The Recognition and Enforcement of Debts under the statutes of Acton Burnell (1283) and Merchants (1285), 1283-1307

Christopher McNall

(Magdalen College)

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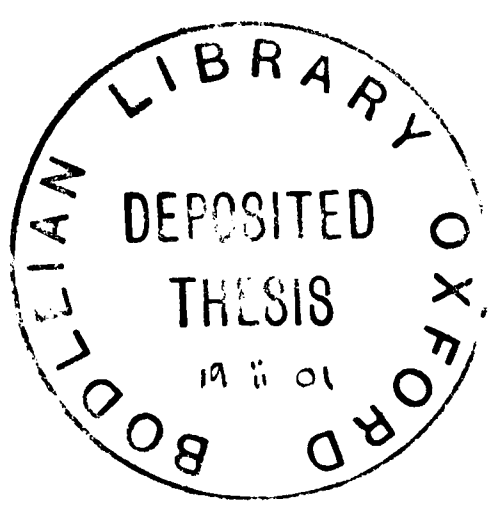

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CM
Coll: Jesu: Oxon:
MM

ABSTRACT

The Recognition and Enforcement of Debts under the statutes of Acton Burnell (1283) and Merchants (1285), 1283-1307

Christopher McNall (Magdalen College)
Thesis submitted for the degree of D.Phil
Trinity Term 2000

This thesis is about the statutes of Acton Burnell (1283) and Merchants (1285) which provided for the voluntary registration of debts before specially established registries, and sophisticated measures of execution against the defaulting debtor's person, goods, and lands.

The introduction describes the sources for this thesis; the London Recognisance rolls; the certificates of statute merchant into the Chancery; the Plea Rolls of the Royal courts and of local - principally, borough - courts.

Chapter 1 describes the background to the statutes, in particular the recoverability of debts before Royal, local, and mercantile courts before 1283.

Chapter 2 explores the immediate legal and political contexts of Acton Burnell. A draft of the statute is discussed and compared with the statute. The need for reform in 1285 is assessed, setting Merchants alongside Westminster II c.39. The provisions under both statutory schemes for recognition and enrolment of the debt, and the initiation of execution are described.

Chapter 3 evaluates the business of the London Acton Burnell and Merchants registries and the Boston Fair Merchants registry. The relative attractiveness of the statutory provisions *vis-à-vis* other modes of recognition is addressed.

Chapter 4 examines execution against the debtor's movable property. The statutory appraisal, sale and delivery of the debtor's goods are examined and compared both with the draft provisions and common law modes of execution. Appraisers' liability under the statutes is examined. Competing execution against the same debtor is investigated.

Chapter 5 examines the debtor's arrest and detention, gaolers' statutory liability, statutory costs and damages. It investigates the operation of the statutes once the debt had been satisfied, the mechanisms for obtaining the debtor's release, and challenges to unlawful imprisonment via the writ *audita querela.*

Chapter 6 examines execution against the debtor's immovable property. The chapter discusses the 'extent' by which the debtor's lands were to be delivered to the creditor under Merchants, and the nature of the creditor's holding of his debtor's immovables (the tenancy 'by statute merchant').

This thesis is 92,800 words in length, excluding tables and appendices

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E 368	Exchequer: Lord Treasurer's Remembrancer: Memoranda Rolls
JUST 1	Justices in Eyre, of Assize, of Oyer and Terminer, and of the Peace etc: Rolls and Files
KB 27	Court of King's Bench: Plea and Crown Sides: Coram Rege Rolls
KB 138	Court of King's Bench and other courts: Various writs and returns
SC 1	Special Collections: Ancient Correspondence of the Chancery and the Exchequer

Abbreviations

Abb.Plac.	*Placitorum in domo capitulari Westmonasteriensi asservatorum Abbreviatio* ['Abbreviatio Placitorum']
BL	British Library
BNB	*Bracton's Note Book*
Bodl	Bodleian Library
Br	*'Bracton' On the Laws and Customs of England*
CEMCR	*Calendar of Early Mayor's Court Rolls*
CFR	*Calendar of Fine Rolls*
CIPM	*Calendar of Inquisitions Post Mortem*
CLJ	*Cambridge Law Journal*
Co.Rep.	*Coke's Reports*
CPR	*Calendar of Patent Rolls*
CRR	*Curia Regis Rolls*
CUL	Cambridge University Library
D(D)	Defendant(s)
E	Easter Term
H	Hilary Term
HEL	Sir William Holdsworth, *The History of English Law*
JA	Justices of Assize
LI	Lincoln's Inn
Lib.Ass.	*Liber Assisarum*
LQR	*Law Quarterly Review*
M	Michaelmas Term

MS(S)	Manuscript(s)
P(P)	Plaintiff(s)
PM	F. Pollock and F.W. Maitland, *The History of English Law before the time of Edward I*
PREJ	*Calendar of the Plea Rolls of the Exchequer of the Jews*
PRO	Public Record Office
RR	Recognisance Roll
RS	Rolls Series: *Rerum Brittanicarum Medii Ævi Scriptores or Chronicles and Memorials of Great Britain and Ireland during the Middle Ages*
SR	*Statutes of the Realm*
SS	Selden Society: Annual Volumes
T	Trinity Term
Thorne	*'Bracton' On the Laws and Customs of England*
TRHS	*Transactions of the Royal Historical Society*

Transcription Conventions

<...> denotes illegible text

^{i}<...> denotes interlineation

^{d}<...> denotes text struck through

(...) denotes editorial note

/ denotes line break

italics denote marginal text

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INTRODUCTION

This thesis is about the statutes of Acton Burnell[1] (1283) and Merchants[2] (1285). Part of the wide-ranging legislative programme undertaken during the reign of Edward I (1272-1307), they provided for the voluntary registration of debts before specially established registries, and stringent and sophisticated measures of execution against the debtor's person, goods, and lands on default.

These two statutes are the wallflowers of the Edwardian legislative scheme, and they have attracted only the occasional nod from modern commentators. The sole extensive modern treatment of the statutes is that of Plucknett, who, in his 1947 Ford lectures, *Legislation of Edward I*, accords them a dozen pages.[3] More typically, they are given but a single paragraph in the most recent edition of Professor Baker's *Introduction to English Legal History*.[4] However, the mere fact that, within two years, two statutes dealing with the same subject matter came to be enacted highlights them, and the problems they were supposed to solve, as deserving of closer attention.

This thesis will endeavour not only to show that the statutes in themselves offer suitable material for treatment in a study of this sort, but also that they throw up challenging issues in several, and disparate, areas of law - for instance, imprisonment and land law: alleged abuse of the statutory power of imprisonment may well have encouraged the development of the writ known as *audita querela* in the 1290s, and the nature of a creditor's tenancy in the lands and tenements of a defaulting debtor forces reappraisal of whole areas of land law.

Chapters 1 and 2 investigate the backgrounds, development, and functions of the statutes. Chapter 3 describes the business of the London Acton Burnell and Merchants registries, and a 'flying' registry introduced at Boston Fair pursuant to Merchants. The remaining chapters of the thesis discuss the modes of statutory execution against defaulting debtors; namely, against goods and chattels (chapter 4), against the debtor's freedom (chapter 5), and against lands and

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1 1 *Statutes of the Realm* 53

2 1 *Statutes of the Realm* 98

3 T.F.T.Plucknett, *Legislation of Edward I* (Oxford, 1949, corr. and repr. 1962) 138-150

4 J.H.Baker, *An Introduction to English Legal History* (3rd edn, 1990) 354

tenements (chapter 6). Where appropriate, the provisions of the statutes are compared with other statutory provisions (e.g. the writ *elegit* given by Westminster II c.18[5]), and common law modes (e.g. the judicial writ *fieri facias*) for the enforcement of debts. Since this thesis aims principally to be a case-based study, extensive reference is made to enrolments drawn from the Plea Rolls of the Courts of King's Bench, Common Pleas, the Justices in Eyre, and the Justices of Assize.

Alongside description of the working of the statutes and analysis of the substantive difficulties which they generated, this thesis also aims to explore the interface between the statutory provisions, the common law, and the law merchant. The legal environment of the late thirteenth century was one of overlapping - and, to some extent, competing - jurisdictions. The great courts of King's Bench and the Common Bench (together with Royal justices sitting on Eyre or Assize) functioned alongside a thriving and heterogenous network of local courts. In certain respects the rules of law implemented in these systems differed, and any particular issue might well have been susceptible of differing treatment in different courts. One field in which this phenomenon is seen to occur is that of the available means of execution against defaulting debtors; hence, this thesis attempts - in so far as is achievable within its prescribed compass - to demonstrate how four systems (namely, Royal courts regulating debt inside and outwith the statutory provisions; local courts (principally, borough courts); and courts administering the law merchant) fitted together.

The Sources for the thesis

1. The London 'Recognisance Rolls'

The rolls described here[6] are those on which the statutes provided that recognisances ('statutes merchant') entered into before the Mayor (or, between June 1285 and April 1298, the Warden)[7] and the statute merchant clerk of the City of London were to be enrolled. Written in a tidy legal hand, they are, for the most part, in good condition, and most of the entries easily legible. These five rolls constitute an indispensable source for this thesis since they provide a

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5 Appendix F

6 Held at the Corporation of London Record Office, Guildhall, London

7 See Williams, *Medieval London*, 252-261

most comprehensive picture - albeit, just for five year-long 'windows' - of the entire business of a statute merchant registry.[8] No rolls for any other registry during this period have been located.

The sequence of the surviving rolls is far from complete. Only five pre-1307 rolls, for different years, survive. The fate of the other Edward I London rolls (probably about forty)[9] is not known. However, if the somewhat haphazard custodial history of the rolls of the Winchester statute merchant registry[10] exposed in Goldington v Bassingbourn (1309-1310)[11] was in any way typical, it is perhaps not surprising that so few rolls have survived. In Goldington the court ordered that the rolls for 1296-97 be produced. Two rolls were produced by the Mayor and statute merchant clerk, who avowed them to be the rolls demanded. However the Mayor said that the rolls had never been in his custody, since he had only very recently assumed office. It appeared that the rolls had been held by the clerk rather than passing from one Mayor to the next.

Each London roll covers a period of approximately twelve months. However, there is no overall consistency (i.e. between rolls) as to the commencement dates. Rolls 1, 4, and 5 seem associated with the regnal year (which, during the period of this study, began on November 20th), whilst Rolls 2 and 3 begin at about the feast of St. Juliana the Virgin (February 16th). Taking into account Merchants provision that the rolls be in duplicate,[12] it may be hypothesised that Rolls 2 and 3 (which begin in February) were perhaps Wardens' rolls,[13] whilst 4 and 5 (which begin in November) were the Clerk's rolls;[14] Roll 4 m 1 is endorsed '*Rotulis* (...) *Bauquell*' (John de Bakewell was the statute merchant clerk), and Roll 5 m 1d is captioned; '*Bauquelle Rotulis statuti de anno RR E xxvii*^{mo} '. Neither Roll 2 nor 3 carries such

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8 See Chapter 3

9 This figure is based on the assumption that, after Merchants, which prescribed that the roll was to be in duplicate (Apps C 22-23; D 15-17), there were two rolls per year one in the possession of the Mayor and one the clerk

10 None of which have survived

11 49 SS 97

12 Above, n 9

13 February appears in connection with the appointment of John Breton as Warden in 1286 and 1288; this perhaps might have influenced the commencement of a new roll at that time

14 Roll 1 is from the Acton Burnell period, i.e.when there was no requirement that the roll be in duplicate

notation. The preparation of Rolls 4 and 5 also differs from that of Rolls 2 and 3, in that Rolls 4 and 5 are ruled, suggesting 'running' compilation, whilst Rolls 2 and 3 are not.

Roll 1 [Acton Burnell roll]

January 8th, 1285 - November 29th, 1285

(Monday next after Epiphany 13 Edw I - Thursday, Feast of St.Andreas the Apostle 14 Edw I)

The roll consists of ten membranes, sewn 'Chancery' fashion (i.e., end to end), on which there are 235 (sequentially numbered) entries.[15] There are no wholly illegible entries. The dorses of the membranes are not used. The original order of the surviving membranes has been preserved.[16] However, the present membrane 1 does not seem to represent the original beginning of the roll. It has no heading (unlike the later rolls), and there are perforations left by stitching at its head. 'C' (*centum*) is entered in a contemporary hand alongside entries 38 and 140. Accordingly, given the near-accuracy of marking up every hundredth entry, it can be hypothesised that at least 60 entries are missing before entry 38. From the density of the entries,[17] it is estimated that at least two, or, possibly, three, membranes are missing from the beginning of the roll. From the period spanned by each membrane, it is estimated that the roll as originally composed would have begun in November 1284; i.e., a regnal year roll. This is still approximately a year after the earliest known operation of an Acton Burnell registry in London.[18] The existence of earlier membranes to Roll 1 (and, possibly, an earlier Acton Burnell roll) is also supported by statute merchant certificates[19] issuing from the London registry which relate to recognisances payable before the date at which Roll 1 (as currently constituted) begins.[20]

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15 The numerals are arabic, and a later addition

16 The dating of the entries from membrane to membrane is sequential

17 mm 1 and 2 each have 22 entries; over 9 fully written membranes, there are 227 entries - an average of about 25 per membrane

18 pp 62, 63

19 pp 11, 117 n 2

20 e.g. 49 SS lxi: Appendix IV (1) = C 241/1 nr 73, issuing in respect of an Acton Burnell recognisance entered into at the London registry, payable at Michaelmas 12 E I (September 29th, 1284); and see (at p 96) writ, dated May 11th 1284, relating to a recognisance payable on March 12th 1284; and bond (at pp 79-80) dated October 27th 1284

Roll 2[21]

February 20th, 1291 - February 15th, 1292

(Tuesday next after feast of St.Juliana the Virgin 19 Edw I - Tuesday next after feast of St.Juliana the Virgin 20 Edw I)

The roll is headed:

> **Rotulus Domini Regis de Recognicionibus Debitorum novi statuti West/ monasteriensis factis in Londonia [i]<tempore Radulphi de Sandwyc>[22]a die martis proxime post festum sancte Juliane virgine anno/**
> **Regni Regis Edwardi Decimonono usque ad eundem diem martis anno revoluto/ tempore domini Radulphi de Sandwyc' tunc custodis Civitatis Londoniensis et Johanne de Bacwell' clerico**

The roll has four membranes, sewn 'Exchequer' fashion (i.e., heads sewn together), with 287 sequentially numbered entries.[23] The entries are made, unlike Roll 1, on both sides of the membranes. There are four wholly illegible entries (numbers 258 to 261, at the foot of m 3d). The original order of the membranes, and the integrity of the roll as a whole, seem to have been preserved; 'C' is written, in a contemporary hand, alongside entries 100 and 200, and the dating of the entries on the roll from membrane to membrane is sequential.

Roll 3

Circa February 16th, 1293 - February 16th, 1294

(Day near feast of St. Juliana the Virgin 21 Edw I - Monday next after feast of St Juliana the Virgin 22 Edw I).

The roll consists of eight membranes, sewn 'Chancery' fashion, with 219 unnumbered entries, written on the faces of the membranes only. The membranes are unruled but tidy. The entries are written hard up to the right hand edge of the membrane. The entries are regularly spaced, generally with the equivalent of two lines between entries. The integrity of the roll as

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21 A small portion of the roll is transcribed by Hall; 49 SS lxxviii lxxix

22 This is a later, although still contemporary, insertion

23 The numerals are arabic, and a later addition

originally compiled seems to have been preserved: m 8 entry 6, being the 200th entry on the roll, is accompanied by a contemporary 'C'.

The dating of the roll is not without difficulty. A later wrapper attributes the roll to 20 and 21 Edw I. Membrane 1 is damaged: approximately 4 cm is missing from its head, and between 2 and 6 cm from the right hand edge of the entire membrane. The membrane does not appear to have had any heading. The damage means that the text of the first two entries is largely missing. However, the roll can be dated with a reasonable degree of certainty from internal evidence.

Membrane 6 is endorsed '*xxi*', although this may not be a contemporary note. A strip of parchment sewn alongside m 2 entry 8 reads, in a contemporary hand, '*Anno R*(egni) *E*(dwardi) *xxi* (tempore) *Domini Johannis de* (Breton) *custod*(is) + *J*(ohannis) *de Bauquelle* (...)'. The *Liber Custumarum* lists John le Breton as Warden of London between 1294 and 1296,[24] but the evidence of the roll (particularly the identification of the days on which certain immovable feasts fell) will only support the thesis that the roll is from 1293 and the early part of 1294. For example;

m 1 entry 12: Thursday, feast of St. Gregory = Thursday, March 12th, 1293

m 2 entry 4: Tuesday, feast of SS. Tibertius and Valerianus = Tuesday, April 14th, 1293

What remains of the first entry reads:

> <...> **virginis Anno regni Regis Edwardi vicesimo** <...>/
>
> <...> **recognovit se debere J de Lammere de Com' Suthampton' viginti l**(ibris) <...> /
>
> <...> **Cathedra anno domini m^{o} cc^{o} nonogesimo tertio**[25] **Et nisi fecerit concedit quod currant su**(per) <...>/
>
> <...> **provise in statuto dicti domini regis edito apud Westmon'**

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24 *Liber Custumarum*, 239

25 Old style; i.e., year beginning March 25th; means repayable February 22nd 1294

The date on which this entry was made (line 1) is missing save for *'virginis'*. The second entry is wholly illegible, but the third entry was entered into on Monday next after the feast of St.Peter in Cathedra (February 22nd). The feast of St. Juliana the Virgin falls on February 16th and seems appropriate, especially since this feast also happens to be that at which Roll 2 begins and ends. Plea Roll entries relating, in all likelihood, to this recognisance[26] both state that it was entered into in 20 E I (i.e., between November 1291 and November 1292),[27] payable at the feast of St.Peter in Cathedra 1294.[28]

Roll 4

Last week of November, 1295 (first week of 24 Edw I) - November 16th, 1296 (final week of 24 Edw I)

(a day in the week before the feast of St Catherine the Virgin 24 Edw I - Friday, feast of St.Edmund Archbishop 24 Edw I).

The roll consists of seven membranes, sewn 'Chancery ' fashion, with 141 unnumbered entries. Only the faces of the membranes have been used. The integrity of the roll seems to have been preserved.[29]

The roll is headed:

> **<...> Regis de Recognicionibus debitorum Novi statuti Westmonasteriensis factis in Londonia a die sancti/**
>
> <...> (an)**no domini Regis Edwardi vicesimo Quarto** (usque) **ad diem Iovis proximo post festum sancti/**
>
> **<...> proximo sequente anno regni Regis Edwardi vicesimo Quinto:** (slightly later hand) **factis coram domino Johanno de<...>/**
>
> **<...> custodis** [i]**<Londoniensis> + Johanne de B**(auquell clerico)

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26 CP 40/110 m 255d (London) (M 1295); /115 m 104d (Kent, London) (M 1296); William de Winchester v John de Lammere

27 Plea Roll entries are not always wholly accurate when it comes to the date on which the recognisance was supposed to have been entered into

28 For execution on this recognisance, see pp 83, 245

29 m 3 is headed 'tertius rotulus'; m 5, 'quintus'; m 6 'sexta rotulis anni vicesimo quarto'. A marginal 'C' accompanies m 5 entry 8, being the 97th entry on the roll

A (later) wrapper attributes the roll to 25 E I. However, at the foot of membrane 1 d '*xxiiii*' is written in a contemporary hand. Membrane 6 is headed '*vj*^{a} *rotulis anni xxiiij*^{to}'. The evidence of immovable feast days suggests that the roll spans 24 Edw I, and not 25 Edw I. For instance, the following are correct for 24 Edw I (1295-1296), but not for 25 Edw I (1296-1297):[30]

m 1 entry 14: Wednesday, feast of St. Thomas the Apostle = Wednesday, December 21st,1295
m 2 entry 2: Wednesday, feast of Conversion of St.Paul = Wednesday, January 25th, 1296

Moreover, some of the entries (e.g. m 2 entries 11 and 13) provide for repayment at Easter 24 Edw I (Easter 1296).

Membrane 1 is damaged. It is missing up to 9 cm from the left hand margin, down to entry 20. There is a 2.5 cm left hand margin, in which there are annotations, and the entries are written hard up to the right hand edge. The membranes have been ruled, with rulings spaced at approximately 4 mm. There are generally 2 blank lines between each entry, although on one occasion this space has been used to accommodate a later entry.[31]

Roll 5

November 30th, 1298 - November 19th, 1299

(Saturday next before feast of St.Andrew the Apostle 27 Edw I - Thursday next before feast of St Edmund Archbishop 27 Edw I)

The roll consists of seven membranes, sewn 'Chancery' fashion, with 171 unnumbered entries. The roll has been ruled, and the entries are regularly spaced at 2 line intervals. There is a 2 1/2 cm margin, which contains annotations, and the entries are written hard up to the right hand margin. Membrane 1 is damaged - between 1 cm and 3 cm of the right hand margin is lost.

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30 Cheney, *Handbook of Dates*

31 RR 4 m 6 entry 12

The roll is headed:

> **Rotulus Domini Regis de Recognicionibus debitorum Novi Statuti Westmonasteriensis/**
> <(factis in)> **London' a die Sabbati proximo ante festum sancti Andree apostili anno regni** <(Regis Edwardi vicesimo)>/
> **septimo usque ad diem mercurii proximo post festum sancti Edmundi Regi et Martyr'** <(anno Reg)>/
> **ni Regis Edwardi vicesimo Octavo.** (Later, contemporary, hand) **factis coram Henrico le Galeis maior** [i]**<Londoniensis> + Johanne de Bauque<**(ll clerico)>

The original order of the membranes seems to have been preserved.[32] Internal evidence - particularly the days on which immovable feast days are said to have fallen - gives cause to assign the roll to 1298-1299. The roll is endorsed, in a contemporary hand, *Rotulus statuti de anno Regni Regis Edwardi xxvii*^{mo}

These Rolls have been used in other studies. Childs has offered a discussion of the creditors' nationalities, the extent of movement by Castilian traders of their business from letter book recognisances to the statutory procedures,[33] and the nature of business involving Castilians on Roll 1.[34] The rolls were also used by Williams in *Medieval London*[35] to illustrate the biographies of figures active in London life during the period of that study. Rolls 1 - 3 were examined, in conjunction with the London 'Letter Books' 'A' and 'B',[36] by Postan in his article *Private Financial Instruments in Medieval England.*[37]

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32 Membrane 1 is marked 'Primus rotulis anno xxvii'; m 2 'Secundus rotulis anni xxvii'; m 4, 'quartus'; m 5, 'quintus rotulis'; m 6 'sextus'

33 cf. p 121-22, 124

34 Wendy R.Childs, *Anglo-Castilian Trade in the later Middle Ages*, (Manchester, 1978) 15; 35 n 33; 137; 191; 193; 200 n 133

35 Gwyn A.Williams, *Medieval London: From Commune to Capital* (London, 1963), especially Chapter 5

36 *Calendar of letter -books, preserved among the archives of the corporation of the City of London at the Guildhall*: *Letter-books* 'A' (c.1275 - 1298) and 'B' (c.1275 - 1312), ed.R.R.Sharpe (1899, 1900)

37 Postan, *Private Financial Instruments*, 38-40

In this study, the 1055 entries on these Rolls will be analysed to assess the 'mercantile' (or other) character of the recognisances. This will be accomplished through description and analysis of the status of the parties engaged in making statutes merchant before the London registry,[38] the purposes for which such statutes merchant were entered into,[39] and the sums recognised.[40] The Rolls will also be used to describe the phenomenon and incidence of repayment by instalments,[41] and the phenomenon and incidence of default leading to certification under the statutory procedures.[42] The Rolls will also be examined for insights into the daily operation of the London Acton Burnell and Merchants registries.[43] Annotations on the rolls will also be adverted to in this thesis, for instance, in respect of the phenomenon of the cancellation of the entry.[44]

2. Certificates of statutes merchant to the Chancellor

These are the certificates which, pursuant to the statutory schemes, were directed by Mayors and statute merchant clerks to the Chancellor upon default by a debtor outside the Mayor's power, requesting that a statutory writ be directed to the sheriff of a named county.[45]

The certificates are a major source for this thesis. They are, in the absence of any statute merchant rolls for this period other than those described above, the sole means for investigation of the activity of statute merchant registries other than London. For the London registry, combined analysis of the rolls and certificates enables issues, unanswerable by either source alone, to be investigated.[46]

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38 p 122 ff

39 p 130 ff

40 p 117 ff

41 p 106

42 pp 85 ff, 137

43 Chapter 3

44 pp 83, 184

45 Apps A 24-26; B 11-13; C 36-40; D 38-40

46 e.g. the incidence of certification; p 137

The certificates make up class C 241[47] at the Public Record Office. Bundles 1 to 54 - i.e, all those for the period of this study - were examined. 'Original' files generally cover six or twelve months, whilst files not identified as 'original' might contain certificates from as long a period as ten years. The number of certificates in a bundle ranges from 11 (C241/38) to 479 (C241/35). Approximately 9000 certificates were examined.

The certificates are written on slips of parchment, generally about 20 cm in length by 6 cm or so in depth. The certificates are cut to have a tag, on which there is sometimes the trace of a wax seal.

There does not appear to have been a standard 'template' for certificates; the text of certificates varies between registries, and also between certificates issuing from a single registry.[48] However, all certificates name the mayor (or his equivalent)[49] and clerk before whom, and the registry at which the statute merchant was entered into; the name(s) of debtor(s)[50] and creditor(s);[51] the sum or thing(s) recognised; and the date(s) on which repayment was due. Certificates issuing from some registries contain more information. For instance, certificates issuing from Appelby, Bristol, Newcastle-on-Tyne and Winchester give the date on which the recognisance was entered into, and certificates from Appelby, Lincoln and York give the date on which the certificate was issued.[52]

Manipulation of such a large sample necessitated the creation of a computerised database which enabled the certificates to be sorted. A searchable copy of the database accompanies this thesis on diskette.[53] Once capable of being sorted, the certificates are transformed from an unwieldy and difficult to navigate mass into an important source.

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47 C 241: Chancery: Certificates of Statute Merchant and Statute Staple

48 p 87 ff

49 p 67 ff

50 p 73 ff

51 p 74 ff

52 See Tables, pp 93-94

53 See Appendix N

This thesis uses the certificates in a number of ways; to describe and analyse the operation of statute merchant registries,[54] in particular the identity and social and economic status of those people using statutes merchant, the sums or things recognised, and the periods stipulated for repayment;[55] to provide insights into the 'private finance' aspect of the business operations of Italian finance houses;[56] to analyse the phenomenon and incidence of certification *per se* from statute merchant registries;[57] to calculate and assess the actual rapidity of certification following default;[58] to examine the phenomenon of 'repeat' certification;[59] to provide insights into the execution of statutes merchant against and by persons other then the original parties (for instance, against the representative(s) of a deceased debtor, and by representatives of a deceased creditor);[60] and to cross-reference the particulars of statutes merchant which appear in Plea Rolls entries relating to their execution. The certificates bring to light a considerable number of apparent 'idiosyncratic' uses of statutes merchant: for instance, the incidence of statutes merchant between relatives, between religious, and in other contexts.[61] There are notes on some certificates relating to the purposes for which statutes merchant could not be employed.[62]

This source has limitations. The principal limitation arises from the very nature of the source: a statute merchant only came to be certified when (a) it was defaulted upon, *and* (b) the debtor was outside the power of the Mayor. Hence, the certificates, numerous though they are, represent only a subset of all 'bad' debts, which, in turn, is a subset of all statutes merchant. It can be argued that the profile of a subset of 'bad' debts which the certificates offers cannot give an accurate idea of the profile either of 'bad' debts or of statutes merchant as a whole, but

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54 Chapters 2 and 3

55 especially Chapter 3

56 e.g. p 105

57 p 85 ff

58 Tables, p 94

59 p 95

60 p 108 ff

61 p 133 ff

62 p 130

this is the best which the available sources allow. It is also possible that the files are not complete.[63]

The variations, discussed above,[64] between the information given by certificates issuing from different registries mean that some of the certificates - in particular, the 1500 or so certificates which issued from the London registry - cannot be fully employed (or, in some cases, not employed at all) in certain of the analyses founded on the certificates.[65]

3. Statute merchant bonds

No original statute merchant bonds (the 'obligatory writings' which were a counterpart to the rolls)[66] have been located. Since the statute merchant bond had to be produced by the person seeking execution,[67] most bonds were probably handed over to the debtor and destroyed on satisfaction of the recognisance. However, transcriptions of Acton Burnell and Merchants bonds survive on Plea Rolls.[68]

4. Plea rolls of the Royal courts

The Plea Rolls are part of the official records of the court whose business they detail, and, as such, are an indispensable resource for any case-based study of the law of this period. There is a virtually uninterrupted sequence of Plea Rolls throughout this period. Generally, there are four rolls per court (i.e., Common Pleas and King's Bench) per year.

This availability imposes limitations on study of the rolls. The first hurdle - a methodological one - generated by the rolls is the location of relevant entries, since like cases are not grouped together on the rolls, nor are the rolls indexed. There is no comprehensive calendar of the Plea

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63 For instance, originating certificates have not been found for all the statutory writs known to have been addressed to the sheriff of Lincolnshire in 1294-5; p 103

64 p 11

65 e.g. Time taken between default and initial certification; Tables, p 94

66 p 79

67 Apps A 11-12; B 7; C 29; D 32

68 p 79 ff

Rolls of either court for this period. Furthermore, once a relevant entry is found, a case may be respited from term to term (which means it has to be tracked from roll to roll).[69] Many cases eventually seem to disappear altogether, possibly because the suit was settled, or skip from court to court.[70] Cases also 'migrate' from one series of rolls to another.[71]

The second limitation goes to the substance of the study. The enrolments do not offer any verbatim account of the arguments of counsel or comments from the Bench. Rather the entries are heavily abbreviated and skeletal accounts, expressed to a considerable degree in formulaic language and in the third person, of the plaintiff's cause of action, the parties' versions of the facts, and any jury verdict, together with a note of any damages awarded or other order of the court. Baker has described the rolls as 'studiously (bypassing) the debates and intellectual processes which governed the moves or the decisions':[72] for these, the Year Books[73] must be examined. A jury verdict is recorded in only a small proportion of cases, but, even then, seldom departs from a straightforward factual account. Hence, the substantive weight of the cases which the entries represent is usually discerned in one of two ways; either the entry happens to contain some statement out of the ordinary (for instance, some contention as to a substantive legal rule), or the recorded facts disclose a relevant point of law: perhaps, above all, the rolls have to be approached with 'a due sense that not every word of a record is true or factually meaningful'.[74]

Plea Rolls of the Court of King's Bench ('Coram Rege' Rolls)

These rolls are class KB 27 at the Public Record Office.[75] The sequence of the rolls is virtually uninterrupted for the period of this study. There are 92 surviving rolls for the period

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69 e.g. Godard v Gras and others (1297-1300); CP 40/121 m 157 (M 1297); /129 m 154 (T 1299); /130 m 189 (M 1299); /131 m 93d (M 1300)

70 e.g. CP 40/97 m 106 (Kent) (M 1291) = JUST 1/375 m 3 (Kent Eyre, 1293)

71 e.g. from the Justices of Assize to Common Pleas; Espicer v Keyrdif; JUST 1/285 m 14d (JA, Bristol, September 1294); CP 40/115 m 143 (Gloucs) (M 1296); and to the King's Bench; Kyngeshemede v Say; JUST 1/1337 m 28 (1) (JA, Horstede, October 1306); KB 27/186 mm 62d; 70 (Sussex) (M 1306)

72 J.H.Baker, *Why the History of English Law has not been finished*, 12

73 p.22

74 Baker, *op.cit.*, 16

75 KB 27: Court of King's Bench: Plea and Crown Sides: Coram Rege Rolls

Michaelmas 11-12 Edw I (M 1283), the term in which Acton Burnell was promulgated, to Trinity 35 Edw I (T 1307), the term in which Edward I died. All the surviving rolls were examined.[76] Until Trinity 1288 the roll is generally in duplicate, and, for this period, only the Chief Justice's roll was examined.

The constraints imposed on this study by this source are those detailed above. However, despite these constraints, the King's Bench Plea Rolls reveal much of relevance. Numerically, by far the largest class of relevant entries describes problems encountered by sheriffs in executing defaulted-upon statutes merchant,[77] discussed in detail below.[78] Only some executions came to be enrolled, since there do not seem to be any corresponding enrolments on the King's Bench rolls for the overwhelming majority of the certificates issued.

Typically, such entries begin by detailing the original order to the sheriff, e.g.;[79]

Hereford'

Preceptum fuit vicecomiti quod quia Rogerus de Mortuo Mari miles soluisse debuit Nicholao Fulberti et Johanni de Novo Burgo sexaginta et decim [i]<marcas> videlicet in quindena Nativitatis sancti Johannis Baptiste anno regni Regis nunc decimoquartus triginta quinque marcas et in quindena sancti Martinis proximo sequenti triginta et quinque marcas sicut coram Radulpho de Sandwyco custode Civitatis Londoniensis et Johanne de Bauquelle' clerico regis recognovit et eas nondum soluit ut dicunt:

followed by an account of the executive action which was ordered;

bona ipsius Rogeri mobilia in balliva sua inventa ad valenciam dicti debiti si ad hoc sufficient vendi et pecuniam inde levatam eisdem Nicholao et Johanni solvi facerit et si emptorem ad hoc non invenerit tunc bona ipsius Rogeri mobilia per

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76 There are no surviving rolls for six terms during this period

77 There are 17 such entries on the King's Bench roll for Easter 1287 alone; KB 27/104

78 p 100 ff

79 KB 27/104 m 3 (E 1287); Nicholas Fulbert and another v Roger de Mortimer

> **racionabilem precium eidem Nicholi liberari facerit. Et si bona mobilia ad hoc non sufficient tunc corpus eiusdem Rogeri capiet et in prisona Regis salvo custodiet quousque eisdem Nicholo et Johanni de predicto debito plene fuerit satisfactum.**

and the sheriff's return or action;

> **Et vicecomes nichil inde fecit set mandavit quod Rogerus de Mortuo Mari feoffavit matrem suam duobus annis elapsis de omnibus terris quas habuit in balliva sua pro quibus cepit terras in Wallia in escambium. Et nichil ei remanet in balliva sua nisi tantum due carucate terre de quibus vendidit boves et totum instaurum et bladum per diversa brevia Regis pro debitis ipsius Nicholai et aliorum mercatorum Ita quod amplius levare non potest extra tempus seminant' et corpus ipsius Rogeri non cepit quia non venit in balliva sua post adventum brevi Regis set moratur ad terras suas in partibus Wallie**

and any subsequent executive order;

> **Ideo sicut alias preceptum est vicecomiti quod fieri faciet predictos denarios et quod capiet predictum Rogerum si invenerit etc et salvo etc Ita quod habeat corpus eius coram Rege etc a die sancte Trinitatis in quindecim dies ubicumque etc**

The database of statute merchant certificates allows the context of many such entries to be explored. For instance, several certificates identify Nicholas Fulbert as a Florentine merchant.[80] In the above instance, statutory execution seems to have been problematic. The Mayor of Hereford requested four times that a statutory writ be directed to the sheriff of Herefordshire.[81] Roger Mortimer seems to have been a bad debtor; he appears as a debtor of

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80 e.g. C 241/1 nr 124

81 C 241/2 nr 249; /6 nr 38; /18 nr 126; /49 nr 326. The explusion of the Italian bankers by Edward I in 1293 perhaps explains the lengthy period which appears to have elapsed between the third and fourth certifications

the Riccardi society of Lucca in 1294,[82] and is known to have entered into a statute merchant for £62-16s-6d in favour of two of the Riccardi partners. The Mayor of London requested four times that a statutory writ founded on this latter recognisance be directed to the sheriffs of Herefordshire and Worcestershire.[83] The King's Bench roll for Hilary 1288 indicates that these creditors were met with the same answer as Fulbert: Roger de Mortimer was in Wales, and could not be found.[84]

The second category of relevant cases which the Plea Rolls of the King's Bench contain is assizes of novel disseisin. Despite their scarcity[85] assizes of novel disseisin are of considerable assistance in exploring a number of substantive issues central to this thesis, in particular the nature of the interest held by the Merchants creditor in the lands and tenements of a defaulting debtor.[86]

The King's Bench rolls also contain many entries detailing process of enforcement on recognisances enrolled otherwise than under Acton Burnell and Merchants, e.g. in the Chancery, before the Justices Itinerant, the Steward and Marshal, and the King's Bench itself. For instance, on the roll for Trinity 1290, there are 31, 4, 3, and 24 such entries respectively.[87]

The King's Bench Plea Rolls have been well studied, and some entries relevant to this study can be found reproduced in the *Abbreviatio Placitorum*.[88] More recently, full (and accurate) transcripts (with parallel translations) appear in several Selden Society volumes, particularly the third volume of *Select Cases concerning the Law Merchant*,[89] and *Select Cases in the*

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82 E 101/126/7

83 C 241/6 nr 194; /8 nr 411; /14 nr 34; /24 nr 30

84 KB 27/108 m 24d (Heref) (H 1288)

85 Only eight assizes involving statutes merchant have been located

86 The tenancy 'by statute merchant'; Chapter 6

87 KB 27/124. Analysis by George Sayles; 57 SS cxxiii

88 e.g. Abb.Plac. 246 = KB 27/170 m 74 (Notts) (M 1302); JUST 1/673 m 16 (JA, Nottingham, Sept 1301). However, the entries in the *Abbreviatio* are in 'record' type, designed to reproduce the contractions used on the Plea Rolls, and no English translation is offered. As a calendar of interesting enrolments, this volume is, however, a good way into the original records

89 e.g. 49 SS 12, 19

court of King's Bench under Edward I.[90] The existence of transcriptions in print has been noted in this thesis, and, where possible, the texts of all cases so referred to have been checked against the plea rolls.

Plea Rolls of the Court of Common Pleas ('De Banco' Rolls)

These rolls are class CP 40 at the Public Record Office.[91] The sequence of the rolls is uninterrupted for the period of this study. There are 96 rolls for the period Michaelmas 11-12 Edw I (M 1283) to Trinity 35 Edw I (T 1307) inclusive.

The Common Pleas plea rolls are, in general, considerably larger than those of the King's Bench. This bulk has imposed certain limitations on this study, principally stemming from the limited time available for archival research. Accordingly, the investigation of the rolls proceeded along two avenues. The first has been the examination of twenty entries, the references to which were kindly provided by Dr.Paul Brand.[92] The second avenue has been to sample the entire run of Plea Rolls, looking at the rolls for every Michaelmas term from 1284 to 1306 inclusive.[93] Some cases will, without doubt, have been missed. But it is contended that this thesis draws on a sufficient bank of enrolled cases to meet the aim that it be a case-based study.

Like the King's Bench rolls, the Common Pleas rolls contain a substantial number of very brief entries detailing the enforcement of statutes merchant. The roll for Michaelmas 1288[94] has been examined by Hall, who has printed translations of four short entries, illustrating some of the fates which could befall the statute merchant creditor seeking execution.[95]

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90 e.g. 55 SS 163 = KB 27/101 mm 3 (Yorks), 35d (Yorks) (M 1286)
58 SS 84 = KB 27/157 m 32d (Warws) (H 1299)

91 CP 40: Court of Common Pleas: Placito Plea Rolls

92 See Table of cases

93 Save Michaelmas 1297, which was unavailable

94 CP 40/75

95 49 SS 109

Plea Rolls of the Justices of Eyre and of the Justices of Assize

These rolls are class JUST 1 at the Public Record Office.[96] For the purposes of this discussion, the rolls, and the business which they contain, fall into two groups; the plea rolls of the Justices of Eyre, and those of the Justices of Assize.

Plea Rolls of the Justices of Eyre ('Eyre rolls')

The first difficulty in the use of the Eyre Rolls is selection. There are often several extant plea rolls for each of the 34 Eyres during the period of this study. For instance, there are six surviving rolls for the Westmorland Eyre, held at Appleby in October 1292.[97] Of these, only two contain 'civil' pleas (i.e, civil pleas originating in Westmorland), 'foreign' pleas (i.e, civil pleas originating outside Westmorland), and 'plaints'. These are the categories in which any cases involving statutes merchant would most likely have appeared. Cases involving statutes merchant would not ordinarily be expected to appear amongst the 'crown' pleas (criminal business), and the rolls dealing with crown pleas[98] were not examined.[99] One of the two relevant rolls from the 1292 Westmorland Eyre (JUST 1/985) is the so-called 'Rex' roll, whilst the other (JUST 1/987) is the roll of the senior justice for that Eyre. This pattern - that of a 'Rex' roll and one or more justices' rolls - is typical for most Eyres. For this study, the roll of the senior justice - generally being fuller than the 'Rex' roll - was examined in preference to the 'Rex' roll, unless the relevant portions of the 'Rex' roll were considerably more extensive than those for the corresponding justice's roll. Where a case can be found in both rolls, the texts seem to have varied little. For instance, Stirkeland v Goldington can be found at JUST 1/987 m 34 (Cressingham – the senior justice's - roll) and JUST 1/985 m 42 ('Rex' roll), and there are no more than the smallest differences of expression between the two accounts.

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96 JUST 1: Justices in Eyre, of Assize, of Oyer and Terminer, and of the Peace etc: Rolls and Files

97 Crook, *General Eyre*, 171-172

98 Similarly, any rolls in JUST 1 described as 'trailbaston' or 'general *oyer and terminer*' were not examined

99 Although, the hazard of this approach is revealed by Stirkeland itself, where a jury in the Crown pleas section of the eyre presented Goldington as a usurer; JUST 1/988 m 8d. I am grateful to Dr.P.A.Brand for drawing my attention to this enrolment

The Plea Rolls of the Justices of Eyre typically follow a similar format to the plea rolls of the courts sitting centrally, although, since the business on the Eyre rolls is distributed as described, navigation of the rolls and, correspondingly, the location of relevant material, is easier. The Justices of Eyre also heard assizes of novel disseisin, and four relevant assizes have been located. The Eyre rolls contain a variety of other relevant business, e.g. recognisances for debt made before the Justices of Eyre; the enforcement of recognisances for debt made *coram Rege*;[100] and the enforcement of statutes merchant.

Plea Rolls of the Justices of Assize ('Assize rolls')

The principal business of the Justices of Assize was to hear and determine assizes of novel disseisin. There are approximately 150 rolls in this series for this period. All were examined. There are several rolls for most counties. For instance, at least nine Assize rolls contain Westmorland assizes.[101] However, these Assize rolls do not cover all the period studied. There is a substantial gap; from 1291 (19 E I) to 1301 (29 E I), and there are similar gaps in the Assize rolls for most counties, which limits this study. A further limitation is the scarcity of assizes of novel disseisin involving statutes merchant; only 37 such assizes were located in the Assize rolls. However, the Assize rolls also contain other relevant entries, for instance dealing with *elegit* procedure,[102] execution on non-statutory recognisances,[103] and other obligatory writings.[104]

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100 e.g. JUST 1/48 m 5 (Berkshire Eyre, 1284)

101 JUST 1/984 (19 Edw I); /989 (29-30 Edw I); /990 (29-31 Edw I: assizes for Westmorland and Cumberland); /991 (31, 34 Edw I); /1271 (14 Edw I: assizes for Westmorland and Yorkshire); /1277 (15-16 Edw I: assizes for Westmorland and Yorkshire); /1283C (17 Edw I: assizes for Westmorland and Yorkshire); /1294 (19 Edw I: assizes for Westmorland and Yorkshire); /1321 (29 Edw I)

102 e.g. JUST 1/1300 m 20d

103 e.g. before the Treasurer and Barons of the Exchequer: JUST 1/379 m 23d (JA, Kent); JUST 1/1281A m 5 (JA, Gloucester, Dec 1288); before the Steward and Marshal: e.g. JUST 1/1311 mm 43 (JA, Suffolk, June 1298), 61 (JA, Norfolk, Sept 1298)

104 e.g. JUST 1/1279 m 30d (JA, Leicester, Sept 1288)

5. Plea Rolls of local courts

Chapter 1 describes and analyses the background and contexts of the statutes of Acton Burnell and Merchants, beginning with the enforcement of debt before courts other than the central courts. There was a considerable network of local courts of varying jurisdictional ambits during this period, and some of their records have survived. The rolls for London, Shrewsbury, and Great Yarmouth[105] were examined in the course of this study. The principal limitations presented by these is that they are generally rather short, and most entries correspondingly brief. Cases of any substantive relevance (for instance, those involving tallies and wager of law) seldom appear. However, these rolls are the only window onto this segment of the background to the statutes.

6. Registers of Writs and Registers of Statutes

This study has focused on post Acton Burnell Edward I registers and early Edward II registers; i.e., a window of approximately 40 years (1283 - *circa* 1320). Such registers were not official texts, but ordinarily constituted part of the library of institutions (for instance, religious houses) or individuals. Registers of writs have been examined to ascertain the various forms of writs associated with the processes of execution under Acton Burnell and Merchants, as well as the development of the writ *audita querela.*[106]

The point of departure was Hall and De Haas' *Early Registers of Writs.*[107] Hall and De Haas transcribe and comment on one register of writs from the very end of the period.[108] They also offer an appendix of manuscript *Registra Brevium.*[109] All eight registers deposited in the

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105 London 'Hustings' Rolls (1304-1306 only examined); Shrewsbury Town court (1272-); Great Yarmouth Borough Court (1280-)

106 p 192 ff

107 87 SS

108 Bodl. MS Rawlinson C 292 ff 9a 104a = 87 SS lv-lxi, 108-311; dated at 1318-20

109 87 SS xxiii-xxvii

Bodleian library and attributed by Hall and De Haas to between 1275 and 1307 have been examined.[110]

All the texts of Acton Burnell and Merchants in registers of statutes from the period held at the Bodleian Library[111] have been examined and collated.[112]

7. Printed sources

Of the primary sources in print, the Selden Society editions of various court rolls, and the series of Year Books for part of the reign of Edward II, have been heavily relied upon. Although the cases in this latter series, strictly speaking, fall outside the period of this thesis, they often raise interesting or difficult points for which no entries have been located in the Plea Rolls examined. The Rolls Series and 'Vulgate' editions of the Year Books have also been used for cases from the reigns of Edward I, Edward III and later.

The London 'letter books'- collections of memoranda and recognisances - have also been used, as well as the Calendars of the Early Rolls of the City of London Mayor's Court and State Papers - the Patent and Close Rolls.[113]

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110 Bodl. MSS Additional C 188; Bodley 559; Douce 98; Douce 139; Rawlinson C 612b; Rawlinson D 893; Tanner 400; Lat.misc d 82

111 Acton Burnell: Bodl. MSS Additional C 188; Lat.misc d 82; Douce 139; Bodl 559; Douce 98: Merchants Douce 98; Douce 139; Rawlinson C 612b

112 e.g. see Appendix C note

113 See Bibilography

CHAPTER 1

The background to Acton Burnell

1. The action of debt before Royal justices

Substantive principles

At the very outset, it must be asked whether the action of debt possessed any particular characteristics which may have prompted the development of a statutory scheme for the enrolment and execution of debt recognisances. On the one hand, it does not appear that the principal subsantive rule governing the action of debt, namely, that it lay only for a fixed (or liquidated) sum (a 'sum certain')[1] or a quantity of fungibles,[2] would have kept many creditors from availing themselves of the action of debt in the event of default. However, debt is inadequate in one commonly encountered situation; namely, where a debt was to be payable by instalments, the action of debt did not lie until the final instalment had fallen due. It was said that one debt generated one duty, and, accordingly, generated one action.[3] It will be demonstrated that the statutory procedures did have the advantage over debt in this respect, in so far as statutory execution could be sought following default on any one recognised instalment.[4]

Jurisdiction

During the 1280s, the practice developed that debt could only be brought before the Royal courts for sums of 40 shillings or more.[5] It is difficult to date this development with more

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1 2 PM 210; The writ of covenant lay if unliquidated sums were to be claimed (for instance, by way of damages for breach of contract) *ibid.* 216. Covenant did not lie for the recovery of a debt, even if the existence of that debt were attested by a sealed instrument, *ibid.* 219

2 i.e., 'Goods defined by weight or measure and generic character, but not identified in particular'; Baker, *Introduction*, 365

3 Simpson, *Contract*, 66

4 p 106

5 Palmer, *County courts*, 251. For the correlative question of whether there was maximum financial limit in local court jurisdiction, see p 29

precision; however, even if this jurisdictional line had come to be drawn by 1283, it does not seem likely that an inability to recover small debts in the Royal courts would have been a significant stimulus for Acton Burnell.

Mesne process

Even if the action of debt was properly brought (namely, it was substantively allowable, and was for a sum which the Royal courts considered triggered their jurisdiction), stumbling blocks remained. One of the governing principles in personal actions[6] was that there could be no judgment by default.[7] This meant that the defendant had to be brought to court; a task addressed by mesne process.[8] On the eve of Acton Burnell, mesne process in personal actions before the Royal justices seems to have been by summons, attachment by pledges, and grand distress (i.e., seizure of all the defendant's goods and chattels by the sheriff, who was to become answerable to the King for the proceeds). The process outlined some decades earlier by Bracton[9] had slimmed down considerably; *habeas corpus* seems to have disappeared as early as 1243,[10] and attachment by better pledges was abolished in 1275.[11] All kinds of distress other than the grand distress were abolished in 1263 by the reissue of the Provisions of Westminster.[12] Furthermore, it should be noted that Bracton countenances a considerable truncation of mesne process in personal actions involving merchants, 'whose affairs call for thorough and immediate consideration' (*quorum negotia maturitatem desiderant et*

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6 Which had not, however, gone uncriticised; e.g. Bracton (4 *Thorne* 368) '... it would be well at the outset to award the plaintiff seisin of chattels equivalent to the amount of the debt claimed, to give him a day and to summon him of whom he complains. If the latter comes on the day of summons, his chattels would then be restored to him, provided he answered on the principal matter; if he did not, he would no longer be heard as to his chattels but the plaintiff would thenceforth be made their true possessor'. BNB nr 900 (1224) has an order to the sheriff that he was to make up the sum owed from the chattels (this year's crops and five cows) and lands of a defendant in debt who had made repeated default

7 cf. the provisions of *Lex Mercatoria*; p 37 ff

8 2 PM 593; For 'final' process (i.e., process after judgment), see pp 28, 40

9 *Bracton* ff.439-444 (4 *Thorne* 363 - 378)

10 2 PM 593 n 4; Brand, *The Age of Bracton*, 71-72

11 Westminster I c.45 (1275)

12 And confirmed by the Statute of Marlborough c.12 (1267)

instantiam).[13] Bracton has a writ ordering the sheriff that 'every hindrance and delay' be put aside in favour of merchants: summons, attachment by gage and pledges, and attachment by gage and better pledges were to be omitted in such cases.[14]

In conclusion, Maitland's assessment of the 'tedious forbearance'[15] of mesne process in personal actions in Royal courts - perhaps not even true of the mesne process described by Bracton where the case involved merchants - [16] was probably much less justified by the 1280s.

Trial

Even when the defendant appeared, he was only put to any defence after the plaintiff's production of suit.[17] Little is known about the production of suit, but it does not seem to have been a burdensome requirement by the 1280s.[18] Examination of the plaintiff's suitors as to the facts of the plaintiff's claim and their personal knowledge of them never seems to have been common, although it seems that a defendant could demand such an examination.[19]

The defence available depended on whether the plaintiff could adduce any sealed writing to prove the debt. Where no such writing was produced, the defendant ordinarily could wage his law; i.e., the defendant could offer (the wager) to deny ('purge') the claim by his own oath accompanied by the oaths of a number of oath-helpers (compurgators); the defendant would then be said to have 'made' his law.[20] The number of oath-helpers needed seems to have varied, although Fleta states that, for every witness the plaintiff produced, the defendant was

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13 *Bracton* f.444 (4 *Thorne* 377).This is emphasised in *Bracton*; merchants '*celere habere debent iustitiam*' (f.334; 4 *Thorne* 63). Also, 'There are some ... personal actions which for good reason demand urgency and brook neither delays nor the formalities of attachments, but require quick justice (*maturitatem iudicii*), such as an *actio iniuriarum* brought by merchants '*qui moram trahere non possunt longam*' (f.439b; 4 *Thorne* 384)

14 Sutherland, *Mesne Process*, 484 n 11. This still leaves five stages to be gone through

15 2 PM 591

16 Which class, the preamble to Acton Burnell states, was intended to be benefitted by the statute

17 2 PM 606; 'no one is entitled to an answer if he offers nothing but his bare assertion, his *nude parole*'

18 Simpson's opinion is that, by the early years of the fourteenth century, the production of suit was becoming an empty formality (*Contract*, 137)

19 2 PM 609

20 2 PM 214

to produce two oath-helpers, up to a maximum of twelve.[21] If any of the oath-helpers refused in court to take the oath, made a mistake in swearing,[22] or if the defendant was short of the required number of oath-helpers, the defence would fail. Wager was risky for a defendant in that if the defendant waged, but failed to make, his law, the damages claimed by the plaintiff did not stand to be reduced by the court.[23] Maitland's opinion was that wager originally was devised so as to be difficult for defendants to accomplish,[24] but it seems to have become increasingly unattractive and inconvenient to defendants in respect of debt before the Royal justices following the centralisation of Royal justice in London,[25] although wager remained an option in local courts and at Eyre.

However, the Royal courts did not allow a defendant to wage his law against a sealed writing - a bond. Accordingly, on this ground alone, it was to the creditor's decided advantage to make a bond. Bonds may have been expensive to draw up, and tallies are known to have been widely used in respect of debts between private parties during this period.[26] Not all tallies were simple notched sticks: some were written upon, and some fixed with the debtor's seal. A recurrent question in the Royal courts during the later part of the thirteenth century was whether a defendant could wage his law against a tally; denial of wager would, it may be supposed, have encouraged the tendency to use tallies. The high-water mark seems to have come in the early fourteenth century, when there was some movement towards treating a sealed tally, if written upon, as a deed,[27] and, accordingly, disallowing wager against it.

Bonds

In the typical bond of this period, the debtor confesses himself to be bound in respect of money lent or goods purchased, and obliges himself and all his movable and immovable

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21 72 SS 211

22 Beckerman (*Procedural Innovation* 204) has described the mode of swearing oaths in manorial courts; right hand on the Gospels whilst swearing, kiss the book afterwards

23 YB H 35 E I (RS) 397 (H 1307)

24 2 PM 601

25 Baker, *Introduction* 87

26 Clanchy, *Memory to Written Record*, 124; H. Jenkinson, *Exchequer Tallies*, (1911) 62 *Archaeologia* 367; Plate 51, fig.2 shows private tallies

27 104 SS 87 (1320)

goods, for repayment on a specified day.[28] Besides the avoidance of wager, the bond had additional advantages. It could be an extremely sophisticated tool. For instance, a bond could detail the provisions for its enforcement, for instance against the representatatives of a deceased debtor,[29] or by the representatives of a deceased creditor.[30] The debtor could also agree to waive all potential challenges. The extent of this was such that the debtor often renounced in advance every possible exception that civil, canon or customary law might have given him, and submitted to harsh penalties in the event of default. Maitland summarises a 'form of obligation of money lent' (*forma obligacionis de pecunia mutuata*) from a 1270s cartulary[31] in which the debtor does just this. He submits to the judgment of any court - spiritual or civil - chosen by the creditor and submits to excommunication and distraint by the King's bailiffs by all his movable and immovable property. The bond authorised the sale of any goods taken by way of distress. The debtor renounced the privilege of crusaders[32] and all cavils. The debtor granted that the creditor or his proctor (*procurator*) were to be believed without making oath. A bond could also provide for the debtor to pay *interesse*,[33] damages and costs - these latter often at a sum set by the creditor, and immune from challenge.

Such bonds left the debtor with little room to manœuvre, and, given this, it is not surprising that such sophisticated creditor-favourable bonds were still being entered in formularies in the mid-fourteenth century,[34] perhaps kept current by the commercial training, known from the

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28 2 PM 225

29 A debtor's debts without writing died with him since his executors could not wage law for him; 80 SS clxxiii

30 In debt without writing, the executors' claim had to be reconceptualised as *detinue* (since *the executors* could not say that the money was owed *to them*); 2 PM 206

31 Maitland, *A conveyancer*, 65 nr 21; CUL MS Ee.i.1

32 The 'privilege of crusaders' meant that the formal order of attachment was not to be observed in personal actions, although *Bracton* f. 444 (4 *Thorne* 377) suggests this privilege was for the benefit of plaintiffs eager to depart on crusade with their business settled, rather than defendants

33 2 PM 225 nn 3, 5; not usurious since conceptualised as compensation for the creditor's 'opportunity costs' in not having the debt repaid on time

34 e.g. *Formularies bearing on the history of Oxford*, vol 1, 118 (MS Royal MS 12 D XI, *circa* 1340-1344)

pedagogic manuals it produced,[35] to have been taking place in Oxford at the end of the thirteenth and beginning of the fourteenth centuries.[36]

Execution of judgment

Once judgment against the defendant had been obtained, the next task for the plaintiff was to secure execution of it; this was accomplished by final process. At the time of Acton Burnell, the principal common law writ for procuring execution against a debtor's property was *fieri facias* (*fi.fa.*)[37] which ordered the sheriff to cause the sum to be 'made up' from the debtor's chattels and the debtor's lands.[38] The writ *fieri* (or *levari*) *facias de bonis ecclesiasticis*[39] lay against the ecclesiastical goods of beneficed clerks.[40]

2. The action of debt other than before Royal justices

There was an extensive and well-developed network of local courts during this period, although information on these is not as extensive as that for Royal courts.[41]

Substantive principles

Debt in local courts appears to have been governed by the same principles as in Royal courts.[42]

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35 H.G.Richardson, *Letters of the Oxford dictatores*. The possible author of CUL MS Ee.i.1 (n 31 above), John of Oxford, may have been one such teacher

36 P.A.Brand, *Courtroom and Schoolroom: The Education of lawyers in England prior to 1400*; and Chapter 3 in *The Making of the Common Law* (1987), esp.p. 74

37 More correctly, referred to as a *fi.fa. de terris et catallis*

38 e.g. 87 SS, writs 'J' 65; 66; 76; 77; 93 (Register 'J' is 1250s); see p 140 ff

39 e.g Writ 'J' 67; 87 SS 325 (1250s); see p 162 ff

40 Both *fieri facias* and *fieri facias de bonis ecclesiasticis* survive; Supreme Court Practice §3C-21; Civil Procedure Rules 1998 (SI 1998/3132) Part 47. In 1997, 47,976 writs of *fi.fa* (almost 90% of all writs enforcing Queen's Bench Division proceedings) were issued: *Judicial Statistics: Annual Report 1997*, 31 (HMSO, CM 3980)

41 Some of the few manorial court rolls of this period in print are *Court Rolls of the Manor of Hales*, 1272-1307; *Court Rolls of the Manor of Wakefield*; *Court rolls of the Wiltshire manors of Adam de Stratton*

Jurisdiction

In jurisdictional terms, it appears (although this is not easy to assess)[43] that, before Acton Burnell, debt for any amount could be brought in local courts by writ or plaint. Palmer has argued that, by the mid 1290s,[44] debt in local courts, influenced by the provisions for the action of trespass made by the Statute of Gloucester (1278) c.8,[45] had undergone a jurisdictional change, and that cases involving more than 40 shillings could no longer be brought by *plaint*,[46] although such cases could still be brought in those courts by writ.[47] However, plaint litigation in debt in the lower courts may have been limited to sums of 40 shillings or less even as early as the mid 1280s; Palmer adduces only two cases from after Hilary 1284 in which actions of false judgment were brought in the Common Pleas in respect of plaints in lower courts respecting actions for more than 40 shillings; one is for that sum exactly, the other for 40s 9d.[48] It does not, however, appear that any 40 shilling limit applied to merchants' transactions in such courts.[49]

Mesne process

Only hints of mesne process in manorial courts can be gleaned from the printed sources; mesne process seems to have been by summons,[50] attachments,[51] and distraints.[52]

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42 p 23

43 Palmer, *County Courts*, 252-253; there are so few rolls of local courts from the 1270s and 1280s, and those extant seldom state the sums sought nor whether the claim had been initiated by writ or plaint

44 Although it is not known whether this ante- or post-dated Acton Burnell

45 1 SR 48

46 For the ability of merchants to bring claims for more than 40 shillings before local courts by plaint, see p 34

47 Maitland has remarked, in respect of cases brought before the court of the Bishop of Ely from as late as 1327, that 'litigation was by no means always of a trivial kind; substantial debts and damages were recovered' (4 SS 113)

48 Palmer, *County courts*, 254 n 77; CP 40/73 m 11d (T 1288) (40s 9d); /90 m 123 (T 1291) (40s)

49 p 34

50 Perhaps followed by resummons; e.g. *Wakefield Court Rolls* 69 (plea of covenant); D *non venit per primam summonicionem. Ideo preceptum est quod resummoniatur*

However, the evidence for borough courts provided by borough custumals is quite large. As in Royal courts, there could be no judgment by default, and - inevitably- some defendants were reluctant to appear.[53] Custumals record a process in personal actions in borough courts comparable with mesne process in Royal courts; summons[54] (with amercement for failure to respond),[55] followed by attachments by gage and pledge,[56] and distraint by chattels.[57] For instance, in Norwich[58] the defendant was to be summoned on the day following the moving of the plea. If the defendant did not come, distress was to be levied.[59] However, the defendant was not to incur any penalty until three distraints had been made.

In summary, the plaintiff in local courts does not seem to have been much better or worse off, in respect of mesne procedure, than the plaintiff before the Royal justices, although some enrolments do hint at substantial delays; for instance, in St Michael v Troner (1275),[60] the plaintiff wine merchant claimed to have sold wine to the defendants' principals at Boston Fair in 1273. It is said that the plaintiff and his representatives 'had often laboured to obtain this money at Boston and at Norwich, but had not been able to get any part of it'. Similarly, in the court of the manor of Sevenhampton (Wiltshire), four debtors of a John de Cruce[61] were distrained (thrice, the record notes, by 'better' distraint) at five successive courts between December 1275 and June 1276 in respect of obligations noted in November 1275.[62] The editor

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51 Sometimes followed by 'better' attachment; e.g. *Wiltshire Manors of Adam de Stratton*, court 19 (Sevenhampton, September 1277)

52 Perhaps followed by 'better' distraints

53 e.g. 2 SS 66 (Honour of Broughton, 1258)

54 In Winchester (*circa* 1280; 18 SS 195), the franchisee defendant was allowed three reasonable summons (on three successive days) in suits where attachment did not lie

55 e.g. 18 SS 91 (Exeter, *circa* 1282)

56 e.g. 18 SS 102 (Great Yarmouth, 1273)

57 e.g. 18 SS 98 (Leicester, 1277)

58 18 SS 188 (before 1340)

59 i.e., there was no necessity for attachment

60 2 SS 152 (St.Ives Fair, 1275)

61 The debts were for sums of between ten pence and five shillings

62 Wiltshire Manors of Adam de Stratton, 15; Sevenhampton courts 2, 3, 4, 5, 6, 7

has noted that the claim then disappears from the rolls; 'the debt may then have been liquidated or the creditor too fatigued to proceed'.[63]

Trial

The treatise *Modus Tenendi Curias*[64] describes a trial procedure in debt before a local court. The plaintiff was to produce suit; without suit, the plaintiff's allegation was 'mere parol' (*solam vocam*), and would not be heard. However, it was the defendant's responsibility to challenge the absence of suit at the very outset of the case. It seems that suit was perhaps regarded as a more solid requirement than before the Royal justices since, the treatise makes clear that, when the defendant offered to make his law,[65] the this was to be against the plaintiff's suit, and not the plaintiff personally. A defendant who waged other than against the plaintiff's suit was to be regarded as undefended and amerced.[66] The defendant could also seek a 'love-day',[67] or the parties could be granted leave to make compromise before the next court.

The role of the plaintiff's suitors as witnesses, suggested by *Modus Tenendi Curias* seems to have been recognised in the 1277 Leicester custumal, which suggests that it was possible for the plaintiff in a plea of debt, and even if the debt was witnessed only 'by word of mouth' (*par vive voiz*), to prove his debt by his oath and witnesses alone.[68] However, such witnesses were to be examined as to their having seen or heard the transaction, and were to be 'lawful folk, and in no wise suspicious customers, not hired to swear false oaths'.[69]

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63 *Ibid.* 15

64 4 SS. The manuscript is *circa* 1307

65 The substantive requirements of the wager are not described. However, it seems to have been six-handed; e.g. 4 SS 85

66 4 SS 84

67 'A love-day, *dies amoris*, is a day given to the parties in order that they may come to terms during the interval'; Maitland 4 SS 20 note 'a'

68 18 SS 163; However, the defendant could wage against the plaintiff's *simple voiz*

69 *ibid.*; Perhaps the ease of proving a debt without writing in Leicester is the reason why, despite it having a substantial late thirteenth century trading community (see Bateson, *Leicester Records*), it did not acquire a statutory registry under Edward I

However, generally, pursuing a claim for debt in a local court did not, however, protect the plaintiff against a defendant waging and making his law where there was no writing. Maitland expressed doubt whether agreements in writing were at all common at this level; 'it is hard to believe that Littleport villeins ... were very ready with the pen, or that when they made agreements about their petty affairs, they procured parchment and ink and wax and a clerk'.[70] Beckerman, however, has noted the occasional use of deeds in lords' courts to bar compurgation.[71] However, Beckerman has argued that the reason so few cases involving specialties are seen in lord's courts may have been that, if such courts could try only by compurgation, and since the proffer of specialty may have barred compurgation, cases involving specialties had to be heard in other courts.

The number of oath-helpers in manorial courts varies from three to twelve,[72] and borough custumals varied from two to six.[73] The variation between borough customs in this respect may have presented some incentive to introduce a uniform system sufficient to bring the debt within that category of transactions where wager was denied but was less time-consuming than drawing up a bond. Some boroughs developed procedural rules which appear to discriminate against non-indigenous plaintiffs in debt. For instance, in Bristol no *extraneus* could produce suit, or prove a tally or debt, without a townsman with him.[74]

As for the actual incidence of wager, Maitland's examination of the rolls of the court of the Bishop of Ely at Littleport led him to remark that 'wager of law was not very common;[75] the

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70 4 SS 115

71 *Procedural Innovation*, 209 n 58 and accompanying text

72 Three-handed (Wakefield Court Rolls, 9 (1274); *legem suam fecit ut debuit cum tercia manu sua*; Halesowen, vol 1 p 26 (1271)); six-handed (Halesowen, vol 1 p 66 (1275)); twelve-handed (Wakefield, 67 (1275))

73 Three-handed (Preston, 12th century, 18 SS 172, 178; the two compurgators had to be burgesses); five-handed (Ipswich 1291; 18 SS 179; for pleas between denizen burgess greater than 16 and a half pence; three-handed for lesser pleas; 18 SS 180); six-handed (Leicester, 1277: 18 SS 163); seven-handed (London, 12th century; 18 SS 177)

74 18 SS 166 (Bristol, *circa* 1240)

75 The same seems to have been true of the Wiltshire manors of Adam de Stratton; there are only six instances in which a defendant appears to have offered to make his law in a plea of debt; *op.cit.* e.g. courts 9 (Sevenhampton, September 1276), 109 (Highworth Portmoot, May 1277)

defendants in debt ... seem to have generally preferred to put themselves upon a jury.'[76] Maitland also observed that wager might have been attended with integrity at local level, where 'it would not be easy for a man of bad repute to produce helpers'.[77]

3. Recovery of debt by merchants

This section will consider two issues, which are not easy to disentangle; the preferential treatment accorded merchants before Royal and local courtsl and the possible existence and nature of a 'law merchant'.

The nature of the 'law merchant'

To begin with the latter, the nature of the 'law merchant' during this period is an issue which has drawn different responses from commentators. Maitland saw the 'law merchant' as

> **a body of rules which stood apart from the common law. But it seems rather a special law for mercantile transactions than a special law for merchants. It would we think have been found chiefly to consist of what would now be called rules of evidence... We take the law merchant to be not so much the law for a class of men as the law for a class of transactions.**[78]

However, Baker adopts a different view. He sees the law merchant 'not so much as a corpus of mercantile practice or commercial law, as an expeditious procedure especially adapted for the needs for men who could not tarry for the common law'.[79]

Whatever its precise nature, it cannot be doubted that the law merchant was accorded some independent status in the reign of Edward I. This is evidenced (for example) by Royal writs which order the addressee to proceed 'according to the law merchant',[80] although it is not clear

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76 4 SS 113

77 2 PM 636

78 1 PM 467

79 [1979] CLJ 295

80 e.g. Palmer, *County courts*, 212 n 103 (1263 *iusticies* writ of *account*); and see p 55

whether mercantile law had become a distinct corpus of rules of which the courts of common law could be said to take notice.

There does not seem to be any definitive solution to these views. Some rules (for instance those relating to the substantive effect of giving earnest) do seem to have been regarded as part of the 'private international law' of the middle ages,[81] and reflect Maitland's conception of the law merchant. Others - such as the procedural concessions discussed above[82] - are most appropriately categorised as rules designed, as Baker has said, to expedite procedure. Merchants were unaffected by the shift in jurisdictional competence of local courts over debt claims in the 1280s, and there is evidence that merchants were accorded the privilege of seeking debts of more than 40 shillings by plaint in local courts;[83] it is difficult to characterise such concessions as either substantive or procedural.

Courts

Two types of court seem to fall within this head. The first type are those local courts which applied mercantile rules at certain times. For instance, a 1300 enrolment describes the custom of Boston Fair appertaining to levying a judgment debt.[84] The plaintiff claimed that £180 worth of his goods had been seized by the three defendants; the Steward of the court of the Earl of Richmond at Boston and two others.[85] The defendants admitted the taking, but pleaded that in the Earl's court at market time a mercantile custom applied that if a merchant recovered a debt against another merchant and the debtor did not have ready cash to satisfy the creditor, goods and merchandise of the debtor to the value of the debt were to be delivered by the court bailiffs to the plaintiff 'by the view and at the appraisal of merchants'.[86]

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81 Maitland, 2 SS 133

82 pp 24-25

83 Palmer, *op.cit.*, 254 n 76; although the earliest authority which Palmer has is 1286

84 KB 27/162 m 64d (Lincs) (M 1300)

85 The identity of the three defendants provides an insight into the actual working of debt enforcement; D2 was D1's *locum tenens* and D3 was 'the common servant of the court for making attachments and distraints in the market of the town'

86 The taking of debtors' goods and chattels appears also in accordance with borough customs; for instance, an execution debtor's goods could be seized for failure to pay rent arrears; KB 27/123 m 23d (Yorks) (E 1290)

The late thirteenth-century treatise *Lex Mercatoria*, to be found in Bristol's 'Little Red Book'[87] is an instructional manual on how to conduct a mercantile court, together with a critique of certain procedural rules, and recommendations on how they could be improved.[88] It describes the relationship between the common law and the law merchant; 'the common law is the mother of the *lex mercatoria*, which endowed her daughter with certain privileges in certain places'.[89] It was free to the parties to choose common law rather than the law merchant,[90] or to withdraw their plea from the market court, and to prosecute in courts of common law.[91] However, where one party demanded to be heard at the common law, and the other at the law merchant, the law merchant was to prevail.[92] Nevertheless, those who rendered judgments in a market court could be brought before the Royal courts to answer for them,[93] and were liable to amercement for false judgement.[94]

The second type are courts whose jurisdiction was exclusively mercantile. *Lex Mercatoria* is (on the whole) structured like a law suit in a mercantile court; that is, from the plaintiff's initial appearance[95] to attaint,[96] and ending with the transfer of records from one court to another.[97] It has the jurisdiction of the mercantile court, and the rules of the law merchant, applying whenever anyone, merchant or otherwise, bought 'merchandise' of a 'merchant'.[98] The

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87 ed. Basile *et al*; The first modern edition is that of F.B.Bickley (1900), and it must be noted that this treatise was probably not known to Maitland at the time the remarks cited above were written

88 e.g. the extent of the rule allowing for judgment by default, even when the defendant had no knowledge of the claim against him; *Lex Mercatoria* 8, and p.34 below

89 *Lex Mercatoria* 18; *lex communis que est mater legis mercatorie et que suam filiam ex certis privilegiis et in certis locis dotavit ... imperpetuum*

90 *Lex Mercatoria* 3

91 *Lex Mercatoria* 2

92 *Lex Mercatoria* 18

93 *Lex Mercatoria* Chapters 12; 20

94 *Lex Mercatoria* 21

95 *Lex Mercatoria* Chapter 3

96 *Lex Mercatoria* Chapter 20

97 *Lex Mercatoria* Chapter 21

98 *Lex Mercatoria* 3; However, 'the common law and the law of the market suppose that all feoffees and residents on markets or market-towns are merchants, even though they do not trade', unless they were clerks, nobles or knights; *Lex Mercatoria* 22

principal substantive limitation was that the mercantile law was said to have 'no cognizance of land or soil'.[99]

Mesne process

Lex Mercatoria has the '*lex mercati*' differing from the common law in three principal ways; the speed of the process, the liability of pledges to answer,[100] and the refusal to admit the defendant to wage his law.[101] However, *Lex Mercatoria* states that in all other matters (for instances, defences, essoins,[102] defaults, judgments and executions), the same procedure was to apply in the *lex mercatoria* and the common law.[103]

The preoccupation with expedition runs like a thread through the treatise. It is stressed that the law merchant 'generally delivers itself (of a judgment) more quickly' (than the common law).[104] Attachments and adjournments[105]could be from hour to hour, morning to afternoon, tide to tide, day to day,[106] or market to market, although the parties could agree on a longer or a shorter time.[107] Another thirteenth century treatise, *De legibus mercatorum apud nundinas et alibi*,[108] has it that the defendant, if present, was to be attached on the first day, essoined on

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99 *Lex Mercatoria* 25

100 If the defendant was convicted, but was later found to be of insufficient means to pay the judgment, for instance if he had dispersed or removed his goods, then his pledges were answerable for that which had been recovered in judgment as well as any amercement; *Lex Mercatoria* 7

101 *Lex Mercatoria* Chapter 2

102 *Lex Mercatoria* 5; 'And when the essoin ought to be adjudged, the common law should be observed in judging in all respects'

103 *Lex Mercatoria* 3

104 *Lex Mercatoria* 2

105 *Lex Mercatoria* 8 deals with the situation where a defendant attached was, due to his distance from the court, not in any position to appoint an attorney 'in such a brief time according to the adjournments customary in these laws'

106 e.g. *Lex Mercatoria* 4; Specimen count in a plea of debt orderd the defendant to be attached by gages and safe pledges to appear on the following day; the order to the bailiffs of the fair (*Lex Mercatoria* 5) orders them to produce the defendant the very same day

107 *Lex Mercatoria* 1

108 Basile et al, *Appendix*

the second, and ought to answer on the third. If not present, he was to be allowed to replevy his goods to another fair, where he was to answer the plea.

