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THE CODIFICATION OF THE CUSTOMS OF KENT

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When certain events in the reign of Edward I are considered together, it seems unlikely that the codification of the body of Kentish customs, known collectively as gavelkind, antedated by many years the earlier of the surviving texts. Among these are the Lambeth version,[1] which is copied in a register of *c.* 1285;[2] the *Liber Horn* version of 1311;[3] the Queenborough version,[4] which is considered to be not later than 1325;[5] the Harley version, believed to be of the early fourteenth century;[6] and the Canterbury version,[7] which survives as a fifteenth-century copy of a probably much earlier original. There is also a version in the Cottonian collection, *Claudius D.ii,* which is thought to be dated *c.* 1325. A clue to the origin of these texts occurs in the version published by Lambarde in 1576,[8] and, less clearly, in the Harley version.

Lambarde took his text from what he described as 'an auncient and fair written Roll, that was given to me by Maister George Multon my Father in lawe, and which sometime belonged to Baron Hales of this Countrie.' This document is lost and its date remains unknown. For publication Lambarde inserted a passage which appears not to have been present in the 'fair written Roll' for he placed asterisks at its beginning and end, and made the marginal note: 'The wordes betweene the starres were taken out of another olde copie.' Lambarde's use of the word 'copie' suggests that this was also a version of the gavelkind customs and not merely a document which referred to them. Thus, it

[1] Lambeth Palace Library. MS. ED 2068.
[2] J. Sayers, *Estate Documents in Lambeth Palace Library,* Leicester, 1965, 31.
[3] Corporation of London Record Office, *Liber Horn,* ff.77b.–79b.
[4] KAO, Qb/AZ.
[5] *Arch. Cant.*, lxxii (1958), 150.
[6] British Library, MS. *Harley,* 667.
[7] Canterbury Cathedral Library, *Register B.,* ff.418–419v.
[8] William Lambarde, *A Perambulation of Kent,* (1st edn.), London, 1576, 416–427.

appears that Lambarde had access to two manuscripts setting out the customs of Kent, neither of which can be firmly identified with any of the surviving texts.

The passage inserted by Lambarde into his published version immediately follows the opening statement, which Lambarde translated from the Anglo-French as: 'These are the usages, and Customs, the which the comunalty of Kent claimeth to have in Tenements of Gavelkinde, and in the men of Gavelkinde.' There is then the interpolation: 'allowed in Eire before John of Berwike, and his companions, the Justices in Eire in Kent, the 21 yeare of King E. the Sonne of King Henrie.' This is year ended 19 November 1293. In the Harley version, the reference to the eyre of Sir John de Berwick occurs towards the end of the custumal, where it seems to merge with a clause concerning juries and the grand assize.

If the validity of Lambarde's interpolation is accepted, and there seems to be no good reason to doubt it, the question arises: what occasioned the justices in eyre in 1293 to endorse a detailed statement of customs for the county of Kent which were exceptional to the common law of England?

It is recorded that John de Berwick headed the itinerant justices at Canterbury 'on Easter Day for fifteen days' in 1293.[9] Easter was on March 29 in that year. The hearings included pleas *de quo warranto*.

The purpose of the inquiries *de quo warranto* was to discover any liberties exercised unlawfully by manorial lords or others. At the same time, the inquiries had the effect of giving royal assent to franchises successfully pleaded. Edward I instituted the inquiries under three statutes, the first in 1278, the second in 1290, and the third also in 1290. The third of these statutes most clearly illustrates how the inquiries would have applied to the customs of Kent. It is brief and is worth quoting in full:

> 'Concerning the Writ that is called *Quo Warranto* our Lord the King, at the Feast of Pentecost, in the eighteenth Year of his Reign, hath established, That all those which claim to have quiet possession of any Franchise before the time of King *Richard*, without interruption, and can shew the same by a lawful Enquest, shall well enjoy their Possession; (2) and in case that such Possession be demanded for Cause reasonable, our Lord the King shall confirm it by Title; (3) And those that have old Charters of Franchise, shall have the same Charters adjudged to the Tenor and Form of them; (4) And those that have their Liberties sith *Easter* last passed by the aforesaid Writ, according to the Course of Pleading in the same

[9] Record Commission, *Placita de Quo Warranto*, London, 1818, 352.

