Jurisdiction as Property: Franchise Jurisdiction from Henry III to James I

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Introduction

In medieval and renaissance England jurisdictions were often held as property. Relationships between these jurisdictions were property relations. The basic laws of jurisdiction were trespass and title. Infringement of a jurisdiction was a trespass, and abuse of a defendant by a court could be a trespass. In addition, the king could use his writ of right to challenge title to a franchise. In determining title, a crucial idea was seisin, which for franchises generally meant proper and continual use, and for jurisdictions in particular came to mean the following of proper procedure. Defense of trespass by and seisin of a franchise court came to imply obligations of protecting individual rights and serving the public good as well as private gain. Thus the property relations between franchises played a significant role in the development of English jurisdictional and procedural law.

I. Franchises

Franchises were incorporeal hereditaments and included a wide variety of rights with a political or public flavor such as rights to collect tolls and duties, to incorporate, to hold a market or fair, and the right to vote for Parliament. Jurisdictions were franchises defined, by custom or statute, in terms of the territory, people, and subject matters over which jurisdiction could be lawfully exercised, and at least broadly in terms what procedures would be followed. These were bundled with the right to use certain police powers in certain ways (defined by custom or statute) to execute the process(es) and remedy(s) required of these jurisdictions and the right to collect the fines, amercements, or forfeited property associated with such jurisdictions for the benefit of the franchise holder.[1] These jurisdictions were named sometimes for the remedy ("pillory," "gallows." "infangthief" for the act of hanging), sometimes by the territory ("hundred"), sometimes by the subject matter ("infangthief" for theft, "waif" for strays, "team" for chattels), and sometimes by the associated process, plea or writ ("the sheriff's pleas"[2] for all those pleas typically heard in county rather than manorial court, "pleas of hue and bloodshed," "pleas *de vetito namo* [withernam]" "return of royal writs.").[3]

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[1] Donald W. Sutherland, *The Quo Warranto Proceedings in the Reign of Edward I, 1278-1294* 1 (pt. I ch. I, "Franchises and Legal Theory") (Oxford at the Clarendon Press, 1963) and W.S. Holdsworth, *A History of the English Law, v. I* 9-18 / ch. I(3), 47-63 / ch. II(2), (Little, Brown & Co. 1908) provide good introductions to the medieval law of franchises, with the exception of the trespass writs discussed in this paper. See also *Valence v. Bohun,* (K.B. 1276), *infra,* (right to hold county pleas in a local court implies the right to exclude the county court's writs)., *Burgman v. Ranulph* (K.B. 1277), *infra* (right to assess monetary damages implies right to imprison if the money not paid), *Att.-Gen. v. Newdegate,* (K.B. 1519), *infra,* ("infangthief" and "outfangthief" imply, and indeed even require for seisin, the erection and use when appropriate of a gallows). But in the late renaissance grants of franchise might be much more narrowly interpreted, at least when it came to power over a party's body. *Clark's Case* (K.B. 1596), *infra,* (franchise to tax does not imply franchise to imprison for non-payment of tax); *Dr. Bonham's Case* (K. B. 1616), *infra* (an expressly chartered right of a guild to police the practice of medicine and punish wrongdoers, including with imprisonment, does not imply a right of the guild to hold a court to try the cause of imprisonment).

[2] "Sheriff's pleas" referred to pleas typically heard in a county rather than hundred or manorial court, whether or not actually held by a royal sheriff.

This author did not find any franchise jurisdiction that did not have a physical territory. This territory was usual just the territory of the land tenure it was eventually appurtenant to, but sometimes other boundaries were defined in charters. In the case of jurisdictions not eventually appurtenant to a landed tenure, either the territory would be defined by traditional royal administrative districts (e.g. hundreds and counties)[4] or it would be expressly defined in the charter.

Many kinds of excessive jurisdiction exercised by a franchise holder could be found to be "exted[ing] their liberties beyond their true bounds"[5] thus give rising to a trespass or to amercement or forfeiture through a *quo warranto.* Sometimes franchise courts had exclusive and sometimes concurrent jurisdiction. Exclusive jurisdiction was implicit or customary for some kinds of jurisdiction,[6] such as a manorial courts (within the scope of their personal and subject matter jurisdiction and the territory of the manor) and counties Palatine (exclusive rights to all otherwise royal pleadings), but a variety of clauses could expressly exclude the king's officials, the running of the king's writs, or both from the jurisdiction's territory.[7]

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[3] *Britton* ch. XX p. 1, in Arthur Nichols ed., *Britton* 62 (John Byrne & Co. 1901), lists a wide variety of franchises extant in the late thirteenth century.

[4]The jurisdictions of both hundreds and counties could be held as franchises. A county jurisdiction could be appurtenant to holding general government over a county (a county Palatine) or severed from some other kinds of administration of the county (as in the right to hold county pleas at issue in *Valence v.Bohun, infra*). Cam estimated that in 1316, even after Edward I's attack on franchises, out of 628 hundreds recorded in a kingdom-wide census, 388 were held by subjects as franchises and only 240 were governed by royal servants. Helen Cam, *Law Finders and Law-Makers in Medieval England* 59 (Barnes and Noble 1962) To complicate things still further, Cam reports that hundreds could be held of, albeit not necessarily coterminous with, a manor. *Id*. at 30, citing Stanton, *English Feudalism* (1920) at 99-102.

[5] Coke's Commentary on the Magna Carta, in Steve Sheppard, ed., *The Selected Writings of Sir Edward Coke, v. II* 762 (Liberty Fund 2003).

[6]Blackstone would later call a franchise that was exclusive a "cognizance" and one that was concurrent a "liberty," but that language is anachronistic for the medieval and renaissance eras when franchise and liberty [*libertate*] were used to refer to both.

[7] Some franchises implicitly exclude some or all of the writs of other franchises, see *de Valence v. de Bohun, infra*.

Franchise courts were not, however, free to ignore the king's extraordinary writs.[8] As we shall see, these writs were generally only made out against franchise courts in two circumstances: when franchise courts exceeded their jurisdictional or procedural limits, or upon non-use, the failure to exercise the jurisdiction when appropriate.

[8]The most common extraordinary writs during the late medieval and renaissance eras were the *quo warranto* (the king's writ of right) and prohibition (the king's writ of trespass), described *infra*. *Habeus corpus* and *certiorari* were also sometimes used to reach into franchises; this paper discusses the use of *habeus corpus* to bring claims of false imprisonment by a franchise before the King's Bench, *infra*.

