# INTRODUCTION

When the lawyers who taught the English common law in the Inns of Court in the later Middle Ages constructed a lecture course for apprentices which consisted of an exposition of, and commentary on, the most important legislation of the thirteenth and early fourteenth centuries, most of the legislation they chose came from the reign of King Edward I.[1] That course also, however, included three statutes that belonged to the reign of Edward's father, King Henry III. These were the 1225 reissue of Magna Carta,[2] the Provisions of Merton of 1236 and the Statute of Marlborough of 1267. The singling out of these three particular pieces of legislation from Henry III's reign as of enduring importance parallels their treatment within the textual tradition of the statute books. Statute books were beginning to be copied in large numbers by the final decade of the thirteenth century and the first decade of the fourteenth century and contained mainly the major and minor statutes of the reign of Edward I and various other non-statutory but useful texts.[3] Magna Carta, the Provisions of Merton and the Statute of Marlborough were not quite the only statutes of the reign of Henry III to be included in such volumes. It was not uncommon to include the quasi-statutory Dictum of Kenilworth of 1266 and the Leap Year ordinance of 1256 as well. Sometimes other statutory texts are found there too. These three statutes, however, were always included and they almost always stood at the very beginning of the volume. This was not just sentimental antiquarianism. They were included because they were statutes of continuing legal importance whose texts any practising lawyer needed to have.

[1] J.H. Baker, *Readers and Readings in the Inns of Court and Chancery* (Selden Society Supplementary series vol. 13, 2000), pp. 3–5; Brand, *MCL*, pp. 70–2.

[2] The text they used is, however, likely to have been that of the confirmation issued in 1300.

[3] Don C. Skemer, 'Reading the Law: Statute Books and the Private Transmission of Legal Knowledge in Late Medieval England' in *Learning the Law: Teaching and the Transmission of Law in England, 1150–1900*, ed. Jonathan A. Bush and Alain Wijffels (London, 1999), pp. 113–31; Paul Brand, 'English Thirteenth Century Legislation' in '. . . *Colendo iustitiam et iura condendo* . . .': *Federico II Legislatore del Regno di Sicilia nell'Europa del Duecento*, ed. A. Romano (Rome, 1997), pp. 325–44 at pp. 342–3.

Successive generations of legal and constitutional historians have worked on the origins and development of the text of Magna Carta, starting with the political crisis of 1215 and its roots in the prior events of John's reign and those of his brother and father and leading through to the definitive text of the 1225 reissue.[4] They have also worked on its later history and shown how the Charter was used and interpreted in practice both in the courts and elsewhere.[5] Less work has been done on the two other major pieces of legislation belonging to Henry III's reign. The detailed investigations of a series of historians over the past century have at least revealed the composite nature of what later passed for the Provisions of Merton and shown that it is not just a single piece of legislation enacted at Merton in 1236. They have also revealed something of the background and context of the individual clauses.[6] Some work has also been done on the subsequent use and interpretation of those clauses, though there is as yet no comprehensive modern account of this available.[7]

The story of the origins and evolution of the Statute of Marlborough of 1267 is an even more complex one. The Statute was, as will be seen, in effect a final reissue, in an amended and expanded form, of the Provisions of Westminster. Those Provisions had originally been promulgated in 1259 and had then been reissued with amendments and additions in 1263 and (in a virtually identical text) in 1264. There also survive a number of different draft texts which lie behind the Provisions as issued in 1259 and texts of some of the requests for legal changes which provoked that legislation and which form part of the 1258 Petition of the Barons. The rediscovery of these various texts lying behind the eventual Statute of Marlborough and recovery of the wider contemporary political and legal context of the legal changes of this period has been a gradual process. The starting-point for modern scholarship on the origins and evolution of the Statute of Marlborough seems to have been the rediscovery of the Provisions of Westminster of 1259 by Serjeant Hawkins, who printed them in the Appendix to the sixth volume of his edition of the *Statutes at*

[4] The classic modern work is J.C. Holt, *Magna Carta* (Cambridge, 2nd edition, 1992).