De legibus mercatorum outlines a different procedure. The goods of a defendant attached in his presence, but who failed to appear, were to be released to the plaintiff at a reasonable price 'on account of the defendant's contumacy'. They could, however, be reclaimed by the defendant within a year and a day if he could find security. Where a defendant was attached in his absence and let his attachment lie over for a year without replevy, the attachment was to be forfeited to the plaintiff for a price.[109]

In non-mercantile courts, Bracton's willingness to abbreviate mesne process in favour of merchant creditors shoud be noted.[110]

Judgment by default

Judgment by default is a key area of discussion within *Lex Mercatoria*, and one in which there appears to have been some controversy. Chapter 5 of the treatise provided for judgment by default in certain circumstances. At the very least, if the defendant was attached and had actual or constructive notice of the attachment (that is, he was present while the attachment was being made, so that it was apparent to him on which day he was to come and answer in court, or was so near that it could clearly be apparent), and he defaulted, the distress was to be kept, and better distress was to be taken of the defendant or his pledges.[111] When distress could not, or could no longer, be found, and the defendant defaulted, he was to be demanded solemnly at the next two courts. If he did not come, the plaintiff was to be admitted at the third court to prove his demand.[112] If the demand was proved, the defendant was to be held as convicted, and his goods or chattels were to be delivered immediately to the plaintiff by the view and testimony of at least three worthy and lawful merchants.[113]

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109 Basile et al, *Appendix* 42

110 pp 24-25

111 This seems a mesne process attended with more stages than the mesne process applicable at common law in the 1280s, in which there were no distresses before the grand distress; p 24

112 *Lex Mercatoria* 6-7

113 *Lex Mercatoria* 7

However, the argument that the defaulting defendant was only to be convicted if he had actual or constructive notice of the claim against him seems to have been at variance with the actual position, since the treatise continues with a discussion of whether those to whom the moving of the plea was not, or could not have been, apparent (for instance, because they were abroad), and 'even though they knew nothing of these same defaults' stood to lose their goods. It is emphatic that this result 'appears to be clearly improper' (*evidenter apparet esse inconveniens*).[114] However, this assessment might have been prompted by instances, to which the treatise adverts, where court officials had 'too quickly and surreptitiously deprived defendants of their goods'.[115] *Lex mercatoria* proceeds to defend the apparent harshness of this situation. It is argued that the provisions of the law merchant were mild in comparison with the common law, in which a free tenement could be lost by a defendant's repeated default.[116] The law merchant provided that, so long as distress could be found, process was limited to distress, and it was only when nothing remained against which distress could be taken[117] that the three defaults began to run against the defendant. The author sounds aggrieved with this; 'although the action (at the law merchant) ought to proceed quicker than at the common law, it proceeds more mildly.'[118]

Trial process

The availability of wager of law seems to have varied throughout the law merchant. In certain mercantile courts, law could be made three-handed.[119] However, the success of wager should not be regarded as a foregone conclusion, since here are instances of wager being offered, but the defendant failing to make his law. For instance, in one 1275 case at St.Ives Fair,[120] the plaintiff claimed that he had bought a horse of the defendants at Stamford Fair,[121] but, lacking

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114 *Lex Mercatoria* 8

115 *Lex Mercatoria* 9

116 Which avoids the issue that judgment by default did not lie in respect of personal actions such as debt

117 The goods and chattels of the defendant's *camera* were only to be distrained if sufficient distress could not otherwise be found, *Lex Mercatoria* 24

118 *Lex Mercatoria* 9

119 e.g. St.Ives Fair (1275); 2 SS 140

120 2 SS 150 (St Ives Fair, 1275)

121 This perhaps demonstrates that claims could be brought before any convenient mercantile court

ready cash, had pledged two horses to them until he brought the money. It was claimed that the defendants had sold the horses. The defendants were ordered to make their law; however, D1 had only two men with him, 'which was three men short', and D2 failed because no-one at all was willing to make law with him.

Chapter 6 of *Lex Mercatoria* differs. It provided that the law merchant 'does not admit anyone to wager of law on the negative side'. This latter is of considerable importance since it enabled plaintiffs to prove those contracts without writing (against which, at common law, wager would have lain) by suit[122] and witnesses.[123] The treatise observes that the law merchant had adopted this rule, 'since it happens and is well known to all that merchants sell their goods and merchandise on credit[124] more frequently without tallies and writings than with tallies and writings. It would be hard and very tedious and a kind of burden and continuous obstacle to them, and especially to merchants of foodstuffs, if they had to make tallies and have writings written and receive them every single time for every little bit of merchandise that they deliver on credit ...'[125]

Fleta extends similar procedural concessions to merchants. They were permitted to prove, by witnesses and a jury, tallies which were repudiated. Furthermore, when a tally of acquittance was produced against a tally of debt, the defendant was allowed to make good his assertion by an oath sworn upon nine altars in nine churches.[126] Merchants were allowed to prove (before the Steward and Marshal), by the oath of at least two men who are found after careful examination to be in agreement about the day, place, amount and the rest of the circumstances, tallies that are repudiated by trustworthy witnesses.[127]

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122 e.g. *Lex Mercatoria* 11; proof of a debt by good suit (*secta bona*) alone. Defendant was denied wager

123 cf. The provisions of the Leicester 1277 custumal, p.29

124 *apprestant* cf. Acton Burnell and Merchants; Apps A 1; B 1; C 1; D 3 ('crediderint'); also *de appresto tradunt*; *Lex Mercatoria* 11

125 *Lex Mercatoria* 11

126 *Fleta* Book 2 Chapter 63; 72 SS 209

127 *Fleta* Book 2 Chapter 61; 72 SS 203

The parties and witnesses were to swear oaths to tell the truth,[128] and were to be examined by the steward of the court in open audience of the parties and of the whole court. Witnesses were to be examined individually.[129] Witnesses were to be sequestered before giving their testimony if the court suspected them of having been hired to speak falsely.[130] Reluctant witnesses were to be distrained by the bailiff of the fair, and were to forfeit the issues of their distrained property until they came. There is a suggestion that the plaintiff needed at least three witnesses in order to prove his claim.[131]

If the plaintiff won by virtue of witness proof, the damages were to be adjudged by 'the merchants of the court' (*mercatores curie*).[132] However, in a case where the fair 'has or is able to have full knowledge of the truth', the damages were to be adjudged by inquest and not by the merchants of the court. If the plaintiff failed, the defendant was to have damages for delays, deferments, costs and other expenses and inconveniences which he had as a result of attachment.[133]

Execution of judgment

Once judgment had been rendered, *Lex Mercatoria* has it that execution was to be ordered immediately.[134] If the bailiffs of the market encountered resistance, they were immediately to inform their superiors about it. The speed which the treatise contemplated is evident; if resistance was encountered in the morning, it was to be made known to the mayor of the market that very afternoon.

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128 *Lex Mercatoria* 12

129 There were only limited grounds for challenge to a witness; *Lex Mercatoria* 19

130 *Lex Mercatoria* 13

131 *Lex Mercatoria* 14

132 *Lex Mercatoria* 13

133 *Lex Mercatoria* 13; p 198 ff

134 *Lex Mercatoria* Chapter 13

4. Recognisances

Given the various technicalities attending mesne process and trial on the action of debt in Royal and local courts, it is not surprising that a way of circumventing the action of debt had evolved by 1283, when two ready models for a scheme of debt registration were to be found immediately at hand.

Non Jewish recognisances

The first scheme of debt registration is predicated by the notion of a judgment debt; that is, if judgment in an action of debt (which the defendant, collusively, would lose)[135] were enrolled, mesne procedure is averted, and similarly the tribulations of trial, since the defendant was unable to wage his law against a judgment. Maitland categorises such judgment debts as recognisances, or 'purported compromises of actions of debt';

> **The defendant confesses (*cognoscit, recognoscit*) that he owes a sum of money,[136] promises to pay it upon a certain day, and 'grants' that, if he does not pay it, the sheriff may levy it from his lands and goods.[137]**

For instance, a typical recognisance on the Close Rolls reads;

> **A recognovit in cancellaria regis se debere B dimidiam marcam solvendum ei Dominica media quadragesime et nisi fecerit concessit quod dicta pecunia levetur de terris et catallis suis in comitatu Suff'[138]**

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135 2 PM 203; 'We see numerous actions of debt brought merely in order that they may not be defended, and we may be pretty sure that no money has been advanced until judgment has been given for its repayment'

136 Or that he ought to deliver a quantity of fungible goods ('goods defined by weight or measure and generic character); Baker, *Introduction*, 365 n 23; this is outside Maitland's five heads of the 'Scope of the action of debt' (2 *PM* 210)

137 e.g. JUST 1/496 m 16 (Lincolnshire Eyre, 1284); *Et nisi etc concedit quod vicecomes fieri faciet de terris et catallis suis et heredum suorum etc*

138 CCR 1259-1261, 463 (1261)

Debt recognisances appear on all manner of pre-Acton Burnell Royal court rolls; those of both Benches; the Justices of Assize; and the Justices of Eyre. Debt recognisances were also entered into before local courts. In London, recognisances were entered into before the chamberlain and aldermen of the City of London in the chamber of the Guildhall and recorded in the Letter Books.[139] In the 1321 Eyre of London, the mayor, aldermen and sheriffs of London were asked by what warrant (*quo warranto*) they received, in the chamber of the Guildhall, recognitions of debts from whoever wished to make them. The response was that the chamberlain and aldermen, or even single aldermen, had been accustomed 'from a time of which memory does not survive' to receive recognitions of debts outside the court of the Husting and of the sheriffs in the Chamber of the Guildhall 'which is the place of old appointed, as it were, for a court to receive recognitions of this sort'.[140] At Great Yarmouth,[141] there were enrolled debt recognisances from *circa* 1282,[142] and also at Shrewsbury (before the *Curia Salop*)[143] and the Court of the Abbot of Ramsey in the fair of St.Ives (Huntingdonshire).[144]

From as early as 1218[145] private recognisances for debt entered into before the Treasurer and the Barons of the Exchequer are recorded in the Memoranda rolls of the King's Remembrancer[146] and the Memoranda Rolls of the Lord Treasurer's Remembrancer.[147] Recognisances are also known to have been entered into before the Steward and Marshal[148] of

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139 *Calendar of letter -books, preserved among the archives of the corporation of the City of London at the Guildhall: Letter-books* 'A' (c.1275 1298) and 'B' (c.1275 - 1312), ed.R.R.Sharpe (1899, 1900); and see p 120

140 49 SS 50 nr 31

141 Paul Rutledge, *A Guide to the Great Yarmouth Borough Records*, 12

142 e.g. Norfolk CRO (Norwich) Y/C4/4: Oct 26th, 1282 or Oct 25th, 1283 (£80 recognised for red herring)

143 e.g. Shropshire CRO (Shrewsbury) SRR 3365/763 (1280-1281) roll 1 m 3d

144 e.g. 2 SS 139 (1275)

145 R.H.Bowers, *From Rolls to Riches: Kings' clerks and Moneylending in thirteenth century England* (1983) 58 Speculum 60, 63 n 10

146 E 159: Exchequer: King's Remembrancer: Memoranda Rolls and Enrolment Books

147 E 368: Exchequer: Lord Treasurer's Remembrancer: Memoranda Rolls. In 1262, these rolls begin to include a separate series of *recogniciones*

148 The Marshalsea court is known to have kept rolls from 1276 onwards. However, none earlier than 1316 has survived. A plea before the Steward and Marshal in 1272 enrolled in the 'Westminster Abbey Domesday' is transcribed at 99 SS xxvi (Appendix I)

which there are notes of their enforcement on the rolls of the King's Bench,[149] and many recognisances are endorsed on the Close Rolls.

Execution

Maitland wrote

> **The recognisance[150] is equivalent to a judgment; nothing remains to be done but execution.**

and the benefit of a creditor being able to secure execution immediately on default was an advantage common to all recognised debts.

Assuming that enrolled debt recognisances were an inspiration for the scheme of enrolment introduced by Acton Burnell, the Plea Rolls do supply evidence that statutes merchant were seen as 'equivalent to a judgment'. For instance, in FitzHumphrey v Bardolf (1300)[151] the plaintiff, whilst the defendant's ward, had entered into a statute merchant in the defendant's favour, and on which execution was sought.[152] The plaintiff sought to challenge execution on the ground that, since he was minor and in the wardship of the defendant, the latter's inducement of him to make the recognisance had been fraudulent. The defendant responded that the statute merchant - described as a *res iudicata* - could not be avoided or annulled. A similar argument is encountered in 1307; a creditor who had been awarded execution on a contested statute merchant argued that the recognisance was 'a judgment in itself, and ought not to be annulled by a jury'.[153]

Execution on non-statutory recognisances was supposed to be straightforward;

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149 e.g. KB 27/149 m 19 (Salop) (M 1296)

150 The 'recognisances' adverted to here are (1) compromised actions of debt on the Plea Rolls, and (2) recognisances entered on the Chancery or Exchequer Rolls

151 CP 40/134 m 177 (Essex) (T 1300)

152 Perhaps an attempt to hold on to the plaintiff's lands - held by knight service of the Earl of Gloucester - once the plaintiff came of age

153 CEMCR 259

Within a year of the date fixed for payment,[154] a writ of execution[155] will issue as a matter of course[156]

Despite the ease with which a writ of execution could be procured by the creditor on his debtor's default, the Plea Rolls reveal that final execution on non-statutory debt recognisances was plagued with difficulties during this period, which might explain why a scheme of *execution* (rather than simply enrolment) as introduced by Acton Burnell might have presented itself as desirable.

Execution on non-statutory debt recognisances ordinarily seems to have been by *fi.fa.*,[157] and the Common Pleas roll for Hilary 1285[158] has 35 entries of process on *fi.fa*'s against lands and chattels arising out of recognisances entered into before the *curia Regis.* First to be noted is the low incidence of the creditor getting his money; the sheriff had managed to make up the total in only two instances,[159] although he had accomplished a partial levy in a further four. This leaves the large majority of the creditors high and dry. In almost two thirds of the entries (20 out of the 35), it is recorded that sheriffs had done nothing at all.[160] 14 sheriffs were ordered *sicut prius* and six *sicut pluries.* In a further five cases, the sheriffs gave a reason for their having done nothing. They claimed that the writ had been forwarded to the bailiffs of some franchise or liberty,[161] who, in their turn, had done nothing. The writ in such cases was repeated, but with the rider that the sheriff was not to omit to act by reason of the liberty; a so-

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154 However, before 1285, if execution was not sought on a non-statutory recognisance within a year of the date fixed for payment, its effect in relieving the creditor the burden of bringing an action of *debt* 'lapsed', and the creditor needed to bring an action of *debt* and obtain judgement in the ordinary way; Plucknett, *Edward I*, 149 n 1. This loophole was closed by the procedure instituted by Westminster II c. 45; Appendix H

155 Not identified by Maitland

156 2 PM 204

157 A Chancery administrative writ *levari facias* (*lev.fa.*) was used in respect of debts recognised there and endorsed on the Close Rolls. It ordered the sheriff to levy the sum from the debtor's goods and the issues of any lands

158 CP 40/57

159 CP 40/57 mm 8d (Surr); 21 (Devon)

160 This proportion is not out of the ordinary; CP 40/55 (M 1284) has 28 orders to *fi.fa.*, in 17 of which it was claimed that the sheriff had done nothing

called *non omittas* (for instance, the sheriff of Surrey was ordered to execute notwithstanding the liberty of Kingston-on-Thames).[162] The excuse that the writ came too late also appears, although only once.[163] Another return encountered was that the debtor had nothing from which the debt could be made up, although this latter was open to challenge by the creditor, who could witness that the debtor did in fact have property.[164] However, as likely as not, the sheriff would not be amerced for such a return, but merely ordered *sicut prius*.[165]

Jewish recognisances

The second scheme to be considered as a possible influence on Acton Burnell was that pertaining to the registration of, and execution upon, recognisances in favour of Jewish creditors, which came into existence pursuant to a Royal ordinance of 1194.[166]

The ordinance stipulated that a secure chest (or 'ark': *archa*) should be maintained in each Jewry,[167] each ark under the superintendance, originally, of two Christians, two Jews, and two clerks specially appointed to write bonds. Security and the avoidance of fraud seem to have been paramount: the ark was to have three locks, each of the three groups holding the sole key to one of these. Originally, at least five of these officials were to be present at each transaction.

By the time of Acton Burnell, regulations provided that Christians' debts in favour of Jewish creditors were to be recorded by three-part[168] 'chirographs' (sometimes called starrs);[169] the

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161 See, generally, Michael Clanchy, *The franchise of return of writs*, (1967) 17 TRHS 59

162 CP 40/57 m 8d (Surrey)

163 CP 40/57 m 54 (Worcs)

164 e.g. CP 40/57 m 13d (Sussex)

165 Writs of *lev.fa.*, the earliest dated 1274 (PRO Class C 243), are often endorsed with details of execution, and these endorsements show execution on Chancery recognisances pursuant to this writ to have been plagued with the same difficulties as under other common law writs of execution on recognised debt

166 *Chronica Magistri Rogeri de Hoveden* (Rolls Series) volume 3, p. 266

167 Of which there were up to 27

168 Before about 1240, these were only in two parts

169 Hebrew '*shetar*' = 'record, contract.' The most comprehensive collection is *Shetaroth: Hebrew Deeds of the English Jews before 1290* (London, 1888)

text of the agreement was to be written out by a clerk (specially assigned and sworn for the purpose)[170] three times on the same membrane. A phrase (or, sometimes, just the word 'CHIROGRAPHUM') was written between the duplicate texts, and the document cut[171] through the phrase or word.[172] One part, to which the debtor's seal was to be attached, was to be lodged in the ark, the middle part retained by the Jewish creditor, and the third part retained by the Christian debtor.[173] The clerk was also to keep a roll of transcripts of all such charters. The *Articles touching the Jewry*[174] provided that the tenor of the bond was to be as follows:

> **Know you all that I, so and so, owe such or such a Jew so much, payable on such and such a day. And if I shall make default, I grant that the amount be made and levied (*seient fet e leves*) from my goods and chattels, and from the issues of my lands, in whose hands soever they may be. And thereto I bind myself and my heirs. In witness whereof, etc.**[175]

Execution

Execution was initiated by presenting the bond at the registry, and having it matched with the clerk's roll; the manner in which execution under Acton Burnell (and, subsequently, Merchants) was to be initiated was very similar to this.[176] The Statutes of the Jewry (1275) provided that execution on a Jewish bond was to lie against up to half of the debtor's lands;[177] the extention of execution to lands foreshadows Merchants,[178] whilst the restriction of execution to half the debtor's lands places the Jewish scheme firmly alongside the provisions of execution pursuant to a writ of *elegit* provided by Westminster II c.18.[179]

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170 Provided by the *Articles touching the Jewry*; 15 SS lvii

171 Often so as to leave a serrated edge; the chirograph is then 'indented'; e.g. PRO E 101/250/13

172 Clanchy, *From Memory to Written Record*, 87-88. A tripartite fine is pictured on the front plate of Crook, *General Eyre*

173 Provided by the *Articles touching the Jewry*; 15 SS lvii

174 The text of this in 15 SS lv is taken from BM MS Additional 32085 ff 120-121

175 15 SS lvii

176 p 81 ff

177 Appendix I

178 Chapter 6

179 Appendix F

Conclusions

Mesne process in debt was probably not, by the time of Acton Burnell, a considerable impediment to the recovery of debts in either Royal or local courts. The burden of mesne process would have been lessened for merchant creditors who could avail themselves of advantageous procedural concessions.

In respect of modes of trial, wager of law would have posed no threat to creditors with writing. The evidence suggests that many creditors (and particularly merchants) used bonds, especially for larger transactions.[180] But, even where wager would have been available to the defendant, there is no evidence to support widespread abuse of it, which leads one to doubt, for the later thirteenth century, Maitland's assessment that 'the ease with which a defendant could escape was in the end the ruin of (the action of debt).'[181] Nor is it not easy to agree with Hall's observation (concerning the origins of Acton Burnell) that 'many merchants had been ruined by the effrontery of a wager of law'.[182] No evidence has been located to support that proposition; on the contrary, wager seems to have been taken seriously.

Final process was attended with difficulties, but it appears that claims between merchants could be settled with reasonable expedition according to the law merchant, either before the Royal justices, or before the merchants' own tribunals.[183] Execution on non-statutory debt recognisances was to be by judicial writs such as *fi.fa.*, and the above account has endeavoured to show that execution pursuant to a *fi.fa.* was often attended by difficulties. This latter point will be developed in the next Chapter, which investigates more immediate causes for Acton Burnell.

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180 p 121

181 2 PM 215

182 49 SS xx

183 p 33 ff

CHAPTER 2

The statutory schemes of Acton Burnell and Merchants

Introduction

The statute of Acton Burnell,[1] dated October 12th 1283, provided that debtors could come before certain Mayors to 'recognise' - acknowledge - debts. The recognisance was to be enrolled by a clerk, who was also to draw up a bond (a 'statute merchant'), to be retained by the creditor, sealed with the seals of the debtor and a Royal statute merchant seal. If the recognisance was not paid on the agreed day, the creditor could, on presentation of the bond at the registry at which the statute merchant had been entered into, seek an immediate sale of the debtor's movables and devisable burgages to meet the debt. If no buyer were found for any or all of these, and the debt remained unsatisfied, they were to be delivered to the creditor at an assessed price, to be set off against the debt. If the whole debt remained unrealised, the debtor was to be imprisoned until some agreement was reached with the creditor. If execution could not be accomplished in the registry town, the Mayor was to certify the statute merchant to the Chancellor, who was to issue a writ to any sheriff in whose county the debtor had movables or devisable burgages, ordering that the sheriff sell them, or, in default of purchasers, deliver them to the creditor.

Acton Burnell was succeeded by the statute of Merchants,[2] enacted in May 1285. Merchants retained the recognition and certification mechanisms of Acton Burnell, but the mode of enforcement of defaulted-upon statutes merchant was strengthened; on presentation of the bond at the registry, the defaulting debtor immediately was to be arrested and imprisoned, remaining in prison at his own cost until agreement for the debt had been made.[3] During the first three months' imprisonment, the debtor was to retain control of all his property, so that he that he might levy and pay the

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1 Appendix B

2 Appendix C

3 Apps C 29-33; D 31-34

debt.[4] At the end of three months, sufficient of the debtor's movables up to the sum of the debt and costs were to be delivered to the creditor at assessed values. If there remained a shortfall, the debtor's lands and tenements were to be delivered to the creditor at an assessed annual value. The creditor was to have an interest - a 'tenancy by statute merchant' - in the debtor's lands and tenements until the debt was met from their annual issues.[5] The debtor was to remain in prison until the debt and statutorily allowable costs had been met.

Sources of the statutes

Alongside a surviving draft of Acton Burnell,[6] there are several sources for the statute as promulgated,[7] although the Close Roll text[8] seems the only undoubtedly contemporary one. The text of Merchants[9] is taken from the *Statutes of the Realm*. Both statutes (and the draft of Acton Burnell) are in French, but exposition of Merchants is assisted by a Latin paraphrase of it - most probably dating from the 1290s - in *Fleta*.[10]

The draft statute

Some idea of the originating intention of Acton Burnell can be surmised from a surviving draft.[11] Since, as will be discussed, the issues which Acton Burnell addressed came to prominence in the summer of 1283,[12] it is hypothesised that this draft was probably drawn up not long before the autumn Parliament at which Acton

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4 Apps C 41-43; D 55-59

5 Apps C 44-47; D 59-62

6 Appendix A

7 App B *note*

8 Provided at Appendix B

9 Appendix C

10 *Fleta* Book 2 Chapter 64; Appendix D

11 Appendix A

12 See p 53 ff

Burnell was enacted. This draft seems to have been a working one; it is written in an untidy legal hand, with plenty of space for interlineation, and the original text has been amended both with strikings-out[13] and interlineations.[14] Some notes have been made below the main body of the text,[15] with the text marked at one point with an intended point of inclusion.[16] The text of the draft, as eventually constituted, is close - but not identical - to the text of Acton Burnell on the Close Roll.[17] Brand thinks that the draft represents 'a process of discussion which preceded the enactment of the statute ... it looks as though the surviving draft is an official one produced by the king and his advisers[18] and that the interlineations and deletions were changes which were forced on them by the wider group of counsellors who were consulted before the legislation was enacted and as their price for consent to its enactment'.[19] This picture, which the running modifications which seem to have been made to the draft supports, challenges Baker's observation that 'medieval legislation ...was not a text which had been pored over word for word by lawmakers, with debates upon the wording'.[20]

The preamble to the draft statute offers a brief account of its immediate stimulus. Initially, it read;[21]

Whereas merchants until now now have advanced[22] their goods to various persons, and have fallen into poverty because they have had no legal means[23] by which they could recover their debts at the day set for payment,

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13 e.g. App A 14-19; 23; 26

14 e.g. App A 2; 3; 13; 21b; 27

15 App A 54, 55

16 App A 47

17 Appendix B; save differences in spelling and expression, there are few substantive variations

18 The draft has it that the statute was 'ordained and established' by '(the King) and his council'; Apps A 4; B 3

19 Brand, *Medieval Legislation*, 337, 339

20 Baker, *Introduction*, 236

21 App A 1-3

22 *Unt preste*; Baker, *Manual*, 175 also gives 'an advance of money, a loan' for the noun *prest*

23 *lay purvue*; App A 2

> **for this reason many merchants have forborne from entering the Realm with their merchandise**

'Recovery at the day set for payment' hints at some inadequacy with the action of debt. The preamble was amended, and the amendments serve to emphasise the slowness of available means. It reads (amendments italicised);[24]

> **Whereas merchants until now have advanced their goods to various persons, and have fallen into poverty because they have had no *suitable*** (*si redde*[25]) **legal means by which they could *speedily*** (*hastivement*) **recover their debts at the day set for payment, for this reason many merchants have forborne from entering the realm with their merchandise *to the damage of merchants and all the Realm*** (*a damage des Marchaunz e de tut le reaume*)

Revealingly, the Close Roll text of the statute[26] identifies it as *Statutum editum pro mercatoribus ad debita sua celeriter recuperanda* (my emphasis); speed is coming to the fore as a statutory purpose.

Even if the object of the statute was to lure foreign merchants back through the provision of improved means for recovery of debts, it never seems to have been intended that the statute be restricted to merchants. Both draft and statute extend to 'all persons who would make recognisances',[27] and this is supported by evidence that the statute *was* quickly seized upon by all manner of creditors.[28] Given the tenor of the amendments to the preamble, and particularly the emphasis on the speediness of

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24 App A 1-3

25 '*redde*', 'strong', 'effective' (Baker, *Manual*, 183). '*si*' is difficult. It could be a variant form of '*cy*', 'here'

26 Appendix B; In the early collections of statutes examined, Acton Burnell is generally headed *Statuta de mercatoribus* (e.g. Bodl.MSS Additional C. 188 f 54d; Lat.misc. d. 82 f 44; Bodl. 559 f 42d) although one manuscript does specify the location of enactment: *Statuta de mercatoribus edita apud Actoneburnel'* (Bodl. MS Douce 98 f 63d)

27 App A 48-49; B 26-27

28 See Chapter 3. The Merchants bond at p 80 identifies the governing statute as 'de creditoribus et debitoribus'

remedy to which the interlined '*hastivement*' points, it is possible that the statute was conceived as a response to substantive inadequacies with the action of debt in the central courts, and these would have affected *all* creditors, and not just foreigners.[29] Two problems have been identified: the 'tedious forbearance' of mesne process,[30] and difficulties with final process.[31] The very fact that Acton Burnell offered its own 'final process' would incline this author to the latter.

The writs of summons to the Shrewsbury Parliament[32] give some indication both of the number and variety of persons summoned, and the business contemplated: to try the Welsh Prince David for treason. Besides the great barons, nineteen judges, and members of the King's council, writs were addressed to the municipal authorities of 21 towns, each ordered to elect two citizens to attend, as well as to every sheriff, ordering two knights of each county to attend. Prestwich suggests that the statute was agreed after the Parliament moved from Shrewsbury to Acton Burnell',[33] at which point 'it was most unlikely that there were many present who were not members of the Royal council'.[34] There is nothing in the writs or surviving documentation from the Parliament to support Powell's belief that the Parliament had been summoned to repay advances made to the King by Italian merchants.[35]

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29 For instance, the availability of wager of law

30 p 24

31 p 100 ff

32 *The Parliamentary writs and Writs of Military Summons* vol 1, pp. 15-16 (London, 1827), ed. Sir Francis Palgrave; Two sheets of memoranda from the Shrewsbury Parliament and about twenty petitions have survived, but none of those in print appears relevant to this matter; 51 *Camden Society* (3rd series) (London, 1935) 12-25

33 The Shropshire manor of the Chancellor, Robert Burnell, Bishop of Bath and Wells

34 Prestwich, *Edward I*, 453; and see n 22 above. Local tradition has it that the Parliament was held in the (partially surviving) Great Barn at Acton Burnell

35 Edgar Powell (ed.), *A Suffolk hundred in the year 1283: the assessment of the hundred of Blackbourne for a tax of one thirtieth*, (Cambridge, 1910)

Despite the fact that there seems to be no overt indication of the presence of the hand of the Italian moneylenders with whom Edward I had strong links[36] behind the statute, it is true that even the most powerful of foreign merchant houses could experience difficulty with recovery of their debts. For instance, in about 1280 the head of the English branch of the Riccardi of Lucca petitioned for assistance in attaching the goods of the Abbot of Meaux after the latter's failure to deliver 120 sacks of wool sold to them.[37] In 1282 a group of prominent Florentine merchants complained of difficulties in getting the sheriff of Yorkshire to act to recover a debt of 420 marks recovered at the Lincolnshire Eyre against the Prior of Pontefract;[38] despite having received many judicial writs to levy the money without delay, the sheriff had done nothing. In a similar vein, Prestwich[39] adverts to a petition to the King, probably from August 1283, in which a Spanish merchant complained of the travails which he had encountered in getting money owed to him.[40] Despite having 'good writing or good tallies that I can readily prove', he had not been paid by 'good persons of London, Salisbury and Winchester' to whom he had sold merchandise. He sought letters to the Mayors or Sheriffs of those towns that they do right by him in recovering what was due. This petition is endorsed with a note that the sheriffs were so ordered.[41] This petition offers evidence that, as late as the summer of 1283, the problems encountered by foreign merchants recovering their debts, even when they had writing or tallies,[42] was a live issue. The 1283 complaint is perhaps all the more revealing since the petitioner does seem to have been commercially astute; he had made use, as a creditor, of pre-Acton Burnell recognisances[43] (and, for what it is worth, is the creditor in two

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36 See Richard W. Kaeuper, *Bankers to the Crown: The Riccardi of Lucca and Edward I*, (Princeton, 1973)

37 SC 1/30 nr 101; printed at C.L.Kingsford, *Sir Otho de Grandison 1238?-1328,* (1909) 3 TRHS (3rd series) 189

38 KB 27/71 m 21 (Yorks) (M 1282)

39 Prestwich, *Edward I*, 277 n 39

40 SC 1/23 nr 4

41 SC 1/23 nr 3A

42 Which suggests that the problem with debt did not lie with wager of law

43 Letter Book A 77

statutes merchant, both by Winchester merchants, certified from the Winchester Acton Burnell registry).[44]

Le Roy v Redmere

A further point of departure for investigation of the factual basis of the preambles is Le Roy v Redmere,[45] called 'a flagrant case' by Hubert Hall, who suggests that it was possibly 'the immediate cause of the issue of the memorable Ordinance of Merchants from Acton Burnell in 1283'.[46] Le Roy exemplifies some of the difficulties with which a foreign creditor could find himself beset.

Le Roy, a Flemish merchant, sought £500 from Redmere, an English merchant. This debt was said to have arisen pursuant to a contract of partnership between the parties. By the time that the case came *coram Rege* at Shrewsbury at the beginning of October 1283,[47] it had accumulated a lengthy litigation history. Redmere had first been impleaded for debt in the Lincolnshire county court in 1267. At that stage, it appears that Le Roy had made a quitclaim for £500 in Redmere's favour, in return for Redmere's agreement to pay 200 marks. The quitclaim was lodged with the Mayor of Lincoln until this sum was paid. However, it does not seem to have been paid. External factors then interposed which made Le Roy's recovery of the 200 marks more difficult. In the summer of 1270, English merchants' goods were impounded at Bruges by the Countess of Flanders.[48] This 'lukewarm economic war'[49] was settled by the Treaty of Montreuil-sur-Mer in July 1274 under which, *inter alia*, two commissioners were to be appointed to assess the reparations due from Flanders.

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44 C 241/1 nrs 10-1; 10-2 (entered into July 1285)

45 James le Roy, burgess of Diksmuide (Flanders) v John de Redmere of Appleby; 46 SS xxxii xxxiv; lx; 18-27

46 46 SS xxxiv

47 46 SS 25-27: KB 27/79 m 12-12d (Octave of Michaelmas 1283); i.e,only some days before the date of Acton Burnell

48 R.H.Bowers, *English merchants and the Anglo-Flemish economic war of 1270-1274* in *Seven studies in medieval English history and other historical essays presented to Harold S.Snellgrove* (ed. R.H.Bowers, Jackson, Mississippi 1983) 21-56

49 Bowers, *op.cit.*, 36

However, the commissioners 'were soon adjudicating commercial disputes which had no direct connection with the problems arising from the embargo of 1270-74'.[50] Le Roy v Redmere was such a case, coming before them in 1274. Before the commissioners, Le Roy claimed £500. Redmere produced two writings; a contract of partnership between the parties and the 1267 quitclaim. Le Roy disputed the authenticity of his seal on the quitclaim. The commissioners compared Le Roy's seals on the contract of partnership and the quitclaim, and upheld the quitclaim. However, in February 1278 the King ordered the authenticity of the quitclaim and seal to be re-examined, in accordance with the law merchant,[51] before a panel of three justices and three merchants.[52] Le Roy contended that the comparison of seals made in 1274 was improper since it had proceeded without any examination of the witnesses named in the quitclaim. Moreover, such comparison was not allowed under the law merchant, because of the possibility that seals could be tampered with. Le Roy claimed that the terms of the quitclaim - a payment of 200 marks to him in release of £500 pounds - had not been met by Redmere save for a single payment of 80 marks, and that Redmere had 'by falsity and malice' managed to procure the quitclaim from the depositee Mayor of Lincoln.

The panel of merchants agreed that the authenticity of a seal could not be proved by a comparison with a seal on another writing, since seals could be lost or stolen.[53] Redmere returned the quitclaim, and was granted licence to make an agreement to pay Le Roy 200 marks.[54] Redmere was to find six pledges. However, the sheriff, who was to certify the pledges' names, did nothing 'because he was a friend' (*quod amicus erat*).[55]

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50 Bowers, *op.cit.*, 47 n 96

51 See p 33

52 CPR 1272-1281, 287

53 46 SS 21

54 46 SS 25-26

55 46 SS 26

Payment of the 200 marks was scheduled in five instalments. These were;

1 Nativity of Blessed Mary 6 E I (8th Sept 1278)	25m
2 Michaelmas next following (29th Sept 1278)	25m
3 Easter 7 E I (21st April 1279)	50m
4 Michaelmas next following (29th Sept 1279)	50m
5 Easter 8 E I (13th April 1280)	50m

The first and second instalments were both paid, and Le Roy made Redmere an acquittance for 50 marks. However, recovery of the final three instalments was not so easy, despite concerted attempts by Le Roy. At least[56] three writs of *fieri facias de terris et catallis*[57] were sent to the sheriff of Lincolnshire, ordering that he cause 100 marks to be made up from all the lands and chattels held by the defendant in the bailiwick on August 1st 1278,[58] and similarly of the lands and chattels of the pledges. The writs and their outcomes were;

1. ***fi.fa. 'sicut pluries'*** for 100 marks (relating to instalments 3 and 4). The money was to be produced by the sheriff in January 1280. Le Roy's attorney came to have his money in February, but the sheriff had done nothing. The sheriff returned that the defendant had no goods or chattels.[59] The sheriff was amerced £20 and was warned that he would be more gravely amerced unless he performed the order in full.[60]

2. ***fi.fa.'sicut prius'*** for 100 marks. The money was to be produced by the sheriff in March 1280.

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56 'at least', since the first is said to be *sicut pluries*

57 p 140

58 For the significance of this date, see p 156

59 46 SS 22

60 46 SS 23

The next two '*postea*'s on the roll relate to the issue of Royal writs. The first was a writ *certiorari,* issued in May 1280,[61] which ordered that the record and process of both the 1274 and 1278 hearings be certified.[62] The second writ, issued in July 1281, ordered execution of the 1278 judgment.[63] A hearing took place in August 1281[64] but Redmere did not come. However, three of his pledges did, and 'said plainly' that Redmere had sufficient lands and chattels in Lincolnshire from which the 100 marks could be levied. Accordingly, a third writ *fi.fa.* was issued to the sheriff of Lincolnshire, for 150 marks (for the final three instalments). The money was to be produced at Easter (March) 1282.

There is only one record of what happened *coram Rege* in Michaelmas 1283.[65] The facts suggest that Redmere may have had legitimate grounds for resisting the *fi.fa.*s. Besides the first two instalments, Redmere had paid 60 marks to a third party at Le Roy's request and on his behalf. Redmere wished that this 60 marks be allowed to him, and they were. Furthermore, Redmere sought the return of the 1267 quitclaim, since he did not want to be made to pay 200 marks twice (200 marks on the 1267 quitclaim, and 200 marks on the 1278 agreement), but this matter does not seem to have been decided upon. The remaining 90 marks[66] owed to Le Roy under the 1278 agreement were paid in November 1283.[67]

It has to be asked whether Le Roy v Redmere was 'a flagrant case', and whether, in particular, it exposes the common law mechanism of final process as so dilatory so as to have been the stimulus for Acton Burnell. Close examination of the case indicates that the creditor might not have fared quite as badly as commentators have suggested. First, the perceived longevity of the case can be challenged. No difficulty appears to have been encountered with impleading Redmere for debt in 1267 on the contract of

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61 i.e., after the final instalment had fallen due

62 46 SS 23

63 46 SS 24

64 *ibid.*

65 46 SS 26: KB 27/79 m 12d (M 1283)

66 i.e., 150 marks (instalments 3, 4 and 5) minus 90 marks

67 46 SS 27

partnership. That claim was settled with the execution of a quitclaim. The four year hiatus of the Anglo-Flemish troubles effectively suspended all possibility of any outstanding moneys being sought between 1270 and 1274. It is seen that Le Roy v Redmere came before the commissioners almost as soon as they were appointed, and there does not seem to have been any jurisdictional impediment to this. It is at this stage that a weakness in the structure of the agreement struck by the parties in 1267 is exposed. The 1267 quitclaim was allowed to prevail in Redmere's favour, even though he produced no acquittance for the 200 marks. Lodging a defeasance with a third party ('in equal hand') to be delivered to one of the parties when a separately executed agreement was performed in full (or defaulted upon) was a common technique.[68] However, this practice was vulnerable to the defeasance falling into unauthorised hands.

However, the *error* proceedings which stemmed from Redmere's contested ability to adduce the quitclaim and the improper comparison of seals in 1274 were not convened until 1278. The reason for this four year delay is not known, but it might have been attributable solely to dilatoriness on Le Roy's part. The 1278 proceedings set aside all which had gone before. Thus, the 'first' Le Roy, arising from the settlement of partnership debts, took eleven years (1267 - 1278), of which four (1270 - 1274) were unavoidable and four (1274 - 1278) unexplained. The first three years, 1267 - 1270, are also a mystery, since we do not know the terms by which payment of the 200 marks was envisaged.

In 1278 the defendant entered into a new agreement (it seems, by recognisance made before the justice)[69] to pay Le Roy 200 marks, and the first two instalments were paid in consonance with the agreement. The difficulties arose with the final three instalments, which fell due between April 1279 and April 1280. There is no evidence of any problem with obtaining writs of execution. The fourth instalment fell due in September 1279, and the money supposed to have been taken under the first recorded *fi. fa.* was payable in January 1280. i.e., only four months after default. The second *fi.*

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68 It was also adopted in respect of statutes merchant; see Appendix O

69 p 42

fa. provided that the money taken was to be paid in March 1280. To this extent, the substantive mechanism for the issuing of judicial writs for recovery of a recognised debt seems to be working with speed.

The crux of the problem seems to have been that recovery under the *fi.fa.*s was frustrated by a saga of inactivity on the part of the sheriff of Lincolnshire. Despite being amerced, he failed to cause execution under the *fi.fa.*s to be made either against the principal debtor or his sureties. The sheriff's inactivity is not fully explained. Eventually, Redmere's pledges came to court to attest that the defendant had sufficient in Lincolnshire from which the debt could be levied.[70]

There is no definitive answer as to whether Le Roy was the stimulus for the statute. At most, Le Roy points to a number of factors which - either singly or in combination - could have prompted Acton Burnell. There are problems with the recovery of judgment debts and recognisances. There is confusion as to the rules of the law merchant. However, featuring perhaps most prominently, is the failure in their duties by the officials responsible at a local level for putting writs of execution into effect. These not only appear as a cluster in Le Roy at the beginning of October 1283, but had been coming to the surface earlier that summer.

The transition from Acton Burnell to Merchants

As to the nature of the statutory reform of 1285, Merchants states that Acton Burnell 'was recited' (*fist reciter*) at the 1285 Parliament.[71] *Fleta* states that the King caused the provisions of Acton Burnell 'to be expounded' (*declarari fecit*).[72]

Merchants repeats the preamble to Acton Burnell[73] but adds that merchants had complained to the King that sheriffs[74] had, 'through malice and misinterpretation',

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70 To avert their liability

71 App C 14-15

72 App D 12

73 p 51

74 Although *Fleta* names *diversos ministros vicecomites et alios ballivos*; App D 9-10

delayed the execution of Acton Burnell.[75] Clearly, something had gone wrong with the enforcement of Acton Burnell. In general terms, the Acton Burnell scheme might have left the creditor vulnerable in circumstances where execution was stalled by sheriffs reluctant to seize the goods of a local debtor at the suit of a non-local creditor.[76] But Palmer has given some cause to doubt one facet of this, observing that it may be misleading to regard sheriffs as neglecting their duties on the ground of local loyalty, since '[...] by the end of the thirteenth century, sheriffs are still not distinctively men of the county they serve'.[77] It will be contended that concern with sheriffs is reflected in two provisions which Merchants made; it is made explicit that the Merchants writ was returnable,[78] and it is stated that Merchants was to be read in conjunction with Westminster II c. 39,[79] which observed that the operation of the Royal courts had been hindered by sheriffs' failure to return writs, and the making of false returns. The chapter provided a procedure for the certification of writs in the county court if the plaintiff feared such wrongdoing on the part of the sheriffs. Furthermore, damages were available to the plaintiff if the sheriff was found to be in default after such an enrolment.[80] Westminster II c.39 also refers to sheriffs who had forwarded writs to the bailiffs of certain liberties which did not in fact themselves have the franchise of return of writs. If sheriffs named the franchise of someone who never had the return of writs, c.39 enacted that the sheriff was to be punished. If the sheriff's return was true, and the writ had gone to a franchise, the sheriff was to be ordered, in the form *non omittas* the liberty, to execute the King's command. In addition, the bailiffs were to be summoned. Chapter 39 also addresses the situation where sheriffs returned that they had encountered resistance in the execution of Royal orders; they were authorised to take a *posse* of the county with them, and that those resisting execution were to be imprisoned. There are certainly instances of where the

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75 App C 12-13; *Fleta*'s version of this passage differs. It says *voluntarias cepit interpretaciones;* App D 10

76 A hangover of the Le Roy syndrome

77 Palmer, *County courts*, 31

78 App C 53-54; App D 67-69. Acton Burnell writs were returnable, although the statute nowhere says so; e.g. p. 89

79 App C 57; Absent in App D

80 1 SR 90-91; Appendix G

blame for unsuccessful execution cannot be laid wholly at the sheriff's door. For instance, in 1288[81] the Mayor and Commonalty of York rescued an arrested debtor from the sheriff of Yorkshire by force, took him within the liberty of York, and would not allow him to be detained.

The opportunity was also taken in 1285 to strengthen the executory régime: the first measure of execution against a defaulting debtor became his arrest and imprisonment, and execution was to lie against all the debtor's movables and immovables. The debtor was to remain in prison until the debt had been paid in full.

However, the above factors notwithstanding, there does not seem to have been any particular haste to implement Merchants, since, even in London, the statute does not seem to have come into effect until at least November 25th 1285;[82] the entries on Roll 1, which straddles the Easter Parliament, do not change their form in any way indicative of a change in governing statute. Furthermore, all the certificates issuing in respect of the recognisances known to have been certified from Roll 1, the latest of which was enrolled on November 25th 1285,[83] state that execution was to be according to Acton Burnell.[84] It is assumed that this attribution is reliable, since the certificates issuing from the London registry seem to have been careful in specifying which of the two statutory execution procedures was applicable during this 'transitional' period.[85]

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81 KB 27/110 m 13d (Yorks) (E 1288)

82 This has informed the discussion of the London Acton Burnell registry, in which all Roll 1 has been considered to fall under the provisions of Acton Burnell

83 RR 1 nr 235, the last entry on the roll; Certificate at C 241/6 nr 144

84 e.g. RR 1 nrs 143 (C 241/6 nr 207; /7 nr 373); 207 (/10 nr 15); 233 (/6 nr 144)

85 e.g. C 241/6 nr 121 has '...*apud* <W> *Acton Burnell*'. The deleted <W> is perhaps 'W(estm)' ('Westminster', i.e. Merchants. The certificates often refer to Merchants as '*novo statuto edito apud Westm*')

The mechanism of the statutes: Recognition

The registries

Acton Burnell provided that recognisances could be taken before the Mayors of London, York, and Bristol.[86] This is supported by the Close Roll, which notes *consimilia statuta habent maiores Ebor' et Bristoll'*.[87] However, there are two contemporary additions to this note. The first mentions Lincoln and Winchester; the second, Shrewsbury.[88] There were at least seven[89] Acton Burnell registries. These, with the earliest dates of their known operation,[90] were;

London:[91]	December 20th 1283[92]
Bristol:	May 3rd 1284[93]
Winchester:	May 27th 1284[94]
Lincoln:	June 29th 1284[95]
Newcastle-upon-Tyne:[96]	September 15th 1284[97]
York:	October 31st 1284[98]
Shrewsbury:	November 8th 1284[99]

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86 App A 5; B 3-4

87 App B 31

88 *Ibid.*

89 'At least', since, given the nature of certification (pp 12, 85 ff), it is possible that another registry could have existed, but either certificated no recognisances, or, if it did, no certificates have survived. Appleby may fall into such a category; p 64

90 The earliest surviving certificates may date from some time after the establishment of the registry; particularly if the volume of business was low, or debtors largely within the power of the mayor

91 For a description of the business of the London Acton Burnell registry, see Chapter 3

92 C 241/2 nr 59

93 C 241/1 nr 117

94 C 241/7 nr 166

95 C 241/1 nr 142

96 Hence, the statutory list of Acton Burnell registries (including the Close Roll additions) is not exhaustive

97 C 241/6 nr 132

98 C 241/6 nr 212

The spread of these dates raises the issue of the rapidity of the statute's dissemination. The earliest reference to it is a resolution by the Mayor, sheriffs and worthies of London, dated December 13th 1283, which provided that the Chamberlain was to continue ro receive recognisances for debt,[100] 'notwithstanding the statute made at Acton Burnell.'[101] In July 1284 the King ordered that copies of the statute to be sent to eleven sheriffs, between them having responsibility for fifteen[102] counties,[103] ordering them 'to cause execution of the King's writs directed or to be directed to them to be made according to the form of the statute'.[104]

If it is accepted that the inclusion of London, as the principal commercial centre, is inevitable in any such scheme, reasons need to be sought which distinguished the remaining six Acton Burnell municipalities from the fourteen other towns which were of sufficient note to be instructed to send representatives to the Parliament, but which did not come to have registries. It does not seem that the location of the registries was dictated by any desire to address deficient provision for the enrolment of recognisances in all locations where business was taking place; for instance, the London registry operated in parallel with existing provision in London for the taking of recognisances before the Chamberlain,[105] and the Shrewsbury registry in parallel with the *Curia Salop'*, before which debts were recognised and enrolled.[106] Furthermore, several towns (e.g. Great Yarmouth)[107] represented at the Parliament and with substantial Continental trading links were not brought within Acton Burnell, and registries at fairs were not instituted until Merchants.[108] Any notion that the Acton

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99 C 241/3 nr 52-1

100 p 42

101 Letter Book A 79

102 Some individuals were sheriff of more than one county

103 Cambs, Essex, Hants, Heref, Herts, Hunts, Kent, Lincs, Middx, Norf, Northants, Oxon, Suffolk, Surrey, Sussex; there was no registry in any of these

104 CCR 1279-1288, 301

105 p 42

106 *ibid.*

107 Where debts were registered before the Borough Court; *ibid.*

108 p 65

Burnell registries were intended to constitute a nationwide network[109] is challenged by the fact that the Acton Burnell registries, despite being well distributed, seem to have left substantial parts of England (for instance, the Midlands) unprovided for.[110] The coverage offered by Acton Burnell registries compares unfavourably with the Jewish arks, which were located in up to 27 towns during this period.[111]

Additional permanent registries came into being after Merchants. These, with the earliest known dates of their operation,[112] were;

Appleby-in-Westmorland:	December 28th 1285[113]
Hereford:	February 1290[114]
Nottingham:	December 1290[115]
Chester:	October 1291[116]
Exeter:	August 1292[117]
Norwich:	October 6th 1298[118]
Oxford:	April 4th 1307[119]

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109 A possible policy goal; see the 1311 'New' Ordinance (1 SR 165); Appendix J

110 The territorial 'spheres of influence' of the statutory registries are discussed below (p 66) and in Appendixes K, L and M

111 Scott, (1950) 10 CLJ 446, 448

112 See n 90

113 C 241/7 nrs 77; 279; 379; /8 nr 152; Appleby may have had an Acton Burnell registry, see n 67 Neither the absence of any recorded appointment of an Appleby Acton Burnell clerk, nor any Acton Burnell certificates issuing from Appleby, is conclusive: not all appointments were recorded (p 69) and certificates may not have issued for some time (n 89)

114 Appointment of clerk, CPR 1281-1292, 346; earliest known activity, February 2nd 1292 (C 241/21 nr 27)

115 ditto, CPR 1281-1292, 448; earliest known activity, March 12th 1291 (C 241/15 nr 127)

116 ditto, CPR 1281-1292, 449; earliest known activity, February 2nd 1293 (C 241/25 nr 188). The King, by a writ dated June 28th 1291 (E 159/65 m 5d), ordered the Barons of the Exchequer to have a Merchants seal made for the Chester registry

117 ditto, CPR 1281-1292, 505; earliest known activity, January 8th 1293 (C 241/22 nr 183)

118 C 241/32 nr 46

Merchants extended the statutory scheme to Ireland,[120] and the Dublin registry was established by April 1292.[121]

Merchants also went some way towards making provision for registries where business was taking place with the institution of 'flying' registries at major fairs.[122] The following 'flying' registries are known to have operated:

Boston/St.Botulph's Fair (Lincs):	before late July 1286[123]
St.Giles' Fair (Winchester, Hants):	before late September 1286[124]
St.Ives' Fair (Hunts):	before early May 1287[125]
Stamford Fair (Lincs):	before late March 1288[126]

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[119] C 241/53 nr 231; the only other certificate (C 241/53 nr 225) relates to a recognisance payable on May 1st 1307. The first statute merchant clerk for Oxford was appointed in August 1306; CPR 1301-1307, 461

[120] App C 89; App D 148. A text of Merchants was transmitted to Ireland in September 1285 (CCR 1279 - 1288, 367), although a petition to the Easter parliament of 1290 asking for appointment as clerk for Acton Burnel recognisances in Dublin and Drogheda was met with the response that no seal had yet been sent to Ireland: *Documents Illustrative of English History in the Thirteenth and Fourteenth Centuries*, ed. Henry Cole (Record Commission, 1844) 72

[121] CPR 1281-1292, 482

[122] Apps C 77-83; D 137-142. 'Flying' registry is my term

[123] C 241/2 nr 188; /6 nr 11; payable September 29th 1286. Boston Fair operated for one month from the Nativity of John the Baptist (i.e., June 24th); Ellen Wedemeyer Moore, *The Fairs of Medieval England An Introductory Study* (Toronto, 1985) 298 - 299 (1258 document). The Boston fair registry appears to have generated the most business; for an account of this, see Chapter 3

[124] C 241/18 nr 114; payable November 11th 1286. St. Giles' fair operated for 15 days from September 8th. There are only seven extant certificates, relating to 4 statutes merchant; C 241/2 nr 233; /9 nr 240; /18 nrs 114, 159; /35 nr 207; /7 nrs 127, 362

[125] C 241/7 nr 26 (recognisance payable May 25th 1287). There are nine certificates, relating to 6 statutes merchant C 241/7 nrs 25, 26; /8 nrs 10, 16 245, 246; /9 nr 16; /12 nr 130; /36 nr 18. St.Ives' fair operated for one month from Easter day

[126] C 241/2 nr 255 (recognisance payable June 24th 1288). There are only two more certificates, C 241/9 nrs 255; 308. Stamford Fair ended the night before Palm Sunday

The lapse, in some cases of several years, before establishment of some of the permanent registries suggests that there was no concerted push to make Merchants *ab initio* a genuinely nationwide scheme.[127] Furthermore, an examination of the direction of writs requested by statute merchant certificates during the entire period of this thesis[128] reveals the continuing patchy territorial coverage of the registries. Bearing in mind that the certificates represent only a portion of all statutes merchant entered into,[129] the first phenomenon to be noted is that the influence of the statutory registries seems to have been strongly localised;[130] that is, for any given registry, a considerable majority of those debtors in respect of whose recognisances certificates issued seem to have come from nearby. Distributed equally over forty counties, the proportion of writs requested to each county would be 2.5%. Of the ten counties above this average there was a statute merchant registry in nine,[131] and these ten counties accounted for about seven out of ten of all writs requested.[132] Approaching the matter from a different angle, about four in every five writs[133] sought are to the sheriffs of the counties in which registries were located.[134] At the opposite end of the scale, there are counties to which a disproportionately low number of writs were requested; there are 18 counties where the number of writs requested was less than half the average. Nine of these counties - Worcestershire, Warwickshire, Oxfordshire, Northamptonshire, Buckinghamshire, Bedfordshire, Huntingdonshire, Rutland and Cambridgeshire - form a large block across the south Midlands, falling roughly within a polygon described by a line joining the London, Winchester, Hereford, Shrewsbury, Nottingham and Norwich registries.[135] Together, they account for only about 1 in 13 of all writs requested. Counties at the 'extremities' of England - Cornwall,

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127 p 64

128 Appendix K

129 pp 12, 85 ff

130 Appendixes K, L and M

131 The exception was Derbyshire, which is the county nearest to the average

132 71%

133 80%

134 Counting the home counties of Bristol as Somerset *and* Gloucestershire, and London as the area under the jurisdiction of the sheriffs of London, Essex, Middlesex, Kent and Surrey

135 The Oxford registry is not included in this analysis. It appears to have come into existence only at the very end of the period studied; p 64

Cumberland, Northumberland,[136] Lancashire, Dorset and Sussex are also underprovided in this sense. The county whose presence in this group is most difficult to explain, either in economic (i.e., it was not a poor county), or geographic, terms (i.e., distance from a registry) is Cheshire. There was a Merchants registry in Chester,[137] but perhaps the legal status of Cheshire as a County Palatine, and its own system of courts,[138] palliated any pressing need for the statutory registration of debts.[139]

The statutory officials

The Mayor

Acton Burnell provided that recognisances were to be entered into before the Mayor.[140] It must be asked why the burden of taking recognisances under the statutes should have fallen upon Mayors rather than professional registrars such as the chirographers responsible for the Jewish 'arks'. Given that Mayors held office only for a certain term, the involvement of the Mayor at the recognisance making stage cannot, for example, have been intended as a safeguard for ascertaining the authenticity of any particular recognisance if execution came to be sought, since the Mayor before whom that statute merchant had been entered into might have vacated office,[141] or died.[142]

Merchants modifies Acton Burnell in two important respects. Explicit account is taken of the fact that, after civil upheaval in mid 1285, London had a Warden imposed

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136 The scarcity of certificates suggests either that the business of the Newcastle-upon-Tyne registry was very light, or most debtors were within the power of the Mayor (and, accordingly, certification was not needed)

137 p 64

138 See *Selected Rolls of the Chester City Courts*, ed. A.Hopkins (1950)

139 p 63

140 Apps A 5; B 4

141 See Goldington v Bassingbourn

142 There are many instances of mayors certifying statutes merchant made before previous incumbents

upon it by the King, rather than a Mayor elected by its citizens.[143] Furthermore, Merchants addresses Acton Burnell's failure to provide for the continued operation of the registry in the absence of the Mayor by expanding the category of persons before whom a statute merchant could be entered into.[144] Perhaps influenced by London practice, whereby recognisances to be enrolled in the Letter Books could be entered into before the Chamberlain's *locum tenens*,[145] Merchants provided that if the Mayor (or, in London, chief warden) were not present, recognisances could be entered into before any worthy (*prodhome*) sworn to the task.[146] If neither the Mayor nor any worthy could be found, this could be done before the statute merchant clerk alone.[147] The former of these provisions seems to have been taken advantage of at the London registry; letter book 'B' records that in September 1298, despite the absence of the Mayor of London in Scotland,[148] nine statutes merchant were sealed.[149] Between September 22nd and October 11th 1298,[150] twelve *littere de statuto* (it is not clear whether this meant statute merchant bonds or certificates) were issued by persons stated to be acting *locum tenens* the Mayor.[151] In other registries, officials other than the Mayor are known to have been involved; in Bristol, certificates state that statutes merchant before 1291[152] were entered into before the Constable of Bristol Castle,[153]

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143 App C 17-20. *Fleta* only has *coram capitali custode civitatis* (i.e., the Warden of London); App D 14-15

144 Or certified; Letter book B 78 (October 1298) has two *locum tenens* certifying a statute merchant. The certificate is C 241/32 nr 43

145 Although the only example post-dates Merchants; Letter book B 89 (July 24th 1299)

146 App C 22; *Fleta* does not mention

147 'One of the two clerks'? Some MSS, e.g Bodl. MS *Douce* 139 f 156 has 'un de deu clers'. Bodl MS Douce 139 and MS Rawlinson C 612b f 60b state that the recognisance was to be enrolled *'de la main del un de deus clers'*

148 Letter book B 74

149 Letter book B 76

150 Unfortunately, this period is not covered by any of the surviving Recognisance Rolls

151 Letter book B 77; 78

152 When the custody of the greater part of the Merchants seal was transferred to the Mayor of Bristol; CPR 1281-1292, 448

153 e.g. C 241/1 nrs 116; 117 (Peter de la Mare)

whilst certificates suggest that recognisance taking in Hereford and Shrewsbury was before dedicated registrars rather than Mayors.[154]

At 'flying' registries, Merchants provided that recognisances were to be entered into before two merchants elected from the Commonalty of London,[155] and the London clerk.[156]

The Clerk

The clerk was to enrol the recognisance,[157] and was to draw up the statute merchant bond.[158]

The identities of many of the clerks are known since the opening clause of statute merchant certificates names the clerk[159] and, since the office was, ordinarily, a Royal appointment, reference to them can be found in the Patent Rolls. There are no extant letters of appointment for any Acton Burnell clerks, but the letters of appointment of twenty one Merchants clerks to twelve registries are copied on the Patent Rolls.[160] These sometimes state the office to have been tenable at the King's pleasure.[161] The credentials of Thomas Wynd, clerk to the Appleby registry, came to be questioned during the 1292 Westmorland Eyre. Thomas denied that he had been appointed to the

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154 In 1290, William Godknave was appointed to the custody of the greater part of the Merchants seal in Hereford without being described as its Mayor (CPR 1281-1292, 346), and in 1295, Thomas Colle, a burgess of Shrewsbury, was appointed to custody of the seal there in place of the deceased Henry Borrey (CPR 1292-1301, 131); see p 70

155 Apps C 81-83; D 141-142; or York; App C 80, and accompanying note

156 See p 70

157 Apps A 7; B 4-5; C 21-22; D 20

158 Apps A 8-9; B 5-6; C 25; D 27-29

159 i.e., the clerk issuing the certificate and, if different, the clerk before whom the statute merchant had been entered into

160 CPR 1281-1292, 245; 292; 302; 335; 346; 409; 448; 449; 481; 482; 505; CPR 1292-1301, 131; 321; 493; CPR 1301-1307, 101-2; 157; 219; 235; 260; 332; 411; 438; 461
and see n.57, but there are no extant letters of appointment for many known statute merchant clerks

161 CPR 1281-1292, 292 (John le Espicer, York); 302 (Robert of Thixendale, York); 505 (Walter of Langedon, Exeter)

office by Royal writ, 'as is ordinary in other cities'. He asserted that he had been elected by the Mayor and Commonalty of Appleby, which had been granted the authority to do this by Royal writ. They agreed that this was the case, although they were able to produce only a copy of the writ, and put themselves on the record of the Close Rolls.[162] In 1295, the Commonalty of Shrewsbury wrote to the Chancellor informing him of the election, 'by the consent and assent of the whole Commonalty of the town', of Thomas Colle as the statute merchant clerk.[163] However, the Commonalty appears under the impression that, notwithstanding the election, some ratification was required: *vobis presentamus dominacionem vestram cum effectu rogando quatinus ipsum ad hoc admittere velitis.*[164]

Neither statute makes any provision for recognisances to be taken in the absence of the statute merchant clerk. However, there is evidence which suggests the clerk sometimes to have been absent. For instance, the clerk to the London registry, John of Bakewell, was appointed a Justice Itinerant for the 1299 Cambridgeshire Eyre.[165] The dates on which that Eyre sat fall within the period covered by Recognisance Roll 5.[166] Notwithstanding, statutes merchant were entered into on several days when the Eyre sat.[167] It is not known whether Bakewell was present at the London registry, although all the feet of fines entered into before that Eyre are witnessed by him.[168] Some statute merchant clerks are known to have absented themselves without cause.[169]

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162 JUST 1/987 m 34

163 SC 1/27 nr 159; March 18th 1295

164 The petition is not endorsed. Perhaps no ratification was needed

165 Crook, *General Eyre,* 179

166 pp 8-9

167 RR 5 m 4 nrs 7-19, 21-27. The assumption is that they were enrolled contemporaneously. At least five are certificated (RR 5 m 4 nr 8 = C 241/34 nr 18; 5 m 4 nr 11 = C 241/34 nr 31; 5 m 4 nr 24 = C 241/52 nr 11; /53 nr 187; 5 m 4 nr 25 = C 241/34 nr 271; 5 m 4 nr 27 = C 241/35 nr 356), but these do not indicate other than the statute merchant was entered into before Bakewell

168 CP 25/1/26/47 nrs 1-31

169 e.g. p 79

On the other hand, Recognisance Rolls 2, 3 and 4 evince periods of inactivity at the London registry which coincide with the dates of those fairs[170] at which there are known to have been statutory registries.[171] This suggests that recognisance-taking before the London registry did pause for fairs,[172] which would fit with Merchants provision that statutory recognisances at fairs were to be entered into before the London clerk. This in turn would perhaps indicate that the presence of the clerk was indispensable for recognisance taking.

Enrolment

The statutes provided that the recognisance was to be enrolled by the clerk,[173] whose hand was to be known.[174] The idea of a recognised hand was perhaps a borrowing from the practice of the Jewish 'arks', where a clerk was assigned to draw up instruments, and whose hand, it is assumed, would have been known.[175] The statute merchant clerk was also to write the statute merchant bond (*le escrit de obligacioun*) to which the debtor's seal and a Royal seal provided for this purpose were to be fixed.[176]

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170 See p 65

171 e.g. RR 2; no enrolments dated between April 21st-30th (m 1d) May 3rd-9th (m 1d) (St.Ives); August 4th-11th (m 2d), 13th-23rd (m 2d) (Boston); September 6th-15th (m 2d) (Winchester); RR 3 m 1; March 13th-19th, 19th-April 3rd 1293 (Stamford)

172 This would have been in line with the interruption which fairs ocassioned to some judicial business in London; for instance, there were to be no Hustings during Fairs (perhaps because the London merchant community moved *en masse* to the fair); *Liber Albus* 181. However, it should be noted that the mercantile community did not represent the majority of business before the London Merchants registry; pp.118-119

173 Apps A 7; B 4-5; C 21-22; D 20

174 *ibid.* App D does not mention

175 Charles Gross, *The Exchequer of the Jews in England in the middle ages* (London, 1887), 18

176 Apps A 8-9; B 5-6; C 25; D 27-29

There is a tension between the requirement that the hand of the clerk be known, and the need that the business of the registry continue despite any absence of the clerk. The infrequent absences of the clerk seems to have generated no problems in practice; a certificate from the Bristol registry names a substitute clerk,[177] and in Goldington v Bassingbourn (1309-1310)[178] the Winchester statute merchant clerk states that some of the rolls predating his appointment were written 'in the hand of a hired clerk' (*de manu clerici conducti*).[179]

Fees

The statutes provided that a fee of one penny for every pound recognised before a static registry[180] was payable 'to sustain the costs of the aforesaid clerk'.[181] The statute is silent, but it is assumed that this charge ordinarily would have been borne by the debtor. Since there is no evidence that the fee fell as part of the Royal revenue, it is reasonable to assume that the fee would have gone directly to the clerk, and the appointments of two clerks mention that they are to receive remuneration for recognisances in accordance with the statute.[182]

The statute does not mention whether fractions of a penny were payable in respect of fractions of pounds recognised, nor whether any fee was payable in respect of recognisances of less than £1.[183] Assuming that the fee was payable only for each whole pound recognised, the sums recognised on Roll 1[184] come to a total of approximately £4300, which would have produced fees, for the first eleven months of 1285, of almost £18.[185] £18, it has to be said, is a relatively small sum compared with the known financial dealings of John of Bakewell, the London clerk, who seems to

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177 C 241/3 nr 17; Geoffrey of Fencote *loco* Richard of Calne. The certificate is undated

178 49 SS 97

179 *Ibid.* 101; KB 27/196 m 50 (E 1309)

180 One and half pence per pound before fair registries; Apps C 87-88; D 144-145

181 Apps A 55; B 25-26. This remained the same under Merchants; Apps C 86-87; D 145-146

182 CPR 1301-7, 219 (Newcastle, 1304); 332 (Shrewsbury, 1305)

183 e.g. RR 1 nrs 2 (17 shillings); 76 (13 shillings); 166 (16 shillings)

184 Rounded down to the nearest pound

185 4300d = £17-18s-4d; and see p.121 for the total sums recognised on Rolls 2-5

have had other irons in the fire, appearing as a creditor in five recognisances (totalling about £130) on Roll 1:[186] nothing in the statutes excluded those involved in the statutory procedure (Mayors, clerks, or sheriffs) from being party to statutes merchant, despite their roles in the execution procedure.[187]

Presence of the debtor and the act of recognition

The statutes state that the creditor was to cause his debtor to come (*face venir*)[188] before the appropriate officials to 'recognise the debt and the day of payment'.[189] It is not known whether *face venir* implied that the debtor himself had to appear, although common sense would suggest - in the interest of the avoidance of fraud - that no recognisance could be enrolled unless the debtor (or, for instance, someone authorised to enter into a recognition on his behalf) were in fact present. However, in respect of statutes merchant being entered into by a debtor's representative, no instance has been located on the Recognisance Rolls or in the certificates resembling pre-Acton Burnell practice in London, where several recognisances made before the Chamberlain state that the conusors are entering into the recognisances on behalf of others,[190] and where, accordingly, the absence of a debtor does not seem to have been an insuperable impediment.[191]

Neither statute fleshes out the physical delineaments, or incidents, of 'recognition'. Roll 1 and the certificates in Bundle 1 state that the debtor '*cognovit*', or

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186 RR 1 nrs 88; 111; 162; 217; 234

187 There are many certificates in favour of clerks; e.g. C 241/1 nr 22 (Winchester - Adam de Northampton); /3 r 16 (Bristol - Richard de Calne); /3 nr 36 (Shrewsbury Robert de Buckenhale); /6 nr 40 (Newcastle-on-Tyne - Henry le Escot); /8 nr 74 (York - John le Especer); /29 nr 18 (Hereford - William Goodknave); /49 nrs 258; 259 (Chester - Alex de Hurel); and Mayors; e.g. C 241/22 nr 92 (York Roger Basy); /27 nr 175 (Lincoln - Richard de Bello Fago); /51 nrs 4; 41 (York - Nicholas de Langeton)

188 Apps A 5; B 3; C 16; D 14 (*venire faciat*)

189 Apps A 6-7; B 4; C 21; D 18-19

190 e.g. Letter Book A 56; 64; 79

191 The question of the liability of the 'principal' in such a case is unclear, since no instance has been located in which execution is being sought against the party on whose behalf another had recognised a debt

'*recognovit*'.[192] '*Cognovit*' and '*recognovit*' seem to have been used interchangeably, and it does not seem that any substantive difference between them was perceived. '*Fateor*' also appears in some statute merchant bonds.[193] All these verbs mean 'to acknowledge', 'to confess', or 'to admit',[194] and suggest something spoken, which reinforces the suggestion that the debtor had to be present. However, none of these verbs suggest that the debtor, for instance, had to swear any oath.

Presence of the creditor

It is not known whether the creditor would have needed to be present. However, common sense would suggest that no interest is served through the prevention of a statute merchant being entered into if the creditor happened to be absent (as would often have been the case, for instance, with a plurality of creditors).[195]

Location of recognition

Face venir simply suggests that the debtor had to appear before the Mayor (or equivalent official) and clerk, irrespective of their location.[196] Accordingly, it is possible that recognisances could legitimately be entered into other than at the accepted municipal forum.[197] The same might have been true of the procedural steps attending execution of a statute merchant; for instance, in Goldington v Bassingbourn (1309-1310), a person seeking certification of a statute merchant went to the house of the Mayor of Winchester; together they proceeded to the house of the statute merchant clerk.[198] These observations perhaps challenge the notion that recognisances under the

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192 In C241/1, *'recognovit'* is used 130 times (93% of legible certificates), and '*cognovit*' 10 times

193 But not in any certificates or on the Rolls

194 *Revised Medieval Latin Word-List*

195 p 105 ff

196 In London, although recognisances before the Chamberlain were generally taken at the Guildhall, some are stated to have been entered into at a variety of locations, including the Chamberlain's house and shop; e.g. Letter Book A 27; 28; 225 (all early 1279)

197 e.g. in London, the Guildhall; although it should be noted that the headings of the Recognisance Rolls simply state that the recognisances were entered into 'in London'.