> Writ heretofore used, shall have Restitution of their Franchise lost, and from henceforth they shall have according to the Nature of this present Constitution.'[10]

It will be noted that this third statute provides for the hearing of claims for which a royal charter could not be produced.

Thus, all the known circumstances point to the earlier of the surviving codifications of the customs of Kent having been drawn up to state liberties for gavelkind tenants under the statutes of *Quo Warranto*.

It is possible that the several versions are not variations resulting from careless transcription, or garbling over the years. It could well be that they represent claims submitted and granted, at two or more inquiries at intervals of a number of years in the reigns of Edward I and Edward II. That this could have happened is evident from the case of Malling Abbey; the abbess, or her attorney, appeared before the justices to state the abbey's claims to liberties in the manors of East Malling and West Malling in 1279, 1293, and again in 1313.[11]

The Lambeth version stands apart from the others, and it might appear to conflict with the argument pursued so far. It is dated between 8 and 22 years earlier than John de Berwick's eyre in Kent, is in Latin, and does not claim the full range of the customs. In some respects its form is different, though it does quote two of the three Kentish 'old saws' which appear in the other and later versions. It may be an incomplete copy, for it ends abruptly with one of these quotations. It also differs in referring to cases affecting the customs which had been heard by itinerant justices in the past. The justices mentioned are H. de Baton' and R. de Seton, and there is a reference to W. de Heure in connexion with the iter of R. de Seton.

Without venturing beyond the *Placita de Quo Warranto* we find in the inquiries at Rochester in 1313 a reference to the iter of 'Roger de Seton in the 55th year of the reign of King Henry, grandfather of the present King',[12] that is, in 1270–71. We also find that William de Heure was attorney to Henry III.[13] *Baton'* is a contraction of *Batonia* which was a latinization of Bath.[14] According to the *Dictionary of National Biography*, Henry de Bathe (or *Bathonia*) became a judge of the common pleas in 1238, and he visited Kent on a commission of assize in 1249. He fell out of favour in 1250, was restored in 1253, and

[10] *Statutes at Large*, i, London, 1763, 123.
[11] Record Commission, *op. cit.* 312, 343, 356, 363.
[12] *Ibid.*, 332.
[13] *Ibid.*, 750.
[14] C. T. Martin, *The Record Interpreter*, London, 1892, 321.

died in 1260. In November 1259, Henry III commanded the sheriff of Huntingdon to proclaim that the itinerant justices were to visit the county to redress certain grievances. The justices named were *Henricus de Batonia* and *Willelmus de Wiltonia.*[15] These references show that the Lambeth version can be no earlier than 1270–71, and no later than *c.* 1285, the date given to the MS. ED 2068. Its general form, and particularly the citing of earlier litigation, suggests that, like the other and later versions, it was prepared as a brief, or was a summary of the evidence, for pleading the Kentish claims, though in this instance probably at the eyre of John de Reygate at Canterbury in January 1279, soon after the first Statute *de Quo Warranto.*

If, then, the Kentish liberties were pleaded before the justices in eyre at Canterbury in 1279 and 1293, it is, at first sight, surprising that they are absent from the collected *Placita de Quo Warranto* published by the Record Commission in 1818. This edition is not claimed to be complete, but Robinson searched without success all the records of 1292/93, including the *Quo Warranto* roll.[16] But in view of the unusual nature of the plea, and, as will emerge, the special arrangements needed for its hearing, it could well be that it was recorded on a separate roll.

Robinson rejected the 'high Appellation of *Statutum de Consuetudinibus Kanciae*' (Statute of the Customs of Kent) given by Lord Coke to the custumal, pointing out that a statute would be in Latin, not French, and that he had searched the Parliamentary Rolls of 21 Edward I, as well as those of the preceding and subsequent years, without finding such a statute. Robinson could find no other foundation for Lord Coke's description 'than that it is sometimes to be met with in old collections of statutes, as are many other matters which were never enacted by authority of Parliament.'[17] Lord Coke's 'appellation' is, in fact, the title of both the *Liber Horn* and *Claudius D.ii* versions of the custumal. Yet, Robinson's objections would seem to stand, for both these versions are in Anglo-French, and neither is in the form of a statute. But, it is relevant to note, Anglo-French, not Latin, was the language of the royal courts of justice. The Lambeth version, which escaped Robinson's notice, cannot be considered as a possibility for, even though it is in Latin, it is even less like a statute than the Anglo-French versions.