[5] Faith Thompson, *The First Century of Magna Carta: Why It Persisted as a Document* (Minneapolis, 1925); Faith Thompson, *Magna Carta: Its Role in the Making of the English Constitution, 1300–1629* (Minneapolis, 1948); J.C. Holt, *Magna Carta and Medieval Government* (London, 1985).

[6] G.J. Turner, 'Some Thirteenth Century Statutes', *Law Magazine and Review* 4th series 21 (1896), 300–16, and 22 (1897), 240–50; H.G. Richardson, 'Glanville Continued', *Law Quarterly Review* 54 (1938), 381–99; F.M. Powicke, *King Henry III and the Lord Edward: the Community of the Realm in the Thirteenth Century* (Oxford, 1966), pp. 148–52, 769–70; *Early Registers*, p. ciii.

[7] J.L. Barton, 'The Mystery of Bracton', *Journal of Legal History* 14, no. 3 (1993), 1–142, especially 5–20; Paul Brand, ' "Time out of Mind": the Knowledge and Use of the Eleventh and Twelfth-Century Past in Thirteenth-Century Litigation', *Anglo-Norman Studies* 16 (1994), 37–54, especially 40–1.

*Large* in 1735–6.[8] They had needed to be rediscovered because texts of the Provisions of Westminster of 1259 and of the reissues of 1263 and 1264 had not been included in most later manuscript collections of statutes and so had not made their way into any of the earlier printed editions of the statutes. The editors of the official edition of *Statutes of the Realm* published between 1810 and 1822 printed the same text in their volume I and also included variants from the 1263 and 1264 reissues in their footnotes.[9] Of the various texts which lie behind the Provisions of Westminster, the 'Petition of the Barons' has been in print (albeit in a version derived from only one of the three surviving texts) since William Fulman's edition of the Burton Annals in 1684. This was re-edited by H.R. Luard in his Rolls Series edition of the Burton Annals in 1864 and reached a much wider public through Bishop Stubbs' *Select Charters and Other Illustrations of English Constitutional History from the Earliest Times to the Reign of Edward the First* in 1870.[10] Of the various drafting stages, the penultimate French text of the Provisions of Westminster, apparently as prepared for the Westminster parliament of October 1259, has also been in print since 1684 as one text formed part of the Burton Annals and was also re-edited by Luard in 1864.[11] The Latin draft text of part of the Provisions known as the *Providencia Baronum* was first published (from two of the four surviving texts) by E.F. Jacob in 1922; the French draft text which lies behind this was first published (from the only known surviving text, now in Philadelphia) only in 1990.[12]

The first coherent general account of the background to, and evolution of, the Provisions of Westminster and the Statute of Marlborough was that provided by William Stubbs in volume II of his *Constitutional History of England*.[13] It was Stubbs who was first to discuss the series of grievances presented to the Oxford parliament of the summer of 1258. He is also responsible for giving it the name of the 'Petition of the Barons'. Stubbs saw it as a list of the grievances of Henry III's baronial opposition produced during the interval between Henry III's agreement to the 'project of reform' in May and the session of parliament at Oxford. Stubbs knew nothing of the various intermediate drafts of the Provisions of 1259 and so did not discuss them. His account of the Provisions of Westminster

[8] Hawkins was not, however, followed in this by either of his main successors, Ruffhead and Pickering.

[9] *SR*, I, 8–11. Somewhat confusingly for later scholars, the numbers printed in the margin of their edition were the numbers of the corresponding clauses of the Statute of Marlborough. The 1259 Provisions are not called the 'Provisions of Westminster' in this text. They are captioned merely as 'Provisions made by the King and his Council'.

[10] Brand, *MCL*, pp. 327–8. [11] Ibid., pp. 349–51. [12] Ibid., pp. 335–8, 359–61.