198 49 SS 97, 103

statutory schemes, or the initiation of execution, were necessarily attended by publicity.[199]

Recognition formulas

A variety of formulas, using *debere* ('to owe') or *tenere* ('to bind'), is employed to describe the condition in which the debtor had recognised himself to be. There does not seem to have been any substantive difference between a debtor recognising that he owes (*quod debet, se debere*) or was bound (*se teneri*) to the creditor. Three formulas are found in the certificates in Bundle 1; *recognovit se teneri* (82 certificates: 58 %), *recognovit se debere*[200] (48 certificates: 34 %), and *cognovit se teneri* (10 certificates: 7 %).[201] The two latter formulas appear associated with particular registries, suggestive of 'house' style; all ten certificates with *cognovit se teneri* are from the York registry,[202] whilst 38 of the 48 *recognovit se debere* are from Lincoln. All seven certificates in Bundle 1 from Bristol[203] have *recognovit se debere*.[204]

Advance agreement to provisions for execution

The Acton Burnell recognisances on Roll 1 invariably end with a statement that the debtor agrees to the measures of statutory execution against him[205] in the event of default; e.g.

> **et nisi fecerit concedit quod current super eum districcio et pena provise in statuto domini Regis edito apud Acton Burnel'**

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199 It may have been that certification was regarded as a substantively different act from recognising (for instance, recognition may have needed to be in a public place); however, at the very least, Goldington demonstrates that at least one part of the statutory procedure could be conducted in private

200 *Fleta*'s statute merchant certificate has '*recognovit de debere*'; App D 97

201 There are three certificates (C 241/1 nrs 58; 102; 130) where the formula is illegible

202 i.e., ten of eleven York certificates. The remaining certificate, C 241/1 nr 75, has '*recognovit se teneri*'

203 C 241/1 nrs 38; 77; 115; 116; 117; 118; 134

204 Of the remaining certificates in this group, two issue from London, and one from Shrewsbury

205 For execution against debtors' heirs, executors and others, see p 108 ff

Accordingly, Merchants instruction that the statutory provisions for default were to be read to the debtor before the recognisance was enrolled 'so that afterwards he could not say that he had put himself to any penalty other than that to which he had bound himself'[206] may have been a formalisation of existing practice.

The Recognisance Roll

Despite the roll's function as the mainstay of the whole administrative structure of recognition countenanced by the statutes, there is no evidence that any Acton Burnell registry kept a duplicate roll to safeguard against the risk of loss, damage, or destruction. Perhaps to remedy this, Merchants instructs that the Recognisance Roll was to be in duplicate; one roll was to be in the custody of the Mayor (or chief warden), the other in that of the statute merchant clerk.[207] This parallels the practice of mercantile courts recounted in *Lex Mercatoria*, where the roll of the court was to be in duplicate; one for the Mayor, and one for the suitors of the court. However, the rolls were not accorded equal status; the suitors' was to be the primary, and that of the Mayor the secondary, roll.[208]

It is possible that duplication of the statute merchant roll might have been intended as an anti-fraud device.[209] Equally, the provision may have been prompted by a desire to protect against mishap, although Merchants makes no provision that the rolls ought to be deposited in a secure place, and this might not have gone without saying. For instance, in Goldington v Bassingbourn (1309-1310)[210] the rolls from the term of one Mayor of Winchester seem to have been treated as his personal property; they had passed on his death to his executrix. These rolls appear neither to have constituted part of the municipal records, nor to have been passed automatically from one holder of office to the next. In Goldington, the plaintiff challenged the statutory execution which was being sought against him on the basis of a statute merchant which he was

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206 Apps C 83-85; D 142-143

207 Apps C 22-24; D 15-18; See p.3 for an application of this provision to the London rolls

208 *Lex Mercatoria* 30

209 In the sense that execution could not be initiated unless the bond matched both rolls

210 49 SS 97

was supposed to have entered into at the Winchester registry some 15 years earlier at the Winchester registry before a former Mayor and clerk. It was ordered that the rolls for 1296-97 be produced before the justices. Two rolls, apparently sealed by the former mayor and a JF were proffered by the Mayor and clerk, who avowed the rolls to be those demanded. However the Mayor said that the rolls for 1296-97 had never been in his custody, since he had only very recently become Mayor. It appears, since the creditor went to the clerk's home to have the rolls scrutinised and compared with the statute merchant bond, that the proffered rolls had been held at the home of the former clerk. JA, the clerk's predecessor in office, said that he had never received any rolls from before his time. The current clerk said that he had the rolls from the former mayor's executrix. Perhaps unsurprisingly, it was adjudged that the proffered rolls were 'suspect in several ways': they appeared to have been tampered with, not least since the recognisance, said to have been made in 25 Edw I, was entered amongst the recognisances for 24 Edw I.[211] The rolls were judged false, and it was ordered that the clerk be arrested for having made certification out of 'unsigned' rolls.

The statute merchant seal

The statute merchant bond drawn up by the statute merchant clerk was to be sealed both with the debtor's seal and a specially provided Royal seal.[212] The reasons for insistence that the debtor's personal seal be affixed are not known; indeed, there were perhaps good reasons for such seals not to be used, since, as the panel of merchants in Le Roy made clear, personal seals were susceptible to theft and all manners of abuse.[213] Furthermore, the dissemination of personal seals in 1283 is not known, although the *Carte Nativorum* points to some use of personal seals even by unfree tenants in the later thirteenth century.[214]

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211 Although recognisances could be inserted on the roll; see RR 3

212 Apps A 8-9; B 5-6; C 25; D 27-28

213 p 55

214 *Carte Nativorum: A Peterborough Abbey Cartulary of the Fourteenth Century* (ed. C.N.L.Brooke and M.M.Postan), (1944-46) 20 Northants Record Society xlii. The Statute of Exeter (1 SR 211) contemplated that, if there were in any township insufficient freemen of whom inquiry could

Acton Burnell states that the seal was 'to remain in the safe guard of the Mayor and the clerk'.[215] By way of contrast, the matrix of the Merchants seal was to be in two pieces;[216] a 'greater' in the custody of the Mayor, and 'the other' in the 'hand' of the Clerk.[217] Perhaps this provision hints at problems with forged Acton Burnell bonds bearing genuine statutory seals. However, if even forged Acton Burnell bonds would still have had to match the recognisance roll for execution to be initiated, this would have necessitated the involvement of one or both of the statutory officials in any deception. However, the Plea Rolls reveal no real difficulty with the statutory officials under Acton Burnell, and Merchants does not single out mayors or clerks for criticism;[218] nor is there any evidence of the dismissal of Acton Burnell personnel in 1285.[219] Accordingly, it does not seem that reforms targeted at the roll and seal were prompted by misuse of public office, although this is known to have occurred under Merchants; for instance, in Stalingburgh v Bretoun and others (1305),[220] the plaintiff complained of a conspiracy, involving the clerk to the Nottingham registry, Robert Ingram, to use a statute merchant entered into before that registry as the means to dispossess the plaintiff of his lands.

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be made for the purposes of that statute, there were to be added certain of the more responsible and law-worthy villeins who possessed seals

215 Apps A 9-10; B 6

216 Apps C 26-27; D 27-30. The matrices of some late thirteenth-century statute merchant seals have survived. London's is silver and circular, about 4 cm in diameter, with a crowned full face bust of the King, a lion of England across his shoulders and a small castle on each side. Around the circumference of the seal is written S' EDW' REG' ANG' AD RECOGN' DEBITOR' APUD; C.S.Perceval, *Statute merchant seals*, (1897) 7 Proceedings of the Society of Antiquaries of London (2nd series) 107, 113

217 Apps C 26-27; D 28-30 (static registries). At fairs, one part of the seal was to be with the two merchants, and one with the clerk; Apps C 80-81; D 140-141

218 p 59

219 Some were re-appointed, e.g. John of Bakewell, the London clerk

220 CP 40/153 m 479 (Notts) (M 1305); John s William de Stalingburgh v Alan de Bretoun and others

The duplication of the statutory seal did not suffice to extirpate its misuse. For instance, in a 1297 case before the Justiciar of Ireland[221] the Dublin statute merchant clerk is reported as having given his part of the seal matrix to at least three unauthorised persons, who used it to seal recognitions in the clerk's absence,[222] and in Goldington[223] it is said that both parts of the Winchester seal had been held in the mid 1290s by the Mayor. In 1307 it is noted that a Thomas Pyrecote was imprisoned in Shrewsbury pursuant to having put a seal from a London statute merchant bond onto another statute merchant bond. This seems to have been a serious offence; the Treasurer and King's Council ordered that he was not to be released without special Royal order.[224]

The statute merchant bond

No original statute merchant bonds for this period have been located. This is probably because the statute merchant bond ordinarily would have been handed over to the debtor and destroyed on the statute merchant being met.[225] However, the text of some bonds survives in the Plea Rolls; e.g.

Acton Burnell bond: [226]

Noveritis universi me Rawelin Godard de Notingh' et civem London' teneri Petro Gras Hugoni Megge Johanni Geudon Willelmo Gerard Bertramo de Grisols Willelmo de la Bessere Arnaldo de la Browr Willelmo de la Garite Petro Fraunk Johanni de Saulis[227] in ducentis sexaginta quinque libris sex solidis et sex denariis argenti quas eis reddam vel uni eorum presens

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221 *Calendar of the Justiciary Rolls of Proceedings in the court of the Justiciar of Ireland 23-31 Edw I* (Dublin, 1905), ed. James Mills, 123

222 Although the grievance here might be with the lack of authorisation, rather than fraud: neither statute makes any provision for the clerk to appoint a deputy

223 49 SS 97

224 1 Rot.Parl. p 196 nr 35

225 For return of the bond where repayment was by instalments, see p 106 ff

226 CP 40/130 m 189 (Notts) (M 1299); the recognisance antedates Recognisance Roll 1

scriptum deferenti terminis subscriptis videlicet in Nundinis sancti Botulphi[228] anno domini m° cc° lxxx quinto decem marcas Et in festo sancti Andree proximo sequenti decem marcas. Et sic annuatim ad eosdem terminos quolibet termino decem marcas quousque dictam pecuniam eis persolvero. Et nisi fecero concedo quod currant super me et heredes et executores meos[229] distrecio et pena provise in statuto domini Regis edito apud Acton' Burnel. Datum London' in vigilia Apostolorum Simonis et Jude anno regni Regis Edwardi duodecimo [October 27th 1284][230]

Merchants bond

Noverint universi quod ego Johannes Ab Adam teneor Johanni de Gornay in quadringentis marcis sterlingorum solvendum eidem Johanni de Gornay vel suo [d]<certo> attornato[231] has litteras deferenti apud Beverstan[232] terminis subscriptis videlicet die dominica proxima post festum sancti Hillarii proximo post confeccionem huius instrumenti ducentas marcas. Et ad festum Nativitatis sancti Johannis Baptiste proximo sequens sexaginta marcas. Et ad festum sancti Michaelis proximo sequens sexaginta marcas. Et ad festum sancti Hillarii proximo sequens viginti marcas . Et sic quolibet anno sequenti post ad quodlibet festum sancti Hillarii viginti marcas usque ad plenariam dicti debiti persolucionem. Et nisi fecero volo et concedo quod currant super me heredes et executores meos[233] districcio et pena in statuto domini Regis de creditoribus et debitoribus apud Acton Burnel edito provisa. In cuius rei testimonium presentes litteras sigillum meum apposui una cum sigillo dicti domini Regis apud Bristoll' ad hoc proviso quod apponi procuravi ad perhibendum testimonium veritati. Datum Bristoll' per manum Petri de la Mare Constabularii Castri Bristoll' et

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227 See p 105 ff

228 See p 65

229 See p 75

230 For proceedings on this, see pp 14, 83

231 p 112 ff

232 p 81

233 p 108 ff

Custodis predicti sigilli die martis proxima ante festum sancte Lucie virginis anno Regni Regis Edwardi decimo nono. [December 11th 1290][234]

The Mechanism of the Statutes: Execution

Initiation of execution

Under both statutes, if the debtor did not pay, execution was initiated by showing the statute merchant bond to the Mayor and clerk.[235] Where the enrolment specified a place of payment[236] it is suggested, possibly in line with debt,[237] that a debtor's failure to tender the sum recognised at the named location would have constituted sufficient grounds for treating the debt as unpaid.[238]

The roll and the bond[239] were to be compared[240] to ascertain whether the debt outlined in the bond had been enrolled, and the day set for payment passed.[241] Some certificates make express mention of this comparison, e.g. *sicut nobis constat per inspeccionem Rotulorum de Recognicionibus debitorum de tempore dicti maioris et scripti obligatorii ipsius* (debtor).[242] The notion of preparing two texts, the authenticity of either of which could only be established by its matching the other, existed before Acton Burnell. A notable precursor along these lines is provided by

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234 CP 40/106 m 120 (Gloucs) (M 1294); and see Appendix O

235 Apps A 10-11; B 6-7; C 27-29; D makes no mention

236 e.g. RR 1 nrs 43; 68; 71; 74 (payable at Boston and Winchester fairs); 102 (payable at Sutton Delby, Leics); 144 (payable *in hospito* of the Bishop of London)

237 The matter is not wholly free from uncertainty, since pleading precedents (for instance those in *Brevia Placitata*), which make reference to repayment being specified at a particular place (e.g. 66 SS 28; 101), go on to allege that no tender at all had been made, rather than alleging a tender defective because at a different location

238 However, no enrolments have been located in which this point arises

239 And possibly, under Merchants, the two rolls between themselves

240 It is not clear whether this comparison could be by the clerk or Mayor alone, or by both. Nor does Merchants state how execution was to be initiated (i.e., before whom) on recognisances entered into before fair registries

241 Apps A 12; B 7; C 28; D makes no mention

242 C 241/6 nr 94 (York registry)

recognitions of debt to Jewish creditors, where three part chirographs were used, and compared with the roll kept by the chirographers.[243] However, indented deeds could be used for agreements of any content.[244]

Location of initiation

The provision that the hand of the statute merchant clerk was to be known[245] suggests that the comparison was not only to be between the *texts* of the roll(s) and bond, but also their *hands*. The insistence on such comparison strongly suggests that execution could only be initiated before the registry at which the statute merchant had been entered into, since the Recognisance Roll would have been found with there. However, there is one certificate, issuing from the York registry, and in respect of a statute merchant supposedly entered into before the London registry, which states that the creditors (the Riccardi of Lucca) had presented a statute merchant bond sealed with the London statute merchant seal, by which it appeared (*evidenter apparet*) that a particular individual had entered into a statute merchant in their favour.[246]

Presentation of the bond

Significantly, neither statute provides that the question of whether the money had in fact been paid was to be gone into by the Mayor and clerk when the bond was presented, and this, coupled with an absence of provision for recording payment once made[247] was to become a problem.[248] Some of the recognisances on the London rolls

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243 p 45 ff

244 For instance, from 1195, three (rather than two) part chirographs were used for fines entered into before Royal justices; Clanchy, *op.cit.*, 87-88. A tripartite fine is pictured on the front plate of Crook, *General Eyre*

245 Apps A 7; B 5; C 22; *Fleta* does not mention

246 C 241/9 nr 227; The statute merchant to which this certificate may have related has not been located on any of the surviving London Recognisance Rolls

247 Nor does there appear to have been in connection with any other mode of recognition taking, although there are instances of enrolled acquittances; e.g. on the Great Yarmouth rolls of a recognisance entered into before the Steward and Marshal; Y/C4/4 m 5 (1283)

248 p 182 ff

do happen to be accompanied with notes of payment;[249] however, these are not typical, since they were made in favour of the statute merchant clerk,[250] who (it is assumed) would have had daily access to the rolls. There is also a note preserved, in a file of Ancient Correspondence, from the London statute merchant clerk certifying satisfaction of a statute merchant entered into before him,[251] but this is the sole example located of such a practice. Some acquittances of statutes merchant are enrolled on the Plea Rolls, and these are carefully drafted.[252]

Since the bond appears to have been the indispensable instrument for the initiation of execution, it would have been an imprudent debtor who entered into a statute merchant without insisting on the sum recognised being to hand, or who paid the sum recognised without insisting on the return of the statute merchant bond,[253] or took an acquittance which detailed fully the statute merchant which the payment was intended to meet,[254] or, at the very least, tendered payment before witnesses.

There are cases which bear out the authenticity of these problems. In Sutton v Sperry (1296)[255] the defendant agreed to loan the plaintiff 40 shillings, but refused to do so unless the plaintiff made an obligatory writing for the sum. The plaintiff entered into a statute merchant for that sum in the defendant's favour. However, the jurors stated that

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249 e.g. RR 1 nr 111; the enrolled recognisance has been crossed out. There is a marginal note: *Soluit. Postea venit et soluit et quietus est*

250 John de Bakewell

251 SC 1/25 nr 29. Neither the recognisance to which this note relates, nor any certificate, has been located

252 e.g. CP 40/149 m 18d (Lancs) (M 1304); See Appendix P

253 *Quaere* the situation where execution was sought against a plurality of co-debtors; CP 40/116 m 102 (London) (H 1297) has the delivery of the statute merchant bond to one of four co-debtors, but, it appears, with the intended effect that only the deliveree should have been quit of the debt

254 Cases like Godard v Gras and others (1297-1301) (CP 40/121 m 157 (M 1297); /129 m 154 (T 1299); /130 m 189 (M 1299); /131 m 93d (M 1300)) resemble a 'battle of the forms'; the plaintiff alleged that statutory execution had been sought on three recognisances (totalling 150 marks) which had been met. However, all he was able to produce was an acquittance for 40 marks said to be in part payment of a debt of over £265 for which the defendant creditors still had, and produced, the statute merchant bond. Later, the plaintiff changed tack, and his story, considerably (CP 40/136 m 97 (H 1301)) claiming that the creditors had been impersonated in claiming execution

255 CP 40/115 m 67 (Yorks) (M 1296)

when the defendant got hold of the bond, he refused to advance the plaintiff any money, and, furthermore, sued out the statute merchant, levying 44s 3d of the plaintiff's goods. Oclethorp v Poteringtone (1293)[256] demonstrates the perils of failure to retrieve the statute merchant bond upon payment. The plaintiff debtor complained that, although the statute merchant had been met in the home of the defendant creditor, the creditor had passed the statute merchant bond to the Mayor of York, who had caused the plaintiff to be imprisoned until he had, again, and '*iniuste*', been made to pay the sum recognised.[257] Graham v Warthull (1301)[258] illustrates the extent of a debtor's caution about an extent statute merchant bond: he rather stayed in prison than have the bond at large. The plaintiff, despite having tendered the creditor goods to the value of the sum recognised and damages, had been imprisoned pursuant to a Merchants recognisance. The sheriff witnessed that the creditor's refusal to accept payment was actuated by malice and a desire to detain the debtor in prison. The jurors' account reveals that the debtor had tendered the money to the creditor when the statute merchant fell due, but the creditor had refused to hand over the bond to the debtor. Without this, the debtor refused to hand over any money: Result - deadlock.[259]

Conversely, the problems attendant upon a creditor relinquishing a statute merchant bond before payment in full had been received appears in Lincoln v Wales (1307);[260] the plaintiff was seeking execution in Buckinghamshire on a recognisance supposed to have been entered into by the defendant before the London registry.[261] The parties came, and the supposed debtor sought whether the plaintiff could show any deed or statute (*factum seu statutum*) which could prove the debt. The plaintiff was not able to produce anything, and claimed that he had neither deed nor statute (which must have meant the statute merchant bond), but only a statutory writ (*breve de Cancell' fundatum super statutum de huiusmodi recognicione*). This was obviously not good

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256 JUST 1/1094 m 1 (Yorkshire Eyre, T ?and M 1293)

257 The plaintiff was amerced, and the defendant went without day because the plaintiff had not given a certain day and regnal year in the *monstracio* of the *querela*

258 KB 27/164 m 31d (Yorks) (E 1301)

259 This was only the beginning of the wrangle; see pp 153, 154, 155, 200

260 CP 40/161 m 30d (Bucks) (H 1307)

261 RR 5 m 3 nr 5 (March 14th 1299)

enough: the defendant, for the time being, went without day, and the plaintiff was amerced.

Sometimes the creditor concedes that he cannot produce the statute merchant bond, but attempts to explain its absence. For instance, in Writtle v Abingdon (1297)[262] the plaintiff had been imprisoned at the suit of the defendant creditor. The plaintiff claimed that, after statutory execution had been set in motion, he had satisfied the creditor of the debt, and that the creditor had handed over the statute merchant bond in full acquittance. Nevertheless, subsequently the defendant had fraudulently sued out statutory execution. For his part, the defendant claimed that the bond had been stolen from a locked box in his house[263] and sold to the plaintiff for a fraction of the sum recognised. The jurors found that the bond had been handed over by the defendant voluntarily, and he was committed to custody.[264]

The mechanism of the statutes: certification

If the preconditions for execution under Acton Burnell were met, the Mayor of the registry town immediately was to cause the debtor's movables and devisable burgages to be sold 'by the appraisal of honest men' up to the sum of the debt.[265] The proceeds were to be paid without delay to the creditor.[266] If the debtor had no movables or devisable burgages within the power of the Mayor of the town where the recognisance had been entered into from which the debt could be levied in full, but had movables elsewhere in the Realm, Acton Burnell provided that the Mayor was to send,[267] under

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262 CP 40/116 m 102 (London) (H 1297)

263 In itself an indication of how valuable a piece of parchment the statute merchant bond was

264 This may not have been the end of these dealings; a case between the same parties in the King's Bench in Michaelmas 1297 (KB 27/152 m 36 (Essex)) has Writtle claiming that Abingdon broke into W's home and abstracted goods and chattels. D claimed that this was done pursuant to a statute merchant. P claimed that the statute merchant had been acquitted, and the bond delivered to him by way of acquittance. The case went to the county

265 Apps A 13; B 8

266 Apps A 13-14; B 9

267 Apps A 24; B 11; *maunde* 'send'?

the statute merchant seal, the recognisance[268] made before him and the clerk to the Chancellor.[269] The notion that a recognisance could be certified by the Mayor if execution was sought outside his jurisdiction was not new to Acton Burnell; one entry in the Letter Books relates to a recognisance of 20 marks for the purchase of two horses, payable in Beaumaris. When the sum went unpaid, the creditor sought a *litera domini Maioris* certifying the recognisance to the Mayor of Beaumaris.[270] Under Merchants, if the debtor could not be found in the registry town,[271] so as to enable his immediate imprisonment, the Mayor was to certify the statute merchant to the Chancellor, seeking a writ ordering Merchants execution[272] against the debtor. The writ ordinarily would be directed to the sheriff. However, in relation to default by debtors against whom execution in Ireland was sought, certificates request that writs be directed to the Justiciar of Ireland[273] (who, presumably, would have acted as a 'post box', and passed these writs on to the appropriate sheriff(s)). Some certificates suggest attempts to 'short-circuit' the sheriff; for example, it is requested that writs be directed

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268 A single certificate could certify more than one recognisance; for instance, one certificate from the Shrewsbury registry, headed *de diversis recognicionibus debitorum subscriptis coram nobis factis apud Salop'* certifies fourteen statutes merchant, although all of these are in favour of the same creditor; C 241/3 nr 52

269 Apps A 24; B 11; Certification did not happen automatically on a failure of execution within the power of the Mayor, but had to be requested by the creditor; many certificates request execution *ut* (creditor) *dicit* e.g. App D 49

270 Letter Book A 73

271 In a handful of certificates (C 241/2 nr 186; /6 nr 7; /7 nr 94; /8 nrs 336; 339; 361; /9 nrs 281; 350; /53 nr 187), the Mayor of London requests that a writ be directed to the sheriffs of London, although the recognisances to which the certificates relate are stated to have been entered into before the London registry. One of the statutes merchant was certificated twice (C 241/2 nr 186; /7 nr 94) each certificate naming the sheriffs of London; repeat certification emphasises that this phenomenon is not a scribal error. It is difficult to see why the debtors in seven certificates identified as citizens of London - or their property in these instances should have been outside the power of the Mayor. Perhaps the sheriffs of London had more extensive territorial jurisdiction than the Mayor

272 Although some certificates all from the Newcastle-upon-Tyne registry, and issued under Merchants simply seek an 'appropriate remedy' (*competens remedium*) e.g. C 241/46 nr 181. '*Conpetens* (sic) *remedium*' is *Fleta*'s translation of 'si redde lay purvue'; App D 4

273 Nine certificates, e.g. C 241/8 nr 388; /14 nr 25; /22 nr 109

to municipal officials such as the Bailiffs of Stamford, the Mayor and Bailiffs of King's Lynn, and the Justiciar and Chamberlain of Chester.[274]

Status of the certificate

Fleta's account of Merchants[275] specifies the form which certification was to take, and the juridical status of the certificate; it was to be letter patent and was to be had as a warrant of the Chancery.[276] A 1307 case[277] sees the certificate treated as part of the 'paper trail' necessary to validate execution. The defendant was said to have entered into a statute merchant to the plaintiff. A writ seeking execution was procured, but, because of several suspicious features (*suspecciones*) in it, the court ordered that execution be suspended until they had consulted the Chancery.[278] The creditors submitted that the writ issued from the Chancery in pursuance of a certificate which could be found there, and they called the certificate to record.

Text of the certificates

The statutes do not specify what the certificate was to say. The earliest extant Acton Burnell certificates read along the following lines;[279]

> **Venerabili patri in Christo ac domino suo karissimo Roberto dei gratia Bathoniensi et Wellensi episcopo, illustris Regis Anglie Cancellario, sui Gregorius de Rokesle major Londonie et Johannes de Bauquell' clericus ad recogniciones debitorum accipiendas deputati salutem cum omni reverencia et honore.**

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274 e.g. Stamford (C 241/1 nr 107); King's Lynn (/8 nr 378); Chester (/46 nr 377)

275 There is no reason to suppose that Merchants, in this respect, would have been anything other than identical with Acton Burnell

276 App D 53

277 KB 27/187 mm 48,49 (Cumbl) (H 1307)

278 It is perhaps notable that execution is being sought in a county - Cumberland other than that in which the statute merchant registry lay, and in which statutory execution seems to have been relatively infrequent (Appendix K). These factors perhaps would have assisted the deception

279 For physical description of such certificates, see p 10 ff

Dominacioni vestre reverende significamus per presentes quod Johannes de Markedich' de comitatu Essex' venit coram Henrico le Waleys tunc maiore Londonie et Johanne clerico predicto et recognovit se teneri Willelmo Barage civi Londonie in tresdecim libris et quatuor solidis argenti solvendis eidem in festo sancti Michaelis anno regni regis Edwardi duodecimo [September 29th 1284] **alioquin quod currerent super eum districcio et pena in Statuto dicti domini Regis apud Acton Burnel' edito provisa.**

Et quia predictus Johannes terminum sue solucionis in nullo observavit nec bona mobilia habeat sub districtu nostro de quibus dictum debitum levari possit reverende dominacioni vestre humiliter et devote supplicamus quatinus scribere iubeatis vicecomiti Essex' quod eundem ad solucionem dicte pecunie quam termino predicto [solvisse] debuit iuxta formam statuti predicti compellat.

Valeat dominacio vestra reverenda diu et bene.[280]

As with enrolments, there seems to have been 'house' style within various registries. However, in respect of Acton Burnell certificates, the variations in phraseology between certificates issuing from different registries suggest perceived substantive differences in the ambit of lawful execution. For instance, Bundle 1 has 46 certificates, issuing from the Lincoln (39), Bristol (6) and Shrewsbury (1) registries, which, unlike the London and Winchester certificates, mention the debtor's immovable as well as movable goods, '*bona mobilia seu immobilia*'.[281] In contrast, none of the 11 York certificates in Bundle 1 makes any mention at all of the debtor's goods.[282] Nevertheless, no evidence has been seen to support any hypothesis that the

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280 49 SS lxi; C 241/1 nr 73. The certificate had a tag, and was sealed (fragments of such seals survive, e.g. C 241/8 nr 320)

281 e.g. C 241/1 nrs 8; 15; 16; 17; 18 (Lincoln); 38; 77; 115; 116; 117 (Bristol); 35 (Shrewsbury); perhaps a perception that devisable burgages were immovables

282 C 241/1 nrs 12; 20; 21; 27; 50; 51; 52; 64; 75; 78; 80

scope of Acton Burnell execution in different registries *did* vary, regardless of what the certificates said or omitted to say.

Merchants certificates were in much the same form, save for variations arising from the Merchants provisions for execution against lands.[283] *Fleta*'s certificate reads;[284]

> **Venerabili in Christo patri et domino suo karissimo, domino A., Dei gracia tali episcopo, illustris regis Anglie cancellario, talis custos talis civitatis et talis clericus ad recogniciones debitorum accipiendas deputati, salutem cum omni reverencia et honore.**
>
> **Reverende dominacioni vestre significamus per presentes quod A. de comitatu tali recognovit coram nobis se debere B. x. marcas, solvendas eidem ad tale festum iuxta formam statuti regis anno regni regis xiij°. editi apud Westmonasterium.**
>
> **Et quia predictus A. terminum solucionis sue non servavit ut predictus B.dicit, reverende dominacioni vestre humiliter et devote supplicamus quatinus scribere iubeatur vicecomiti Herefordie quod eundem A. ad solucionem predicte pecunie iuxta formam statuti predicti conpellat**

Creditor's retention of the statute merchant bond

Once the certificate had been issued, and even after execution had been obtained, it seems that the creditor was entitled to keep the bond (presumably until the sum recognised had been met). In Hamelton v Perdriz (1305)[285] the plaintiff had sought execution on a recognisance entered into by the defendant before the London registry.[286] The recognisance was certified, and a statutory writ to the sheriff of Essex

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283 Chapter 6

284 App D 41-52

285 KB 27/181 m 53d (Essex) (T 1305)

286 RR 5 m 5 nr 25 (February 2nd 1299)

requested.[287] The debtor was imprisoned, and seisin in his lands delivered to the creditor's attorney. However, the creditor complained that the damages he had been awarded were insufficient, since the statute merchant had been payable some five years earlier. In support of this he produced the *littera obligatoria de statuto*, which, since it was of even date with the recognisance, appears to have been the statute merchant bond.

The jurisdiction of the Mayor

The statutory conception of certification and its role in the statutory procedure is open to criticism on several grounds. The first ground stems from the precondition for certification, namely that the defaulting debtor had property, or was himself, outside the 'power' (*poer*) of the Mayor of the town in which the statute merchant was entered into.[288] If 'power' meant 'jurisdiction', the evidence suggests that this provision was not well conceived, since the territorial ambit of the Mayor's jurisdiction might have been extremely narrow.[289] For instance, there are many instances of certification to the sheriff of the county in which the certifying statute merchant registry lay ('home' county). For instance, of the 2029 extant certificates issued from the York registry during the period of this study, 1805 (or 89%) requested that a statutory writ be directed to the sheriff of Yorkshire.[290] This pattern is reasonably consistent across all the statute merchant registries;[291] of the 952 certificates from the Lincoln registry, 757 (80%) requested a statutory writ to the sheriff of Lincolnshire, and from Shrewsbury 87% requested a writ to the sheriff of Shropshire. Developing this analysis, it is always the case that the next ranked county requested after the 'home' county is a neighbouring one. For instance, the next most frequently requested sheriff in certificates from the Lincoln registry is the sheriff of Nottinghamshire (68

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287 C 241/34 nr 106

288 Apps A 23; B 10-11; C 36-37; D 38-39 (*in potestate*)

289 Perhaps this explains the certificates from the London registry requesting that writs be directed the sheriffs of London; p 86

290 The incidence of defaulting debtors against whom execution could be accomplished within the city of York is not known because of the absence of any recognisance rolls

291 Except London; See Appendix M for analysis

certificates), making a total of 825 certificates (757 and 69); hence, almost nine out of ten (87%) of all certificates issung from the Lincoln registry request that writs be directed either to the sheriff of Lincolnshire or Nottinghamshire - an adjacent county. This pattern is reflected at other statute merchant registries.[292] Hence, the certificates suggest that defaulting debtors or their property were often not far from the town in which the statute merchant was entered into, but were nevertheless beyond the power of the Mayor. The necessity for certification in such cases must have been especially frustrating for creditors. In such cases, it would have been quicker for the Mayor to certify directly to the sheriff of the county concerned - bypassing the Chancellor entirely. However, neither statute countenances any such abbreviated procedure,[293] and this is not surprising given that such a provision would have entailed a radical shift in administrative thinking since there was in general no direct mechanism of communication between local judicial organs.

Availability of other redress?

Secondly, unless the contrary were already known for sure, the statutes suggest that it would have been necessary to ascertain that a defaulting debtor had no executable property in the statute merchant town before seeking certification. In Acton Burnell, this matter is of substantive importance since the statute appears to contemplate the debtor could not be imprisoned until such a negative had been established. Neither statute suggest any means by which the creditor and Mayor were to discover where the debtor had property, although this might not have been very difficult.[294] The London rolls often give the debtor's county (or counties) of residence, e.g. 'Robert de Berkeley, knight of Gloucestershire'.[295] The procurement of such information at the time of the recognisance, and its enrolment, would perhaps have assisted execution in so far as any certificate could specify any such county or counties as those to the sheriff(s) of

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292 Appendix M

293 Also, see certificates requesting writs to bailiffs, p 87

294 Bearing in mind that the above observations on certification indicate that debtors before the registries other than London were predominantly locals, and perhaps there would have been no practical difficulty in discovering where they had property

295 RR 1 nr 9

which any writ(s) seeking statutory execution were to be directed, although this should not be understood to mean that the creditor would have had no input in this respect at the certification stage. Of the eighty eight recognisances on Roll 1 which identify debtors by county, 17 were certificated, and the counties named in the certificates as the destinations of the requested statute merchant writs correspond in all but one case[296] with the debtors' counties named on the roll.[297] Even where debtors are said to be of two or more counties, the same is true. For instance, Sir Peter de Grenham is said to be of Devon, Berkshire and Norfolk.[298] The recognisance was defaulted upon, and the certificate requested that writs be sent to the sheriffs of those three counties,[299] although single certificates requesting that writs be directed to the sheriffs of more than one county are unusual.[300]

Some certificates appear to have been prepared *in extenso* but without specifying the county, which seems to have been inserted later.[301] This raises questions about the preconditions for certification; it is possible that the county in which execution against the defaulting debtor most appropriately ought to have been sought was not known in all cases to the creditor or Mayor at the time of certification. Some creditors seem to have tried to keep their options open; for instance, the Mayor of Lincoln requests that a writ be directed to the sheriffs of Lincolnshire *or* Nottinghamshire.[302] It is not known how the Chancery would have dealt with this sort of request. A small number of certificates (about a dozen) name no sheriff at all, although some of these are repeated *sicut alias* with named sheriffs.[303]

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296 RR 1 nr 186; C 241/6 nr 218 has no county

297 e.g. RR 1 nrs 12 (C 241/9 nr 106; Yorks); 14 (/1 nr 3; /9 nr 325, Cambs); 31 (/7 nr 300; /8 nr 413, Oxon)

298 RR 1 nr 154

299 C 241/6 nr 206

300 There are only five such certificates in C 241/1; nrs 76 (1 debtor, 2 counties); C 241/1 nrs 24; 59; 106; 137 (two debtors, three counties)

301 e.g. C 241/6 nr 162

302 C 241/7 nr 361

303 e.g. C 241/36 nr 318 (no sheriff named); *sicut alias* at C 241/34 nr 223 (writ to sheriff of Hampshire requested)

Speed of certification

Thirdly, certification would have added time to the process of execution; the certificate had to go to the Chancellor, wherever he was to be found,[304] and the statutory writ go from the Chancery to the county.[305] The speed of neither of these stages can be assessed from the surviving records.

However, the question of how long it took for an initial certificate to be issued can be investigated through the certificates issuing from the Appleby, York and Lincoln registries, since these certificates ordinarily are dated.[306] This allows the period between the recognisance falling due and the initiation of procedure where the debtor was outside the power of the Mayor to be determined.

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304 The Chancellor accompanied the King, and, hence, was peripatetic during this period

305 It is possible that there were backlogs in the issue of writs from the Chancery, which prompted repeat certification; p 95

306 p 11

Speed of 'initial' certification from Appleby, York and Lincoln registries[307]

	Appleby	*%*	*York*	*%*	*Lincoln*	*%*	*Total*	*%*
≤ 6 days	5	9	31	6	45	12	81	9
1 wk ≤ 13 dd	18	31	78	15	36	10	130	14
2 wks ≤ 20dd	3	5	33	6	16	4	52	5
3 wks ≤ 27dd	3	5	33	6	33	9	69	7
4 wks ≤ 2 m	4	7	73	14	56	16	133	14
2 ≤ 6 mths	10	17	121	23	92	25	223	24
6 mths ≤ 1yr	1	2	78	15	46	13	125	13
> 1 year	14	24	80	15	38	10	132	14

Cumulative totals

	Appleby	*%*	*York*	*%*	*Lincoln*	*%*	*Total*	*%*
≤ 6 days	5	9	31	6	45	12	81	9
1 wk ≤ 13 dd	23	40	109	21	81	22	211	23
2 wks ≤ 20dd	26	45	142	27	97	26	263	28
3 wks ≤ 27dd	29	50	175	33	130	35	332	35
4 wks ≤ 2 m	33	57	248	47	186	51	465	49
2 ≤ 6 mths	43	74	369	70	278	76	688	73
6 mths ≤ 1yr	44	76	447	85	324	90	813	86
> 1 year	58	100	527	100	362	100	947	100
Totals	**58**	**100**	**527**	**100**	**362**	**100**	**947**	**100**

Although certification *could* be accomplished on the day of default itself - for instance, there is a Lincoln certificate dated *die solucionis dicte pecunie*,[309] and there are certifications within a few days of default[310] - certification does not, on the whole, seem to have been pursued with any great rapidity. Only about a third of the York and Lincoln certificates were issued within four weeks of the recognisance falling due.[311] Slightly mystifying is the significant proportion of 'initial' certifications which seem to

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307 Appleby: all certificates (1286 - 1301); York and Lincoln: certificates in C 241/1 - 17 (1283 - 1292)

309 C 241/3 nr 2; i.e., the date that payment was due

310 e.g. York (2 days); C 241/7 nr 244

311 Such close correspondence between the results from the two bigger registries suggests the results are sound

have been made more than a year after the statute merchant to which they relate was stated to have fallen payable. However, these latter certificates may not in fact have been 'initial'. There is some evidence that the files of certificates are not complete.[312] Alternatively, execution might well have been sought at length but unsuccessfully within the jurisidiction of the Mayor of the statute merchant town before the creditor attempted to obtain execution via certification.

Repeat certification

'Repeat' certification is where a plurality of certificates request that writs on a particular statute merchant be directed to the sheriff of one particular county. This seems to have been a spontaneous procedural development, since neither statute makes any provision for the repeated certification of an outstanding statute merchant to the Chancery. Repeat certification may point to inadequacies in the statutory enforcement procedures, either at local level or perhaps in the Chancery itself; for instance, backlogs in the issue of the statute merchant writs. Instances of repeat certification can be identified in a number of ways; some certificates state that execution is being sought *sicut alias* or *sicut pluries*. Other repeat certificates are discoverable through the database of certificates, searching for matching parties, sums and dates of repayment.

Statutory writs

Acton Burnell

No Acton Burnell writs have been located but copies of their texts survive on the Close Rolls, where it was common to enrol new writs and forms as specimens, and in enrolments of Acton Burnell execution on the Plea Rolls. The earliest on the Close Roll reads;

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312 There are many examples on the Plea Rolls of execution on statutes merchant which ostensibly were certificated, but in respect of which no certificates have been located

Pro Johanne Fungoyn et Reym' de Belyn

Rex vicecomiti Surr' salutem. Quia Jacobus de Kyngeston' aurifaber soluisse debuit Johanni Fongoyn et Reymundo de Belyn quadraginta solidos die dominica in media quadragesima proximo preterita [March 12th 1284] (et) **eas nondum soluit nec terras seu tenementa**[313] **habet in Civitate nostra London' unde pecunia illa levari potest sicut per litteras maioris London' et Johannis de Bauquell' clerici ad recogniciones mercatorum in Civitate predicta recipiendum iuxta statutum dudum apud Acton' Burnel coram nobis provisum assignatorum sigillo nostro ad hoc proviso sigillatas et nobis missas nobis constat Tibi precipimus quod predictos Quadraginta solidos de terris et catallis predicti Jacobi in balliva tua sine dilacione levari et prefatis Johanni et Reymundo habere faciatis. Teste Rege apud Hardelagh' xi die maii** [Harlech, May 11th 1284] [314]

Interim 'hybrid' writ

Another writ is to be found shortly afterwards on the Close Roll. This writ[315] postdates the promulgation of Merchants (May 1285), but antedates the date suggested for the introduction of Merchants even in London.[316] The procedure contemplated by this writ is not on all fours with Acton Burnell; i.e. it fails to specify that, if the debtor's goods were unsold (the writ mentions neither chattels nor devisable burgages), they should be delivered to the creditor in allowance of the debt.[317]

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313 An interesting thing to say, given the stated ambit of execution under Acton Burnell; see pp 88, 142

314 C 54/101 m 6d. There is an undated certificate, relating to the same recognisance, and seeking a writ to the sheriff of Surrey, at C 241/1 nr 103. The creditors are identified as Bordeaux merchants. No corresponding statute merchant has been located on the London rolls. A second writ on the roll, issued at Caernarvon on July 20th 1284 (C 54/101 m 4d), is captioned *super statuto*. The substance of the May and July writs is virtually identical. New writs were often enrolled on the Close Roll

315 C 54/102 m 6d

316 p 61

317 cf. comments on the irregular ambit of Acton Burnell execution contemplated by some certificates; p 88

However, imprisonment is in accordance with Acton Burnell; namely, only if the debt was unlevied through sale of the debtor's movables.[318] However, the writ is made returnable.[319] Given the latter provision, and Merchants express tightening-up on the sheriff in this respect,[320] it is suggested that this writ is a hybrid of Acton Burnell and Merchants procedures, and perhaps was intended to act as an interim writ before the full introduction of the latter statute. It reads:

> ***Forma brevis de pecunia levanda iuxta statutum etc***
>
> **Rex vicecomiti Buk' et Bed' salutem. Quia David de Flittewyk' soluisse debuit Bartholomeo de Castello viginti libras in festo Pasche anno regni nostri duodecimo** [April 9th 1284] **sicut coram Gregorio de Rokesle maiore nostre London' et Johanne de Bauquell' clerico nostro recognovit et eas nondum soluit ut dicunt: tibi precipimus quod bona ipsius David mobilia in balliva tua inventa ad valenciam dicti debiti si ad hoc sufficant vendi et pecuniam inde levatam eidem Bartholomeo sine dilacione solvi facias; et si emptorem ad hoc non inveneris tunc bona ipsius David mobilia ad valenciam predicti debiti per racionabilem precium eidem Bartholomeo liberari facias. Et si bona mobilia ipsius David ad hoc non sufficiant tunc corpus eiusdem David capi et in prisona nostra salvo custodiri facias quousque eidem Bartholomeo de predicto debito plene satisfacerit. Et qualiter hoc preceptum nostrum fueris executus scire facias Iusticiariis nostris apud Westmonasterium in octabis sancti Michaelis per litteras tuas sigillatas. Et habeas ibi hoc breve. Teste Rege apud Ledes xv die Iulii**[321] [Leeds, July 15th 1285]

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318 Lines 7-10

319 Lines 12-15

320 p 60

321 C 54/102 m 6d

Merchants

The Merchants writ was similar to this, save for substantive differences arising from that statute;

> ***Bref de la Chauncelerie sur mesme le estatut***
>
> **Breve. Rex vicecomiti salutem. Quia A coram tali Maiore vel Custode talis ville vel coram Custodibus sigilli nostri de mercatoribus in Nundinis de tali loco recognovit se debere B tantum quod ei reddidisse debuit tali die et nondum reddidit ut dicitur tibi precipimus quod corpus predicti A capias et in prisona nostra salvo custodias quousque predicto B de predicto debito satisfecerit. Et qualiter istud preceptum nostrum fueris executus scire facias Iusticiariis nostris apud Westmonasterium tali die vel nobis per litteras tuas sigillatas. Et habeas etc. Datum apud Westmonasterium xxviij die Junii Anno Regni nostri tertio decimo** [June 26th 1285] [322]

Fleta has a writ along very similar lines:

> **Rex vicecomiti salutem. Quia A.coram tali custode talis civitatis recognovit se teneri B. in .x. marcis quas ei solvisse debuit a die Pasche in xv.dies anno regni regis etc. et eas nondum soluit, ut dicit, tibi precipimus quod corpus ipsius A. capias et salvo in prisona nostra custodiri facias donec eidem B. de predicto debito plenarie fuerit satisfactum. Et qualiter hoc preceptum nostrum fueris executus nobis scire facias per litteras suas sigillatas in octabis sancti Hillarii ubicumque tunc fuerimus in Anglia, et habeas ibi hoc breve. Teste etc.**[323]

The above writs provide only for the immediate arrest and imprisonment of the defaulting Merchants debtor; they make no mention of execution against the debtor's

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322 1 SR 100 n (a), taken from 'Liber' A (see App B *note*)

323 App D 96-103

property (for instance, if the debtor was not found by the sheriff,[324] or if the debt was not paid within the first three months of the debtor's imprisonment). Accordingly, a further writ would in such circumstances have been necessary since specific warrant was needed for execution against property. *Fleta* gives such a writ, which it refers to as a 'writ of judgment' (*breve de iudicio*):

> **Rex vicecomiti salutem. Cum nuper tibi preceperimus quod, quia A.coram etc. tu nobis retornasti ad eundem terminum quod predictus A. non fuit inventus in balliva tua postquam breve nostrum inde tibi venit, tibi precipimus quod omnia bona et catalla, simul cum omnibus terris et tenementis que fuerunt predicti A. in ballivia tua die quo predictum debitum recognovit, ad quorumcumque manus devenerint per feoffamentum vel alio modo, nisi terre et tenementa illa ad heredem infra etatem existentem devenerint, eidem B.vel eius assignato per racionabile precium deliberari facias, tenendi nomine liberi tenementi quousque prefato B. de predicto debito satisfecerit, simul cum dampnis et custagiis necessariis in laboribus, sectis, dilacionibus et racionabilibus expensis. Et si contingat corpus ipsius A. in balliva tua interim inveniri, si laycus sit, tunc illud capias et salvo in prisona nostra custodias ita quod per unum quarterium anni postquam captus fuerit vivat de suo proprio in prisona nostra, infra quod quarterium anni habeat terras suas et tenementa, bona et catalla sua, deliberata, de quibus per suos possit predictam pecuniam levare et predicto B. satisfacere, si voluerit, quorum vendicio infra predictum terminum stabilis erit et firma, corpore predicti A. in prisona nostra nichilominus interim remanente cui predictus B. inveniet panem et aquam ad victum. Et caveas quod predictus A. postquam captus fuerit in salva custodiatur prisona, quia si contingat ipsum a prisona nostra evadere, de corpore vel de debito te oportebit respondere. Et qualiter hoc preceptum nostrum etc.**[325]

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324 As is the case in the writ below; lines 2-3

325 App D 106-128

The text of this writ is very close to enrolments of Merchants execution on the Plea Rolls. For instance, the enrolment in Wengham v Basset (1288) reads:[326]

> **Preceptum est vicecomiti quod corpus predicti SB si laicus sit capiat et illud in prisona salvo etc. quousque de predicto debito etc simil cum dampnis custagiis necessiis et racionabiliter in laboribus sectis dilacionibus et expensis. Ita quod per unum quarterium anni postquam SB captus fuerit vivat de suo proprio in prisona Regis infra quod quarterium anni deliberata habeat terras et tenementa bona et catalla sua de quibus per suos levare possit predictam pecuniam et predicto JW satisfacere si voluerit quorum vendicioni infra predictum tempus stabilis et firma erit. Et si predictus SB infra quarterium anni postquam captus fuerit predicto JW de predicto debito non satisfecerit tunc omnia bona et catalla SB in balliva sua simil cum omnibus terris et tenementis que fuerunt ipsius SB tali die quo predictum debitum recognitum ad quorumcumque manus devenerint per feoffamentum vel alio modo nisi terre et tenementa sua ad heredem infra etatem existentem devenerint eidem JW vel suo assignato per racionabilem precium deliberari faciet tenendum nomine liberi tenementi quousque predicto JW de predicto debito simil cum etc. corpore predictus SB nichilominus in prisona Regis interim remanenti cui predictus JW inveniat panem et acqam de victum etc. Et caveat quod predictus SB in salva custodiatur prisona quia si contingat ipsum a prisona illa evadere de corpore vel de debito vicecomes oportet respondere. Et qualiter hoc preceptum etc. scire faceret Regi a die sancti Michaelis in quindecim dies ubicumque etc. per litteras suas sigillatas etc Et unde vicecomes etc.**

Effectiveness of the sheriff

In those instances where the defaulting debtor was not to be found in the power of the Mayor, the Mayor was to certify the statute merchant to the Chancellor, who was to direct a statutory writ to the sheriff(s) of the county(ies) in which the debtor(s) were

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326 KB 27/110 m 3 (Leics) (E 1288); certificate at C 241/8 nr 371; John de Wengham v Simon de Basset

supposed to be found and to have property. Therefore, the statutory schemes derive much of their effect from the efficiency and diligence of the sheriff's office.

Accordingly, it would be of interest to investigate the role of the sheriff in statutory execution. Unfortunately, the Plea Rolls of the Royal courts for the six terms between the enactments of Acton Burnell and Merchants[327] contain only a scattering of sheriffs' returns to Acton Burnell writs. This is perhaps unsurprising given that the statutory registries in some instances seem to have taken over a year to set up;[328] they had barely begun operation before the statutory régime changed. This impedes any exercise based on them as a means of testing the validity of the open rebuke in the preamble to Merchants. However, examination of the activity of sheriffs in the sphere of executing non-statutory debt recognisances (principally, recognisances entered into before the *curia Regis*) during this period, a process authorised by the judicial writ *fieri facias*, shows that sheriffs more often than not returned that neither debtors, nor any property against which execution could be made, had been found.[329] For instance, the Common Pleas roll for Hilary 1285[330] has 35 such entries; a total levy had been made by sheriffs in only two, and a partial levy in a further four instances. Twenty entries record that sheriffs had done nothing at all.[331] In a further five cases, the sheriffs claimed that the writ had been forwarded to the bailiffs of some franchise or liberty who, in their turn, had done nothing.[332]

For the years immediately following Merchants, there is a considerable volume of Plea Roll evidence for the operation of the statutory writs; about 125 sheriffs' returns to Acton Burnell and Merchants writs are recorded in the King's Bench rolls for the

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327 KB 27/81 (H 1284); /83 (E 1284); /86 (T 1284); /88 (H 1284); /90 (E 1284); KB Roll for M 1284 missing: CP 40/52 (H 1284); /53 (E 1284); /54 (T 1284); /55 (M 1284); /57 (H 1285); /58 (E 1285)

328 p 62

329 C.I.J.McNall, *The Role of the sheriff in the enforcement of recognised debt and the effect of Westminster II c.39* in *Bean-Counters and Bureaucrats: Essays in Medieval Administration* (Manchester UP, forthcoming), ed. R.H.Britnell

330 CP 40/57

331 Which proportion was not out of ordinary: CP 40/55 (M 1284) has 28 orders to *fi.fa.*, in 17 of which it was claimed that sheriff had done nothing

332 See, generally, Michael Clanchy, *The franchise of return of writs*, (1967) 17 TRHS 59

five terms from Easter 1287 to Easter 1288.[333] The following discussion is subject to the *caveat* that the enrolled returns might only be those where execution had gone awry in some way, and further execution was required – that is, it might not be a representative sample.

These returns reveal, despite the strictures of Merchants that sheriffs were to be subject to the provisions of Westminster II c. 39, that creditors seeking execution outside the power of the Mayor continued to encounter an array of obstacles. Many returns lead to the repetition of a statutory writ of execution, and orders in the form *sicut prius* and *sicut pluries* are to be found in abundance. Only a small minority of returns indicate the statutory procedure to have worked; namely, that the debt had been levied by the sheriff. The problem with writs disappearing into liberties persists, and sheriffs are not hesitant to cite that writs had been sent to liberties 'within which we have no entry save by special order of the King'. In about a third (38) of the entries, sheriffs returned that that they had sent the writ to the bailiffs of some liberty who had done nothing. Writs issuing in respect of statutes merchant entered into before the York registry appear to have been particularly susceptible to this; the Yorkshire liberties of Osgoldcross (7), the Ainsty (4), Richmond (4), Alverton (1) and Ripon (1) account between them for almost half (17) of the 38 entries. However, in cases where the liberty was a recognised one, Westminster II c. 39 gave no option but to order the sheriff to act *non omittas*; this is very much to the detriment of speed. There are no recorded instances of the bailiffs being summoned, as chapter 39 permitted, although there are instances on the Plea Rolls of local officials being distrained by their chattels for failure to execute statutory writs.[334]

When the aggrieved individual was powerful and had the resources to pursue the claim, Westminster II chapter 39[335] could bite against local officials reluctant to pursue statutory execution. For instance, Gregory de Rokesle, a former Mayor of London, sought execution on an Acton Burnell recognisance made in his favour by a Norfolk knight at the London registry. The sheriff of Norfolk returned that the debtor

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333 KB 27/104 (E 1287); /106 (T 1287); /107 (M 1287); /108 (H 1288); /110 (E 1288)

334 e.g. CP 40/145 m 264 (Notts) (M 1303)

335 KB 27/104 m 3 (Heref) (E 1287)

had no goods or chattels from which the money could be levied.[336] However, when it was witnessed to that the debtor did have goods and chattels in Norfolk, the sheriff was amerced £5. Later that term, the sheriff returned that the debtor had no goods, and that he was abroad. However, it was witnessed to that the sheriff not only had managed to levy £9 of the debtor's goods, which money he had maliciously kept for himself, but that the debtor had been arrested but released with the debt unpaid and without Royal authorisation.[337] The sheriff was amerced a further £10.[338]

The general picture of viscontiel laxity is borne out by a memorandum of writs returned by the sheriff of Lincolnshire to the Exchequer, King's Bench, and Common Pleas in 1294-5.[339] Of the 11 returns to statutory writs, five are positive (i.e., the sheriff returned that the debtor was in prison (2), that the money had been levied (1), or that the creditor had been satisfied (2)), whilst six were negative (i.e., the writ had come late (2); the debtor had not been found (4)).[340] The workload generated by statutory execution appears to have been a relatively heavy one; out of a total of 56 writs returnable to the Bench in the octave of Hilary, 10 related to the statutory procedures.[341]

Miscellaneous problems attending recognition and execution

Capacity of the debtor

The statutes are silent regarding whether a minor could make a statute merchant.[342] This silence implies that the normal rules about contractual capacity were to apply;

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336 CP 40/64 m 26 (Norf) (M 1286)

337 CP 40/64 m 142 (Norf) (M 1286)

338 Even this does not even seem to have been the end of the matter, since one, and, possibly, two further certificates were issued seeking writs be directed to the sheriff of Norfolk pursuant to this recognisance; C 241/6 nrs 101; 171

339 E 163/2/42

340 See p. 153 for discussion of this document and competing execution

341 E 163/2/42 m 2

342 There is nothing to prevent an infant being statutory creditor, or of getting statutory execution; 3 HEL 516

namely, that, since a minor could be sued,[343] it would have been possible for a minor to enter as a debtor into a statute merchant. Instances may be found of minors entering into statutes merchant with payment expressed due at a date when the debtor would have been of full age,[344] or if payment was expressed due at a date when the debtor would still not have been of age, deferring execution until he came of age.[345]

Plurality of debtors

A plurality of co-debtors was a common occurence. On Roll 1, just over a quarter of the entries[346] involves more than one debtor,[347] and the number of debtors is as high as seven. But this is nowhere near the upper limit; two certificates relating to a statute merchant entered into at the Winchester registry name 46 debtors, all merchants and burgesses of Southampton, who recognised a loan to themselves and the Commonalty.[348]

Apportionment of liability between co-debtors

The question arises here whether any principle governing the apportionment of liability between a plurality of co-debtors can be discerned from the form which the enrolment takes. Some recognisances read that the debtors bound themselves severally, as well as jointly; e.g. *utriusque eorum insolidum.*[349] The fact that most certificates[350] in Bundle 1[351] issuing pursuant to statutes merchant with a plurality of

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343 2 PM 442

344 CP 40/153 m 479 (Notts) (M 1305)

345 However, by the end of the fifteenth century, the general principle seems to have been that, when an infant attained age, he could disclaim all that he did while an infant; 3 HEL 518 n 8. Simpson, *Contract*, 540, affirms the 'vacillation' of the law of this period

346 61 from 235

347 Two debtors (41 recognisances); three (9); four (6); five (3); six (1); seven (1)

348 C 241/6 nr 36; /7 nr 288

349 e.g. RR 1 nrs 5; 10; 13; 27; 38; 48; C 241/1 nrs 24; 96; 106; 137; (or variations on this, e.g. *quilibet eorum in solidum* (C 241/1 nrs 59; 115) or *unumquemque eorum in solidum*, C 241/1 nr 3; There is also an instance of 14 debtors recognising *se singulos in solid' tener'* (C 241/1 nr 27)

350 18 of 26; C 241/1 nrs 10-1; 18; 52-2; 60; 65; 81; 87; 92; 98-1; 98-2; 111; 116; 118 (two debtors); 67; 72; 75; 84 (three debtors); 114 (four debtors)

351 C 241/1; containing 143, all Acton Burnell, certificates

debtors make no mention of several liability between the co-debtors suggests that their liability, unless expressly varied, was joint and not several.[352] This principle[353] has to be behind Albredesbury and Kingford v Ralegh (1306);[354] the plaintiffs[355] were two of three individuals who had together entered into a recognisance before the Exeter registry. The defendant, then sheriff of Devon, had been ordered to effect statutory execution against all three, so that the debt should be levied *pro rata* against all three of them. However, the sheriff, through favour to the third debtor, WF, and having no regard to his portion, did not execute against him.[356]

Plurality of creditors

On Roll 1, just over one in ten[357] recognisances involves more than one creditor.[358] Naming a plurality of creditors seems to have been a device adopted for the most part by foreign merchants, and, amongst these, principally Italians.[359] In part, this might have reflected the business practice of the Italian merchant houses; obligatory instruments to them ordinarily name several obligees.[360] This would have made execution easier, especially if individual members of the company were absent. In practical terms, it does not appear that it would have been unduly burdensome for all

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352 This also appears to have been the case with non-statutory recognisances, in which only some recognisances by a plurality of debtors is accompanied with a statement that each binds himself in the full sum recognised, e.g. Y/C4/5 m 4 (Great Yarmouth, 1283); 2 debtors, *et quilibet eorum pro toto*

353 Which would be consistent with award of a *fi.fa.* against a plurality of judgment debtors; e.g. CP 40/161 m 217d (Essex) (M 1306). The sheriff burdened one of four judgment debtors with the whole of the debt, *contra legem et consuetudinem Regni*

354 CP 40/161 m 501 (Devon) (M 1306)

355 What the enrolment says about the mode in which this complaint was brought makes it look very much like an *audita querela*; see p 192 ff

356 A re-extent was ordered, so as to ascertain what had been levied of each debtor

357 26 of 235

358 Two creditors (17); three creditors (8); five creditors (1)

359 Of the statutes merchant with more than one creditor on Roll 1, all but two are in favour of foreign merchants. There is a similar ratio in Bundle 1; 32 of the 38 certificates with a plurality of creditors represent statutes merchant to foreigners

360 And see the Acton Burnell bond at pp 79-80 which names ten creditors, all Lucchese merchants

the named parties to attend, even when there was a plurality both of debtors and creditors; no recognisance on Roll 1 involved more than eight named parties.[361]

Repayment by instalments

The interpretation of the statutory provisions that the debtor was to recognise the 'day[362] of payment' (*le ior de la paie*)[363] poses a difficulty where payment was to be in instalments. About one third[364] of the recognisances on Roll 1 are like this.[365] The largest number of instalments was 120;[366] £20 repayable in quarterly instalments of a quarter mark.[367] It does not seem that the debtor was put to recognise each and every instalment. The enrolment, instead of specifying all the instalments, details the first four and then says *et sic annuatim ad eosdem terminos quousque dictam pecuniam eidem persolverit.*[368] The sums in such instances do not always work out; for instance, a statute merchant for £3-15 is payable in quarterly instalments of 10 shillings, so one of the instalments is going to have to be for a different sum, although there is no mention of this in the enrolment.[369]

The above provision would have needed massaging where a recognisance provided for repayment by instalments. The question is whether statutory execution could be sought following default on any instalment, or whether the creditor had to wait until the time set for payment of the final instalment had passed before seeking the whole sum recognised. The common law rule in debt was that where money was due by instalments, debt could only be brought to recover the whole sum; hence, the action

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361 RR 1 nr 170 (7 debtors, 1 creditor); Six parties, RR 1 nrs 31 (3 debtors, 3 creditors); 95 (1 debtor, 5 creditors); 112 (5 debtors, 1 creditor); 137 (5 debtors, 1 creditor)

362 Singular

363 Apps A 6-7; B 4: C 21: D 18-19

364 76 of 235

365 Two instalments (54); three instalments (9); four instalments (1); more than four instalments (12)

366 RR 1 nr 184

367 Repayment may have taken 30 years, according to the measure suggested at p 232

368 See also RR 1 nr 66

369 RR 1 nr 72; similarly, RR 1 nrs 8; 32; 80; 94; 207

could only be brought after the final instalment had become due.[370] The certificates suggest that, in contrast to debt, statutory execution could be sought on default on any single instalment. For instance, a certificate relating to a statute merchant for £36, repayable in three equal instalments, states that the debtor *primum terminum solucionis in nullo observavit.*[371] It seems that statutory recovery was limited *pro tanto* the instalments defaulted upon; i.e., default on one instalment did not entitle the creditor to seek the whole;[372] a small number of instances seem to support this model - default on successive instalments generates certification for increasingly large sums.[373] Judging from the evidence of the Coventry statute merchant roll from the end of the fourteenth century,[374] repayment by instalments seems to have become the exception; the apparent practice was for the debtor to make a separate recognisance in respect of each 'instalment'.[375] This perhaps suggests that default on any one instalment came to be considered insufficient to activate the statutory execution procedure, bringing the statutes in line with debt.

Provision for repayment by instalment does, however, stress the statutory schemes if the creditor could only seek statutory execution on presentation of the bond; this would have been a powerful incentive for the creditor to retain the bond until payment had been made in full. Accordingly, with a statute merchant at large, and in the absence of any statutory provision for cancellation of the recognisance once the debt had been paid,[376] a prudent debtor ought to have insisted on a letter of acquittance in respect of each instalment paid.

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370 Simpson, *Contract*, 66

371 C 241/1 nr 138. This position was the same under Merchants; e.g. Default on the first instalment: C 241/2 nrs 76; 82; /4 nrs 1; 8: Default on the first two instalments: C 241/2 nr 89

372 e.g. Statute merchant for £44, payable in four instalments of £11 (RR 4 m 5 nr 20). Four certificates seek £11 (C 241/18 nr 92; /31 nr 162; /32 nrs 94, 320) and one £44 (C 241/34 nr 299)

373 e.g. C 241/2 nr 13 (£1-3s, payable M 17 E I); /12 nr 36 (£2-6s, payable M 17 and 18 E I); and the statute merchant described in Creting v Lovetot and Lovetot (CP 40/86 m 104 (Essex) (M 1290)); a recognisance for £127 was payable in two instalments - £80 on February 26th 1290 (certificated at C241/2 nr 218), and £47 on June 4th 1290 (certificated at C241/2 nr 165)

374 Beardwood, *Coventry Roll*

375 e.g. February 28th 1399; A entered into two statutes merchant, each for £60, to B: one payable May 1400, the other February 1401

376 pp 82-83

Enforcement other than against the debtor

The next question to be examined is whether statutory execution could lie against someone other than a named debtor.

Heirs and executors

The first scenario is death of the debtor, either before the debt fell due, or before execution had been initiated. Merchants provided for certain measures of execution against the debtor's heir[377] (to whom the debtor's realty would have devolved)[378] and those who possessed the lands[379] of Merchants debtors.[380]

The situation in debt was that where the debt was supported by a specialty,[381] a testate debtor's executors could be sued.[382] However, neither statute provided for execution against the debtor's executors or administrators, and, although there are certificates in which statutory execution against executors is sought,[383] it may have been that execution only lay where the statute merchant expressly provided that the debtor's executors were to be bound.[384] The debtor's executors, in any case, would only have held the debtor's personalty.[385]

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377 Apps C 75-77: D 89-91; and, e.g., C 241/8 nrs 270; 275 (execution sought against debtor's *filius et heres*)

378 Baker, *Introduction*, 428

379 But Merchants makes no mention of those who possessed the debtor's goods, although execution against them does happen to be contemplated by some certificates, e.g. C 241/4 nr 12 (execution against *illos quos bona eiusdem* (debtor) *possident*)

380 Apps C 70-73; D 82-87

381 Since a debtor's executors could not wage his law, they were not bound by his 'simple' debts (i.e., debts without specialty) against which wager would have been available to the debtor; 2 PM 347

382 80 SS clxxiii

383 e.g. C 241/4 nr 9

384 See statute merchant bonds above; pp 79-81

385 Baker, *Introduction*, 428

Successors

If the holders of particular offices entered in their official capacities as debtors into statutes merchant, it may have been necessary, in order that the debtor's successors in office be bound, to state that they were to be bound.[386] All the examples located relate to heads of religious houses, and the phenomenon may have been confined to them; for instance, the Prior of Lewes recognised £234 *pro se et conventu suo et successoribus suis* to three Florentine merchants.[387] However, this is not always clear-cut; each of three certificates issued in respect of a statute merchant entered into by the Prior of Monks' Horton (Kent) uses a different formula to describe the obligatory ambit of the originating recognisance: the debtor is said to have recognised *pro se et conventu suo* (C 241/1 nr 63); *pro se et conventu suo et succesoribus suis* (C 241/1 nr 122); *nomine suo et conventui sui et successorum suorum* (C 241/1 nr 138). This suggests either that the clerk did not follow slavishly the wording of the statute merchant bond or roll, or that the wording of the certificate in such respects was not regarded as substantively significant. However, it cannot be overlooked that two certificates request that the sheriff be ordered to proceed against the debtor's successors, whilst the remaining certificate does not. Alternatively, it may have sufficed, for a statute merchant to be actionable against a debtor's successors, that the statute merchant make clear on its face that it had been entered into by the debtor other than in a personal capacity; for instance, the Abbot of Quarr entered into a statute merchant to two merchants for corn bought of them *ad commune proficuum domus predicte*.[388]

Mainpernors and sureties

The statutes provided that the creditor, if the debt remained unsatisfied, could have execution, in the same manner as against the principal debtor, against any of the debtor's mainpernors or sureties.[389] Although such arrangements appear in connection

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386 cf. the 'default' position in respect of joint or solidary liability of co-debtors; p 104 ff

387 C 241/1 nr 62; also RR 1 nr 6 (*in nomine suo et conventus sui*)

388 C 241/6 nr 35

389 Apps A 40-44; B 21-23. Apps C 67-70 and D 80-82 only mention pledges

with other types of recognisances,[390] it is not known how common they were in respect of statutory recognisances, although there is a distinct paucity of evidence; one certificate,[391] issuing in respect of a recognisance entered into by one AS before the London registry in 1284, reads that an EF was present and constituted himself *fideiussor*[392] of the sum recognised, so that if AS did not meet the debt, EF would do so for him.[393] Two certificates relating to two statutes merchant entered into by a TB at the Bristol registry in June 1286 each states TB to have been accompanied by five others who, *unusquisque eorum in solidum,* bound themselves as 'principal debtors and payors'.[394] Perhaps express instances of this phenomenon are scarce since pledges bound themselves as straight co-principals. In such cases, there would have been no subsidiary liability *stricto sensu*, and, accordingly, certificates reflecting this arrangement would be indistinguishable from certificates with a 'straight' plurality of co-debtors. There are no entries on Roll 1 which embody without ambiguity any arrangement whereby a principal debtor entered into a statute merchant to his surety/co-principal. However, there is something like this on Roll 2: A and B entered into a recognisance in favour of C and D. Their liability was expressed to be joint and several.[395] The very next entry on the Roll, of even date, is a recognisance by B in favour of A.[396] Although the sums do not tally (the former recognisance is for more (£21) than the latter (£6)), the pattern is not inconsistent with interpretation of these two recognisances as incorporating a surety arrangement. However, this is not without ambiguity, since the latter recognisance falls due a fortnight (June 10th 1291) before the former (June 24th 1291).

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390 A 1283 Great Yarmouth enrolment has three persons identified as mainpernors, although an insertion in this entry appears to classify the mainpernors also as principal debtors (Y/C4/4 m 4); two pledges (Y/C4/4 m 3d; 1283)

391 C 241/1 nr 135; no corresponding entry on the Recognisance Roll has been found

392 'One who gives surety'; *Revised Medieval Latin Word-List*

393 This statute merchant was certificated *sicut alias*, but that certificate has the debtor and surety as straight co-debtors; C 241/8 nr 205; also C 241/3 nr 52-5; also C 241/3 nr 40-4 (two pledges); C 241/3 nrs 9-1, 9-2; /7 nr 10-2 (execution sought against debtors and *fideiussors*)

394 C 241/6 nr 5-1; also /6 nr 5-2

395 *utriusque eorum in solidum et pro toto*

396 RR 2 nrs 51 (£21); 52 (£6); both April 2nd 1291

If the pledges were to enter into a separate recognisance in favour of the creditor, there does not seem to be anything to prevent the creditor from enforcing *that* statute merchant, even if the 'principal' recognisance *had* been met. This latter analysis would tend towards the notion of the 'subsidiary' statute merchant being conditioned on the debtor's failure to meet the 'primary' statute merchant. However, there is nothing on Roll 1 which looks like this. In the Letter Books, however, there is a recognisance in which A, on behalf of C, bound himself to B.[397]

Payment to, and enforcement by, someone other than the creditor

Executors

Although neither statute adverts to the situation, some statutes merchant were stated to be payable to the creditor or his executors if the creditor died (*vel suis executoribus si de eo interim contingat humanitas*).[398] However, it is not known whether the statute merchant was enforceable by the creditor's executors if the enrolment and/or bond made no mention of them.[399] This said, the phenomenon of executors or administrators[400] seeking enforcement of statutes merchant was not unusual, especially where the deceased had multiple outstanding statutes merchant in his favour; for instance, there are fifteen certificates issuing from the York registry in favour of the executors of Robert de Scarborough, Dean of York.[401] Statutory writs of the early fourteenth century enjoin payment to the creditor or his executors.[402]

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397 Letter Book A 68

398 e.g. RR 1 nrs 9; also nrs 12; 16; 35; 88; also Bundle 1; C 241/1 nrs 76; 112; 135

399 There are only five certificates issuing from the London registry where execution is sought by creditors' executors (C 241/2 nrs 54; 65; /27 nr 8; /29 nr 23; /49 nr 312) and there is no corresponding enrolment for any of them on the extant Recognisance Rolls

400 e.g. C 241/8 nrs 212 217

401 e.g. C 241/16 nrs 165-168; 170-172; 174-175; C 241/23 nrs 79-82; 92; 108

402 e.g. 'R' 491 (87 SS 223; c.1318) payable to executors; *ibid.*, 492 (to creditor or executors); CUL Ms Hh vi 5 (c.1321). I am grateful to Jeffrey Hackney for supplying me with a copy of G.D.G.Hall's draft transcription of this register

Representatives

The debts recognised in many of the entries on Roll 1 and Bundle 1 are expressed to have been payable to the creditor(s) or a representative; just over a third[403] of the certificates in Bundle 1 provide for payment to someone other than a named creditor. Of these, the most common formula (37 certificates) provides for payment to the creditor(s) or 'his certain attorney' (*suo certo attornato*). Six certificates vary this, providing for payment to the creditor or 'his certain mandatory' (*suo certo nuncio*).[404] Nineteen provide for payment to the creditor or 'his attorney' (*suo attornato*). It is not clear whether there was any substantive difference between an 'attorney' and a mandatory,[405] nor what - if anything - '*certus*' added.[406] It has to be said that only one certificate has been located which states expressly that execution is being sought by an attorney of the creditor,[407] and this is in somewhat special circumstances; a Robert de Reymes is identified as the attorney of Bishop Langton, whose financial affairs were somewhat imaginative and tangled.[408]

Some certificates state that the sum recognised was to be paid to the creditor or the person (whether one of a plurality of creditors, an attorney, or a mandatory) presenting the statute merchant bond; *scriptum inde obligatorium deferenti.*[409] There is a noteworthy variation in the diplomatic of three certificates from the Lincoln registry in Bundle 1. These state that payment, instead of being made to the creditor or the bearer of the statute merchant bond, was to be made to the attorney producing 'these

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403 52 of 144

404 *Nuncius* is used only in certificates from the London registry, although the usage in London during this period was varied; Roll 1 has instances of both *attornatus* and *nuncius*; RR 1 nrs 6 (*nuncius*); 38 (*attornatus*)

405 Brand, *The Origins of the English Legal Profession*, 87-94

406 See the bond at p 80 for a hint that *'certus attornatus'* and *'attornatus'* were not the same

407 C 241/47 nr 1

408 For 'somewhat special', see the Langton literature adverted to in the Bibliography. Unfortunately, this matter seems to end here, since there is no mention of Reymes in it

409 e.g. RR 1 nrs 7; 34; C 241/1 nrs 10 (Winchester); 15 (Lincoln); 38 (Bristol)

presents' (*presens scriptum deferenti*).[410] There is a certificate from the Winchester registry to the same effect, but referring to a *littera* rather than a *scriptum.*[411] These look like direct transcriptions of the text of the statute merchant bond itself,[412] perhaps copied unwittingly - and mistakenly?[413] - by a clerk, since neither Acton Burnell nor Merchants contemplates that the *certificate* was to have had any obligatory effect.