II. Quare (trespass)

Besides the *quo warranto* cases, the cases of most interest to the development of jurisdictional and procedural law were the pleadings of trespass involving franchise jurisdictions. A franchise official could trespass on the king's jurisdiction and a franchise jurisdiction could be trespassed upon. These trespasses often involved going beyond the customary scope of what we now call subject matter jurisdiction or personal jurisdiction, but they might also involve breaching customary or statutory limits on coercive procedures. Furthermore, an official of a franchise court could trespass on that court's defendant if the coercive process of that court, such as distraint of goods or imprisonment, trespassed on the king's jurisdiction or violated certain customary or statutory procedural requirements.[9] The defendant in franchise court would then become a plaintiff pleading trespass in the king's court, assuming the franchise did not also enjoy exclusion of the king's ordinary writs or the defendant in franchise court was falsely imprisoned and could obtain the extraordinary writ of *habeus corpus.* We will see examples of all of these kinds of cases *infra.*

The *trespas* or *transgressione* was an improper crossing of an actual or metaphorical boundary. Pleadings of trespass against or by franchise courts, detailed *infra,* took the general form of all early trespass. First the plaintiff asked "why [quare]" the act of transgression took place. Then the defendant denied "force and arms [*vim et*

[9] Similarly, a royal official could trespass against a defendant by using wrongful process or acting beyond his jurisdiction. Two of many such cases are found in *Select Cases of Trespass from the King's Courts, 1307-1399 Vol. I,* Arnold ed., Selden Society Vol. 100 (1984): *Wiseman v. Gibbs,* K.B. 27/400, m. 37 (Coram Rege roll, Trinity 1360), at 117 118 (bailiff defended arrest of goods as "by order of the lord king"), and *Hanwell v. Norton,* C.P. 40/474, m. 195d (De Banco roll, Easter 1379), (sheriff defended arrest of goods as execution of an Exchequer writ to levy the goods). Such cases are however beyond the scope of this paper.

armis]", either by denying the forceful act itself or by pleading a legal justification of that act. This is presumably similar to the thirteenth century form of complaints against royal officials that Plucknett found "curiously similar" to later forms of trespass.[10] As trespass actions involving franchises were common early in the history of trespass,[11] and were central to franchise law itself (as detailed in this paper), these actions probably contributed significantly to the development of trespass in general.

The very Latin name of the trespass writ (*quare,* "why")[12] strongly suggests that the focus of early trespass cases was not on the forceful act (*"vim et armis"*) itself but on the justification for that act. We will see that in complaints of trespass by or on franchises, the acts (imprisonment, confiscation of chattels, etc.) were usually readily conceded and that the focus of the pleadings was on the *quare*: on the legal justification for the acts.

[10] Plucknett at 371. See also *supra fn. 9* on fourteenth century trespass actions against royal officials.
[11] Sutherland at 10, fn. 1 lists eight cases of writs of trespass on a franchise in the space of fourteen years (from 1276 to 1290). The list is incomplete as this author found several other cases of trespass against a franchise during this period including *Valence v. Bohun,* briefed in detail *infra*. This author found reasonably good odds that a randomly chosen index entry for "trespass" from Selden Society volumes from the late thirteenth or early fourteenth centuries would be a case involving trespass on or by a franchise.
[12] Plucknett at 375.

III. Quo Warranto: Testing the Title of Franchises

D. Edward I's Quo Warranto Campaign and the Debate over Prescriptive Rights

The *quo warranto,* "the king's writ of right,"[13] was the action whereby the king recovered franchises were not properly held of right. The writ asked the defendant *quo warranto* ("by what warrant") the defendant claimed the right to hold a franchise. Over the centuries English kings conducted several campaigns wielding the *quo warranto* against franchises they felt had been unjustly usurped. The most significant of these were those of Henry III in the mid thirteenth century, Edward I from 1278 to 1294, and Henry VIII around 1519.

From the results of the thirteenth century *quo warranto* cases, Sutherland distilled three basic rules of franchise law up to 1290 as follows: first, that like all property, franchises originated by grant or recognition of the king; second, that seisin of an incorporeal thing consisted in its use, and was lost (along with right) upon non-use, and third, that a franchise should not be "abused."[14] The most hotly debated issue, not resolved until the Statutes of Quo Warranto in 1290,[15] was whether and the extent to which franchise rights could exist, like rights in land, as a prescriptive right through long use.

The actual arguments made by royal and franchise lawyers in court varied quite widely, and judgments also varied. Cam observed in the *quo warranto* records "widespread inconsistency, not only in judgments but in the arguments of the king's

[13] Holdsworth at 94-95 quoting *Selwyn Nisi Prius* (Ed. 1842) 1143.
[14] Sutherland at 8-9.
[15] 18 Edw. I Stat. 2 and 3 (1290).

counsel."[16]

On the one hand, at least some franchise owners succeeding to William's fellow Norman conquerors rejected the first rule, arguing that they owned their land and appurtenant franchises alloidally[17] by the same original right as that of the king, namely right of conquest.[18] Monasteries as peaceful enterprises could not make this claim,[19] but the Church argued, with much more success than the alloidal claims of lords, that it held its spiritual jurisdiction of God (via the pope), not of the king.[20] Also more successfully, both lords temporal and the Church argued that franchises could arise from prescription ("long user") not just by grant (*infra*). They also rejected the second and third theories, arguing franchises were, as with their land, theirs to use as they saw fit.[21]

On the other extreme, Romanist scholars such as Bracton, Fleta, and Britton read to varying degrees an imperial hierarchy of delegation from the king (as emperor) into

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[16] Cam, *Law Finders* at 41.

[17] That is, independently of the king. While the alloidal theory didn't have much success in England, a similar theory of ownership of land and jurisdiction independent of a king (indeed, they had no king) prevailed for several hundred years among the Norse settlers of Iceland. Jesse Bycock, *Viking Age Iceland* (2001); David Friedman, "Private Creation and Enforcement of Law: A Historical Case," http://www.daviddfriedman.com/Academic/Iceland/Iceland.html

[18] " In one thirteenth century *quo warranto* case, John of Warenne reportedly "held up in court his old rusty sword and said, 'Here my lords, is my warrant! My ancestors came with William the Bastard and conquered the lands with the sword, and I shall defend them with the sword against anyone who tries to usurp them. The king did not conquer and subject the land by himself, but our forefathers were partners and co-workers with him.'" Sutherland at 82, (quoting H. Rothwell ed., *The Chronicle of Guisborough* 216, (Royal Society, Camden Series, v. 89).

[19] Sutherland at 84

[20] Harold J. Berman, *Law and Revolution* 110-11 (Harvard University Press 1983). Berman reports that "in the thirteenth century more cases heard on appeal by the papal court in Rome came from England than from any other country," and writs could even be obtained from the pope to try original cases locally using direct papal delegates rather than the standard abbot's or bishop's courts. *Id*. at 261. Indeed at one point, this went even farther: King John "gave England to the pope and received it back as a fief, swearing an oath of vassalage and agreeing to send a yearly tribute to Rome." *Id*. At 262. The Magna Carta of 1215 did not go this far, but did declare that "the English Church should be free." *Id*. at 263. Compare this comment by James I in 1609, after Henry VIII had taken over the Church of England: "I am the head of Justice immediately under God." *The Case de Modo Decimandi, and of Prohibitions, debated before the King's Majesty,* Trinity Term, 7 James 1, 13 *Eng. Rep.* 37 in Steve Shepard ed., *The Selected Writings of Sir Edward Coke v. 1* 505 (Liberty Fund 2003).

[21] *Attn.-Gen. v. Newdegate,* (K.B. 1519), *infra* at 284.

the Anglo-Norman hierarchy of property grants. Bracton argued that jurisdiction over the "king's peace" could not be granted, only delegated, and thus could be revoked at will.[22] Fleta extended this argument to apply to all franchises.[23] Britton argued that the king can revoke at will franchises granted by his predecessors, and that they should be revoked unless they served "to hold the people's affections and speed justice."[24] Although these imperial views had largely won by the modern period, in thirteenth century England they were as Sutherland says "too extreme to be of practical value"; they were seldom heard in court.[25]

During the reign of Henry III, the university-trained legal scholar Bracton, following the legal texts of the totalitarian[26] Roman Empire, argued against franchise jurisdiction generally and prescriptive franchise jurisdiction in particular. Following the Roman model, he argued that all jurisdiction originated in the king. While exercisers of franchise jurisdiction argued that, like other kinds of property, franchise jurisdiction could come to be held by long use (what we call prescriptive rights), Bracton argued that

[22]Sutherland at 13, citing Bracton, *De Legibus,* fos. 14 and 55-66. Franchises involving the "king's peace", and thus being really delegated rather than alienated, for Bracton included view of frankpledge, withernam (*vee de nam*), infangtheof and outfrantheof, gallows, and the like: roughly corresponding to the modern criminal subject matter and tp police powers pertaining at that time to enforcement of such law.

