
> (Act 31st. Elizabeth 3rd. Section)
> Then smite him as a Coup de Grace
> With Utlagatum Capias.
> Exacted, outlaw'd and embruted,
> His head to head of Wolf transmuted,
> Compell'd by writ of Exigenter
> The Lists against his will to enter.[89]

The methods which were in the hands of the law in the middle ages to force the appearance of a defendant, were both interesting and varied. They ranged from the actions of law enforcement by the king's royal servants throughout the realm, to the duties imposed upon individuals and groups at various levels in society. We have already seen much of the role of the king's officers in the judicial system during this period, but the very important role of the "private citizen" in this scheme remains to be discussed.

The first legal duty of the individual in medieval English society was to assist in the maintenance of civil

---

[89] Quoted from W. S. Holdsworth, A History Of English Law, IX, 254, note 3.

peace and tranquility. It is necessary to remember that there was no well organized police force to help prevent crime, and no well organized agency to apprehend the criminal. The sheriffs were few in number, and these few could police only limited areas. Absence was often necessary as shown in a case before the King's Bench heard in the Easter Term of 1291.[90] A proclamation of outlawry was annulled because the sheriff of the county was in attendance at another county court and without the sheriff's presence the court that proclaimed the outlawry was not a legal tribunal. If the sheriff could not consistently appear at monthly county courts, his ability to properly administer the day-to-day duties to the whole area under his jurisdiction was probably even less consistent and efficient. The numerous proclamations of outlawry in the records attest to the fact that the law officers were often unable to produce the accused before the court, and consequently many crimes went unresolved. The abilities of law enforcement officials were so limited, that in many instances the identity of the criminal was never discovered by the

---

[90] Cases In Court of Kings Bench: Edward I (Selden Society), II, 41-43.

law,[91] and even the deceased in a homicide might go unidentified.[92] Consequently, the individual and the community as a whole had to be included in law enforcement, to supplement the often abortive efforts of the royal officers.

The role of the private person in the scheme of compulsion in medieval law has several facets, which may be reduced to two general classifications. The first, is the active participation of the members of the community in the apprehending of the criminal. When the act of felony was brought to the attention of the community, a certain procedure was ordinarily followed. For example, in the event of finding a dead body, an alarm or the "hue and cry" was raised by the finder as actually occurred when Agnes Colburn found her son Henry dead, on August 22, 1266, at Barford.[93] Or when the body of John Clerk, tiler, was found on August 9, 1366, as the jury reported to the Coroner of Middlesex, that; "Thomas Clerk of Aldgate Street first

---

[91] Rolls of the Justices In Eyre: Being the Rolls Of Pleas and Assizes for Gloucestershire, Warwickshire and Staffordshire (1221-1222)(Selden Society), ed. Doris Mary Stenton (London, 1940), pp. 401, 406. Hereafter cited as Justices In Eyre: Gloucestershire, Warwickshire, Staffordshire(Selden Society).

[92] Justices In Eyre: Gloucestershire, Warwickshire, Staffordshire(Selden Society), p. 400.

[93] Coroners Rolls(Selden Society), p. 3.

found him, and he raised the hue [and cry]."[94] The witness or witnesses to a crime were to raise the "hue" and give chase to capture the criminal. The Coroners Rolls in 1267[95] reported that the township of Sudbury saw the commission of assault and homicide on an unknown man. "The hue was raised and the aforesaid persons [the defendants] were pursued into the county of Huntingdon; the hue was [also] pursued in the county of Bedford from township to township."

The ancient use of the hue and cry by the Anglo-Saxons in England was confirmed in a series of statutes of the post-Norman kings. Early in this series was the statute of Winchester of 1285,[96] which had as the title of its first provision: "Fresh Suit shall be made after Felons and Robbers from Town to Town, &c." This clause provided, that "Cries shall be solemnly made in all Counties, Hundreds, Markets, Fairs, and all other Places where great Resort of People is," so that no one would be ignorant of such felonies or felons. In the second clause of the same statute, "Town, Hundreds, and Franchises," were made responsible to

---

[94] Coroners Rolls (Selden Society), p. 55.

[95] Coroners Rolls (Selden Society), p. 9.

[96] 13 Edward I.

present the felon, and the counties were ordered to produce him within forty days. If any of the above failed in this charge, they would be answerable for the damages. In a statute of Edward III in 1354,[97] the provisions of the statute of Winchester (1285) were confirmed by a clause that said, "immediately after Felonies and Robberies done, fresh suit be made from Town to Town, and from County to County." And once again, "Towns, Hundreds, Franchises, and Counties," were ordered to capture the body of the felon, or to remain answerable for the damages.

Once the hue and cry had been raised by the populace, a statute of Edward I,[98] provided that the neighbors of the district were to turn out with their prescribed "harness," to apprehend the criminal and keep the peace. "Every Man between Fifteen Years of Age, and Sixty Years," says the statute "shall be assessed and sworn to Armor according to the Quantity of their Lands and Goods." For example, "From Fifteen Pounds Lands, and Goods Forty Marks, and Hauberke, a Breast-plate of Iron, a Sword, a Knife and a Horse . . . and he that has less than Twenty Marks in Goods, shall have Swords, Knives, and other less Weapons," and

---

[97] 28 Edward III, c.11.

[98] 13 Edward I, c.6.

"that they shall follow the [Hue and] Cry with the County . . . as they are bounden." The law made clear to the community and to each individual the role each was expected to play in bringing a criminal to justice.