Some statute merchant enrolments and certificates state that the sum recognised was payable to the creditor *vel eius attornato litteras suas deferenti* (my emphasis).[414] It is not clear what the debtor's 'letters' were. Perhaps this meant a letter of attorney, or, at the very least, some written authorisation of the creditor permitting the payee to give a valid receipt. It seems to have been possible for a creditor to make an express attornment for some third person to obtain execution;[415] for instance, a 1287 enrolment reads that an Acton Burnell recognisance entered into in favour of John of Bakewell[416] was to be payable to a WS, 'whom the said JB attorned in his place *coram Rege* to receive this money'.[417] The enrolment continues that the debtor's goods were to be delivered to WS *nomine* JB, and that the debtor was to be imprisoned until WS '*nomine* JB' was satisfied of the debt.

Such recognisances were known before Acton Burnell. In Great Yarmouth, there are recognisances payable to the creditors or a (named) attorney,[418] and also in the Letter

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410 C 241/1 nrs 42; 69; 93. There are also scattered instances of this under Merchants, e.g. C 241/45 nrs 60; 120; 189 (all from the Exeter registry)

411 C 241/1 nr 26; payable to creditor *vel suo certo attornato litteram istam defferenti*; Madox, *Formulare Anglicanum*, (London, 1702) nr 642; *aut suo certo Atturnato hanc litteram ostendenti* (1347)

412 pp 79-80

413 C 241/1 nr 95 has *presens scriptum deferent'* underscored; indicative of a scribal error

414 C 241/4 nrs 35; 37; 38; 43; 44; 45; This form seems to have been confined to the Winchester registry

415 Although it is not clear whether this could be accomplished if the statute merchant made no provision for enforcement by an attorney

416 The London statute merchant clerk

417 CP 40/69 m 68 (Notts) (M 1287)

418 e.g. Y/C4/1 m 4 (1274 at latest)

Books.[419] A provenance to the above expressions can also be discovered in obligatory instruments of the period. Maitland[420] discusses a formulary,[421] perhaps compiled in the 1280s, but containing copies of instruments dated during the 1270s. He partially transcribes an instrument headed *forma obligacionis de pecunia mutuata*,[422] in which the obligor is bound, in respect of certain loans made in 1274, in certain sums to the principal creditor 'or to his certain procurators or his heirs or his executors presenting this bond.' An *obligacio denariorum*[423] makes the obligor bound to pay the creditor 'or his certain attorney bringing these letters'. Another formulary adverted to by Maitland[424] also contains a *littere obligatorie*[425] in which the obligor binds himself to pay the principal creditor 'or his certain procurator or attorney attorned for this purpose or presenting these letters'.[426]

Foreign merchants were at the forefront of striving to attain the widest possible enforceability of obligatory instruments in their favour. One such means, frequently encountered, was to make the statute merchant payable to any member of a particular merchant house. For instance, a statute merchant entered into in favour of Capellin de Piacenza is expressed to be payable to him and (unnamed) associates of the Rusticati society of Piacenza;*'et sociis suis mercatoribus de societate Rusticati de Placencia.*'[427]

A further means by which the ambit of persons entitled to enforce the statute merchant may have been widened is suggested by those statutes merchant in which the creditor is identified as someone's 'servant' (*valletus*, *garcius*). It may be speculated that this identification might have come about since the servant was taking the recognisance on

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419 e.g. Letter Book A 61; payable to creditor, his valet, or to the bearer of the tally of the debt

420 7 LQR 63

421 CUL MS Ee.i.1 ff 225 - 231v; *Modus et ars componendi cartas*

422 *Ibid.* 65 (nr 21)

423 *Ibid.* 66 (nr 24)

424 CUL MS Mm.i.27

425 CUL MS Mm.i.27 f 78

426 *ad hoc destinato vel presentes litteras deferenti*

427 RR 1 nr 71. The Riccardi of Lucca did similarly; for instance, certificates record statutes merchant payable to between three and five named members of the society *ac ceteris ipsorum sociis civibus et mercatoribus Lucan' de societate Ricardor' de Luca solvendis eis vel uni eorum aut eorum attornato* ; C 241/1 nr 84

behalf of the master. However, this attribution may simply have been to assist with identification of the creditor. A similar purpose might have been served by those statutes merchant with a plurality of creditors where one is named as the 'merchant' of the other(s); *mercator suo*.[428] The 'principal' creditors in all these instances are foreign merchants. The originating statute merchant enrolment for one such certificate exists, and it makes the statute merchant payable to the creditor or his (named) *mercator*.[429] Perhaps qualification of the role of the co-creditor was a means of ensuring that, if payment was made to the *mercator*, he would have to account for it to his co-creditor.

Commonalties

Some statutes merchant do not indicate that they were payable to any individual at all; the recognisance is made in favour of the 'Commonalty' (*communitas*) of a certain town.[430] For instance, two debtors entered into a statute merchant at the Shrewsbury registry to a sole creditor, 'the Commonalty of the town of Shrewsbury' ('*communitati ville Salop'*).[431] There are two further examples; recognisances entered into before the Nottingham registry are each payable to three creditors - two named individuals and 'the Commonalty' of the town.[432] Maitland draws the distinction[433] between the *communitas* as a 'merchant guild' - 'a trading *communitas*' - which he did not believe could, ordinarily, sue (or be sued),[434] and a 'municipal' *communitas*, which could. The nature of the *communitas* in these statutes merchant seems to have been the latter.

Linked to the question of the persons by whom a statute merchant bond could be presented for enforcement is whether a statute merchant could be presented for

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428 e.g. C 241/1 nrs 71; 87. Statutes merchant to Arnald Filol, burgess of Leybourn, and Peter de Carrof *mercator suo*

429 RR 2 nr 103; payable to Bertram Markeys, burgess of Besançon and William Acre, *mercator suo*; C 241/2 nr 244

430 This is also encountered in Letter Book A 53; a 1282 recognisance to the Mayor and Commonalty of London

431 C 241/32 nr 249; /36 nr 47

432 C 241/49 nrs 220; 223

433 2 SS 134-135

434 For an instance of a statute merchant entered into *by* a Commonalty, see C 241/6 nr 36; /7 nr 288

execution by *any* bearer; that is, the bond would have become a kind of negotiable instrument. Postan has argued that creditors were unable to assign debts recorded on the recognisance rolls, which inability impelled the merchant to use 'less formal instruments' instead of recognisances for all but his 'less liquid debts'.[435] There is an instance - from the mid fourteenth century - which has the sale of a statute merchant bond ('a letter of statute merchant').[436] The purchasers are said to have 'pursued execution' against the debtor's rents and tenements. It is not clear whether the vendors retained any interest; they 'granted their interest in the statute merchant'[437] to the purchasers 'until the sum recognised be paid'.

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435 Postan, *Medieval Financial Instruments*, 42. This issue is also touched upon, although inconclusively, by Bailey, *The Assignment of Debts*, 48 LQR 269 nn 30 & 31

436 *Cartulary of John Pyel*, entry 6 (*circa* 1349)

437 Unfortunately, the *Calendar* does not have the original French text

CHAPTER 3

The business of the registries

The London registries

Despite the short life of Acton Burnell,[1] Roll 1 and the certificates of 'missing' defaulted-upon Acton Burnell recognisances from the London registry,[2] provide sufficient evidence to enable some conclusions on the use of Acton Burnell in London to be drawn. The evidence for the business of the London Merchants registry is derived exclusively from Rolls 2-5.[3]

Sums recognised

From the outset, the entry level - i.e., the sum at which it was perceived worthwhile to enter a statute merchant - was below the level at which it has been speculated even whether any fee was payable.[4] The sums recognised on the Acton Burnell roll begin at 13 shillings,[5] and on the Merchants rolls at one mark (13s 4d).[6] This is consistent with the pre-Acton Burnell letter books, in which there are several recognisances[7] for £1 or

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1 p 59 ff

2 That is, certificates for statutes merchant stated to have been entered into before (a) Henry le Galeys (Mayor until October 1284) (119 certificates); (b) Gregory de Rokesle (Mayor between October 1284 and July 1st 1285) (34 certificates); or (c) Ralph de Sandwich (appointed Warden, July 1st 1285) (14 certificates), and seeking execution according to Acton Burnell, and for which there is no corresponding recognisance on Roll 1

3 i.e., no account is taken of the Merchants cerificates issuing from the London registry; see p 13

4 p 72

5 RR 1 nr 76

6 RR 2 nr 11

7 17 from 420; 4%

less.[8] Recognisances for small sums suggest procedures which were cheap to use and readily accessible.

The average sum[9] recognised on Roll 1 is £18-5s.[10] However, if the recognisances for the six greatest sums[11] are disregarded, this falls to £15-10s.[12] This chimes with the average sum of the London Acton Burnell certificates;[13] this is £22-5s;[14] disregarding the certificates for the six greatest sums,[15] the average sum recognised is - also - £15-10.[16] Combining the statutes merchant on Roll 1 with this group of certificated London Acton Burnell recognisances gives a sample of 400 statutes merchant, with £20 the overall average sum recognised;[17] this falls to £16-10s[18] if the statutes merchant for the six greatest sums[19] are discarded.[20]

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8 e.g. Letter Book A 48 (6s 8d); 66 (7s); 4 (9s)

9 All sums are given to the nearest five shillings

10 £4,296 divided by 235 recognisances

11 RR 1 nrs 6 (£200); 90 (£200); 68 (£100); 196 (£100); 36 (£80-16s-5 1/4d); 95 (£80)

12 £3,535 divided by 229 recognisances

13 Excluding (i) 'repeat' certificates, (ii) certificates for statutes merchant on Roll 1, and (iii) two certificates (C 241/6 nrs 15 (11 'cars' of lead); 42 (3 sacks of wool)) which state no sum

14 £3,671 divided by 165 recognisances

15 C 241/18 nr 388 (£648-16s-6d); /1 nr 62 (£243-13s-4d); /6 nr 193 (£86-13s-4d); /1 nr 61 (£80-16s-5d); /1 nr 76 (£70-0s-11d); /14 nr 34 (£62-16s-6d)

16 £2,478 divided by 159 recognisances

17 £7,967 divided by 400 recognisances

18 £6,475 divided by 394 recognisances

19 C 241/8 nr 388 (£648-16s-6d); /1 nr 62 (£243-13s-4d); RR 1 nrs 6 (£200); 90 (£200); 68 (£100); 196 (£100)

20 The size of this fall 18% is consistent with the size of the fall for a similar exercise conducted in association with the Merchants rolls

The overall and 'weighted'[21] average sums recognised on Rolls 2 -5 are:

	Roll 2 (1291-2)	**Roll 3** (1293-4)	**Roll 4** (1295-6)	**Roll 5** (1298-9)
Overall average	**£23-5s**[22]	**£32-10s**[23]	**£24-10s**[24]	**£42**[25]
'Weighted' average[26]	**£18-5s**[27]	**£25-5s**[28]	**£17-10s**[29]	**£26-5s**[30]

£30[31] is the overall average sum, and £21-10s[32] the 'weighted' average sum recognised on Rolls 2 -5. The rise between the overall weighted averages of Merchants is only about a third - but, barring the 'blip' of Roll 4 - there is a sharper increase over the 15 years which the Acton Burnell and Merchants rolls cover. This perhaps indicates something about the genuine attractiveness of the Merchants provisions for execution on default; it may be postulated that devastatingly attractive execution provisions would have drawn in more and more recognisances for increasingly larger sums, and boosted the averages correspondingly.

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21 Discarding the recognisances for the six greatest sums on each roll

22 £6,407-10s divided by 276 recognisances

23 £6,412-5s divided by 197 recognisances

24 £3,389-5s divided by 139 recognisances

25 £7,252-10s divided by 173 recognisances

26 There is a consistency in the size of the fall between rolls, which suggests this manipulation to be valid. The Roll 2 average falls approximately 22%; Roll 3, 22%; Roll 4, 28%; and Roll 5, 28%

27 £4,944-15s divided by 270 statutes merchant; RR 2 nrs 114 (£368-15s); 268 (£300); 90, 174; 224 (all £200); 253 (£194) were discounted

28 £4,806-5s divided by 191 statutes merchant; RR 3 m 4 nr 18 (£400);m 4 nr 6 (460m); m 5 nr 28 (£300); m 3 nr 23; m 4 nr 3; m 7 (all £200) were discounted

29 £2,339-5s divided by 133 statutes merchant; RR 4 m 6 nr 9 (£500); m 5 nr 11 (£200); m 5 nr 21; m 4 nr 9 (both £100); m 5 nr 10 (£80); m 2 nr 13 (£70) were discounted

30 £4,391-10s divided by 167 statutes merchant; RR 5 m 4 nr 13 (£1000); m 3 nr 15 (1000m); m 1 nr 26 (£435); m 4 nr 1 (550m); m 2 nr 3; m 6 nr 13 (both £200) were discounted

31 £23,461-10s divided by 785 recognisances

32 £16,481-15s divided by 761 statutes merchant

The average figures for Acton Burnell recognisances can be compared with pre-Acton Burnell recognisances entered on the Close Rolls and in the London Letter Books . The average sum recognised on the Close Roll between November 1279 and December 1283 was £47.[33] Even when the recognisances for the six greatest sums in this group are removed, this average falls to £37-10s,[34] i.e., still more than twice the weighted average sum recognised in London under Acton Burnell. This *quantitative* discrepancy suggests that Close Roll recognisances were also *qualitatively* different, arising in different contexts, from the early statutory recognisances. The average sum recognised in the Letter Books between January 1276[35] and December 13th 1283[36] was £14-10s,[37] which falls to £13-5s[38] when the six recognisances for the greatest sums[39] are removed. The proximity of these latter figures to those from the London Acton Burnell registry indicates, perhaps, that an Acton Burnell recognisance was seen as a straightforward alternative to a Letter Book recognisance, rather than a Close Roll recognisance. However, it was not unknown for Close Roll creditors to appear as creditors both in the pre-Acton Burnell Letter Books, or on Roll 1; 18 Close Roll creditors are also creditors in the Letter Books, whilst 13 appear on Roll 1. It may have been that the choice of which recognisance to employ was determined by the size of the sum recognised. This discrimination indicates a degree of sophistication amongst creditors as to the most appropriate forum for any particular recognisance.

This diversity of modes of securing debt is illustrated by a schedule of the debts due to Gregory de Rokesle, a former Mayor of London, prepared in 1299.[40] 52 debts 'owed *per litteras*', 40 *per tallias*, and 13 recognitions made in the Exchequer are listed. The average

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33 £19,598 divided by 417 recognisances

34 £15,440-15s divided by 411 recognisances

35 Letter Book A 3 is the earliest dated recognisance; January 6th 1276

36 Letter Book A 79; for the significance of this date, see p 63

37 £6,063-10s divided by 419 recognisances

38 £5,467-5s divided by 413 recognisances

39 Letter Book A 46 (£150); 68 (£126-3s-3d); 67 (£123-6s-5d); 56 (£66-13s-4d); 66 (£66-13s-4d); 68 (£63-6s-8d)

40 E 163/2/12

sums for each category (removing the largest sum in each category) are £11,[41] £2-10s[42] and £19[43] respectively; so, although an obligatory writing was the most popular, on the whole recognisances seem to have been preferred for larger sums. Tallies seem to have been employed for much smaller debts; this perhaps reflects the ease in making - with tallies the easiest (there need not even be anything written on the tally), through letters (which could be made anywhere), to recognisances (which could only be entered into before the appropriate forum, and which might have required the attendance of the parties, as well - perhaps - as the payment of a fee). By way of comparison, the average of the certificated statutes merchant to Rokesle was £24;[44] although this average is derived from a small sample, it is nevertheless on all fours with the above picture of recognisances generally being for greater sums than debts accompanied by obligatory instruments or tallies.[45]

Although Acton Burnell expressly preserves other modes for the recognition of debts,[46] a marked decline in the number of Letter Book recognisances after Acton Burnell is visible. During a twelve month period preceding the advent of Acton Burnell, about 117 recognisances were entered in Letter Book A[47] i.e., about ten recognisances a month. However, only about 60 recognisances are entered in the Letter Books during the 21 month period between the advent of Acton Burnell and Merchants,[48] i.e., about three recognisances a month. However, a decline of Letter Book business coincidental with the advent of Acton Burnell in London of itself does not prove that the decline was attributable to Acton Burnell. The incidence of Letter Book creditors 'migrating' to statutory recognisances can be investigated. It is contended that this offers a sound

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41 £553-15s divided by 51; a letter for 100 marks was disregarded

42 £99 divided by 39; a tally for £50 was disregarded

43 £206-10s divided by 11 (one recognisance was for 5 sacks of wool, with no price specified); a recognisance for £70 was disregarded

44 £238 divided by 10

45 At least when in favour of domestic creditors

46 Apps A 50-51; B 28-29; This provision was repeated by Merchants; Apps C 92-94; D 148-149

47 Letter Book A 51-70 (June 11th 1282 May 27th 1283)

48 Letter Book A 79-90 (October 1283 - July 1285)

measure of contemporary perception of the attractiveness of Acton Burnell. Between January 1276 and December 1283, the Letter Books identify 321 creditors; of these, 29 appear as Acton Burnell creditors; hence, about 1 in 11 of the pre-Acton Burnell Letter Book creditors resorted to the statutory recognisances: some movement from the Letter Books to Acton Burnell, but not an especially pronounced one.[49] It seems Acton Burnell's business was new, rather than a straightforward attrition of business from the other recognisance taking forums in London.

Provenance of the parties

There are 412 individuals on Roll 1; 246 debtors and 173 creditors.[50] 259 individuals appear on the certificates from the 'missing' London Acton Burnell rolls, of whom 64 also appear on Roll 1. Hence, at least 607[51] persons used the London Acton Burnell registry. The size of this class can be compared with the pre-Acton Burnell letter books, in which, over the four years scrutinised, 685 individuals are named.[52] The pattern of fewer creditors than debtors is consistent (although more pronounced in the former) between Acton Burnell (255:364), the Letter books (321:390), and Merchants. Furthermore, the categories of debtors or creditors are almost mutually exclusive; only 15 persons of the 607 (i.e, about one in forty) Acton Burnell, and 26 (also about one in forty) Letter Book parties appear both as debtors and creditors.

There is a strong London flavour to the business of the London Acton Burnell registry. Just over a quarter of all the known Acton Burnell recognisances are in favour of persons identified as citizens of London.[53] Overall, about half of the entries on Roll 1 involve persons identified as citizens of London in some capacity.[54] This latter is reasonably

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49 It is submitted that it is not the business of this thesis to investigate further the decline in recognisances entered into before the Chamberlain

50 Seven individuals appear both as debtor and creditor: 412 = (246 *minus* 7) + 1

51 (259 *minus* 64) + 412

52 26 individuals appear both as debtor and creditor: 685 = (390 *minus* 26) + 321

53 114 of 402; 45 creditors on Roll 1, 59 creditors on the certificates

54 121 of 235: 61 with citizens of London as debtors, 45 as creditors, and 15 with both parties

consistent with the certificates, of which about 4 out of 10 involve persons identified as citizens of London.[55] However, this latter figure may be deceptive (reflected in the very small number of London debtors) since, the Mayor of London must often have been able to secure execution against defaulting London debtors, and no certification would be needed.

The London registry did catch business from further afield. Roll 1 has debtors[56] from Gloucestershire, Herefordshire, Staffordshire, Devon, Derbyshire, Shropshire.[57] By way of contrast, the pre-Acton Burnell letter books do not ordinarily seem to have assigned the debtor's place of origin; this perhaps suggests that debtors were ordinarily based in London. Negatively, this could suggest something about the mode of execution on Letter Book recognisances; perhaps it was ineffective against persons from outside London.

Mercantile involvement

The next question to be examined is whether the persons availing themselves of Acton Burnell in London were the 'merchants' (and particularly, the foreign merchants - those merchants who had forborne from entering the Realm) with whom the preambles to the draft and statute were so concerned.[58]

There is a heavy mercantile component to the business of the London Acton Burnell registry. Merchants or tradesmen are involved in approximately two thirds of the recognisances on Roll 1,[59] slightly more prominently as creditors (they appear in just

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55 65 of 167: 3 with citizens of London as debtors, 59 as creditors, and 3 as both parties

56 For the identification of debtors' counties on the roll, see pp 91-92

57 Gloucs: RR 1 nrs 9; 105; 106 (knights); Heref nr 61 (a vintner); Staffs nr 115; Devon nrs 21 (a knight); 114 (a taverner); 154 (a knight); Derbs nr 174; Shropshire nr 64 (a rector)

58 Apps A 3; B 2; pp 50-51

59 137 of 235 (58%) 58 recognisances have persons identified as merchants or tradesmen making recognition in favour of other merchants or tradesmen (i.e, recognisances which look exclusively mercantile or commercial), a further 58 identify at least one of the creditors as a merchant or tradesman,

under half of the recognisances)[60] than as debtors (about a third of all the recognisances).[61] The profile differs for the recognisances to which the London Acton Burnell certificates relate. Over a third[62] of these are in favour of merchants or tradesmen, but there is only a small number by merchants.[63] It may be hypothesised that merchants or tradesmen - in London at least - defaulted much less often that non-merchants, or, alternatively, that execution against them could be accomplished by the Mayor of London, with no need for certification.

There is a sizeable contingent of foreign merchant creditors on Roll 1 and in the London Acton Burnell certificates - 66 foreign merchants are named as creditors, amongst them 25 Frenchmen,[64] 18 Italians,[65] 9 Spaniards,[66] and Germans.[67] By way of contrast, very few domestic merchants appear as creditors; one from Leicester,[68] and burgesses of Southampton[69] and Great Yarmouth. are noted.[70] A figure which reflects the marked contraction in the level of mercantile business before London Merchants registry is that only nine of the creditors named as London Acton Burnell creditors appear as such on the Merchants rolls. The tribulations and eventual expulsion of the Italian bankers in the

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and 21 recognisances identify at least one of the debtors as a merchant or tradesman but with no indication whether any of the creditors was mercantile

60 116 of 235; 49%

61 79 of 235; 34%

62 60 of 167; 36%

63 7

64 e.g. from Toulouse, RR 1 nrs 18, 19; from Bergerac e.g. nrs 26, 46, from Burgundy e.g. nrs 10, 11; from Paris e.g. C 241/12 nr 15

65 e.g. The *Riccardi* of Lucca, RR 1 nrs 21, 31, 87; The *Eubaldi Cardelini* of Lucca, 94; The *Rusticati* of Piacenza 71; from Florence e.g. 89, 93; from Piacenza, 69, 78

66 e.g. RR 1 nrs 181; 209; 210; 211 (Peter Fort, 'merchant of Spain'); 144; 146; 147 (Simon Peres, 'merchant of Bures')

67 e.g. RR 1 nrs 9; 139; 140 (all John Graunt, 'mercator Alemann')

68 RR 1 nr 118

69 RR 1 nr 220; 225

70 RR 1 nr 84

1290s by Edward I explains some of this, but, otherwise, several prominent Acton Burnell merchant creditors simply disappear.

On the Merchants rolls, the percentage of recognisances in favour of known merchants or tradesmen[71] are reasonably consistent, but well below the level of mercantile involvement on Roll 1; i.e.,

Roll 2; 14%;[72] **Roll 3;** 28%;[73] **Roll 4;** 17%;[74] **Roll 5;** 20%[75]

Hence, a significant proportion of the recognisances have no apparent mercantile or commercial connection, and this will be explored below.[76]

Since the rolls and certificates typically reveal very little, it is not easy to draw any hard conclusions as to the context of the statutes merchant engaged in by merchants and tradesmen; some recognisances make it clear on their face that they are for the sale of goods, and in others the identity of the parties is in itself strongly suggestive. For instance, Roll 1 identifies a variety of tradesmen as debtors, most prominently blanket-makers (20 recognisances)[77] and leather-workmen[78] (16).[79] Almost all these

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71 Or in respect of goods sold; p 130 ff

72 38 recognisances. A further 10 recognisances have persons identified as merchants (all domestic) as debtors, with no merchant as creditor. Hence, as few as 15% of the recognisances on Roll 2 could be mercantile

73 55 recognisances. A further 16 recognisances have persons identified as merchants (all but one domestic) as debtors, with no merchant as creditor. Hence, as few as just over a third 36% - of the recognisances on Roll 3 could be mercantile

74 24 recognisances. A further 13 recognisances have persons identified as merchants (all but one domestic) as debtors, with no merchant as creditor. Hence, as few as about a quarter - 26% - of the recognisances on Roll 4 could be mercantile

75 32 recognisances. A further 13 recognisances have persons identified as merchants (all domestic) as debtors, with no merchant as creditor. Hence, as few as about a quarter - 26% - of the recognisances on Roll 5 could be mercantile

76 p 133 ff

77 19 'Chaloners' e.g. RR 1 nr 13; and 1 'burreller' (maker of burel, a kind of cloth); RR 1 nr 178

78 'Tawers' (*allutarius*), e.g. RR 1 nrs 33; 15; 17

recognisances are in favour of a small number of Spanish merchants,[80] and it can safely be postulated that these recognisances were associated with the purchase of leather by the 'debtors' from the 'creditors'.[81]

Apart from these, one explanation for the context of statutes merchant in favour of merchants would be as security for the repayment of loans. However, only one recognisance on Roll 1 states that the statute merchant was entered into '*ex causa mutui*',[82] and, similarly, only a single certificate.[83] Postan was prepared to infer the 'mercantile character' of many recognisances by virtue of the sums recognised in them. He observes that the sums recognised in the Letter Books and the statutes merchant on Rolls 1 to 3;

> **'are relatively small and seldom expressed in round figures. There are odd pennies, half-pennies and farthings in most of them. In short, they have the unmistakable appearance of debts contracted in the ordinary course of buying and selling'**.[84]

However, this assessment is not borne out by Roll 1. Only about one in five[85] of the recognisances are for 'untidy' sums (i.e., sums other than exact pounds, marks, half

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79 e.g. Also Taverners (6 recognisances): e.g. RR 1 nrs 18; 30; 52; Goldsmiths (4): e.g. nrs 150; 194; 228; Drapers (3): nrs 71; 109; Furriers (3): nrs 174; 229; 230; Pepperers (2): nrs 20; 78; Smiths (2): nrs 35; 134; Tailors (2): nrs 187; 204; a butcher nr 49; a tiler nr 75; a vintner nr 108; two chirographers nr 126; a spicer nr 140; a barber nr 129; a tanner nr 2; a baker nr 148; an armourer nr 75

80 e.g. to Peter Fort, *mercator Castri Novi de Vallibus* (e.g. RR 1 nrs 209-213), Simon Peres (e.g. RR 1 nr 144). Interestingly, these merchants do not appear as creditors in the pre-Acton Burnell Letter Books, in which there are many recognisances (e.g. Letter Book A 10; 13; 16; 17 *et passim*) associated with the sale of leather; this supports the idea of Merchants generating its own business; p 120

81 Similarly, taverners or vintners recognising in favour of French merchants; e.g. RR 1 nrs 18; 52

82 RR 1 nr 97

83 C 241/6 nr 69; such attribution is also rare in the London Letter Books. There are only two instances pre-Acton Burnell; Letter Book A 32; 45

84 Postan, *op.cit.* 40-41

85 43 of 235; and only 19 of 167 certificated recognisances

marks, or multiples of five shillings),[86] and, of these, only eleven include odd pennies,[87] and one a fraction of a penny.[88] However, there is little reason to suppose, as Postan does, that recognisances expressed in 'respectable round figures' should have arisen otherwise than in connection with 'the ordinary transactions of buying and selling'.[89] Only 23 of the the 116 statutes merchant on Roll 1 which have at least one creditor identified as a merchant are 'untidy' in the above sense.

Besides the 'roundness' of the sums, a pattern reveals itself if the recognisances to different categories of creditor are ranked:

Recognition:	**Roll 1 overall average**
To foreign merchants	£11-15s[90]
To domestic merchants	£8-10s[91]
To all merchants	£11[92]
To all others	£18-10s[93]

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86 e.g. RR 1 nrs 17 (21-9s); 18 (4-11s)

87 e.g. RR 1 nrs 14 (£48-15s-2d); 64 (£1-6s-2d)

88 RR 1 nr 36 (£80-16s-5d farthing)

89 Postan, *op.cit.* 40-41

90 £1,113-5s divided by 95 recognisances

91 £178 divided by 21 recognisances

92 £1,291-10s divided by 116 recognisances

93 £1,274 divided by 69 statutes merchant

The perhaps surprising result is that the average sum recognised in other than an ostensibly mercantile or commercial context is greater than in such a context. In terms of pure economic history, this may be indicative of a healthy money supply and prosperity during the period. Within the narrower parameters of this thesis, this pattern could be seen as reflecting a widely disseminated confidence in the Acton Burnell scheme, and an alacrity on the part of non-mercantile creditors to bring their debts within its provisions. It is not possible to attribute the relatively weak showing by merchants as symptomatic of any initial conservatism in resorting to an untried scheme, since the pattern of Roll 1 is consistent with the Merchants rolls, in which the average sums recognised are:

Recognition:	**Roll 2 overall average**	**Roll 3 overall average**	**Roll 4 overall average**	**Roll 5 overall average**
To foreign merchants	£21[94]	£40-10s[95]	£14[96]	£54-10s[97]
To domestic merchants	£8-10s[98]	£12[99]	£21[100]	£30[101]
To all merchants	£18-5s[102]	£33-15s[103]	£19-10s[104]	£46-15s[105]
To all others	£25[106]	£32-5s[107]	£25-10s[108]	£41[109]

94 £1,027 divided by 49 recognisances

95 £1,298 divided by 32 recognisances

96 £69-10s divided by 5 recognisances

97 £1,147-15s divided by 21 recognisances

98 £118 divided by 14 recognisances

99 £119 divided by 10 recognisances

100 £400-10s divided by 19 recognisances

101 £298-5s divided by 10 recognisances

102 £1,145 divided by 63 recognisances

103 £1,417 divided by 42 recognisances

104 £471 divided by 24 recognisances

105 £1,446 divided by 31 recognisances

106 £5,262-10s divided by 213 recognisances

107 £4,995-5s divided by 155 recognisances

108 £2,918-5s divided by 115 recognisances

109 £5,806-10s divided by 142 recognisances

Removing the four recognisances for the highest sums in each category emphasises the pattern; the average sums recognised fall to:

Recognition:	Roll 2	Roll 3	Roll 4	Roll 5
To foreign merchants	£16[110]	£24[111]	£14[112]	£18-10s[113]
To domestic Merchants	£6[114]	£4-15s[115]	£11[116]	£13-10s[117]
To all merchants	£14-5s[118]	£21[119]	£11-10s[120]	£21-10s[121]
To all others	£20[122]	£25-15s[123]	£18-5s[124]	£26[125]

The overall weighted averages for the different categories of recognition under Merchants are

£18 to foreign merchants;

£8-15s to domestic merchants;

£17 to all merchants (this is consistent with the overall average sum recognised at the Boston Fair registry, and in respect of which certification issued: £14-15s[126])

£22-10s to all others.

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110 £725-5s divided by 45 recognisances

111 £675-5s divided by 28 recognisances

112 There were only 5 recognisances

113 £321-15s divided by 17 recognisances

114 £57 divided by 10 recognisances

115 £28-5s divided by 6 recognisances

116 £165-10s divided by 15 recognisances

117 £81-5s divided by 6 recognisances

118 £843-5s divided by 59 recognisances

119 £794-10s divided by 38 recognisances

120 £228 divided by 20 recognisances

121 £578 divided by 27 recognisances

122 £4,193-15s divided by 209 recognisances

123 £3,895-5s divided by 151 recognisances

124 £2,018-5s divided by 111 recognisances

125 £3,580-10s divided by 138 recognisances

126 p 138

Statutes merchant for goods

There are six recognisances on Roll 1, included in this thesis in the category of 'mercantile' recognisances, in which the debtor promises to deliver certain quantities of goods or their price;[127] four of these entries relate to wool,[128] and the remaining two to corn, and oats.[129] The categorisation of such recognisances, when they appear, as 'mercantile' is, it is suggested, supported by the fact that the enrolment often goes into the sort of detail usually encountered in a commercial sale of goods contract. For instance, one entry on Roll 1[130] has the recognition of six sacks and six and a half stones of wool, to the value of £41-13s- 4d, to three members of the Riccardi. Payment in full had already been made. The weight of the wool was to be according to the 'Oxfordshire measure' and the wool itself was to be of the debtors' own stock or better. The wool was deliverable in three annual instalments between June 1285 and June 1287.

Two certificates issuing from the Lincoln registry in respect of Acton Burnell recognisances suggest that the matter of whether statutes merchant could be made for goods had not been free of controversy. One notes that '(the Chancellor) ordered that we (i.e., the Mayor and clerk) should take no recognisance save for a certain sum of money', but pleads that the recognisance was entered into before that order reached the Mayor.[131] No such order has been located.

The thousands of certificates reveal a wide variety of things which could be the subject matter of a statute merchant; sacks[132] of wool,[133] various types of grain (most commonly,

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127 Since this ratio (6: 235; 1 in 39) chimes with the ratio (4: 167; 1 in 42) for the certificates relating to similar recognisances amongst the London Acton Burnell recognisances (C 241/1 nr 111; /6 nrs 15; 42; 164), it is assumed that Roll 1 is trustworthy in this respect

128 RR 1 nrs 3; 31; 79; 102

129 RR 1 nrs 185; 186

130 RR 1 nr 31; January 1285

131 C 241/1 nr 68 (certificate dated June 26th 1285); also /7 nr 315; statute merchant for quantities of wheat and barley

132 Or fells; C 241/16 nr 64 (200 sheepskins (*vellera*), price 5d each)

wheat, rye, barley, and oats), beans,[134] 'cars' of lead,[135] horseloads ('seams') of iron,[136] loads ('lasts') of herring,[137] lime,[138] wine,[139] cloth,[140] peat,[141] and a horse.[142]

This stands to be qualified in so far as it is almost always the case that, where the statute merchant stipulates for the delivery of goods, a monetary sum is also named,[143] and the debtor's performance cast as delivery (*solutio*) of the goods or payment of the money, e.g. *sex saccis lane de proprio instauro suo de L. et de K. precii sexaginta libris quam lana vel precium soluisse debuit* (my emphasis).[144] Such statutes merchant seem to have been entered into in connection with genuine transactions; the prices per sack of wool are both

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133 About 450 statutes merchant in total. There is a clear regional bias to these; almost half (209) were entered into before the York registry, and 110 at Nottingham. The quantities of wool recognised ranged from three stones (e.g. C 241/27 nr 91) to 24 sacks (C 241/45 nr 267). The Riccardi of Lucca produced a list of all the wool which they had bought in 1294 (E 101/126/7/12) describing 44 purchases; the average purchase was about three sacks, which is about the same as the amounts recognised in statutes merchant

134 About 10 statutes merchant in total; e.g. C 241/3 nr 14; 16 and a half quarters of *fabar et pis*

135 About 30 recognisances in total; e.g. C 241/9 nr 199; 27 'cars' at 2 shillings a car

136 About 5 recognisances in total; e.g. C 241/34 nrs 192; 6 and a half 'seams' (*summa*) at 15 shillings a seam

137 C 241/15 nr 35; /49 nr 60; /51 nr 7

138 About 6 recognisances in total e.g. C 241/5 nr 16; /7 nr 148

139 About 12 statutes merchant in total e.g. C 241/14 nr 20

140 e.g. C 241/7 nrs 75; 76; 77

141 C 241/32 nr 75

142 C 241/8 nr 430

143 By way of exception, there are scattered instances where the debtor recognises to 'pay' a particular thing with no expressed monetary alternative (e.g. C 241/35 nrs 112; 145; 324; 457; /36 nrs 28; 31). However, most of these certificates are curious in some respect; e.g. the word *precii* is present, but followed by a blank (C 241/35 nr 324); certificate specifies that the debtor has rendered up (*soluisse*) neither the goods *nor the money* (C 241/35 nr 112); 'repeat' certificates *do* specify monetary values (e.g. C 241/36 nr 262; /45 nr 102). There is a hint on the Plea Rolls that, where a quantity of goods was recognised without any price, the sheriff was to be ordered to 'make up' the goods recognised pursuant to a writ of *fi.fa.* e.g. an order to *fi.fa.*three sacks of wool on Acton Burnell recognisance (CP 40/64 m 125 (Essex) (M 1286)). However, in this instance, a corresponding certificate (C 241/6 nr 42) makes no mention of *fi.fa.*, but orders straightforward Merchants execution

144 RR 1 nr 102

consistent across registries,[145] and tally with known market prices.[146] The same is true of statutes merchant for grain.[147] The correspondence between the value of the goods recognised and the sum named suggests that the latter was the purchase price, and did not incorporate any penalty in case of the debtor's failure to deliver the goods. This is perhaps slightly surprising given that there was a way in which this could easily be accomplished through recognisances. For instance, in Great Yarmouth a debtor sometimes enters into two recognisances; one *de principal debiti*, and one *de dampnis*,[148] or promises to pay *sub pena* a certain sum *ad opus* the creditor and/or the Bailiffs.[149]

There is no evidence that buyer/creditors in commodity transactions themselves entered into statutes merchant for the payment of the price. This is consistent with a model of advance payment by the buyer/creditor;[150] in theory, the purchase price would have been recoverable using the statutory procedure in the event of non-delivery.[151]

The very absence of detail on the face of the statute merchant bond or in the enrolled recognisance do hamper assessment, in almost all cases, of the underlying nature of the transaction. However, the Plea Rolls do disclose one instance - Stirkeland v Goldington

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145 With a very small number of exceptions, between 8 and 12 marks a sack

146 T.H.Lloyd, *The movement of wool prices in medieval England*, (Cambridge, 1973). However, there is no way of knowing, unless the creditor happens to name a suspiciously low price (as in Stirkeland v Goldington,p 19) that the transaction was a genuine sale. For instance, a usurious loan *could* be disguised by the naming of a current price for the commodity recognised by the debtor, but the creditor advancing less money

147 D.C. Farmer, *Some Grain Price Movements in thirteenth century England*, (1957-58) 10 Economic History Review (2nd series) 207, 212

148 e.g. Y/C4/1 m 5 (1274 at latest)

149 e.g. Y/C4/2 mm 1d; 5d (1281)

150 e.g. RR 1 nr 31

151 However, the availability of the statutory procedures does not eliminate the risk of the buyer/creditor being unable to recover the payment from an insolvent, or recalcitrant, debtor; for instance, a statute merchant for four sacks of wool, price £7 per sack and payable at June 1291 was certificated at least three times before August 1293; C 241/17 nr 80 (October 26th 1292); /23 nr 75-2 (March 12th 1293); /22 nr 158 (August 6th 1293); perhaps also /22 nr 151 (3 sacks, £21)

(1292)-[152] in which a statute merchant seems to be used as an instrument to disguise an illegal - since usurious - loan. The jury found that P, obliged in the York Jewry, needed money to acquit himself there. P agreed to sell D 10 sacks of wool for £30; the suspiciously low price[153] puts us on notice that the transaction was a prohibited loan with interest.[154] A day was set for P to receive the money. However, when D came, P insisted, ostensibly from considerations of the defendant's 'mortality' (*asseruit se mortal' esse*), that the date of delivery of the wool be brought forward a year, from Whitsun 1288 to Whitsun 1287, and refused to hand over any money to P unless P entered into a statute merchant guaranteeing delivery of at that time.[155] P, 'fearing disinheritance' by the Jewry, agreed.

Non mercantile use of statutes merchant

The nomenclature of Merchants is noteworthy in pointing towards how the 1285 statute was perceived; namely, that it was not just for merchants. The attribution '*De Mercatoribus*' is perhaps accidental. *Fleta* has the statute as *De Debitoribus et Creditoribus*, which mirrors the naming of the statute in certificates[156] and bonds[157] from the Bristol registry, whilst a pre-1307 manuscript describes Merchants as *Addicio super statut' de Actoneburnel.*[158] Most certificates refer to it as 'the statute issued lately at Westminster'.

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152 JUST 1/987 m 34 (Westmorland Eyre, 1292)

153 p 132

154 The jury at the Eyre presented the defendant creditor as a usurer, specifically in respect of his dealings with Stirkeland; Goldington had made 10 and a half marks from the loan of 40 shillings, and 22 marks for lending 10 marks; JUST 1/988 m 8d. I am grateful to Dr. P.A.Brand for drawing my attention to this enrolment

155 This is consistent with the model of advance payment for goods postulated at p 132

156 e.g. C 241/31 nr 132

157 Appendix O; line 105

158 MS Bodl. Douce 98 ff 65 - 67

Roll 1 goes some way to identifying the non-merchants using the registry. There are 31 recognisances which identify at least one of the parties as a knight (*miles*), 9 with clerks (*clericus*), 11 with rectors or vicars, and 2 with Priors.[159] However, as with recognisances to mercantile or commercial creditors, the roll (and certificates) often reveal nothing; for instance, it is probably never going to be known why two rectors recognised £16-13s- 4d to a Royal clerk,[160] or one chirographer was recognising to another.[161] A case in the London Mayor's Court in 1307 scratches the surface of an otherwise unremarkable statute merchant. P, who had been in Ireland for six years as a Royal justice,[162] claimed to have instructed D, his servant, to obtain credit on P's behalf. D did so, obliging himself to creditors for just under £20. P entered into a statute merchant for £40 in D's favour, on condition that D would not be entitled to more money than he in fact managed to raise for P and any damages which D might incur for failure to repay the money borrowed on time. D sought and obtained execution on the statute merchant.[163]

The certificates so sometimes reveal the range of purposes for which statutes merchant were entered into. For example, statutes merchant for the following purposes were certified;

> bailiffs in a county administration recognising to their sheriff;[164]
>
> to have the marriage of the creditor's son and heir;[165]
>
> in free marriage with the creditor's daughter;[166]

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159 Knights: e.g. RR 1 nrs 7; 9; 14; Clerks: e.g. nrs 12; 73; 76; Priors: nrs 37; 95; Rectors or vicars; e.g. nrs 45; 64; 73

160 RR 1 nr 96

161 RR 1 nr 126

162 Brand, *The Birth and Development of a colonial judiciary*, 28

163 CEMCR 259 (1307); Sir John de Fresyngfeld v John Deveneys. The recognisance is at RR 4 m 1 nr 15, but does not suggest any of this purported context, nor does a certificate issued on it (C 241/18 nr 57)

164 e.g. four Lincolnshire bailiffs recognising to *dominus* John Gobaud, sheriff of Lincolnshire; C 241/42 nrs 47; 51; 52; 53

165 C 241/35 nr 216

166 C 241/36 nr 108

for the relief of fees;[167]

for the fruits of a church;[168]

for tithes,[169] and for tithes of sheaves[170]

The latter reveal a decided non-secular component in statutes merchant. A Register of the early 1320s[171] which appears to have belonged to a religious house (the writs are overwhelmingly religious and there is not much interest in family property) nevertheless contains a number of writs in connection with statutory recognisances.

Some Plea Roll enrolments also reveal statutes merchant deployed as one element in larger transactions. The 1294 example transcribed in full as Appendix O embodies a more complex, familial, arrangement.[172] Transacted between a prospective father-in-law (F), his daughter (D), and son-in-law (S) and daughter (D), the transaction can be broken up into three parts.

1. Feoffment[173]

On December 9th 1290, F and S covenanted that F would enfeoff S and D of all F's lands to hold to S and D and the heirs of their bodies, rendering F an annual rent of £600 for his life. This rent was not to be demandable until July 1291.

2. Agreement to refeoff[174]

When F had recognised before a Royal court that all the lands were to be the right of S and D and their heirs, S and D were to refeoff F of all the lands for his life, except (1)

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167 C 241/21 nr 30

168 e.g. C 241/34 nr 187; /45 nr 133; /54 nrs 9; 10

169 C 241/20 nr 43

170 e.g. C 241/35 nr 353; /47 nr 41

171 CUL MS Hh vi 5. I am grateful to Jeffrey Hackney for drawing my attention to this Register

172 CP 40/106 m 120 (Gloucs) (M 1294)

173 Appendix O lines 10 - 28

174 Appendix O lines 28-42; 45-56; 77-79

land to the value of £20 which was to remain to S and D in perpetuity, and (2) land to the value of £30 which was to go to F's wife as her dower if F were to predecease her. On the refeoffment, the annual rent of £600 was to cease. This was to be done by fine, and S was to pay F £40 on the day that the fine was levied, and a further instalment of £40.

S and D were to have seisin of the lands in the abovementioned form a week after the marriage, undisturbed by F and the chief lords of the fee.

3. Statute merchant[175]

Two days after the covenant between F and S described above, S entered into a statute merchant for 400 marks in favour of F; £120 was payable on the wedding day. The statute merchant was to be lodged a third party until a fortnight after the marriage of S to D. Only then, and no sooner, was the statute merchant to be delivered to F. S and D were to promise by charter to perform all the due services, and this was also to be lodged with the third party, to be delivered to S and D when everything had been fully accomplished.

Perhaps dynastic arrangements are behind about thirty certificates in which the debtor and the creditor appear to have been closely related; for instance, sons recognising debts in favour of their fathers.[176]

Certification

There is no means of ascertaining, for any registry other than London,[177] the proportion of statutes merchant for which certificates came to be issued. Certified statutes merchant represent the intersection of two subsets of all recognisances taken, i.e. (i) defaulted upon statutes merchant for which, (ii), execution in full could not be secured by the certifying Mayor. For the London registry, the proportion of statutes merchant certified can be assessed via a comparison of the five extant Recognisance Rolls and statute merchant

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175 Appendix O lines 42-45; 65-69

176 e.g. C 241/42 nrs 5; 48; /53 nrs 197; 276

177 And that only for the sample of five years represented by the surviving Recognisance Rolls

certificates issued during the reign of Edward I.[178] This comparison indicates that a certificate was issued in respect of approximately one in six of all recognisances on the Rolls.[179]

There is nothing notable about the average sum of the 22 Acton Burnell recognisances on Roll 1 which came to be certified, i.e., they are neither especially big nor small. The average sum was £16-15s.[180]

Repayment periods

The final issue is the periods specified for repayment of the debt. In respect of the 180 recognisances on Roll 1 for which this can be determined, the periods from the date on which the recognisances were entered into the day stipulated for repayment[181] were:

	Number	Percentage[182]	Cumulative Total	Cumulative Percentage
1 week or less	4	2	4	2
1 - 2 weeks	1		5	3
2 - 3 weeks	4	2	9	5
3 - 4 weeks	2	1	11	6
1 - 2 months	41	23	52	29
2 - 3 months	44	24	96	53
3 - 6 months	61	34	157	87
6 - 12 months	20	11	177	98
More than 1 yr	3	2	180	100

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178 Restricting the analysis to the Edward I certificates may mean that some certificates are missed

179 164 certificated of 1053:

Roll 1	235 statutes merchant	22 certificated (9 %)
Roll 2	287 statutes merchant	37 certificated (13 %)
Roll 3	219 statutes merchant	45 certificated (21 %)
Roll 4	141 statutes merchant	23 certificated (16 %)
Roll 5	171 statutes merchant	37 certificated (22 %)

180 £367-15s divided by 22 recognisances. The same is true for Merchants

181 Or, where repayment was to be by instalments, for the first instalment to fall due

182 To nearest percent

Some points can be made. The first is that there does not seem to have been anything strange about entering into a recognisance for a debt payable almost immediately.[183] This strengthens the picture of the statutory recognisances as worth entering into.[184] The overall picture is one in which debts were repayable in the short to medium term; some repayment is due on about half of all recognisances within three months, and on almost nine out of ten within six months.

Business of a fair registry: Boston

With no extant surviving Recognisance Rolls, the certificates are the best means of assessing the business of a fair registry. The fair registry in respect of whose business the greatest number of certificates survives is Boston. There are 167 certificates, relating to 139 statutes merchant. The sums recognised range from £1[185] to £232 (348 marks).[186] The average sum recognised across the certificated statutes merchant is £14-15s;[187] i.e., about the same as the average sum recognised in London under Acton Burnell.[188] There are 19 certificates (relating to 17 statutes merchant) for the sale of commodities - lead, oats, and wool[189] - but the latter only in small quantites (from one to five sacks).[190]

There are 80 named creditors in the certificates, of whom only 27 (i.e., about one in three) are *not* identified in the certificates (or otherwise identifiable) as merchants, or trading for commodities. Several merchants are particularly prominent, and involved in a

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183 e.g. RR 1 nrs 189 (£2, recognisance Sept 25th 1285); 190 (Sept 25th); 191 (Sept 26th); all payable Michaelmas (September 29th 1285)

184 Although such recognisances were also encountered in the Letter Books (e.g. CEMCR 66 (1300); 'payable tomorrow') and Great Yarmouth (e.g. Y/C4/2 m 3; 1280)

185 C 241/16 nr 137

186 C 241/8 nr 17; *sicut alias* at /8 nr 52

187 £2,061 divided by 139 recognisances

188 See p 118

189 C 241/22 nr 30 (lead); /15 nr 113 (*ordeum*)

190 See p 130; C 241/7 nr 126 (one sack, price 13 marks); /15 nr 144 (5 sacks, price 12 marks each)

number of statutes merchant.[191] The average sum recognised to 'non-mercantile' creditors is £7-5s;[192] i.e., less than half the overall average sum recognised before the Boston Fair registry in respect of which a certificate came to be issued.

There are 120 named debtors in the certificates. The requested destination of statutory writs gives some idea of their provenance, and the territorial ambit of the registry.

Requested destination of writs in certified Boston Fair recognisances[193]

Gloucs	1 (0.7%)	**Derbs**	4 (2.6%)
Heref	1 (0.7%)	**Nhnts**	4 (2.6%)
Kent	1 (0.7%)	**Hunts**	5 (3.3%)
Oxon	1 (0.7%)	**Notts**	5 (3.3%)
Westm	1 (0.7%)	**Staffs**	5 (3.3%)
Hants	2 (1.3%)	**Suff**	7 (4.7%)
London	2 (1.3%)	**Leics**	10 (6.6%)
Rutland	2 (1.3%)	**Yorks**	11 (7.3%)
Cambs	3 (2.0%)	**Norf**	20 (13.3%)
Warws	3 (2.0%)	**Lincs**	62 (41.3%)

The picture of the sphere of influence of the Boston Fair registry broadly mirrors the general picture of the influence of static registries;[194] the registry exerted a strongly localised, 'centripetal', effect. Over four in every ten writs are requested to the sheriff of the 'home county', Lincolnshire, and almost three quarters of certificates[195] request writs to sheriffs of eight counties thirty miles or less from Boston; Lincolnshire, Norfolk, Leicestershire, Huntingdonshire, Nottinghamshire, Northamptonshire, Cambridgeshire and Rutland.

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191 e.g. Gaylard Buschon, '*mercator Caors*' (15 statutes merchant); Jacob Hugelyn, '*mercator Luk*" (10 statutes merchant)

192 £191-15s divided by 26 recognisances

193 Excluding 'repeat' certificates. Certificate requesting writs to more than one sheriff are counted for each addressee

194 p 66

195 74%; 111 of 150

CHAPTER 4

Statutory Execution Against Movable Property

Common law writs of execution

At the time Acton Burnell was enacted,[1] the principal common law writ for procuring execution against a debtor's property was *fieri facias* (*fi.fa.*)[2] which ordered the sheriff to cause the sum to be 'made up' from the debtor's chattels[3] and the debtor's lands[4] (which, given the inability of the sheriff to seize lands must be taken to mean the issues[5] of those lands). For instance;

> **[Rex vicecomiti salutem]. Precipimus tibi quod de terris etc. fieri facias .ix. libras et illas habeas etc. ad reddendum .B. de debito .x. librarum quod idem talis in curia etc. cognovit se debere eidem tali et quas ei reddidisse debuit in octabis sancti Martini et nondum reddidit nisi tantum viginti solidos, ut dicit.**[6]

*Fi.fa.*s of lands and chattels survived unsupplanted by the *elegit* given by Westminster II c.18.[7]

Some writs of *fi.fa.* seem to have restricted execution to the debtor's goods and chattels.[8] The confusion between these writs evinced in the literature[9] is found as early as *Fleta*.[10]

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1 And earlier; the earliest such mention of such a writ in BNB is from 1229; BNB nr 352

2 Sometimes referred to as a *fi.fa. de terris et catallis*

3 Including leases and rentcharges

4 e.g. 87 SS, writs 'J' 65; 66; 76; 77; 93 (Register 'J' is 1250s). The *fi.fa.*of lands and chattels is adverted to by Westminster II c.18; App F 3

5 e.g. rents. After 1285, 'issues' were defined by Westminster II c.39; Appendix G

6 Writ 'J' 66; 87 SS 325 (1250s)

7 e.g. JUST 1/652 m 54d (Northumberland Eyre, 1293); an order to *elegit* pursuant to a recognisance entered into before the Justices of Eyre has been struck out and replaced with an order to *fi.fa.de terris et catallis*

The writ *fieri* (or *levari*) *facias de bonis ecclesiasticis*[11] lay against the ecclesiastical goods of beneficed clerks, and came to be used in respect of statutory execution against clerical debtors.[12]

There was also a Chancery administrative writ, *levari facias* (*lev.fa.*),[13] used in respect of debts recognised there,[14] which ordered the sheriff to levy the sum from the debtor's chattels and lands.[15]

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8 e.g. Writ 'R' 504 (87 SS 227; c.1318), which orders a sum to be levied from the goods and chattels of someone who had recognised a debt in the county court. There is no such writ in The register of Judicial writs 'J', and Hall and de Haas classify R 504 as their sole instance of a '*levari facias*' (87 SS 394). The form of this writ is unusual not only in that it uses *levari*, but also that it begins with 'Monstravit nobis', and ends 'Ne clamor ad nos inde perveniat iteratus'

9 Maitland (2 PM 596) distinguished between a writ of execution lying against the debtor's goods and chattels (which he called *fieri facias*), 'or levied (*levari facias*) out of his goods and the fruits of his lands'. Plucknett (*Concise History* 390) describes a *fi.fa.* lying against goods, chattels and (390 n 1) leases, with a *lev.fa.* going against issues as well. Baker (*Introduction* 78) has *fi.fa* lying only against the chattels (including leaseholds) of an execution debtor, and *lev.fa.* lying against the chattels and profits of the lands of a Royal debtor 'or a recognizee'

10 *Fleta*'s account of Westminster II c.18 (despite the clear wording of the statute), departs from the text and adverts to a writ allowing the sheriff to *fi.fa.de bonis et catallis rei etc.* (72 SS 208). Perhaps this is what led Coke (*First Institute*, §504 p 290b) to consider the *fi.fa.* referred to in Westminster II c.18 as lying only *de bonis et catallis*

11 e.g Writ 'J' 67; 87 SS 325 (1250s)

12 p 162 ff

13 Files of writs of *levari facias* from 1274 are to be found in PRO Class C 243

14 p 41 ff

15 The writ contains the phrase 'Tibi precipimus ... quod predictas [sum] de terris et catallis [debtor] in balliva tua sine dilacione levari'; (C 243/1 nr 4; May 1276). Confusingly, however, some writs in this class order the sheriff to *lev.fa.*of the debtor's goods and chattels (e.g. C 243/1 nr 10). For difficulties in execution on *lev.fa.*, see p 100 ff

The statutes

Introduction

Both the draft of Acton Burnell, and the statute as enacted provided, on adjudication of the debtor's default,[16] for immediate sale of debtor's movables and devisable burgages[17] up to the sum of the debt.[18] If the debt was not paid by such a sale, the goods and devisable burgages were to be delivered to the creditor at appraised values. If the debtor had no movables in the power of the Mayor, the recognisance was to be certified to the Chancellor, who was to issue a writ to the sheriff of any county in which the debtor was said to have goods or devisable burgages, authorising Acton Burnell execution.[19]

The Merchants scheme departs markedly from Acton Burnell. It permitted execution against all the debtor's movable and immovable property, so, accordingly, the provisions dealing with the debtor's movables are usually combined with mention of lands and tenements. Secondly, the first resort against a defaulting debtor under Merchants was imprisonment.[20] For the first three months' imprisonment, the debtor's movables were to be delivered to him, 'so that by his own he may levy and pay the debt'.[21] If the Merchants debtor did not settle the debt within these three months, all the debtor's goods were to be delivered to the creditor by a reasonable appraisal.[22] The goods, once delivered to the creditor, were unrecoverable by the debtor. A small number of enrolments relating to Merchants recognisances state that the sheriff was ordered to *fi.fa.* the sum recognised of the debtor's lands and chattels.[23] However, the

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16 p 81 ff

17 In this chapter, references to 'goods', 'chattels', or 'movables' liable to execution under Acton Burnell should be read as referring also to devisable burgages. However, this thesis considers burgages as a species of immovable property, and, accordingly, a discussion of them is offered in Chapter 6

18 Apps A 12-14; B 7-9

19 p 85 ff

20 Chapter 5

21 Apps C 42-43; D does not mention this

22 Apps C 44-47; D 59-62; And all the debtor's *lands* by a reasonable *extent*

23 e.g. KB 27/178 mm 62d (Yorks); 69d (Yorks) (M 1304)

certificates which correspond to these statutes[24] give no indication that execution was to be otherwise than under Merchants.

Property affected

There is some diversity in the vocabulary used to describe the categories of the debtor's movable property against which Acton Burnell lay; the draft qualifies 'movables' (*moebles*) with the interlineation 'such as chattels and devisable burgages' (*com chateus e burgages devisables*),[25] and both draft and statute also refer to 'goods' (*biens*).[26] However, the heterogenous terminology does not seem to have had any substantive significance.

Devisable burgages aside, it does not appear that the category of movables affected by the statutory recognisances[27] was wider than those affected by a *fi.fa,*[28] a *lev.fa.*,or under specifically merchant procedures. In respect of lands, *fi.fa.* may have reached further than Acton Burnell since, although *fi.fa.*did not permit the sale of any lands, it did warrant the raising of money from the issues of all lands.

The Acton Burnell sale

Immediacy

Acton Burnell ordered that the statutory sale was to be immediate.[29] However, it might have been possible to accomplish a statutory sale 'immediately' only in those instances where the debtor had goods within the power of the Mayor. If this was not the case, certification would have been necessary.[30] Some enrolments, even if they give no

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24 KB 27/178 m 62d = C 241/43 nr 22; m 69d = C 241/43 nr 222

25 App A 13

26 e.g. Apps A 31; 33; 39 (all qualified with an interlined '*mobles*'); B 9

27 For this purpose, there does not appear to have been any substantive difference between Acton Burnell and Merchants recognisances; accordingly, they will be considered together

28 It is also assumed that the category of movables affected by a *fi.fa. de terris et catallis* was no different from those affected by a *fi.fa de bonis et catallis*

29 Apps A 13; B 8

30 p 85

time-frame for execution, hint at the slowness of statutory procedure. For instance, in Sothill v Graham (1292),[31] a creditor was attached to answer respecting the seizure of the debtor's cows. The jurors returned the cows had been taken, pursuant to an Acton Burnell writ, by the bailiffs of the sheriff of Yorkshire at Sothill, and driven to Wakefield[32] to be sold. However, no one in Wakefield had been willing to buy them or take them at an extent, so the bailiffs delivered them to the debtor at Dringhouses. Traipsing around Yorkshire at the speed of an ambling cow cannot have been quick. Furthermore, Acton Burnell recognises, in allowing the 'merchant stranger' his costs for as long as he 'tarried' about the suit of the debt and until the movable goods of the debtor were sold or delivered to him,[33] that the statutory process might have been slow.

The view

The Acton Burnell sale was to be 'by the view' (*par vewe*) of honest men'.[34] The draft and statute are silent on the meaning of '*vewe*'.

Acton Burnell can be compared to the appraisal within the procedure contemplated by the treatise *Lex Mercatoria*,[35] in which the purpose of the view was twofold; (1) an *identification* and (2) a *valuation* of the defaulting debtor's goods, so that the appropriate quantity of goods (i.e., equivalent in value to the debt) could be delivered to the creditor. The custom of Boston Fair[36] provided that the bailiffs were to attach and appraise the goods of an absconding merchant defendant against whom a debt was sought. If the defendant did not appear by the end of the fair, goods appraised at the value of the debt were to be delivered to the plaintiff. Within the common law,

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31 KB 27/131 m 7 (Yorks) (E 1292)

32 A distance of approximately 20 miles

33 Apps A 38-40; B 20-21

34 Apps A 12; B 8

35 p.134

36 KB 27/162 m 64d (Lincs) (M 1300)

appraisal of a debtor's goods is known to have been part of the process of execution on a *fi.fa. de terris et catallis*[37] and *lev.fa.*[38]

Perhaps something about the function of the Acton Burnell view can be inferred from the persons by whom the statute stipulates it was to be conducted, namely, the *prodeshomes*, which Baker has as 'goodman'.[39] The enrolments suggest that *prodeshomes* were needed since a 'reasonable price', for the purposes of the statute, could only be set by their oaths.[40] Any deficiency in the number of appraisers[41] would stall the procedure.[42]

The provision as it stood in the unamended draft suggests that the purpose of the *vewe* included a valuation. The debtor's movables were to be sold at the valuations made by those who had conducted the *vewe*. However, the draft passage was modified;

> **And if it be found by the roll and bond that the debt was recognised and the day set for payment passed, the Mayor, by view of worthy men, shall immediately cause the debtor's movables [i]<as convicted of the debt[43] such as chattels and devisable burgages>[44] to be sold up to the sum of the debt[45]**

It is suggested that reading *com ateint de la dette* in conjunction with a further interlineation which specifies that the goods were to be sold *a celui qi plus offri*[46]

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37 e.g. KB 27/179 m 3 (Sussex) (H 1305). But not under *fi.fa. de bonis et catallis*

38 e.g. KB 27/128 m 4 (Surrey) (T 1291)

39 Baker, *Manual*, 176; *'as in good men and true, i.e., worthy to serve on a jury'*

40 e.g. CP 40/123 m 45d (Lincs) (E 1298). Similarly in *elegit*; in 1299, the legitimacy of an *elegit* appraisal was challenged by a debtor on the ground that it had been made by the Bailiff of Lambourne 'and not by the oaths of worthy men'; KB 27/157 m 38 (Berks) (H 1299)

41 The number of appraisers is not known

42 e.g. KB 27/180 m 29 (Sussex) (E 1305); goods seized could not be appraised *pro defectu juratorum*

43 *Com ateint de la dette*

44 *com ateint de la dette si come chatels e burgages devisables*

45 Apps A 12-13; B 7-8

46 Apps A 32; B 16

suggests a shift, during drafting, in both the purpose or structure of the *vewe*, and the intended nature of the statutory sale. It is contended that the sale of the debtor's goods *at appraised values* becomes a sale *by auction*. *'Com ateint de la dette'*, read as meaning 'as convicted of the debt' offers an explanation of why immediate execution is justified, and, also, perhaps, emphasises that satisfaction of the debt operated to free any remaining movables from statutory execution.[47]

An auction?

This hypothesis that the Acton Burnell sale was a sale by auction is not wholly free from doubt, since both the interlineations adverted to are capable of sustaining other interpretations. The provision providing for sale to the highest bidder appears as a justification for disallowing any complaint by a debtor that his goods had been sold or delivered for less than they were worth,[48] and seems to have been made to clarify *leaument* (lawfully); i.e., if the goods had been sold to him who offered the most - even if for less than their true value - they had been sold *leaument,* which sufficed to deprive the debtor of any ground for complaint. A 1286 enrolment of execution on an Acton Burnell recognisance is not perhaps on all fours with this hypothesis; the sheriff had been ordered to *fi.fa.* the sum from the debtor's movable goods. He returned that the goods 'were estimated' (*estimata sunt*) at thirty six shillings,[49] which suggests that the goods were offered for sale at assessed prices. It is also possible that the *estimatio* took place after an abortive sale, with 36 shillings being the reasonable price at which the unsold goods were to be delivered to the creditor.

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47 which latter interpretation would parallel *fi.fa.*; the sheriff was not to sell more of the execution debtor's goods than were necessary for making up the levy, and nothing more was to be sold once the levy had been realised

48 Apps A 31-33; B 15-17

49 CP 40/64 m 20 (Notts) (M 1286)

Acton Burnell's warns 'those who appraised' (*ceus qi priserunt*) the debtor's movables[50] prior to a delivery that if the price which they set was not a 'just and impartial price' (*resnable pris e owel*) but too high, the goods were to be delivered to them at the price which they had set, and they were to be liable to the creditor for the debt.[51] If the *'resnable pris*' associated with the delivery of unsold goods[52] can be read as being the same as the '*resnable pris e owel*' of this passage (which the vocabulary suggests), this helps to settle the structure and purpose of the statutory *vewe*,[53] and the dual responsibility of the *prodeshomes*. They were (1) to witness the sale of the debtor's movables and devisable burgages, and the price obtained for them. Failing the realisation at auction of the sum recognised, they were (2) to value any remaining goods.[54]

Abandoned draft provisions

At this point - namely, if the sum raised through sale of the debtor's movables did not meet the debt - the draft and the promulgated text depart from each other.

The original draft provides, in a passage deleted in the course of drafting, for execution against the debtor's immovable property.[55] It is suggested that the procedure contemplated by the unamended draft can be read in two ways. The first reading of the draft is faithful to the internal order of the draft provisions. If the debt was not satisfied from an attempted sale of the debtor's movables, then, where the debtor had immovable property of his own inheritance or purchase, the Mayor was to cause the sale of such to be announced. If the debtor could not sell the immovables or make agreement with his creditor within forty days of this announcement, the Mayor, within

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50 It is assumed that this meant the *prodeshomes* who had conducted the statutory 'view'

51 p 243 ff

52 Apps A 20; B 9

53 p 144

54 But cf. the description which Coke gives (*Second Institute*, p.396) of the appraisal of the debtor's property under Westminster II c.18. The sheriff was to impanel a jury (i) to make inquiry of all the debtor's goods and chattels, and (ii) to appraise the same

55 App A 14-19

one week of the expiration of that fortieth day, was to cause the immovables to be sold to the highest bidder until the debt was satisfied. Any purchaser of the debtor's immovables was to hold them of the chief lord of the fee by due services and customs. The purchase price was to be paid immediately to the creditor. If no buyer for the immovables could be found, then the movables and immovables up to the sum of the debt, and in allowance of the debt, were to be delivered to the creditor. [56]

The second reading, founded on a re-ordering of the text, makes *delivery* of the debtor's unsold *movables* to the creditor at a reasonable price the first step upon failure to *sell* the movables. It is suggested that this reading is the more appealing since it does not seem sensible that the debtor's unsold movables could not be delivered to the creditor against the debt until after his lands had been seized and unsuccesfully offered for sale. It is a possibility that, notwithstanding an abortive sale, the debtor's unsold movables alone could have sufficed to meet the debt if delivered at a reasonable price to the creditor. In this reading, the statutory provisions against the debtor's lands would be triggered only if the debt could not be satisfied by sale and/or delivery at a reasonable price of the debtor's movables.

Delivery of goods to the creditor under Acton Burnell

The draft and Acton Burnell procedures re-merge at this point. If the Mayor could find no buyer for the debtor's goods,[57] he was to cause them to be delivered to the creditor at a reasonable price up to the sum of the debt, and in allowance of the debt.[58] The provision that the debtor's goods could be delivered to the creditor differs markedly from *fi.fa.*, which, in general,[59] did not authorise delivery of the debtor's goods to the

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56 App A 20-21a

57 Apps A 14 (*mobles*); B 9 (*biens*)

58 Apps A 20; B 9-10

59 It seems that delivery *in specie* could happen under *fi.fa.de bonis ecclesiasticis*, e.g. KB 27/126 m 14d (Yorks) (H 1291); and see p 131 for execution on statutory recognisances entered into for quantities of goods with no expressed price

creditor,[60] (although there is no indication that the execution creditor was prohibited from buying the debtor's goods under a *vendicioni exponas*).

Delivery of goods against which execution was being made under Acton Burnell (and Merchants) had to be made to the creditor, an attorney, or someone acting on behalf of the creditor. If no one came to receive the goods, execution stalled.[61] The simple fact of delivery is the disputed issue in some enrolments, with the creditor asserting that neither he himself nor anyone on his behalf had received any goods.[62] Neither the draft nor Acton Burnell laid down any procedure if the creditor refused to take delivery of the goods at the appraised value without wishing to challenge the appraisal itself.

Undervaluation

Neither the draft nor Acton Burnell gave the debtor any remedy if he considered that his goods had been sold, or delivered to the creditor, at an undervalue.[63] If the goods of an Acton Burnell debtor came to be sold,[64] the statute argues that the debtor had only himself to blame since he could have sold his movables before the day for payment, but had not done so.[65] Lafford v Atte More and others (1297)[66] seems to have been generated by such a scenario. However, the plaintiff, the aggrieved debtor, pursues an avenue of redress outside Acton Burnell. He complains of 'conspiracy and trespass' 'according to the King's ordinance thereto provided'.[67] The sheriff had been ordered to deliver £80 worth of the plaintiff's goods and chattels to the creditor (who

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60 Blackstone, Book 3, Chapter 26, Part 2; although, *contra*, KB 27/120 m 32d (Essex) (T 1289), which seems to countenance the delivery of goods

61 e.g. CP 40/102 m 4d (Derbs) (M 1293); delivery on a *fi.fa.*

62 e.g. CP 40/96 m 92 (Rutl) (M 1292)

63 The position was the same in *elegit*; the debtor could not avoid a statutory extent by a claim of undervalue. Furthermore, the Acton Burnell provision might have prevented redress even if the sale had *not* been to the highest bidder

64 Consistency suggests that this probably ought to read as including *delivery* at an undervalue to the debtor

65 Apps A 32-34; B 16-17

66 KB 27/152 m 50 (dorse marked 47) (Lincs) (M 1297)

67 Perhaps 1 Rot.Parl. 96a (1293)

does not seem to have been a party to these proceedings) by a reasonable price up to £80. The defendants had been assigned by the sheriff to perform this. The plaintiff asserted that the goods - wheat, barley and dredge[68] - appraised by the defendants (and delivered to the creditor) for a value of £21 were actually worth (*valuerunt*) £80. The defendant appraisers said that the goods had not been extended for any value other than 'as it seemed to them according to their understanding' (*quam eis videbatur quod valuerunt secundum eorum intellectum*).[69]

Comparison with fi.fa.

By way of comparison, although *fi.fa.* imposed no obligation on the sheriff to have the value of the debtor's goods and chattels appraised before being put up for sale, he was not justified in selling them greatly under their value (even if this sale was to the highest bidder) and was to be held personally liable to the creditor if he did allow the goods to be sold for an unreasonably low price. If the sheriff returned that no buyers had been found, a writ *vendicioni exponas* could issue; under it, the sheriff was bound to dispose of the goods for whatever price he was able to obtain, [70] and he incurred no liability if the goods did happen to be sold well below their true value.[71] No *vendicioni exponas* followed a *lev.fa.* and the debtor's goods could go at an appraised value to the creditor.[72]

Overvaluation

Acton Burnell warned 'those who appraised' the debtor's movables that the exercise of this function exposed them to potential statutory liability. If, through favour to the

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68 '*dragetum*', a mixture of barley and oats

69 A later enrolment records that the debtor had been awarded £21 against the creditor in respect of the 'unlawful asportation of the plaintiff's goods and chattels'; KB 27/155 m 10 (Lincs) (T 1298)

70 CP 40/149 m 24 (Herts) (M 1304) orders the sheriff to expose the goods for sale 'from day to day'

71 Perhaps the sheriff wishing to obviate his own potential liability would always return 'no buyers'

72 e.g. KB 27/128 m 4 (Surrey) (T 1291)

debtor, the price which they set on the movables was not a 'just and impartial price'[73] (*resnable pris e owel*) but too high, the goods[74] were to be delivered to the appraisers at the price which they had set,[75] and they were to be liable to the creditor for the debt.[76]

Neither the draft nor Acton Burnell specifies with whom any complaint of over-value needed to originate, but presumably this almost always would have been the creditor. For instance, in Lincoln v Lekeburn (1298),[77] the plaintiff creditor refused to accept goods at an appraisal[78] since 'it appeared to him' (*videbatur ei*) that the goods had been over-valued.