Although there is no statute covering the Kentish customs of gavelkind in the 1695 and 1763 editions of the *Statutes at Large,* there is such a statute in the 1810 edition of *Statutes of the Realm.* The date of this statute is given as 'uncertain'. It is printed in two languages,

[15] W. W. Shirley (ed.), *Royal Letters, Henry III,* ii, London, 1866, 141.
[16] Thomas Robinson, *The Common Law of Kent,* (2nd edn.), London, 1788, 279.
[17] *Ibid.,* 280.

English and Anglo-French. In a footnote (p. 223) it is explained that the title *Consuetudines Cantiae*, 'The Customs of Kent', is 'inserted from the Copy in Tottell's Edition of Magna Carta and the Old Statutes, printed in 1556', and that 'The Translation given above is printed from that made by Lambarde . . .' For the parallel text in Anglo-French, *MS. Harley 667, fo.* 83b is used, with variations of readings from Lambarde, Tottell, Cotton and *Liber Horn*. In this perhaps surprising use of Lambarde's version, the interpolated passage 'allowed in Eire before John of Berwike . . ' (etc.) appears as an integral part of the English text, although there is a footnote at the point where it is lacking from the Harley MS.: 'L. as supplied by another old Copy.' By the use of these two versions it was the clause: 'all the bodies of Kentishmen be free', not merely the bodies of all gavelkinders, that has the authority of the Statute Book.

Robinson observed that 'the Books call Gavelkind by a higher Appellation than is given to any other Customs, THE COMMON LAW OF KENT' and that 'the same favour is not allowed to Gavelkind in any other County.'[18] Whether Robinson was justified in following this precedent by entitling his book 'The Common Law of Kent: or the Customs of Gavelkind', may be questioned. Of unwritten law established by usage, Jacob makes the distinction: 'if 'tis universal, then 'tis Common Law; if particular to this or that Place, then 'tis Custom.'[19] However, if the Kentish customs were allowed by the justices in eyre they would have had the power of law, and, as we have seen from the statute of 1290 quoted above, if the customs were successfully pleaded at *quo warranto* inquiries, they would have gained royal assent. For that purpose it is clear that they would need to have been codified.

Here it is worth remarking that a statute of 18 Henry VI (1439) has the passage: '. . . within the county of Kent there be but Thirty or Forty persons at the most, which have any Lands or Tenements out of the Tenure of Gavelkind, because the greater Part of the said County, or well nigh all, is of the Tenure of Gavelkind.'[20]

Normally, pleas *de quo warranto* were made by individual tenants-in-chief. A claim on behalf of an entire county was, of course, exceptional, and might seem to present a special problem. All the versions of the custumal open with the statement that the usages were claimed by the commonalty of Kent.

[18] *Ibid.*, 44.
[19] Giles Jacob, *A New Law Dictionary*, (6th edn.), London, 1750, *sub. voc.* 'custom'.
[20] *Statutes at Large*, i, London, 1763, 586.

There was at the time the legal concept *Totus Comitatus*[21] (the whole county), and there was also provision for a 'Jury of the Body of the County.' Robinson wrote: 'issues joined on any Custom of the County of Kent were, even before 4 Anne, *c.*16, to have been tried by a Jury of the Body of the County . . . ' and he cited a case 'Where the Issue being on a Custom of Kent, it is entered on the Roll, that the Court of *B. R.* [*brevia regia*] before they awarded the *Venire* to the Sheriff to return the Jury, consulted with the Judges of the Common Pleas about the Matter of it, and then because the said Issue touched and concerned the Commonalty of the County of Kent, awarded the *Venire de Corpore Comitatus.*'[22]

We may now attempt to adduce the evidence that might have been presented to support the Kentish claims. It is thought unlikely that the detailed customs would have been gathered together into one document before Edward I issued his first writ to the sheriff to summon those with claims to franchises to appear before the itinerant justices.