In practice, we see several interesting and illustrative cases of the hue and cry. In a plea during the Michaelmas Term of 1328 before the King's Bench,[99] Richard of Welford and Geoffrey of Weston, merchants of London, were robbed of one-hundred and thirty pounds, and "immediately after that robbery was committed, they had raised the hue and cry against those evildoers and pursued them from township to township in those parts with the hue and cry thus raised." According to the laws of the realm, Richard and Geoffrey by properly raising the hue and cry, had a right to expect that the men in the towns where the "cry" was raised would then capture the criminals as they were bound to do under the provisions of the statute of Winchester. But the men of the towns involved failed to make the attempt, and by terms of the Statute they were accordingly to be amerced for the damages; one-hundred and thirty pounds. Another county reported that <u>its</u> men had arrested the fugitives upon

---

[99] <u>Cases In Court Of Kings Bench: Edward III</u>(Selden Society), pp. 34-35.

the hue being raised in <u>that</u> county, within the prescribed "forty days". The justicesthereupon issued a stay for the order of amercement against the alleged negligent town for damages; it could not be held to answer under the statute if the evildoers had been arrested by another group. In another instance in 1378,[100] John Souter struck and killed John Hore, while the deceased was at home. The accused man fled, and the men of Urchfont were amerced for the damages; that is, the appraisal of the sword which was the murder weapon, at four pence. In 1218, the vill of Brinsworth in Yorkshire was put in mercy upon its failure to take one Adam Buscell for the slaying of Elias, son of Roger of Brinsworth. The village knew of the slaying and it also knew that Adam Buscell was the culprit.[101]

The responsibility put on local inhabitants to participate in and maintain law and order, carried over into other similar duties. In a case heard at Worcester in 1221, the Rolls of the Justices for that eyre reported that, William de Bracy, suspected of the slaying of William of Stone,

---

[100] <u>Coroners Rolls</u>(Selden Society), p. 106.

[101] <u>Rolls Of the Justices In Eyre: Being the Rolls Of Pleas and Assizes For Yorkshire in 3 Henry III (1218-1219)</u> (Selden Society), ed. Doris Mary Stenton (London, 1937), pp. 194-95. Hereafter cited as <u>Justices In Eyre: Yorkshire</u> (Selden Society).

fled to sanctuary in Stone Church. The king's serjeant put the villages of Stone, Heathy, and Dunclent on guard to see that de Bracy did not escape. However, de Bracy did escape dressed in monks attire, and "The villages admit this and therefore are in mercy."[102]

Another aspect of the hue and cry and community participation in bringing the accused to justice, was the trial and treatment of one caught red-handed in the act of a crime, or "hand-having" (the holding of the stolen goods or the weapon used for the crime). In this situation a procedure called "summary justice" was used. This justice was rendered quickly and with little procedural ceremony, though the court records indicate that its use disappeared in the late fourteenth century. In a typical case, in the town of Bodden, the hue and cry was raised against a horse thief during the night. The thief was caught with the horse in his possession, and the Prior of Bodden hastily summoned a court which tried and hanged the accused.[103] Bracton comments on such cases, saying that, if such things as the dead body or "bloody knife" implicated the accused, then by ancient constitution, no further proof was needed and justice

---

[102] Justices In Eyre: Lincolnshire and Worcestershire (Selden Society), p. 559.

[103] Y.B. 30 and 31 Edward I (Rolls Series), pp. 501-502.

could be quickly done.[104] The felon could be gotten into court and his career as a danger to society could be ended quickly with a semblance of judicial authority.

The second of the general classifications of the roles of "private citizens" in the functioning of the law, concerned two specialized English medieval institutions, called tithing and frankpledge. The origins and exact nature of both are open to much controversy,[105] and are therefore beyond the scope of this study. But certain salient characteristics may be discerned, from the time of William the Conqueror to the sixteenth century.

Generally speaking, tithing and frankpledge constitute a system of collective police functions by local groups, which had in it the element of surety for each of the members. According to Bracton,[106] all males twelve years old and over, except "magnates, knights, and their relations, a clerk, a freeman, . . ." were to be in a tithing or in frankpledge. These groups consisted of ten to twelve men, presided over by a "headman" or "tithing-man," or by a lord who guided and was responsible for the frankpledge.

---

[104]Bracton, f. 137.

[105]For a good summary of this subject see, Bryce Lyon, A Constitutional and Legal History of Medieval England (New York, 1950).

[106]Bracton, f. 124b.

In the records of the Justices in Eyre at Worcester in 1221,[107] there are several notations which name the tithing-man who was responsible and the locality of the tithing. For example, in one case the record reports that Theobold le Fulur was suspected of homicide and that, "he fled, and he was in the tithing of Robert Keis of Berrow. . . ."[108] In another case in the same eyre,[109] we see that Thomas of Belbroughton was the master of a frankpledge which carried his name and that he was responsible for the actions of its members. In a more complete description, the Coroners Rolls report an inquest held at Ensham in 1390, where, "Richard Cavill, tithingman of Ensham, John London, tithingman of Cassington, John Sexy, tithingman of Sutton, and John Hawkin, tithingman of Stanton Harcourt, together with their tithings," "swore oath as to the cause of the death of one William Bray."[110]

One of the most important responsibilities of the

---

[107] Justices In Eyre: Lincolnshire and Worcestershire (Selden Society).

[108] Justices In Eyre: Lincolnshire and Worcestershire (Selden Society), pp. 591-92.

[109] Justices In Eyre: Lincolnshire and Worcestershire (Selden Society), p. 557.