[13] William Stubbs, *The Constitutional History of England*, 2nd edition (3 vols., Oxford, 1874–8), II, 73–97.

misunderstands the relationship between the 'administrative' decisions reached there and the legislation enacted there and says very little about that legislation. Stubbs knew of the reissues of the Provisions of 1263 and 1264, though he did not note, and so did not discuss, the significant differences between these reissues and the original 1259 Provisions. His lack of interest in the details of legal reform also emerges from his brief discussion of the Statute of Marlborough, which he characterises simply as a statutory re-enactment of the Provisions of 1259.[14] The first scholar to note the existence of the Latin draft version of a text of part of the Provisions of Westminster published in March 1259 (the *Providencia Baronum*) and to discuss its contents was E.F. Jacob in his *Studies in the Period of Baronial Reform and Rebellion*, published in 1925.[15] Jacob also distinguished, in a way that Stubbs had not, between the 'administrative' decisions taken at Westminster and the proposed arrangements for the forthcoming special eyre and the permanent legislation enacted there.[16] Jacob was also the first scholar to discuss various of the texts of the 1263 and 1264 reissues of the Provisions and correctly to note that they represented a revised version of the original Provisions of 1259 with various additions.[17] But Jacob's main interest was in local administrative reform during this period and the remedying of local grievances. He did not attempt to give anything like a coherent account of the gradual evolution of the legislation of this period over time or even a full account of the immediate political context of the reforms; and his interest in legislative texts did not extend as far as the Statute of Marlborough of 1267. There is a much more detailed account of the immediate political context of the baronial take-over of royal government in 1258, of the drafting of the 'Petition of the Barons' and of the relationship between the 'Petition' and the Provisions of Westminster of 1259 in R.F. Treharne's *The Baronial Plan of Reform, 1258–1263*, first published in 1932 and originally envisaged as the first part of a two-part study, of which the second part was never published.[18] Treharne also discussed the *Providencia Baronum* and the different published texts of the Provisions of Westminster and gave the first more general account of the contents of the Provisions of Westminster, though one which inevitably suffered from Treharne's lack of detailed knowledge of the earlier legal context. The one major contribution to our knowledge of the 'Petition of the Barons' (noting the existence of

[14] Ibid., II, 97.
[15] E.F. Jacob, *Studies in the Period of Baronial Reform and Rebellion, 1258–1267* (Oxford Studies in Social and Legal History 8, 1925), pp. 72, 78–83.
[16] Ibid., pp. 86–101. [17] Ibid., pp. 76–7, 121–5.
[18] R.F. Treharne, *The Baronial Plan of Reform, 1258–1263* (Manchester, 1932). For Treharne's plan to write a second volume see pp. viii–ix.

three separate and different texts) and of what can now be seen as three different draft texts that lie behind the Provisions of Westminster that has been published since was an article by the present writer originally published in 1990, which has since been reprinted in a collection of my essays.

There has also been some work on the use and later interpretation of this legislation. E.F. Jacob noted in passing some of the evidence on the plea rolls for the enforcement of various of the individual clauses of the Provisions of Westminster between 1259 and 1263,[19] and Treharne was able to add to this with further evidence drawn from the Chancery Rolls.[20] G.D.G. Hall was able to add materially to what was already known (and to look beyond 1263) in a brief discussion in his introduction to a jointly edited volume of *Early Registers of Writs* in 1970.[21] For the use and interpretation of the provisions of the Statute of Marlborough after 1267 the modern literature begins with the passing references to the provisions of the Statute in Plucknett's *Statutes and their Interpretation in the First Half of the Fourteenth Century*, first published in 1922.[22] Plucknett also dealt in rather more depth with the enforcement and interpretation of many of the clauses of the Statute of Marlborough in his Ford Lectures of 1947, first published in 1949 and subsequently reissued in a revised form in 1962.[23] The main weakness of Plucknett's work, however, was that it was based wholly on the material then in print. The only reported cases of the reign of Edward I known to him were those published by Horwood in the Rolls Series edition of *Year Books of Edward the First*.[24] Nor did he look at any one of the voluminous surviving plea rolls of the royal courts for the reign of Edward I which, as will be seen, provide an invaluable source of information on this subject.