A further point of difficulty is how the 'reasonableness' of the price placed on any unsold goods prior to delivery was to be determined upon. The notion of a 'reasonable price' is not an easy one. The 'reasonable' *price* set on an item might not necessarily correspond with its 'reasonable' *value*. A 1292 enrolment illustrates the considerable disparity which could exist between the value set on goods by their owners and impartial third parties; goods had been delivered to the creditor at a value of £32. However, the plaintiff, the debtor's father, claimed that some of these goods were his, and sought their return. The plaintiff claimed that these goods were valued at £100, i.e., more than three times the valuation which had been made by the appraisers.[79]

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73 *Statutes of the Realm* has 'just and reasonable price'. 'Just' and 'reasonable' are both acceptable for *resnable*. However, the reading adopted here follows Baker, *Manual*, 161; '*owel*': '(1) fair, impartial, indifferent'

74 Or, perhaps, *each* thing? *la chose prisee* is singular; Apps A 29; B 14. But this raises the question of whether an alleged over-valuation of a *single* item could have triggered the appraisers' liability, and would have led to *all* the items appraised being delivered to the appraisers

75 For the appraisers refusing to accept the goods, see Lincoln v Lekeburn (1298)

76 This also happened in *elegit*; KB 27/152 m 55d (Nhnts) (M 1297); KB 27/185 m 31 (Lincs) (T 1306)

77 CP 40/123 m 45d (Lincs) (E 1298)

78 See p 153

79 KB 27/130 m 4 (Essex) (H 1292)

It is possible to contend, reading this provision narrowly, that it was only activated if the over-value had been motivated through partiality to the debtor. Otherwise, it is easy to imagine that creditors would have sought to challenge *every* appraisal of unsold goods as too high. There is a tension between the 'subjectivity' of the appraisers acting '*en favor del dettur*' and the 'objectivity' of the '*resnable pris e owel*'. Perhaps the allegation that the appraisers had acted 'in favour of the debtor' was an allegation made irrespective of the true circumstances of the appraisal, or motive of the appraisers.

No cases have been located in which it is discussed whether the activation of this provision operated to relieve the Acton Burnell debtor of continuing statutory liability, and particularly the risk of imprisonment. Principle suggests that this ought to have been so were the goods (over) valued, with the over-value meeting the debt: the creditor stands to get the debt from the appraisers, and there would be no need for imprisonment. However, if the goods, even at an over-value, did not meet the debt, the debtor would probably have remained liable to imprisonment.

The lack of evidence means that other questions remain open. It is not known what was to happen if the appraisers, having incurred liability, themselves defaulted in payment. This could have (re-)activated the liability of the original debtor to imprisonment, or the appraisers themselves could have been treated as Acton Burnell debtors, and subject to the statutory modes of execution. This latter would have posed a particular risk when the appraisal was in respect of a considerable sum. To pose a case; an Acton Burnell debtor defaults on a recognisance for £500. £200 is raised by sale. The creditor alleges that the debtor's unsold goods, delivered to him at an appraised value of £300, were worth only £150. The statute seems to read that the liability of the appraisers is for the full sum outstanding - i.e., £300 - and not for £150 (i.e., the difference between a 'reasonable and fair' price alleged by the creditor and the actual appraisal.) It is assumed that it would have been open to the appraisers to sell any goods delivered to them pursuant to this provision.[80] However, even if the

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[80] Acton Burnell makes no mention of the power of the appraisers to deal with the goods delivered to them under this provision

appraisers were able to sell the goods for £150, they have - in effect - been penalised (in this instance) £150 for their over-appraisal; a harsh penalty and a strong disincentive to participate in an appraisal. This is especially true if this liability can be triggered in the event of incompetence or inadvertence on the part of the appraisers, falling short of wilful malfeasance.[81]

Perhaps this lies behind Lincoln v Lekeburn (1298),[82] which suggests that the statutory procedure did not always work smoothly. The plaintiff creditor refused to accept goods and chattels at an appraisal,[83] claiming them to have been over-valued. Moreover, the appraisers themselves had refused to accept the goods;

> **bona illa postea oblata fuerunt predictis appreciatoribus qui ea admittere recusaverunt etc**

If the language of the enrolment accurately represents what has happened, there perhaps has been a deviation from the statute: '*oblata fuerunt*' ('they were offered') is very different from '*seit liveree*' (shall be delivered), since the latter does not appear to give the appraisers any liberty to decline.

Adoption within Merchants

The provisions of Acton Burnell relating to the over-valuation of the debtor's goods before delivery to the creditor[84] came to be adopted within the Merchants regime, in respect of the appraisal of the debtor's movables.[85] Graham v Warthull (1301)[86] raises this, but also exposes flaws in the Merchants scheme. The plaintiff, an imprisoned

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81 This is just one facet of a much larger problem in the thirteenth century; participation in the administration of justice could lead to financial penalty; for instance, jurors were at risk of attaint

82 CP 40/123 m 45d (Lincs) (E 1298)

83 Although this seems to have been undertaken pursuant to a Merchants recognisance; The enrolment and certificates (C 241/27 nr 177; /30 nr 45) state the recognisance to have been payable in May 1294

84 Apps A 27-30; B 13-15

85 And in respect of the statutory extent of debtors' immovable property; p 228 ff

86 KB 27/164 m 31d (Yorks) (E 1301); /165 m 33d (Yorks) (T 1301)

Merchants debtor, had tendered the defendant creditor goods and chattels to the value of the sum recognised and damages. However, the creditor refused to accept these, and the debtor complained that he had been imprisoned for six weeks by reason of this refusal. The creditor admitted this, but explained his refusal to accept the goods; they had been valued greatly above their true value, and he had been entitled to refuse them. The jurors' account discloses (as it often does) more than the parties themselves have seen fit to reveal. The recognisance had fallen due in November 1300, and the debtor had tendered the money. The creditor was amenable to accepting the money, but refused to hand over the statute merchant bond to the debtor. Accordingly the debtor (sensibly)[87] refused to hand over any money. The appraisal, however, had been done *fideliter* and the goods appreciated at what they were worth; *bona illa bene valuerunt ad quod appreciata fuerunt.*

Debtor's goods worth more than the debt

If the debtor's goods were valued at more than the outstanding sum (and no over-valuation was alleged), common sense operated. This was the situation in Graham v Warthull (1301);[88] two ricks of rye were extended at £9, and a horse at 8 marks - £14-6s-8d in all - £1-19s-8d more than the combined value (£12-7s) of the debt (£10-7s) and damages (£2). The creditor was to pay the debtor the difference.

Execution after certification

Where the debtor had no movables or devisable burgages in the power of the Mayor, and the statute merchant was certified to the Chancellor, the statutory procedure pursuant to the statute merchant writ seems to have been the same as if the debtor was in the power of the Mayor; namely, a sale '*desqes a la summe de la dette*' (presumably conducted by the sheriff or bailiffs), followed, if the debt was not met, by delivery to the creditor at a reasonable price in allowance of the debt.

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87 p 89

88 KB 27/164 m 31d (Yorks) (E 1301); /165 m 33d (Yorks) (T 1301)

Nature of the goods taken in statutory execution

Graham v Warthull (1301)[89] gives some idea of the nature of the goods (in that case, two ricks of rye and a horse) which were taken in Merchants execution. An enrolment from the very early operation of Merchants[90] provides a detailed inventory of the debtor's goods seized;[91] 7 quarters of rye; 2 and a half acres of barley; two and a half acres of vetches; 7 acres of oats; 4 pigs; 4 piglets; a cart; 4 cart wheels; timber; some firewood; a chest; a table; a pack horse; and an assemblage of military equipment worth 4 shillings. However, the total sum here is only £4-1s-4d, i.e., about a quarter of the £16 recognised. The sheriff was ordered that he allocate the goods in part payment of the debt. As this instance demonstrates, the Merchants provisions against the debtor's movables need not have been particularly meaningful from a financial point of view.[92] In those instances where the value of the goods taken in execution is recorded, the value could be as low as 6% of the sum recognised.[93] There are, however, rare instances of a complete levy.[94]

Problem areas

Moment at which the goods were bound

The question must be asked whether there was any particular aspect in which Acton Burnell (and, later, Merchants) might have offered the creditor some substantive advantage over the common law modes of execution. The answer to this question, it is

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89 KB 27/164 m 31d (Yorks) (E 1301); /165 m 33d (Yorks) (T 1301)

90 CP 40/64 m 144d (Surr) (M 1286)

91 This is not a complete list; two of the items are illegible

92 CP 40/125 m 153d (Middx) (M 1298) has an extensive inventory and valuations of all the items (livestock, crops, farm equipment, and household implements) which the debtor claimed the creditor had taken

93 e.g. 23 SS 63 (Boston Fair, 1293; two pieces of serge, value 40s, seized for debt of £32-10s; 6%); JUST 1/673 m 16 (JA, Nottingham 1301) (12%); JUST 1/1313 m 30 (Wilts) (14%); CP 40/96 mm 18; 69d (Leics) (M 1292) (16%); CP 40/161 m 200 (Notts) (M 1306) (18%)

94 e.g. CP 40/161 m 180d (Leics) (M 1306); £11-16s-8d levied of debtor's goods and chattels in execution on a statute merchant for £11

contended, might well be found in the *minutiae* of the working of the statutes and writs.

During this period, a *fi.fa.* seems to have bound the debtor's goods from the date of the judgment debt or recognisance. If a debtor's movables were alienated after this date, they could be 'followed'[95] by *fi.fa.* into the hands of a third party. For instance, a sheriff, ordered to *fi.fa.* from the debtor's lands and chattels, returned that the debtor had sold all his goods before going abroad. Nevertheless, the sheriff was ordered to seize the movables wherever they were to be found.[96]

The draft and statute are both silent as to the moment at which the class of the debtor's movables which stood to be affected by Acton Burnell crystallized. Either the question was not considered at all, or the answer was so obvious as not to require articulation. However, the evidence indicates that the goods of an Acton Burnell debtor were bound from the day of the *recognisance,* rather than the date of the *writ.* For instance, Acton Burnell writs seek execution against all the goods and chattels which were the debtor's *on the day that the debt was recognised*, from any hands into which subsequently they had come.[97] Hence, execution need not be sought on the day of default; a creditor's position would not substantively be weakened[98] by the debtor's alienation of goods if he deferred the initiation of execution on a defaulted-upon statute merchant.[99]

The position under Merchants is not free from uncertainty. Enrolments of Merchants writs on the Plea Rolls are clear that Merchants provided for a creditor to get execution against all the *lands* which were the debtor's on the day that the recognisance was entered into,[100] although it is not clear whether such clauses *stricti*

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95 'Following' is 'a physical process of tracking a thing as it moves in time and space...until the trail is lost or the thing destroyed'; Lionel D.Smith, *The Law of Tracing*, (Oxford, 1997) 68

96 KB 27/131 m 23d (Beds) (E 1292)

97 KB 27/132 m 10 (Yorks) (T 1292)

98 It would be weakened, however, if the goods ceased to exist (e.g. crops)

99 See Tables of speed of initial certification; p 94

100 Similarly *elegit* arising out of a recognisance (*Quaere* judgement debts and awards of damages); Coke *Second Institute* p.395 point 6, although it is not clear whether this passage also referred to the debtor's *goods*

sensu can be read, or were intended, to include the debtor's *goods and chattels*. A 1306 enrolment complains, of execution on a Merchants recognisance, that the sheriff *minus recte exequendo* the statutory writ seized certain goods, found in the hands of a third party, which were not the debtor's on the day of the recognisance. However, the order to the sheriff suggests that such goods were only to be exempted from statutory execution if they had not been the debtor's on the day of the recognisance *or afterwards*;[101] this appears to bring 'after-acquired' goods within the ambit of statutory execution.[102]

Competing execution

Assuming, firstly, that Acton Burnell and Merchants both bound the debtor's movables on the day of the recognisance,[103] and, secondly, that the goods remained in existence at the time execution was sought, two situations fall to be considered.

Between statutory creditors

The first is where a statutory creditor sought to take a debtor's goods from the hands of another statutory creditor. Since no enrolments have been located in which one Acton Burnell creditor appears to be seeking the recovery of his debtor's goods from another Acton Burnell creditor or any third party, the matter is left open.

Competing execution does, however, appear in connection with Merchants recognisances. For instance, a memorandum by the sheriff of Lincolnshire in 1294-5 of the writs returned by him notes two writs, both returnable at the octave of Hilary 1295, relating to two recognisances entered into by a Sir Ranulph de Friskney before the London registry. One, in favour of a Florentine merchant, was for £10[104] and the other, entered into a week later and in favour of a different creditor, was for 20

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101 CP 40/161 m 129d (Bucks) (M 1306)

102 cf. provision in respect of after-acquired lands; p 216

103 p 155 ff

104 Entered into January 21st 1294, payable July 1st 1294; RR 3 m 8 nr 1. Certified at C 241/25 nr 49

marks.[105] But this is not all; the London roll reveals a further recognisance, in favour of a third creditor and for 60 marks, entered into by Friskney in December 1293,[106] and payable in three instalments of 20 marks, but on which, judging by the fact that this latter was also certified,[107] Friskney defaulted. If that were not enough, a recognisance entered into by Friskney before the Lincoln registry in favour of a fourth creditor[108] for £8 was certified at this time.[109] So execution was being sought, concurrently, against him, in respect of statutes merchant totalling over £60, by four creditors and in respect of recognisances entered into before two registries.[110]

Pykering v Appelby and others (1292)[111] seems to have arisen under Merchants although the enrolment deals only with the debtor's goods. The plaintiff complained that cloth and wool had been taken by the defendants (a statute merchant creditor (G) and four bailiffs of the city of York). The defendants claimed that a certain S had defaulted on a statute merchant to G.[112] G had obtained a writ to have all those goods and chattels which had been S's on the day on which the recognisance was entered into, regardless of any hands into which these goods and chattels subsequently had come. The bailiffs found by an inquisition that wool which had been S's on the day that the recognisance in favour of G had been entered into had come into the plaintiff's hands. Accordingly, the bailiffs seized this wool, and delivered it to G. However, the

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105 Entered into January 28th 1294, payable April 18th 1294; RR 3 m 8 nr 4 . Certified at C 241/25 nr 94

106 RR 3 m 7 nr 1; payable June 24th and September 29th 1294

107 C 241/25 nrs 74 (40 marks); 102 (20 marks)

108 Perhaps ironically, the 'warden' of the Lincoln registry

109 C 241/25 nr 37

110 The outcome of this particular log-jam is not known. However, Friskney appears to have been a prolific borrower: CP 40/96 m 138 (Lincs) (M 1287) records a challenge to an *elegit* extent of Friskney's lands and chattels pursuant to a recognisance for 34 marks entered into before the Bench (according to the extent, that debt would have been paid within two years), and there are recognisances by him on the Close Rolls; e.g. CCR 1296-1302 p.478 (1301; £105-11s-8d, in favour of Edmund of Lancaster, to whom his lands seem eventually to have passed: 3 CIPM p.317)

111 KB 27/132 m 10 (Yorks) (T 1292)

112 There is a certificate at C 241/23 nr 72

plaintiff claimed that S had made a statute merchant in his favour,[113] and that S had delivered the wool to the plaintiff before S made any statute merchant to G. The jury found that S had made statutes merchant to both G and the plaintiff, but they did not know to which of them he was first obliged.[114]

Pykering suggests that where the competing plaintiffs are both statute merchant creditors, execution on the earlier statute merchant has priority; i.e., A enters into a statute merchant in favour of X. A subsequently enters into a statute merchant in favour of Y.[115] If all the goods which were A's on the day of the recognisance are chargeable by the recognisance to X, then X's execution cannot be affected by any subsequent statutory recognisance. Two enrolments support the proposition that the creditor of a prior Merchants recognisance can have execution despite prior (and legitimate) execution in favour of the creditor of a subsequent Merchants recognisance, and demonstrate that the rules of priority of execution extend to lands as well as goods.

In Botiler v Botiler (1303),[116] the plaintiff - a creditor's executrix - sought statutory execution. The sheriff returned that none of the debtor's movables or immovables could be delivered to her since S had been seised by the sheriff of all these by virtue of a certain Royal writ relating to a recognisance which came to him first (*prius per se inde sibi directi.*) The plaintiff contended that the defendant had entered into a statute merchant to her late husband before that to S, and that it was lawful (*iuri consonum*) that priority of execution should be afforded the earlier recognisance. The court seems to have agreed with this; a writ of *scire facias* ordered S to show whether he had anything to say why all the goods and lands which were the debtor's on the day that the recognisance was entered into ought not be delivered to the plaintiff.

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113 C 241/17 nr 48 (payable May 11th 1291, certificate dated April 2nd 1292); /22 nr 94 (payable May 31st 1291; certificate dated September 5th 1293)

114 It is curious why the York recognisance rolls do not seem to have been produced or examined in answer to this question

115 It does not seem to make any difference whether the recognisances are both Acton Burnell, Merchants, or one of each

116 KB 27/174 m 95d (Yorks) (M 1303)

In Fynchingfeld v Shrewsbury (1306)[117] the defendant had entered into a Merchants recognisance in the plaintiff's favour. The sheriff returned that the defendant had no property which 'at present' could be delivered: the defendant did have goods etc on the day that recognisance to the plaintiff had been entered into, but these had been delivered, pursuant to a statutory writ, to one M before the arrival (*ante adventum*) of the plaintiff's writ. The plaintiff contended that the sheriff's return was made to impede execution of the plaintiff's writ, through favour to M. The plaintiff claimed that 'long before' M's statutory writ came to the sheriff, the plaintiff had brought his writ, both of earlier date and relating to an earlier recognisance, which writ 'first and sooner' (*prius et citius*) ought to have been acted upon. The plaintiff made security for his claim, and the sheriff was attached to answer by the Coroners. In Fynchingfeld, it is perhaps arguable that the law was sufficiently uncertain for the plaintiff not to confine himself to his strongest point, i.e., that the recognisance in his favour was the earlier, but adopts a different tack; namely, (1) the sheriff had received his writ first, and (2) had acted improperly in not executing it soonest. Later in the fourteenth century, another avenue seems to have been open to the creditor; in 1340 a writ *supersedeas* was allowed to an 'earlier' creditor directing the sheriff not to execute a later statute merchant.[118]

Pykering, Botiler and Fynchingfeld appear to answer the question of priority of execution between competing statute merchant creditors. This situation must have been more common than the small number of enrolments located suggests since neither statute places any burden on the Mayor, sheriff or creditor to investigate whether there were any 'outstanding' statutes merchant entered into by a debtor against whom execution was being sought, and there are many instances of debtors entering into statutes merchant in favour of a succession of creditors.

Moreover, the facts of the above three cases are not complicated; the plaintiffs make no attempt to 'follow' the goods beyond the competing creditor, there is no suggestion that the debtor's goods have come to be held by anyone other than the creditors, and

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117 KB 27/183 m 1d (Middx) (H 1306)

118 YB E 14 E III (RS) 62-63 nr 20 (E 1340)

there is no indication that the goods are not still in existence. As such, these cases seem to be amongst the simplest instances of recovery *in specie*.

Between a statutory creditor and a third party

A further situation is where a statutory creditor seeks to take a debtor's goods from a third party other than another statutory creditor (e.g., a purchaser, donee, transferee, chargee or non-statutory creditor)[119] into whose hands the creditor's goods had come. No such enrolments have been located. However, if all the debtor's goods were charged at the day of payment, purchasers from statutory debtors are at risk. This is of particular danger when the period between the date on which the recognisance was entered into and the date specified for repayment was a lengthy one. How was the purchaser of movables to know whether his vendor was a statutory debtor - especially if that recognisance had been entered into months, or even years, previously? Even if a purchaser did happen to know that his vendor had previously entered into a statutory recognisance, it is surely expecting too much of a purchaser to find out whether his vendor was wholly solvent, and not likely to default on any statutes merchant.

Between a statutory creditor and those taking goods after debtor's decease

In respect of Acton Burnell and Merchants, the question remains open since no cases have been located in which Acton Burnell execution is so sought, although, it has been noted above, some enrolments contemplated that execution could be sought against a debtor's executors.[120] By way of comparison, no cases have been located in which goods were taken by *fi.fa.* from the hands of a debtor's widow or heir, although *fi.fa.*[121] could reach goods in the hands of a debtor's executors.[122]

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119 Or the debtor's widow, heir or executors

120 p 80; Appendix O line 104

121 And *elegit*, which lay against the goods of a deceased debtor; e.g. KB 27/143 m 18d (Yorks) (H 1295)

122 e.g. KB 27/168 m 33 (Warws) (E 1302)

The prevention of execution

There were attempts, by means of prohibitions, to prevent *ab initio*, or to stall ongoing statutory execution against goods. For instance, in Executors of Ughtred v Kyme (1304)[123] the plaintiffs sought execution on a statute merchant against the Prior of Holy Trinity, York. The defendant, sheriff of Yorkshire, claimed that he had received 'a certain Exchequer writ' which forbade him to make, or allow to be made, any distress, alienation, or levy on the Prior's goods. However, since statutory execution had been accomplished before the writ came to the sheriff, the court did not consider whether the prohibition would have operated to prevent execution which had not yet been set in motion.[124]

Execution against clerical debtors

Execution against the secular goods of clerical statutory debtors could be by *fi.fa.de bonis*.[125] Where there were ecclesiastical goods, execution could be by *fieri facias de bonis ecclesiasticis*. The writ lay to the relevant clerical authority - usually, the bishop - to *fi.fa.* the sum recognised from the ecclesiastical goods of the debtor in the addressee's diocese.[126] The only examples encountered of this writ have been in enrolments of statutory procedure pursuant to certification (i.e., where execution is outside the power of the Mayor). In the case where a debtor's ecclesiastical goods *were* within the power of the mayor, it is not known whether the writ would have been needed. If it is assumed that execution was not allowed into ecclesiastical goods without such a writ, then *fi.fa.de bonis ecclesiasticis* appears facilitative, rather than restrictive, since it is permitting execution into a category of goods which otherwise would have been exempt. The effect of the order sometimes looks like a *lev.fa.*, in that it could lie against issues (e.g. rents). In a 1292 enrolment; it was attested to that

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123 KB 27/176 m 90 (Yorks) (E 1304)

124 The sheriff could be ordered, by a *supersedeas*, to suspend further execution pursuant to any antecedent Merchants writ until the dispute as to the legitimacy of execution was resolved; e.g. KB 27/148 m 16d (Yorks) (T 1296); cf. Brymshope v Acton (KB 27/155 m 30d (Heref) (T 1298))

125 e.g. KB 27/134 m 36d (Yorks) (M 1292)

126 e.g. KB 27/170 m 2 (London) (M 1302)

the debtor had sufficient ecclesiastical goods since his church was valued at 30 marks per year.[127]

The application of this writ against statutory debtors appears to have been accepted without demur, since there was nothing in Acton Burnell which exempted clerical debtors from any aspect of statutory execution, nor did the statute make any allusion to this writ. There are enrolled examples from as early as Michaelmas 1284.[128] Merchants - unlike Acton Burnell - did not permit the imprisonment of clerical debtors,[129] and it appears that the forms of *fi.fa.* would have been the only means of obtaining execution against a clerical debtor under Merchants. Despite these restrictions, clerical debtors were not uncommon under both Acton Burnell and Merchants.[130] The 'administrative' paperwork gives no hint of the writ; the wording of Acton Burnell and Merchants certificates[131] seeking execution against clerical debtors (where that execution is known, from the Plea Rolls, to have been by *fi.fa. de bonis ecclesiasticis*) is identical to certificates relating to default by lay debtors. Likewise, the Recognisance Rolls demonstrate no variant 'obligatory' formula for clerical debtors, or the penalty to which they submitted.

One advantage which the Plea Rolls suggest could be offered by this writ over an ordinary *fi.fa de* was that there could be delivery *in specie* under it. For instance, a 1291 enrolment[132] records that the Archbishop of York had sequestered the prebendary and ecclesiastical goods of the debtor in his diocese, and that these were delivered to the creditor by a reasonable price according to the estimation of worthy men.

A particular difficulty attending *fi.fa. de bonis ecclesiasticis* arises from the delegation of execution to the ecclesiastical authorities, who might have been less well equipped

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127 KB 27/132 m 26d (Yorks) (T 1292)

128 e.g. CP 40/55 m 49d (Surrey) (M 1284)

129 p 174 ff

130 e.g. p 133

131 e.g. C 241/1 nr 62, relating to CP 40/60 m 14 (Norf) (M 1285)

132 KB 27/126 m 14d (Yorks) (H 1291)

to execute any such order than the secular authorities. There are examples of resistance to execution pursuant to all forms of final process,[133] but this comes out most clearly in respect of *fi.fa. de bonis ecclesiasticis*. For instance, in a 1293 enrolment,[134] the Bishop of Norwich returned that the debtor had forcibly resisted so that the order could not be executed. The sheriff of Suffolk was ordered to take a *posse* with him to assist the Bishop in the full execution of the order.[135]

The enrolments suggest that *fi.fa.de bonis ecclesiasticis* used pursuant to statutory recognisances entered into by religious debtors was prone to the same weaknesses as *fi.fa.* against seculars who had entered into non-statutory recognisances.[136] For instance, S entered into statute merchant for £49-6s-8d to H before the London registry, payable at Michaelmas 1289. Three certificates issued.[137] The Bishop of Exeter, ordered to *fi.fa.de bonis ecclesiasticis*, succeeded in sequestrating goods only to the value of £12;[138] i.e., less than a quarter of the sum recognised. Even against debtors such as the Prior of Lewes, whose ecclesiastical goods, one would suppose, would have been substantial, recovery under *fi.fa. de bonis ecclesiasticis* is known to have been limited to a fraction of the sum sought; a 1285 enrolment[139] relates to arrears of £67-6s-8d on a statute merchant for £117-6s-8d in favour of Luccanese merchants. It was returned that *fi.fa.* had realised only £10 of the debtor's ecclesiastical goods.[140]

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133 e.g. p 100 ff

134 CP 40/102 m 247 (Suff) (M 1293)

135 Similarly, CP 40/130 m 177 (Nhnts) (M 1299)

136 p 100 ff

137 C 241/14 nr 93; /32 nr 97 (to sheriff of Cornwall); /18 nr 150 (to sheriff of Wilts)

138 KB 27//182 m 91 (M 1305) (Exon)

139 CP 40/60 m 14 (Norf) (M 1285)

140 cf. KB 27/118 m 33d (Kent) (E 1289) (5 m of 15m); /132 m 26d (Yorks) (T 1292) (4 s of £10)

CHAPTER 5

Imprisonment of the Debtor

Introduction

Acton Burnell provided that the debtor was to be imprisoned if the whole sum recognised could not be levied from the sale, or delivery at an assessed price, of the debtor's goods and devisable burgages to the creditor. The debtor was to remain in prison until he, or 'his friends' on his behalf, made agreement for the debt.[1]

The idea of imprisonment founded on civil liability was not new in 1283. For instance, the action of account lay to enforce a bailiff's obligation to account to his master for (*inter alia*) money or goods received on the master's behalf. However, Plucknett's assessment of account during the earlier thirteenth century as 'absurdly inadequate'[2] could help explain extra-judicial redress in this sphere: 'we hear casually of a man who owed account being held prisoner in his lord's house in 1221'.[3] In 1267, the Statute of Marlborough c.23[4] gave the writ *monstravit de compoto*, providing for the attachment of the body of an absconding bailiff who had neither lands nor tenements by which he could be distrained.[5] Westminster II c.11[6] legislated further in this field, and that provision will be considered in conjunction with the imprisonment provisions of Merchants.

Imprisonment for debt was also known in borough customs. For instance, in 1285[7] the custom of King's Lynn was stated to be that anyone convicted of debt in its court was to be delivered into the custody of the town bailiffs until the creditor was satisfied. Similar provisions

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1 Apps A 35-36; B 18

2 Plucknett, *Edward I*, 152

3 *ibid.* n 2 and accompanying text; 59 SS nr 978

4 1 SR 24

5 e.g. writ 'CC' 121c; 87 SS 70 (Register 'CC' is mid 1260s)

6 Appendix E

7 KB 27/94 m 32 (Norf) (M 1285)

operated in markets. For instance, the practice of Hereford Fair was considered in 1292.[8] The defendant had been impleaded for a debt before the Steward and Bailiffs of the market. The plaintiff acknowledged the debt, but could not find security for it. The Steward delivered the plaintiff into the custody of the creditor until the plaintiff satisfied the debt 'according to mercantile custom'. The jurors confirmed there to be a mercantile custom that a creditor could imprison his debtor until a recognised debt be satisfied[9] and the defendant went without day.[10] The facts are broadly similar in Appleby v Sorthull (1287).[11] The plaintiff, a substantial York merchant, had been arrested and imprisoned for 13 days pursuant to a recognisance entered into by him before the defendants in the court of the count of Brittany at Boston Fair. The defendants, the Fair Bailiffs, claimed that, since the plaintiff did not have the sum recognised to hand to pay the creditor, he had been arrested and imprisoned 'according to the custom of the fair until he should find security to pay the debt'.[12]

Staunton v Tutteleye (1296)[13] shows the availability of imprisonment pursuant to default on recognisances entered into before the Marshalsea. The plaintiff sued the sheriff of Shropshire, claiming that he had been imprisoned, and goods taken from his manor. The sheriff claimed that he had received a writ from the King's Steward[14] to levy a certain sum from the goods and chattels of the plaintiff *ad opus* a merchant to whom the plaintiff was bound by a recognisance made before the Steward and Marshal. He claimed that the writ commanded him to imprison

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8 JUST 1/303 m 30 (Herefordshire Eyre, 1292)

9 The debtor seems to have been 'working off' his debt in the defendant's service. He 'remained for a long time in the creditor's house as his taverner, and at no point left the house'

10 Since the antiquity of these customs is not known, it cannot be said with certainty whether they influenced Acton Burnell or Merchants; however, representatives of both King's Lynn and Hereford were summoned to the 1283 Parliament

11 CP 40/69 m 107 (Lincs) (M 1287)

12 Imprisonment of debtors also featured in certain pre-Acton Burnell Continental schemes of debt recovery. For instance, it ears that execution on *condamnations volontaires* entered into at the Champagne fairs allowed for action against the body of the debtor; Bourquelot, *Études sur les foires de Champagne* (vol 2, Paris, 1865) 346-348. In Marseilles in the 1240s, and where the debt was notarised, a debtor could be held under house arrest, to be imprisoned if he 'broke custody'; *Business contracts of medieval Provence - selected notulae from the cartulary of Giraud Amalric of Marseilles* 24

13 KB 27/149 m 19 (Salop) (M 1296)

14 Who had jurisdiction over cases of bonds in which mention was made of distraint by the Steward and Marshal; Fleta Book 2 chapter 3 (72 SS 110; 112-113)

the debtor if the goods were insufficient to levy the debt.[15] The plaintiff did not seek to challenge the legitimacy of imprisonment *per se*, but argued that the debt had been met before the bringing of the writ. The date of this enrolment does not enable it to be said whether the idea of imprisonment for recognised debt on an Acton Burnell model (i.e., imprisonment on shortfall of the debtor's goods) might have filtered across from Acton Burnell to non-statutory recognisances, or *vice versa*.

The statutory schemes

Acton Burnell provided that the debtor was to be imprisoned only if the whole sum recognised could not be levied from the sale of his movables and devisable burgages, or by their delivery at an assessed price to the creditor. The debtor was to remain in prison until he, or 'his friends' on his behalf, made agreement for the debt.[16] The draft and statute both contemplated that the imprisoned debtor might be destitute. In such a case, the statute made the creditor responsible for finding bread and water for the debtor, 'so that he might not die.'[17] In such cases, imprisonment seems to have served no purpose save pressurising the debtor to find someone to settle on his behalf. However, sometimes, even this might not have been possible. Espicer v Keyrdif (1296)[18] describes the release, ostensibly on compassionate grounds, of a terminally

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15 The court of Marshalsea is known to have had its own very stringent process on debt recognisances. In a copy (BL MS Additional 31826 f 157r) of a plea of debt in that court brought by two Lucchese merchants against two non-mercantile debtors, the merchants argued that it was allowable, *secundum consuetudinem aule domini regis super hec usitatam et hactenus aprobatam*, to arrest and imprison debtors until the debt be paid. I am grateful to Dr. P.A. Brand for drawing my attention to this manuscript. Fleta states that the Marshal was authorised to imprison, in the Fleet, accountants who remained in the King's debt after rendering account (72 SS 133)

16 Apps A 35-36; B 18

17 Apps A 36-37; B 18-19

18 JUST 1/285 m 14d (JA, Bristol, Sept 1294); CP 40/115 m 143 (Gloucs) (M 1296). There are also reports of this case at BL MS Additional 5925 ff 12v-13r and 18v - 19r. I am grateful to Dr. P.A.Brand for drawing my attention to these reports

ill Acton Burnell debtor[19] who, the evidence suggests, may have been imprisoned for several years.[20]

The place and role of imprisonment within the statutory schemes is a major point of variance between Acton Burnell and Merchants; as opposed to being the final resort against Acton Burnell debtors, imprisonment became the first - and immediate - step against defaulting Merchants debtors.[21] For the first three months' imprisonment, the debtor was to keep control over all his goods and lands 'so that he may levy and pay the debt'.[22] If the debtor did not levy the debt by the end of this period, all his goods and lands were to be delivered to the creditor.[23] The Merchants debtor was to remain in prison until the debt had been paid.[24]

Askeby v Appelby (1292-3)[25] suggests that imprisonment could be an effective lever for payment against recalcitrant, but solvent, Merchants debtors; the plaintiff complained that he had been imprisoned for eight days in the liberty of Richmond at the suit of the defendant in respect of a recognisance for one sack of wool. The jurors returned that the plaintiff had been lawfully imprisoned and had been released as soon as he paid. In this instance, eight days' imprisonment had sufficed to achieve payment of a recognisance which had fallen due two years earlier.[26]

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19 '*quia de eius convalescentia desperabatur*'

20 The only relevant certificate, seeking Acton Burnell execution, issuing from the Bristol registry (C 241/8 nr 334), relates to a statute merchant for 11 marks payable at Michaelmas 1287 to Peter Oriol, a Gascon merchant

21 Apps C 30-32; D 31-32

22 Apps C 41-43; D 55-57; 118-122

23 Apps C 44-47; D 59-62

24 Apps C 32-33; D 62. And damages; see p. 173: *Fleta*'s account of Merchants contains a passage which does not appear in the statute. It states that, once the debtor had been arrested, the creditor could not 'retrace his steps, since it is to be presumed, because he has once and for all released the gage he held, that a fresh contract exists, and a fresh contract gives rise to a fresh action.'; App D 91-94

25 CP 40/96 m 159d (Yorks) (M 1292); JUST 1/1090 m 28 (Yorkshire Eyre, T 1293); /1089 m 25 (Yorkshire Eyre, M 1293)

26 There are two certificates requesting writs to the sheriff of Yorkshire; C 241/6 nr 103-1 (not dated); /8 nr 256 (April 12th 1288). The payment of the statute merchant to which these certificates relate was due at Trinity (June 9th) 1286. The debtor was imprisoned on May 30th 1288

Merchants imprisonment can set alongside other examples of the power of imprisonment in the 1285 legislative bundle. Most prominent is Westminster II c.11 which provided that when an account was found to be in arrears, the accountant was to be imprisoned in a Royal prison until the master had been satisfied of them.[27]

Some enrolments suggest that Merchants-model imprisonment was available on Acton Burnell recognisances. For instance, an enrolment in Michaelmas 1286[28] relating to execution on an Acton Burnell recognisance[29] clearly contemplates Merchants execution. It may also have been open to the Merchants creditor to untwine the statutory provisions for imprisonment from those for execution against the debtor's goods and lands. In several enrolments, imprisonment on a Merchants recognisance seems to have been 'hybridised' with an *elegit*;[30] i.e., the full weight of the Merchants provisions against the debtor's lands were not resorted to. In certain circumstances, this might have been of advantage to the Merchants creditor; a 'pure' *elegit* provided neither for imprisonment nor damages, but some Merchants creditors might not have been particularly interested in taking *all* the debtor's lands.[31]

Immediacy of Merchants imprisonment

It is difficult to assess the 'immediacy' of imprisonment pursuant to default under Merchants since, even if the sheriff returned that the debtor had been imprisoned, the date on which this happened rarely made its way onto the Plea Roll. It is only ocasionally, as in one 1311 case[32] (in which the debtor was captured six days after default) that the potential speed of the process

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27 App E 5-9

28 CP 40/64 m 142 (Norf) (M 1286)

29 There are two certificates relating to this (London) recognisance (C 241/1 nr 48; /6 nr 171). The dates they give for repayment (Hilary 1284), as well as the mayor before whom they were taken (Henry le Waleys), show this recognisance to have been taken under Acton Burnell

30 e.g. CP 40/86 m 70 (Derbs) (M 1290); /96 m 78 (Kent) (M 1292)

31 Particularly if the extended annual value of those lands represented only a small proportion of the sum recognised. In these circumstances, it might have been preferable to take a tenancy by *elegit* in half the debtor's lands, pressurising the imprisoned debtor to seek settlement, possibly by selling the remaining lands. In this way, the creditor would stand a good chance of recovering the whole debt by lump sum rather than as a trickle over a longer period

32 63 SS 9

can be detected. The scattered instances from the Plea Rolls have longer periods between default and imprisonment.[33]

Arrest

If the Plea Rolls were to be taken at face value, the evidence for the years immediately following Merchants[34] was that debtors often managed to evade capture by the sheriff; this return is made in almost a third of the entries.[35] It may have been that Westminster II c.39, in failing to penalise the sheriff who returned that the debtor had not been found, provided a recognised escape route to those sheriffs not overly enthusiastic about the business of tracking down debtors. This is suggested by the high incidence of challenge to this return; it is often witnessed to, despite the sheriff's return, that the debtor is *vagans* and wandering the county, or even is known to be at such-and-such a place.

Merchants arrest could be by any appropriate official acting *vice* the sheriff. For instance, in Basingstoke v Godsalm (1294)[36] the debtor had been arrested by the Royal Itinerant Bailiff in Essex and Hertfordshire.[37] It seems that statutory arrest could even take place in fairs.[38] However, 'self-help' was impermissible; it was not open to the creditor himself to detain the debtor, even if the authorities had refused to act. In Coigners v Dunnesford (1294)[39] the plaintiff complained of his imprisonment at the hands of the defendant creditor during the Yorkshire Eyre. The jurors returned that the creditor himself had arrested the debtor on the steps of the hall where the justices were sitting. On the arrival of the City Bailiffs, the creditor

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33 e.g. JUST 1/1090 m 28 (Yorkshire Eyre, T 1293) has about six weeks between the date of the latest certificate (C 241/8 nr 256) and imprisonment. In Bonatius of Milan v The Abbot of Westminster (KB 27/136 m 33d (Middx) (E 1293)) the debtor had been imprisoned on June 22nd 1290 in respect of a statute merchant payable at Christmas 1289

34 About 125 sheriffs' returns to Acton Burnell and Merchants writs are recorded in the King's Bench rolls for the five terms from Easter 1287 to Easter 1288: KB 27/104 (E 1287); /106 (T 1287); /107 (M 1287); /108 (H 1288); /110 (E 1288)

35 41 instances

36 CP 40/103 m 134d (Herts) (H 1294)

37 The certificate, C 241/22 nr 133, requested a writ to the sheriff of Hertfordshire

38 23 SS 63

39 JUST 1/1091 m 30 (Yorkshire Eyre, H 1294)

entreated them to arrest the debtor and cause him to be imprisoned. The Bailiffs refused to do this without an order from the Justices. The creditor led the debtor to his house and locked him in a storeroom for a whole day. The plaintiff was awarded £20 damages, and the defendant committed to gaol.

Location of imprisonment

Acton Burnell simply states that the debtor was to be imprisoned wherever he was to be found.[40]

Where the debtor was to be found within the power of the Mayor, Merchants states that imprisonment was to be within the 'town prison, if there was one'.[41] It is possible that this specification was an attempt to regularise unorthodox or irregular imprisonments (perhaps in private prisons) under Acton Burnell, although the scarcity of evidence on this aspect of the operation of Acton Burnell does not allow this to be developed.

Where the debtor could not be found within the power of the Mayor, the writ to sheriff ordinarily stipulated that imprisonment was to be in a safe prison[42] (which need not have been a Royal prison);[43] in London, Cripplegate, Newgate, 'London' prison, and the Tower of London are all mentioned.[44] *Fleta* adds that the debtor was to be committed to the custody of the 'marshal'.[45]

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40 Apps A 35; B 18

41 App C 32; Appendix D makes no mention of this

42 p 97

43 Although the Merchants writs in *Fleta* specify a *Royal* prison; *'prisona nostra'*; e.g. App D 99; 118; Westminster II c. 11 is to a similar effect - imprisonment of defaulting accountants was to be 'in the nearest Royal gaol in those parts' (App E 5-6). However, despite this, Merchants imprisonment is known to have occurred in franchisal prisons, e.g. Prison of the Abbot of Reading (KB 27/106 m 3d (Hants) (T 1287)

44 e.g. Cripplegate (KB 27/136 m 18 (London) (E 1293)); Newgate (KB 27/181 m 41 (Devon) (T 1305)); 'London' prison (KB 27/139 m 39 (London) (H 1294); Tower of London (CP 40/161 m 74d (Lincs) (M 1306)

45 App D 33. Fleta says that if judgment was passed before the Steward for debt, the defendant was to be committed to the custody of the Marshal (72 SS 113)

Manner of imprisonment

Acton Burnell creditors were liable in all cases of imprisonment to provide bread and water for an imprisoned debtor;[46] sensible, since the Acton Burnell debtor would, it is assumed, ordinarily have found himself confined to prison only in those cases where the sale or delivery of his movables and devisable burgages had not sufficed to meet the debt, and nor did he have any land (otherwise exempt from statutory execution) which he could sell. That is, he would have been indigent. However, no means was provided for the enforcement of the creditor's obligation.

Merchants provided that, although the debtor was to bear his own expenses during the first three months' imprisonment;[47] the creditor became liable to provide bread and water following the delivery of all the debtor's movables and immovables to the creditor at the end of this period.[48] This would have been necessary, since the creditor at that point, it is assumed, would have been left with no assets.[49] Merchants is silent on how the creditor's duty was enforceable, but a Register of *circa* 1318 has a writ to the sheriff specifically aimed at this, '*De pane et aqua inveniendis debitoribus in prisona commorantibus*';[50] the sheriffs of London were commanded 'to cause bread and water to be found by the creditor according to the form of the aforesaid statute[51] and as has been customary in similar cases'.

The mode of imprisonment described by Merchants seems to have been less severe than that described by Westminster II c.11; Merchants makes no mention of 'irons',[52] nor did the imprisoned Merchants debtor have to provide for himself whatever his circumstances.[53] The picture in reality, of course, may have been different. Some petitions from Merchants debtors imprisoned in Newgate, dating from 1318, survive,[54] in which it is complained that the

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46 Apps A 36-38; B 18-19

47 Apps C 32-33; D 124-125

48 Westminster II c.11 made no such provision

49 See p 155 for inventories of Merchants debtors' property delivered to the creditor

50 Writ 'R' 497; 87 SS 225

51 i.e, Merchants

52 Westminster II c.11 does; App E 7

53 The imprisoned accountant under Westminster II c.11 had to; App E 7-9

54 E 163/4/5

petitioners were shackled in irons, incarcerated amongst felons and thieves, deprived of food, and denied common alms and contact with their friends and families until they made fines in favour of the gaoler.[55]

Statutory imprisonment of persons other than the debtor

One question is whether anyone other than a debtor could be imprisoned pursuant to a statutory recognisance. Acton Burnell remarks that sureties or mainpernors, if they bound themselves as debtors, could be imprisoned on default.[56] However, their liability was not to be activated if the sum recognised could be met from the sale or delivery of the 'principal' debtor's[57] movables and devisable burgages. This does not seem, however, to represent subsidiary liability *strictu sensu*, since the sureties or mainpernors could only be imprisoned if they bound themselves as principal co-debtors.

Where the debtor died before execution, Acton Burnell does not consider whether the debtor's heir or executors could be imprisoned. Merchants provided that the debtor's heir could not be imprisoned,[58] and, *a fortiori*, it does not appear that the debtor's executors could be imprisoned.

Immunity from imprisonment

Some categories of debtor were immune from imprisonment.

Minors

Acton Burnell is silent on the matter of the imprisonment of minors, and there is nothing in Merchants which appears to prohibit such imprisonment, although *Fleta* expressly extends the

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55 E 163/4/5 nrs 2 (Petition of John de Gissyng); 12d (Petitions of Stephen Ferbraz, Miles de Houssom and William de Ok)

56 Apps A 43-47; B 21-24

57 The 'principal' debtor being the debtor whose performance the 'pledges' etc were guaranteeing

58 Apps C 75-76; D 89-90

immunity from imprisonment to minors.[59] FitzHumphrey v Bardolf (1300)[60] has a plaintiff imprisoned in statutory execution on a recognisance which, whilst a minor and the defendant's ward, he had entered in favour of the defendant: the plaintiff was to be kept in custody until the matter was resolved. Even if the imprisonment of minors was not allowed, this does not exclude the possibility that a minor could legitimately enter into a statute merchant[61] with payment either expressed due at a date when the debtor would have been of full age, or, if payment was expressed due at a date when the debtor would still not have been of age, execution deferred until he did come of age; this latter is analogous with the Merchants provisions for execution against the lands and goods of a deceased debtor when these had descended to an heir within age; no execution could be had (or, if begun, could continue) against such lands or goods until the heir came of age.[62] However, this provision seems to turn on the status of the heir *qua* heir, rather than nonage, since Merchants did not allow the imprisonment of the heir even if of age.

Clerics

Clerics could be imprisoned under Acton Burnell,[63] but Merchants only allowed the imprisonment of secular debtors.[64] *Fleta* departs from this, narrowing the exemption: only unmarried clerics were to be immune.[65] Merchants clerical debtors were imprisoned. For instance, in 1299 the Bishop of London issued letters patent claiming RB, who had been arrested and imprisoned on a statute merchant, as a clerk. The mayor and sheriffs were ordered to release RB without delay.[66] In Servat v Thunderle (1308)[67] a statutory creditor brought a plea of trespass before the Barons of the Exchequer. It was claimed that the defendants - former and current sheriffs of London - had permitted an imprisoned statute

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59 App D 54

60 CP 40/134 m 177 (Essex) (T 1300)

61 For the capacity of minors to enter statutes merchant; see p 103

62 Apps C 76; D 90-91

63 e.g. CP 40/60 m 59d (Berks) (M 1285)

64 Apps C 31; 62; D 54-55; 74; 118

65 App D 53-55; although this is not reflected in the *Fleta* Merchants writ

66 CEMCR 36 (1299)

67 49 SS 23 nr 17

merchant debtor, RH, to go free with a debt for £60 unpaid.[68] The defendants alleged that they had been ordered to release the debtor by a Royal writ, '*pro clericis obligatis secundum Statutum de Acton Burnell*",[69] which stated that clerks were neither to be arrested nor imprisoned under Merchants. As in 1299, the Bishop of London had directed letters patent to the King, testifying that Ralph Honylane, 'a clerk and held to be a clerk, tonsured and wearing priestly habit' (*clericus est et pro clerico habitus, coronam deferens et habitum clericalem*), had been detained in Newgate for several debts recognised to merchants. The writ ordered the sheriffs to cause Ralph to be released without delay, if he was detained solely on account of the statutes merchant. The imprisonment of clerical debtors under Merchants seems to have been sufficiently prevalent for a writ *pro clericis* to have made its way into registers by the second decade of the fourteenth century. Register 'R'[70] (*circa* 1318) has two writs prohibiting such imprisonment.[71] The writs are of slightly different effects; R 495 orders the release of an imprisoned debtor claiming clerical exemption, whilst R 496 appears to have preceded imprisonment. The Rawlinson writs differ in several respects to the writ in Servat. They do not adduce the testimony or assert the protection of any ecclesiastical authority, and they leave the addressee with a discretion regarding the validity of the prisoner's claim to clerical privilege; the petitioner was to be released 'unless it is clear to you that there is any reason why he ought not to enjoy clerical privilege according to the tenor of the aforesaid statute'. Furthermore, the Rawlinson writs make no mention of the 'extrinsic' criterion of being a clerk, namely, the 'tonsure and clerkly habit'.

The identity of the debtor in Servat raises questions about clerical status; a Ralph Honylane was admitted Alderman for Bishopsgate Ward in 1298,[72] was a commercial agent for a Bordeaux merchant, and went bankrupt in 1306.[73] Honylane appears in two certificates as a debtor,[74] and as a creditor on the Recognisance Roll in 1291.[75] None of these describes him

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68 Which was against Merchants; Apps C 62-63; D 74-79

69 Although the statute under which the debtor had been imprisoned was not Acton Burnell, but Merchants; the statutes were often referred to interchangeably

70 Bodl. MS Rawlinson C 292; 87 SS

71 'R'495; 496; 87 SS 225

72 Williams, *Medieval London*, 35

73 *ibid.*, 120

74 C 241/18 nr 54 (£58); /53 nr 47 (£26-10s)

75 RR 2 nr 99 (£8-8s)

as a clerk. If this was the same Honylane as in Servat (his commercial activity might explain the large sum recognised and an association with the creditor, a London merchant,[76] and the 1306 bankruptcy would lend credence to a default) then the claim to clerical status and privilege begins to look suspect. However, no challenge to it is recorded.

Married women

Fleta extends the immunity from imprisonment to married women.[77] There are recorded instances of the imprisonment of female debtors under Merchants,[78] although it is not known whether these were married or not. What can be said is that no instance has been located in which any woman imprisoned in execution on a statute merchant seeks release on the ground that having a husband. The immunity of married women from imprisonment may well have stemmed from the general rule that a married woman had no property,[79] and could make no contracts.[80] It is not known what would have happened had an unmarried woman entered as debtor into a statute merchant, subsequently married, and defaulted; it is possible that execution lay against the goods and lands of the husband, even if, it is hypothesised, he could not be imprisoned pursuant to another's recognisance.

Merchants: first three months

For the first three months of imprisonment under Merchants, the debtor was to keep control over all his goods and lands 'so that he may levy and pay the debt'.[81] It appears that the debtor could not be deprived of the facility which this measure conferred. For instance, in Berstede v Maydenstan (1291)[82] the lands of the plaintiff debtor had been delivered to the defendant creditor in execution on a statute merchant. Later, the plaintiff was imprisoned. Subsequently,

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76 Identified as such in C 241/17 nr 61 and JUST 1/504 m 14d (JA, Lincoln, 1294)

77 App D 54-55

78 e.g. CP 40/64 m 73d (Surr) (M 1286). In CP 40/153 m 372d (Devon) (M 1305), the defendant claimed that her failure to appear to defend her right in a manor ought not be held against her since, on the way to court to defend, she had been arrested and imprisoned for 4 days in Winchester pursuant to a statute merchant

79 Marriage made the wife's chattels absolutely the property of her husband; 3 HEL 527

80 3 HEL 528

81 Apps C 41-43; D 55-57; 118-122

82 CP 40/97 m 332d (Kent) (M 1291)

at the suit of the debtor's wife, his lands were delivered to her 'by the form of the statute within a quarter of a year from the time of arrest'. Such a scenario might have been generated by the ordinary operation of Merchants; common sense dictates that initial failure to locate and imprison the debtor could not be allowed to impede execution against the debtor's lands. *Vice versa*, Merchants execution against a debtor's goods and lands ought not to have prevented the debtor's imprisonment. There are enrolments which support this latter hypothesis. For instance, one sheriff had delivered all the debtor's lands and tenements to the creditor. However, when it was witnessed to that the debtor was in another county, the debtor's arrest was ordered.[83] From a practical point of view, it is not clear why imprisonment of the debtor was so stringently to be enforced, given the extensive provision which Merchants makes for execution, notwithstanding the absence of the debtor, against the debtor's property.[84]

Any sale by the debtor during this three month period was to be 'firm and stable'.[85] This is careful drafting, in so far as the statute disapplies from the incarcerated debtor the common law rule that sales of immovables by prisoners were voidable for duress.[86] There is an instance of sale (albeit in slightly irregular circumstances) in 1296;[87] RH and WH, the plaintiff, were jointly enfeoffed of a messuage. RH was imprisoned in execution on a statute merchant, and 'wishing to sell the messuage to unburden himself of the aforesaid debt caused a certain charter of enfeoffment to be made, made to RH solely'. RH sold the messuage and the plaintiff was disseised.

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83 CP 40/96 m 69d (Leics) (M 1292)

84 In 1346 Shareshull J.(with whom Hillary J. agreed) seemed to limit the availability of *capias* under Merchants, suggesting that if the debtor had not been arrested before his lands were delivered to the creditor, the creditor was not subsequently to be allowed to seek the debtor's arrest; YB T 20 E III (2nd part) 88 nr 57 (T 1346). *Sed contra*, Berstede v Maydenstan, CP 40/97 m 332d (Kent) (M 1291)

85 Apps C 43-44; D 58 (*pro rata habebitur illa vendicio*); 123

86 Simpson, *Contract*, 99; and. e.g. CP 40/106 m 281d (Soms) (M 1294)

87 CP 40/115 m 68 (Middx) (M 1296)

Statutory liability of officials

Merchants provided measures which buttressed the committal of the arrested debtor to gaol, and the imprisonment of the debtor until the debt was paid. First, if the keeper (*gardein*) of the prison refused to receive the debtor, Merchants makes him, if he has sufficient, liable to the creditor for the debt.[88] If the keeper of the prison did not have sufficient to answer for the debt in these circumstances, the person who delivered the prison to the keeper was to be liable for the debt.[89] These provisions might have been prompted by deficiencies with the Acton Burnell imprisonment provisions, or designed to plug a recognised lacuna, since Acton Burnell provides no sanction against the gaoler who refuses to accept the debtor into custody. No enrolments have been located in which these Merchants provisions seem to have been discussed.

Secondly, once the debtor had been imprisoned, the keeper was to answer 'for the debtor's body or the debt';[90] this would have made him liable in the event of the debtor's premature release or escape.[91] Although this provision appears in that part of Merchants which deals with the arrest of a debtor *outside* the power of the Mayor, there is no reason to suppose that this provision did not also apply where the debtor was taken *within* the Mayor's jurisdiction.

Merchants parallels Westminster II c.11, which imposes liability on sheriffs[92] and gaolers if the imprisoned accountant was released without the master's consent.[93] The very fact that provisions dealing with unauthorised release appear in two statutes suggests that there was a genuine problem. Nevertheless, it is not clear how great a disincentive these provisions were

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88 Apps C 34-36; D 34-37

89 Apps C 36; D 37-38

90 Apps C 62-63; D 74-79; 126-128. *Fleta*'s account is far more detailed than Merchants, making it clear that the 'debt' meant the outstanding principal and all statutorily allowable damages

91 The gaoler also appears to have been liable for escape under Merchants where Merchants imprisonment was used on an Acton Burnell recognisance; e.g. CP 40/64 m 142 (Norf) (M 1286)

92 *Sheriffs* (unless the keepers of prisons or their superiors) were not made liable under Merchants; but see Servat v Thunderle, pp 174-6. Perhaps London was different

93 Appendix E

in practice; for instance, the length of the debtor's imprisonment before premature release by the sheriffs in one case is said to have been just three days.[94]

The Merchants enrolments indicate that the gaoler's liability to the creditor sounded in debt;[95] i.e. the gaoler was not himself treated as a Merchants debtor and did not become liable to Merchants sanctions. For instance, in Cave v Amnesbury (1294)[96] the plaintiff claimed that his debtor had been permitted by the defendant, one of the sheriffs of London, to leave London prison with a recognisance of £16 unpaid. The defendant was held liable for the sum recognised and £5 damages, which gross sum was to be made up by *fi.fa.*of his lands and chattels. No enrolment has been located in which the gaoler sought indemnification from an escapee. However, by way of parallel, Register 'R' has a writ available to the gaoler from whose custody an imprisoned accountant had escaped, seeking - against that accountant - indemnification for the statutory damages to which the gaoler had been held liable under Westminster II c.11.[97]

It does not seem that, if the gaoler could produce the body of the Merchants debtor, he was to be liable for the debt, irrespective of any prior escape. This does not seem to have been the same under Westminster II c.11. In Smalcombe v Tauntefer (1303)[98] the imprisoned accountant had escaped, and the plaintiff creditor brought debt against the gaoler for the statutorily allowable damages. It seems that the accountant was subsequently recaptured, and the gaoler struggles to evade liability. However, counsel for the defendant was pressurised by the court to answer whether the accountant was in prison *when the writ was sued out*, had remained there continuously, and was still there. Hengham C.J.C.P. was the principal agent of the drubbing given to defendant's counsel;

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94 KB 27/149 m 20d (Yorks) (M 1296); also YB M 5 E II: 63 SS 9 (23 days)

95 e.g. KB 27/139 m 39 (London) (H 1294); *also* KB 27/178 m 50d (Yorks) (M 1304); the creditor recovered the sum recognised and damages. This was also the case under Westminster II c.11 (App E 24-30)

96 KB 27/139 m 39 (London) (H 1294)

97 Writ 'R' 439; 87 SS 213

98 CP 40/146 m 25 (Devon) (H 1303); there are also reports at British Library MSS Additional 31826 f 146v; Stowe 386 ff.169v-170r; and Additional 5925 f 64v. I am grateful to Dr.P.A.Brand for drawing my attention to these reports and enrolment

> **You** (the defendant) **cannot take the line that the accountant was in prison the day that the writ was sued out because it may be that you released the accountant as the plaintiff pleads, and, because you were afraid of being impleaded, you sent him back to prison later. You must answer what the plaintiff says. Did you release him after he was delivered to you or not?**[99]

Perhaps the defendant recognised the way that the wind was blowing; the jurors' return simply states that the defendant released the accountant who had never returned to prison.

There does not seem to have been anything to prevent a creditor from permitting his debtor to leave prison, temporarily or otherwise.[100] Berstede v Maydenstan (1291)[101] features the release, at the creditor's instigation, of an imprisoned debtor, so that he could enter into a second statute merchant in the creditor's favour. Writtle v Abingdon (1297)[102] has a debtor making two payments to the creditor following execution on a Merchants recognisance[103] and before the delivery of the statute merchant bond to him; one was in the home of a sheriff of London, and the enrolment does not make clear whether the debtor had actually been detained.[104]

In a parallel of the Merchants provisions imposing liability for refusal to *accept* a defaulting debtor, Westminster II c.11 provided that the gaoler's liability for unauthorised *release* of an imprisoned accountant was to extend to the gaoler's superior, if the gaoler was not able to meet the damages.[105] A strict reading of Merchants suggests a lacuna; i.e., the superior's liability would have been triggered only in the event of refusal to *imprison* the debtor, and not in the case of *unauthorised release*. It has to be questioned whether such a lacuna can have been intended, since this would have left without redress the Merchants creditor whose debtor

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99 British Library MS Additional 5925 f 64v

100 For instance, to deliver seisin of lands to the creditor; p 213

101 CP 40/97 m 332d (Kent) (M 1291)

102 CP 40/116 m 102 (London) (H 1297)

103 C 241/18 nr 59

104 Payment could have been made, for instance, by attorney

105 App E 30-32

had escaped or had been prematurely released by a keeper himself insufficient to meet the debt. [106]

Merchants refers to the *gardein* of the prison,[107] and contention did arise concerning the identity of this individual.[108] For instance, in Master Bonatius of Milan v The Abbot of Westminster (1292-3)[109] the creditor complained that the Abbot had allowed his debtor to leave the Abbot's prison in the Liberty of Westminster before a Merchants recognisance had been satisfied. The Abbot tried to evade responsibility,[110] saying that another, RW, was keeper 'as of fee' (*ut de feodo*) of the Abbey Gate and the prison above it, and that RW, his father, and grandfather before him, had answered without the Abbot two or three times before the Justices in Eyre regarding the escape of prisoners. RW contended that he did not have, nor had he ever claimed to have, *custodia* of the prison.[111] Finally, lest execution of the statute merchant be retarded by the plea between the Abbot and the creditor, the sheriff was ordered to *fi.fa.* the sum of the recognisance and damages from the Abbot's lands and chattels to render to the creditor. The Abbot was to attempt to recover from RW.[112] In Glasnyth v Beynyn (1311)[113] the plaintiff brought debt against the Mayor of Exeter, who, it was claimed, had released the plaintiff's statute merchant debtor from custody without consent. The argument turned on whether the writ lay against the Mayor. The plaintiff argued that the writ was properly brought, since the Mayor, together with four bailiffs, arrested the debtor, and delivered him to one T, who was then keeper of the prison, but had nothing.[114] Avoiding the

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106 See Glasnyth v Beynyn; p 181

107 App C 33; 35; 63; *Fleta* has *custos* (D 34; 74) and 'marshal' (D 33)

108 This was perhaps an argument generated by the lacuna postulated above

109 KB 27/130 m 48 (H 1292)

110 KB 27/136 m 33d (Middx) (E 1293)

111 The arrangements in London seem to have been slightly out of the ordinary, perhaps given the proliferation of prisons there. In Cave v Amnesbury (KB 27/139 m 39 (London) (H 1294)) the issue of authority, sufficient to ground statutory liability, over London prison is raised. In that case, it is the defendant sheriff of London who answers for the debt

112 There was parallel litigation between the Abbot and RW on the issue whether RW's serjeanty of the Abbey Gate also carried with it responsibility for custody of the prisoners in the abbot's gaol. The litigation was eventually concluded by an acknowledgment by RW that he was responsible for the custody of prisoners; CP 40/100 m 134d (E 1293); YB 21 & 22 E I (RS) 577-587 (Middlesex Eyre, 1294)

113 63 SS 9

114 A lacuna case?

possible lacuna point, it was also argued that T was appointed by the Mayor, and removable at the Mayor's will. These characteristics sufficed to make T the holder of some office other than that of *keeper* of the prison, perhaps a 'yeoman'[115] for the purpose of keeping the prison. The Mayor said that T was not removable at the will of the Mayor alone, and had *custodia* of the prison 'by commission' (*ex commissione*) of the Mayor and the four bailiffs.[116]

After three months

If the debtor could not levy the debt himself within the first three months of imprisonment, all his goods and lands were to be delivered to the creditor.[117] The debtor was to remain in prison until the debt was fully levied.[118] Some enrolments suggest that, if this statutory provision was complied with, imprisonment could have been lengthy; some statutory tenancies, if the statutory provisions were complied with, could have been[119] of considerable length: instances of possibly up to 62 years have been located.[120]

Payment and Release

If the debtor was in prison, payment could be tendered by a third party on his behalf. Payment could be made to an attorney of the creditor,[121] if it was attested to that the attorney was genuine and that the attorney had sufficient lands and tenements from which he could answer the creditor for the money if necessary. Sometimes, there seems to have been a 'chain' of payees; probably, the object was to avoid the debtor being imprisoned any longer than necessary by virtue of the absence of the creditor if able to produce the money. Even if the

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115 *garcoun*; *garcio*

116 CP 40/161 m 162d (Heref) (M 1306) has a statutory creditor seeking damages against the *bailiff* of Hereford for having allowed the plaintiff's debtor to go free with the debt unpaid; perhaps the bailiff was the *gardein* of Hereford prison

117 Apps C 44-47; D 59-62

118 Apps C 47; D 62

119 This depends on the manner in which the tenancy by statute merchant was conceived; see p 230 ff. For the purpose of these figures, the 'actuarial' model postulated below has been adopted

120 KB 138/96 (1312) (recognisance for £1000; property extended at £16. Perhaps the debtor had property elsewhere as well); 20 years (JUST 1/504 m 23d (JA, Stamford 1294)); 17 years (CEMCR 106 (1300))

121 e.g. KB 27/146 m 6 (Oxon) (M 1295)

debtor was under no danger of imprisonment (e.g., because he was a cleric) the courts still seem to have adopted an attitude facilitative of payment.[122]

Neither Acton Burnell nor Merchants institutes any procedure for effecting the release of a debtor once the creditor had been satisfied. This contrasts with Westminster II c.11[123] which provided the imprisoned accountant with what looks like a genuine mechanism for scrutiny of the accounting proceedings which had put him there; the prisoner could be mainprised to appear before the Barons of the Exchequer, on which day the master, having been summoned, was to rehearse the account before the Barons or court-appointed auditors, and '*fiat partibus iusticia*.'[124] Register 'R' has a writ accomplishing the release of the imprisoned accountant.[125] The failure to provide any such mechanism was a serious omission in Merchants, although, as will be seen, an institutionalised response did develop. Challenges to statutory imprisonment did not develop in a vacuum; as early as Appelby v Sorthull (1287)[126] the plaintiff, imprisoned pursuant to a (non-statutory) recognisance entered into before the court of the Count of Brittany at Boston Fair, was released by virtue of an unidentified Royal writ.

The challenges to statutory imprisonment can be seen to fall into three groups, although it has to be noted that there is no contemporary attempt at classification. In the first two groups, the debtor does not dispute the initial legitimacy of his imprisonment, but contends that continuing imprisonment is unlawful since the sum recognised has been levied by the creditor,[127] or that the sum recognised had been paid and the debtor has an acquittance.[128] In the third group are instances in which the debtor claims that his imprisonment has been wholly unlawful since, most typically, the debt had already been paid.[129] Imprisonment could

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122 e.g. KB 27/170 m 2 (London) (M 1302). 4 marks made up by *fi.fa.*of the debtor's ecclesiastical goods. Neither the creditor nor anyone in his name came to receive the money. The money was delivered to R *ad opus* the creditor. Later, in full court, R delivered the money to one W

123 App E 9-16

124 *Fleta* Book 2 Chapter 70; 72 SS 237

125 Writ 'R' 436; 87 SS 212

126 CP 40/69 m 107 (Lincs) (M 1287)

127 e.g. KB 27/155 m 33 (Yorks) (T 1298); also available in *elegit* e.g. 49 SS 19

128 e.g. KB 27/167 m 33 (Glouc) (H 1302); But these latter cases are not always easy to distinguish from the third group, p 190 ff

129 e.g. KB 27/141 m 26 (Hants) (T 1294)

have been brought about by misunderstanding[130] or fraud.[131] The very existence of instances of imprisonments supposedly unlawful *ab initio* raises questions about the integrity of Merchants procedure; the statute is clear that execution was not to be obtained without presentation of the statute merchant bond,[132] and although Merchants establishes no mechanism by which the fact of timely payment of the statute merchant was to be registered, common sense would suggest that a prudent debtor would have demanded return of the bond on payment.[133] It may be postulated that statute merchant bonds were being retained by creditors despite payment, and were being used subsequently to launch unlawful executions, or execution was being allowed to creditors without requiring presentation of any statute merchant bond.

Imprisonment initially lawful

Of the three groups, enrolments relating to the first (execution had been lawful, but the debt has now been levied) are the most commonly encountered. Two enrolments on the King's Bench Plea Roll for Michaelmas 1291 are the earliest extant orders located which were designed to bring Merchants execution to an end in this situation, although it would be surprising if these were in fact the earliest, given the six years which had elapsed since Merchants.[134] There was to be an accounting between the parties to the recognisance to ascertain whether anything was still owing. This is the nub of the earlier of these two enrolments;[135] the sheriff of Devon is ordered to cause the creditor to come to account (*ad computandum*) with the debtor. This device may have been drawn along the lines of the

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130 e.g., many of the enrolments of this kind have the debtor imprisoned at the suit of a deceased creditor's executor(s); e.g. CEMCR 108 (1301). A creditor's executor, who had found an unacquitted statute merchant bond amongst the deceased's papers, sought execution against the plaintiff debtor, who was committed to prison

131 The language of the Merchants enrolments of this kind mirrors the complaints of certain accountants imprisoned under Westminster II c. 11; e.g. 'R' 436; 87 SS 212

132 Apps C 29; D 32

133 For the hazards of an extant bond; p 83 ff

134 An enrolment in Trinity 1291 (CP 40/90 m 24d) has a dispute between the debtor and creditor regarding an accounting on a Merchants recognisance made before the sheriff of Lincolnshire. The accounting seems to have taken place in 1288 or 1289, since the certificate issued on this recognisance (C 241/7 nr 200) is dated June 4th 1287, and execution was said in the enrolment to have lasted a year

135 KB 27/129 m 41 (Devon) (M 1291)

mechanism whereby a debtor whose lands had been taken in execution by a Jewish creditor[136] could bring the creditor to render account of the issues of those lands;[137] the lands were redeliverable as soon as the debt had been levied. For instance, in Charlecote v Licorice (1253)[138] the creditor was brought to account regarding her seisin of the debtor's land. She had been seised five years earlier pursuant to a chirograph for £20. The plaintiff claimed that this sum had been more than levied from the issues of the lands. An inquest found that the issues during this period amounted to £151, and it was ordered that the lands and surplus issues be returned to the debtor; the Merchants debtor was also entitled to surplus issues levied.[139]

The second enrolment from 1291, Darel v Markeys,[140] is more expansive, and lays bare the structure and content encountered in many subsequent enrolments.[141] The preamble crystallises the complaint; the debtor states that the sum recognised had been fully levied and the sheriff is ordered to summon[142] the creditor to account with the debtor. It seems that there was no assessment of the veracity of the plaintiff's claim before issue of the writ; this was to be left to the accounting. In the meanwhile, the debtor was to remain in prison.[143] However, the courts seem to have supported the process, and frustrated moves by statutory tenants to decelerate it. For instance in 1317[144] a tenant challenged the validity of the writ summoning him to account by *scire facias* on the ground that 'it has been the custom to take a *venire facias* to make the party come and render an account to the other after the time was past'. However, Bereford C.J allowed the writ; *venire facias* was sued by attachment and distress,

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136 p 202 ff

137 e.g. 15 SS 18, 19 (1253); 102 (1278)

138 15 SS 21

139 e.g. CP 40/150 m 167d (Norf) (H 1304). This surplus could be *fi.fa.*d from the creditor's lands and chattels; CP 40/153 m 398d (M 1305)

140 KB 27/129 m 46Ad (Yorks) (M 1291)

141 It is assumed that the language of the enrolment reflects the language of the writ which the debtor procured. This assumption of correspondence between enrolment and writ stems from comparison of the enrolments ordering execution on certain Acton Burnell and Merchants recognisances, which closely follow the language of the statutory writs; p 95 ff

142 The enrolments use *scire faciet* and *venire faciet* interchangeably

143 Otherwise, perhaps, the writ would have taken the sting out of the Merchants provisions for imprisonment

144 La Lee v Pykerel; 54 SS 10

and 'the law ought to be favourable to purchasers to regain their lands without a long process':[145] *scire facias* was easier to sue.[146]

Later authorities have it that the Merchants debtor was put to suing out a *scire facias ad computandum* for two reasons. The first was that Merchants allowed the tenant costs and damages, which were not certain sums,[147] and had to be assessed. The second reason was that the tenant by statute merchant held by a matter of record,[148] and the tenancy could not be brought to an end without giving the tenant an opportunity to answer in court.

The Accounting

Where an accounting was sought, it could not go ahead unless the creditor was present, or some person ostensibly present on behalf of a creditor was able to show that he had the authority to account (and, if required, to issue a valid acquittance) on behalf of any absent creditor. If the creditor failed to appear on the specified day, a series of orders systematically unknits the Merchants execution. The sheriff was ordered to cause the debtor to rehave seisin of all the lands and tenements which had been delivered to the creditor (*rehabere facias seisinam*). It is not clear whether the debtor needed any judgment to re-enter the lands. Some Merchants debtors do seem to have entered without any *scire facias* or accounting, and this phenomenon underlies some cases in which statutory tenants, put out by their debtors, brought *novel disseisin*, only to be met with the defence that the debt and costs in respect of which the lands had been taken had been levied pursuant to the statute.[149] However, Sely v Okestede and others (1299)[150] suggests that the debtor could not re-enter any lands which had been taken in execution without a court order; the defendant debtor claimed that she had entered the lands following the creditor's repeated refusal to come and account, even though the debt had been

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145 54 SS 12

146 Appendix H

147 And hence needed to be assessed. cf. *elegit*, where the debtor did not need to bring a *sci.fa.*, because the tenant by *elegit* only got the land until the debt (a sum certain) was levied, and *elegit* gave neither costs nor damages; YB M 31 E I (RS) 440 (M 1303) (FitzHumphrey v Bardolf) *per* Hengham C.J.