[23]*Id*. citing Fleta, Bk. III, ch. 6.

[24]*Id*. quoting Britton i. 221-22.

[25]Sutherland at 14.

[26] The *Corpus Juris Civilus* of the Emperor Justinian, a compilation of Roman imperial law which was rediscovered in the West and became standard legal texts at university laws schools across Europe including Oxford and Cambridge (but not in the apprenticeship system and later Inns of Court where English common law lawyers were trained) in the two centuries before Bracton. The *Corpus* specified that law was created merely by the emperor speaking: "*Quod principi placuit legis habit."* As the unaccountable top of a single hierarchy, the emperor could reverse and even disobey his own edicts. The emperor, in other words, was above the law: "*Princeps legibus solitus est."* Scott Gordon, *Controlling the State* 117 (Harvard University Press 1999) quoting the *Corpus Juris Civilus* of Justinian. From Bracton onward, the Roman idea of a single delegation-based hierarchy of jurisdiction repeatedly came into conflict with the Anglo-Norman idea of legal pluralism via severally held franchise jurisdictions, and eventually largely supplanted it. A remnant of legal and jurisdictional pluralism remains in the United States in the form of federalism, and a new form has arisen in the form of arbitration clauses, which are however contract-centric rather than the property-centric franchise jurisdictions we are exploring in this paper. See also fn. 59 *infra,* for Spelman's view, which he applied to his analysis of franchise rights under *quo warranto* in 1519, reflecting the head/limbs metaphor for Roman *imperium*.

jurisdiction must be strictly granted and that exercisers of jurisdiction must prove this by producing a written charter or lose their jurisdiction. He believed that long use, rather than justifying jurisdiction, aggravated the offense.[27] Henry III initiated a *quo warranto* campaign in 1255 without much success. Anticipating royal arguments under Edward I, Henry's III's attorneys argued that a charter must specifically mention a liberty -- a charter granting simply a "manor," for example, would not be construed as granting a right to hold a manorial court by custom. Following Bracton, they argued that prescriptive rights and custom were insufficient to establish title to a franchise.[28]

Franchise jurisdiction however continued to expand under Henry III and IV, even as the meaning of the older Anglo-Saxon jurisdictions were giving way to newer Anglo-Norman jurisdictions, thus making old grants by charter more obscure and a poorer fit with the legal order. The exercisers of franchise jurisdiction adapted by demanding and getting new charters granting or recognizing franchise jurisdictions in the newer language.[29] Furthermore, the king's sales of franchises were a lucrative source of royal revenue.[30]

1274 Edward I, "the English Justinian,"[31] and his royal courts temporarily turned the tide against the franchises. In that year Edward sent out commissioners to investigate franchises, returning with Hundreds Rolls that Holdsworth declared "give us information about the jurisdiction of the thirteenth century similar to the information given to use by

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[27] Holdsworth, *A History of the English Law*, Vol. 1 at 47.
[28] Cam, *Law-Finders* at 41.
[29] Holdsworth at 48.
[30] Cam, *Law Finders and Law-Givers* at 30. It might be deduced that these revenues, as well as the practical functions performed by franchise courts that royal courts were not ready to replace, and finally the political power of the lords, provided strong reasons for the king himself to oppose the more extreme claims of the Romanists in favor of royal jurisdiction. Franchises would probably have sold for far less if they were merely delegations to agents and revocable at will per the Romanist argument.
[31] http://columbia.thefreedictionary.com/Edward+I

the Domesday Book respecting the fiscal system of the eleventh century."[32]

Inspired by Bracton and the Roman model, "the English Justinian," and under the authority of new statute changing the procedure for the writ *quo warranto*,[33] the royal bureaucracy used the information so collected to started a kingdom-wide attack on franchise jurisdictions. Britton reported that the procedure was to "let inquiry be made, what persons in the county claim to have [a long list of franchises, both jurisdictional and financial]."[34] First the claimants were ordered to appear using the writ *quo warranto*[35] If the putative franchisee failed to appear, the royal sheriff temporarily barred exercise the challenged franchise(s) and furthermore his (or theirs, in the case of a corporation) chattels were distrained as would occur for an action of trespass or debt. Britton does not suggest that any concurrent royal court was ready to hear the cases pending on the franchise court's docket, or even to take over that court's job in the near future. If the putative franchisee continued to fail to appear, or if they could not produce a written document with an expressed grant,[36] the royal court judged that "a personal wrong has been committed against us" [37] and the franchise was permanently "recovered" for the king..[38] If the document had been lost, or burned in a fire, that was too bad for the franchisee (and for his clients, if no alternative local royal justice was available as was often the case in the thirteenth century).

Cam reports that, contrary to the teachings of the Romanists, "immemorial tenure

[32] Holdsworth at 48.
[33] Statute of Gloucester (6 Edw. I)(1279).
[34] *Brittton* XX. 1 at 62.
[35] Holdsworth at 48.
[36] The requirement of a written grant would be relaxed after the reign of Edward I and once again holding a franchise jurisdiction by long use would be respected, and often recognized expressly by charter, but the rigorous *Quo Warranto* procedure described by Britton would continue. Holdsworth at 49.
[37] *Britton* XX.1 at 62-63. Note that the usurpation of jurisdiction is considered to be a personal wrong against the king, not a wrong against the public good or individual rights.
[38] *Id*. at 63.

was repeatedly accepted [by royal courts] as good warranty, especially in the earlier eyres [prior to the reign of Edward I], well before the Statute of 1290 [that resolved the issue by recognizing prescriptive right, *infra*]."[39] The *quo warranto* procedure's disruption of franchise dockets and the harsh requirement of a narrowly interpreted written grant in an era where writings were concise, expensive, and often lost, and much property was held by prescription, must have led to much complaint. Sutherland reports that between 1276 1290, while judicial dicta recognized "time out of mind,"[40] judgments were generally reserved on cases of prescriptive right, causing case to accumulate.[41]

In the spring of 1290, this stalemate was broken when a former ardent *quo warranto* prosecutor, Gilbert of Thornton, was tapped to head the King's Bench.[42] Among the first cases they heard were those of Robert fitz Walter and Henry of Grey, who claimed franchises but could only prove long seisin. The justices held that prescription did not prove right so that the king should recover the franchises. The prospect of the vast case backlog being decided against the franchise operators, as well as the prospect of forfeiting hundreds of other franchises yet to be prosecuted, caused a storm of protest at the Easter Parliament. In response the king reversed the judgments against fitz Walter and Grey and Parliament passed the Statute Quo Warranto in 1290.[43] It decreed, among other reforms, that henceforth that right based on "time out of mind" for franchises could be proved, as was already the case for prescriptive rights in land, by demonstrating seisin back 1189 (the first year of the reign of Richard I.

[39]Cam, *Law-Finders* at 37.
[40]Sutherland at 73.
[41]*Id*. at 72.
[42]*Id*. at 97 and 182-3.
[43]*Id*. at 72.