In Part I of this book I make a fresh attempt to explore the background and contemporary context of the Statute of Marlborough. Chapter 1 looks at the immediate political context of the Provisions of Westminster of 1259 as part of the reform programme of the baronial opposition which came to power in the summer of 1258. It also examines the various surviving texts which allow us to trace the gradual evolution of the Provisions

[19] Jacob, *Studies*, pp. 110, 113, 115–16, 123.
[20] Treharne, *Baronial Plan*, pp. 209–10.
[21] *Early Registers*, pp. xlv–xlvii.
[22] T.F.T. Plucknett, *Statutes and their Interpretation in the First Half of the Fourteenth Century* (Cambridge, 1922). There is also an older scholarship on the enforcement and interpretation of the Statute to be found in Sir Edward Coke's *The Second Part of the Institutes of the Laws of England*, first published after his death in 1642, at pp. 101–55.
[23] T.F.T. Plucknett, *Legislation of Edward I* (Oxford, 1949 and revised edition of 1962).
[24] For the many other surviving reports see Paul Brand, 'The Beginnings of English Law Reporting' in *Law Reporting in England*, ed. Chantal Stebbings (London, 1995), pp. 1–14.

between the first suggestions for reform contained in the so-called 'Petition of the Barons', presented to the Oxford parliament of that same summer, and the final promulgation of the first version of the reforming legislation at the autumn parliament held at Westminster in the summer of 1259. Chapters 2 and 3 look in greater depth than has been previously attempted at the social and legal context of the individual clauses of the Provisions in the development of the common law prior to 1259, and try to explain why reform in these particular terms was thought necessary in 1259. They also analyse the ways in which the individual clauses changed during the course of drafting and what these changes meant and why they were made. Chapter 2 focuses on three different groups of clauses. A first group are those clauses which reformed aspects of the lord–tenant relationship: regulating distraints made to enforce performance of suit of court, preventing abuses of the lord's rights at succession and giving lords a right to control alienations to the religious made by their tenants. The second group of clauses are those giving landholders additional powers to control and bring to account the temporary managers of their lands, whether lessees or bailiffs or the trustee guardians of lands held in socage. The third group of clauses examined in this chapter are those which speeded up the process used by the king's court in securing the appearance of recalcitrant defendants and allowed those courts to override charters of exemption from jury service. Chapter 3 also looks at three different groups of clauses. A first section examines those clauses which were intended to reform the criminal justice system, eliminating abuses in the levying of *murdrum* fines and other kinds of unjustified amercements plus various kinds of beaupleder fine and exempting various categories of person from attendance at the sheriff's tourn. A second section looks at other clauses intended to eliminate grievances relating to attendance at sessions of royal courts held in the localities but not connected with the hearing of criminal pleas. The third group of clauses confirmed existing rules restricting the use of the right of distraint, gave clear authority for the release of distresses held within franchises when the franchise-holders failed to act and confirmed and strengthened various royal franchisal monopolies.

Chapter 4 considers the evidence for the enforcement of the Provisions of Westminster during their initial period of operation prior to the first reissue of the Provisions early in 1263. It looks at the evidence for the creation of new forms of action by Chancery and their subsequent use by litigants; for the enforcement of the legislation by means of plaints; for the citation and observance of the legislation in pre-existing forms of litigation; for the observance of the legislation relating to crown pleas fines and amercements; and for the observance of the legislation in relation to