[110] Coroners Rolls (Selden Society), p. 96.

frankpledge or tithing was to produce a member in court if he was involved in a litigable matter. In most cases the tithing or frankpledge had to act when one of the group committed a felony and then fled from justice. We see countless cases of the frankpledge and tithing used in this way. In most of these instances we see this indirectly, as the various groups were amerced for their failure to present the accused member at court. In Worcestershire in 1221,[111] Jordan le Stut killed William Willoc and fled. Jordan was in the frankpledge of Nicholas le Rus of Severn Stoke, and therefore the frankpledge was put in mercy. The Pleas Heard Before the Crown records in an inquest taken in Somerset,[112] that William, Richard's son, was outlawed for theft; and we see that he "was in the tithing of John Eskelling's Ocford, [sic] which is therefore in mercy." Similarly, in 1201 in a case heard at Wells, the tithing of Ash Priors was made responsible, that is, put in mercy for having allowed the escape of Richard Coffin and Richard, son of Botilda. Both were accused of having participated in the slaying of Walter de Wik, and both were in the

---

[111] Justices In Eyre: Lincolnshire and Worcestershire (Selden Society), p. 545.

[112] Pleas Of the Crown(Selden Society), p. 80.

tithing of Ash Priors.[113]

However, there are several cases in the court records which indicate a more direct and active participation of the frankpledge and tithing in maintaining the law and compelling the accused to appear at court. In 1323 in Northamptonshire, in the inquest of the coroners of Northampton town, one John Small had been killed while resisting arrest by "the constable and frankpledges of the township of Stoke Bruern."[114] And again in 1321, we see the tithing in a more active and direct role, as "Hugh Lucas of Thropston was arrested in the fields of Little Addington with a bay horse belonging to Thomas Howett of Irthlingborough by the tithingmen and constable of [Irthlingborough]."[115]

In another example of the role of tithing, we see that William of Churchill appealed John of Bilstone and Richard of Wyke for unjust imprisonment in 1255. In the transcript of the case, John and Richard admit freely that they imprisoned William, but they claim that they did so because "the aforesaid William's tithing had presented him

---

[113] Pleas Before the King Or His Justices (Selden Society), II, 216.

[114] Coroners Rolls (Selden Society), p. 79.

[115] Coroners Rolls (Selden Society), p. 67.

as a thief and wrongdoer," and "because the tithing refused to answer for him."[116] In order for the tithing to avoid the responsibility and possible amercement upon the escape or further wrongdoings of William, they rather presented him for incarceration to the local authorities. The action taken by this tithing was considerably different than that of the tithing of Richard of Caundle in Somerset, in 1201. In this case, when Richard was appealed of murder by Odierna, widow of Adam, he presented as sureties, Richard de Bruneshull, and his tithing of Caundle. Richard never did appear for trial nor did he <u>essoin</u> himself, and his tithing was put in mercy for his nonappearance; but at least his tithing had fulfilled its duty and acted as surety for him.[117]

The law was so much concerned with the maintenance of order by the use of frankpledge, that in a case in 1221, heard at Worcester, we see the consequences to a man not enrolled in a frankpledge or tithing. Here, John Alfolc, who was arrested on suspicion of robbery and had come to

---

[116] <u>Select Cases Of Procedure Without Writ: Under Henry III</u>(Selden Society), ed. H. G. Richardson and G. O. Sayles (London, 1941), p. 100. Hereafter cited as <u>Procedure Without Writ: Henry III</u>(Selden Society).

[117] <u>Pleas Before King Or His Justices</u>(Selden Society), II, 221.

court to answer, said that "he does not wish to put himself upon the country." Since he was not in frankpledge or tithing and since he did not have a lord who was willing to be surety for him, the court replied, "therefore let him abjure the realm and leave the land before the Saturday next after the octave of St. John the baptist." He also was required to forfeit his goods and chattels into the hands of the king's sheriff.[118]

The responsibility for the members of frankpledge and tithing to participate in the scheme of the law, in the post-Norman period, rests on the provisions contained in two major statutes. The first and more important one was the Assize of Clarendon of 1166, issued by Henry I. This assize confirmed and regularized the parctice of inquests held by royal officers which had been used with increasing frequency and effectiveness in England since the Domesday Book investigations by William I. The Assize provided that, "for the preservation of peace and the enforcement of justice, inquiry shall be made in every county and in every hundred through twelve of the more lawful men . . . to tell the truth . . . whether there is any man accused or publicly

---

[118] Justices In Eyre: Lincolnshire and Worcestershire (Selden Society), pp. 589-90.

known as a robber or murderer or thief, or any one who has been a receiver of robbers or murders or thieves. . . ."[119] This inquiry was to be made twice a year by the sheriff or the justices, and it came to be known as the "view of frank-pledge" or the "sheriff's tourn." The second statute, issued in 1325 by Edward II,[120] was entitled, "The Statute for View of Frankpledge." It provided for essentially the same testimony to be sworn by the jurors before the royal officers, but it specified in detail a large number of specific subjects into which the sheriffs were to make inquiry. For example, inquiry was to be made; "Of Thieves that steal Clothes . . . of Cries levied and not persued . . . Of Escapes of Thieves or Felons . . . Of Women ravished . . . of Clippers and Forgers of Money," and for many other of the various concerns of the king to secure the peace of his realm.

In its efforts to compel the accused to appear, the law would proceed to its most stringent form of coercion--outlawry--only when forced to do so. As we have seen,

---

[119] From Statutes of the Realm, translated in Sources Of English Constitutional History: A Selection Of Documents From A.D. 600 To the Present, ed. and trans. Carl Stephenson and Frederick George Marcham (New York, 1937), p. 77.

[120] 18 Edward II.

outlawry was a long and complicated process, and the results of this process was often of dubious value. If the accused chose to live the life of a fugitive, the cause of the plaintiff was still left unsatisfied, and in addition, the contempt shown to the king's court during the process remained unpunished. Consequently, the law much preferred to make the defendant more responsive to its directives by the less dramatic but more practical methods of attachment, surety and responsibility.