B. Seisin and Non-Use

Besides right by prescription, another common issue in *quo warranto* cases was non-use. Loss of seisen through "non-user" could lead, like other failures of right, to forfeiture of the jurisdiction or amercement of its holder either via a writ of *quo warranto*, the king's writ of right, or to failure in an action of trespass on the jurisdiction or by its officials.

A letter from Henry III to the abbot of Peterborough, who apparently held a view of frankpledge, in 1237 illustrates a probable case of non-use and its link to statutory requirements and the king's peace:

> Since we ordered all the bailiffs in our realm to see that watches were kept by night against the disturbers of our peace and commanded that the holders of liberties should see that this was observed in their liberties, we marvel greatly that you in your liberty of Peterborough have allowed homicide and theft to be committed, and have taken no steps to keep our peace...We enjoin you therefore that, as you wish to retain your liberty, you take care to deal with malefactors and peace breakers, so that it may appear that you are a lover of peace, and that we may not have to lay our hands upon your liberty because you have failed.[44]

[44] Cam, *Law-Finders* at 38-39, quoting *Close Rolls, 1234-1237*, at 556. If the abbot held a view of frankpledge, as Cam seems to suggest, it is ambiguous whether the abbot's faults described here would be categorized under neglect of a service to the king due by grant of a view of frankpledge (as Cam also suggests), or as a case where seisin is being lost through non-use, or both. It is, however, an anachronism, or at least the taking of a Romanist position out of the mainstream of actual thirteenth century holdings, to say this was "in effect exercising a delegated jurisdiction" or acting as a "royal agent," as Cam does. *Id*. at 38, echoing Bracton's argument *supra*. For one thing the acts of franchises dealing with third parties, even the franchises involving the king's peace, and except for the franchise of return of writs, could not bind or obligate the king to do anything. For another, the king's recourse, if the king did not like what the franchise was doing (or failing to do), was a writ of right (*quo warranto)* or trespass (prohibition), not an agency-related writ. Black's Law Dictionary, "Agency". In the case of return of writs, however, Edward I

By the time of Henry VIII 's *quo warranto* campaign, "use" and thus seisin of a franchise consisted not only of use for private gain (that had been a given), but increasingly also use for the public benefit,[45] as illustrated by *Att.-Gen. v. Newdegate* (K.B. 1519)[46] Newdegate "claimed infangthief and outfangthief" but "the king's attorney showed that he had not used it, and had also misused it, for he did not have gallows..."[47] Newdegate had explained that "his gallows were blown down by the wind," but over a year had gone by and they were still down.[48] Barrister Roo argued for Newdegate that "non-user is neither a forfeiture nor finable because this is a liberty granted to him which he may use as he wishes, and it is for his own advantage."[49] But Fyneux [C.J.] held that "This leet is granted for the common wealth as well as for the benefit of the party, and it must be used or else is forfeit." [50]

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at least did consider the franchise holder to be an agent: complaining of "a fail[ure] to execute my writs," he argued that "because you have these powers, you are my minister." Cam, *Law-Finders* at 43, quoting K.B. Michaelmas, 33-34 Edward I [K.B. 27/182] m. 103d.

[45] Note that this vague ideal of a "common weal" served by a franchise court is a different idea than the idea that franchise courts should protect the rights of defendants. Defendant's rights were probably developed in large part under the independent ability of abused defendants to sue the franchise holder or official for trespass in the king's court, *infra,* and in part under the idea of that certain abuses constituted loss of seisin or (in Cam's interpretation) failure to perform a feudal service, but not under the idea that non-use constitutes loss of seisin, which works against defendants.

[46] *Attn.-Gen. v. Newdegate,* K.B. 1519, in *Reports from the Time of Henry VIII,* v. II, Selden Society v. 121 (J.H. Baker, ed. 2004) at 284. This case brief is quite succinct and stylized, perhaps reflecting more a case that had achieved legendary status as part of a philosophical debate at the Inns of Court than reflecting the main arguments in the actual case.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

C. Abuse

A wide variety of procedural requirements were applied to different kinds of franchise jurisdictions, by custom and by statute. Some jurisdictions, such as the return of the king's writs and the view of frankpledge, were franchises to execute the king's ordinary writs and the king's law, and thus involved greater degree of royal oversight. Furthermore, manorial courts involved a greater degree of royal oversight than other franchise courts. Detailed procedural requirements date back at least to the *"leges"* of Henry I which specified a large number of procedures for holders of *soke* (the Anglo-Saxon word corresponding to the standard jurisdiction of a manorial lord over his *sokemen,* but which also could be granted in non-manorial contexts) to follow.[51]

Violations of statutes and customs involving these particularly royal franchises could constitute "abuse," sometimes also called "misuse," of the franchise, apparently a separate category from loss of seisin via non-use. Abuse could lead to amercement or, in rare cases, forfeiture of an enterprise under a *quo warranto.*[52] Cam refered to such obligations as "the extensions to [liberties] of the feudal principle of conditional tenure," analogous to knight's service, that she argued were implicit when the king sold a franchise to a lord.[53] Cam cited these obligations as stemming from the many royal grants of franchises for revenue (i..e. sales of franchises) between the time of Henry I and Edward I.[54] However, seigniorial abuses were lumped together with royal abuses in

[51] L.J. Downer ed., *Leges Henrici Primi* 127-37.
[52] Sutherland at 147.
[53] Cam, *Law Finders and Law-Makers in Medieval England* at 37-39.
[54] *Id.*

Henry III's thirteenth-century campaign to quell abuses.[55] These procedural obligations for maintaining title, whether they stemmed from a theory of seisin, from servitudes implicit in royal grants, or from statutes, varied widely between different kinds of jurisdictions. They seemed to be practically non-existent for Church and merchant courts prior to Henry VIII, for example (despite the latter stemming mostly from royal grants and the former from spiritual right), but were common for manorial, hundred, and county franchises that did not exclude the king's ordinary writs. Procedural requirements under the rubric of "abuses" are thus a complex topic unto themselves and beyond the scope of this paper.[56]

In 1519 Spelman accumulated long lists of procedural defaults amounting to "abuse" whereby a franchise could be amerced forfeited in a *quo warranto.* Spelman echoed Bracton in treating franchises as a form of delegation and added the following metaphor: "the body politic of this realm of England, which is composed of the king as the head and of the lords spiritual and temporal and the commons as the limbs....for the Romans had dominion over the whole world for as long -- but only for as long -- as they did justice."[57] Spelman anticipated Coke in *Dr. Bonham* and the York prohibitions dispute by arguing that "ministers of these laws and customs should be persons who are learned in the laws..."[58] This "shall be achieved through the king's authority, which

[55] Cam, *Law-Finders* at 151.
[56] For more arguments of abuse during the late thirteenth century see generally Donald W. Sutherland, *The Quo Warranto Proceedings in the Reign of Edward I, 1278-1294,* (Oxford at the Clarendon Press) (1963), Ch. VII (Investigations Into Abuses of Liberties). By the early sixteenth century the list of possible abuses has grown considerably and spread to merchant courts, see *Spelman's Readings on Quo Warranto* (1519), J.H. Baker ed., Selden Society v. 113 (1997), Lecture I (at 76)
[57] *Spelman's Readings on Quo Warranto* (1519), J.H. Baker ed., Selden Society v. 113 (1997), Lecture I (at 76). Compare Bodin, *Six Books of the Commonwealth,* Book III, Ch. 1: "The state [Julius Caesar's Rome] therefore flourished like a healthy body in which all the members obey the head without having any part in its deliberations."
[58] *Id*. Lecture I (at 76).

authority the king has only delegated."[59] Despite this view of franchises, they would still be considered a form of property, an incorporeal hereditament, at the time of Blackstone, albeit increasingly subject to restrictions, narrow interpretations of their powers, and greater control by the king's courts.[60]

The *quo warranto* allowed the king to recover usurped jurisdictions, and to maintain a general background threat against jurisdictions that got too far out of line, but it did not protect wronged defendants and it did not provide a way for jurisdictions to interact with each other on an ongoing basis. For those functions, we turn to trespass.