The charter of Henry III which, according to the Harley Queenborough and Lambarde versions, was in the custody of Sir John de Northwood on St. Alphege's Day, 1293, concerned, of course, only the special gavelkind privileges for the grand assize as claimed in the passage immediately preceding its mention. The Anglo-French of the custumal closely follows the Latin text of this charter. (The clause is absent from the Lambeth version.) The charter concludes by ordering that it is to be held by the sheriff.[23] According to the *Dictionary of National Biography,* Sir John Northwood was sheriff of Kent in 1292 and 1293 and again in 1300, 1305 and 1306. If John de Berwick's eyre at Canterbury is extended over the stated fifteen days from Easter, which fell on March 29 in 1293, the last day would have been April 12. If allowance is then made for the twelve days' difference between the Julian and Gregorian calendars, we find that St. Alphege's Day, April 19, fell within the period of the eyre.

According to the chronicler Spot (or Sprot), a monk of St. Augustine's Abbey, Canterbury, Kent retained its ancient customs by a grant of William I in return for the shire's submission at the Conquest. Somner scornfully dismissed this story, emphasizing that in the interim of more than 200 years from the Conquest until Spot wrote in the time of Edward I, 'there was no record of any kind . . . to warrant the

[21] C. Stephenson and F. G. Marcham, *Sources of English Constitutional History,* London, 1938, 99, render *totus comitatus* as 'full county [court]'; more cautiously, Robinson, *op. cit.* 260, suggests that the expression meant all those bound by a general summons to attend a court of justices in eyre.

[22] Thomas Robinson, *op. cit.*, 260.

[23] *Close Rolls, 16 Henry III, m. 14,* (1231–32), cited by Robinson, *op. cit.*, 256.

relation.'[24] Robinson remained non-committal, but sceptical. Lambarde considered that Spot's account lacked authority because no other chronicler had reported it, but he accepted it as credible in the light of the survival of the Kentish customs 'much different from other countries', and he claimed to be the first to publish it.[25] Camden also pointed out that no ancient writer corroborated Spot's story of the composition with William, but nevertheless concluded his summary of the Kentish customs by saying (in Edmund Gibson's translation of Camden's Latin):

> 'So that what we find in an ancient Book is very true, though not elegantly written: "The County of Kent urges that that County ought of right to be exempt from any such burthen, because it affirms that this County was never conquered as was the rest of England, but surrendered it self to the Conqueror's power upon Articles of agreement, provided that they should enjoy all their liberties and free customs which they then had and used from the beginning.'[26]

Camden did not identify the 'ancient book' from which he quoted, nor did he mention the 'burthen' from which Kent ought to be exempt, so that the opening clause of his quotation is a *non sequitur*.

The subject of the complaint is found in the Lambeth version of the customs of Kent. This version includes a claim that the presentment of Englishry in Kent infringed these customs, and it refers to the eyre of H. de Bath (*Baton'*) when it was represented that (translated from the Latin):

> 'this county must by right be free of this grievance, for they say that this county was never conquered as the rest of England, but by making peace rendered itself dominion of the conqueror[s], saved for ever all its liberties and free customs it had and used from the beginning.'

The resemblance of Camden's quotation to the text of the Lambeth version is even closer when this passage in the original Latin edition of *Britannia*[27] is compared with the Latin of the Lambeth manuscript. It

[24] William Somner, *A Treatise of Gavelkind*, (2nd edn.), London, 1726, 62–64.
[25] William Lambarde, *A Perambulation of Kent*, London, 1826/Bath 1970, 20.
[26] William Camden, *Britannia*, London, 1695/Newton Abbot, 1971, 187.
[27] *Idem*, London, 1607, 231.

is clear that Camden's 'ancient book' was either the Lambeth register, or the common source of both the Lambeth and Camden quotations:

Camden:	Lambeth (unextended)
Dicit Cantij Comitatus quod	*. . . et dicu' q'd*
in comitatu iste de jure debet	*cu' Comitat' iste di iure debet*
de eiusmodi grauamine	*de hi' g'uamine*
esse liber quia dicit quod	*esse liber q' dicu' q'd*
Comitatus iste vt residuum	*Com' iste ut residuu'*
Angliae, nunquam fuit conquestus,	*Anglie nu'q' fuit conquestus*
sed per pacem factam se	*set p' pace' f'c'am se*
reddidit Conquestoris dominatui	*reddidit d'naconi' conquestor'*
saluis sibi omnibus libertatibus	*saluis s' om'ib' lib'tatib'*
suis & liberis consuetudinibus	*suis et lib'is cons'*
primo habitis & vsitatis.	*p'mo h'itis et vsitatis.*

These extracts are unlikely to have been copied directly from the record of Henry de Bath's eyre of 1249 for, as we have noted, court proceedings were normally in Anglo-French; but the process of translation may account for the inelegance of the Latin which offended Camden, and which Gibson corrected in his rather free rendering into English. It seems unlikely that two independent translations from Anglo-French into Latin would have been so close as the two quoted above. Their similarity points to Camden having copied his from the Lambeth register.

The people of Kent again claimed the retention of their ancient customs and exemption from presentment of Englishry when the itinerant justices, led by Henry de Stanton, visited Kent in 1313. The case was pleaded on grounds similar to those at the eyre of Henry de Bath. Sir Edmund de Passleigh, Serjeant of the King's Pleas, spoke on behalf of the 'knight's, serjeants and stewards of the great lords' and said (here we translate from the Anglo-French): 'that the customs that they had before the time of William the Conqueror so had they used ever since, and that by peace made between the aforesaid William the Conqueror and the people of the county, it was granted to the people of the county that they should have the same customs and laws after the conquest as they had before. And he said that before the time of the conquest Englishry was not presented in the county. And on that they prayed that the Justices allow their customs that they had always used before the time of the Conqueror and since. On the right of the other points of which they were charged they prayed judgment (*jour de avisement*); that was granted to them.'[28] Their plea for exemption from

[28] A. J. Horwood (ed.), *Year Books of the Reign of Edward the First*, London, 1863, Appendix to Preface, lv–lx.

presentment of Englishry, however, was disallowed on the precedent of an earlier eyre.

Thus there is documentary evidence that royal justices recognized that the survival of pre-Conquest customs in Kent was by a grant of William I. The first document, which refers to court proceedings of (it appears) 1249, although not original, has the ring of authenticity since it is correct in all details that can be checked from collateral evidence. The occasion it cites is earlier than Spot's chronicle by about a generation, that is, if Spot wrote in the time of Edward I. The second document, which appears to be the official record of the proceedings of the justices in eyre in 1313, is later than Spot's chronicle; but even if the chronicle were already known outside St. Augustine's Abbey in 1313, it is improbable that a serjeant-at-law would have based his plea solely upon such a recently written story, and inconceivable that the justices would have been persuaded by it.

No injustice seems to have been done in refusing to recognize the claim for Kent to be exempt from presentment of Englishry. The justices' argument is not given, but their judgment did not conflict with the Conqueror's grant of pre-Conquest customs for, although after the Conquest presentment of Englishry was designed to protect the French settlers, it was not a new law. The Norman king had merely reaffirmed the law made by Cnut to protect his Danish subjects in England. Cnut does not appear to have made any regional exceptions and, except for Passleigh's assertion and the claim in 1249 concerning Englishry, which appear to have been misapprehensions, it was never claimed that Kent was distinguished by its customs from the rest of England before the Conquest. (The law of presentment of Englishry was abolished by statute, 14 Edward III, *c.* 4.)

A parallel to the Kentish case is documented. A charter of William I granted to the burghers of London the laws they had enjoyed under Edward the Confessor. The charter is very brief and gives no details of the laws, except for one which Stubbs translates: 'And I will that every child be his father's heir, after his father's day.'[29] From this, it appears that, under similar circumstances, the custom of partible inheritance was preserved in London as it was in Kent. For the rest, if there had been a charter for Kent, it would probably have been as uninformative as the London charter, particularly as by their very nature customs were not normally codified.