Although the many writs and court records of the period indicate that actual recourse to outlawry was commonplace, it is also apparent that the law made even more frequent and greater efforts to compel appearance by the rapidly developing system of personal security or surety. Surety in medieval law has several facets and perhaps the best way to understand it is to see, first, how it was used in practice. The accuser or appellant, in order to assure the law that he would prosecute his suit to outlawry if need be, was required to put up "pledges" or "security" for prosecution. This proffering of pledges had the effect of making the appellor responsible before the law for his actions, or, more specifically, for his lack of action. Bracton cites many writs that describe the manner

in which the appellor was made responsible and which show how he was directed to prosecute his appeal. For example, in one representative writ, the king greeted his royal sheriff in the shire and said, "If **A** [the appellor] has given you security to persue his complaint, then place B and C . . . under bail and sureties . . . to answer the said **A**," and if they (the defendants) do not come to answer the charges, "then upon the appellor presenting himself to carry on the suit, let them be attached by better sureties. . . ."[121] In an illustrative phrase from another of Bracton's writs, we see the king inform the sheriff, "if **A** shall make you secure, etc.,"[122] then you [the sheriff] may proceed further against the appellee, but not until the plaintiff **A**, has become responsible before the law, by making you "secure." The security that was usually offered by the appellor or accuser was the names of certain responsible men who would act as his "pledges for the prosecution." If the appellor failed to prosecute his suit, then these pledges for the prosecution stood responsible and therefore amerciable before the law. The court records contain countless references to pledges for prosecution and to the consequences of the appellor failing to complete the suit. For example,

---

[121]Bracton, f. 149b.

[122]Bracton, f. 149b.

in the Trinity Term of the year 1212, two men failed to complete prosecution in an accusation of arson. Both of the appellors were put in mercy, and their "pledges to prosecute," one John of Draughton and one Robert of York were also put in mercy.[123] In another case in 1313, we see one John de Craven appeal Miles de Munteney and five others of felonious assault. From the court record we learn that the pledges of prosecution for the plaintiff, John, were John atte Wood and Thomas of Thorpe. The record further informs us that, "John de Craven, solemnly called the first, second, third and fourth day, did not come, and he was the appellor. Therefore let him be arrested and his pledges of prosecution amerced. . . ."[124] Thus, the law provided for its satisfaction in a litigable question concerning the prosecution of a cause.

Similarly, the law used the same principles of surety and responsibility to deal with the far more important problem of the appearance of the accused. One concept dealing with this problem was that something of value could be held by the law in lieu of the appearance of the defendant in court. Then the law by the use of such a measure would

---

[123] Pleas Of the Crown(Selden Society), p. 66.

[124] Select Cases In the Court Of the Kings Bench: Under Edward II(Selden Society), ed. G. O. Sayles (London, 1957), p. 50.

have a good method to cause the accused to be responsible for his actions. The implications of this were fully understood and were finally recognized and confirmed in a statute of Edward III in 1350. The law said, "the Sheriff shall cause to be seised his [the accused] Chattels . . . and [if] the Indictee cometh not . . . the Chattels shall be forfeit . . . but if he come and yield himself . . . then the Goods and Chattels shall be saved."[125] In practice this is what happened as we can see by a review of a few cases. In 1202 Henry Lenveise failed to answer a plea made against him, "Wherefore precept [was sent] to the sheriff that he put him by gage and safe sureties to appear . . . and to show wherefore he has kept his day in the coming of the Justices into Essex as he was summoned."[126] And again in the Worcestershire Eyre of 1221, we see that Isabella, wife of the deceased William of Stone, appeals four men of the death of her husband, and they did not appear to answer the charge. Therefore, the transcript reports, "let the sheriff take their lands and chattels into the kings hands."[127] While the inevitable loss of one's

---

[125] 25 Edward III, s.5, c.14.

[126] Pleas Before the King Or His Justices (Selden Society), II, 261.

[127] Pleas Of the Crown (Selden Society), p. 86.

property must certainly have had some effect on the thoughts of recalcitrant defendants, in the more serious charges of felony when reluctance to face the court was great, the law needed recourse to a somewhat more effective use of surety. Indeed, the sheriff (Gilbert Fitz Renfrey) of York and the coroners of York in 1218 reported, that in serious acts of felony they rarely just attached those accused of breach of peace.[128] In cases such as these they looked to the more responsible and efficient provisions for surety, such as those found in bail and mainprise and in frankpledge and tithing.

In the medieval period, the scheme of bail and mainprise was utilized as an integral part of the process to bring the accused to court. Before we see how bail and mainprise were used in practice, it would be wise to examine briefly the theory of these two legal devices, and some of the differences between the theory and the practice. To begin with, in the middle ages bail and mainprise as descriptive legal terms were often used interchangeably in the records of the courts.[129] This was quite understandable,

---

[128] Justices In Eyre: Yorkshire (Selden Society), p. 304.

[129] Matthew Hale, The History Of the Pleas Of the Crown, 2 vols. (London, 1778), II, 124. Hereafter cited as Hale, P.C.

since in effect bail and mainprise accomplished approximately the same thing, that is, the procuring of the release of a person from legal custody and undertaking to have him appear before the court. For example, the transcript of a case in 1422, said in one place that the defendant was "handed over in bail" to certain men until the time of the trial, and in another place in the very same record, that the defendant was released to the same men "who gave mainprise to have the [same] body" at court at the specified time.[130] Although in practice, bail and mainprise seem to mean approximately the same thing, legally however, there is a major theoretical difference between the two. If a man were to be delivered up or released on bail, in the eyes of the law (even though the defendant has his physical freedom), he is technically still in the custody of the law. For example, if a defendant was granted bail from the King's Bench in fact, his custody was merely shifted from the King's Bench prison to the custody of those who secured his release, his bailors. But in the eyes of the law the defendant is still in the custody of the Keeper or Marshall of the King's Bench Prison, _in custodia marescalli_.[131] Under the terms of bail, the

---

[130] _Y.B. I Henry VI_ (Selden Society), pp. 3-5.