[59] *Id.*

[60] A major exception to this trend were the very large franchises, the corporate and Palatine counties and colonies, the legal form of which persisted up to the Royal South African Company (granting the government of Rhodesia, now Zimbabwe) at the end of the 19th century.

IV.Trespass on a Franchise

Trespass on a franchise could take a variety of forms. Such a trespass could involve active interference with the operation of the jurisdiction or simply competition to the damage of a franchise held as an exclusive right.

When the abbot of Ramsey tried to hold a leet court "for the conservation of the king's peace" in Marham, the abbot's steward (the leet court judge) was able to swear six of the needed twelve men. The defendant, John Crowe and his accomplices, "with swords, bows, and arrows, impeded the aforesaid six unsworn men by which...the aforesaid steward was less able to hold his leet." The defendants were attached "to answer the abbot of Ramsey concerning "a plea why [*de placito quare*]" the defendants had taken such action. The defendants issued a simple denial of the charges and the jury found against them for damages of to the abbot of ten pounds.[61]

Often the dispute was over land boundaries to which the franchise was appurtenant, as in *Baud v. Lotryngton,* where the defendant "with force of arms broke the pillory and tumbrel" belonging to a "market and fair" that had been granted to the plaintiff by the present king. The defendant argued that whereas he owned three parts of the vill, and the plaintiff only one part, he was therefore lord of the vill and the "common waste" on which the market's pillory and tumbrel were erected therefore belonged to him.[62]

Another problem that often eventually led to disputes was how to divide a franchise in inheritance. One method was to operate the franchise as a kind of

[61] *Abbot of Ramsey v. John Crowe et. al.*, C.P. 40/201, m. 143 (De Banco roll, Michaelman 1313) in *Select Cases of Trespass from the King's Court, 1307-1399, v. I,* Selden Society Vol. 100 (1984), Arnold ed., at 107.
[62] K.B. 27/302, m. 120 (Coram Rege roll, Michaelmas 1335), Selden Society Vol. 100, at 109.

partnership while dividing up the land it was appurtenant to. This occurred for the manor of Kirkby and its fair in *Thwing v. Down Biggins.*[63] Dispute between partners had been resolved, according to the defendants, by granting the plaintiffs the defendants' share of the fair and the defendants a right to one-third of the tolls from the fair. The defendants then "coming to the fair with force and arms, collected and carried away the toll and other profits" amounting to one hundred marks or thirty shillings, according to the plaintiffs and defendants respectively. The jury found for the plaintiffs damages of sixty shillings.

Another method was to pass on the franchise undivided, possibly severing it from other parts of the estate. *Valence v. Bohun*[64] involved an entire county court jurisdiction that had been privatized -- that of Pembroke county. It was a dispute over whether that county court or a smaller franchise court should hold "the sheriff's pleas" (i.e. the kinds of pleas that would normally be heard by a sheriff in county court rather than in manorial court) for a set of towns and lands within Pembroke county called Haverford. Joan de Valence and her husband William brought a "*placito quare*" [plea to answer why] Humphrey de Bohun had unlawfully obstructed the running of the writs of the franchise that Joan claimed to hold, "the pleas of the county of Pembroke," into Humphrey's towns and demesne lands in that county, collectively called Haverford.[65] By her attorney, Joan claimed to hold this franchise as the "purparty" [a share of a larger inheritance, but apparently the franchise itself passed undivided to her] from her brother, who in turn inherited the franchise from Walter, an earl marshal of England, who Joan argued held

[63] K.B. 27/304, m. 138d (Coram Rege roll, Easter 1336), in Selden Society Vol. 100 at 111.
[64] Coram Rege Roll, n. 21 (Easter 1276), m. 28, in *Select Cases in the Court of King's Bench, Edward I Vol. 1,* Selden Society v. 55 (G.O. Sayles, ed.) (1936), pgs. 23-25
[65] *Id*. at 23.

them by custom. The exchequer's inheritance records demonstrated this line of inheritance from the marshal.

Humphrey's reply started with a typical reply to a trespass: "den[ying] force and tort when etc. [*defendit vim et iniuriam quando etc.*]"[66] Humphrey argued against Joan's prescriptive claim with his own: "in the time of the earl marshal and before the earls marshal had anything in the aforesaid town, [Haverford] was a liberty by itself and in it were held all kinds of pleas by the steward of the same manor, and that the men resident in that liberty were never accustomed to come to the county court of Pembroke or to depart from that liberty to plead any pleas." The exchequer's inheritance records (seemingly contradicting the exchequer records brought forward by Joan) showed that "the pleas and prerequisites of the court of Haverford [*placita et perquisita curie de Hauerford]* were assigned in the purparty [i.e. as a share of inheritance, but again the franchise itself passing undivided] of the aforesaid Humphrey's mother."[67] Joan conceded this exchequer record was as valid as the one favoring her, but argued that Humphrey's pleas did not include "the pleas which belong to the [role of the] sheriff in the aforesaid liberty...the pleas of the court and the pleas of the county are different things..." as is indicated by fine differences of language in the exchequer rolls ("pleas of the court ["*placita curie"*] vs. "pleas of the county court [*placita comitatus*]").[68]

In order to resolve the contradiction between exchequer records, court looked to the actual procedures of the Haverford court to determine whether Haverford's pleas included all county pleas or pleas not held by the county. "If the pleas of Haverford were accustomed to be held along with the pleas of the sheriff, so that there was no

[66] *Id*. at 24.
[67] *Id*. at 24.
[68] *Id*. at 24.

separation," then the extenders [of the grants, who language is here being interpreted] must have intended that all those county pleas should be appurtenant to Haverford, and thus now belong to Humphrey.[69] If they were "held separately, that is to say, on different days or at different times on the one day," then only the "pleas of the court" belonged to Humphrey.[70] The parties conceded that "the pleas belonging to [the role of] the sheriff were wont to be held separately," and so the court held that "William and Joan should henceforth have the pleas and prerequisites belonging to the sheriff in the liberty of Haverford in the condition which they were in the time of their common ancestor" and amerced Humphrey for damages.[71]

Despite the contemporaneous *quo warranto* campaign (*supra),* in which the king's lawyer's argued one could not obtain franchise by prescription, in *Valence* the King's Bench seemed to accept such a claim, and even favored an argument of seisin, observing the nature of the franchise by observing actual court procedures, in order to untangle contradictory exchequer records. However, the court rejected Humphrey's broad claim of ancient prescription, presumably because it was contradicted not only by Joan's claims that the earl marshals were accustomed to hear county pleas from Haverford, but primarily by the exchequer records of her inheritance as interpreted in light of the separation of proceedings between the sheriff's claims and other claims heard by the Haverford court.