148 See FitzHumphrey v Bardolf CP 40/134 m 177 (Essex) (T 1300)

149 e.g. KB 27/156 m 71 (Yorks) (M 1298) The creditor entered 'as he was entitled to' when debtor had fully levied all the debt, damages and costs. The plaintiff, erstwhile tenant by statute merchant, sought licence to resile from his writ; Sutherland, *Novel Disseisin*, 152

150 JUST 1/1315 m 30 (JA, October 1299)

fully levied. The creditor claimed that this was not so - he had not yet levied the sum recognised - and the jurors returned that the debtor's re-entry was an unlawful disseisin.[151] The two cases may be distinguishable on the ground that, in Sely, the debt had not in fact been levied.

Where an accounting was sought, but the creditor did not appear, the debtor could be released from prison (*deliberari facias*) on mainprize.[152] This was only fair in these circumstances; otherwise, a creditor, through absenting himself, could have kept his debtor in prison more or less indefinitely.

Annerey v Swarte and Russel (1297)[153] shows the caution which need be exercised in entering into an account. The debtor, seeking an account under the head that the debt had been levied, refused to go any further until both creditors appeared: one creditor was said to be in Germany, and the creditor who appeared had no express authority on behalf of the other to account or issue an acquittance. The creditor present sought a writ to warn the absent co-creditor that he was to come to account. Oysel v Stapelton (1297)[154] was similar; the debtor claimed that the defendant creditor had levied over 120 marks pursuant to a statute merchant for 100 marks.[155] The defendant was ordered to come to account. However, it was three terms before she finally came to account,[156] having argued that she could not without her husband.

There seems to be have been little pressure which could be brought to bear on a recalcitrant creditor; for instance, the sheriffs of London were ordered to distrain by all his lands and issues one creditor who did not come to answer a claim that the debt had been paid.[157] It was

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151 The enrolment does not mention whether the jurors had made any assessment of the sum levied before determining the legitimacy of the debtor's entry

152 This might have been a conditional release; e.g. in CP 40/129 m 154 (Notts, Derbs) (T 1299); it was ordered that the debtor *interim custodietur* although he was mainprized

153 KB 27/150 m 5 (Norf) (H 1297)

154 KB 27/152 m 47(Yorks) (M 1297)

155 Certificated at C 241/27 nr 193

156 KB 27/155 m 49d (Yorks) (T 1298)

157 There was an accounting in Middlesex in 1298 (CP 40/125 m 153d (Middx) (M 1298)), but the creditor did not come. It was adjudged that the debt had been levied, but the court considered that his attendance was necessary before judgement. The sheriff was ordered to distrain him by all his lands

returned that he had been distrained by chattels to the value of 12d.[158] Even a year later, the creditor had still only been distrained by chattels of half a mark, although his mainpernors were amerced.[159]

The form of the accounting can be gleaned from Graham v Executors of Pontefract (1296).[160] The plaintiff had been imprisoned pursuant to a Merchants writ brought by the defendant executors of the creditor. However, *ex parte* the debtor, it was claimed that he had an acquittance for the debt. The sheriff was ordered to deliver the debtor by sufficient mainprize to be *coram Rege*, and William Selby, a serjeant of the Common Bench,[161] was assigned to the parties to hear their account. The sheriff was also ordered that he should cause *tot et tales* to appear before Selby, and by whom any challenges to specific items (*calumpnias*) of the account could be declared. There seems to have been some flexibility regarding that composition of the authority before whom the account was taken; a 1303 enrolment[162] has the creditors petitioning for the account to be by arbitration. Four arbitrators were appointed; two at the election of the debtors, and two at that of the creditors.[163] It seems that the parties to such a claim could choose a 'bespoke' dispute procedure, if this was in the interests of a speedy settlement. For instance, in Hardel v Nevile (1299)[164] the parties requested that the question of the authenticity of three disputed acquittances, supposed to have been issued by the defendant in respect of a statute merchant, be inquired into *per mercatores privatos et extraneos de communitate*. Four arbitrators were nominated by agreement of the parties, with a fifth named as a 'tie-breaker'.[165]

Some enrolments lay bare the workings of an accounting. For instance, in Oysel v Stapelton (1297)[166] there were three undisputed items, namely, goods and chattels in the manor of A, a

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158 CP 40/130 m 324 (London) (M 1299); similarly CP 40/130 m 318d (Bucks) - the creditor did not come when ordered to account. It was ordered that he be distrained by all his lands, but the sheriff did nothing

159 CP 40/131 m 352d (London) (M 1300)

160 KB 27/148 m 16d (Yorks) (T 1296)

161 Brand, *Earliest English Law Reports*, vol 2 (112 SS c-civ) provides an extensive biography

162 KB 27/173 m 16d (Yorks) (T 1303)

163 A later enrolment of the case, KB 27/177 m 49 (Yorks) (T 1304) omits this

164 49 SS 14; CEMCR 26 (1299)

165 49 SS 18

166 KB 27/152 m 47 (Yorks) (M 1297)

payment to the creditor by a third party on the debtor's behalf and recorded by tally, and two years' issues of the manor of A. The defendants conceded the receipt and the value of these three items. However, there were also four disputed items, the ascertainment of which involved the somewhat awkward measure of summoning three juries: to determine the value of goods and chattels in the manor of K delivered to the creditor, the sheriff was ordered to cause 24 of that neighbourhood (*visnetum*) to come. For two sums, evidenced by tally, the sheriff was ordered to cause a jury from York to come, as well as 24 from Richmond. The 24 of Richmond were also to answer respecting a further sum paid at Richmond but for which the defendants had refused to make a tally or an acquittance. This phenomenon is also encountered in Sutton v Graham (1298);[167] the debtor sought that the defendant creditor account for his execution on two statutes merchant. There were some disputed items; a sum paid by tally, the issues of various houses and land, and the sale of some goats. The sheriff of Yorkshire was ordered to summon 24 from York, 24 from Wyginton, and 24 from Thurmeton to resolve these.[168]

The second group of cases (the debtor did not claim his imprisonment had been procured by fraud or malice, but nevertheless he claimed to have paid the debt and wished to come to court to prove this) may have been generated by the Merchants provisions making the gaoler liable for the body of the debtor or the debt.[169] That is, even when the debt and damages had been levied or paid, and an acquittance made in favour of the debtor, these provisions would have presented gaolers with a strong disincentive to release debtors until ordered to do so by writ. The safest course would have been for the creditor himself to appear before the court to recognise that he had been fully satisfied of the debt.[170]

Even where the debtor was able to produce the statute merchant bond, the courts showed themselves reluctant to determine its authenticity without the presence of all the parties to it. Writtle v Abingdon (1297)[171] exposes the need for the creditor to be present. The defendant creditor claimed that the statute merchant bond had been purchased by the imprisoned debtor

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167 KB 27/155 m 33 (Yorks) (T 1298)

168 The plaintiff eventually withdrew his claim, and was remanded in custody

169 p 178 ff

170 e.g. KB 27/160 m 47d (Lancs) (M 1299)

171 CP 40/116 m 102 (London) (H 1297)

following its theft from the creditor's home, and used to secure his release. This allegation was judged false by the jury; the statute merchant bond had been handed over voluntarily by the creditor to the debtor following payment of an agreed proportion of the sum recognised. In Alisaundre v Tilly (1302)[172] the plaintiff debtor, who eventually produced a statute merchant bond and an acquittance, was released, but the court made an express reservation that the creditor could reinstigate execution. In Lung v Sautreour (1304)[173] an imprisoned debtor obtained an *ex parte* writ requiring that he appear before the court of Husting to show an acquittance for the statute merchant on which execution had been obtained. However, when produced, the creditor denied that the acquittance was his deed, and, since it appeared that the acquittance had been made outside the Realm (namely, in Scotland), the court declined jurisdiction on the ground that it did not consider itself to have the power to summon any Scots through whom the authenticity of the acquittance could be inquired of. The plaintiff was instructed to seek the assistance of the Royal courts, and was remanded in custody.

Imprisonment unlawful ab initio

In the third group, the debtor alleging imprisonment wholly unlawful since procured by fraud or malice also often seeks to adduce an acquittance or some other proof of payment.[174] Such cases appear as early as the early 1290s; for instance, in Askeby v Appelby (1292-3)[175] the plaintiff had been imprisoned pursuant to a Merchants recognisance, but claimed that this was unlawful since he had paid the creditor more than a year earlier. This was to be inquired of *per patriam*. The nub of such complaints is expressed succinctly by a writ, dated July 9th 1298, the text of which happens to have been enrolled as the initiation of a case before the London Mayor's Court:[176] the debtor had paid and took an acquittance, but his imprisonment had been procured (the writ observes '*maliciose*') 'as if the money had not been paid'.[177] In the early 1290s, there still seems to have been some fluidity about the mode in which the complaint was

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172 KB 27/167 m 33 (Gloucs) (H 1302)

173 London Hustings Roll nr 30 m 1 (Nov 1304)

174 e.g. KB 27/142 m 21d (London) (M 1294); CP 40/138 m 83 (Lincs) (E 1301)

175 CP 40/96 m 159d (Yorks) (M 1292); JUST 1/1089 m 25 (Yorkshire Eyre, M 1293); /1090 m 28 (Yorkshire Eyre, T 1293)

176 49 SS 14. See also London Hustings Roll nr 30 m 1 (Nov 1304)

177 *ac si predictam pecuniam non solvisset*

brought; for instance, in Pluckenet v Executors of Dalerun (1294)[178] it looks like the plaintiff's claim was brought as *trespass*; the defendants are alleged, 'maliciously and in deception of the King's court', to have sought execution on a Merchants recognisance after the debt had been met. They were summoned to answer the King and the debtor for the deception and the wrong (*transgressio*).

The writs read along the following lines:[179]

Edwardus dei gracia etc Iusticiariis suis de Banco salutem.

Querelam Simonis de Notingham' de Derby capti et detenti in prisona nostra apud Notingh' recepimus continentem quod cum ipse nuper coram Radulpho de Sandwyco tunc custode Civitatis nostre Londoniensis et Johanne de Bauquell' clerico nostro ad recogniciones debitorum in eadem Civitate accipiendum deputatis recognovit se debere Johanni de la Cornere de Derby quatuor saccos lane precii viginti et octo libris solvendum eidem Johanni ad festum Nativitatis sancti Johannis Baptiste anno regni nostri sextodecimo iuxta formam statuti nostri pro mercatoribus in huiusmodi recognicionibus provisi ac idem Simon postmodum prefato Johanno de predicto debito satisfecerit ac plenam aquietanciam ipsius Johannis inde habeat sufficientem:

idem Johannes nichilominus predictum Simonem virtute statuti predicti ac si idem Simon prefato Johanni in nullo satisfecisset per breve nostrum coram vobis ut dicitur retornatum maliciose se capi et in prisona nostra Notingh' detineri procuravit in ipsius Simonis dampnum non modicum et gravamen.[180]

Nolentes igitur quod idem Simon taliter indebite pregravetur vobis mandamus quod auditis partium racionibus in premissis et inspecta quietancia predicta si per inspeccionem eiusdem aut alio modo legitimo vobis constare eidem Johanni per

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178 KB 27/141 m 26 (Hants) (T 1294)

179 CP 40/125 m 50 (Derbs) (M 1298)

180 It is this element - the complaint - which usually allows the enrolment to be assigned to one of the three groups

prefatum Simonem fuisse sicut predictum est satisfactum tunc eidem Simoni tale remedium fieri faciatis in hac parte quale de iure fore videritis.

Teste me ipso apud Gedeworth x die Octobr' anno regni nostri vicesimo sexto (October 10th 1298)

Audita Querela

The whole tone of such writs - the King signifying his displeasure, and commanding that 'justice' be done suggests that some genesis for the writ *audita querela* - which, it would not be too strong to describe as a proto-judicial review - can clearly be found in such cases.[181] The *Mirror of Justices*, written between 1285 and 1290,[182] alludes to a writ of *audita querela*, classifying it alongside the writ of conspiracy,[183] and saying that the issue of such writs was abusive unless they contained the substance of the complaint.[184] The writ *audita querela* referred to by the *Mirror* seems to be a non-specific writ of trespass before assize justices, and is to be found by the mid 1280s in such contexts.[185] This writ seems to have been spilling over from trespass into other contexts in the early 1290s.[186] For instance, a writ in the form *audita querela* and dealing with a similar matter can be found in1291;[187] addressed to the Mayor and Bailiffs of King's Lynn, it concerns a complaint by a JW of Lynn that some £20 was owed to him by tally. The Mayor and bailiffs were ordered, 'having heard his plaint' (*audita querela sua*) for the aforesaid debt, to do 'full and speedy justice in accordance with

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181 e.g. KB 27/148 m 16d (Yorks) (T 1296); /155 m 33 (Yorks) (T 1298); /167 m 33 (Glouc) (H 1302); CP 40/151 m 192 (Surrey) (E 1304)

182 Maitland's estimate; 7 SS xxiv

183 Which seems to have come into existence pursuant to an ordinance of 1293, 1 Rot.Parl. 96a; and see Winfield, *The History of Conspiracy and Abuse of Legal Procedure*, (Cambridge, 1921) 26

184 7 SS 174 nr 140; *qe ne contenent nient les substances des pleintes*

185 e.g. JUST 1/1080 m 1d (Yorkshire assizes, 1287): Dominus Rex mandavit Iusticiariis suis hic quod audita querela Johannis le Warner de Normanby de pluribus transgressionibus eidem Johanni per Priorem de Briddlington' [and others] illatis et vocatis partibus coram eis eidem Johanni le Warner debitum et festinum Iusticie complementum inde fieri facerent prout de Iure et secundum legem et consuetudinem Regni sui

186 Although as late as 1288 there seems to have been an attempt in the London Hustings to restrict *audita querela* to pleas of trespass; Hustings Roll 16 m 6d (1288). I am grateful to Dr. P.A.Brand for drawing my attention to this enrolment

law and the law merchant' (*plenam et celeram iusticiam prout de iure et secundum legem mercatoriam*).

The writ transcribed above is significant in that the plaintiff is stated to have made a *querela*, although sometimes the writ is said to have been issued pursuant to an 'information';[188] both terms point towards an informality in complaint procedures, conducive of speed and accessibility. But, apart from this, it is not known how the *querela* or *information* was to be brought; the enrolments sometimes state the complaint to have been made *ex parte* the plaintiff,[189] which is understandable enough if the plaintiff is imprisoned.[190] In FitzHumphrey v Bardolf (1300)[191] the plaintiff said that his complaint against arrest and imprisonment had been made by petition to the King and his council at Parliament in Westminster.

It is clear that the writs countenance expeditious procedure; the release of the debtor assumed priority, and, accordingly, could be accomplished before any accounting (distinguishing these cases, procedurally, from the first group). Security was to be taken from the plaintiff for the prosecution of his claim, and he was to be mainprized. The enrolments speak of 'sufficient' mainprize, and the number of mainpernors varies.[192] Finding 'sufficient mainpernors' and release of the complainant was also part of the set of orders contemplated in the writ designed to bring the accountant imprisoned under Westminster II c.11 before the Barons of the Exchequer.[193] If the mainprized Merchants debtor failed to appear, he and his sureties were to be amerced. Furthermore, Merchants execution was to resume against the absconding debtor.[194]

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187 C 255/4/1 nr 10g

188 e.g. CP 40/161 m 501 (Devon) (M 1306); *ex infumacione*

189 e.g. KB 27/148 m 16d (Yorks) (T 1296); /155 m 33 (Yorks) (T 1298)

190 The writ to deliver an accountant imprisoned under the provisions of Westminster II c.11 is also *ex parte*; 'R' 436; 87 SS 212

191 CP 40/134 m 177 (Essex) (T 1300)

192 e.g. ten (CP 40/129 m 154 (T 1299)); eight (CP 40/158 m 85 (H 1306)); four (KB 27/148 m 16d (T 1296))

193 e.g. writ 'R' 436; 87 SS 212

194 e.g. CP 40/121 m 157 (Notts) (M 1297)

Furthermore, the enrolments suggest that the procedure in such cases, once initiated, could be very quick. For instance, in Troie v Eschekere (1294)[195] the plaintiff complained that he had been imprisoned '*minus iuste*' despite having long satisfied the debt and taken sufficient quitclaim, which he was ready to adduce. The sheriffs of London were ordered to bring the plaintiff *coram Rege* from Cripplegate 'this very day' to show his acquittance. The writ which summoned the creditor to show whether he had anything to say why the debtor should not be released was dated October 4th 1294, and the case is noted as being heard in the quindene of Michaelmas, i.e., about October 13th. In Lung v Sautreour (1304)[196] the Mayor and sheriffs were ordered to produce the imprisoned debtor at, and summon the creditor to, the very next Hustings; only ten days elapsed between the writ and the date of the enrolment.

Conditioned statutes merchant

It has already been observed that challenges to putatively unlawful statutory imprisonment were usually made by a writ in the form *audita querela*, and it has been hypothesised that the failure of Merchants to provide any mechanism by which imprisonment could be challenged provided the principal breeding ground for the development of this writ. However, Plucknett identified conditioned statutes merchant - 'statutes merchant as securities for the performance of some other agreement' - as providing a further stimulus for the writ *audita querela*.[197] The date of the appearance of writs dealing with this situation is not known; Plucknett's earliest instance is 1297,[198] which is broadly consistent with the writs discussed above. However, the use of statutes merchant in such a manner is known from 1294.[199]

The situation is simple: A enters into a statute merchant in favour of B, subject to a separately expressed agreement that B shall not sue out the statute merchant if A pays a certain sum or performs a certain act. For instance, in Walssheman v Wygnaunt (1300),[200] one JR entered into a statute merchant for £40 in favour of AW before the Winchester registry, 'as a means of

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195 KB 27/142 m 21d (London) (M 1294)

196 London Hustings Roll nr 30 m 1 (Nov 1304)

197 Plucknett, *Edward I*, 145

198 *ibid.*, 145 n 1

199 e.g. CP 40/106 m 120 (M 1294); Appendix O

200 CP 40/161 m 182d (Hants) (E 1306); William Walssheman and others v Adam de Wygnaunt

security to ratify a covenant' (whereby JR conceded lands to AW and Matilda, JR's daughter) between JR and AW. JR was to 'complete and ratify' this covenant by a fine levied in the Royal court. Once the fine had been levied and the lands transferred,[201] the statute merchant was to be of no effect.

The difficulty arises when it is recalled that the condition never seems to have made its way onto the statute merchant bond or Recognisance Roll; the statute merchant, on the face of it, is unconditioned, and can be sued out if it is not met at the day stated for payment. The cases of interest are when this does happen,[202] and the debtor, claiming that the condition had been fulfilled, seeks that execution be overturned.

For instance, in Shakenhurst v Executors of Foliot (1304-6)[203] S entered into a statute merchant for £200 in favour of F. F conceded for himself and his executors that if S could get a certain third party to enfeoff F and his heirs in perpetuity of certain lands, S was to be quit of the statute merchant. S claimed that he had procured this enfeoffment. However, statutory execution nevertheless came to be preferred against him.[204] S proferred and sought judgment on a certain writing under the name of the deceased which witnessed the covenant. The text of the writ is given in an enrolment. A Year Book report of the case[205] simply says that the debtor came into court 'by a writ which he had out of Chancery at his suggestion'.[206]

Rex vicecomiti Wygorn' salutem.

Ex querela S accepimus quod cum ipse de denariis F ad opus eiusdem F quasdam terras et tenementa in R ipso F in partibus transmarinis tunc existenti nuper emisset, et predictus S per convencionem inter ipsum et dictum F factam postquam

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201 Simpson, *Land Law*, 122-125

202 One way of attempting to avoid this pitfall would be to lodge the statute merchant bond with a third party ('in equal hand'); this is what is done in Appendix O; And see p 136

203 CP 40/149 m 124 (Worcs) (M 1304); /158 m 85 (Worcs) (H 1306)

204 CP 40/153 m 239 (Worcs) (M 1305); S had been imprisoned in Worcester castle. The executors, notwithstanding, 'falsely and maliciously' sought a statutory writ

205 YB H 34 E I (RS) 127 (H 1306)

206 *a sa suggestion*; Baker, *Manual*, has '*suggestion*' as 'surmise, supposal (i.e., untried assertion of fact)

a partibus rediisset supradictis pro eo quod emptio illa sibi displicuit coram *(here the statute merchant recognisance is detailed)* **et scriptum recognicionis illius iuxta convencionem predictam JD et CE ex assensu eorundem S et F ut in equali manu traditum fuit custodiendum.**

Ita videlicet quod si predictus S de aliis terris ad opus predicti F emend' infra certum tempus post dictam recognicionem factam eidem F pro denariis suis predictis satisfaceret tunc recognicio predicta penitus adnullaretur.

Et nos pro eo quod idem F una cum aliis malefactoribus et pacis nostre perturbatoribus, licet dictus S de aliis terris et tenementis infra tempus predictum dicto F iuxta convencionem predictam satisfecerit: scriptum tamen illud in custodia predictorum JD et CE apud Shekenhurst inventum una cum aliis bonis et catallis predicti S ad valenciam quadraginta librarum ibidem tunc existentibus vi et armis dum idem S nobiscum in guerra nostra Scocie sub proteccione nostra extitit cepit et asportavit et alia enormia ei intulit ad grave dampnum ipsius S et contra proteccionem nostram predictam et contra pacem nostram:

assignaverimus dilectos fideles nostros RM WM et HW Iusticiarios nostros ad transgressionem illam audiendum et terminandum secundum legem et consuetudinem regni nostri:

Idem F maliciam suam predictam continuando dictumque S a prosecucione sua in hac parte impediri machinando, eundem S per breve nostrum coram Iusticiariis nostris de Banco retornandum pretextu recognicionis predicte capi ut sic eum impediat, quominus querelam suam de transgressione predicta coram predicti RM WM et HW secundum legem et consuetudinem regni nostri prosequi possit, maliciose iam prosequitur in ipsius W dispendium non modicum et gravamen.

Et quia huiusmodi malicie quantum de iure et absque statuti predicti offensa poterimus in hac parte velimus obviare, tibi precepimus quod si idem S invenerit tibi sufficientes manucaptores qui eum manucapiant habere coram prefatis Iusticiariis de Banco a die sancti Michaelis in quindecim dies ad faciendum et

recipiendum quod curia nostra consideraverit in premissis: tunc ad capcionem predicti S interim non procedas.

Et scire facias F ostensurus quare execucio recognicionis predicte iuxta convencionem predictam adnullari non debeat.[207]

Similarly, in Kytenore v Forde (1306),[208] WK enfeoffed AF, IF (A's wife) and HF (A's son) of lands in B, and *pro statu eorundem A I et H assecurando* entered into a statute merchant for £40 in their favour. Beyond this (*super hoc*) WK and AF covenanted that AF would never exact the £40 from WK unless another deed in the name of WK to anyone else appertaining to the same lands and tenements should be found, whereby A, I and H would lose the lands or incur loss. The statute merchant was sued out 'against the form of the covenant'. A was to be attached by his body, and was mainprised.

The strength of the statutory provisions - especially in relation to the interest taken by the creditor in the lands of the defaulting debtor[209] - appears to have provided a considerable incentive for colourable statutes merchant; i.e., statutes merchant entered into with the intention that they be used as an instrument for investing the creditor with an interest in the debtor's lands. This scenario, too, was attended with the issue of *audita querela* writs. For instance, in Adderbury v Limesy and Middleton (1308),[210] the plaintiff claimed that the defendants fraudulently schemed to charge the lands of D1's wife, and to this end procured her to enter into a statute merchant in favour of D2 for £600. She defaulted, and the lands were taken by D2 in execution. The plaintiff obtained a writ[211] with the following clause;

Et quia huiusmodi fraudi malicie et decepcioni taliter in elusionem legis et consuetudinis regni nostri factis volumus remedio quo poterimus obviari, vobis mandamus quod vocatis coram vobis hiis quos fore videritis vocandos, et auditis

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207 CP 40/149 m 124 (Worcs) (M 1304)

208 CP 40/161 m 25d (Soms) (M 1306); William de Kytenore v Adam de la Forde

209 p 230 ff

210 49 SS 21; Richard de Adderbury v Richard de Limesy and Richard de Middelton

211 49 SS 22; the writ is dated March 27th 1308

racionibus suis coram vobis inde proponendis, examinato que diligenter negocio memorato

Damages and costs

Acton Burnell did not provide for damages, and costs were allowable only to a limited category of creditors, namely, the 'foreign' (*estraunge*) merchant, all the time he was suing for the debt.[212] These costs ceased to accrue when the goods of the debtor had been sold or delivered to him, even if the appreciated value of these fell short of the sum recognised. Acton Burnell fails to specify whether these costs were to be levied using the statutory procedure, or by common law.[213]

Merchants allowed all creditors[214] damages, as well as costs.[215] This is one advantage which Merchants possessed over *elegit*, pursuant to which damages were not available.[216] Damages under Merchants, once assessed, were a debt, and ordinarily seem to have been recoverable by *fi.fa.* or *elegit*.[217] The debtor was not to be released from prison until this had been accomplished.[218] Recovery of damages by *elegit* or Merchants would, potentially, have exposed the debtor to the possibility of much longer in prison[219] than *fi.fa.* which provided for sale of goods and delivery of the money generated to the creditor *sine dilacione*. In the case of *elegit* and Merchants, the sum awarded as damages could have taken some time to accrue from the issues of the debtor's lands. However, there is a small number of enrolments which appear to authorise the levying of damages on a Merchants recognisance using Merchants.[220]

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212 Apps A 38-40; B 20-21

213 e.g. *fi.fa.*

214 Although it must be noted that Merchants adverts to the creditor as '*marchaunt*' (App C 16; 28; 45; 48; 54; 59; 64; 65; 66; 71;75) and never as '*creaunzur*'; *Fleta* has '*cuicumque*' (whomsover) (App D 13), and *creditor* (App D 19; 32; 37; 60; 63; 69; 76; 82; 90; 91; 135). Acton Burnell uses '*creaunzur*' (e.g. App B 7)

215 Apps C 65-67; D 76-78; 115-117

216 YB M 31 E I (RS) 440 (M 1303) *per* Hengham C.J.

217 e.g. CP 40/145 m 207 (Notts) (M 1303)

218 e.g. KB 27/175 mm 48 (Sussex); 76 (Berks) (H 1304); although, neither *fi.fa.* nor *elegit* provided, in themselves, for imprisonment

219 Although in Hamelton, below, the enrolment makes no reference to any order that the debtor be imprisoned

220 e.g. Hamelton v Suthechurch (KB 27/178 m 104 (Essex) (M 1304)

The factors which influenced the quantum of damages are not known, although in Hamelton v Suthechurch (1304)[221] the powerful creditor[222] successfully argued that the quantum of damages ought to reflect the longevity of the default. This is consistent with a rule in the *Liber Albus*[223] which provided that damages of 20 per cent of the principal were recoverable for each year that an unrecognised debt was overdue. In Hamelton the creditor's attorney had accepted goods to the value of the sum recognised (40 marks) and damages (seven shillings). The damages were elevated on the ground that seven shillings was inadequate when the statute merchant had gone unpaid for five years:[224] the court awarded £5 damages[225] - a considerable rise, but still a somewhat lower sum than the *Liber Albus* rule would have produced. Nearer to those is the award, recorded in a 1312 extent, of £600 damages in respect of a statute merchant for £1000 which had gone unpaid for four years.[226] However, the high damages in that instance may have been a means to 'mitigate' the relatively meagre sum recognised by execution: the extent details property with a total annual value only of about £16.[227] Statutory damages on the whole seem to have been low, and the ratio of damages to principal seems to have varied according to the circumstances. An average over 14 known awards[228] is 22% of the principal, with the damages awarded ranging from 3% to 43% of the principal.

The issue of whether Merchants imprisonment lay for statutory damages alone, independent from liability on the principal sum recognised, arose in Askeby v Appelby (1292-3).[229] The plaintiff complained that he had been imprisoned for eight days in the liberty of Richmond at

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221 KB 27/178 m 104 (Essex) (M 1304); similarly, Hamelton v Perdriz; KB 27/181 m 53d (Essex) (T 1305)

222 William de Hamelton; Vice-Chancellor (1286), and Dean of York (1298): '*No one else in the Realm is so expert in laws and customs*'; CCR 1296-1302, 309

223 *Liber Albus* 471

224 This was correct; the debt was payable at Easter 1299. Two certificates had been issued requesting writs to the sheriff of Essex; C 241/35 nr 8; /37 nr 54

225 To be made up by the statutory procedure, rather than *fi.fa*

226 KB 138/96

227 Accordingly, repayment would take about 62 years, according to the measure described at p 232

228 Excluding the above award of £600 damages

229 CP 40/96 m 159d (Yorks) (M 1292); JUST 1/1090 m 28 (Yorkshire Eyre, T 1293); /1089 m 25 (Yorkshire Eyre, M 1293)

the suit of the defendant in respect of a statute merchant for 12 marks. The jurors returned that the sum recognised had been met, the bailiffs had released the imprisoned plaintiff, and the creditor delivered the statute merchant bond to them. However, the bailiffs sought one mark for their costs and reimprisoned the debtor, not at the suit of the creditor but for their own ends.[230]

Fourteenth century Year Book authority suggests that Merchants damages and costs were recoverable only where the debtor's lands had been delivered to the debtor; a 1338 note[231] describes the rigorous working of such a principle. A Merchants debtor had defaulted, and a certificate was issued requesting that a writ of execution be sent to the sheriff of Yorkshire. The debtor came into the custody of the sheriff on the very day on which the writ was returnable and tendered the money. The creditor was denied damages since, it was said, 'the Statute gives expenses and costs only where the lands are delivered'. This is like the Acton Burnell rule that costs were recoverable only where the recognisance had been sued out. It is not known whether any such principle would have applied where the debt had, for instance, been levied from the debtor's goods and chattels.

The Merchants creditor's assessment of his damages and costs was to be assessed. For instance, in Drinkwater v Bokelaund (1304)[232] the sheriff of Berkshire returned that the creditors had been satisfied of the sum recognised 'but of the damages and costs they have not yet been satisfied since these cannot be taxed without the discretion of the court'. In Master Bonatius's case (1292-3)[233] the damages were taxed 'by the discretion of the Justices', whilst in Graham v Warthull (1301)[234] the damages were taxed 'by the jurors'.

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230 The legitimacy of this is not decided upon

231 YB E 12 E III (RS) 462 (E 1338)

232 KB 27/175 m 76 (Berks) (H 1304)

233 KB 27/130 m 48 (H 1292)

234 KB 27/164 m 31d (Yorks) (E 1301)

CHAPTER 6

Statutory Execution against Real Property

Several modes in which a debt could be charged against a debtor's lands were known in 1283, and these survived Acton Burnell and Merchants. As the background against which the statutes were set, and functioning alongside them, they help illuminate some of the doctrinal and practical difficulties which Acton Burnell and Merchants generated.

The legal institution which offers the most striking antecedents to the statutory tenancies is the gage of immovables. Such gages, which arose by the will of the parties rather than by operation of law, appear in obligatory instruments as early as the 1160s. For instance, a bond of the Christian moneylender William Cade has the debtor putting all his tenements *in vadimonium* from year to year until the loan was paid.[1]

Glanvill mentions two species of gage over immovables.[2] The first was the 'dead' (*mort*) gage, so-called since the issues of the gaged land did not go in reduction of the debt.[3] The mortgage was 'deemed a kind of usury'.[4] However, although described by *Glanvill* as 'unjust and dishonourable', it was not forbidden by the Royal courts. Since the mortgagee often entered into possession of the gage immediately,[5] the mortgage is some way removed from the tenancy by statute merchant.

The second species is a gage in which the issues of the gaged realty went in reduction of the debt,[6] which came to be known as a 'live' gage (*vifgage / vivum vadium*).[7]

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1 H. Jenkinson, *A Moneylender's bonds of the twelfth century*, in *Essays presented to R.L.Poole* (ed. H.W.C.Davis, Oxford, 1927), 206 (bond 3, 1160-61)

2 *Glanvill* Book X Chapters 6 - 8; Book XIII Chapter 26

3 *Glanvill* Book X Chapter 6

4 *ibid.*

5 J.L.Barton, *The Common Law Mortgage*, (1967) 83 LQR 229, 230

6 *Glanvill* Book X Chapter 8. *Glanvill* does not say by what means, or with what frequency, the issues of the gaged land were determined upon

Glanvill contrasts it with the mortgage, describing the live gage as a 'just and binding' transaction. Since redemption of the land was accomplished 'automatically', the live gage and Merchants execution against realty resemble each other. Unfortunately, too little is known about the live gage[8] for the law of live gages to offer much assistance in assessing the nature of the statutory tenancies.[9]

Glanvill states that the gagee need not be seised of the gaged property; this stood to be determined by the will of the parties.[10] However, if the gagee was seised, this is described by *Glanvill* and *Bracton* as 'as of gage' (*ut de vadio*) in contrast to 'as of fee' (*ut de feodo*).[11] Neither treatise gives novel disseisin to the gagee; this lay to the gagor.[12] Sutherland suggests that gagees were regarded as investors of cash, rather than as the owners of any interest in land.[13] However, the position seems to have shifted throughout the thirteenth century, and *Fleta*,[14] departing from *Bracton*,[15] says that novel disseisin lay to gagees. However, it is not known whether this shift came before 1285.[16]

Alongside the live gage as an antecedent of the tenancy by statute merchant was the gage taken by Jewish creditors over their debtors' lands, which appears in bonds as early as the 1170s.[17] The nature of this 'Jewish' gage is a matter which has exercised commentators.[18] Maitland remarked of the pre-Edwardian law;

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7 *Glanvill* does not name it

8 The literature is small. H.D.Hazeltine, *Die Geschichte des englischen Pfandrechts* (Breslau, 1907) 202-213; *The gage of land in medieval England*, (1903-4) 17 Harvard LR 549; (1904-5) 18 Harvard LR 36

9 Live gages seem to have been used as late as the 1280s; 2 PM 123 n 4 (1286)

10 *Glanvill* Book X Chapter 6

11 e.g. *Glanvill* Book XIII Chapter 26; *Bracton* f. 268 (3 *Thorne* 286)

12 *Glanvill* Book X Chapter 11

13 Sutherland, *Novel disseisin*, 32

14 *Fleta* Book 4 Chapter 2; 89 SS 50

15 *Bracton* f.165 (3 *Thorne* 26) does not mention gagees

16 *Fleta* also mentions the tenant by statute merchant, so some of the passage was written after 1285. By 1302, 'after some uncertainty', it was 'settled' that *novel disseisin* lay to mortgagees; YB 30 E I (RS) 211 (Cornish Eyre, 1302); Sutherland, *Novel Disseisin*, 138 n 9

17 H.G. Richardson, *The English Jewry under the Angevin Kings* (London, 1960) Chapter 3

> **... the Jewish 'gage' was among Englishmen a novel and alien institution, since it broke through the old law by giving rights in land to a creditor who did not take possession**[19]

The Statute of Jewry (1275)[20] limited what could be taken by the Jewish creditor. Execution into the debtor's lands was allowable only if the debtor's movables were insufficient to meet the debt. Even then, the creditor could only take half the debtor's lands,[21] and the debtor's principal dwelling was exempted. The lands were to be extended by the oaths of lawful men 'so that it may be known with certainty when the debt is quit, and the Christian may have the land again'.[22] The seisin of the Jewish creditor, although described as *ut de vadio*,[23] was protected by the Exchequer of the Jews.[24] The extent of the debtor's lands, and the restriction of execution to half of them both anticipate aspects of the 1285 legislation, as does the fact that, in both cases, execution was to be by the sheriff and local administration. The focus on the issues of the land, and the gagee's ability to sell the gage align the Jewish gage with the live gage.

Debtors' lands could also be charged pursuant to the customs of certain boroughs, and it is possible that Acton Burnell or Merchants could have been modelled on such provisions. The closest antecedent to Merchants appears to have been the scheme described in the 1272 Great Yarmouth borough charter,[25] which looks like a live gage;

> **... it is provided that all those who buy in the town well and lawfully pay for all merchandise according to the agreement ... made at the purchase, ... and if the buyer does not do so, and plaint ensues, the bailiffs and the wise men**

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18 2 PM 469 - 473; 15 SS xiii; (1902) 18 LQR 305; (1904-05) 18 Harvard LR 36, 45

19 2 PM 469

20 Appendix I

21 cf. App F 4-5

22 App I 6-7; For the significance of this phrase, see p 232 ff

23 e.g. 2 PREJ 297 (Justices of the Jews, 1275)

24 *ibid.*

25 Ballard, *op.cit.*

> **shall compel the buyer to pay by his chattels, and unless he makes satisfaction within three days, his chattels shall be sold by view**[26] **of worthy men to make satisfaction,** ***and if his chattels do not suffice, his lands, rents and houses shall be delivered into the hand of the merchant by the valuation***[27] ***of worthy men until the balance of the debt be levied,***[28] ***saving the rents due to the chief lords of the fee, and the repairs of the aforesaid houses*** (my italics)

Bateson speculates that the 'general silence' (with one exception)[29] of the pre-Acton Burnell borough customs on the subject of sale of a debtor's realty suggests that borough custom followed the common law in treating the debtor's land as *distrainable* but not *saleable*; i.e, the greatest extent of the creditor's power was occupation of the distrained property, with the issues going – like a live gage - in reduction of the debt.[30]

Acton Burnell

The draft of Acton Burnell provided, on the debtor's default, for sale of all his immovables if his movables were insufficent to meet the debt.[31] However, all references to immovables were deleted during the course of drafting.[32] Nevertheless, the idea of statutory execution against immovables was not wholly discarded from the

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26 *par la vewe*

27 *par estimaciun*

28 *seit plenerement parrendue*

29 Chapter 74 of Hereford's 1486 custumal (18 SS xxx; 118). This chapter may have been adopted from a pre-Westminster I original (18 SS xxxii) since it refers to the practice of 'our ancestors' (*antecessores nostri*) where one citizen of Hereford had been distrained upon 'in foreign parts, in Wales *or elsewhere'* (*vel alibi*) for a debt owed by another, and for which he was not a pledge. Such punitive distraint was outlawed by Westminster I c.23 (1275) (1 SR 33); accordingly, the argument as to whether Chapter 74 antedates 1275 turns on whether *vel alibi* can be read as 'within the Realm'. If the Hereford scheme *does* antedate Acton Burnell, it would be of particular interest as a possible model for that statute since it provided for the delivery of the debtor's goods to the person distrained upon, and, if the goods were insufficient, for sale of the debtor's realty. If the debt remained unsatisfied, the debtor could be imprisoned until satisfaction had been made 'by his friends for him'; cf. Apps A 35-36; B 18

30 21 SS lx

31 App A 14-15. For a description of this process, see p 143 ff

32 e.g. App A 20; 23; 26; 28; 34; and, conversely, the references to goods often qualified with an interlined 'mobles'; e.g. App A 27; 31; 32; 33; 45; 46

scheme. At the draft stage, 'movables' (*moebles*) came to be qualified with the interlineation of 'such as (*com*) chattels and devisable burgages'.[33] Further tinkering with the draft developed a clause which provided that the statute merchant seal was to be put 'in lasting witness' to all statutory sales and, if necessary, to the delivery of devisable burgages;[34]

> [i]**<E a la vente e a la liveree des burgages devisables serra mis le seal le Rey avauntdit>/**
>
> **<...en pardurable temoner..>**
>
> (*foot of membrane*) **en pardurable testmoyne**

This tinkering suggests that the very idea of execution against the debtor's lands was hesitated over. Reading the above clause in association with the interlined qualification of *moebles* suggests that the inclusion of devisable burgages represented some 'halfway house' between the inclusion and exclusion of all immovables. If Acton Burnell was specifically targeted at mercantile debtors, then execution against devisable burgages could have been perceived as desirable since, as a Northampton custumal of the late thirteenth century states, 'burgess merchants generally have half or more of their chattels in the form of housing.'[35]

Lands and tenements of burgage tenure were subject to the custom of the borough in which they lay.[36] In general, they were characterised by the payment of an annual rent which operated in discharge of all other services. There was also a variable degree of freedom of *inter vivos* alienation and devise. In some boroughs it was deemed that land which the tenant held by inheritance (rather than by purchase) constituted part of his patrimony, and its alienation[37] and devise[38] were prohibited.

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33 App A 13

34 Apps A 21b-22; 55 (=B 10)

35 21 SS 96; This passage is dated at 1295 X 1316; 18 SS xliii

36 Hemmeon, *Burgage Tenure*

37 e.g. 21 SS 91 (Wearmouth c. 20, '1164-1195', and Tewkesbury c. 4, 'before 1183'); *ibid.* 93 (Dunwich, '1215'); *ibid.* 94 (Leges Quatuor (*sic*) Burgorum c. 101, '1270 (about)')

Examination of the freedom of devise of tenements in the seven towns known to have had Acton Burnell registries[39] allows the force of Acton Burnell's provision against *devisable* burgages to be determined. It appears[40] that London was the only locality in which all burgage tenements - irrespective of whether they were acquired by the tenant's purchase or inheritance - were devisable.[41] In the remaining Acton Burnell towns, land of the burgess' inheritance does not seem to have been undevisable (although this was not without some uncertainty).[42] Accordingly, the reach of Acton Burnell in those towns would have been shorter than in London.

Whether a particular burgage was devisable could become a matter in issue in Acton Burnell proceedings. For example in 1296 the heir of a Bristol Acton Burnell debtor claimed that the creditor had disseised him of a tenement which the debtor had by devise.[43] The jury were asked what tenements in Bristol were devisable. They answered that the tenements which ought to descend by hereditary right (*iure hereditario*) were not devisable, but tenements held by a tenant's own purchase were.[44]

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38 Hemmeon, 131; 'the distinction of lands of purchase and lands of inheritance, with freedom to the former and restriction to the latter, ran a course in devise nearly parallel to that in sale'

39 p 62

40 Hemmeon, 130-144

41 Hemmeon, 141

42 For Bristol, see below. Newcastle-on-Tyne (Hemmeon, 139 n 2); Shrewsbury (YB 20 E I (RS) 262 at 266; 1292 Shropshire Eyre); Winchester (Hemmeon, 139 n 2); the evidence for York is not conclusive, and the situation in Lincoln is not clear

43 JUST 1/285 m 14d (JA, Bristol 1294); respited to CP 40/115 m 143 (Gloucs) (M 1296) where the plaintiff retracted

44 The Bristol custumal, c.4 (c.1240) allowed the devise of lands of purchase (21 SS 95 n 3), although this is not of itself conclusive evidence that lands of inheritance could not be devised. Hemmeon observes that this provision was defied (Hemmeon, 142 n 2)

Merchants

Merchants struck more decisively against the debtor's immovables than Acton Burnell, potentially charging all the lands and tenements held by the debtor on the day of the recognisance. There seems to have been a sea-change in legislative attitude towards getting execution into debtors' lands in 1285. Plucknett[45] suggests that the charging of all the debtor's lands under Merchants was prompted by weaknesses of the Acton Burnell scheme;[46]

> **Possibly it was realised that (Acton Burnell) was in part directed against the wrong people. Its concern with devisable burgages (but with no other land) suggests that it had townsmen in mind;[47] but the townsman ... was only the easier part of a much bigger and more difficult problem.**

The execution provisions of Acton Burnell were perhaps too weak. Given the restrictions outside London on the category of devisable burgages,[48] provisions for the seizure and sale of devisable burgages might not have been attractive to creditors, or, alternatively, were not proving in practice a sufficiently persuasive incentive to make recalcitrant debtors meet their debts.

Merchants lies alongside Westminster II c.18 which gave execution, pursuant to a new writ called *elegit*, into all the movables (except beasts of the plough and burden), and half[49] of the realty of certain types of debtor. However, the unequal reaches of Merchants and *elegit* - the former lying against all the debtor's realty, the latter against only half - hampers the discernment of whether any coherent policy underpinned the two statutes. If it be supposed that the two 1285 statutes cannot be considered in isolation from each other, then there is an argument that they could be seen as two

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45 Plucknett, *Edward I*, 139

46 Rather, for instance, than any intention to 'dovetail' Merchants with the *elegit* given by Westminster II c.18

47 For an analysis of London Acton Burnell debtors, see Chapter 3

48 p 205

49 App F 4-5; cf. Statutes of Jewry (1275); App I 8

halves of a more widely-conceived scheme, designed in conjunction, and enacted contemporaneously, to capture debts incurred in at least four different ways.[50] The relative 'leniency' of *elegit* in comparison with Merchants may be explained in terms that Merchants debtors had voluntarily brought themselves within the statutory scheme, agreeing that statutory execution would run against them in the event of default whilst *elegit* lay against persons who had made no such agreement. However, disrupting the notion that the two 1285 statutes were intended as complementary, there are stark differences between their operation in certain spheres; for instance their effect on land of the ancient demesne,[51] and the availability of damages and costs.[52] This chapter will only discuss *elegit* where it provides a significant parallel or contrast with Merchants.

First three months

For the first three months' imprisonment,[53] the debtor was to keep all his property 'so that he could levy and pay the debt'.[54] If the debtor could not be found, statutory execution against his property could proceed regardless. However, this was subject to the possibility that, should the debtor subsequently appear, his immovables were to be delivered to him. For instance, in Berstede v Maydenstan (1291)[55] the plaintiff's manor had been delivered to the defendant under Merchants. The debtor subsequently presented himself to the sheriff and was imprisoned. At the suit of his wife, the manor was redelivered to the debtor for three months.

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50 i.e., Merchants (statutory recognisances); *elegit* (judgment debts, debts recognised in the *curia Regis*, and awards of damages)

51 p 223 ff

52 p 198 ff

53 The 'three months' accrued from the date of the debtor's imprisonment, and not the date of default; Apps C 41-42; D 57

54 App C 42-43; D implies this; 55-59

55 CP 40/97 m 332d (Kent) (M 1291)

The 'levying' could be accomplished by sale. Merchants, addressing the difficulty that sales of immovables by prisoners were voidable for duress at common law,[56] provided that any such sale made by the imprisoned debtor during the first three months' imprisonment was to be 'firm and stable'.[57] However, unlike Acton Burnell, the responsibility for organising any sale was placed squarely on the shoulders of the Merchants debtor, rather than those of the Mayor or sheriff.[58] It has to be asked why a sale by an imprisoned debtor should have been considered preferable to the (Acton Burnell) sale by the Mayor or sheriff. Perhaps the Acton Burnell sale was an area to which the Merchants preamble was adverting when it spoke of the *'mal enterpreteison'* of Acton Burnell,[59] although Mayors are not mentioned in this connection. This change seems to disadvantage the Merchants creditor, since the statute imposes no duty to sell on the debtor. As such, in the event of a non-sale, the Merchants creditor could have had to wait for at least three months before getting anything at all.

The parties sometimes 'short-circuited' the execution provisions, and used a statute merchant within a mortgage-like arrangement, where the creditor entered the lands as soon as the statute merchant was entered into. For instance, in Teye v Tayllur (1292)[60] the plaintiff had entered into a statute merchant in the defendant's favour, and had immediately enfeoffed the creditor of a tenement. There was a condition that, if the statute merchant was met, the tenement would return unencumbered to the debtor.[61] However, if it were defaulted upon, the tenement was to remain with the creditor in fee.[62]

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56 Simpson, *Contract*, 99; and, e.g., CP 40/106 m 281d (Soms) (M 1294)

57 Apps C 43-44; D 58 (*pro rata habebitur illa vendicio*); 123

58 App C 42 (*par les soens*)

59 App C 12

60 JUST 1/1292 m 14d (JA, Aylesbury 1292); JUST 1/1297 m 1d (same assize)

61 Compare this with the 'conditioned' statutes merchant, discussed at p 194 ff, in which the condition related to the payment of some sum or performance of some act other than the payment of a statute merchant

62 Perhaps this arrangement was insisted upon by the creditor since the debtor appears to have been a prolific defaulter; e.g. C 241/2 nr 208; /11 nr 24 (£28-6s-8d); /2 nr 202; /9 nr 126 (£40); /49 nr 204 (£95-13s-4d); /46 nr 1 (£12)

End of three months: statutory delivery

If the debt was not met in full within three months, all the debtor's goods, chattels, lands and tenements were to be delivered to the creditor- the movables at an appraised value, and the immovables by a reasonable extent - to hold[63] until any outstanding sum[64] was levied from the issues of the realty.[65] The debtor was to remain in prison until the debt was paid.

However, the evidence of the Plea Rolls for the early period of Merchants operation[66] suggests that, when it fell to the sheriff to make a return as to the debtor's lands against which execution could be awarded (which task fell outside the ambit of Westminster II c. 39 and Merchants), it seems that sheriffs acted without fear of penalty in returning that debtors had nothing in the bailiwick whereof they could be distrained.[67] That this return was often suspect is suggested by the incidence with which it was witnessed to that the debtor did have sufficient lands and tenements.[68]

The imprisoned debtor also seems to have retained the power to sell his immovables even after their delivery to the creditor.[69] The only instance located in which a Merchants debtor sells his lands[70] does not make clear whether the imprisoned debtor sold in the first three months or afterwards, or what interest the purchaser was

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63 Any movables delivered were not returnable to the debtor

64 i.e, the sum recognised *minus* the value of any payment made by the debtor in the first three months, *minus* the value of the movables delivered to the creditor

65 Apps C 46-47; D 61-62

66 KB 27/104 (E 1287); /106 (T 1287); /107 (M 1287); /108 (H 1288); /110 (E 1288)

67 e.g. KB 27/106 m 4 (Warws) (T 1287); the debtors were two Warwickshire knights

68 e.g. KB 27/104 m 6 (Yorks) (E 1287)

69 App C 63-65; D does not mention this. There is no parallel provision in *elegit*. It is probably safe to assume, despite the silence of Merchants, that the statutory provision legitimising sales during the first three months notwithstanding the debtor's imprisonment (p 177) extended to sales by the debtor after delivery to the creditor, although *Fleta*'s Merchants writ appears to restrict the debtor's power of sale to the first three months; App D 123

70 CP 40/115 m 68 (Middx) (M 1296)

supposed to have taken,[71] although there are descriptions of the debtor's interest as a 'reversion' on the statutory tenancy.[72]

Alongside an enforced restructuring effected by a debtor's sale, there was nothing to prevent the parties from voluntarily restructuring their relationship after execution. For instance, in Paneter v Sedgefield (1290)[73] the creditor held a messuage with an extended annual value of £2-10s in execution on a statute merchant for £30; he came into court, and 'recognised and conceded' the messuage to his debtor, who was to render the creditor £5 per year (i.e., twice the extended issues) until £30 was paid. It was agreed that, if the debtor defaulted on any repayment, the messuage was to remain to the creditor and his heirs in fee.[74]

The sequencing of the orders within enrolments of sheriffs' returns suggests that the debtor's immovables were only to be extended and delivered if the appraised value of the movables fell short of the debt:[75] there would have been no reason for a creditor to have had the debtor's lands if his movables were sufficiently valuable. Some enrolments suggest that a separate writ was used at this stage;[76] it ordered the sheriff to deliver all the debtor's movables and immovables to the creditor to hold etc, but it contains no *capias* clause nor any mention of the first three months' imprisonment.[77]

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71 The principal difficulty with such a sale is the effect on the statutory tenancy; i.e., could a purchaser oust the tenant before the tenant had levied the debt from the issues? The debtor could sell, and attempt to bring his creditor to account, and by tender of the outstanding debt etc, to take the lands from the statutory tenant. The statutory tenant would suffer no financial loss; and, in fact, getting the money in a lump sum rather than in issues over a number of years might have been preferable to him

72 e.g. Sturey v Cobham, 29 SS 65 (Kent Eyre, 1314)

73 KB 27/121 m 48d (Middx) (M 1290)

74 The debtor subsequently defaulted, and the creditor sought the messuage; KB 27/140 m 27 (Middx) (E 1295)

75 This seems to have been the same in *elegit*; KB 27/157 m 38 (Berks) (H 1299)

76 p 99

77 e.g. CP 40/97 m 106 (Kent) (M 1291)

It is possible that statutory execution against secular lands was not available in favour of religious creditors.[78] *Inter alia*, The Statute of Mortmain (1279)[79] forbade all alienations to religious houses, but they later came to be allowed if licensed by the Crown. Such alienations were known as alienations in 'mortmain' since corporations (such as religious houses) did not die, which characteristic prevented the accrual to the lord of any incidents which would have arisen on the tenant's death.[80] Despite these provisions, collusive proceedings which could lead to a church acquiring land by judgment remained a way around The Statute of Mortmain and statutes merchant entered into in favour of religious have to be considered in this light. Westminster II c.32[81] required the courts to take special precautions when an ecclesiastical body was on the point of recovering land by default'.[82]

The livery of seisin was a watershed, and even Royal intervention might not have been able to unknit this; in Brymshope v Acton (1298)[83] the plaintiff, a Merchants debtor, adduced a Royal protection to try and reverse execution. However, the protection was produced on the fourth day after seisin had been delivered to the creditors. The jurors denied that the protection had been read or in any wise proclaimed in the county before seisin had been delivered. Accordingly, nothing had been done against the protection, and the plaintiff was amerced. However, the manner in which the question to the jurors is cast does suggest that the livery of seisin to the creditor might have contravened the protection had it been proclaimed beforehand.

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78 A religious could not have *elegit* into secular lands, 'for the tenements may come into mortmain' (Although *quaere* statutory execution in favour of a religious against religious lands). In 1341, a Prior getting Merchants execution into the debtor's lands 'was in fraud of the statute'; YB M 15 E III (RS) 424 nr 61 (M 1341)

79 1 SR 51; and, see, generally, Brand, *The Control of Mortmain Alienation in England 1200-1300* (in *The Making of the Common Law* (London, 1992), chapter 11)

80 Baker, *Introduction*, 277; Plucknett, *Edward I*, 96-100

81 1 SR 87

82 But there must have remained some incentive for religious to take statutes merchant from secular debtors. There is a small, though consistent, representation of ecclesiastical creditors on the London recognisance rolls

83 KB 27/155 m 30d (Heref) (T 1298)

There are enrolments in which seisin was delivered by the imprisoned debtor's attorney,[84] or by a debtor temporarily released from prison.[85] although, at the end of three months, livery of seisin to the creditor could be performed by the sheriff or another official.[86] For instance, in Executors of Ughtred v Kyme (1304)[87] the sheriff of Yorkshire received a Merchants writ to proceed against the debtor's immovables. He made W, his bailiff, a letter patent by way of warrant, and sent him to the debtor's manor to deliver seisin. W caused certain lawful men to be assembled there, and, when the warrant had been read to them, the debtor's manor and its contents were extended and delivered.

There did have to be a liver*ee*;[88] there are sheriffs' returns which state that the debtor's lands had been extended, but that execution had gone no further since no-one had come to receive seisin.[89] However, delivery did not have to be made to the creditor; a bailiff[90] or attorney[91] was acceptable. In the latter case, Fevre v Snow (1293)[92] suggests that some positive act of ratification may have been needed by the creditor before he could be said himself to be in seisin. The creditor attorned X to receive, on his behalf, seisin of those tenements held by the debtor on the day of the recognisance. The attorney was alleged to have conspired with the debtor to secure execution - improperly[93] - into two acres of which the plaintiffs had been enfeoffed by the debtor before the recognisance. The creditor was not named as a deforciant in the assize, and the jurors suggest (although this might have been motivated by the standing of the creditor), that, although the attorney had been seised in the creditor's name, the

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84 e.g. JUST 1/504 m 14d (JA, Lincoln 1294)

85 e.g. JUST 1/544 m 8 (Middlesex Eyre, 1293)

86 e.g. King's Bailiff - KB 27/156 mm 30-31 (Worcs) (M 1298); Wapentake bailiff - JUST 1/504 m 23d (JA, Stamford 1294)

87 KB 27/176 m 90 (Yorks) (E 1304)

88 cf. a term of years, where there was no need for livery of seisin to the lessee; Coke, *First Institute* f.48a

89 e.g. KB 27/152 m 55d (Nhnts) (T 1298); CP 40/135 m 267 (Norf) (M 1301)

90 e.g. KB 27/186 m 62d (Sussx) (M 1306)

91 e.g. KB 27/118 m 23d (Leics) (E 1289); /162 m 69 (Yorks) (M 1300)

92 JUST 1/1298 m 80 (JA, Bedford 1293)

93 p 214 ff

creditor had never received seisin of the two acres (*nuncquam hucusque acceptavit nec eam ratam habuit*). This perhaps points in the direction of seisin being taken as more than a purely ministerial act, e.g. because it involved not the simple physical entering onto the land, but accepting it with appropriate mental element.

Where rent was taken in execution under Merchants[94] (or *elegit*)[95] it may have been necessary for the creditor or his representative to take an oath of fealty - that is, 'an acknowledgment of the services'[96] from the debtor's tenants[97] - in order to maintain *novel disseisin* for the rent.[98] Rent-service payable to the Merchants debtor could be taken in execution.[99]

Lands affected

Merchants reads that the creditor was to have seisin of all the lands and tenements 'which were in the hand[100] of the debtor' (*qe furent en la main le dettur*)[101] on the day[102] that he made the recognisance,[103] irrespective of any hands into which the lands or tenements subsequently had come by feoffment or other means,[104] except if

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94 e.g. KB 27/156 mm 30-31 (Worcs) (M 1298)

95 e.g. KB 27/121 m 31d (Leics) (M 1289)

96 3 HEL 54-57

97 e.g. KB 27/118 m 23d (Leics) (E 1289)

98 JUST 1/504 m 23d (JA, Stamford 1294); however, the plaintiff had not been seised of the rent This in itself would have been a ground for refusing *novel disseisin*. Without fealty, the rent could have been a *rent seck*; Sutherland, *Novel Disseisin*, 52 n 1

99 e.g. CP 40/131 m 175d (Middx) (M 1300); debtor had sold all his lands reserving a service of 1d per year for the seven years, therafter £30 per year in perpetuity. The payors confessed themselves ready to deliver the money to the creditor or his true attorney. Where the grant in fee farm preceded the statute merchant, the lands did not fall in statutory execution since the tenant by fee farm had a free tenement

100 Fleta has 'in fee'; App D 84; although Fleta's Merchants writ omits this qualification; App D 110

101 App C 71

102 Some reports have this as 'the hour and the day'; e.g. La Lee v Pykerel (1317) 54 SS 10

103 cf. *elegit* on a 1341 recognisance entered into before the Chamberlain of London. The inquest related to the lands held *on the day that the debt was due; Cartulary of John Pyel*, entry 5

104 It is not known whether this was intended to catch (or would have caught) lands sold by an imprisoned Merchants debtor during the first three months of his imprisonment

they had come into the hands of an heir within age.[105] *Fleta*'s account of the lands which could be taken in execution appears more extensive than Merchants; all the lands and tenements 'found in the hands of the debtor' (*in manibus debitoris inventis*)[106] were liable to be taken in execution.[107] Rents, customs and services could also be taken in execution.[108] The Merchants position parallels that which obtained in *fi.fa.*, according to a 1303 opinion of Howard J.,[109] who said that if, in response to a *fi.fa.*, the sheriff was to return that the debtor had no lands, tenements, goods, or chattels against which execution could be made, but the plaintiff witnessed that the debtor did have such on the day that the writ was obtained but subsequently had alienated, the plaintiff was to have a writ of execution against lands and tenements on the day that the original writ was obtained.

Third parties

The first starnd to Merchants execution was that lands could be taken in statutory execution from third parties. This is broadly consistent with the Jewish gage;[110] the plea rolls of the Exchequer of the Jews show the Jewish creditor's right to take the debtor's lands from any holder for the time being in execution on a debt.[111] In the early years of Merchants, the enrolments show sheriffs sometimes wary of proceeding against debtors' lands where a third party did happen to be in possession. For instance in 1287, the sheriff of Yorkshire, returning that he had done nothing on a Merchants writ, seemed to have been under the impression that Merchants execution could be foiled if the debtor had sold all his lands and goods after the statute merchant had been

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105 Apps C 76-77; D 90-91; 112-113; This provision was abided by e.g. in KB 138/94 (1312) the extenders returned that one of the debtors was dead, and his heir was within age

106 App D 83

107 Q*uaere*, even if they had not been held on the day of the recognisance

108 e.g. In KB 138/5 (1313) the rents of the debtor's free tenants, and the customs and services of twenty customary tenants are extended and delivered

109 Reported at LI MS Miscellaneous 738 f 16r. I am grateful to Dr. P.A.Brand for drawing my attention to this report

110 And possibly also with the writ *fi.fa de terris et catallis*; e.g., KB 27/175 m 67 (Northb) (H 1304)

111 e.g. 1 PREJ 29 (1220) immediate assignee of creditor; 1 PREJ 118 (1253); assignee of assignee of charged lands seeks acquittance from his immediate assignor

made. A writ *sicut alias* issued, specifying that the sheriff was to *fi.fa.* the sum recognised from the debtor's lands and chattels, from the hands of anyone in his bailiwick into which they had come.[112] This particular rule might lie behind some of the instances of resistance to execution over lands. For instance in 1288 the sheriff of Yorkshire was ordered to take a sufficient *posse* of the county with him to the debtor's lands, and, were any resistance encountered,[113] to arrest the wrongdoers.[114] However, by the early fourteenth century, it seems that some purchasers from statutory debtors had become reconciled to being put out of their lands.[115]

After-acquired lands

An instance of statutory execution in 1313 appears to have proceeded on the assumption that Merchants execution could lie against lands acquired by the debtor after the day of the recognisance. The Merchants writ is endorsed with the note that the sheriff delivered all the lands which were the debtor's on the day of the recognisance *and afterwards.*[116] The attached extent notes that it was found that one of the debtors did not have any lands or tenements on the day of the recognisance *nec unquam post*. One report of La Lee v Pykerel (1317)[117] also suggests this. The creditor had a writ to the sheriff that all the chattels and lands which were in the debtor's hand on the day of the recognisance 'or afterwards purchased' (*ou pus purchace*) be delivered to him.[118]

A note in a 1341 Year Book also hints at this; when the sheriff returned that the debtor was dead, the plaintiff had execution in respect of the lands which the debtor had on

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112 KB 27/104 m 6 (Yorks) (E 1287)

113 Which would have been contrary to Westminster II c.39; App G 61-65

114 KB 27/108 m 31 (Yorks) (H 1288). This is happening into the fourteenth century, e.g. KB 27/164 m 6 (Essex) (E 1301)

115 e.g., in La Lee v Pykerel (1317) (54 SS 10) statutory execution was awarded into lands which had been sold by the defaulting debtor to the plaintiffs. The plaintiffs seem to have accepted this without objection, waiting until the debt had been levied before seeking redelivery of their lands

116 KB 138/5 (1313)

117 54 SS 10

118 However the transcribed enrolment does not mention this; 54 SS 13

the day of the recognisance 'or at any time afterwards' (*ove unqes puis*).[119] This form of order, however, might be related to the death of the debtor, intended to 'freeze' all his lands.[120] A 1318 Year Book note,[121] discussing *elegit* on non-statutory recognisances for debt, goes still further; even where the debtor had no land on the day of the recognisance, subsequently purchased some, and alienated it before the day due for payment, it could be taken in execution under *elegit*.[122]

Debtor has a limited interest

Debtor not solely enfeoffed

The enrolments show that the question whether lands of which the debtor was not solely enfeoffed could be taken in execution is perplexing sheriffs as late as 1290. For instance, in Morare v Nayrburgh (1290) the sheriff of Lincolnshire returned that he 'did not dare' (*non fuit ausus*) put the creditors in seisin of a certain messuage, since the debtor and his wife were jointly enfeoffed of it.[123] By the mid-1290s, however, it seems to have become settled that Merchants execution into lands of which the debtor had not been solely enfeoffed was not allowed.[124]

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119 YB H 15 E III (RS) 327 nr 32 (H 1341)

120 e.g. YB 24 Lib Ass 113 nr. 2 (1350). The debtor was dead. The creditor sought the lands which he had on the day of the recognisance *ou onqes puis*. The defendant echoes this language; he claimed he had been enfeoffed by the debtor before the recognisance. Hence, the debtor held neither on the day of the recognisance *ou onque puis*

121 61 SS 244 nr 33

122 Although, *contra,* YB 16 E III (1st part) (RS) 88 nr 26 (H 1342), *per* Hillary J: A can only get *elegit* of lands which the debtor held on the day of the recognisance. This is doubted by the reporter. This case is cited in a 1494 reading (105 SS 295 nr.148) as support for the proposition that all lands purchased after the recognisance were liable in *elegit*

123 KB 27/125 m 17d (Lincs) (M 1290)

124 e.g. JUST 1/375 m 40 (Kent Eyre, T 1293). The sheriff returned that the debtor was dead, and proceeded to execute a statute merchant entered into by P's husband in D's favour. Afterwards, P came, and seisin of lands in which she had been jointly enfeoffed (*coniunctim feoffata fuit*) with the debtor was redelivered to her. Also Merchants execution was prohibited where the debtor had been enfeoffed *pro indiviso* with others; JUST 1/1298 m 24 (JA, Norwich 1293)

Debtor holds a life interest

Statutory execution did lie against realty in which the debtor had a life interest (such as a life term,[125] dower,[126] or a tenancy in tail) or any lesser interest (such as a guardianship in chivalry,[127] or a term of years). The cases suggest that the tenant by statute merchant took no interest more extensive than that which the debtor had.[128] For instance, in 1347[129] the Bench asked whether it would be a mischief if lands in which a debtor held a life interest were over-extended and were delivered to the extendors. Counsel agreed that the extendors would hold an estate for the time that the tenancy endured in the debtor, and they were not to be liable for longer.[130] This is a facet of a more general position, expressed in a note to the 1321 London Eyre.[131] Supposedly based on the responses of four advocates, it records that *elegit* lay against the lands of a tenant for life, a tenant in dower, and a tenant by curtesy, *but only pursuant to their own recognisance and for their term* (my italics).[132]

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125 e.g. JUST 1/1313 m 30 (JA, Salisbury, December 1297) Beck v FitzJohn; the defendant debtor held the manors of Yalhampton and Stokenham (Devon) and Earlstoke (Wiltshire) by a demise for life from the King; CPR 1281-1292, pp 279-280; CFR 1272-1307, 242

126 e.g. Kyngeshemede v Say; JUST 1/1337 m 28 (1) (JA, Horstede, October 1306); KB 27/186 mm 62d; 70 (Sussex) (M 1306). And, also, presumably, curtesy

127 CP 40/145 m 406 (Yorks) (M 1303) is *perhaps* a case like this; TS, a statutory conusor, 'by occasion of a certain debt in which he was bound by statute', 'loaned?' (*accommodavit*) a certain tenement of which he had seisin as the plaintiff's guardian to his debtor. It is not clear whether the '*accommodatio*' is intended to express statutory execution (no corresponding certificate has been located). The plaintiff recovers by novel disseisin

128 See the remarks on 'higher estate', p 232

129 YB T 21 E III 21 pl. 11 (T 1347)

130 Perhaps the extendors were, on delivery, immediately liable for the entire sum to the creditor; the risk of the tenant dying before the whole debt had been levied from the issues of the lands would surely have fallen on them and not on the creditor. Under this analysis, an over-extent of lands in which the debtor held a limited interest would stand to favour the creditor

131 86 SS 357

132 Accordingly, if the reversioner entered the lands after the death of any such debtors, the tenant by *elegit* (and, *a fortiori*, Merchants) would not have *novel disseisin*

In 1324 the question of the degree to which a debtor who held an interest in tail in lands could oblige those lands by statute merchant is explored.[133] The creditor sought execution on a statute merchant entered into by D. The sheriff returned that D was dead, and that all his lands had been delivered in execution to other creditors, save the manor of N, in which D had held only a life interest. The plaintiff claimed that D had purchased the manor for himself, his wife, his son, W, and the heirs of W's body, and that if W were to die without heirs, the manor was to remain as the right of D's heirs. W died without issue, and D died seised of the manor. S entered as D's son and heir. The argument explored the nature of D's interest; S claimed that D had only a life interest, and demanded judgment whether the land could continue to be charged by the recognisance after D's death. The ability of a tenant in tail to bar the entail by a 'lineal warranty with assets descended' - very much a live issue during this period[134] - is discussed. The plaintiff contended that, after the death of W, D had 'fee and right and free tenement' (*fee et droit et franktenement*), and D's interest was sufficient that if he had alienated and obliged himself and his heirs to warrant, this act would have repelled S bringing either a writ *scire facias* or *formedon in the remainder*; 'if D could alienate this land, he could charge it'. Stonore J. thought that, if D was survived by his wife, who was impleaded and lost the land by repeated default, the right heir of D could still recover. Schardelowe J. distinguished this case from where the grant had been made to D and the heirs of his body; there, any grant by D even obliging his heirs to warrant could not defeat a *formedon in the descender* by the heir. There seems to have been no decision on the point, although Bereford C.J. ordered that execution cease; i.e, the entail had not been barred. In a 1343 assize,[135] the plaintiff was the heir of a statute merchant debtor. He had entered after the debtor's death, only to be be ousted by the creditor's executors. The assize returned that the debtor had nothing in the lands save a fee tail. On adjournment to the Bench, judgment was demanded for the plaintiff on two grounds, of which this was one. However, judgment was given for the plaintiff on another ground, and this point does not seem to have been decided

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133 YB M 18 E II 577 (M 1324)

134 Simpson, *Land Law*, 126-129

135 YB 17 Lib Ass f. 52 nr. 21 (1343)

upon.[136] The question seems to have been settled by 1500. A reading on Merchants has it that when a creditor took the estate of a tenant in tail he was taking an estate *pur autre vie*. When the tenant in tail died, the heir would oust the creditor.[137]

Problem areas

Leases

The principle that a lessor for years did not divest himself of the freehold[138] leads to the conclusion that if A demised[139] realty for years,[140] the term he had demised would fall subject to Merchants execution on A's recognisance;[141] hard on the lessee for years.[142] Whether this ever happened is difficult to assess, since cases which raise the

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136 In YB 29 Lib Ass f. 169 nr.61 (1355), the plaintiff in an assize was the son and heir of a statute merchant debtor. He claimed that his father had been seised in tail of the disputed tenements, and that the plaintiff was seised as issue in tail so that he could only be ousted by him who had the true title (*issint qe nous ne fuimus pas oustable forsque per celuy qe avoit veray title.*) The Year Book mentions that it was discussed whether this was properly pleadable as a disseisin or in *audita querela*. It was adjudged a disseisin

137 102 SS 178 nr.104

138 Simpson, *Land Law*, 72

139 Or, *quaere*, granted a tenancy at will; Boclaunde v Maydenstan (CP 40/97 m 106 (Kent) (M 1291); /92 m 161d (Kent) (H 1292)).P's house had been delivered to D in execution on a statute merchant entered into by one EC. P argued he had taken by a feoffment made before the recognisance, and, accordingly, that EC had *neque feodum neque ius* on the day of the recognisance. D argued that EC had only granted a tenancy at will, such that he had not divested himself of his free tenement. P wins in 1293 Kent Eyre (JUST 1/375 m 3)

140 But not for life; the life tenant had a free tenement (Simpson, *Land Law,* 70). *Sed contra* JUST 1/156 m 14d (JA, Derby 1302); D was bound by statute merchant to X, and 'because he was afraid of the debt', D leased these to P (his son) for life. This might well be explicable on the ground that the lease for life is an attempt to deny statutory execution; cf. Creting v Lovetot and Lovetot, KB 27/123 m 11d (Essex) (E 1290); CP 40/86 mm 104; 146d (Essex) (M 1290)

141 *Vice versa*, where the debtor was a tenant for years, execution against his term ought to have fallen within the provisions for execution against chattels; the creditor could take and sell the term

142 In Mulgar v Hengham (KB 27/182 m 93 (Essex) (M 1305)) a WA was said to hold a messuage of the debtor for a 15 year term. He was saved when an inquisition (KB 27/184 m 56d (Essex) (E 1306)) returned that, although he had originally been a lessee, he held a charter of feoffment *de dono* from the debtor dated March 1302, and that the debtor had quitclaimed to him in November 1302.

issue often come to no conclusion.[143] For instance, in Syan v Potman (1307)[144] the sheriffs returned that, on the day on which the recognisance was made, the debtor had certain tenements in fee, but these had been leased to GB for a term of years not yet expired. The sheriffs did not deliver seisin in these to the creditors, and asked whether the creditors ought to be precluded from having seisin in the tenements by virtue of a lease for years. The court wished to be certified of the manner (*qualiter*) in which the debtor's immovables were leased and for which term. It transpired that the lessee was dead, and the case went no further when his executors returned that they claimed nothing in the tenement or in the term.[145] In a 1315 extent, the sheriffs of London returned that the debtor, before the date of the recognisance, had demised three shops to a certain WW, whose eight-year term had not ended. Seisin of these had not been delivered to the creditor, and the sheriffs sought the Chancellor's guidance.[146] The extent suggests that the creditor was to have a writ to the sheriffs to deliver seisin of the shops notwithstanding the term. It remains open whether any

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Since the statute merchant was not entered into until June 1303, the messuage was exempt from execution under the statute merchant. Perhaps the charter of gift and the quitclaim were ways of attempting to anticipate and defeat statutory execution, insisted upon by the prudent lessee for years, stemming from his lessor's default on any statute merchant entered into subsequent to the term of years

143 e.g. Kyngeshemede v Say JUST 1/1337 m 28 (1) (JA, Horstede, October 1306); KB 27/186 mm 62d; 70 (Sussex) (M 1306). PP were the lessees of a manor which their lessor (D) had held in dower. They complained that they had been disseised by reason of D's default on a statute merchant in favour of H. The lease to the plaintiffs had initially been for a term of two years. However, this term was extended without there being any interruption in the lessees' possession. The statute merchant was made before the agreement to modify the term. The plaintiffs fail, but on the ground that they omitted to name the creditor

144 KB 27/187 m 49 (London) (H 1307)

145 cf. *elegit*, Wokyndon v St.Michael , KB 27/184 m 8 (Kent) (E 1306); P had recovered damages from DD. A and B were summoned as tenants of DD's lands. They argued that the lands and tenements should not be burdened by the judgment since they had been enfeoffed three years before it by a lease (*ex dimissione*) of the defendants. The jurors returned that DD had been seised on the day of the judgment, and had afterwards alienated to N and A. It is not clear whether there was any lease here

146 KB 138/25

lessee so ousted would have had any remedy against his lessor (for instance, *quare ejecit infra terminum*).[147]

Ecclesiastical lands

Merchants execution against ecclesiastical lands also posed problems. Merchants appears, in its express provision that only seculars could be imprisoned,[148] to contemplate that religious could enter as debtors into statutes merchant, and the evidence is that they did.[149] However, the enrolments suggest that there could be no tenancy by statute merchant in religious lands;[150] Westminster II c. 41[151] forbade alienations by heads of religious houses of tenements bestowed upon them, and this may have prevented statutory execution. Furthermore, Merchants execution against ecclesiastical debtors is known to have been by the writs *fi.fa.*, and *fi.fa. de bonis ecclesiasticis*.[152] Some *notabilia* in reports of the 1321 London Eyre[153] outline the prohibition against getting *elegit* into the lands of religious;

> **a man shall never have the *elegit* against a religious, ... since the lands of religious may come to seculars because of the large amount of the charge**

This contemplates a more general problem: lands could be charged by statute merchant (perhaps collusively) with a sum much greater than their annual issues, with

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147 Statutory execution against a debtor's lessee might have had the effect of delaying the term till after the statutory tenancy. JUST 1/156 m 14d (JA, Derby, 1302) seems to be such a case, but it is not clear what remedy is being sought

148 p 174 ff

149 e.g. p 134

150 A 1317 note (YB T 10 E II: 54 SS 174 nr 9), attributed to Bereford C.J., says that *elegit* lay against neither an Abbot nor a Prior, since *fi.fa.* was available

151 1 SR 91-92

152 p 162 ff

153 86 SS 357; The note is an assemblage of points on *elegit*, supposedly based on the responses of four (named) counsel, and does not seem founded on any particular case

the effect that, on execution, they could remain away from the debtor for a long time.[154]

The Ancient Demesne

The question of whether land within the ancient demesne could be taken in statutory execution was a thorny one, since it raises the question of the nature of the tenancy by statute merchant. The ancient demesne was not 'at the common law', and only the little writ of right close[155] was said to run there.[156] Neither Merchants nor Westminster II c.18[157] mention the ancient demesne. The cases do not appear to disclose any general principle concerning the ability of a tenant of ancient demesne land to oblige his realty by a statute merchant. The question seems to have been left to be determined according to the custom of the manor in question. For instance, there is a detailed exposition of the custom of the ancient demesne manor of Mansfield in Meaux v Huntingfeld (1302).[158] The plaintiff claimed that the disputed tenement had been in the seisin of RH, who entered into a statute merchant in the plaintiff's favour. RH defaulted, and the plaintiff was seised of the tenement by an extent, and remained seised for more than a year. The defendant disseised the plaintiff, who brought *novel disseisin*. The defendant challenged the assize on the ground that the tenements were in the ancient demesne, where only the little writ of right ran. However, the plaintiff said that this writ was not appropriate, since he was not claiming a freehold in the tenements, but a tenancy by statute merchant. The recognitors said that tenants of that manor could oblige their tenements by statute merchant, 'otherwise, they would not be their own'. No writ ran in their manor save the little writ of right, but tenants ejected and disseised from tenements within the manor, even if tenants by way of pledge, could recover by the little writ of right. The jurors returned that the tenancy by statute

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154 According to the measure outlined at p 232 ff

155 e.g. 87 SS 37; writs 'CC' 12 and 12a (mid 1260s)

156 e.g. 87 SS 115; note to Register 'R' writ 33 (c.1318)

157 In Marmion v Saddler (1315) (41 SS 42), a plaintiff tenant by *elegit* who had brought novel disseisin argued that the failure of Westminster II c.18 to distinguish ancient demesne tenements from freehold meant that novel disseisin had to be allowable

158 KB 27/170 m 74 (Notts) (M 1302)

merchant did not change the nature of the tenements,[159] nor was it in prejudice of the lord or to the disinheritance of the tenants, since the statute merchant burdened the tenements only for a certain time, after which they would revert to the tenant freed of the incumbrance to hold as before, and according to the custom of the manor.[160]

The availability of novel disseisin in the ancient demesne was also challenged in Pykerel v La Lee (1308).[161] The plaintiff tenant by statute merchant claimed to have been disseised of crops on ancient demesne lands. The defendants pleaded that the lands in question were of the base tenure (*bassa tenura*) of the ancient demesne,[162] and were not pleadable other than in the court of the Earl of Hereford at Hatfield Regis, where no writ ran except the little writ of right. The assize found that the tenements could be alienated from hand to hand and obliged like tenements at the common law, 'and there are many kinds of ancient demesne'. They said that the tenements were not of the base tenure of the manor, but of 'frank' fee and in the past had been bought and sold as frank fee by charters. Where the tenant was a free sokeman, holding by certain services, he could alienate the tenements without the consent of the lord, and execution could be at the common law; both the little writ of right and novel disseisin could run.[163]

However, the argument about the tenancy by statute merchant burdening the tenements only for 'a certain time' is not unassailable. For instance, in Marmion v

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159 Similarly, the tenancy by *elegit*; in Marmion, the tenant by *elegit* argued that since he only held the lands 'by way of gage', his success in novel disseisin could not change the nature of the tenements. Moreover, Westminster II c.18 gave *elegit* as an alternative to *fieri facias de terris et catallis*, which did not affect the nature of the tenancy of lands in any way

160 Novel disseisin was allowed, and the tenant recovered the tenements

161 17 SS 92 nr 37; enrolment *ibid.* 192. Later (1317) proceedings (feoffees seeking recovery of lands at end of tenancy) are at 54 SS 10

162 i.e., the tenant holds by uncertain services exactable at the will of the lord, could not alienate, and his wife did not have dower of those lands; *per* Staunton J. Maitland notes (17 SS 92 n 3) that this exposition seems to have been based on Bracton

163 However, in Marmion, Bereford C.J. refused novel disseisin to the tenant by *elegit* as contrary to the custom of the ancient demesne. However, this refusal did not matter since he was of the opinion that the little writ of right close 'serves for every kind of writ'

Saddler (1315) the defendant[164] attempted to torpedo the question of whether novel disseisin was available to the tenant by *elegit* ousted from ancient demesne lands, with an assertion that there could not - on what look like policy grounds - be any *elegit* of ancient demesne lands;[165]

> **A tenant in ancient demesne might, by collusion between himself and a creditor, bind himself in a thousand pounds more than the land was worth, and the creditor could sue out an *elegit* and hold the land as though it were in its nature freehold** (*come en manere de fraunk fee*); **and so, in the exercise of the rights of lordship** (*par dreit le seignur*), **would during that time take the customary payments, tallages and other profits of the land to which he would be entitled by the character of his tenancy etc.**[166]

Inge J. used this as a reason not to allow *elegit* against ancient demesne lands; the abuse aimed at were collusive recoveries by virtue of which the creditor 'would then take the land as if it were by its nature freehold'.[167]

Merchants execution was available against lands held by the debtor in chief of the King.[168] Despite this, in Hamelton v Berneval (1296),[169] the defendant debtor appears to have attempted to frustrate Merchants execution against his manor of R. by claiming that the manor was so held. However, the enrolled text of a writ describes the defendant's attempt to evade the assize by fraudulently recognising the manor as the King's right, by virtue of which it was taken into the King's hands. This was not to be allowed; however, this was on the ground that the operation of Merchants was not to be defeated by fraud or malice.

