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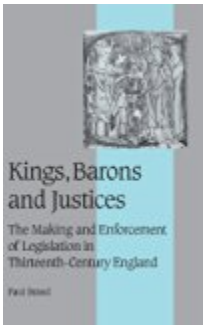
Paul Brand. *Kings, Barons and Justices: The Making and Enforcement of Legislation in Thirteenth-Century England.* Cambridge: Cambridge University Press, 2003. vii + 410 pp. $90.00 (cloth), ISBN 978-0-521-37246-6.



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The Beginnings of Large-Scale Legislation in England

In 1947 T. F. T. Plucknett gave the Ford Lectures, subsequently published as *The Legislation of Edward I*, at Oxford. He proposed that, from the battle of Evesham (1265) onwards, "the dominating personality in the government was no longer Henry III but his son, the lord Edward. It was he who initiated a policy of appeasement towards the Disinherited [defeated supporters of Simon de Montfort], and it was evidently a part of that policy that the principal heads of the Provisions of Westminster of 1259 should be accepted and regularized in the solemn royal statute made at Marlborough in 1267".[1] Plucknett's consideration of Edward's legislation would begin, therefore, in the time of Edward's father, with the Statute of Marlborough 1267.

The Statute of Marlborough was effectively a final, revised and expanded re-issue of the Provisions of Westminster 1259, of which there had been intermediate re-issues in 1263 (twice) and 1264. The essential outline of the legislative history has been known for some time. The Provisions of Westminster, omitted from most later manuscript collections of statutes and from the earlier printed collections, were rediscovered in the eighteenth century.[2] In the 1870s, Bishop Stubbs gave an account of the list of grievances presented to the Oxford parliament of 1258, which he named the "Petition of the Barons," some of which were answered by the Provisions; he was also aware of the re-issues of the Provisions between 1259 and 1267.[3] In the 1920s, E. F. Jacob gave more detailed attention to the re-issues and noted a Latin draft of part of the Provisions of Westminster (the *Provi-dencia Baronum*, published in March 1259).[4] In the following decade, R. F. Treharne's work on the baronial plan of reform 1258-63 provided a more detailed treatment of the Petition of the Barons and the Provisions of Westminster.[5] Jacob and Treharne gave limited attention to the use and interpretation of the legislation, to which Plucknett as well as E. de Haas and G. D. G. Hall added.[6]

This older material is now conclusively superseded. Paul Brand's book will be irreplaceable as a standard work on the legislative and political processes leading to the Statute of Marlborough, and on the enforcement and interpretation of the statute in the courts to the end of the reign of Edward I (1307).

In 1947, Plucknett assured his Oxford audience that the legislation of Edward I could now be read in its proper context of "plea rolls, contemporary treatises, and ... the Year Books," but he was conscious of the limitation of his work to the few primary sources then in print. "It is hazardous to treat a statute solely on the basis of its text without reference to its construction by the courts. Unhappily there is hardly anything in print to show how the statute of Marlborough fared in the courts between 1267 ... and the last years of Edward I".[7] Brand's work, in contrast, is based upon a wealth of material from manuscript sources–legislative drafts, records and reports–gathered since he began work on the project as a doctoral student in 1967. There are some gaps: the rolls of the central courts are incomplete for parts of the period, and the entire lack of contemporary county court rolls

creates acknowledged and inevitable lacunae. But the contrast between Plucknett's material and that amassed by Brand can hardly be exaggerated.

The book is in two roughly equal parts, the first covering the period from the Provisions of Westminster 1259 to the Statute of Marlborough 1267, and the second the interpretation and enforcement of the Statute of Marlborough in the courts to 1307. The preface identifies three basic questions: why was the legislation of 1259-67 necessary and what effect was it intended to produce? What effect did the legislation have during its initial period of operation between 1259 and 1267? How was the legislation enforced and interpreted by the courts between 1267 and 1307 (p. xiv)?