[131] Hale, P.C., I, 325.

prisoner could be reseized and committed, if there was a doubt as to his appearance at trial. It was thought that the "incumbent risk" which was assumed by the bailor or "keeper" to produce the prisoner, was as good a certainty of the accused coming to trial as incarceration in one of the few and not very secure royal prisons.[132]

Mainprise on the other hand, in legal theory does not hold the accused in custody as does bail.[133] The court merely delivers out of its custody to the suretors or mainpernors the body of the accused for them to present at court on the assigned day. Moreover, mainprise is always granted in recognizance of a certain sum of money, while bail may or may not be granted under these conditions.[134] For example, bail may also be granted under the considerably more stringent terms of corpore pro corpore, that is, "body for body." In a case before the King's Bench court in 1287, we see an illustration of this. The court record reports, "Robert de Lavendrye . . . is handed to the bail of Robert le Crevequer, [and others], to have his body at

---

[132] Justices In Eyre: Yorkshire (Shelden Society), record a considerable number of cases of breach of prison.

[133] Hale, P.C., II, 35.

[134] Hale, P.C., II, 124.

the aforesaid term, body for body. . . ."[135] Theoretically then, the body of the bailor would be liable upon his failure to present the accused, while the mainpernor would be liable only for the sum of money which he had pledged as security.

Returning to the practice of bail and mainprise, we can see two situations in which they were used to insure appearance in court. The first is the case where the defendant is already in the custody of the law, and where he is released or repleived upon pledge of bail or mainprise by some suretor(s). In almost every instance, the courts saw fit to release the accused on security, rather than keep him in prison. In one case, William Skinner was arrested on charges of homicide, and upon the appearance of "pledges of the peace" on William's behalf, who would answer for him if he failed to appear at trial, the constables allowed him his freedom.[136] In another case, six men came forward and, "gave mainprise to have the body of the aforesaid William Barkyng here at the aforesaid term, namely, their bodies for his body."[137] Here, in addition to an illustration of freedom granted upon a pledge of security, we see an

---

[135] Cases In Court Of Kings Bench: Edward I (Selden Society), I, 167.

[136] Coroners Rolls (Selden Society), p. 104.

[137] Y.B. I Henry VI (Selden Society), p. 104.

obvious use of the word mainprise in the theoretical sense of bail.

There are many cases such as these in the court records, and among them there are many variations in the terms provided for release and in the language that is used. In his treatise on the law, Hale says that there ought to be at least two men of ability or substance as pledges, before the defendant may be released.[138] Bracton gives us a more detailed example of the terms of surety, in a writ that he cites. In this writ, the king sends greeting to the viscount and says, "If twelve free and loyal men of your county have become sureties before you to present before us or our justices on such a day B., [the defendant] to answer in court concerning an appeal which A. [the plaintiff] has made . . . then cause that appeal to come before us or our justices. . . ."[139] Similarly, in a case in the Michaelmas Term in 1280, an order from the king was sent to the sheriff to release one Ralph of Burn (accused of horse stealing), if he could find twelve "upright and lawful men" to assure his appearance on the assigned day.[140]

---

[138] Hale, P.C., II, 125.

[139] Bracton, f. 149b.

[140] Cases In Court Of Kings Bench: Edward I (Selden Society), I, 70.

However, in 1366 Thomas Ughtred was held in gaol by the sheriff, until Thomas found mainprise of: four knights and one esquire, who were bound for the sum of five-hundred pounds.[141] And in 1295, we see a very interesting case concerning the terms set for mainprise. Here, although the accused procured the necessary writs for his release, he still lay in prison for a year-and-a-half, as the prison warden had strict orders from the Bishop of Bath not to make deliverance unless three-hundred and twenty pounds were offered as security.[142]

In many cases of deliverance from custody, we see a rather unique phrase used in the court records which seems to indicate a type of release quite similar in effect to bail or mainprise. This phrase is, "making fine of the king." It occurs when the accused appeared before the arresting officers and was consequently taken into custody. At this time, the prisoner proceeded to pray deliverance from the king's officers by the offering of a sum of money tendered or pledged by a friend or a relative. In a case in 1310, we see a particularly illustrative example of the process of

---

[141] Select Cases Before the Kings Council: 1243-1482 (Selden Society), ed. I. S. Leadam and J. F. Baldwin (Cambridge, 1918), p. 55. Hereafter cited as Cases Before Kings Council (Selden Society).

[142] Cases Before Kings Council (Selden Society), p. 11.

"making fine." Here, Thomas the defendant was taken into custody and "Afterwards Thomas made fine with the king for the trespass by twenty shillings by the pledge of John of Theford of the county of Norfolk. Therefore let him be delivered etc."[143] In another case in 1260, heard in Leicestershire, the record reports that, "William made fine . . . by forty shillings, for fear of imprisonment and [sic] to be put on bail."[144] Thus, it seems that "making fine" must have the same effect as bail; that of deliverance from prison.