initial and mesne process to secure the appearance of defendants and in authorising shorter adjournments between procedural stages in various kinds of action. It also analyses the degree of correlation that exists between observance of the legislation and the current political climate during this period. Much of the evidence used in this chapter has not previously been known to scholars and it allows a more accurate and more finely nuanced picture to be drawn of the enforcement of the legislation during this first period than has hitherto been possible. Chapter 5 examines the evidence for the reissuing of the Provisions in 1263 and 1264. It argues for there having been two reissues in 1263 (in January and again in June) as well as a single reissue in 1264. It discusses the changes made for the 1263 reissue, particularly in the preamble to the Provisions and in a number of minor amendments elsewhere, and looks at the four clauses added to the Provisions. The most important of these was a clause allowing the issue of writs of entry 'outside the degrees', which allowed writs of entry to be used in a wider range of situations than had hitherto been possible. The chapter also examines the surviving unofficial texts of the 1264 reissue and the minor changes made in the text of the 1263 reissue for this reissue under the Montfortian regime. Chapter 6 then focuses on the evidence for the enforcement of the Provisions as amended between the early months of 1263 and the winter of 1267, when the Provision of Westminster received their final revision and reissue as part of the Statute of Marlborough. Again the full range of possible ways of applying the legislation are considered: the use of remedies specifically authorised by the Statute, both those invented between 1259 and 1263 and the new remedies authorised by the clauses added in 1263; the enforcement of the legislation through pre-existing common law actions or in crown pleas sessions; the application of the legislation through modified process to secure appearances in court or through the shortening of adjournments; and the evidence for the enforcement of the one clause (on mortmain alienations) omitted from the 1263 and 1264 reissues of the Provisions. Although the poor survival of records makes our picture necessarily an incomplete one, more evidence survives than has hitherto been known to historians and it casts interesting light on the divergent attitudes towards the Provisions held and expressed during the period prior to their confirmation and re-enactment in 1267.

Chapter 7 concludes the first part by exploring in detail the final expanded revision and reissue of the Provisions in 1267 as the Statute of Marlborough. It examines the evidence for what this revision contained and what it omitted, together with the context of the eight new chapters added at the beginning of the legislation. The first four chapters were a restatement and reaffirmation of some of the basic norms of the

thirteenth-century legal system and were intended to provide ideological and practical support for the reassertion of royal power after the civil war. Chapters 5 and 8 were also in effect reaffirmations of existing law. Chapters 6 and 7 were the most obviously innovatory chapters. Chapter 6 dealt with devices which deprived lords of their rights of wardship. Previous writers have seen the chapter as intended to deal with a major social problem but it is argued that the chapter was probably a reaction to two specific cases then pending in the courts. Chapter 7 provided a further modest instalment of statutory procedural reform along the lines initiated in 1259 and continued in 1263: allowing the awarding of judgment by default in the action of wardship, but with various procedural safeguards.

Part II looks at the rather different story of the enforcement and interpretation of the Statute of Marlborough during the first four decades after its enactment, down to the end of the reign of Edward I, a period when the validity of the legislation had ceased to be in question and legislators had ceased to look for ways of improving or amending its text. The chief interest of the story in this period is in seeing how the courts dealt with the prescriptions of the legislation and how useful they proved to be to individual litigants. This is the first time that the evidence of the unprinted plea rolls and unpublished law reports of the reign (as well as that of the Year Books of the reign of Edward I already in print) has been used for this purpose. These new sources, as will be seen, make a major contribution to our understanding of how the legislation was enforced and interpreted in practice and also provide us with significant information on those parts of the legislation which do not seem to have been much used or cited.

Chapter 8 traces the post-1267 history of the one form of action specifically created by the Provisions of Westminster (and which received continuing authorisation from the Statute of Marlborough) in order to give effect to the new rules about the use of distraint to enforce the performance of suit to lords' courts laid down in the legislation, the action of *contra formam feoffamenti*. A thorough examination of the plea roll evidence indicates that it was in regular, but not common, use during this period and various reasons are suggested for why this might have been so. Also examined are the various ways in which the courts seem consciously to have departed from the specific provisions of the Statute during this period: in respect of the process used in the action; through altering or allowing the alteration of the limitation date used in the action, the date before which defendants had to show regular seisin of suit to make a good title to distrain for it; through refusing to give its natural meaning to the clause exempting those with charters specifying a fixed service 'for

all service' from suit other than in a single case brought by a special writ. There is also an analysis of the types of plaintiff and defendant involved in such cases, the types of court to which suit was claimed and the counties involved.

