Published by the University of Manchester at
THE UNIVERSITY PRESS (H. M. MCKECHNIE, Secretary)
12 Lime Grove, Oxford Road, Manchester

LONGMANS, GREEN & Co.
London: 39 Paternoster Row
New York: 443-449 Fourth Avenue, and Thirtieth Street
Bombay: 8 Hornby Road
Calcutta: 303 Bowbazar Street
Madras: 167 Mount Road

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Studies and Notes supplementary to Stubbs' Constitutional History

II

BY

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MANCHESTER
AT THE UNIVERSITY PRESS
LONGMANS, GREEN & CO.
LONDON, NEW YORK, BOMBAY, &c.
1915

University of Manchester Publications
No. XCI.

PREFACE.

As was foreshadowed in M. Petit-Dutaillis' preface to the French translation of the first volume of the "Constitutional History" of bishop Stubbs, the second volume, of which the French version appeared last year, has been found to need much less revision of the kind for which footnotes are inadequate. Instead of the twelve additional Studies and Notes of volume I, which were translated by Mr. W. E. Rhodes and published under my editorship by the Manchester University Press in 1908, M. Petit-Dutaillis has thought it unnecessary to append to volume II more than two such studies. The subjects with which they deal, "The Forest" and "The Causes and General Characteristics of the Rising of 1381" are, however, treated with such thoroughness as to provide sufficient matter for another volume of "Supplementary Studies." In his preface M. Petit-Dutaillis holds out the hope that his additions to the third volume of Stubbs' work will be concerned with questions more directly constitutional; but the Forest played a part in the contest between the English crown and people which makes the inclusion of the first essay in these studies quite appropriate, while the many additions that have been made to our knowledge of the Peasants' Revolt since Stubbs wrote constitute a sufficient justification for the second. The translation of the two studies has been made by my friend and colleague Mr. W. T. Waugh, and my duties as editor have been exceedingly light. As in the first volume, a few footnotes have been added in square brackets, in most cases by Mr. Waugh, who has also adapted the index from the one made by M. Lefebvre for the French edition.

JAMES TAIT.

The University,
Manchester,
July 10th, 1914.

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THE FOREST.

THE institution of the Forest, established by the Norman kings and maintained by the Plantagenets, has strong claims on the attention of the historian. Not only, as an institution very characteristic of the times, does it throw valuable light on certain features of mediæval society, law, and administration; but the fact of its existence led to important results in the constitutional crises of the thirteenth and fourteenth centuries. One may regard the Forest as a melancholy and decisive witness to the brutality of the Norman Conquest, as an illustration of the despotic authority of the Norman and Angevin kings, as a cause of the hostility of the barons and higher clergy towards the crown, or as a ground for the hatred felt by the people towards the king's officers. But from every point of view the Forest is equally worthy of study.

Interest of the subject

Stubbs did no more than touch upon the subject, and, as far as we know, the history of the Forest in mediæval England has never been treated in its entirety on the general lines which we wish to follow. Our intention is to set forth the most important of the results that have been achieved. We have used such printed records—whether published in full or calendared—as we have been able to consult, and several valuable works of modern scholarship, among which special mention should be made of Dr. F. Liebermann's critical essay on the *Constitutiones de Foresta* ascribed to Cnut, and

Mr. G. J. Turner's study on the Forest in its legal aspect during the thirteenth century. In addition, the interest of the task has led us to make cautious expeditions into the realm of comparative history. In seeking the origins of the English Forest we have turned to the Continent, where they are certainly to be found, and occasionally we have drawn a parallel between the evolution of the Forest in England and the corresponding process in France.

Use of the comparative method

(I)

THE FOREST AND THE RIGHT OF THE CHASE IN MEDIÆVAL ENGLAND.—ORGANISATION OF THE FOREST.

Meaning of the word "forest"

We have first to ask what meaning was attached in England to the word "Forest," in its legal sense,[1] as used, for example, in the phrase "Forestas retinui" in the charter of Henry I, or in such expressions as "bosci afforestati," "manere extra forestam," which appear in the charter of 1217.

Definition in the "Dialogus de Scaccario"

As early as the time of Henry II, Richard Fitz-Neal, in his *Dialogus de Scaccario,* gave a very clear definition of the Forest. It consists, he says, in preserves which the king has kept for himself in certain well-wooded counties where there is good pasture for the venison. There the king goes to forget his cares in the chase; there he enjoys quiet and freedom: consequently those who commit an offence against the Forest lay themselves open to the personal vengeance of the king. Their punishment is no concern of the ordinary courts, but depends entirely on the king, or his specially appointed delegate. The laws of the Forest spring "not from the common law of the realm, but from the will of princes; so that what is done in accordance with them is said not to be just absolutely, but just according to the forest law."[2] The nature of the Forest could not be more clearly stated, and the definitions given by Manwood in the sixteenth century and Sir Edward Coke in

1. The word is also used, even by lawyers, in its modern sense of a tract covered with trees; the author of the *Dialogus de Scaccario* writes, "Reddit compotum. . . . de censu *illius nemoris vel foreste. . . .*" (*Dialogus de Scaccario,* II. xi; ed. Hughes, Crump, and Johnson, 1902, p. 141).
2. *Dial. de Scacc.* I. xi, xii; ed. cit. 105 sqq.

the seventeenth, are based on those formulated by Richard Fitz-Neal.[1]

The word *Forest,* adds the author of the *Dialogus,* comes from *fera,* wild beast, *e* being changed to *o.*

The Forest is a hunting-preserve

Fanciful though it be, this derivation is deduced from a perfectly correct notion: in law and in fact, if not in etymology, the Forest owed its origin to sport. The Forest or the Forests—the word was used, in the middle ages, in both the plural and the singular—consisted of a number of game-preserves protected by a special law. They were mostly covered with woods, but also included moorland, pasture, and even agricultural land and villages.[2]

In what sense does the Forest belong to the crown?