Usually, the cost of "making fine" for the defendant or his suretor was the sum of one-half mark. In a plea heard at York, we see that Rannulf of Abeford (accused of felonious assault) "came and made fine by half a mark by pledges of Walter son of William of Abeford."[145] Similarly, in another case heard at York, we see John, son of Swan of Upton, put in mercy for false appeal against Adam de Mora. The record reports that, "afterwards John came and made fine by half a mark by pledge of Adam the reeve of Upton and Adam the

---

[143] Y.B. 4 Edward II (Selden Society), p. 129.

[144] Procedure Without Writ: Henry III (Selden Society), p. 101.

[145] Justices In Eyre: Yorkshire (Selden Society), p. 231.

forester of Elmsall."[146] But in a number of instances we see various sums of money, other than half a mark required to "make fine with the king." For example, in 1253, William de Kyme was required to "make fine of the king" for the sum of twenty marks.[147] And in 1298, in a plea heard in Yorkshire, one Roger the carter was required to make "fine with the lord king by ten pounds."[148] Thus, whether the sum for "fine" was the usual half a mark, or ten pounds, or any other figure, "making fine of the king" was an act resulting in deliverance from custody, in the sense of bail and mainprise. It was a pledge of money for the future appearance of the defendant; and in accordance with a statute of Edward III, published in 1363, the fines were to be taken in the presence of the pledges, and "that the Pledges Know the Sum of their Fine before their departing."[149]

In order to be released on bail or mainprise, the accused had to sue out a writ of replevin or recovery for his body from the king. Generally, one of three writs was

---

[146] Justices In Eyre: Yorkshire (Selden Society), pp. 218-19.

[147] Procedure Without Writ: Henry III (Selden Society), p. 32.

[148] Cases In Court Of Kings Bench: Edward I (Selden Society), III, 67.

[149] 38 Edward III, s.1, c.3.

used by the accused to gain his freedom. The most often used was the writ _de homine replegiando_, which directed the sheriff to deliver the body up upon pledge of sufficient security that the accused would appear in court to answer the charges made against him. The writ was a comprehensive document in that it was applicable in almost every offense, up to and including felony. But it served until the advent of the writ of _habeas corpus_ made it obsolete.

The two other writs used to effect release from custody are more limited in scope than that of _de homine replegiando_. The writ _de manucaptione_ (writ of mainprise), was used to obtain the release of a defendant accused especially of a felony. Because the charge of felony was such a serious matter, the sheriffs in many cases refused to release prisoners on low bail. In a situation such as this, the defendant then sought release by an offer of a greater pledge of bail and mainprise, accompanied by the writ _de manucaptione_. Finally, those who were imprisoned specifically on the charge of murder, had recourse to the writ _de Odia et Atia_ under certain conditions. If a man was under heavy suspicion of murder, he could not avail himself of the writ. But if he could prove that the charge of murder and the consequent imprisonment was a result of

the "ill will" or "malice" of the sheriff, he could then obtain his release upon pledge of sufficient surety and this writ.

Bracton mentions the writ de homine replegiando as the correct formula to secure release on bail,[150] and Hale cites the writs de manucaptione and de Odia et Atia, as well as de homine replegiando, as possible formulas for release.[151] But both Bracton and Hale indicate basic limitations in the use of these writs under certain conditions and in certain classes of cases. According to Hale, the above named writs were to be addressed to either the sheriff of the county, his bailiff(s), or to a Justice of the Peace.[152] But in an enumeration of actions by Bracton,[153] which is confirmed by Hale,[154] we see that such cases as serious felony, homicide and treason are listed amongst those offenses which are not bailable by such royal officers as sheriffs, bailiffs, or Justices of the Peace. In such cases as these, only the King's Court, which acted in the king's name could grant

---

[150] Bracton, f. 154.

[151] Hale, P.C., II, 127-27.

[152] Hale, P.C., II, 126.

[153] Bracton, f. 154.

[154] Hale, P.C., II, 126-27.

bail.[155] This was true because, as we have already seen, all persons bailed before the King's Bench justices were supposed to be still in the custody of the law, in custodia marescalli. Obviously, it was considered that security in terms of bail or mainprise given into the hands of minor royal officials, was not security enough for those crimes of the most serious nature. Blackstone concludes that bail is allowed for offenses less than serious felony, but for the most serious crimes the public may demand the highest security, that of the actual body in custody.[156]

A series of statutes issued throughout the medieval period clearly illustrates the fears and attempts of the crown to insure the appearance of the accused in court, by the suspension of bail in the enumerated offenses by local officials. In 1275, Edward I declared, that a sheriff or his bailiffs would be attainted and would lose their offices, if they allowed to bail those indicted or appealed of felony, homicide, treason, arson, counterfeiting, etc.[157] This statute was the basis for the limitations of those offenses which were bailable, and upon it further statutes were issued.

---

[155] Hale, P.C., II, 126-27; 3 Henry VII, c.3.

[156] Blackstone, IV, 297-98.

[157] 3 Edward I, c.15.

A statute of Edward III, in 1330, informed those men who were "Keepers of the Peace and Sheriffs" that "such as shall be indicted . . . shall not be let to Mainprise by the Sheriffs, nor by none other Ministers, if they be not mainpernable by the Law;" and "if they make Deliverance, or let to Mainprize [sic] any so indicted, which be not mainpernable, and to punish the said Sheriffs, Gaolers, and others, if they do any Thing against this Act."[158] Throughout the medieval period, further statutes were published which added to the body of the law dealing with bail and mainprise. A statute of Henry VI, in 1444, supplemented the statute of Edward I in 1275, by providing, "the said Sheriffs, and all other Officers and Ministers aforesaid, shall let out of Prison all Manner of Persons by them or any of them arrested, or being in their Custody, by Force of any Writ, Bill or Warrant in any Action Personal, or by Cause of Indictment of Trespass, upon reasonable Sureties of sufficient Persons, having sufficient within the Counties where such Persons be so let to Bail or Mainprise, to keep their Days in such Places as the said Writs, Bills or Warrants shall require." But according to the statute,