[69] *Id*. at 25
[70] *Id*. at 25
[71] *Id*. at. at 25

VI. Prohibition and other Trespasses on the King's Jurisdiction

The writ of prohibition was "a writ of trespass made against the king's crown" [original *un brief de trespas fet encountre la Coroune le Roy*].[72] Blackstone would later refer to it as a writ for "encroachment on jurisdiction, or calling one *coram non judice,* to answer in a court that no legal cognizance of a cause[.]"[73] The writ ordered the franchise court to stop proceeding with the prosecution of the case.[74]

A court that received a writ of prohibition could reply by its own letter explaining why it had jurisdiction and requesting a writ of consultation. If the royal court agreed with the letter, this writ would issue, and the franchise court could legally proceed with the case.

If not obeyed, and a consultation was not granted, the writ of prohibition could be followed by another extraordinary writ, a writ of attachment on the prohibition.[75] In this follow-on writ the franchise holder or official was called "to answer why [*quare*]" he was proceeding with a case "to the damage of the King's Crown and dignity etc. [*in lesionem Corone et dignitatis Regis etc.*]"[76]

One of the purposes of the prohibition, according to Flahiff, was "to publicize and make prevail" the king's claim that "the royal authority alone has the right to determine what jurisdiction is competent in doubtful cases." As we have seen, franchise officials could also sue, in royal courts, royal or franchise officials for trespass on their jurisdictions. However, the ecclesiastical courts, the main targets of prohibitions, at least

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[72] *Argentein v. Bishop of Chichester* (K.B. 1317), De Banco Rolls, 11 Edw. II, Hilary (no. 221), r. 152, Sussex, in *The Year Books of Edward II, 1317-18,* Collas and Holdsworth eds., Selden Society v. 61, at 221 (1942), quoting Bereford, C.J. (recorders notes in Law French).
[73] Bl. Comm. iii 111.
[74] Holdsworth at 93, citing Fitz-Herbert, *Natura Brevium,* seventh edition, pgs. 93-108.
[75] *Argentein* at 221.
[76] *Id.* at 221, from the record of the case (Banco Rolls) in Latin.

also claimed the right to determine jurisdiction in doubtful cases[77] and it was a canonical offense to cause a Church court action to be unjustly prohibited by a lay court.[78]

Although described as a the king's "writ of trespass," the writ of prohibition was always moved for by the litigant,[79] and the remedy for the *transgressione* was to order the case to stop rather than amercement for damages. If the king desired only damages he could bring an ordinary trespass action, *infra.*

Prohibitions often did not lead to the ordered termination of prosecution. Adams and Donaghue discuss the use of writs of prohibition during Edward I's *Quo Warranto* campaign, which was a also a prohibition campaign.[80] Of the six cases of prohibition orders against the Canterbury church court between 1292-94 that they discuss, only one ended up terminating that court's prosecution.[81] In one case, the party opposing the prohibition purged himself in royal court and then proceeded with the church case; in another the writ was read very literally to apply only to the original church court and the case was removed to a higher church court. In a third case, a writ of consultation was successfully obtained. In the two remaining cases, the prohibition seemed to be openly violated. In one of these cases the authors describe the prohibition as "patently unwarranted," and in the other the court was "probably relying on a previous

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[77]For example, in 1147 Pope Eugene II ordered Church officials to "not submit ecclesiastical transactions to the judgment of laymen, nor shall they cease to administer ecclesiastical justice because of the prohibition of laymen." Berman at 266, quoting G.B. Flahiff, "The Writ of Prohibition to Court Christian in the Thirteenth Century, *Medieval Studies* v. 7 (1945), at 241, fn. 71.

[78]Berman at 266, citing Flahiff at 243-244.

[79]Berman at 265 fn. 14, citing Flahiff at 232. It is perhaps more technically accurate to describe the writ of attachment on a prohibition, which as with a normal trespass contained the language *placita quare* and attached the franchise officials to appear as defendants, as the king's writs of trespass and the writ of prohibition itself as a kind of pre-emptive injunction and warning letter precedent to an action of trespass. Practically, however, while the substantive pleadings on these writs parallel those of trespass on a franchise, the prohibition writs are a set of more powerful extraordinary writs reserved for use by the king to facilitate the removal of cases.

[80] Norma Adams and Charles Donaghue, Jr., *Select Canterbury Cases 1200-1301,* Selden Society v. 95 (1978-9) at 100.

[81] *Id.*

consultation."[82] Adams and Donaghue also reported that parties could agree to proceed notwithstanding the prohibition: although technically a party could not renounce the king's right to a prohibition, the process relied on a party besides the king to prosecute an attachment on a prohibition.[83] Berman concluded that, at least with respect to Church courts, the royal writ of prohibition "could be a powerful weapon" but that "[f]or the most part, it was complex and unwieldy, relatively difficult to obtain, and easy to circumvent."[84]

Other large franchises could be large targets for prohibitions. Coke reported that the President of York (presumably the municipal corporation of York) complained to the king that his Common Pleas had issued "sixty or fifty" prohibitions "to the President and Councel of York."[85] Coke cited a wide variety of acts of the President and Councel of York that Coke and his fellow Common Pleas justices had adjudged jurisdictional excesses or procedural defaults. Coke complained that the President, while "a Nobleman," was not "learned in the Law;" that the Councel "although that they have countenance of the Law, yet they are not Learned in the Law; and yet they take upon them final and uncontroulable Decrees in matters of great importance...without Error, Appeal, or other remedy," and touted the superiority of the King's courts.[86]

Coke further complained that one defendant in a debt case "at the Common Law might have waged his law" but was not allowed to in the York court, rendering the

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[82] *Id.*
[83] *Id. fn. 4.*
[84] Berman at 265.
[85] *Prohibitions,* notes of a conference defending prohibitions against York, C.P. Hilary Term, 6 James I (1609), 13 *Eng. Rep.* 30, in Shepard, *The Selected Writings of Sir Edward Coke, v. I* at 501.
[86] *Id.* at 503. Coke's complaint assumes that his court (Common Pleas), already handling a wide variety of cases, most of them involving rural farmland or esoteric procedural issues, is more likely to discover the substantive errors of an urban court regarding urban disputes than it is to make errors of its own in cases that the urban court got right. But the motivation of Coke and his contemporaries, in prohibition as well as trespass-on-defendant cases (*infra*) to force substantive review by greatly expanding the detail of required procedure, becomes apparent from such comments.

proceedings "*coram non judice"* and thus to be stopped by prohibition.[87] For lawsuits "by English Bill on penal Statutes...the manner of prosecution, as well for the Action, Process, &c. as for the count, is to be pursued, and cannot be altered; and therefore without question the Councel in such cases cannot hold Plea..."[88] The crackdown on franchises displayed by Coke and his contemporary royal justices in cases of trespass by franchise official(s) against the defendant (*Clark's Case* and *Dr. Bonham's Case, infra)* carried over to prohibitions.

If the royal court desired a record of the franchise court proceeding, a writ of *recordiari* (later *certiorari*) could be made out. In *Upton v. Le Mazerer*[89] a "writ of right according to the custom of the manor," a dispute over lands of the manor, was removed via *recordiari* from the manorial court because the tenant party claimed to hold in frank-fee rather than as a sokeman of the lord of the manor. If this was the case the king, not the lord of the manor had personal jurisdiction over the tenant.