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164 41 SS 42 at 43

165 But the same argument could also apply to tenancies by statute merchant in the ancient demesne

166 41 SS 42 at 43

167 The lengthiest possible tenancy by *elegit* located is 91 years; KB 27/152 m 55d (North) (M 1297)

168 e.g. JUST 1/1090 m 2 (Yorkshire Eyre, T 1293)

169 JUST 1/1309 m 13d (JA, Liberty of Rocheford 1296)

Priority of charges

The provision specifying 'the day of the recognisance'[170] also comes to the fore in cases dealing with priority of charges between statutory creditors; it was not uncommon for creditors to be met with the return that all their debtor's property had been delivered in execution on another statute merchant,[171] and some of these cases have been discussed above.[172] The principle seems to have been that if execution into a debtor's lands had been awarded to a creditor (Y), the creditor could be made to deliver the lands at an extent to any earlier creditor (X). The lands would return to Y on the expiration of X's statutory tenancy.[173]

In the case of *elegit*, it seems that, if there were two successive *elegit*s, the second creditor would stand to take only a quarter of the debtor's lands (i.e., a half of the remainder). This is what happened in a 1295 case.[174]

The next area of difficulty is the effect which subsisting charges over the debtor's land in favour of a third party had on statutory execution. This pressurises the Merchants provision that all the lands held by the debtor on the day of entering into the recognisance were liable to execution.

The cases principally address the widow's right to dower.[175] Merchants does not state whether, or how, the entitlement of a debtor's widow to up to a third of her deceased husband's realty for her life[176] stood to be affected by any statute merchant made by her husband.

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170 p 214

171 e.g. KB 27/124 m 62d (Leics, Staffs) (T 1290); CP 40/97 m 85 (Kent) (M 1291)

172 p 157 ff

173 Coke *Third Institute*, § 504 p 289b

174 CP 40/110 m 89 (Middx) (M 1295); the debt in respect of which the second *elegit* issued was entered into after execution of the first *elegit*

175 No relevant cases have been located in which *curtesy*, a husband's entitlement to remain seised of all his wife's land after her death for the rest of his own life (3 HEL 185-189) arises

Where the widow had her dower before execution (that is, when the dower had been assigned or the doweress had entered), the lands could not be taken from her by subsequent Merchants execution on her husband's recognisance. For instance, in Hareworth v Meaux (Nr 2) (1300)[177] the plaintiff was the widow of a Merchants debtor. She contended that, despite her husband's recognisance, she ought not to have been ejected (*amoveri*) from certain tenements, since some were held in frank marriage and the rest had been assigned to her by way of dower after her husband's death. She said that tenements so held ought to be quit of a husband's debts after his death. The jurors found that she had been seised before being ejected by the defendant (the sheriff of Yorkshire), and they sought judicial guidance as to whether such lands could be taken in execution. It was held that the ejection was a disseisin, and damages were awarded. In Pichard v Barre (1306)[178] a third of a manor,[179] which third the plaintiff claimed to hold as dower, had been delivered to the defendant creditors. It was claimed that this was against the law and custom of the Realm. The defendant creditors 'said nothing why the plaintiff should not be reseised of the third part of the aforesaid manor as her dower.' The plaintiff was to rehave her dower, and all the mesne issues and profits (*proficua*) which the creditors had taken. The enrolment continues, moreover, in more general terms; it was 'very clear' (*satis est manifestum*) that only two thirds of any manor of which the remaining third had been assigned or recovered as dower ought to be burdened with acquittance of the debt. That third was to remain wholly unencumbered (*exonerata*). The Year Book report[180] fleshes this out slightly; the plaintiff previously had recovered and had been seised of her dower in the manor. The defendant got statutory execution into the manor. The plaintiff's claim to her dower was readily conceded, but the defendant sought that the doweress' third should not be taken into allowance in the statutory extent;[181] however, there is no warrant for any such concession in Merchants. In 1314, it was held that novel

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176 Simpson, *Land Law*, 68

177 KB 27/162 m 69 (Yorks) (M 1300); One of a pair of related assizes

178 CP 40/161 m 24d (Heref) (M 1306)

179 Thurtleston, Herefordshire

180 YB M 34 E I (RS) 292 (M 1306)

181 *Ibid.* at 292, *per* King

disseisin lay to a dowager to recover her dower where her dower lands had been taken in execution.[182]

The statutory extent

The extent raises the key question of whether the tenancy was for a certain or uncertain term. Merchants provides that the debtor's realty was to be delivered by 'a reasonable[183] extent' (*resnable estent*),[184] until the debt was levied from the issues. Westminster II c.18 gave execution into half the lands of certain debtors, to be held by a 'reasonable extent or price' (*racionabile precium vel extentam*).[185]

Neither Merchants nor Westminster II c.18 expands on what the statutory extent was supposed to be, which perhaps suggests that such extents were intended to proceed along well-understood lines. Having already appeared in the Statute of Jewry (1275), an extent of debtors' immovables was no innovation in a statutory setting.[186] Extents also played a key role in manorial management.[187] Walter of Henley describes the extent as a detailed annual inquest conducted by a jury of the lord's faithful tenants 'so that (the owner) may know how much (his) lands and tenements are worth per year'.[188]

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182 Fitzherbert, *Grand Abridgement*, 'Assize' nr 417

183 It is not known how 'reasonable' was intended to qualify the extent; encountered in association with a writs, for instance writs of account (in which A is ordered to render B his 'reasonable account' (*racionabile compotum*), e.g. 87 SS 69, writ 'CC' 121), 'reasonable' appears simply to imply that the action enjoined be performed with a fairness which could withstand judicial scrutiny

184 App C 46; 60; *Fleta* has *racionabile precium*; App D 61; 114

185 The 1285 statutes are less careful in this respect than the Statute of Jewry, which does distinguish the appraisal of chattels (*les chateus seient pris*) from the extent of lands (*les terres seient estenduz*); App I 3; 5

186 Appendix I

187 Reginald Lennard, *What is a Manorial extent?*, (1929) 44 English Historical Review 256

188 D.Oschinsky, *Walter of Henley and other Treatises on Estate Management and Accounting* (Oxford, 1971), 312; also *Fleta* Book 2 Chapter 71 (72 SS 238)

There are several texts from this period which go into considerable detail about the manner in which a manorial extent was to be conducted.[189] The typical order[190] was chief messuage, demesne arable, meadow, pasture, woods and mills, freeholders, customary tenants, and court perquisites, and, where it is known, Merchants extents do seem to have followed this pattern.[191]

The enrolments suggest that statutory extents[192] typically were conducted by a twelve man jury[193] in the presence of the sheriff,[194] sworn,[195] and sealed.[196] Although the extent could be taken in the presence of the creditor,[197] or both parties,[198] it need not be.[199] The extents in KB 138[200] from the reign of Edward II indicate that extents were generally taken within three months of the writ - that is, they would have taken some time to organise, and this would have put a brake on statutory execution.

If the statutory extent proceeded along manorial lines, the property extended would have to be described exactly; i.e., the extent could not just say that the debtor was seised (for example) of a tenement, but had to specify whether he was seised of a house, or of land etc.[201] The extent had also to specify the estate of which the debtor was seised. This latter requirement comes out most strongly in those cases in which

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189 e.g. *Britton* 3.7.5

190 T Lomas, *The Development of the Manorial Extent*, (1980) 6 Journal of the Society of Archivists 260, 263

191 e.g. CP 40/125 m 153d (Middx) (M 1298)

192 Like Acton Burnell appraisals; Chapter 4

193 Although not invariably; KB 138/93 (1312) has only six jurors. KB 138/94 (1312) has ten

194 e.g. KB 27/116 m 30d (Berks) (H 1289)

195 e.g. Merchants: CP 40/97 m 332d (Kent) (M 1291); *elegit*: KB 27/157 m 38 (Berks) (H 1299); cf. sworn extent under Statute of Jewry; App I 3

196 e.g. KB 27/165 m 33d (Yorks) (T 1301)

197 KB 27/181 m 9 (Middx) (T 1305)

198 KB 27/187 m 54d (Yorks) (H 1307); perhaps the Merchants debtor was temporarily released from prison

199 See discussion of livery of seisin, p 212

200 Court of King's Bench and other courts: Various writs and returns

201 1 PM 362; the jury verdict 'condescended to the smallest details'. Perhaps the extent would have been bad for uncertainty otherwise, although extents did miss things out; p 230

the debtor holds some land which might have been exempt from Merchants execution. For instance, in Mulgar v Hengham (1305-6),[202] the sheriff returned that, since a W held a messuage and land of the defendant debtor for a 15 year term, seisin of these had not been delivered to the plaintiff creditor. This return was judged insufficient[203] since it did not say whether W held the messuage on the day that the recognisance was entered into. The King ordered that an inquisition be taken by a jury in the presence of W and the creditor.

Failure to conduct extents thoroughly could generate subsequent litigation. The phenomenon of creditors taking by inaccurate extents underlies a slew of cases in which it comes to be claimed, after delivery, that the debtor's lands happened at the time of the extent to have been subject to some charge of which the extent took no account. For instance, in Sturey v Cobham (1313)[204] the plaintiff brought *novel disseisin* for an annual rent said to have been granted to him over a manor before that manor had been delivered to one of the defendants in execution on a statute merchant.[205] The facts left no room for doubt that the annual rent had been granted to the plaintiff, and that this had been done before the statute merchant was made. The nub of the statutory tenant's resistance appears to have been that the annual rent was not taken account of in the extent when the manor was delivered to him.[206]

Nature of the tenancy by statute merchant

Merchants does not specify the nature of interest of the tenant by statute merchant save that it was to be protected with *novel disseisin* and *redisseisin*.

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202 KB 27/182 m 93 (Essex) (M 1305)

203 KB 27/184 m 56d (Essex) (E 1306)

204 29 SS 65 (Kent Eyre, 1313-14)

205 The defendants were the tenant by statute merchant, the deceased debtor's heir, and the lessees for life of the manor. The inclusion of the debtor's heir suggests that the question of who was liable did not admit of an easy answer

206 29 SS 66 I; also see Hareworth v Meaux, Pichard v Barre

E eit le marchaunt en ceuls tenemenz a luy liverez ou son assigne tele seisine qil puisse porter bref de novele disseisine sil seit engete, e redeseisine autresi cum de frank tenement[207]

Fleta has the debtor's realty delivered to the creditor *nomine liberi tenementi*,[208] but *Fleta*'s version of the above Merchants passage has a different emphasis; *novel disseisin* and *redisseisin* are given 'so that the (statutory tenant) shall have (his) freehold (in the tenements) for the duration of his term' (*ita quod liberum tenementum habeat in eisdem durante termino suo*).[209] Merchants use of the phrase *autresi cum de frank tenement* was perhaps incautious, since it tended to a misapprehension that the statutory tenancies *were* free tenements. However, *autersi* means 'similarly, also, likewise';[210] that is, it was not the *tenancy* which was like a free tenement, but the *protection* afforded it.[211]

Another way of approaching this appears in Gosehall v Cobham (1313).[212] The tenant by statute merchant sought aid of the debtor's lessees for life against a writ of *dower* brought by the debtor's widow. The tenant attempted to draw a distinction between his statutory estate and that held by the lessees for life; he held *ausi come franctenement*, whilst the lessees held 'the pure freehold' (*le franctenement purement*).[213] Spigurnel J. agreed.[214]

In the Year Books of this period, the limited nature of the statutory tenancies frequently comes to be emphasised through comparison with some 'higher estate'. For

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207 App C 48-50

208 App D 61; 114-115

209 App D 63-66; *Fleta*'s wording is much closer to Westminster II c.18 than Merchants

210 Baker, *Manual*

211 Coke, *First Institute* § 57; note on '*Franktenement*'; also Coke, *Second Institute*, on Westminster II c. 18, note 9; '*ut is similitudinary, because they shall by the statutes have an assize as tenant of the freehold shall have, and to that respect hath a similitude of a freehold.*' This refers to *ut liberum tenementum*, the Latin translation of 'autersi cum de frank tenement', which appears in writs of *elegit*

212 27 SS 62

213 27 SS 66 *per* Toudeby

214 *Ibid.*

instance, in Sturey v Cobham (1313)[215] the plaintiff brought *novel disseisin* for a life interest in an annual rent alleged to issue from a manor delivered under Merchants to the defendant. The defendant's argument, with which Spigurnel J. agreed, was that, where the assize was brought to recover a life interest, the tenant by statute merchant could not answer without the grantor since the judgment 'affects an estate higher than the one (the statutory tenant) has' (*qe se liera plus haust qe soun estat*).[216] Other Year Book cases talk of the tenant by statute merchant holding 'a bailiff's interest (*mainovere*),[217] or by way of gage.[218]

A term of years

Given that the statutory tenancies were not free tenements, the primary interpretation in the Year Books is that the interest of the tenant by statute merchant was a chattel interest; namely, a term of years. However, such comments often have to be treated with some caution; when proceeding from counsel they are usually biased, in the sense that counsel is attempting to categorise the statutory tenancy as a term of years either to bring the statutory tenant within, or exclude him from, some statutory provision or common law rule. For instance, in Leicester v Tuxford (1291)[219] the debtor attempted to bring the tenant by statute merchant within the provisions of the the Statute of Gloucester c.5 (1278)[220] which provided for a writ of waste against (amongst others) the lessee. The defendant challenged the writ on the ground that it

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215 29 SS 65 (Kent Eyre, 1313)

216 29 SS 68 *per* Spigurnel J.; cf. Choch v Estdene (YB E 3 E II (E 1310); 20 SS 102 nrs 22 A and B). The plaintiff sought dower in lands and tenements held by the defendant tenant by statute merchant. The defendant submitted, *per* Passeley (at 103), that, if she were to recover, she would recover a higher estate than the statutory tenant, who held 'by way of freehold' (*en noun de fraunctenement*) for a term of years until the debt was levied

217 Sturey v Cobham (1313) 27 SS 65 at 70, *per* Spigurnel J.

218 Marmion v Saddler (1315) 41 SS 42 at 43, *per* Herle

219 CP 40/90 m 24d (Lincs) (T 1291)

220 1 SR 48

was available only against the tenant for life or for a term of years, and that he was neither.[221]

The governing characteristics of a term of years were settled by the mid-thirteenth century; Bracton says *terminus annorum certus sit et determinatus*,[222] i.e., the duration of a term of years was ascertainable at its outset. Neither Merchants nor Westminster II c.18 are, in this particular respect, as revealingly drafted as the Statute of Jewry, which makes clear that the purpose of the sworn extent of the debtor's lands prior to their delivery to the creditor was so that the debtor 'may know with certainty' (*puisse saver certeinement*) when the debt is quit, and the Christian can rehave his lands.[223] Hence, the extent prescribed by the 1275 statute seems to have functioned as a pre-determination of the duration of the creditor's interest in the debtor's realty.

Since neither Merchants nor Westminster II c.18 has any explanation of the purpose of the extent, the nature of the statutory tenancies remains an open issue. The cases point to two broad ways of analysing the extent and its offspring, the tenancy. The first is that the extent functioned 'actuarially', producing a figure for the net[224] annual issues of the debtor's realty. In the absence of any evidence that the statutory extent was conducted more than once, this would have to be treated as an invariable forecast of the issues. That is, the 'actuarial' extent would have set the duration of the tenancy *ab initio*; as such, a tenancy founded on an actuarial extent would have been a term certain. For example, the tenancy by statute merchant in lands with an extended

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221 By Muncy v Kyme (CP 40/150 m 167d (Norf and Essex) (H 1304)), it seems to have become accepted that a tenant by statute merchant was impeachable of waste. However, Coke (*Third Institute* p 301 n 5) doubts this; 'the tenant by statute merchant ... is not within the act ... they are not tenants for years'

222 *Bracton* f.27 (2 *Thorne* 92)

223 App I 6-7

224 e.g. CEMCR 106 (1300); a debtor had tenements worth £10-14s-4d per year, but these were charged with £2 *per annum* to lords of fees and 5 marks *per annum* for the keep of a chaplain. Hence, the net annual value was £5-7s-8d. Coke's opinion (*Second Institute* p 395 point 6) that, since *elegit* left half the land for the lord to distrain on for his services, the extent in *elegit* might have returned the gross issues of the land does not seem to have been the practice in the period covered by this thesis; e.g. the *elegit* extent in CP 40/153 m 127 (Leics) (M 1305) has values *deductis omnibus reprisis* and *ultra servicium domini*; i.e., net values

annual value of £10, and delivered pursuant to a recognisance for £50, would last for five years.[225]

There are Merchants enrolments which suggest that the extent did function as a pre-determination of the length of the statutory tenancy. For instance, in Kyngton v Coweye (1293)[226] the jurors said that the defendant's land had been delivered to the plaintiff in execution on a statute merchant 'for a term of six years' (*ad terminum sex annorum*). The plaintiff had been seised for two years when disseised. The plaintiff recovered the lands 'for the remainder of the term' (*per residuum terminum predicti*). The language of Meaux v Huntingfeld (1302)[227] also hints at this. The plaintiff had been seised of a tenement extended at £4-9s-6d per year in execution on a statute merchant for 100 marks (£66-13s-4d). After one year, 'within the time limited to him by the extent' (*infra tempus iuxta extentam ... ei limitatum*), he was disseised. However, perhaps, this statement cannot be relied upon too heavily. Meaux had been seised for a small proportion of what might have been the anticipated duration of the tenancy (about a dozen years) if the extended value had been 'actuarial'. Moreover, even if - postulating another model for a moment - the statutory tenancy was to last until the debt had in fact been levied, there could have been no serious suggestion that Meaux could have levied the debt from those lands in a single year. Meaux's case might have been different - and, it is contended, more instructive - had the tenant been disseised after, say, ten or eleven years.[228] There is a similar phenomenon in *elegit*; a 1290 enrolment[229] deals with an *elegit* for £72. The debtor's lands were extended at £4-5s-4d, of which half was £2-2s-8d. These were to be delivered to the creditors for 21 years 'until the said debt be levied'.[230]

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225 This example assumes that there were no goods or chattels

226 JUST 1/544 m 19 (Middlesex Eyre, M 1293)

227 KB 27/170 m 74 (Notts) (M 1302)

228 cf. Leicester v Tuxford; CP 40/90 m 24d (Lincs) (T 1291)

229 CP 40/86 m 231 (Essex) (M 1290)

230 The sums do not quite add up; perhaps 21 times £2-2s-8d (about £45) equals £72 minus the value of the goods taken in execution

Remarks pointing towards an 'actuarial' extent and tenancy persist. For instance in Daumory v Hocclive (1311),[231] the plaintiff argued that 'the debt is certain, and the tenements are delivered by an extent which is certain; and so by reckoning a man can know with certainty the period'.[232] However, Bereford C.J. doubted this. In Gosehall v Cobham (1313), the statutory tenancy was described as a 'certain term'; 'for a man may be guaranteed a certain term by extent'.[233] In 1316, a creditor's executors petitioned the King in terms which clearly contemplate that the extent was to have given the creditor a term of twenty years in the debtor's manor.[234] In a 1343 case,[235] the plaintiff had purchased a debtor's lands pending suit against him on a statute merchant. The purchased lands were subsequently extended and delivered to the defendant. The plaintiff sought an account, claiming that the money had been levied. Stonore J. refused;

> **You say that he has levied the money;** ***we are apprised by the record that he has not held for such a time that he could have done this*** (*il nad pas tenu par taunt de temps qil le pout aver leve*) [236] (my italics)

In 1325 a tenant by *elegit*, summoned to account, argued that he had been able to levy only part of the sum in respect of which the lands had been delivered since the land had been destroyed by war. Nevertheless, the lands were redelivered to the debtor.[237]

The 'actuarial' position is also adopted in Fitzwilliam's 1466 reading on the Statute of Merton c.4 (1236).[238] It provided that crops sown by a doweress were to go to her executors if she died, since she had cultivated the land and incurred expenses in respect of them. Others in the same position - i.e., having uncertain terms - eventually

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231 26 SS 183

232 26 SS 183 at 184 *per* Malberthorpe

233 27 SS 62 (Kent Eyre, 1313)

234 1 Rot.Parl. p 345 nr 31

235 YB T 17 E III (RS) 478 nr 6 (T 1343)

236 *Ibid.* at 481; the case seems to have turned on an allegation that the creditor had improved the land, and, hence, levied more. However, Stonore J refused to concede that the creditor stood to be prejudiced by this

237 YB M 19 E II 626 (M 1325)

238 71 SS 43 at 44

came within the statute, e.g. the tenant for life, *pur autre vie*, by curtesy and by will. However, four categories of persons were said to fall outside the protection of that chapter; a tenant for years, a guardian in chivalry, a tenant by statute merchant, and a tenant by *elegit*. These were all excluded 'by the knowledge of the certainty of their term.' Hence, if any of these sowed lands, knowing that their tenancy would expire before the next harvest, they would lose the emblements.

One set of circumstances in which the tenancy seems to have been a term certain was where the statutory tenant leased his interest. For instance, in Berdefeld v Cheval (1296),[239] a statutory tenant who had taken a tenement at an extended value of two marks per year leased this to the defendant's father for this same sum, until the creditor had been fully paid of 24 marks.[240]

However, the actuarial model is pressurised by situations in which a charge, standing to diminish the issues taken, arises over the debtor's lands after execution. The most frequently encountered instance of this nature is dower. A widow's claim to enter or have her dower assigned arising *after* execution on her husband's recognisance,[241] presents a difficulty in that the statutory extent may not have taken account of the dower; it could not have been known that the husband would pre-decease his wife. Either the widow is going to be denied her dower, or the statutory tenant stands to be prejudiced if he is compelled to deliver a third of his debtor's lands to the doweress with the extent unmodified; Merchants makes no provision for any 're-extent'. By way of comparison, Bracton states that where land of which dower is claimed had been given for a term of years, the third part could be recovered, and the judge would permit the lessee to retain the two parts beyond his term,[242] 'until he has taken issues

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239 JUST 1/1309 m 4 (JA, Newport Pagnell, 1296)

240 *Sed contra* JUST 1/1303 m 21 (JA, St Albans, 1294). D2 was the lessee of a tenant by statute merchant, RP. D2's interest was *tenenda de anno in annum ad voluntatem RP reddendo inde per annum extentam eorundem tenementorum.* RP's interest was described by the jurors as a *terminus*, which had not yet expired, although the enrolment does not record how the jurors reached that conclusion

241 For statutory execution against a tenant by dower, see p 227 ff

242 *Bracton* f. 312 (3 *Thorne* 397)

therefrom to the value of the lost third'.[243] Bracton says that it was necessary to ascertain the value of the third part by reasonable extent.[244]

In Choch v Estdene (1310),[245] the plaintiff brought a writ of dower against the tenants by statute merchant. The tenants argued that if the plaintiff recovered, 'she would have a higher estate than we ourselves have, for we hold only a term of years until the debt be paid'.[246] The tenants prayed aid of the reversioner. This was not allowed, but they were allowed to vouch their estate. A 1311 note has dower being sought against a tenant by statute merchant, 'who (succesfully) vouched (the guardian) according to the provisions of the statute etc'.[247] In Le Power (1312)[248] a widow had recovered dower against the tenants by statute merchant because they had prayed aid of the reversioner, who did not come. The tenant asked that judgment be made that he hold the remaining two thirds until the debt be levied. Stanton J. indicated that the one third diminution of the quantity of land held by the tenant by statute merchant would be allowed for 'when you come to account'.

The statutory tenant seems to be on different ground where he has entered through a feoffee of the debtor. This appears to have been the situation in Gosehall v Cobham (1313).[249] The plaintiff, the widow of a statute merchant debtor, brought a writ of dower, and claimed a third of the manor of G. The defendant, tenant by statute merchant, resisted the claim with the argument that he had not entered by the debtor,

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243 e.g. 14 CRR nr 937 (1230)

244 e.g. 12 CRR nr 726 (1225)

245 20 SS 102 nrs 22A, B

246 cf. *Bracton* f. 309 (3 *Thorne* 390); if the defendant in a writ of dower claims that he only has a term, the writ fails, and the plaintiff was to proceed against the person in whose name the tenant held. In the statute merchant context, this would mean proceeding against the debtor's heir

247 31 SS 173 entry (m); although cf. 31 SS 37 nr 25, which suggests that the tenant (and not the vouchee) was forced to render dower

248 34 SS 25; Eleanor, widow of Hugh le Power v Dean and Chapter of St Ethelbert's, Hereford

249 Margaret w John de Gosehall v James de Cobham. This is a composite of two accounts;

(1) YB E 6 E II = 43 SS 125 nr 25 (E 1313)

(2) YB Kent Eyre 131 = 27 SS 62 (Canterbury, July 1313). Some of the facts have been supplied from other litigation, 24 SS 65, at the Kent Eyre relating to the manor of G.

but through the debtor's feoffees.[250] The tenant by statute merchant sought a view since 'it is not known whether I hold the whole of the tenements which were in the debtor's seisin. By view, we shall be able to certify ourselves'.[251] The plaintiff wished to aver that the tenant had entered by her husband; a recovery under a statute merchant was tantamount to entry through the debtor, irrespective of any subsequent feoffment by the debtor.[252] Staunton and Spigurnel JJ found for the plaintiff, and denied the view: entry by the husband's recognisance was entry by the husband.[253]

The tenant then prayed aid of the debtor's lessees. It was argued[254] that it was fitting that the tenant could have aid of those against whom the tenant had execution, since they could vouch the debtor's heir, and the wife could recover her dower against the vouchee, 'and thereby we shall lose nothing during our term'. This argument was also intended to protect the lessees for life; if the tenant by statute merchant did not have aid, dower would be recovered against him. Accordingly, after the tenancy, the debtor's lessees would also lose a third during the whole of the wife's lifetime, without being able to recover that value from the heir, 'and that would be a hardship'. In this case, the tenant by statute merchant could not answer without aid of the lessees, since the tenancy could end while the wife was still living; the statutory tenancy being a limited interest (*nous navoms rien en ces tenementz si noun une tenaunce en noun de fraunktenement*),[255] the tenant's surrender could not be extended to comprehend so large an estate as the doweress was seeking. Staunton J agreed with this; 'Aid is not granted in case of dower and in the usual course of law; but new circumstances call for changes in the law'.[256] The lessees for life were summoned, and vouched H, the debtor's son and heir.

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250 24 SS 65; they were lessees for the term of their three lives

251 27 SS 65, *per* Toudeby

252 24 SS 65

253 27 SS 63

254 27 SS 63, *per* Toudeby

255 27 SS 64, *per* Toudeby

256 27 SS 67 and 70

If the debtor died leaving a minor heir, and wardship arose, the tenancy by statute merchant was to be suspended.[257] The debtor's lands were to go to the guardian until the ward came of age.[258] They were then to return to the statutory tenant.

Apart from suspension of the tenancy (for instance, by wardship), and the reduction of issues by a set degree for some period (for instance, by dower), the issues could fluctuate from year to year, affected by factors wholly outside the control of the tenant.[259] If the tenancy by statute merchant was truly a term certain, any diminution in the issues would have put the tenant at risk of recovering less than the sum for which the realty had been delivered; i.e., diminished issues would not have served to 'stretch' an 'actuarial' tenancy, nor, conversely, increased issues to abbreviate one.

Tenancy not a term of years

This points to another way of looking at the tenancy by statute merchant; the tenant was to hold the lands until the debt had in fact been levied from the issues (for brevity, an 'actual' tenancy.) This resembles a live gage[260] in that the actual issues of the lands would have gone in reduction of the debt. Such a tenancy would not, however, be a term certain, since it would not be possible to tell at the outset how long the tenancy was going to last.

Nevertheless, it is at least arguable that this interpretation is supported by the statutory language, which emphasises the element of levying; Merchants reads that the debtor's lands and tenements were to be held until the debt was levied,[261] and the debtor was to be released and his lands redelivered to him only after the debt was levied and paid.[262] Westminster II c.18 provides that the creditor was to hold a moiety of the debtor's

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257 Or *elegit*: JUST 1/1303 m 6 (JA, Thetford, September 1294); P tenant by *elegit* brought *novel disseisin.* The jurors returned that the lands had come into the hands of the King by way of wardship for the minority of the debtor's heir

258 e.g. JUST 1/1090 m 2 (Yorkshire Eyre, T 1293)

259 Sheriffs' returns do not indicate any awareness that the annual value of extended realty could fluctuate. Nor is there any suggestion of this in *lev.fa.*

260 p 201

261 *serra levee*; Apps C 47; D 61 (*leventur*)

262 *levee e paee*; Apps C 51; D 88 (*recuperaverit*)

lands 'until the debt shall be levied by a reasonable price or extent' (*quousque debitum fuerit levatum per racionabile precium vel extentam*).[263]

There is evidence that the tenancy by statute merchant was an 'actual' tenancy. In a 1300 *elegit* case,[264] half of P's lands, which half was extended at 6 marks per year, were awarded in execution for 80 marks. P claimed that the lands had been delivered to the D to hold for 'thirteen and more years'.[265] There was an accounting. D had held for 15 years, but only 39 marks had been levied; no reason is given for this shortfall. It was held that the tenant was to keep the lands until the debt had been levied. Sometimes it is possible to draw in extrinsic evidence as to the value of the property taken in execution. For instance, a 1292 enrolment[266] records that the debtor's manor of Whitford in Devon had been delivered in execution on a statute merchant for £20. Execution could have happened at any time since November 1285 since a certificate relating to the recognisance[267] states that the statute merchant was payable in 14 E I. Hence, execution could be for as long as seven years. However, the creditor still does not seem to have levied the debt. However, the debtor's inquisition post mortem, conducted in late 1298, values Whitford at £6-7-1 1/2d per year.[268]

In Daumory v Hocclive (1311)[269] Bereford C.J. commented that 'when tenements are delivered by the form of the statute to a creditor, no certain period is named'.[270]

However, the idea that the tenant by statute merchant could hold the lands until the debt had actually been levied, even if the time calculated by the extent had run out, is difficult to reconcile with a number of features; first are the statements, adverted to above, that the tenancy by statute merchant was a term certain. Secondly, the valuation aspect of the statutory extent,[271] and the fact that the valuation seems to

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263 App F 5-6

264 JUST 1/1318 m 4 (JA, Guildford, 1300)

265 80 divided by 6 gives just over 13

266 KB 27/130 m 6 (Devon) (H 1292)

267 C 241/9 nr 150

268 C 133/87 (16)

269 26 SS 183

270 *ibid.*, 184

271 p 228 ff

have mattered - the provisions for penalising the extenders for an over-valuation are explicable, it is contended, only if an over-extent makes some difference to the length of the statutory tenancy. There is also the phenomenon of debtors bringing tenants by statute merchant to account; the question which must be answered is whether there can be any room for any sort of interim adjustment of a tenancy founded on an 'actuarial' extent - either sufficient time has passed since delivery for the debt to have been levied from the issues in accordance with the extent, or it has not.

To address the account point first. The cases suggest that the statutory accounting principally came to be deployed for two purposes; (1) as the means for the debtor to tender any residue, have damages and costs assessed,[272] and redeem his realty,[273] or (2) to obtain redelivery of his realty on the expiration of the period pre-calculated by the extent.[274] For instance, in Brun v Newenham (1298)[275] the plaintiff debtor claimed that the defendant tenant by statute merchant had levied a debt of 40 marks from the lands and chattels; a messuage, gardens, marshes, meadowland, pasture, and woodland, were worth, it was claimed, £23-10s-4d per year: 'and so' (the debtor claimed) 'the sum over four years[276] should be £94-1s-4d'. The defendant had also had 14 acres of land, each acre worth 2 shillings per year, for three years; this should have produced £4-4s. However - as often in this sort of case - the creditor denied that the

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272 These were probably to be made up by *fi.fa.*

273 e.g. Leicester v Tuxford CP 40/90 m 24d (Lincs) (T 1291); P's lands were delivered to the defendant in execution on a statute merchant for 50 marks. After a year, an account was taken of the year's issues. It was found that 40 marks had been levied. In FitzHumphrey v Bardolf (YB M 31 E I (RS) 440; M 1303) D tenant by *elegit* was summoned to account with the plaintiff debtor. 'By the extent and account it appeared that there were five years arrears' (*par estente e par acounte cinq aunz arere etc*). The debtor tendered five years' 'arrears' and sought redelivery of the lands, which Hengham C.J. allowed

274 e.g. KB 27/152 m 53 (Yorks) (M 1297). This is the first 'case' discussed above, p. 178

275 CP 40/125 m 153d (Middx) (M 1298)

276 This is consistent with what is known about the originating recognisance, which was entered into on November 11th 1293, and payable July 24th 1294 (RR 3 m 6 nr 19). It was certificated (C 241/25 nr 189)

debt had in fact been levied;[277] in fact, the debtor adduced the extent in support, claiming to have taken only £16 over four years 'according to the extent made by the sheriff'.

Later authorities[278] indicate that the extended value represented the issues of well-husbanded land. This in turn set the duration of the tenancy; accordingly, it was a term certain. An accounting could be taken when, according to the extent, the issues should have been levied. However, the realty would not be redelivered to the debtor if the land had been well-husbanded, but the issues had been completely lost[279] by circumstances outside the control of the tenant.[280]

The converse question is what was to happen if the actual issues were greater, or accrued more quickly, than the extent indicated. One way in which this could happen was if the statutory tenant improved the land, causing the issues to increase. In 1346, it was Willoughby J.'s opinion that the statutory tenant was not to be prejudiced if he happened to improve the land[281] and increase the issues; i.e., any improvement would not serve in the debtor's favour by letting him back into his lands any sooner than he would have done had the lands remained unimproved. Merchants perhaps alludes to this question in providing that, even after the debtor's lands had been delivered to the creditor, the debtor could lawfully sell them,[282] however, subject to the condition that 'the merchant shall have no damage from his approvements'.[283] No cases have been

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277 e.g. KB 27/155 m 49d (Yorks) (T 1298); debtor claimed that more than 120 marks had been levied in execution on a statute merchant for 100 marks. This was denied by the creditor; Similarly in *elegit*; JUST 1/1318 m 4 (JA, Guildford, 1300)

278 YB M 11 H VI 6 pl.11 (M 1433) *per* Babington C.J.; YB 15 E IV f.5 pl.8 (1476) *per* Brian C.J.

279 The situation of partial loss of issues is more difficult; Sir Andrew Corbet's case (4 *Co.Rep* 81b (Court of Wards, M 1600); 76 ER 1058)

280 Sir Gilbert Debenham's case (YB 15 H VII f 14B pl.6 at 14B (Exchequer Chamber, H 1500); YB E 7 H VII 10B pl.2 at 12B (1492) *per* Kebell): tenant by statute merchant interrupted in the taking of the profits by 'sudden adventure' (*soudain aventure*), war, escheat, flood, wildfire, or Act of God

281 YBB 20 E III (1st part) (RS) 428 nr 70 (E 1346); T 17 E III (RS) 478 nr 6 (T 1343)

282 p 210 ff

283 *issint qe le marchaunt neit damage de ses approumenz* (App C 65); *Fleta* has no equivalent to this passage

located in which this particular clause comes to be examined, or in which the statutory tenant seeks the benefit of improvements which he has made to the land; the most obvious time for this latter would have been during any account between the parties.

Another way in which the issues would exceed the extended value was by a 'windfall'. In the 1480s, Caryll said that a writ *venire facias* lay to bring the statutory tenant to account where he had levied the money by a windfall.[284] This was also the approach of a 1466 reading on the Statute of Merton; if there was a windfall 'two or three years' before the money ought to have been levied (*puissont este levez*) by the tenant, he nevertheless could keep the emblements.[285]

Challenges to the extent

The availability of account during the tenancy is not the only phenomenon which has an effect on the nature of the tenancy. The provisions of Acton Burnell which related to the over-valuation of the debtor's goods before delivery to the creditor[286] came to be adopted[287] within the Merchants regime, in respect of the statutory extent of the debtor's immovables.[288] The Acton Burnell provisions might themselves have been influenced by the availability of challenge to an over-extent in dower.[289] The Merchants creditor[290] could challenge the statutory extent, and those who had over-extended (i.e., over valued) the realty could be penalised.[291] This thesis has suggested

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284 105 SS 105 nr 106

285 71 SS 47; The reader was Thomas Fitzwilliam

286 Chapter 4

287 It is not known when this adoption occurred. The earliest located instances of this are in 1305; KB 27/179 m 58 (Hunts) (H 1305); /182 m 20 (Beds) (M 1305)

288 And in respect of the statutory extent of debtors' immovables

289 e.g. CP 40/110 m 17d (Norf) (M 1295); AK recovered dower against RK. The Bailiffs, through animosity to RK, in favour of AK, and in RKs absence, made inquisition. RK challenged the extent, and called for a re-inquiry

290 And the person who had obtained *elegit*; e.g. CP 40/69 m 138 (Lincs) (M 1287). The creditor *calumpniat* the extent, 'because it is made by my enemies'. A re-extent was ordered. Similarly, CP 40/153 m 33 (Norf) (M 1305)

291 The only challenges located include allegations of over-extent. Other 'procedural' improprieties do not seem to have attracted this attention. For instance, a 1313 extent (KB 138/3) has the creditor's attorney as one of the extenders

that any measures which emphasise the valuation component of the statutory extent point to an actuarial extent, and, accordingly, an assessment of the statutory tenancies as terms certain.

There was certainly room for a remedy for 'over-extents' within Merchants; if lands worth £5 per year were extended at £10 per year, and delivered in execution on a statute merchant for £20, the tenant is going to hold - according to an actuarial measure - for two years. But this will mean that he will only have been able to levy £10. The shortfall has been caused neither by any natural disaster nor by the tenant's poor husbandry nor by any wilful default to take the issues. The tenant in this situation needs the means either to challenge the extent, or, alternatively, to hold the lands until the debt was in fact been levied. The latter seems to have been accomplished within account.

If the creditor's challenge to an 'over-extent' was sustained under Merchants, the debtor's lands could be delivered to the extendors at the value which they themselves had set, and they were to be answerable to the creditor for the debt. However, there are instances in which a new extent, rather than a delivery to the extendors, was sought. For instance, in Kyme v Muncy (1301)[292] the plaintiff creditor complained that the defendant's lands in two Norfolk manors had been delivered to him by an extent at a value twice their worth.

Executors of Brus v Brus (1298)[293] shows an attempt by a disgruntled creditor to use the Merchants provision in respect of an *elegit* extent. The creditor's executor refused to accept the defendant's goods, chattels and lands pursuant to an *elegit* extent, claiming that they had been extended above their true value. He adduced 'the Statute' (*subveniatur ei per Statutum*), 'in which it is contained that if the appraisers of goods and chattels less than sufficiently appraise those in favour of the debtor and to the damage of the creditor, they are to be delivered to the appraisers so that they shall answer to the creditor at the value they have set upon them'. This argument seems to have met with some success: the sheriff was ordered *sicut prius* to conduct an extent.

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292 CP 40/135 m 267 (Norf) (M 1301); Philip de Kyme v Sir Walter Muncy

293 KB 27/153 m 22d (Essex) (H 1298); Executors of Robert de Brus sr v Robert de Brus jr; cf. CP 40/69 m 138 (Lincs) (M 1287)

Extents in cities may well have assumed a different form than those outside cities, since there would have been no 'institutionalised' extents of municipal property, and the rules of the manorial-type extent[294] would just not have been appropriate in an urban context. However, any different manner and form of a 'municipal' extent (which usually seem to have valued the letting value of the property) do not seem to have affected the available remedy in the case of an 'over-extent'. For instance, in 1295 the sheriffs of London caused the lands and tenements of a Merchants debtor[295] to be extended. The annual value of these in all issues, saving the services due to the chief lords of the fee, was one mark. However, the creditor (to whom two messuages and four shops had been delivered according to the extent) claimed that they were only worth half a mark per year. The sheriffs were ordered to cause the tenements to be re-extended and appraised.[296]

Assuming that creditors may have preferred to get the debt in a lump sum from the extendors, rather than as a trickle over some years from the issues of the lands, it must have been tempting for all creditors to complain of an over-extent. It is not known whether more than the creditor's word was required to determine any supposed 'over-valuation'.[297]

The doctrine may have been only of limited assistance to the creditor. Once seisin had been delivered to the creditor, the extended value was 'locked-in', and there could be no re-extent; in 1433 Babington C.J. remarked that, in such a case, 'it was the creditor's own folly that he took the land at such an extent', and his tenancy was set by the extent.[298] In 1500 it was noted that an over-extent had to be complained of on the very day that the extent was returned.[299]

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294 p 228 ff

295 RR 3 nr 1; and see p 6

296 CP 40/110 m 255d (London) (M 1295); Winchester v Lammere

297 In the case of rural lands taken in execution, there may often have been a recently conducted manorial-type extent. Any discrepancy between the issues in the statutory and any antecedent manorial extent could have alerted the creditor to the possibility of an 'over' extent. However, lands other than rural lands would probably not, *ex hypothesi*, have been extended every year, and this would have deprived the creditor of the advantage of any comparison

298 YB M 11 H VI 6 pl.11 (M 1433)

299 YB M 15 H VII f.14 pl 6 at f.15B (M 1500)

The converse case is an 'under-extent', e.g., lands and tenements worth £10 a year are extended at £5. Acton Burnell allowed the debtor no complaint if he considered that his movables or devisable burgages had been sold or delivered at too low a price,[300] and this rule seems to have transferred to Merchants.

Conclusion

There is no easy answer to the question whether the tenancy by statute merchant was a term certain or not. It was still capable of controversy 150 years after Merchants; in a 1433 assize[301] the plaintiff, the assignee of a tenancy by statute merchant, had been disseised. The recognisance had been for £200, and the lands extended at an annual value of £20. The facts are not clear, but it seems that £200 had not been levied despite more than ten years having passed since execution. The issue was whether the assize ought to be abated. This raised different views of the function of the statutory extent. Two judges expressed views on the relationship between the extent and the tenancy. Fulthorp J. saw the extent as actuarial; the extent proved that the creditor ought to have levied the money in ten years, and, since ten years had passed, the tenant's interest had come to an end. Hence, *novel disseisin* was not maintainable, although trespass lay to the plaintiff for his damages. However Babington C.J. took a more advanced line. The assize was not to be abated;[302] ordinarily, the extent set the term, which would not be extended if bad husbandry by the tenant reduced the issues.[303] However, if the land was flooded so that he could take no profit from it, the tenancy was to continue, 'since there is no default in the tenant'.

It has to be said that the matter does not seem to have created difficulties in practice. For instance, in a 1346 case, the extent was treated by the court as wholly irrelevant in

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300 Apps A 30-33; B 15-17

301 YB M 11 H VI f. 6 nr.11 (M 1433)

302 Babington C.J. and Newton J. were in a minority on this point. Fulthorp, Cottesmore and Paston JJ. held that the writ of *novel disseisin* could be abated

303 Similarly, descriptions of the interest of the tenant by statute merchant in terms of *mainovere*, e.g. Sturey v Cobham ((1313) 27 SS 69 IV at 70 *per* Spigurnel J.) perhaps suggests that the statutory tenant could not take advantage of a diminution of issues caused by letting the land lie fallow; Baker (*Manual*) has *mainovere* derived from *manuopus*, and meaning 'manual possession or use', or from *manuopere*, meaning 'to work'. *Manuop/eror* is 'to labour, or to till'

determining when the statutory tenancy was to come to an end. The debtor sought a re-extent of lands which, he contended, had been extended well below their true value. Willoughby J. denied a re-extent, observing that it was no mischief for the debtor to be denied a re-extent if he believed the lands to have been extended at too low a value since, notwithstanding the extent, he could use the mechanism of account to have the lands redelivered as soon as the debts and costs had actually been levied.[304]

Protection of the tenant by statute merchant

The Merchants creditor[305] was to have such seisin in the debtor's realty that the writs of *novel disseisin* and *redisseisin* lay to him.[306] Westminster II c.18 affords the tenant by *elegit* the same protection.[307] This compares favourably with the protection given to gagees[308] and termors,[309] neither of whom seems to have had the assize in 1285. These measures have to be put into the context of the general expansion in the availability of *novel disseisin* effected by Westminster II c. 25[310] which gave the assize, *inter alia*, to the holders of estovers, profits, corrodies, tolls, and other bailiwicks and offices in fee.

The writ of *novel disseisin* allowed to the statutory tenants was governed by common law principles. In Bakewell v Wandsworth (1313)[311] the defendant argued that *novel disseisin* brought by the tenant by *elegit* was abatable since he had been enfeoffed jointly with his wife, who was not named. The plaintiff argued that, since she was seised by virtue of the defendant's sole recognisance, it was not necessary to name his wife.[312] Spigurnel J. thought that, since the plaintiff was trying to recover a freehold

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304 YB 20 E III (1st part) (RS) 428 nr 70 (E 1346)

305 Or any assignee, e.g. KB 27/181 m 9 (Middx) (T 1305) the assignee of a tenant by statute merchant recovered his seisin

306 Apps C 48-51; D 63-66

307 App F 6-7; e.g. 24 SS 75 (1313)

308 *Glanvill* Book X Chapter 11; Sutherland, *Novel Disseisin*, 12 n 9

309 Sutherland, *Novel Disseisin*, 13 n 1

310 1 SR 84 - 85

311 24 SS 75 and 134 (Kent Eyre, 1313)

312 24 SS 75 I

which the debtor had jointly with his wife, the wife ought to be named. Staunton J. expatiated on the relationship between the common law and statute;

> **Statute law does not alter common law unless it expressly purports to do so. Consequently, though the statute gives you an assize for the recovery of a moiety of the lands until etc. it does not follow that you are not bound by the common law in regard to your procedure; and by the common law we are of the opinion that your writ is abatable by the plea of joint tenancy**[313]

The writ of redisseisin was originally given by the Statute of Merton c.3 (1236).[314] The writ recites the plaintiff's recovery of the freehold in a previous assize of novel disseisin, and his later disseisin of the same tenements by the same adversary, and orders the sheriff to go with the keeper of the pleas of the crown and the twelve original recognitors to make diligent enquiry. The re-disseisor was to be imprisoned in a Royal prison until the King issued any further order. The penalty was made more severe by Westminster II c. 26[315] which provided for double damages which the plaintiffs sustained by reason of the disseisin, taxed by the oaths of the aforesaid twelve, to be levied from the lands and chattels of the re-disseisor.[316] Only a single enrolment has been located, on the Plea Rolls of the Royal courts examined in connection with this study, in which a tenant by statute merchant uses the writ of redisseisin.[317] However, this is not surprising given that the writ initiated proceedings in the county court.[318] The process seems to have been speedy since the writ of redisseisin is dated May 5th 1298 and the enrolment records that the plaintiff recovered his seisin by an inquisition held on May 22nd 1298.

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313 24 SS 75 at 78; also 134 at 135; 'A statute does not change the process given by the common law unless another process be provided by the statute'

314 1 SR 2; e.g. 87 SS 84, writ 'CC' 168 (late 1260s)

315 1 SR 85

316 e.g. 87 SS 269, writ 'R' 695; also writs 'R' 696 - 701

317 KB 27/156 m 30 (Worcs) (M 1298)

318 e.g. 87 SS 84 (writ 'CC' 168; 1250s); 269 (writ 'R' 695; c.1318). Further evidence for the use of this writ is to be found in PRO C 69, Chancery: Re-Disseisin Rolls

Creting v Lovetot and Lovetot (1290)[319] deals with a collusive recovery against a debtor, intended to take the land out of the creditor's reach before delivery. D1 held lands of D2, his father, by an annual service of £60. It was claimed that D1 had ceased to perform the due services for two years (*cessavit per biennium*) and D2 recovered the lands.[320] The plaintiff said that D1 had entered into a Merchants recognisance in his favour, which had been defaulted upon. The plaintiff sought execution and pleaded that he should not be excluded from the tenement by any collusion. Execution of the *cessavit* judgment was deferred until the debt had been levied. This is similar to what would have happened in the case of a term of years; if the freeholder suffered himself to be impleaded in a real action and made collusive default, the lessee was not to be ousted from his term, but was given a remedy under the Statute of Gloucester (1278) c.11.[321] Execution of the judgement obtained in the real action was to be stayed until the term of years had ended. It was, however, a moot point whether this provision extended to protect the tenant by statute merchant.[322]

Assignment of the tenancy

The statutory tenancies could be assigned, although it appears that any such assignment had to take place *after* execution. For instance, the enrolment of Re Lands of Walter Rivers (1289)[323] has a writing in which one of three co-tenants by statute merchant granted and transferred (*concessisse et tradidisse*) his interest to a third party. However, the interest granted was limited; the assignee was to hold in the name of the assignor, and the interest endured only until the assignee had been fully satisfied of the co-creditor's 'portion' of the principal, debt and damages. Such a grant was not the same as any sale or assignment of a statute merchant *bond*, which does not

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319 KB 27/123 m 11d (Essex) (E 1290); CP 40/86 mm 104; 146d (Essex) (M 1290)

320 Within the provisions of Westminster II c. 21 (1 SR 82 - 83)

321 1 SR 49

322 Coke, *First Institute* f.46a thought, 'by the better opinion of books', that it did not, and criticises (*Second Institute* p 321) the reasoning of the cases which treated the tenant by statute merchant as a lessee for years, and brought him within the statute

323 KB 27/116 m 10 (H 1289)

seem to have occurred during this period.[324] The assignment of a tenant's interest often seems to have been by way of lease. Assignment by way of lease might well have been particularly attractive to foreign creditors, who, even if they were receiving the debt as a trickle of rent rather than a trickle of issues, were at least saved the trouble of having to take the issues themselves.[325] If a lessee of a statutory tenant was put out, the statutory tenant probably needed to be named as co-plaintiff in the writ of novel disseisin.[326]

Effect of death

If the debtor died and had an infant heir, execution against the debtor's lands was not to be commenced (or, if it had been commenced, was to be interrupted) until the heir was of age.[327] As to the former proposition, in Hareworth v Meaux (1300)[328] a statute merchant debtor died seised of the lands. The plaintiffs, his five sons, entered the lands as next heirs, and were seised until the defendant brought a Merchants writ. The jurors sought judicial guidance as to whether there had been any disseisin. It was found that it was 'clearly' against the form of the writ and statute that lands held in fee by the debtor on the day of the recognisance were to be delivered to the creditor if they had come into the hands of an infant. On inspection of them, it was clear that the plaintiffs were still infants. Such an ejection was against the King's order, and the form of the writ, and was a 'clear' (*aperta*) disseisin.[329] Where the heir was adult, the

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324 However, *Cartulary of John Pyel*, entry 6 (*circa.*1349) recounts the purchase of a statute merchant bond ('a letter of statute merchant') from the creditors as part of the settlement of the debtor's estate. The purchasers are said to have 'pursued execution'. The vendors 'granted their interest in the statute merchant' to the purchasers 'until the debt be paid'; Bailey, *Assignment of Debts*, 268 n 26 and accompanying text

325 The only instance located, though, is JUST 1/1331 m 57d (JA, Hereford; December 1306) Defendant in an assize of novel disseisin pleaded that he had the messuage, *in suburbio* of Hereford, by the lease of Frecherio, a merchant

326 JUST 1/1303 m 21 (JA, St.Albans, 1294)

327 Apps C 76-77; D 89-91

328 KB 27/162 m 69 (Yorks) (M 1300); Hareworth v Meaux (No.2); but, *contra* in *elegit*; Executors of Hengham v Wrotham (1318) (61 SS 238 nr 28)

329 cf. JUST 1/1327 m 25d (JA, Stamford 1303), in which P, heir of a statute merchant debtor, claimed that he was within age and sought judgment in accordance with the terms of the statute.

statutory tenant could probably initiate execution against the debtor's executors, or, if already seised of the tenancy by statute merchant, use novel disseisin against the debtor's adult heir if put out prematurely.[330]

On the death of the creditor, his interest passed as a form of personalty, and went to his executors and not his heir. In 1314[331] Inge J remarked;

> **In the same way as the heritage** (of lands) **descends from the father to the son, a chattel which represents a freehold** (*le chatel qest en noun de fraunctenement*) **devolves from the person of the testator to the executors etc**

The cases show execution on outstanding statutes merchant being undertaken by executors, and lands taken in execution being delivered to executors.[332] A 1339 case has Merchants execution lying to the executor of an executor.[333] In the case of ouster, the executors had novel disseisin.[334]

However, the defendant creditor contended that the debtor was not dead at all, but had merely absented himself in Ireland to avoid execution. The jurors returned that the debtor was indeed dead

330 KB 27/181 m 9 (Middx) (T 1305)

331 36 SS 85 nr 44

332 e.g. KB 27/130 m 4 (Essex) (H 1292) Debtor's personalty and realty delivered to creditor's executrix; KB 27/176 m 90 (Yorks) (E 1304)

333 YB M 13 E III (RS) 174 nr 77 (M 1339)

334 e.g. Executor of Morar v Mosse; JUST 1/504 m 1 (JA, Boston, July 1293)

CONCLUSIONS and an APOLOGIA

The mainspring of this thesis has been the exploration of a simple, and perennial, situation. A wishes to borrow from B. B wishes to secure repayment of the debt as best he can. The questions which any prudent potential creditor would ask are, it is suggested, broadly the same in the 1280s as they would be today; what are the available mechanisms for securing a debt, and how do these mechanisms compare? More particularly, will any given mode of security accomplish, in the event of A's default, all that it is claimed for it? This latter question itself generates the need to consider a range of issues; what property - movable and immovable - does A have? Where is it? How easily can it be seized? Would any of it be exempt from seizure? How long would this process be likely to take? Is A already indebted to someone else? If so, will that debt affect B's ability to recover the debt due to him?

These are technical questions, and they demand technical answers. By way of example; A enters into a statute merchant in favour of B. A happens already to be bound to C by a recognisance entered into before the Chancery. A defaults on both. C's writ of *fieri facias* is received by the sheriff before B's statutory writ. Here, whether the recognisance to C suffices to bind all A's property on the day of the statute merchant to B makes all the difference to B - possibly the difference between getting all his money and getting nothing at all.

Much of the discussion rests on the London recognisance rolls and the statute merchant certificates for the reign of Edward I, for which the first detailed description and analysis has been offered. Attention has been drawn to these hitherto under-utilised sources, and examination of them has raised a number of interesting substantive issues, which in turn have exposed divergences between the rules governing execution on statutory recognisances and debt (for instance, the availability of the statutory enforcement process following default on any one instalment of a statute merchant).[1] These sources will have

[1] p 106 ff

yet more to yield on the general picture of debt in the latter years of the thirteenth century; however, one important feature which they have revealed is the predominantly non-commercial use of statutes merchant.[2] Furthermore, the way in which statutes merchant came to be deployed as individual components in more extensive transactions,[3] shows a widespread and astute awareness of the potential impact of a statutory recognisance.

The endeavour to deploy these sources to flesh out substantive difficulties (for instance, the problems of competing execution amongst several creditors against a single debtor)[4] has, it is contended, itself been an illuminating exercise - an unpromising mass of documentation somewhat peripheral to the sources of this period ordinarily resorted to by legal historians has shown its worth in helping to answer straightforwardly legal questions.

This approach has been mirrored in some of the work on Plea Rolls, and particularly in that part of this thesis which has taken a close look at a type of enrolment often skimmed over; namely, the enrolments (with which the Plea Rolls happen to be saturated) dealing with final process in debt. The discussion presented in Chapter 2 about the genesis of Merchants and the possible association between its introduction and that of Westminster II c.39 offers some start for future investigation of the question of the actual effectiveness at local level of Royal orders. The conclusion reached here[5] that Westminster II c.39 appears, in relation to execution on statutes merchant, to have had no effect in the years immediately following its enactment is provisional, but nevertheless, it is contended, a significant one; the law as decided by the Royal courts is dependent, in almost all its aspects, on the co-operation of local officials. Without scrutiny of that co-operation, we

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2 p 133 ff

3 Such as that transcribed in Appendix O

4 p 157 ff

5 p 100 ff; a more detailed exposition is given in the author's *The Role of the Sheriff in the Enforcement of Recognised Debt and the effect of Westminster II c.39* in *Bean-Counters and Bureaucrats: Aspects of Medieval Administration* (ed. R.H.Britnell, Manchester UP, forthcoming)

are only seeing part of the picture, and a sanitised part - free of the untidiness which has always seemed to attend the execution of legal orders[6] - at that. The judicial writ is often far from the end of the matter; this is demonstrated not only in Chapter 2, but also in Chapter 4 in which the provisions for execution against movable property are explored.

This thesis principally is concerned with the law administered by the Royal courts, but it has been necessary to examine what is often referred to as the 'law merchant'. The delineaments of this remain, despite the welcome publication of a new scholarly edition of the treatise *Lex Mercatoria*, obscure. There are deep waters here; indeed, it has still - arguably - not even been proved whether there was any such thing as the 'law merchant' at all in a substantive sense in England in the later thirteenth century (its supposed heyday), or whether what goes under that name is simply an assemblage of procedural tinkerings passing themselves off as something rather grander.[7] The surface of this question has barely been scratched by this thesis - it has not been its place to go any deeper - and there has been only a guarded attempt at integration of the rules of the common law with those presented as characteristic of the 'law merchant'; examination of some series of borough court rolls has shown that there is much to be done in this sphere.

The thesis not only has endeavoured to explore, in as straightforward an expository manner as possible, what the statutes said, but also to take some aim at what (to the mind of someone accustomed to dealing with modern statutes) they seem to have omitted to say. Perhaps most perplexing and prominent amongst these omissions is their failure to provide any mechanism for the release of an incarcerated debtor. It is here that the responsiveness of the common law, through the development of the writ *audita querela* and the adaptation and incorporation of an accounting mechanism within statutory execution, comes to be seen. Plucknett's observation in passing that the writ *audita*

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6 cf. the remarks of R.H.Helmholz (reviewing *Royal writs addressed to John Buckingham, Bishop of London 1363-1398. Lincoln Register 12B. A Calendar* (1997) 86 Lincoln Record Society; (1999) 20 *Journal of Legal History* 137 at 138) about the 'apparent futility' of much final process

7 See my review of *Lex Mercatoria and Legal Pluralism*; (1999) 20 Journal of Legal History 135

querela was generated by the statutes[8] has been vindicated, although this thesis has pushed the date of the inception of this writ back from the 1330s or 40s to the very early 1290s[9] (and it is not inconceivable that the writ is even earlier). These seemingly spontaneous developments, without statutory warrant, but with an explicit emphasis on the primacy of justice and supported without demur by the Royal courts, are important illustrations of the flexibility and imagination at play in the law of this period. They also show that the statutes are not free-standing, but, with considerably speed, became knitted in - one might say, almost 'organically' - within the body of the common law.

The substantive question on which Chapter 6 turns is the nature of the tenancy by statute merchant; principally, was it a term certain or not? This thesis, in the end, has had to come down firmly on the fence. There is much evidence - perhaps too much - and it does not hang together. However, even though any destination be for the moment unknown, the journey is an interesting one, and it is submitted that the evidence presented, at the very least, allows the tenancy by statute merchant to be accorded a rightful place alongside the other limited interests in land about which so much more, until now, has been written.

In his inaugural lecture for the Downing Chair, Professor John Baker noted that 'no doubt some cases in all ages are of passing technical interest only and it would be absurd to try and write legal history so as to accommodate every single procedural jot and tittle'.[10] However, he goes on to say that the example which Maitland gave is to attempt 'to understand the past in its own terms.' This thesis has attempted to accomplish the latter, but, possibly, has not been able to avoid falling prey - to some extent - to the former.

However, is it so 'absurd' to look at procedural *minutiae*, and can the history of legal institutions genuinely be understood without serious reconstruction and scrutiny of such? There is excellent support for retention of this approach: Maitland, following Maine,

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8 Plucknett, *Edward I*, 145

9 p 192 ff

10 J.H.Baker, *Why the History of English Law has not been finished*, 17

introduced his lectures on the forms of action with the proposition that 'substantive law has at first the look of being gradually secreted in the interstices of procedure'.[11] It is contended, for the field investigated by this thesis, that every 'procedural jot and tittle' does matter; this is why, perhaps in more parts of this thesis than is seemly, it is the footnotes rather than the text which seem to be doing more than their fair share of the work. Despite much economy, this came to seem inevitable.

Exposition of the statutes, in the sense of trying to make some sense of each and every word, has not been easy; the statutes are well, but imperfectly, drafted. Due to an unpropitious combination of *lacunae* and opacity, constructing a coherent narrative of them sometimes has been experienced as rather like building a wall by fitting bricks into a lattice of mortar. In the absence of clear statutory guidance, cases have been needed to bear the weight. This raises a further problem; the substantive law has to be discerned through the glass darkly of the Plea Rolls; treacherous shoals of hints, slips of the pen, stories cut short or over-economical in the telling, dead ends, half-truths, and evasions. But these are the straws from which the bricks for this thesis, such as they are, have had to be made.

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11 F.W. Maitland, *The Forms of Action at Common Law*, (Cambridge, 1936) Lecture I p.1; following Sir Henry Maine, *Ancient Law*, 389

The Recognition and Enforcement of Debts under the statutes of Acton Burnell (1283) and Merchants (1285), 1283-1307

Appendixes

Christopher McNall

(Magdalen College)

Submitted in partial fulfilment of the requirements of the University of Oxford for admission to the degree of Doctor of Philosophy

Trinity Term 2000

Transcription Conventions

<...> denotes illegible text

^{i}<...> denotes interlineation

^{d}<...> denotes text struck through

(...) denotes editorial note

/ denotes line break

italics denote marginal text

Where the principal text is taken from the *Statutes of the Realm*, the 'Record type' contractions used in that edition are silently expanded.

APPENDIXES

Transcription Conventions

Statutes

A	Draft of Acton Burnell	(i)
B	Promulgated text of Acton Burnell	(v)
C	Statute of Merchants	(ix)
D	Statute of Merchants in *Fleta*	(xiii)
E	Westminster II c.11 (account)	(xix)
F	Westminster II c.18 (*elegit*)	(xxi)
G	Westminster II c.39 (sheriffs)	(xxii)
H	Westminster II c.45 (*scire facias*)	(xxv)
I	Statute of Jewry	(xxvi)
J	'New' Ordinances c.33	(xxvii)

Other

K	Requested Destination of statutory writs	(xxviii)
L	Map of sphere of influence of statutory registries	(xxix)
M	Territorial influence of statutory registries	(xxx)
N	Explanation of diskette of statute merchant certificate database	(xxxii)
O	A statute merchant as part of a wider transaction	(xxxiv)
P	Acquittance of a statute merchant	(xxxvii)

Diskette of statute merchant database (inside back cover)

APPENDIX A

Draft of the statute of Acton Burnell

PRO E 175/11/4

(Exchequer: King's Remembrancer and Treasury of the Receipt: Parliament and Council: Series II)

Membrane measures 19cm x 61cm

In addition to transcription conventions:

[x]<...> denotes illegible text supplied from Close Roll text of Acton Burnell (App B)

The draft is written on the face of a single membrane.

The numbers in the margin represent the line numbers of the original.