[158] 4 Edward III, c.2.

there were exceptions to the above, as the statute indicates in such instances as those outlawed by <u>capias utlagatum</u>, vagabonds refusing to serve according to the statute of Laborers, and those in ward by virtue of condemnation.[159] Another statute concerning the bailing of those in custody for non-bailable offenses appeared in 1486. This statute of Henry VII, echoed the practice of the time and reiterated that those arrested for "light Suspicion of Felony" were bailable, but that "divers Persons, such as were not mainpernable, were oftentimes letten to Bail and Mainprise, by Justices of the Peace, against the due Form of the Law, whereby many Murderers and Felons escaped, to the great Displeasure of the King, and Annoyance of his liege People."[160] The statute further stated that the letting to bail had to be done by at least two justices and in strict accordance with the law, as had been basically stated in the statute of 1275. Thus, the concern of getting the accused to appear at trial carried over into the pronunciations of the law. The policy of allowing minor royal officials to administer bail and mainprise was reconsidered upon demonstration that it was basically unsound, and did not in practice guarantee

---

[159]23 Henry VI, c.9.

[160]3 Henry VII, c.3.

appearance of the accused.

In practice, the use of these statutes which regulated bail and mainprise can be observed in court records. For example, in an interesting and illustrative plea heard before the King's Bench court in Shropshire, in 1304,[161] the sheriff, Richard of Harley, set free on mainprise Roger le Wilde and Denis la Gardenere of Ludlow; both of whom were indicted as accessories in the homicide of William of Eyton. The sheriff, Richard, was imprisoned because he illegally allowed to mainprise Roger and Denise, who according to the statute of 1275,[162] were irrepleviable. In addition they did not have a writ (de homine replegiando) from the king. The newly appointed sheriff of the county, Walter, imprisoned the old sheriff Richard of Harley, but was ordered by the king to release him on mainprise, if Richard could find twelve lawful freemen as sureties. Richard did present the requisite security, but Walter refused to allow him his freedom, as he claimed that since Richard mainprised non-repleviable felons, he himself was non-repleviable. Now the situation became complicated, as the current sheriff,

---

[161] Cases In Court Of Kings Bench: Edward I (Selden Society), III, 127-29.

[162] 3 Edward I, c.15.

Walter, was himself put in mercy for illegally[163] holding Richard in gaol, after Richard had proffered sufficient and legal security. Indeed, a sheriff was not to replieve those who were non-repleviable by the law or those who failed to present a warrant of mainprise from the king. But Richard had obtained the proper writ from the king, and, in addition, his crime, that of allowing to bail those who were non-bailable, was itself an act for which the present sheriff, Walter, was required to grant bail, and for which no statute expressly prohibited deliverance. In a more clear-cut case heard at Suffolk in 1356,[164] John Toft and William Heath, constables of the vill of Bergholt, were put in mercy as they accepted "pledges of the peace" and released from custody William, son of Thomas Skinner, who stood accused of manslaughter. This decision to put the negligent constables in mercy seems to refer back to a note written in a session of the Royal Court with Justice Spigornel presiding. The note said, "if a Sheriff let go on bail a prisoner who is attached for manslaughter, he shall answer for him at Eyre."[165] Thus, by statute and by precedent, the minor

---

[163] 23 Henry VI, c.9.

[164] Coroners Rolls(Selden Society), p. 104.

[165] Y.B. 30 and 31 Edward I(Rolls Series), p. 506.

royal law officers in the various localities throughout the realm knew which prisoners could be released upon pledge of security and the consequences of negligent duty concerning such releases.

The use of surety in the form of pledges of bail or mainprise to cause appearance of the accused, can also be seen when the defendant remained outside the custody of the law. We have already seen the point at which the law began to exert heavy pressure on the fugitive to surrender in the exaction process leading to outlawry. At almost any one of the five county courts at which these summons or exactions took place, or at almost any time during this process, the defendant might come forward and offer pledges that he would appear at the next meeting of the county court. If the accused appeared on the assigned day, the process of exaction stopped, and the proclamation of outlawry would never be pronounced. But, after the fifth exaction at the fifth county court had been made, the fugitive could no longer offer pledges for appearance, nor could anyone appear for him to tender his pledges. At this point the man became an outlaw, and no essoin was admitted because then the process would tend to be drawn on indefinitely.[166]

---

[166] Bracton, f. 125.

For example, in a case heard in 1275 in Cambridgeshire,[167] three men were appealed of homicide and breach of the kings peace. They fled upon the commission of the act, and in due course the process of exaction began. Two of the defendants were mainprised to appear before the justices after the third exaction; both of them appeared and they were taken into custody, and their pledges were saved. The third defendant however, was mainprised to appear before the justices after the fourth exaction, and he failed to appear. By the law, he could make no further pledge to appear, he would now be outlawed, and his mainpernors would be put in mercy.

Thus, after many variations of the theme of surety and responsibility, the law utilized its last and most dread weapon--the proclamation of outlawry, to compel the recalcitrant to stand to right. Considerable time and effort had been expended by the law in the process evolved to force appearance, and as we have seen, only reluctantly was the sentence of outlawry pronounced.

---

[167] Coroners Rolls (Selden Society), pp. 32-35.