The agreed facts were that Hugh, ancestor of the current lord, had granted to Hugh, a sokeman tenant (i.e. a tenant then under the jurisdiction of Hugh the lord), the same lands that Hugh already held of his lord, but in "frank," thus releasing Hugh the tenant from the lord's to the king's jurisdiction. The current tenant, a successor to the tenant Hugh, claimed the grant was frank-fee, i.e. "for all time", while the current lord, an heir to Hugh the lord, agreed that it was a grant of freedom from the lord's jurisdiction but argued that the grant was only for "a term of life."[90] The current lord, heir of Hugh the lord, argued that "we are claiming these tenements as ancient demesne from the seisin

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[87] *Id*. at 504.
[88] *Id.*
[89] Hilary Term, 11 Edward II (K.B. 1317) 15, in Collas and Holdsworth eds., *Year Books 11 Edward II, 1317-18* 206, Selden Society v. 61 (1945).
[90] *Id*. at 207.

of [our] ancestor, which is higher in time than this deed"[91] In modern terms, the lord of the manor was claiming that the tenant now held only the reversion of the life estate, which was just the original sokeman fee held of the lord of the manor, and thus that the lord of the manor had regained jurisdiction over the tenant. The outcome of the case thus hinged on whether the grant adding to the tenancy freedom from the lord's jurisdiction was for a term of life or a perpetual fee. The outcome of this factual issue was not reported, but the reporter observed that "if it be found that Hugh [the tenant] had fee, the original writ, which remained in the lord's court, would abate...[a]nd if it be found that he only had for a term of life, then the parties shall go back to the lord's court, and plead with regard to the original etc."[92] The personal jurisdiction of each court was entirely contingent on the outcome of the property issue: as one Scrope (either a justice favorable to the lord, or one of the lord's barristers) observed, "[t]he scope of the averment is only to determine whether the tenements ought to be tried here or sent back to the lord's court."[93] The reporter also noted main property law issue on which jurisdiction hinged: "[w]hen a man recovers tenements from his ancestor's seisin, he shall recover the tenements in the state wherein his ancestors held them, and all deeds made in the meantime between the ancestor's recovery and the seisin will be defeated by this recovery."[94]

If the king sought damages rather than stopping a case, the king's agent simply pled a normal trespass. As with trespass on a franchise, the wrong could involve active interference or simply competition to the damage of a royal jurisdiction held as an exclusive right. When the vill of Shrewsbury, as John de Chester, who sued on behalf of

[91] *Id*.
[92] *Id*.
[93] *Id*.
[94] *Id*.

the king put it, erected a fair, "to the nuisance of the king's fair...in the amount of one thousand pounds [*sic*] per year,"[95] in the nearby vill of Overton, the community [*communitas*] was "summoned to answer the lord king concerning a plea why [*placito quare*]" it had operated the fair.[96] The community through its attorneys claimed that Edward I (the previous king) had granted and confirmed by charter the market, on condition that it not be a nuisance to a nearby fair, and expressly stated that the fair was not a nuisance to the Overton fair. The issue went to the jury, which apparently decided against Shrewsbury with the result that the community came to be "in mercy for several defaults."[97]

[95] By drawing away merchants and customers; no physical interference with the king's fair was alleged.
[96] *Rex v. Commonalty of Shrewsbury*, K.B. 27/216, (Coram Rege roll, Easter 1314), in Selden Society v. 100, *supra*.
[97] *Id.*

VII. Trespass By a Franchise Against a Subject

Besides seeking to remove a case through prohibition, another avenue for an aggrieved defendant was to plead, after the franchise court had imposed an imprisonment or distraint, and if the king's ordinary writs ran into the franchise, a trespass against himself or his goods. If the king's ordinary writs did not run into the franchise, in the case of false imprisonment an agent for the wronged defendant could plead for removal by the extraordinary writ of *habeus corpus*, after which false imprisonment could be pleaded. This section deals with such cases of trespass and false imprisonment brought against franchise officials.

A claim of trespass against franchise officials centered around the franchise's answer as to why (*quare)* the officials had been legally justified imprisoning the plaintiff or distraining his chattels. The justifications focused on the legality of the jurisdiction and procedures that led to the imprisonment or distraint rather than on the substantive law of the case.

The anonymous author of the late thirteenth or early fourteenth transcript *Lex Mercatoria* stated that a defendant wronged in merchant court "could have his recovery" against officials or holders of the merchant court "by a writ of trespass of the lord king, as a matter done of their own wrong and against the law and custom and against mercantile law."[98] The wrong must be procedural in nature: "whether the judgment was just or unjust in itself" was irrelevant.[99] The author gave only one example of a procedural default: if a judgment is rendered by a particular official (such as a mayor or seneschal) of the franchise rather than "by merchants of the same court."[100] By the early

[98] Anonymous, *Lex Mercatoria and LegalPluralism*, Basile, Bestor, Coquillette, & Donahue transl., (The Ames Foundation 1998) Ch. 12 "On the Rendering of Judgments", at 20.
[99] *Id.*
[100] *Id.*, presumably referring to the customary jury of fellow merchants.

sixteenth century Spelman[101] would list about a dozen different kinds of procedural faults that would render the process of a merchant court *coram non judice.*[102] Many of these faults could also be deemed "abuses" leading to amercement or forfeiture in a *quo warranto* proceeding.[103] None of these faults involved substantive error, consistent with our anonymous thirteenth century author's observation of justice "itself" being immaterial and with Coke's later complaints in *Dr. Bonham's Case* and the controversy of the York prohibitions that no remedy like a writ of error was available for defendants substantively but not procedurally wronged by a franchise court.[104]

In *Burgman v. Ranulph,*[105] Ralph son of Ranulph et. al., apparently officials of the borough court of Derby, were attached to answer John Burgman "on a plea as to why [*de placito quare]"* they imprisoned Burgman and took his goods and chattels. The defendants did not deny the imprisonment but instead explained the background of the lawsuit before the town court as a result of which the imprisonment occurred, and some of the legal procedures involved in that lawsuit. Walter of London (one of the defendants) replied against the charge of "trespass [*transgressione*]*"* that one Henry of Bolton "gave gage and pledge to the bailiffs [of Derby]" to sue John, who was then "convicted in six marks...because the aforesaid John failed in a certain law which he waged against the aforesaid Henry. And because he could not find surety for the aforesaid six marks, [William] arrested him until he could find good security for that same money." John replied that he had in fact found twelve men as surety. Presumably

[101] *Spelman's Readings on Quo Warranto* (1519), J.H. Baker ed., Selden Society v. 113 (1997), Lecture XII (Text A) (at 110).
[102] The phrase *coram non judice* (roughly translated "not presented before a judge") was used to indicate either lack of jurisdiction or particular procedural faults. Cf. *Dr. Bonham's* case (1616), *infra,* where Coke held that guild officials, not learned in law, did not constitute a proper court, thus false imprisonment because done under a procedure *coram non judice.*
[103] *Spelman,* Lecture XII (Text A) (at 110).
[104] *Dr. Bonham's Case,* (1610) Hilary Term, 7 James I, in the Court of Common Pleas (Coke, J.), from Sheppard ed., *The Selected Writings of Sir Edward Coke,* vol. 1 (2003), at 283.
[105] Coram Reges Roll, no. 30 (Hillary 1277), m. 12, in Selden Society v. 55, at 33-35

because the franchise court's procedure was proper, and in particular because John was not believed about his surety, all the defendants were found "in nowise guilty" of the trespass and let "go quit" and John amerced for a false claim.[106] John's challenge against the imprisonment was apparently not about the trial procedure (vaguely described by the reporter as "John failed in certain law which he waged"), much less its substance, but specifically over whether he properly obtained sureties during the remedy phase.