1 Pur sceo ke marchaunz ke avant ces oures unt preste lur aver a diverse genz sunt chez en poverte pur/

2 sceo ke il ne avayt pas [i]<si redde> lay purvue par la quele il poayent lur dettes [i]<hastivement> recoverer au Iour assis de paye/

3 e par cel achesun sunt muz de marchaunz sustret devenir en ceste terre os lur Marchaundises [i]<a damage des Marchaunz e de tut le reaume>/

4 Le Roy par ly e par sun Cunseil ad ordine e establi ke marchaunt ke voit estre seur de sa/

5 Dette face venir sun dettur devant le Mair de Lundres ou de Everwyk hu de Bristowe e/

6 devant le Mair e devant un Clerk ki le Roya a sceo aturnra conise la dette e le Jour de la/

7 paye: e sait le conisaunce enroulee de la main le avandist Clerk ke serra conue E estre/

8 sceo le avant dist clerk de sa main face le escrit de obligacion al quel escrit seit mis le sel/

9 del dettur ov le sel le Rey ke a sceo est purvu, le quel sel demurra en sauve garde le/

10 maire e le Clerk avaunt dist. E si le dettur ne rende au Jour ke ly est assis si veyne/

11 le creanzur au Mair e au Clerk ov sa lettre de obligaciun e si trove seit par roule e par/

12 lettre ke la dette fu conu e ke le Jour assis seit passe le Maire par vue des prodeshomes/

13 maintenaunt face vendre les mobles al dettur [i]<com ataynte de la dette> [i]<com chateus e burgages devisables> dekes a la soumme de la dette e le deners/

14 saunz delay paye a Creanzur [d]<E si les mobles ne suffisent dunck si le dettur ad nunmobles/

15 le meire face crier la vente de les nun mobles ke sunt de sun propre heritage hu purchaz./

16 E ke le dettur de enz karante jours pusse ses nun mobles vendre e fer gre a sun creanzur/

17 E si le dettur ne le face de enz karante jours dunk le Mayre de enz les hu iur apres le karante/

18 jurs passe fait la vente de tous nun mobles dekes a la summe de dette [i]<au ly ky plus voudra doner> a tenir des chef/

19 seynurages del fee par servis du e custume e les deners maintenant face livere al creanzur>/

20 E si le Maire ne trose achatur face par renable pris liverer les mobles [d]<e nun mobles> dekes a la/

21b summe de la dette [d]<al creanzur> *en allowance de sa dette [d]<E a la vente hu la livere de nun mobles>

21a interlined at *<E a la vente u a la lyvere de Burgages devisables serra mis le seel le Rey avauntdit>/

22 [d]<fetes par le maire seit mis la sel le Roy ke a sceo est purveu en perdurable temoyne.> E si le/

23 Dettur ne ait moble ne nunmoble en le poer le Maire dunt la dette pusse estre leve enz ait aylurs/

24 en le reaume. Dunk maund le Maire desuz le sel le Ray avauntdist al Chaunceler conisance/

25 fete devant ly e le avant dist Clerk E le Chaunceler emvaye bref al Viscunte en ky baylie le/

26 dettur avera mobles [d]<hu non mobles> e le Viscunte face fere gre au Creanzur par meme la furme/

27 ke est devise ke le Mayre le frait si les been [i]<mobles> al dettur fuisent en sun poir mes been se gar/

28 dent ceus ke priserunt les mobles [d]<hu non mobles> [i and x]<pur liverer al Creaunzur> ke il mettent renable pris e huwel ke [i]<si> il les pris>/

29 ent trop haut en favur del dettur e damage le creanzur la chose pri[x]<see seit liveree a ceus>/

30 ke le averunt prise [i]<par le pris qe mis hi unt> e maintenant res [x]<poignent> al creanzur de sa dette. Et [x]<si le dettur voille dire>/

31 ke ses biens [i]<mobles> furunt venduz hu liverez pur meinz [x]<qe il ne valent de ceo ne purra il remedie aver>/

32 pur quay le Maire hu le Viscunte eyent leaument les biens [i]<mobles> venduz [i]<a cely ke [x]<plus> offry venduz kar il pu[x]<rra retter a lui>/

33 memes ke avant le Iur de la soute [d]<e denz karante Iurz apres> poait ses beens [i]<mobles> aver vendu e/

34 par sa main ses deners leve e ne voleit E si le Dettur ne ad mobles [i]<ne nun mobles> dount/

35 tut la dette pusse estre leve: Dunk seit sun cors pris [i]<u ke il seit trove> e em prisun tenu Dekes atant ke il ait/

36 feet gre hu ses amis pur ly e sil nad del soen [i]<dunt> estre sustenu en prisun le Creanzur ly troyse/

37 pain e ewe issi ke il ne murge pur defaute les que custages le dettur ly rende ov la dette/

38 avaunt ke il isse de prisun E si le Creanzur soit Marchaund estraunge il demurra au custages/

39 del dettur [d]<par> tut le tens ke il sura pur sa dette lever dekes au Jur ke le beens [i]<mobles> au dettur seint/

40 venduz hu ly liverez. E si le Creanzur ne se paye pas de la surte sulement le dettur par/

41 quei [d]<il voyle> plegges [d]<aver> [i]<li soient trovez> hu mainpernurs les mainpernurs hu les plegges veynent devant le/

42 Maire e le avantdist clerk e se obligent par escrit e par reconisaunce sy cum avant est dist del/

47 dettur. En meme la manere si la dette ne soit pae al Iur assis sait fet le execuciun su les plegges/

44 hu mainpernurs cum avant est dist del dettur. issi nepurkaunt ke taunt cum la dette pusse playnement/

45 estre levee de biens [i]<mobles> au dettur les mainpernurs hu les plegges ne eent damage [x]<mes en> defaute/

46 de bens [i]<mobles> au dettur ait le Creanzur recoverer su les mainpernurs hu su les plegges [x]<en la forme>/

47 ke avant est dite del dettur [i]<+> [see line 55 below] Cest ordeinement e establisement veut le Roy [x]<qe desoremes seit tenu>/

48 par tut sun reaume de Engleterre entre quel gent ke sceo seyent ke de lur [x]<eindegre voderunt>/

49 tel reconisaunce fere horpris Jus al queus ceste est[x]<ablisement ne se estent pas. E par cest esta>/

50 blisement [i]<ne seit bref de dette abatu> ne seent pas le Chaunceler [i]<(?)>baruns del Escheker [x]<Justices del un Baunc e del autre e>/

51 iustices herraunz forclos de prender reconisances de dette [x]<de ceus qi> devant eus fetes [x]<voderunt fere>/

52 mes le execuciun des conisaunces devant eus [x]<seyent pas fetes par la forme avauntdite>/

53 mes par le ley e le usage [i]<e la manere> avant use./

Foot:

54 en pardurable testmoyne/

55 E a sustenir le Custage del avant dist clerk si prendra le Rey de Chekun livre un [x]< denier>/ [this line is marked for insertion at + at line 47]

APPENDIX B

The statute of Acton Burnell

PRO C 54/100 m 2d: Close Roll, 11 E I

(Chancery: Chancery Division of the High Court and Central Office of the Supreme Court of Judicature: Enrolment Office: Close Rolls)

The Close Roll text of Acton Burnell is preferred to the text at 1 *Statutes of the Realm* 53-54, since that is compiled from at least three sources, none of which is undoubtedly contemporary. They are:

1. The 'Great' Chancery Statute Roll (C 74/1 m 46: Chancery: Statute Rolls). This membrane is possibly *circa* 1285 (H.G. Richardson and G.O.Sayles, *The Early Statutes*, (1934) 50 LQR 201, 212).
2. 'Liber A' (E 36/274 f 310b: Exchequer: Treasury of the Receipt: Miscellaneous Books). The PRO catalogue dates this volume at *c* 1282 X *c* 1292.
3. 'Liber X' (E 164/9 f 40: Exchequer: King's Remembrancer: Miscellaneous Books: Series I). The PRO catalogue gives the earliest date for the compilation of this volume at *c* 1294.

No Latin text of this statute has been located.

The numbers in the margin represent the line numbers of the Close Roll.

Statutum editum pro mercatoribus ad debita sua celeriter recuperanda

1 Pur coe qe Marchaunz qe avaunt ces houres unt preste lur aver a diverse genz
sunt cheuz en poverte pur ceo qe il ni aveit pas si redde ley purvewe par la quele
il poeyent lur dettes/
2 hastivement recoverir al ior asis de paye e par cele achesun sunt mult de
Marchaunz sustretz de venir en ceste terre od lur marchaundises a damage des
Marchaunz e de/
3 tut le reaume le Roy par lui e par sun conseil ad ordine e establi qe Marchaunt qi
veut estre seur de sa dette face venir sun dettur devaunt le Maire de Lundr'/
4 ou de Everwyk ou de Bristowe e devaunt le Meire e devant un Clerk qi le Roy a
ceo atornera conoisse la dette e le ior de la pae e seit le reconisaunce en/

5 roullee de la main le avauntdit Clerk ke serra conue E estre ceo lavauntdit Clerk face de sa main le escrit de obligacioun al quel escrit seit mis le seal del/

6 dettur od le seal le Roy qe a ceo est purveu le quel seal demorra en sauve garde le Meire e del Clerk avauntdit E si le dettur nene rende al ior qe lui est asis/

7 ci veigne le Creaunzur al Meire e al Clerk od sa lettre de obligacion E si trove seit par roule e par lettre qe la dette fu conue e qe le ior asis seit passe le Meire/

8 par vewe de prodeshomes meintenaunt face vendre les moebles al dettur com ateint de la dette si com chatels e burgages devisables desqes a la summe de la dette/

9 e les deniers saunz delay paez as Creaunzurs. E si le Meire ne troesse achatur face par renable pris liverer les moebles al Creaunzur desqe a la summe de la dette en/

10 allowance de sa dette E a la vente e a la liveree des burgages devisables serra mis le seal le Roy avauntdit en perdurable tesmoinaunce E si le dettur ne eit moeble/

11 en le poer le meire dunt la dette pust estre levee einz eit aillurs en le reaume dunqe maunde le Meire desuz le seal avauntdit a Chauncelier la conoissaunce fete de/

12 vaunt lui e le avauntdit Clerk e le Chauncelier envoye bref al Viscunte en qi baillie le dettur avera moebles e le Viscunte face fere gre al Creaunzur par mesme la/

13 forme qe est devisee qe le Meire le fereit si les biens moebles [i]<al dettur> fussent en sun poer mes bien se gardent ceus qi priserunt les moebles pur liverer al Creaunzur qe il/

14 imettent resnable pris e owel qe si il les prisent trop haut en favor del dettur e en damage del Creaunzur la chose prisee seit liveree a ceus qi la averunt prise/

15 par le pris qe mis i unt e meintenaunt respoignent al Creaunzur de sa dette E si le dettur voille dire qe ses biens moebles furent venduz ou liverez pur meins qe il/

16 ne valent, de ceo ne purra il remedie aver par quei qe le Meire ou le Viscunte eyent leaument les biens moebles a celui qi plus offri vendu Car il purra retter a lui/

17 meimes qe avaunt le ior de la soute poeit ses biens moebles aver vendu e par sa main les deniers leve e ne voleit. E si le dettur nad moebles dunt tute la dette/

18 pusse estre levee dunqe seit sun cors pris ou qe il seit trove e en prisun tenu desqe taunt qe il eit fet gre ou ses amis pur lui. E si il nad del soen dunt estre sustenu/

19 en prisun le Creaunzur le creaunzur (sic) lui trosse pain e ewe issi qe il ne moerge pur defaute les quels custages le dettur lui rende od la dette avaunt ceo il isse de prisun/

20 E si le Creaunz(ur) seit Marchaunt estraunge il demorra as custages del dettur tut le tens qe il siwera pur sa dette lever desqe al ior qe les biens moebles al dettur/

21 seyent venduz ou a lui liverez. E si le Creaunzur ne se pae pas de la seurte solement le dettur par quei plegges lui seyent trovez ou mainpernurs les mainpernurs/

22 ou les plegges veignient devaunt le Meire e le avauntdit Clerk e se obligent par escrit e par reconoissaunce sicom avaunt est dit del dettur En mesme/

23 la maniere si la dette ne seit pae al ior asis seit fete la execucion sur le plegges ou mainpernours cum avaunt est dit del dettur issi nepurquant qe taunt/

24 come la dette pusse pleinement estre levee des biens moebles al dettur les mainpernurs ou les plegges ne eyent damage mes en defaute des biens moebles al dettur/

25 eit le Creaunzur recoverir sus les mainpernurs ou ses (badly emended to sus) les plegges en la forme qe avaunt est dite del dettur. E a sustenir les Custages lavauntdit clerk si/

26 prendra le Roy de chescune livre un denier. Cest ordeinement e establissement veut le Roy qe desoremes seit tenu par tut sun reaume de Engleterre entre quel/

27 gent qe ceus seyent qe de lur eindegre voderunt tele reconoissaunce fere forpris Jeus as quels cest establissement ne se estent pas. E par cest establissement/

28 ne seit bref de dette abatu. E ne soyent pas le Chauncelier Baruns del Escheqere Justices del un Baunc e del autre e iustices erraunz forclos de prendre re/

29 conoissaunces de dettes de ceus qi devaunt eus le voderunt fere mes les execucions de Conoissaunces devaunt eus ne seyent pas fetes par la forme avauntdite/

30 mes par la ley e le usage e la maniere avaunt usee. Donee a Actone Burnel le duzim ior de Octobr' en lan de nostre regne unzime./

Margin: C

31 Consimilia statuta habent maiores Ebor' + Bristoll'. Linc' + Wynton'[1] + Sallop'[2]

---

1 Linc' + Wynton' : Later hand

2 + Sallop' : Later hand

APPENDIX C

The statute of Merchants (1285)

1 *Statutes of the Realm* 98-100

The text in *Statutes of the Realm* is taken from the 'Great' Chancery Statute Roll (C 74/1 m 46d: Chancery: Statute Rolls). See note to Appendix B. The text of Merchants is endorsed on the membrane which gives Acton Burnell.

The footnotes in *Statutes of the Realm*, reproduced here, refer to two other exemplars of the statute:
1. 'Liber A' (E 36/274: Exchequer: Treasury of the Receipt: Miscellaneous Books). See note to Appendix B; and
2. MS BL Cotton Claudius D.II. *A Catalogue of the Manuscripts in the Cottonian Library deposited in the British Museum* (London, 1802) dates (p.195) the manuscript as fourteenth century, and the statutes are described (p.196, item 63) as copied from the 'Great' Chancery statute roll (item 1, above).

The footnotes also note substantive divergences between manuscript copies of the statute examined during this study but not by the editors of the *Statutes of the Realm*, and the text presented in that edition.

Pur ceo qe Marchaunz qi avaunt ces hures unt preste lur aver a divers genz, sunt cheuz en poverte pur ceo qe il ni avoit pas si redde ley purvewe par la quele il poeient lur dettes hastivement recoverir au jour assis de paye; E par cele encheson sunt mulz des marchaunz sustrez de venir en ceste terre ove lur
5 marchaundises, a damage des marchaunz e de tut le reaume; Le Rey par luy e par sun counseil a sun parlement, qe il tint a Acton' Burnell, apres la Seint Michel le an de sun regne unzime, fist e ordina establissement sur ceo a remedie des marchaunz, le quel ordeinement e establisement le Rey comaunda qe tenuz fuissent e fermement gardez en tut sun Reaume, dunt marchaunz unt eu
10 remedie, e a mains meschief e travail unt recovre lur dettes, qe avaunt ne soleient: Mes pur ceo qe marchaunz puys se pleindrent al Rey qe Viscuntes qi malement enterpretent sun statut, e aconefei par malice e par mal enterpreteison

delaerent lexecucion del statut a grant damage des marchaunz, le Rey a sun Parlement a Westm' apres Pask, lan de sun regne troizime, fist reciter lavauntdit statut fet a Acton' Burnell; E pur declarerer aquns articles de sun statut avauntdit ad ordine e establi, qe marchaunt qi veut seur de sa dette face venir sun dettur devaunt le meyre de Appelby[1] ou devaunt autre chief gardeyn de vile ou de autre bone vile ou le Rey ordinera; E devaunt le meire, ou chief gardein, ou autre prodhome a ceo eslue e jure, quaunt meire ou chief gardeyn ne poet entendre, e devaunt un des clers,[2] qi le Rey a ceo atornera qaunt ambedeus ne poent entendre, conusse la dette, e jour de la paie, e seit la conoissaunce enroullee de la main del un des clers[3] avauntdiz qi serra conue, e la Roule duble, dunt le un demorge vers le meire ou chief gardein, e lautre vers le Clerk qi a ceo primes serra nome; E estre ceo un des avauntdiz clers de sa main face le escrit de obligacion a quel escrit seit mis le seel del Dettur ove le seel le Rey, qe a ceo est purvue, le quel seel serra de deus pieces, dunt la greignour piece demorra en la garde le meire ou chief gardein, E lautre piece en la main le Clerk avauntdit. E si le dettur ne rende al jour qe lui est assis, si veigne le marchaunt al Meyre e al Clerk, ove sa lettre de obligacion; E si trove seit per roule ou par lettre qe la dette fust conue, e le jour assis seit passe, si face le Meyre ou chief gardeyn prendre le cors al dettur sil est lay, quel houre qe il seit trove en sun poer, e liverer a la prison de la vile, si prison iseit, e la demoerge a ses custages propres desqe ataunt qil eit fet gre de la dette. E comaunde est qe le gardein de la prison de la vile le reteigne par la livere del meyre ou le gardeyn; E sil nele voille receivre, si respoigne meintenant le gardein de la prison de la dette, sil eit de qei: E sil nad de qei, si respoigne celui qi la prison luy bailla a garder;[4] E si le dettur ne poet estre trove en le poer del meyre ou chief gardein, dunqe maund le meyre ou chief gardein, desuz le seel le Rey avauntdit al Chaunceler, la conoissaunce fete de la dette; E le Chaunceler envoie bref al Viscunte, en qi baillie le dettur serra trove, qil preigne son cors, sil est lay, e en sauve prison le

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1 Liber 'A' and MS Cotton Claudius D ii have 'Lundres'

2 MS Bodl. Douce 139 f 156 reads 'un de deu clers'

3 MSS Bodl Douce 139 and MS Rawlinson C 612b f 60b state that the recognisance was to be enrolled 'de la main del un de deus clers'

4 'A garder' interlined on the Chancery roll. Liber 'A' omits

garde desqe ataunt qil eit fet gre de la dette; E dedenz un quarter del an, apres ceo qe il serra pris, eit ses chateus e ses terres delivres, issint qe par les soens puisse lever e paier la dette; E bien luy list, dedenz le quarter, terre et tenement vender pur ses dettes aquiter, E sa vente serra ferme et estable. E sil ne face gre dedenz le quarter[5] passe, seient liverez au marchaunt touz les biens del dettur, e totes ses terres par resnable estent, a tenir desqe ataunt qe la dette pleinement serra levee, E ja la plus tart le cors demoerge en prison cum avaunt est dit; E le marchaunt luy truisse pain e ewe; E eit le marchaunt en ceuls tenemenz a luy liverez, ou son assigne tele seisine qil puisse porter bref de novele disseisine sil seit engete, e redeseisine autresi cum de frank tenement, a tenir a lui e a ses assignez, taunt qe la dette sait paiee: Apres la dette levee e paee seit le cors al dettur delivere ove sa terre. E en le bref, qe le Chaunceler enverra, seit mencion fet qe le Viscunte certefie les Justices del un baunc ou del autre coment il avera furni le comaundement le Rey a un certein jour. A quel jour le marchaunt, si sun gre ne soit fet, sue devaunt les Justices; E si le Viscunte ne returne nul bref, ou returne qe le bref vint trotart, ou qil ad maunde al baillifs de la fraunchise, si facent les Justices solom ceo qil est contenu en le drein statut de Wemuster. E si par cas le Viscunte maunde qe le dettur nest pas trove, ou seit clerk, si eit le marchaunt bref a tuz les Viscuntes ou il avera terre, qil lui liverent tuz les chateus e les tenemenz al dettur par resnable estent a tenir a luy e a ses assignez en la furme qe est avauntdite; E ja la plus tart, eit bref a quel Viscunte qil vodra de prendre son cors, sil est Lay, e tenir en la furme avauntdite. E bien se garde le gardein de la prisun qil luy covendra respundre del cors, ou de la dette. E apres ceo qe les terres al dettur serrunt livereez al marchaunt bein lirra au dettur sa terre vendre issint qe le marchaunt neit damage de ses approumenz. E sauvez seient touz jours al marchaunt damages, e chescunz custagez necessaires e resunnables en travails, sutes, delaies e en despenses. E si le dettur truisse plegges, qi se conoissent estre principals detturs, apres le jour passe seit fet des plegges en totes choses cum est dit del principal dettur, quant a cors prendre e terres liverer, e autres choses. E quant les terres al detturs serrunt liverez as marchaunz, si eit seisine de totes les terres, qe furent en la main le dettur, le jour

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5 Liber 'A' has 'apres le quarter'

qe la conoissaunce fu fete, en qi mein qe eles serrunt apres devenuz, ou par feffement, ou par autre manere. E apres la dette paie, les terres issuez del dettur[6] par feffement, returnent autresi bien arere al feffe cum les autres terres as detturs. E si le dettur ou plegge moerge, point neit le marchaunt recoverir a prendre le cors le Eir, mes a ses terres cum avaunt est dit sil est de age, ou quant il serra de age. E seit purveu un seel qi serve as feires; E i ceo seel serra envoie a chescune feire desuz le seel le Rey par un clerk Jure. E par le Gardein[7] de la feire e [8] la communaute des marchaunz seient elluz deus leus marchaunz de la cite de Lundres[9] qil facent le serment; e devaunt eus seit le seel overt; E la une peece seit baille as avauntdiz marchaunz, e lautre demoerge vers le clerk; E devaunt eux ou le un des marchaunz, si amdeus ni poent estre, seient les conoissaunces fetes cum devaunt est dit. E avaunt ceo qe nule reconoissaunce seit enroullee seit la peine del statut apertement leu devaunt le dettur, issint qil ne puisse autrefoiz dire qe lom li met autre peine, qe icele au quele il se obliga. E a sustenir les custages del avauntdit clerk, si prendra le Rey de chescune livre un dener en chescune vile ou le seel serra, horepris Faire ou il prendra treis mailles de la livre. Cest ordeinement e establisement veut le Rei qe desoremes seit tenu par tut sun reaume de Engleterre e de Irlaunde, entre quelsz genz, qi ceo soient, qi de lour eindegre vodrunt tele reconoissaunce fere, forspris Jeus, as queus cest establisement ne sestent pas. E par cest establisement ne seit pas bref de dette abatu: E ne seient pas le Chaunceler, Baruns del Escheker, Justices del un baunc e del autre e Justices erraunz forclos[10] de prendre reconissaunces de dettes de eus qi devaunt eux les vodrunt fere; mes les execucions des conoissaunces devaunt eus fetes par la furme avauntdite, mes par le ley, e le usage, e la manere purveue aillors en autre estatut.

Memorandum Consimile statutum de verbo ad verbum habent Maior et Cives Exon'

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6 Liber 'A' has 'issues des dettours'; MS.Cotton Claudius D ii has 'issuez des dettours'

7 Liber 'A' has 'juree a per le gardein'

8 'par'; Old Printed Copies

9 MS Bodl *Douce* 98 f 66d has 'ou de la Cite de Everwyk'

10 'forclos' interlined on the Chancery Roll

APPENDIX D

The statute of Merchants (1285)

Fleta Book 2 Chapter 64: 72 SS 212-216

'J'= BL Cotton. MS.Julius B.VIII.

The modern scholarly edition is based on the 1647 and 1685 editions of *Fleta* by John Selden

De Debitoribus et Creditoribus

Cum mercatores et alii creditores qui temporibus retroactis bona et catalla sua diversis debitoribus crediderint dampnum ac paupertatem incurrerent pro eo quod conpetens remedium nullatenus ordinabatur, per quod diebus statutis pro solucionibus bona sua sic credita recuperare nequiverant, ob quod plerique cum bonis et mercandisis suis in hoc regnum venire retraxerunt ad dampnum eorum et forte tocius regni, dominus rex nuper in parliamento suo apud Actone Burnel habito, supplendo defectus predictos, debitum fecit remedium ordinari. Verum quia ordinacio illa in aliquibus articulis per diversos ministros, vicecomites et alios ballivos voluntarias cepit interpretaciones, idem rex in parliamento suo apud Westmonasterium anno regni sui xiij°. termino Pasche predictos articulos declarari fecit in hunc modum.

In primis ordinavit quod cuicumque de bonis suis credendis firmam affectaverit securitatem optinere venire faciat suum debitorem coram capitali custode civitatis et ad hoc per regem deputato et coram quodam clerico, cuius erit rotulum recognicionum dupplicare, quorum unus penes dictum custodem. maiorem vel eius locum tenentem remanebit et alius penes clericum memoratum, coram quibus predictus debitor cognoscat debitum suum et diem solucionis inter ipsum et creditorem suum prefixum, quam idem clerus (sic) statim manu sua irrotulabit et litteram eciam obligatoriam faciet nomine debitoris eiusdem quemadmodum cognovit, cuius tenor talis est:

Noverint universi me A. de tali comitatu teneri B. in x. marcis, solvendis eidem ad festum Pentecostes anno regni regis etc. Et nisi fecero, concedo quod currant super me et heredes meos districcio et pena provise in statuto domini regis apud Westmonasterium. Datum Londoniis tali die anno supradicto.

Ad quam idem debitor apponat sigillum suum, ad quam eciam quoddam sigillum regis ad hoc specialiter de duabus peciis provisum apponatur in testimonium, unde medietas penes custodem et alia penes predictum clericum salvo custodienda remanebit.

Item si debitor predictus solucionis diem non servaverit, statim ad querimoniam creditoris litteras predictas ostendentis capiatur corpus eiusdem debitoris, si in eorum potestate inveniatur, et custodie marescalli mancipetur in qua custodiatur donec creditori suo satisfecerit conpetenter. Et precepit rex omnibus custodibus gaolarum suarum quod huiusmodi debitores sic custodiendos admittant quociens ab huiusmodi custodibus inde fuerint requisiti. Alioquin de satisfaciendo huiusmodi creditoribus debito petito teneantur. Et si huiusmodi prisonarii ad hoc non sufficiant, superiores inde respondebunt. Et si debitor in potestate illius maioris vel custodis non inveniatur, tunc sub prefato sigillo regis scribatur suo cancellario sic:

Venerabili in Christo patri et domino suo karissimo, domino A., Dei gracia tali episcopo, illustris regis Anglie cancellario, talis custos talis civitatis et talis clericus ad recogniciones debitorum accipiendas deputati, salutem cum omni reverencia et honore. Reverende dominacioni vestre significamus per presentes quod A. de comitatu tali recognovit coram nobis se debere B. x. marcas, solvendas eidem ad tale festum iuxta formam statuti regis anno regni regis xiij°. editi apud Westmonasterium. Et quia predictus A. terminum solucionis sue non servavit, ut predictus B.dicit, reverende dominacioni vestre humiliter et devote supplicamus quatinus scribere iubeatur vicecomiti Herefordie

quod eundem A. ad solucionem predicte pecunie iuxta formam statuti predicti conpellat.

Et erit huiusmodi littera patens ut pro waranto cancellarii habeatur. Et sciendum quod clericus, nisi habeat uxorem, nec minor nec uxor habens virum non poterunt ad predictam penam obligari. Et postquam idem debitor in huiusmodi prisona extiterit, habeat suorum mobilium et inmobilium (sic) liberam administracionem durante primo quarterio anni post eius capcionem, qui si aliquid inde vendiderit pro rata habebitur illa vendicio, non obstante inprisonamento predicto. Quia si in illo quaterio non satisfecerit, ex tunc liberentur eidem creditori omnes terre omniaque catalla predicti debitoris, per racionabile precium, nomine liberi tenementi tenenda donec plenarie leventur tam debitum quam dampna, et nichilominus remaneat idem debitor in prisona, cui predictus creditor panem inveniet pro victu et aquam. Et si ab huiusmodi tenementis eiciatur, statim conpetit ei remedium per assisam nove disseisine et redisseysine, si necesse fuerit, ita quod liberum tenementum habeat in eisdem durante termino suo.

Et in brevi vicecomiti faciendo fiat mencio quod ad diem in brevi contentum certificet regem vel eius cancellarium vel iusticiarios de banco qualiter mandatum regis sibi directum fuerit assecutus. Ad quem diem creditor[1] coram iusticiariis sequatur, si sibi non fuerit de debito suo satisfactum. Et si retornaverit quod huiusmodi debitor non est inventus in balliva sua, habeat petens breve cuicumque vicecomiti eligere voluerit quod ille vicecomes habere sibi faciat seysinam omnium terrarum et tenementorum et omnia catalla ipsius debitoris et quod corpus debitoris capiat, si laycus sit. Et caveant sibi custodes ne capti negligenter custodiantur eo quod, si contingat huiusmodi captos a prisonis huiusmodi abire priusquam creditoribus suis de debito petito simul cum dampnis, misis necessariis et custibus racionabilibus in laboribus, dilacionibus et expensis plenarie satisfecerint, extunc ipsi custodes de premissis satisfacere creditoribus teneantur.

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1 J: creditori

Item si huiusmodi debitores plegios invenerint qui se tanquam principales debitores obligaverint die solucionis non observato, tunc fiat de eis in omnibus prout de principalibus est ordinatum. Nec solum fiat creditori seysina de terris et tenementis que fuerunt in manibus debitoris inventis, set eciam de omnibus terris et tenementis que fuerunt ipsius debitoris in feodo die quo recognicionem fecit in quorumcumque manus devenerint per feoffamentum vel alio modo, nisi per mortem debitoris devenerint huiusmodi terre et tenementa ad heredem infra etatem existentem. Et quam cicius de huiusmodi terris debitum suum cum pertinenciis recuperaverit, revertantur terre et tenementa predicta debitori et feoffatis vel heredibus suis. Si autem debitor et plegii mortui fuerint, tunc non habeat creditor breve ad corpora heredum capienda, set tantum ad terras et tenementa et catalla in forma supradicta. Et cum creditor debitorem semel dimiserit ad capcionem eius, ea occasione quam prius non habebit regressum, eo quod de novo contracto presumendum est, ex quo vadium a manu sua semel liberavit, et novo contractu nova sorciatur accio.

Breve autem vicecomiti dirigendum tale erit:

Rex vicecomiti salutem. Quia A.coram tali custode talis civitatis recognovit se teneri[2] B. in x. marcis quas ei solvisse debuit a die Pasche in xv.dies anno regni regis etc. et eas nondum soluit, ut dicit, tibi precipimus quod corpus ipsius A. capias et salvo in prisona nostra custodiri facias donec eidem B.de predicto debito plenarie fuerit satisfactum. Et qualiter hoc preceptum nostrum fueris executus nobis scire facias per litteras suas sigillatas in octabis sancti Hillarii ubicumque tunc fuerimus in Anglia, et habeas ibi hoc breve. Teste etc.

Si autem vicecomes retornaverit quod debitor non potuit in balliva eius inveniri postquam huiusmodi breve sibi venit, tunc fiat tale breve de iudicio:

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2 J: debere

Rex vicecomiti salutem. Cum nuper tibi preceperimus quod, quia A.coram etc.tu nobis retornasti ad eundem terminum quod predictus A. non fuit inventus in balliva tua postquam breve nostrum inde tibi venit, tibi precipimus quod omnia bona et catalla, simul cum omnibus terris et tenementis que fuerunt predicti A. in ballivia tua die quo predictum debitum recognovit, ad quorumcumque manus devenerint per feoffamentum vel alio modo, nisi terre et tenementa illa ad heredem infra etatem existentem devenerint, eidem B.vel eius assignato per racionabile precium deliberari facias, tenendi nomine liberi tenementi quousque prefato B. de predicto debito satisfecerit, simul cum dampnis et custagiis necessariis in laboribus, sectis, dilacionibus et racionabilibus expensis. Et si contingat corpus ipsius A. in ballivia tua interim inveniri, si laycus sit, tunc illud capias et salvo in prisona nostra custodias ita quod per unum quarterium anni postquam captus fuerit ivvat[3] de suo proprio in prisona nostra, infra quod quarterium anni habeat terras suas et tenementa, bona et catalla sua, deliberata, de quibus per suos possit predictam pecuniam levare et predicto B. satisfacere, si voluerit, quorum vendicio infra predictum terminum stabilis erit et firma, corpore predicti A. in prisona nostra nichilominus interim remanente cui predictus B. inveniet panem et aquam ad victum. Et caveas quod predictus A. postquam captus fuerit in salva custodiatur prisona, quia si contingat ipsum a prisona nostra evadere, de corpore vel de debito te oportebit respondere. Et qualiter hoc preceptum nostrum etc.

Et si petens per se vel per procuratorem seysinam inde non fuerit prosecutus, et vicecomes ad diem retornaverit quod talis non fuit inventus in ballivia sua postquam breve inde sibi venit, nec quod aliquis venit pro querente seysinam terrarum et rerum mobilium petiturus, tunc iterum precipiatur sicut alias nisi petens petat aliud breve alii vicecomiti, in cuius comitatu corpus debitoris capi poterit, destinari. Qui si capiatur, tunc ordinatus est sic quod salvo in prisona custodiatur donec creditori suo satisfecerit.

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3 J: vivat

De Districcionibus in Nundinis

Item provisum est quod aliud fiat sigillum specialiter pro nundinis. Unde, electis duobus mercatoribus fidedignis de civitate Londoniarum per tocius communitatis mercatorum nundinarum assensum et ad officium subscriptum iuratis, statim liberetur eis eiusdem sigilli medietas, cuius altera penes quemdam clericum per regem ad hoc deputatum remanebit, coram quibus vel altero saltem mercatorum fiant recogniciones. Et priusquam debitores fecerint suas recogniciones, legatur eis pena statuti ut inde legitime premuniantur. Clericus autem nundinarum tempore pro qualibet libra argenti recognita tres denarios percipiet et obolum. Alibi autem qui fuerit clericus pro qualibet libra cognita de uno denario sit contentus pro sustentacionibus.

Has igitur constituciones precipit rex per totum regnum et dominium suum, Anglie scilicet et Hibernie, firmiter observari. Nec propter hoc suspendantur recogniciones faciende coram iusticiariis et ad scaccarium et alibi in curia regis, nec breve de debito nec forma execucionis consueta.

APPENDIX E

Westminster II c. 11

1 *Statutes of the Realm* 80-81

De servientibus, Ballivis, Camerariis et quibuscumque receptoribus, qui ad compotum reddendum tenentur concorditer est statutum et ordinatum, quod cum dominus huiusmodi serviencium dederit eis auditores compoti, et contingat ipsos esse in arreragiis super compotum suum, arrestentur corpora ipsorum per testimonium auditorum eiusdem compoti, et mittantur aut liberentur proxime gaole domini Regis in partibus illis, et a Vicecomite seu custode eiusdem gaole recipiantur et mancipentur carceri in ferris sub bona custodia, et in illa prisona remaneant de suo proprio viventes, quousque dominis suis de arreragiis plenarie satisfecerint. Attamen si quis sic gaole liberatus, conqueratur quod auditores compoti ipsum iniuste gravaverunt, onerando de receptis que non recepit, vel non allocando expensas aut liberaciones racionabiles, et inveniat amicos qui eum manucapere voluerint ad ducendum coram Baronibus de Scaccario, liberetur eis; et scire faciat Vicecomes in cuius prisona fuerit domino quod sit coram Baronibus de Scaccario ad aliquem certum diem, cum rotulis et talliis per quos compotum reddiderit, et in presencia Baronum vel auditorum, quos assignare voluerint recitetur compotus et fiat partibus iustitia, Ita quod si fuerit in arreragiis committatur gaole de Flete ut supradictum est. Et si defugerit et gratis compotum reddere noluerit, sicut alibi in aliis statutis continetur, distringatur ad veniendum coram Iusticiariis ad compotum suum reddendum, si habeant per quod distringi possint. Et si ad curiam venerint dentur auditores compoti, coram quibus si fuerint in arreragiis, si statim arreragia solvere non possint committantur gaole custod' in forma predicta. Et si defugerit et testatum fuerit per Vicecomes quod non sunt inventi exigantur de Comitatu in Comitatum quousque utlagentur et sint huiusmodi incarcerati irreplegiabiles. Et caveat sibi vicecomes vel custos eiusdem gaole, sive sit in libertate sive non, quod per commune breve quod dicitur Replegiar' vel alio modo sine assensu Domini, ipsum a prisona exire non permittat, quod si fecerit, et super hoc convincatur, respondeat Domino de dampno per huiusmodi servientem sibi

illato, secundum quod per patriam verificare poterit et habeat suum recuperare
30 per breve de debito. Et si custos gaole non habeat per quod iusticietur vel unde solvat, respondeat superior suus, qui custodiam huiusmodi gaole sibi commisit per idem breve.

APPENDIX F

Westminster II c.18

1 *Statutes of the Realm* 82

Cum debitum fuerit recuperatum vel in curia Regis recognitum, vel dampna adjudicata, sit decetero in eleccione illius qui sequitur pro huiusmodi debito aut dampnis, sequi breve, quod Vicecomes fieri faciat de terris et catallis, vel quod Vicecomes liberet ei omnia catalla debitoris, exceptis bobus et affris caruce et medietate terre sue, quousque debitum fuerit levatum per racionabile precium vel extentam: et si eiciatur de illo tenemento, habeat recuperare per breve Nove disseisine et postea per breve redisseisine si necesse fuerit

Fleta's account of Chapter 18 (*Fleta* Book 2 Chapter 62; 72 SS 208) differs in one key respect; the creditor is to have a choice between a writ of *fieri facias* against the lands and goods of the debtor or a writ of *elegit*, lying against all the chattels of the debtor *quatenus sufficiant*. However, it is only if their value falls short of the debt that execution under *elegit* lies against half the lands of the debtor;

..vel quod vicecomes liberet ei omnia catalla debitoris quatenus sufficiant, exceptis bobis et affris caruce sue, unacum medietate terrarum debitoris si catalla non sufficiant ...

APPENDIX G

Westminster II c. 39

1 *Statutes of the Realm* 90-91

Quia Iusticiarii, ad quorum officium spectat unicuique, coram eis placitanti iusticiam exhibere, frequencius impediuntur quominus officium suum debito modo exequi possent, per hoc quod vicecomites brevia originalia et judicalia non returnant, per hoc eciam quod ad brevia Regis falsum returnant responsum, providit dominus Rex et ordinavit, quod illi qui timent maliciam vicecomitis liberent brevia sua originalia et judicalia in pleno Comitatu, vel in retro Comitatu, ubi fit colleccio denariorum Domini Regis, et capiatur bilettum de vicecomite presente vel subvicecomite in quo biletto contineantur nomina petentis et tenentis que nominantur in brevi et ad requisicionem illius qui breve liberabit apponatur sigillum vicecomitis vel subvicecomitis in testimonium et fiat mencio de die liberacionis brevis. Et si vicecomes vel subvicecomes huiusmodi biletto sigilla sua apponere noluerint, capiatur testimonium militum et aliorum fide dignorum qui presentes fuerint, qui sigilla sua huiusmodi biletto apponant. Et si vicecomes brevia sibi liberata non returnavit, et super hoc iusticiariis querimonia perveniat, mandetur per breve de iudicio Justiciariis ad assisas capiendas assignatis, quod inquirant per eos qui presentes fuerint quando breve vicecomiti liberatum fuit si sciverent de illa liberacione, et inquisicio retornetur. Et si compertum fuerit per inquisicionem quod breve fuit ei liberatum adiudicentur petenti vel querenti dampna habito respectu ad quantitatem et qualitatem accionis et ad periculum quod ei evenire posset per dilacionem, quam paciebatur; Et per istam viam fiat remedium, quando vicecomes respondet quod breve adeo tarde venit quod preceptum Regis exequi non potuit.

Multociens eciam capiunt placita dilacionem per hoc quod vicecomites respondent quod preceperent Ballivis alicuius libertatis qui nichil inde fecerunt et nominant libertates que nunquam returnum brevium habuerunt, propter quod ordinavit Dominus Rex quod Thesaurius de Scaccario liberetur in rotulo omnes libertates in quibuscumque Comitatibus, que habent returnum brevium. Et si vicecomes respondeat quod returnum fecit ballivis alterius libertatis quam alicuius contente in

predicto rotulo, statim puniatur vicecomes tanquam exheredator Domini Regis et Corone sue. Et si forte respondeat quod retornavit Ballivis alicuius libertatis, que veraciter returnum habet, mandetur vicecomiti quod non omittat propter predictam libertatem, quin exequatur preceptum domini Regis, et quod scire faciet Ballivis quibus fecit returnum quod sint ad diem in brevi contentum ad respondendum quare de precepto Domini Regis execucionem non fecerunt; et si ad diem venerint et se acquietent quod returnum brevis eis non fuit factum statim condempnetur vicecomes domino illius libertatis et similiter parte lese per dilacionem in restitucionem dampnorum. Et si ballivi ad diem non venerint, vel venerint et supradicto modo se non acquietaverint, in quolibet brevi de iudicio quamdiu durat placitum, precipiatur vicecomiti quod non omittat propter libertatem etc. Multociens eciam falsum dant responsum, quoad illum articulum, Quod de exitibus etc. mandantes aliquando et mencientes, quod nulli sunt exitus, aliquando quod parvi sunt cum de majoribus respondere possunt, aliquando non facientes mencionem de exitibus, propter quod ordinatum est et concordatum quod si querens petat auditum responsionis vicecomes concedatur ei; Et si offerat verificare quod vicecomes, de majoribus exitibus respondere potuit, fiat ei breve de iudicio ad Iusticiarios ad assisas capiendas assignatos, quod inquirant in presencia vicecomitis si interesse voluerit de quibus et quantis exitibus vicecomes respondere potuit, a die recepcionis brevis, usque ad diem in brevi contentum. Et cum inquisicio retornata fuerit, si de pleno prius non respondit oneretur de superplusagio per extractas liberatas ad Scaccarium, et nichilominus graviter amercietur pro concelamento. Et sciat vicecomes quod redditus, blada in grangia, et omnia mobilia preter equitaturam, indumenta et utensilia domus continentur sub nomine exituum: precipit Dominus Rex quod vicecomes pro huiusmodi falsis responsis, semel et iterum si sit necesse, per Iusticiarios castigentur. Et si tercio deliquerint alius non apponat manum quam Dominus Rex. Multociens eciam falsum dant responsum mandando quod non potuerunt prosequi preceptum Regis propter resistenciam potestatis alicuius magnatis, de quo caveant vicecomites decetero, quia huiusmodi responsio multum redundat in dedecus Domini Regis; et quamcito ballivi sui testificentur quod invenerunt huiusmodi resistenciam, statim omnibus omissis, assumpto secum posse Comitatus sui eat in propria persona ad faciendum execucionem; Et si inveniat subballivos mendaces puniat eos per prisonam, ita quod alii per eorum penam castigentur; Et si inveniat eos veraces, castiget

resistentes per prisonam, a qua non deliberentur sine speciali precepto domini Regis. Et si forte vicecomes cum venerit resistenciam invenerit, certificet curiam de nominibus resistencium, auxiliancium, consenciencium, precipiencium et fautorum, et per breve de iudicio attachientur per corpora ad veniendum ad curiam; Et si de
65 huiusmodi resistencia convincantur, puniantur secundum quod domino Regi placuerit. Nec intromittat se aliquis minister domino Regi de pena huiusmodi infligenda, quia Dominus Rex hoc specialiter sibi reservat pro eo quod huiusmodi resistentes censentur pacis sue et regni perturbatores.

APPENDIX H

Westminster II c. 45

1 *Statutes of the Realm* 93

Quia de hiis que recordata sunt coram Cancellario Domini Regis et eius Iusticiariis, qui recordum habent et in rotulis eorum irrotulata, non debet fieri processus placiti per summoniciones, attachiamenta, essonia, visus terre, et alias solempnitates Curie, sicut fieri consuevit de contractibus et convencionibus factis extra Curiam; observandum est decetero quod ea que inveniuntur irrotulata coram hiis qui recordum habent, vel in finibus contenta, sive sint contractus sive convenciones sive obligaciones sive servicia aut consuetudines recognita vel alia quecumque irrotulata, quibus Curia Regis, sine iuris et consuetudinis offensa, auctoritatem potest prestare, talem decetero habeant vigorem quod non sit necesse de hiis inposterum placitare; set cum venerint conquerentes ad Curiam domini Regis si recens sit cognicio vel finis videlicet infra annum in brevi levatus statim habeant breve de execucione illius recognicione facte. Et si forte a maiori tempore transacto facta fuerit illa recognicio vel finis levatus precipiatur vicecomiti quod scire faciet parti de qua fit querimonia quod sit ad certum diem ostensurus si quid sciat dicere quare huiusmodi irrotulata vel in fine contenta execucionem habere non debeant. Et si ad diem non venerit, vel forte venerit et nichil sciat dicere quare execucio fieri non debeat, precipiatur vicecomiti quod rem irrotulatam vel in fine contentam exequi faciat. Eodem modo mandetur ordinario in suo casu observato nichilominus quod supradictum est de medio qui per recognicionem aut iudicium obligatus est ad acquietandum.

APPENDIX I

from **The Statute of Jewry (1275)**

1 *Statutes of the Realm* 221a

E si Visconte u autre baillif par comaundement le Rey deit fere seisine al Geu a un ou a plusurs pur lor dette de chateus ou de terre a la value de la dette, les chateus seient pris par serement des prodeshomes e seient baillez a Geu ou a Geus ou a lur message a la mountaunce de la dette; e si les chateus ne suffisent, les terres seient estenduz par meme le serement avaunt ke la seisine seit livere a Geu ou a Geus a checun solom son afferaunt: issi ke lem puisse saver certeinement ke la dette est quite, e la Crestien pusse reaver sa terre, donc sauve tuz jors al Crestien la meyte de la terre e de ces chatels a sa sustenance, com est dit e le chef mees.

APPENDIX J

The 'New' Ordinances c.33 (1311)

1 *Statutes of the Realm* 165

De lestatut de marchantz

Pur ceo qe multz des gentz de poeple autres qe marchantz conuz se sentent mult grevez e reintez par lestatut de Marchaunz fait a Acton Burnel, Nous ordenoms qe cel estatut ne se teigne mes fors qe entre Marchaux et marchaux, et des marchandises entre eux faites, et qe la reconisance se face si come est contenuz en le dit estatut, et par tesmoignanz des quatre prodeshommes et leaux conuz et qe lour nons soient entrez en la reconisanz pur tesmoigner le fait.

Et qe a nuli soient autres terres liverez a tenir en noun de frank tenement par la vertu del dit estatut forspris Burgages des Marchanz et lour chateux moebles, et ceo fait a entendre entre marchanz et marchanz, conuz marchanz.

Estre ceo Nous ordenoms qe le Seals le Roi qe sont assignez pur tesmoigner les dites conissances soient baillees a plus riches et plus sages des villes souzdites a cele garde esleuz par les Comunaltez de mesmes les viles, cest asavoir, a Noef chastel sur Tyne, a Everwik et Notingham pur les contiez de la Trente, et les Marchantz ilokes venantz et demoerantz. A Excestre, Bristeut, et Suthampton pur les Marchantz venantz et demorrantz en les parties del Suth et del West; a Nichol et Northamton pur les Marchantz venantz et demorrantz ilokes; a Loundres et a Cantrebir' pur les Marchantz, venantz et demoorantz en cel parties; A Salop' pur les Marchantz venantz e demorrantz en cel parties; A Norwiz pur les Marchantz venantz et demorrantz en cel parties. Et les reconisances per aillours faites qe en les ditz villes tiegnent nul leu desormes.

APPENDIX K

Requested Destinations of Statutory Writs in Class C 241[1]

County	Number (%age of total)	County	Number (%age of total)
Beds	*58 (0.6%)*	London	41 (0.5%)
Berks	113 (1.3%)	Middx	98 (1.1%)
Bucks	*97 (1.1%)*	*Nhnts*	*105 (1.2%)*
Cambs	*67 (0.8%)*	**Norf**	**457 (5.1%)**
Chesh	*16 (0.2%)*	*Northb*	*52 (0.6%)*
Cornw	*33 (0.4%)*	**Notts**	**374 (4.2%)**
Cumb	*38 (0.4%)*	*Oxon*	*110 (1.2%)*
Derbs	**253 (2.8%)**	*Rutl*	*19 (0.2%)*
Devon	**336 (3.8%)**	**Salop**	**807 (9.0%)**
Dorset	*39 (0.4%)*	Soms	201 (2.3%)
Essex	**339 (3.8%)**	Staffs	121 (1.4%)
Gloucs	120 (1.3%)	Suff	124 (1.4%)
Hants	**472 (5.3%)**	Surr	145 (1.6%)
Heref	**298 (3.3%)**	*Sussex*	*108 (1.2%)*
Herts	145 (1.6%)	*Warw*	*67 (0.8%)*
Hunts	*43 (0.5%)*	*Westm*	*87 (1.0%)*
Ireland	*10 (0.1%)*	*Wilts*	*93 (1.0%)*
Kent	207 (2.3%)	*Worcs*	*69 (0.8%)*
Lancs	*38 (0.4%)*	**Yks**	**1947 (21.8%)**
Leics	137 (1.5%)		
Lincs	**1042 (11.7)%**		Total: 8926 writs requested

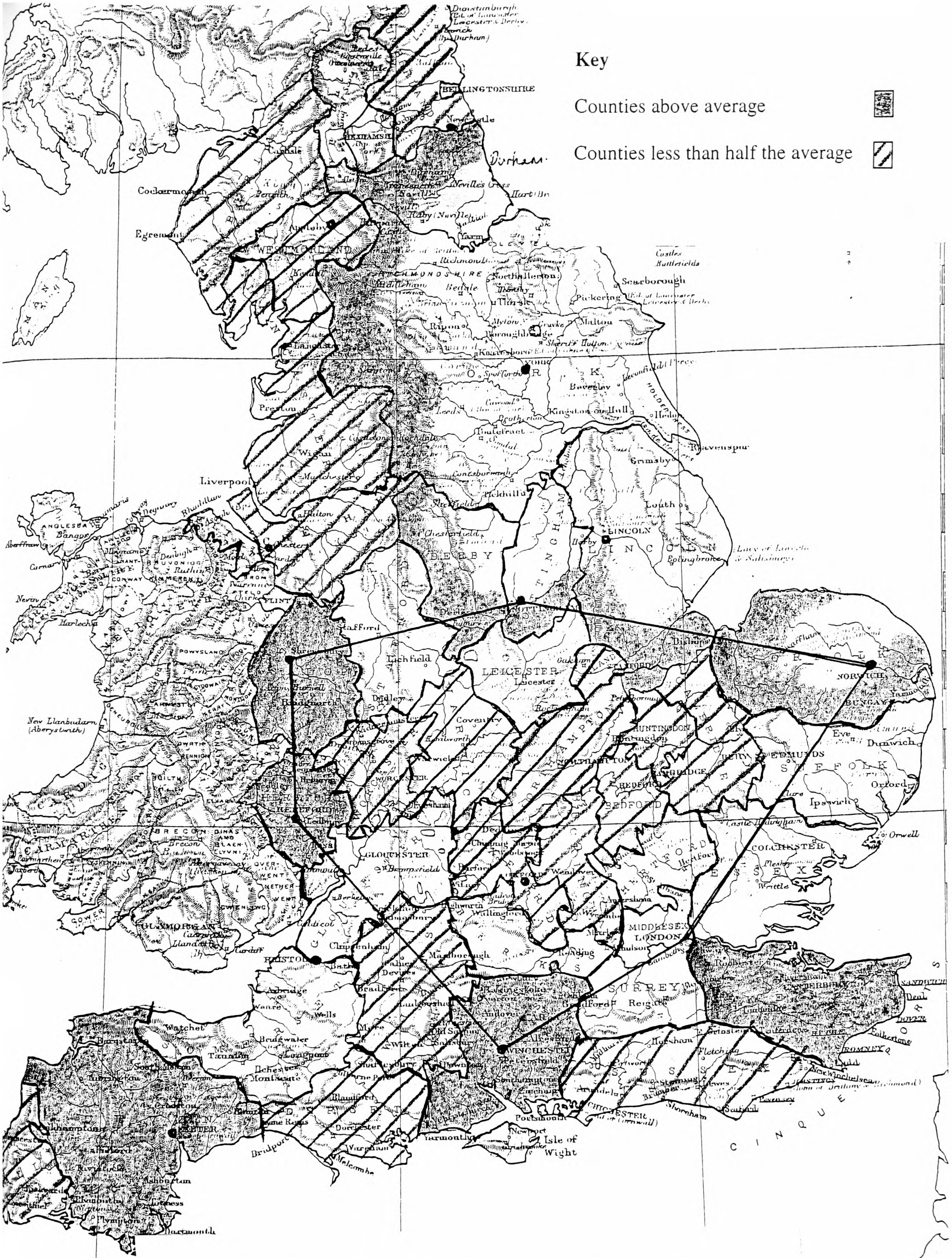
Distributed equally between forty potential addressees of writs, the average proportion of writs requested to each addressee would be 2.5% (223 certificates).

Counties above this average are highlighted.

Counties less than half this average are italicised.

---

[1] C 241/1-53; these figures take account of certificates which name more than one sheriff, but do not exclude 'repeat' certifications. For the destination of writs requested from individual registries, see Appendix M


Key
Counties above average
Counties less than half the average
Durham
Liverpool
LINCOLN
YORK
LEICESTER
Leicester
NORFOLK
NORWICH
SUFFOLK
ESSEX
SURREY
LONDON
MIDDLESEX
HUNTINGDON
BEDFORD
CAMBRIDGE
DERBY
STAFFORD
WORCESTER
GLOUCESTER
HEREFORD
SALOP
CHESTER
FLINT
DENBIGH
CARNARVON
ANGLESEA
MONTGOMERY
BRECON
GLAMORGAN
CARMARTHEN
PEMBROKE
RADNOR
SOMERSET
DEVON
CORNWALL
DORSET
HANTS
BERKS
WILTS
SUSSEX
KENT
Newcastle
Carlisle
Cockermouth
Egremont
Penrith
Appleby
Richmond
Northallerton
Scarborough
Pickering
Ripon
Malton
Knaresborough
Wetherby
Tadcaster
Sherriff Hutton
Castles
Battlefields
Preston
Wigan
Manchester
Leeds
Wakefield
Pontefract
Doncaster
Sheffield
Chesterfield
Kingston on Hull
Beverley
Barnsley
Rotherham
Ravenspur
Grimsby
Louth
Horncastle
Boston
Lincoln
Derby
Uttoxeter
Lichfield
Stafford
Shrewsbury
Bridgnorth
Dudley
Birmingham
Coventry
Warwick
Kenilworth
Rugby
Daventry
Northampton
Peterborough
Oakham
Stamford
Bedford
Huntingdon
Cambridge
Ely
Bury St Edmunds
Thetford
Norwich
Yarmouth
Lowestoft
Beccles
Harleston
Diss
Bungay
Ipswich
Orford
Woodbridge
Eye
Dunwich
Colchester
Harwich
Maldon
Chelmsford
Braintree
Saffron Walden
Epping
Hertford
Ware
Barnet
Watford
Uxbridge
Brentford
Kingston
Guildford
Reigate
Croydon
Bromley
Dartford
Rochester
Chatham
Maidstone
Ashford
Canterbury
Sandwich
Deal
Dover
Folkestone
Romney
Hythe
Rye
Winchelsea
Hastings
Battle
Lewes
Brighton
Shoreham
Arundel
Chichester
Petersfield
Winchester
Alresford
Basingstoke
Andover
Odiham
Farnham
Godalming
Horsham
Cuckfield
Tenterden
Cranbrook
Staplehurst
Sevenoaks
Tonbridge
Tunbridge Wells
Fletching
Uckfield
Portsmouth
Gosport
Southampton
Romsey
Lymington
Newport
Isle of Wight
Salisbury
Wilton
Amesbury
Devizes
Marlborough
Hungerford
Newbury
Reading
Abingdon
Wallingford
Henley
Thame
Aylesbury
Buckingham
Brackley
Banbury
Chipping Norton
Woodstock
Oxford
Witney
Burford
Cirencester
Tetbury
Malmesbury
Chippenham
Calne
Bradford
Trowbridge
Frome
Shepton Mallet
Wells
Glastonbury
Axbridge
Bridgwater
Taunton
Watchet
Dunster
Minehead
South Molton
Barnstaple
Bideford
Great Torrington
Hatherleigh
Okehampton
Crediton
Tiverton
Cullompton
Honiton
Exeter
Chudleigh
Newton Abbot
Totnes
Dartmouth
Kingsbridge
Plymouth
Tavistock
Launceston
Bodmin
Truro
Penryn
Helston
Redruth
Camborne
Penzance
St Ives
Bridport
Dorchester
Wareham
Poole
Christchurch
Lymington
Ringwood
Fordingbridge
Romsey
Alton
Farnham
Haslemere
Petworth
Midhurst
Arundel
Littlehampton
Worthing
Shoreham
Lewes
Brighton
Hastings
Rye
Winchelsea
Battle
Tenterden
Ashford
Canterbury
Sandwich
Deal
Dover
Folkestone
Romney
Hythe
Maidstone
Rochester
Chatham
Gravesend
Dartford
Sevenoaks
Tonbridge
Tunbridge Wells
Uckfield
Crowborough
Eastbourne
Pevensey
Hailsham
Seaford
Newhaven
Brighton
Chichester
Portsmouth
Gosport
Southampton
Romsey
Lymington
Newport
Isle of Wight
Ryde
Cowes
Yarmouth
Newport
Ventnor
Sandown
Shanklin
Freshwater
Totland

APPENDIX M

Territorial Influence of Statutory Registries

1	2	3	4	5	6	7	8	9
		A	B			X		
Registry	County	All from R	From R to C	B/A %	CC	From R to CC	B + X	(B+X)/A%
appelby	westm	74	47	**64**	cumbl	23	70	**95**
bristol	gloucs*	250	77	**31**	soms	118*	195	**78**
chester	cheshire	15	0	**0**	lancs; staffs**	8; 7	15	
exeter	devon	363	300	**83**	soms	27	327	**90**
hereford	heref	294	250	**85**	salop	15	265	**90**
london***	london	2166	11	**34**			736	**34**
	kent		192					
	essex		309					
	middlesex		85					
	surrey		139					
lincoln	lincs	952	757	**80**	notts	68	825	**87**
newcastle	northb	45	27	**60**	westm	6	33	**74**
nottingham	notts	550	232	**42**	derbs	207	439	**80**
norwich	norf	319	282	**89**	suff	30	312	**98**
oxford	oxon		1					
shrewsbury	salop	896	778	**87**	staffs	66	844	**94**
winchester	hants	586	413	**70**	wilts	43	456	**78**
york	yorks	2029	1805	**89**	lincs	58	1863	**92**

Key

A: Total number of requests from Registry R for statutory writs
B: Total number of requests from Registry R that a statutory writ be directed to the sheriff of the county in which the registry lay ('C')

CC: Next ranked county after C in terms of total number of requests from Registry for statutory writs
X: Total number of requests from Registry R that a statutory writ be directed to the sheriff of CC

* For the Bristol registry, A is less than X: more requests issued from the Bristol registry requesting that the Chancellor direct a writ to the sheriff of Somerset, than to Gloucestershire, the county in which the registry is situated (Bristol lies on the border of Gloucestershire and Somerset).
** No statutory writs to the sheriff of Cheshire are requested by the Chester registry
*** London is presumed to lie in five home counties

Example

A total of 550 writs (A: column 3) were requested by the Nottingham registry (column 1).

232 (B: Column 4) [or 42%: B/A%: column 5] of these were requests that a statutory writ be directed to the sheriff of Nottinghamshire (the 'home' county: column 2)

The county to which the next highest number of writs was requested [CC] was Derbyshire (207 requests: X: columns 6 and 7).

Hence, a total of 439 (column 8: 232 add 207) [or 80%: (B+X)/A%: column 9] of all requests were that writs be directed to the sheriff of Nottinghamshire or the sheriff of Derbyshire.

APPENDIX N

Explanation of C 241 database

The following nine fields (where appropriate) from each certificate were entered onto the database.

Column 1 Piece/File number;
2 Certificate number;
3 Registry before which statute merchant was entered into;
4 Name of debtor(s);
5 Status or occupation of debtor(s) (where given)
6 Sheriff(s) to whom execution was sought.
7 Name of creditor(s);
8 Status or occupation of creditor(s) (where given), or any notable other feature (for instance, whether the certificate was a 'repeat certificate', or whether it bore any endorsement or notation).
9 Sum or thing recognised.

Given the following certificate, with the bold portions of text being those details abstracted for the database:

> Venerabili patri in Christo ac domino suo karissimo domino .R.. dei gratia Bathoniensi et Wellensi Episcopo illustris Regis Anglie Cancellario sui R. de Sandwyco Custos Civitatis **[3] Londonie** et J. de Bauquell clericus ad recogniciones debitorum accipiend deputati salutem cum omni reverencia et honore.
>
> Dominacioni vestre reverend Signficamus per presentes quod **[4] Warinus de Insula [5] miles [4] Walterus de Rammeton [5] rector** ecclesie de Langeton de comitatu Cantebr' + **[4] Johannes fil' Radulphi** de comitatu Bedef' venerunt coram Henrico le Waleys tunc maior **[3] Londonie** et Johanne clerico predicto et recognoverunt se teneri unumquoque eorum insolidum **[7] Roberto de Rokesle [8] Civi Londonie in [9] quadraginta et octo libris quindecim solidis et duobus denariis argenti** solvendis eidem ad duos terminos videlicet in festo Nativitatis sancti Johannis Baptiste anno regni Regis Edwardi tertiodecimo viginti quatuor libris septem solidis et septem denariis et in festo sancti Michaelis proximo sequente viginti quatuor libris septem solidis et septem denariis alioquin quod currerent super eum (sic) districcio et pena in statuto dicto domini Regis apud Acton Burnel' edito provisa.
>
> Et quia predicti Warinus Walterus et Johannes terminos sue solucionis in nullo observaverunt nec bona mobilia habeant sub districtu nostro de quibus dictum debitum levari possit Reverende dominacioni vestre supplicamus quatenus scribere iubeatis vicecomitibus **[6] Cantebr' et Bedef'** quod eosdem Warinum Walterum et Johannem ad solucionem dicte pecunie iuxta formam statuti predicti compellant. Valeat dominacio vestra reverendissima diu et bene.

(C 241/1 **[1]** nr 3 **[2]**)

(To the venerable father in Christ and his very dear lord R(obert) by the grace of God bishop of Bath and Wells, Chancellor of the illustrious King of England, his own R(alph) of Sandwich, mayor of **London**, and John of Bakewell, clerk appointed for the receiving of recognitions of debts, greeting, with all reverence and honour.

We signify to your very reverent lordship by these presents that **Warin de Insula, knight, Walter de Rammeton, rector** of the church of Langeton, of Cambridgeshire and **John son of Ralph,** of Bedfordshire, came before Henry le Waleys, then Mayor of **London**, and John, the aforesaid clerk, and recognised to be bound, each of them for the whole, to **Robert de Rokesle, citizen of London, in forty eight pounds fifteen shillings and two pence** of silver, payable to the same (Robert) in two instalments, namely, in the feast of St. John the Baptist in the 13th regnal year twenty four pounds seven shillings and seven pence, and in the feast of Michaelmas next following twenty four pounds seven shillings and seven pence, statute of Acton Burnell.

And because the aforesaid Warin, Walter and John have in no means observed the times specified for repayment, nor have they any moveables under our distraint whereof the said debt can be levied, we supplicate your reverent lordship that you do order letters to be written to the sheriffs of **Cambridgeshire** and **Bedfordshire**, that they may compel the same Warin Walter and John to payment of the said money according to the form of the aforesaid statute.)

The database entry is:

1	3	l	insula, warinus de	kt	camb	rokesle, rob de	cv l	48.1502
1	3		rammeton, walt de	rt				
1	3		ralph, j s		beds			

A copy of the complete certificate database accompanies this thesis on 3.5" diskette. It is in Microsoft® EXCEL format, and zipped.

APPENDIX O

A statute merchant as part of a wider transaction

CP 40/106 m 120 (M 1294)

Adhuc de mense sancti Michaelis et de Crastino Animarum
Metingham

Glouc'

Thomas [i]<de Berkeleye> de Glouc' summonitus fuit ad respondendum Johanni Ap Adam de placito quod reddat ei quoddam scriptum obligatorium quod ei iniuste detinet etc

Et Thomas per Adam de Cyrencestr' attornatum suum venit. Et dicit quod per assensum predicti Johannis et cuiusdam Johannis de Gurnay liberata fuerunt ei duo scripta ut in equali manu custodienda etc que profert in hec verba.

Le an du regne le Rey Edward fiz le Rey Henri disenefyme le Dimeyn procheyn apres la feste seint Nicholas (December 9th 1290) **acovint entre Johan de Gurnay seignur de Beverstan de une part e Johan Ab Adam de autre part. Ce est a savoir ke Johan de Gurnay dorra e per sa chartre feffera le avaundit Johan Ab Adam e Elyzabeth sa feme la fille le avaundit Johan de Gurnay de tuz ces maners terres e tenemenz feez reversiouns eschetes ove les apurtenaunces ke en aucune manere li porreint escheir en les Countez de Glouc' e de Somers' ou en nule part en Engleterre ke escheir li porreyent per dreit e per heritage ou decendre A aver e tenyr des chefs seingnurages des feez a les avauntdiz Johan Ab Adam e Elizabeth sa feme e a les heirs de lour deus cors lewement engendrez Rendaunt al avauntdit Johan de Gurnay les avauntdiz Johan Ab Adam e Elizabethe sa femme e a les heirs de lour deus cors [i]<lewement> engendrez e en ky mains ke les avauntdiz terres e tenemenz devendrount sis Cent livres de argent de annuele rente par an a paer a quatre termes principaus par ouele porcion tute la vie le avaunt dit Johan de Gurnay. E ke ceste rente avaunt nomee ne soit done ne demaundee ne lu ne tiengne alavauntdit Johan de Gurnay dek la quinzeyne procheine apres la Nativete seint Johan le Baptist prochein avenir apres la confection de cest escrit. E lavauantdit Johan de Gernay vendra en la Court nostre seingnur le Rey kaunt il serra somouns par bref le Rey e reconustra tutes les terres e tenemenz ove les apurtenaunces avaunt nomez estre le dreit les avauntdiz Johan Ab Adam e Elizabeth sa feme e lur heirs de lour [i]<deus> cors issaunz. E pur cele reconissaunce fete en la Court nostre seingnur le Rey les avaunt diz Johan Ab Adam e Elizab' sa femme refefferunt le avauntdit Johan de Gornay de tutes les terres e tenemenz enterement ove les apurtenaunces avaunt nomez a terme de sa vie forspris vint livere de terre par aan en Radewyk' e Puryton' ove les apurtanaunces par renable estente ke demorra a les avant diz Johan Ab**

Adam e Elyzabeth sa femme e lur heirs de lour cors issaunz a tuz iourz. E trente livere ⁱ<de> terre par aan tute la vie Olyve la femme Johan de Gornay outre son renable doweyre si issi aveyne ke Johan de Gornay moerge vyvaunt lavauntdite Olyve sa femme. E ceo seit reconu en la fyn leve. E estre ceo lavaunt dit Johan Ab Adam dorra al avauntdit Johan de Gornay quatre Cent marz de argent. Dunt il se obligera a Johan de Gornay par la Novele surte a Bristut. Ce est a saver a paer le iour des Esposayles Cent e vint livres. E les avauntdiz Johan Ab Adam e Elizabethe sa feme averount seisine des terres en la forme avauntdite la semeyne siwaunte apres le iour des Esposayles saunz nule manere desturbaunce del avaunt dit Johan de Gornay. E si nule desturbaunce seit fet a Johan de Ab Adam par les chefs seingnurages de ky les tenemenz sount tenuz ren del covenaunt Johan de Gornay ne seit bregge ne enpire. Mes le avauntdit Johan de Gurnay seit tenuz a temoyngner son fet e sure a la Court e Rey a par ayllours a les coustages Johan Ab Adam si mester seit. E lavaundit Johan de Gornay assignera Johan Ab Adam a paer pur son Relef au Rei Cent marz. E le iour ke la fin se leve en la fourme avauntdite si paera il a Johan de Gornay quarante livres. E a la seint Michel en lan le Rey Edward' disenefyme quarante livres. E ceste fin avaunt nomee pleynement en tote choses as coustages Johan Ab Adam se levera saunz nule forsprise. E estre ceo Johan ⁱ<de> Gurnay e sa femme e sa menee demorront a touz coustages as coustages Johan Ab Adam en Covenable lu e honorable. Cest a savoyr par la semeyne quaraunte souz de argent deus quarters de aveyne fein littere e busch' suffisaument. E ceste paye seit fete de semayne en semayne sci la ke Johan de Gornay seit reffeffe en la fourme avaunt dite. E kaunt Johan Ab Adam e Elizab' sa femme receyverunt seisine des terres Johan de Gornay il receyverunt tut son estor e biens moebles e non moebles par certeyn pris. E ke la novele surte avauntdite seit baylle en la meyn sire Thomas de Berkele a garder par assentement des parties dekes a la quinzeyne procheyn suaunte ke Johan Ab Adam eyt espose Elyzabeth la fille Johan de Gornay: E dunk seit la surte livere a Johan de Gornay e ne mye avaunt E seit fete une chartre a Johan Ab Adam e a Elizab' sa femme e as heyrs de lour deus cors lewement engendrez de tutes les terres e tenemenz avaunt nomez a tenir des chef seingnurages des fez fesaunt les serviz ke as chef seingnurages apendunt saunz nul retenement a Johan de Gornay E ceste chartre seit baille en la mayn sire Thomas de Berkele par assentement des parties. E kaunt toutes choses seient pleynement acompliz de une part e de autre E Johan de Gornay eyt seisine des terres en la fourme avaunt dite: la chartre seit livere a Johan Ab Adam e a Elyzabeth sa femme e ne mye avaunt. E kaunt Johan de Gornay serra reffeffe de toutes les terres en la fourme avaunt dite: tute cele annuele rente de sis cent livres avaunt nomez sessent a touz iourz. E si si aveyngne ke lavauntdite Elizab' sa femme Johan Ab Adam merge saunz heir de soun cors: demorrunt toutes les terres e tenemenz enterement apres le deces Johan de Gornay a tote la vie Johan Ab Adam. E apres le deces Johan Ab Adam: totes les terres e les tenemenz enterement as dreiz heirs Johan de Gornay saunz nuly countredit recourgent. E si il avent Johan de Gornay ou Johan Ab Adam venir en countre les Covenaunz avaunt nomez en partie ou en tut: Celi ke Copaple serra trovee solom les escriz seit tenuz a celuy a ky le

trespas ert fet en Cinc Cenz livres a paer denz lan procheyn siwaunt. En temoygnange de ceste choses les parties en ces escriz unt mis lour seaus de une part e de autre. E a ceo (?)**mut affermer e temoyner Sire Thomas de Berkele ad mis son seal en lun e en lautre escrit a la requeste des parties. Done a Wotton pres del Abbeye de Kyngewode en le Counte de Glouc' le iour e lan avaunt nomez** --(December 9th 1290) -----

Et profert aliud scriptum in hec verba.

Noverint universi quod ego Johannes Ab Adam teneor Johanni de Gornay in quadringentis marcis sterlingorum solvendum eidem Johanni de Gornay vel suo [d]**<certo> attornato has litteras deferenti apud Beverston terminis subscriptis videlicet die dominica proxima post festum sancti Hillarii proximum post confeccionem huius instrumenti ducentas marcas. Et ad festum Nativitatis sancti Johannis Baptiste proximo sequens sexaginta marcas. Et ad festum sancti Michaelis proximo sequens sexaginta marcas. Et ad festum sancti Hillarii proximo sequens viginti marcas . Et sic quolibet anno sequenti post ad quodlibet festum sancti Hillarii viginti marcas usque ad plenariam dicti debiti persolucionem. Et nisi fecero volo et concedo quod currant super me heredes et executores meos districcio et pena in statuto domini Regis de creditoribus et debitoribus apud Acton Burnel' edito provisa. In cuius rei testimonium presentibus litteris sigillum meum apposui una cum sigillo dicti domini Regis apud Bristoll' ad hoc proviso quod apponi procuravi ad perhibendum testimonium veritati. Datum Bristoll' per manum Petri de la Mare Constabularii Castri Bristoll' et Custodis predicti sigilli die martis proxima ante festum sancte Lucie virginis anno Regni Regis Edwardi decimo nono.** (December 11th 1290)

Et dicit quod paratus est predicta scripta liberare cui Curia consideraverit etc. Et liberatur Johanni le Boteler de Comitatu Glouc' attornato predicti Johannis de Ap Adam. Ita quod idem Johannes predicta scripta integra et non cancellata salvo custodiat etc. Et ea habeat hic etc si a casu heredes predicti Johannes de Gurney vel executores testamenti eiusdem inde loqui voluerint etc.

APPENDIX P

Conditional Acquittance of a statute merchant

CP 40/149 m 18d (Lancs) (M 1304)

Omnibus Christi fidelibus has litteras visuris vel audituris Walterus de Hepaym salutem in domino sempiternam. Noveritis me ex mera voluntate relaxasse perdonasse et omnino a me et heredibus meis sive assignatis meis quietumclamasse domine Isabelle quondam uxori domini Henrici le Botiler' totum ius meum et clamium quod habui vel aliquo modo habere potui in viginti et novem libris sterlingorum quas predicta domina Isabella michi per statutum Westm' et Actone Burnel' tenebatur prout recognovit coram domino Willelmo Kaus' et Stephano de Stanham' apud Linc' die mercurii proxima post festum Exaltacionis sancte Crucis anno regni Regis Edwardi tricesimo primo (September 18th 1303)* si contingat me ante solucionem dictorum viginti et novem librarum michi plenarie non factam in fata discedere. Ita videlicet quod heredes mei vel executores mei sive assignati mei vel aliqui alii nomine eorum aliquod iuris vel clamii seu accionis racione debiti vel causa alicuius alterius tituli in predictis viginti et novem libris post transitum vite mee quaquam exigere vel vendicare poterunt. In cuius rei testimonium has litteras meas acquietancie eidem domine Isabelle fieri feci patentes et sigillo meo signatas. Datum apud Somerby [i]<die mercurii> proxima post festum Epiphanie Domini anno regni Regis Edwardi tricesimo secundo (January 8th 1304)

* C 241/43 nr 25 is a certificate, dated September 21st 1303, of the statute merchant to which this acquittance refers.