BIBLIOGRAPHICAL ESSAY

I. Primary Sources:

In research for this study, the two most valuable sources of information were the records and cases of English justice as collected and edited in the publications of the Selden Society and the Rolls Series; and in the statutes of the various reigning monarchs as the pronunciations of the law. Both of these sources are extremely valuable in long-term investigations, in that they yield after careful scrutiny a full and accurate picture of the development of substantive and procedural English medieval law. The Selden Society offers a collection of edited and translated English legal manuscripts in a set at present totaling seventy-nine volumes. Especially valuable for this study were the following. Select Pleas Of the Crown, 1200-1225, ed. F. W. Maitland (London, 1888), is a collection of transcripts of criminal pleas from the Curia Regis rolls. Select Civil Pleas, 1200-1203, ed. W. P. Baildon (London, 1890), is a collection of civil pleas from the Curia Regis rolls. Select Cases From the Coroners Rolls, 1265-1413, ed. Charles Gross (London, 1896), contains cases illustrating the role of the Coroner in the judicial system. The Year Books of

Edward II (25 vols., London, 1903-53), is a series of transcripts of cases, both civil and criminal, reported during selected years in the reign of King Edward II. Especially valuable were; Year Book 4 Edward II, ed. G. J. Turner (London, 1914), Year Book 12 Edward II, ed. J. P. Collas and T. F. T. Plucknett (London, 1950), and Year Book 8 Edward II, ed. W. C. Bolland (London, 1925), for cases and procedure in criminal law. Select Cases Before the Kings Council, 1243-1482, ed. I. S. Leadam and J. F. Baldwin (London, 1918), is a valuable collection of illustrative criminal actions. Year Books of Henry VI, 1 Henry VI, ed. C. H. Williams (London, 1933), and Year Books 10 Edward IV and 49 Henry VI, ed. N. Nielson (London, 1931), are similar in content to the Year Books of Edward II. Rolls of the Justices In Eyre: Being the Rolls of Pleas and Assizes For Lincolnshire, 1218-19, and Worcestershire, 1221, ed. Doris Mary Stenton (London, 1934), is a valuable report of the Assize rolls of criminal cases heard by the justices in eyre. Rolls of the Justices In Eyre: Being the Rolls of Pleas and Assizes for Yorkshire in 3 Henry III, ed. Doris Mary Stenton (London, 1937) and Rolls of the Justices In Eyre: Being the Rolls of Pleas and Assizes for Gloucestershire, Warwickshire and Staffordshire, 1221-1222, ed. Doris Mary Stenton (London, 1940), are similar in content and value

to the Justices In Eyre: Lincolnshire and Worcestershire. Select Cases In the Court of the Kings Bench: Under Edward I, ed. G. O. Sayles (3 vols., London, 1936-39), contains pleas from the Coram Rege rolls heard before the Court of Kings Bench. Select Cases In the Court of the Kings Bench: Under Edward II, ed. G. O. Sayles (London, 1957), and Select Cases In the Court of the Kings Bench: Under Edward III, ed. G. O. Sayles (London, 1958), are similar in content. Select Cases of Procedure Without Writ: Under Henry III, ed. H. G. Richardson and G. O. Sayles (London, 1941), has cases heard without royal writ before the kings court and the justices in eyre. Pleas Before the King or His Justices: 1198-1202, ed. Doris Mary Stenton (2 vols., London, 1952-53), contains cases heard directly before the king and transcripts of the pleas from the Curia Regis rolls. The Rolls Series includes the Year Books of the Reign of King Edward the First, ed. and trans. Alfred J. Horwood (5 vols., London, 1863-79), and Year Books of the Reign of King Edward the Third, ed. and trans. Alfred J. Horwood and Luke Owen Pike (15 vols., London, 1883-1911). This series includes many cases heard before the Court of Common Pleas, in both civil and criminal actions. Especially useful were: Year Books 20 and 21 Edward I and Year Books 30 and 31 Edward I, ed. Alfred J. Horwood (London,

1863-66), and Year Books 12 and 13 Edward III, ed. Luke Owen Pike (London, 1888). For statutes, the collection of laws in Statutes At Large is good, but not the best source. Many of the statutes listed are translated from the Latin or French. Also, Sources of English Constitutional History: A Selection of Documents from A.D. 600 to the Present, ed. and trans. Carl Stephenson and Frederick George Marcham (New York, 1937) is a good collection of selected documents, helpful in this study in materials found in Statutes of the Realm.

II. Legal Treatises:

Henrici de Bracton, De Legibus Et Consuetudinibus Angliae, ed. Travers Twiss (6 vols., London, 1878-83) is the earliest and best treatise on the law to the thirteenth century. It is an accurate and comprehensive evaluation, upon which many later commentaries are based. Matthew Hale, The History of the Pleas of the Crown (2 vols., London, 1778) is a good source for information on the law as concerned Crown pleas. William Blackstone, Commentaries On the Laws of England, 19th ed. (4 vols., London, 1836) is a valuable recapitulation of the law; especially of the commentaries of Bracton.

III. Secondary Sources:

Frederick Pollock and Frederic William Maitland, The History of English Law, 2nd ed. (2 vols., Cambridge, 1923) is an excellent general study of the substantive and procedural structure and development of early English law. William S. Holdsworth, A History of English Law, 7th ed. (12 vols., London, 1924-56) is a comprehensive study of English law. Well detailed and documented, it is an excellent reference work. J. W. Jeudwine, Tort, Crime and Police In Medieval Britain (London, 1917) is a brief summary of early law and custom. Bryce Lyon, A Constitutional and Legal History of Medieval England (New York, 1950) is a textbook of high quality. Heinrich Brunner, Deutsche Rechtsgeschichte (2 vols., Leipzig, 1887-92) is an excellent and systematic study of early Germanic law.

MICHIGAN STATE UNIVERSITY LIBRARIES
3 1293 03083 2673