In pleading their claims, especially after the statute of 1290, it would have been necessary only for the commonalty of Kent to show that their customs had been observed 'time out of mind', or beyond legal memory, that is to say, before the accession of Richard I. To take again

[29] William Stubbs, *Select Charters*, (9th edn), Oxford, 1913, 97.

the example of Malling Abbey, on each of the three occasions when the Abbess was required to prove the liberties of the abbey, it was sworn on oath that the Abbess and her predecessors had had these liberties 'time out of mind' (*quo non extat memoria*).[30] The reign of Edward I was still within the period when the sworn testimony of 'good and lawful men' was a normal form of evidence. Oral tradition would have played a large part in presenting the case, particularly if the liberties were claimed, as they were in the Canterbury, Harley and Lambarde versions, to date from before the Conquest. (Robinson found this claim to be 'repugnant' to the claim for privileges under the charter of Henry II; but it would seem to be not unusual for the king to confirm by charter franchises established by usage, or even granted by an earlier charter. For instance, the grant to the City of London by William I, mentioned above, was confirmed by Henry III,[31] and old charters are specifically included as subjects for inquiry in the statute of 1290.) The nature of the customs of gavelkind, if nothing else, indicates a pre-Conquest origin. What Maitland said of the ancient laws would then probably have applied to the customs of Kent: 'Law was transmitted by oral tradition and the men of one shire would know nothing and care nothing for the tradition of another shire.'[32] Or again: 'An ancient popular court with a traditional law was no court of equity; forms and ceremonies and solemn poetical phrases are the things which stick in the popular memory and can be handed down from father to son.'[33] Maitland's observations are entirely consistent with the English ('Kentish' according to the custumal) rhyming 'old saws' in the Anglo-French and Latin texts: they were fragments of the oral tradition, 'solemn poetical phrases' likely to have been quoted as evidence of antiquity at an inquiry *de quo warranto*. It could then well be that the variations are not so much garbling in copying or transcription, as versions remembered and recited orally by various witnesses and written down at various times in the thirteenth or early fourteenth centuries, never having been committed to writing before. Such variations are typical of old saws—and it is relevant to remark in this context that the word 'saw' derives from O.E. *sagu*, one of the meanings of which was 'testimony'. There were three of these rhymes. Whatever form they took when quoted in the various texts, the sense usually remained consistent.

The first concerned the custom by which land held in gavelkind was

[30] Record Commission, *op. cit.*, 312, 343, 356, 363.
[31] *9 Henry III, cap. ix, Statutes at Large*, London, 1695, 2.
[32] F. W. Maitland, *Constitutional History of England*, Cambridge, 1913, 4.
[33] *Ibid.*, 5.

not forfeited if the tenant was hanged as a felon; it passed to the heir. The couplet is best known in Lambarde's version modernized as:

The father to the bough
and the son to the plough.

It has been established from the Queenborough, Harley, Canterbury and Lambeth versions that Lambarde's 'plough' is a garble of 'logh', meaning 'place' or 'stead'.[34] In the Lambeth version the couplet is:

The fader to the bogh
the sone to the logh.

Among the early versions, only *Liber Horn* has 'plough'. The several erasures in this text give some reason for suspecting it to be the source of the corruption. Lambarde is exonerated.

The second jingle relates to the widow of a deceased tenant in gavelkind, who retained half the estate during her lifetime, the other half going to the son or sons, or to the daughters if there were no son, or the whole estate if there were no children, or while the children were under age. The Queenborough version has:

Si that is wedewe,
si is leuedi (levedi).

('She that is a widow, she is the lady'.) This rendering presents no difficulty of understanding, but what appears to have been a slight error in transcription has led to a curious distortion, which appears in Lambarde's version as

Se that hir wende, se hir lende,

which Lambarde translated as 'he that doth wend her, let him lend her', the interpretation of which has, not unnaturally, caused considerable puzzlement. What was presumably a printer's error converted 'wend' to 'mend' in the translation in the 1826 edition of *The Perambulation* (even though the runic form of 'w' had been introduced into the M.E. text), and added to the confusion. Yet this garbling can be simply explained. In most medieval hands the letters 'n' and 'u' were often indistinguishable one from the other, and medial 'v' was usually written as 'u'. The word 'widow' took a variety of forms in Old and Middle English. Stratmann gives 'widewe', and from the *Ayenbite* 'wodewe', but does not give 'wedewe' as used in the Queenborough version of the custumal.[35] Old English forms were 'widuwe', wuduwe',

[34] *Arch. Cant.*, lxxii (1958), 154–5, and xcii (1976), 71–2.