Chapter 9 starts by looking at the evidence for enforcement of the same chapter of the Statute of Marlborough through actions other than *contra formam feoffamenti:* at whether or not the lord's action authorised by the chapter ever came into existence; at the enforcement of the rules about liability to perform suit and other services contained in the chapter in the non-statutory action of replevin; and at the creation of various new actions specifically invoking that Statute to enforce the rules about liability for suit in respect of divided tenements which it laid down. It then focuses briefly on the enforcement of the clause protecting tenants against lords abusing their rights of wardship and primer seisin by awarding them damages in the short period before this was superseded by the more general provisions of the Statute of Gloucester of 1278. The chapter ends by looking at the enforcement of two measures intended for the benefit of lords: the new chapter 6 of the Statute of Marlborough protecting the rights of wardship enjoyed by lords against devices whose effect, if not intention, was to deprive them of this; and the clause of the original Provisions of Westminster which required the consent of the lord of whom land was held for any grant of that land to the religious which was omitted from all subsequent reissues, including the Statute of Marlborough, but which was being cited from the later 1270s as though it was legislation still validly in force and enforced through specially drafted writs citing its provisions.

Chapter 10 examines the evidence for the enforcement of the various provisions relating to abuses within the criminal justice system. The statements of county custom on the presentment of Englishry provide a good source for the extent to which individual counties picked up on the legislation confining the adjudging of *murdrum* fines to felonious homicides and specifically cited it, tacitly adopted it, or simply continued to state their previous liability to present Englishry in respect of accidental deaths as well. Examination of the actual practice of the justices in eyre in making judgments of *murdrum* provides, however, a much better guide to the actual extent of observance of the legislation by those in the best position to ignore or observe it and also to just how much difference the legislation made in practice to the communities who were liable to payment of the fine. The contrasting fate of two of the other clauses on crown pleas amercements is then traced: the continuing observance after 1267 of the clause exempting from amercement the sureties of clergy charged with felonies who pleaded their clerical status, and the effective repeal in 1267

of the clause exempting villages from amercement for failing to attend inquests 'fully' by a proviso that took coroners' inquests into homicides outside its scope. The chapter also looks at the post-1267 enforcement of the chapter exempting various categories of person from attendance at the sheriff's tourn through prohibitions issued by both Exchequer and Chancery; at the post-1267 extension of the statute's provisions to attendance at the private, franchisal view of frankpledge and their enforcement through litigation; and at the enforcement of the rules about attendance at the tourn and at view of frankpledge through a variety of common law actions. The chapter concludes by considering the evidence for the enforcement of the clause abolishing beaupleder fines, unless they had become fixed prior to 1230, and the variety of different ways this was enforced in practice: through prohibitions, through special actions based on the litigation, through plaints, through presentments and through citation in the common law action of replevin.

Chapter 11 investigates the effectiveness of the various chapters of the Statute relating to the procedures of the king's courts. It looks at the evidence for their compliance with the prescriptions of chapter 12 of the Statute of Marlborough on the abbreviation of adjournments in actions of dower and actions of *quare impedit* and darrein presentment and the telescoping of mesne process in *quare impedit* and in personal actions generally; at the enforcement of the provisions for the awarding of judgment by default in *quare impedit* and the various technical problems this posed for the courts, and the use of the similar provisions (but with a much more complicated preliminary process) in the action of wardship and why this seems to have been rather less successful in practice. The chapter also looks at the post-1267 history of the writ of *monstravit de compoto*, an action of account employing a special initial process: at the different forms of this writ; at the procedures required of those who wished to use the writ (and at the evidence suggesting that initially it was only available to a limited group of persons enjoying privileged access to Chancery); at the initial process which the writ authorised and the subsequent process used when that initial process failed to produce the defendant in court; at the different types of defendant against whom the writ could be brought; and at the remedies available against its improper use and the various technical problems of statutory interpretation these raised for the courts. It concludes by considering briefly the fragmentary evidence on three other clauses: that authorising the courts to override charters of exemption from jury service; that prohibiting the amercement of warrantors resident in a county who were not in court when vouched to warranty in the eyre; and one limiting the justices with authority to amerce for default of common summons.