In attempting to answer these questions, Brand is necessarily faced by the centrifugal tendency of the problems which the legislation sought to address. As he observes (and this is a key theme), the legislation of 1259-67 cannot be fully understood unless placed in proper contemporary context, both legal and political. The political story may perhaps be told as a connected narrative, but the legal context is necessarily fragmented, to a degree, by the diversity of the legislation's concerns–suit of court; seignorial rights at succession; control of mortmain alienations; waste by lessees; accounting by bailiffs and socage guardians; speed of process in *quare impedit* and dower *unde nichil habet*; royal charters exempting from jury service; the *murdrum* fine; attendance at inquests and the sheriff's tourn; sureties for clerks claiming benefit of clergy; beaupleader fines; attendance at the general eyre; distraint; royal control over false judgment cases; royal authorization for compulsion of free men to answer for their free tenements; royal monopoly on compulsion of free men to take oaths; warranting of essoins in local courts; actions for heads of religious houses in respect of depredations against their predecessors; writs of entry; evasion of wardship; unauthorized release of persons imprisoned for redisseisin–each requiring detailed assessment before the significance of the relevant parts of the legislation can be appreciated.

It may have been this inherent fragmentation that rendered the original doctoral thesis (now much revised and much supplemented), as Brand puts it, "somewhat rebarbative and lacking in a clear overall argument." The clarification of the argument is entirely successful–the reader is carefully guided throughout, and topics are clustered, so far as possible, under broader headings. At the same time, the detailed treatment of the questions addressed by the legislation based on the manuscript evidence, significantly revising and supplementing previous understanding, will make the book an essential source for those specifically interested in, say, suit of court or writs of entry, as well as for those concerned with Brand's broader themes.

Consideration of the treatment of each aspect of the legislation is impossible in a review of this length, but a few lessons may be singled out. Legislative provision in this period is clearly an inadequate basis for conclusions concerning the frequency or novelty of its subject matter, or, indeed, for the novelty of its solution. In some instances, legislative treatment may be of such length and detail to suggest that a question was a matter of major contemporary importance. According to Brand, for example, the opening three clauses of the Provisions of Westminster suggest that suit of court was a significant matter of contention between lords and tenants in 1259 (p. 43). But he finds little evidence that collusive feoffments to avoid wardship, which reserved an excessive rent payable from the date at which the feoffor's infant heir came of age (dealt with in chapter 6 of the Statute of Marlborough), were common before 1267. Indeed the only evidence of such collusive feoffments appears to be a dower case in the Common Pleas in 1262, which happened to involve the chancellor, Walter of Merton, and which, Brand argues, led directly as a single instance to the statutory provision (pp. 200 ff). There is an echo here of Joseph Biancalana's recent argument that another single case, *de la Rivere v. Spigurnel* in 1281, "probably did much to motivate" the enactment of chapter 1 of the Statute of Westminster II 1285 (*de donis conditionalibus*).[8] In a different field, Brand shows that clause 12 of the Provisions of Westminster, requiring guardians of socage tenure land to account to the heir, should be understood against the background of already established customs to this effect in Kent and London (pp. 66 ff).

Nor is legislative provision necessarily a safe guide to the motives behind devices prohibited by statute. Chapter 6 of the Statute of Marlborough again provides an example, namely the fact that a feoffment to an infant heir would not now defeat the lord's wardship upon the feoffor's death did not mean that such feoffments were invariably made with defeating wardship in mind: some, at least, may be explained as an element in settling land upon marriage (pp. 196 ff).

If legislative provision forms a doubtful guide retrospectively, it may be no more reliable prospectively. Plucknett, for example, concluded from chapter 9 of the Statute of Marlborough that the statute gave the lord an

action (*de secto subtracto*) to be used to secure suit of court withdrawn by his tenant.[9] Although, as Brand shows, there is plentiful evidence for the existence and use of the equivalent action for the tenant (*contra formam feoffamenti*), to which he gives extended attention, there is no evidence either before or after 1267 for the creation or use of the lord's action authorized by the statute, for the simple reason that lords preferred to rely upon extra-judicial distraint (p. 251).

And the possible significance of largely pragmatic questions of drafting should not be overlooked. Much ingenuity, for example, has been exercised since Maitland's day in seeking to explain the so-called "degrees" of the writs of entry, which before reform in the 1260s limited the demandant in such a writ to two connecting words ("through" and "to whom") in telling the story of the flaw in the tenant's title. Brand suggests, however, that the "rule" was no more than a consequence of combining a perceived propriety in mentioning all the steps linking the tenant to the alleged flaw in his title with "a desire on the part of the draftsmen of Chancery writs to avoid clumsy writs" (p. 157). Similarly, he argues that the dropping, from the final draft of the Provisions of Westminster, of a provision for writs of entry outside the degrees (reinstated in the 1263 re-issue) may indicate not magnate opposition to extending the reach of actions which bypassed seigniorial courts, but simply a difficulty as to the drafting of the new writs (p. 159).