[35] F. H. Stratmann, revised Henry Bradley, *Middle-English Dictionary*, Oxford, 1967, 396.

'wudwe'. It is evident that there was latitude for some early form which, if the 'u' were misread as 'n', would give 'wende', and the need to rhyme would prompt 'lende' for some form of 'levedi'.

The third rhyme is the most obscure of the three. It concerns the complicated procedure for the recovery of land distrained by the lord upon failure to render rents or services at the due time. It seems that the Middle English terms were expected to present problems of interpretation, for, in at least three cases (Lambeth, Canterbury and Harley), an explanation is given. In the case of Canterbury a separate entry is made for this purpose in the register, immediately following the custumal. The entry recites the procedure and is entitled *Expositio cuisdam usagij in Com' Kanc' q'd d'c Gavelate* ('Explanation of a certain usage in the County of Kent which is called Gavelate.') It is interesting to note that whereas the body of the texts in the Canterbury and Harley versions is in Anglo-French, the explanation of this Middle-English proverb is, in both cases, in Latin. Although the Latin terms vary in each explanation, their meaning remains broadly the same. Therefore only one need be quoted, and the Harley version is taken as it is rather less abbreviated than the others:

> Neghesithe yelde and neghesithe gelde,
> and vif pund for the were,
> her he bicome healdere.
> *Hoc est novies arreragia solvere*
> *et novies arreragia deaurare*
> *et centu' solid' p' detentione redditus*
> *antequam tenem'tu' rehe'at.*

Lambeth and Canterbury have *forisfacture* ('penalty', 'forfeiture') which is a closer translation of 'were'. The Latin may then be rendered into modern English as:

> That is, nine-times the arrears to pay,
> and nine-times the arrears to gild [*sic*],
> and a hundred shillings for the penalty paid
> ere he recovers the tenement.

It is considered possible that, originally, 'neghesithe' may not have been used here in the sense 'ninefold'. Conceivably, the term may be explained by the procedure, described in the preceding passage in the custumal, which the lord had to follow, and which Lambarde rendered as 'let the Lord seeke by the award of his Court from three weeks to three weeks, to find some distresse upon that tenement, until the fourth court, alwaies with witnesses; And if within that time he can find no

[36] F. W. Maitland, *op. cit.*, 37.

distresse in that tenement, whereby he may have justice for his tenant, Then at the fourth court let it be awarded, that he shall take that tenement into his hands, in the name of a distresse, as if it were an oxe, or a cowe . . .' One may wonder whether there is some connexion between 'neghesithe' — 'nine times' and the three courts at intervals of three weeks, making nine weeks in which the tenant could pay his overdue rent before his land could be seized. The three scribes, it will be noted, each translated 'neghesithe' unequivocally into *novies* — 'nine times'; but it cannot be disregarded that O.E. and M.E. 'sith' could be used in the sense 'chance', suggesting the possibility that originally the phrase meant 'nine chances to pay', or perhaps 'nine occasions to pay'. The apparent harshness, otherwise, of the conditions and penalties exacted before a confiscated tenement could be restored to a defaulting tenant seem to be inconsistent with the rest of the custumal, and what is known of the times in Kent. In the detailed descriptions of the gavelate procedure in all the surviving texts, and the additional entry concerning gavelate in the Canterbury Cathedral register, there is no mention of ninefold payment of arrears of rent. Apart from settling the arrears, the tenant was to make only 'reasonable amends'. The 'were' of five pounds, thoroughly latinized to a hundred *solidi* in the Harley gloss, seems to be in excess of what might have been regarded as a reasonable amercement in medieval Kent. The possibility that 'fif', in the Harley version 'vif', was a garble of 'yif' has to be allowed for. The Queenborough version has 'and yif pund for the were' and Tottell has 'yef', which Robinson translated as 'give'. Instead of 'five pounds', it is at least as likely that 'give a pound for the penalty' was the original meaning. Only with the greatest caution and diffidence might one question the accuracy of a contemporary, or near-contemporary, translation from Middle-English into Latin; but it may not be too presumptuous to allow for the possibility that the scribe had Anglo-French as his first language, and may well not have been at home in the vernacular. Indeed, the literal translation into Latin seems to have been more for the benefit of those who were not familiar with the English language, than for any who needed a legal point to be explained, particularly as the English jingles merely illustrated the detailed exposition already given in the Anglo-French text. It is, then, perhaps not too reckless to suggest that if one came to the original Middle English without the influence of the Latin glosses, and freed from the trammels of rhyme, a tentative alternative translation of the Queenborough version of the quatrain might have been:

Nenghe sithe yelde,	Nine chances to yield,
nenghe sithe gilde	Nine chances to pay,

and yif pund for the were,	And give a pound for the penalty,
yan is he heldere.	Then is he possessor.

In concluding that the customs of Kent were first committed to writing to meet the requirements of *quo warranto* proceedings, it must be remembered that these customs were not always peculiar to Kent. Most, perhaps all, were survivals from the common law of pre-Conquest England, and several can be recognized in the dooms of the Old-English kings.

Partible inheritance was certainly the general law before the feudal system was introduced into England by the Normans. Primogeniture first applied to tenure by knight's service, and its gradual application did not extend to socage tenure until the time of Edward I.

Provision for the widow is consistent with pre-Conquest law. In the *Secular Dooms* of Cnut it is associated with partible inheritance, *Cap.* 70: 'And if any one depart this life intestate, be it through neglect, be it through sudden death; then let the lord draw no more from his property than his lawful heriot. And according to his direction, let the property be distributed very justly to the wife and children and relations, to every one according to the proportion that is his due.'[37]

The right of the youngest to inherit the hearth is well-known as the custom of 'Borough English', so named to distinguish it from the Norman law, sometimes called 'Burgh Frauncoyes'. The custom appears to have been widespread in Europe in early times, and some historians have identified it in Asia.[38]

The gavelate procedure for recovering lands from a tenant who failed to render his dues also appears in the *Secular Dooms* of Cnut, *Cap.* 19: 'And let no man take any distress either in the shire or out of the shire, before he has twice demanded his right in the hundred. If at the third time he have no justice, then let him go at the fourth time to the "shire-gemot", and let the shire appoint him a fourth term. If that then fail, let him take leave that he may seize his own wherever he can.'[39] The closeness of the form of this article in the Kentish custumal, quoted above in Lambarde's translation, to the form of Cnut's doom, is particularly noteworthy. It is also significant, in view of William's charter, that there was a system of gavelate in London, and the 'Statute of Gavelet', 10 Edward II, applied to Lords of Rents in the City of London as well as in Kent.

We must not expect to find in Old-English law the negative provision for the lands of a man hanged for felony to be retained by the heirs

[37] William Stubbs, *op. cit.*, 87.

[38] Thomas Robinson, *op. cit.*, Appendix; F. Seebohm, *The English Village Community*, London, 1915, 351, 353.

[39] William Stubbs, *op. cit.*, 86.

instead of being forfeited to the Crown. It was not until the reign of Henry I that hanging became the penalty for felony. In Anglo-Saxon England the penalty for homicide was the payment of wergeld, with the blood-feud as the alternative. Fines, outlawry or mutilation were commonly the punishments for other crimes. But the post-Conquest privilege of Kent did not apply to high treason. This limitation is consistent with pre-Conquest law, for in the dooms of Alfred it is laid down, *Cap.* 4: 'If any one plot against the king's life, of himself, or by harbouring of exiles, or of his men; let him be liable in his life and in all that he has . . .'.[40]

To claim that the bodies of all Kentishmen (or gavelkinders) were free was to claim no more than the freedom of the ordinary peasant (ceorl), as distinct from the slave (theow), in pre-Conquest England. This leads to the vexed question whether there was ever villeinage in Kent, to the definition of villeinage and the distinction between the Old-English ceorl and the medieval villein; but this is not the place to embark on such a wide-ranging and controversial discussion.

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[40] *Ibid.*, 70.