The ability of a wronged defendant to sue for trespass could make it a very expensive mistake for a franchise to act beyond its jurisdiction. In *Okeover v. Okeover*,[107] Laurence de Okeover brought an action against Roger de Okeoever for "false imprisonment, forcing the plaintiff to make fine, and carrying away his goods and chattels."[108] Roger "den[ied] force and wrong etc." and argued that Laurence his villein, and thus he had personal jurisdiction over him.[109] The jury, however, declared that Laurence was "a free man of free estate and condition" and awarded Laurence at his option damages of seventy pounds, a rather substantial sum for the time, or "all the goods and chattels" of Roger and his attorney (who was also involved in the unlawful imprisonment) and half their lands. Laurence opted for the latter.[110]

Every franchise had a territory (*supra)*, and plaintiff or prosecutor in a franchise court as well as the franchise officials had to be very careful to confine their coercive processes to within its bounds. In *Boddington v. Stanford*,[111] Simon of Boddington brought and action for false imprisonment against Steven of Stanford. Steven had successfully obtained a judgment of eight marks and sixty shillings against Simon from a

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[106] *Id*. at 34-35.
[107] K.B. 27/232, m. 28 (Coram Rege roll, Easter 1318), in *Select Cases of Trespass from the King's Courts 1307-1399, v. 1*, Selden Society v. 100 (1984), at 35.
[108] *Id*.
[109] *Id*. at 36. Cf. *Upton v. le Mazerer, supra*, another case where personal jurisdiction hinged on freehold.
[110] *Id*. at 37.
[111] C.P. 40/384, m. 109 (De Banco roll, Hilary 1356).

London Guildhall jury, "and likewise the same Steven be taken pursuant to the statute in such case" as a security for payment of the award. Before they could capture him, Simon had fled to the border between the liberty of London and Middlesex, and was found by Stevens and London bailiff hanging out "outside the bar of West Smithfield, London." Stevens and the bailiff arrested him there and imprisoned him in London "pursuant to the judgment." Simon argued that he had been arrested "within the county of Middlesex and outside the liberty" of London. The Common Pleas justices awarded Simon thirteen shillings and four pence from Steven, and the king for his trouble forty pence from Steven.[112]

Franchises were still quite active in Coke's day, and the cases collected by Shepard indicate that Coke recorded or presided over a large number of disputes involving franchises. In these cases the property nature of franchises was in the background, assumed or neglected; it was the multiplying and ever changing (thanks to an active Common Pleas and King's Bench as well as an active Parliament) procedures required for a franchise to properly answer trespass that were at issue. In *The Chamberlain of London's Case,*[113] the King's Bench expanded the power of municipal corporations by holding that the City of London could pass an ordinance to assess a tax not expressly granted by charter but implied by statute. Although the case had been removed from the city court via *habeus corpus,* the plaintiff apparently did not plead false imprisonment, but instead to be free of the tax. But then such corporate power was severely curtailed in *Clark's Case,*[114] an action for false imprisonment which held that

[112] *Id.* Nothing is said of the validity of the London court's judgment itself, so presumably Simon still owes the eight marks and sixty shillings to Stevens, if Stevens can manage to arrest him while actually within the boundaries of the liberty of London.
[113] K.B. 32 & 33 Eliz. I, Michalmas, *Reports v. 5 at 62b* (1590), in Sheppard ed., *The Selected Writings of Sir Edward Coke,* vol. 1 (2003), at 131
[114] K.B., 38 Eliz. I, Trinity term, *Reports* v. 5 at 64a, in Shepard, *supra* at 134.

without an express grant of imprisonment, the town of St. Alban's could not enforce its granted tax via imprisonment for failure to pay. The court cited Magna Carta:

> No freeman shall be taken or imprisoned...save by the lawful judgment of his peers or by the law of the land.[115]

As Cam reports, "law of the land" in later statutes became "due process."[116] Apparently the court held that the town's legal apparatus had fallen short of due process; how it did not say. The town court could only enforce the tax by means not forbidden by Magna Carta, namely by distress or an action (presumably in royal court) of debt.

In *Dr. Bonham's* case, even an express royal grant to a franchise, in this case the London College of Physicians, of the power to imprison, confirmed by Parliamentary statute, was held by the King's Bench, with an opinion written by Coke visiting from Common Pleas, to be void (and the statute itself void). Any such charter or statute was controlled by common law, which judged it void, if it was "against Common right and reason, or repugnant, or impossible to be performed." [117]

Coke alternatively held that the College's censors, which had tried, found guilty, and imprisoned the plaintiff, were not "made judges, nor a court given to them." The charter had expressly granted the power to imprison, but it could not be implied (as it formerly would have been) that this included the power to try, [118]

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[115] Magna Carta ch. 29, quoted in Helen Cam, *Magna Carta -- Event or Document?* (1965), at 18.
[116] Cam, *Magna Carta*, at 19.
[117] K.B., 7 James I, Hilary term, *Reports v.* 8 at 113b, in Shepard, *supra* at 264 at 275.
[118] *Id.* at 279.

at least not if the court did not follow proper procedure such as recording the pleadings.[119] Grants of jurisdictional or police powers must be interpreted strictly in order to prevent loss of a subject's liberty at the pleasure of others.[120] Coke thereby achieved what royal attorneys had often vainly tried to achieve during the *quo warranto* campaign of Edward I, namely a very strict (and in practice often ruinous) interpretation of franchise grants, but under the rationale of protecting the rights of subjects rather than of protecting the rights of the king.

[119] *Id*. at 280-81. Most franchise courts historically had not made records, but apparently in this post-printing-press era of literacy expectations were rising.

[120] *Id*. at 281. "Liberty" here is used in the sense of freedom from restraint, or in the sense of the general rights of Englishmen, rather than as a synonym for franchise, unless we stretch the property analog much further and deem the rights of Englishmen to be prescriptive franchises, or at least to treat the Magna Carta and subsequent statutes' grant of freedom from imprisonment etc. without due process to be a mass grant of such a franchise to all freemen. But by this time even for ancient franchises the property model had slipped into the background, so it may be unlikely that Coke or his contemporaries though of the "liberty" referred to here as a form of incorporeal hereditament.

Conclusion

As property, medieval and renaissance franchise jurisdictions could be trespassed against and challenged as of right. Furthermore, improper coercive process of a court could trespass against a defendant. Challenges of right included, in addition to issues of grant, prescription, and inheritance, challenges of loss of seisin through non-use.

Franchise jurisdictions contributed to the developing law of jurisdiction and procedure in England, as well as to the law of trespass itself. Seisin involved pleading that one exercised the franchise when appropriate, while answering trespass involved pleading that coercive process followed proper legal procedure. Early forms of trespass were commonly trespasses on or by franchise jurisdictions. Many cases influential in the development of procedural and constitutional law, such as *Clark's Case* and *Dr. Bonham's Case,* were cases of trespass by a franchise court against its own defendant in which the procedure followed by the franchise court was at issue. Reason dictated that procedures applicable to a wide variety of franchise courts were applicable to royal courts as well, and that procedures used in royal courts be made workable for franchise courts. As a result, despite the fact that the English legal world has moved to a largely Roman model of judicial hierarchy, our legacy in constitutional, jurisdictional, and procedural law is one developed from legal pluralism, in which many courts dealt with each other not as master and servant, nor even as principle and agent, but as diverse and often unequal partners that used property principles, with metaphorical as well as physical boundaries, to develop procedures to defend themselves and the parties in their courts. This partnership was reflected in the almost symmetrical use of writs of trespass on and by franchise officials against the king and vice versa, as well their symmetrical

use against each other. Thus did the property relations of franchise courts play a significant role in the development of English law.