Two reservations may be mentioned. Reviewing Plucknett's Ford Lectures in 1951, F. M. Powicke observed that he began by discussing "with refreshing candour and commonsense the familiar problem of custom and prerogative, the distinction between the idea of a new statute as a contribution to the common law and the later theory of statute law as a separate body of material susceptible of gloss and commentary".[10] While Brand's work is centered upon the inspiration, drafting, interpretation and enforcement of the Provisions of Westminster; their re-issues; and the Statute of Marlborough, he does not follow Plucknett's lead in giving sustained attention to the nature of legislation in relation to the common law in the thirteenth century, with the risk that unwary readers may too easily carry away anachronistic assumptions. In similar vein, while it is true that "the first half of the thirteenth century was not, in general, a period of large-scale legislative reform of the common law" (p. 409) (so that the Provisions of Westminster, their re-issues, and the Statute of Marlborough may be seen as having "effectively created the idea of large-scale legislative reform" [p. 409]), Brand does not pursue Plucknett's observation that Edward I "might well have said that his age had a vocation for legislation," and that at this time a "great wave of legislative activity was sweeping over Europe".[11]

In the same review, Powicke observed that Plucknett's analysis "suggests the need for a more thorough study of the petition of the barons in 1258 and subsequent baronial discussions about matters later given statutory authority in more sweeping form, especially as at first sight the Provisions of Westminster and the Statute of Marlborough assert principles not congenial to baronial minds".[12] Powicke's impression is fully borne out by Brand's work. As Brand states, "what is more striking and impressive about the legislation [the Provisions of Westminster] ... is just how little it reflects the specifically magnate domination of the king's council in 1258-9" (p. 390). Brand does not, however, venture any thesis as to why this should have been so. In this respect, as in others, Brand is content to identify the puzzle without seeking to provide an explanation. Examples include, deliberate disregard of the Provisions of Westminster in respect of *murdrum* fines by justices in eyre in some counties but not in others in the early 1260s (pp. 131-132), and the "surprising" initial reversion by the Chancery to a radically "baronial" formula for the legislative authority of writs of *contra formam feoffamenti* in 1267, after Henry III had regained control of government (p. 207). It may well be that he prefers to say nothing rather than to merely speculate. But the reader might appreciate an indication that this is so.

This is a remarkable book, founded on an astonishing knowledge of the primary sources.[13] As Powicke said of Plucknett's Ford Lectures, it "will be of permanent value," and will require to be "read and read again." It will be the starting point for all future work in its field, and, it may be hoped, a starting point too for the work which, as Brand points out, is yet to be done in producing a satisfactory revision of Plucknett's pioneering work on Edward I's legislation to which the Provisions of Westminster and the Statute of Marlborough were a curtain-raiser.

Notes

[1]. T. F. T. Plucknett, *The Legislation of Edward I* (Oxford: Oxford University Press, 1949), pp. 23-24.

[2]. W. Hawkins, ed., *Statutes at Large*, vol. 6 (London, 1735-36), appendix.

[3]. W. Stubbs, *Constitutional History of England* (Oxford: Oxford University Press 1874-78), vol. 2, pp. 73-97.

[4]. E. F. Jacob, *Studies in the Period of Baronial Reform*

and Rebellion (Oxford: Oxford University Press, 1925).

[5]. R. F. Treharne, *The Baronial Plan of Reform, 1258-1263* (Manchester: Manchester University Press, 1932).

[6]. E. de Haas and G. D. G. Hall, *Early Registers of Writs* (London: Selden Society, 1970), pp. xlv-xlvii; and Plucknett, *Legislation of Edward I.*

[7]. Plucknett, *Legislation of Edward I*, pp. 2, 69.

[8]. Joseph Biancalana, *The Fee Tail and the Common Recovery in Medieval England, 1176-1502* (Cambridge: Cambridge University Press, 2001), p. 32.

[9]. Ibid., p. 67.

[10]. F. M. Powicke, review of Plucknett, *Legislation of Edward I*, *English Historical Review* 66 (1951): p. 108.

[11]. Plucknett, *Legislation of Edward I*, p. 2.

[12]. Powicke, review, p. 108.

[13]. Dr. Brand announced at the British Legal History Conference in July 2005 that a further French draft of part of the Provisions of Westminster (in Lambeth Palace MS 499), which was probably produced for discussion at the June parliament of 1259, had eluded him until too late in the day for inclusion in the book. This further discovery, which it is hoped will be published, may complete the first draft version of all the clauses of the Provisions.

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