The Forest, as such, belonged to the king. It must not, indeed, be confused with the royal demesne: for there were royal woods which were not Forest, and on the other hand, a forest often comprised estates which were the property of subjects, even of great lords. But it belonged to the king in the sense that it was created for his benefit, that within its limits none save himself and those authorised by him might hunt the red deer, the fallow deer, the roe, and the wild boar,[3] and

1. "A forrest doth chiefly consist of these foure things, that is to say, of vert, venison, particuler lawes and priviledges, and of certen meet officers appointed for that purpose, to thend that the same may the better be preserved and kept for a place of recreation and pastime, meet for the royall dignitie of a prince" (Manwood, *Treatise of the Lawes of the Forrest,* 1598, f. 1); "A Forest doth consist of eight things, videlicet of soil, covert, laws, courts, judges, officers, game, and certain bounds" (Coke, *Fourth part of the Institutes of the Laws of England,* ed. 1644, p. 289).

2. The word *forestis, foresta,* which is found in Merovingian documents of the seventh century, comes, according to Diez, from the Latin *foris,* and already meant a district placed *outside,* or preserved, by royal command. This etymology is quite in accordance with the sense of the word Forest in England, but after a careful study of Merovingian records, I am doubtful whether to accept it.

3. These four were generally considered to be the "beasts of the Forest" to which the forest law applied. The list varied somewhat in different times and places. See the very learned and sound paper of F. Liebermann, *Ueber Pseudo-Cnuts Constitutiones de Foresta,* 1894, p. 20; G. J. Turner, *Select Pleas of the Forest* (Selden Society, 1901), x sqq. From the time of the first Norman kings neither the wolf nor the fox was regarded as a beast of the forest. John of Salisbury says that they were not hunted according to the rules of venery (Liebermann, p. 23).

that it was subjected, throughout its extent, to very severe laws, enacted arbitrarily by the kings for the protection of the "vert and venison," that is to say for the preservation of the beasts of the Forest and the vegetation which gave them cover and food.[1]

In mediæval documents mention is also made of the king's *parks* and *warrens,* and sometimes of his *chase.*

Chases and royal parks

There was, in our opinion, no real difference between the king's chase and the Forest.[2] Parks were distinguished by the fact that they were enclosed by a wall[3] or fence.[4] But the records published by Mr. Turner show that the royal parks formed part of the Forest,[5] that they were under the oversight of foresters,[6] and that offences committed in them were punished in the same way as forest offences:[7] and in these respects isolated royal parks must have been in the same case as those surrounded by Forest. As the king's object in making a park was the better preservation of his game, it would be absurd if the forest law were not applicable to it. It is well to insist on this point, for English historians have vied with one another

1. If the king alienated a part of his Forest the forest law might still be applied to it for the benefit of the new owner. This was the case in the forests held by the earls of Lancaster in the fourteenth century (Turner, pp. ix, cxi sqq.). But as a rule the forest, in such an event, became a chase (see below, p. 154).

2. According to W. H. P. Greswell, *Forests and Deer Parks of the County of Somerset* (1905), p. 244, the chase was not subject to the forest law. He gives no proof of this, and admits that in certain documents the Forest of Exmoor is called the Chase of Exmoor. Kingswood Forest in Essex is another case in point. In 1328 J. le Warre complained that some years before the "gardeins de la chace" had put his manor "en la chace de Kingeswode et de Fulwode"; so that he no longer had the right to cut his wood (*Rotuli Parliamentorum,* ii, 29). Kingswood was part of the forest of Essex (Turner, p. 69). Mr. Turner's remarks on chases (*ibid.,* pp. cix sqq.) apply only to the chases of feudal lords.

3. "Fregit murum parci et intravit eum cum canibus" (Turner, p. 40).

4. "*Operarii in parco predicto ad reparandum palicium*" (*ibid.,* p. 55).

5. "Venacio data per dominum regem: . . . comes Cornubye venit in foresta de Rokingham . . . et cepit in parco et extra parcum bestias ad placitum. . . . ." (*ibid.,* p. 91).

6. "Willelmus, forestarius pedes in parco de Bricstoke" (*ibid.,* p. 83). These foresters were sometimes styled parkers (*ibid.,* p. 55).

7. *Ibid.,* pp. 4, 54 sqq., etc.

in repeating that parks were not subject to the forest law.[1] In this general form, the statement is false: a distinction should be made between the royal parks and those of the lords.[2]

The position of the royal warrens has never, as it seems to me, been accurately stated. It is clear that the word bore another meaning than the one it had in France,[3] and was applied especially to land reserved for hare-hunting. It would, however, be too much to say that royal warrens were entirely exempt from the forest law,[4] for in the *Placita foreste* we find thefts of hares from a warren judged by the same process as poaching in the Forest.[5] Even in Middlesex there was

Royal warrens

1. See, e.g., W. S. Holdsworth, *History of English Law* (1903), i, 346; MacKechnie, *Magna Carta* (1905), p. 493.
2. The treatise of Mr. Turner, who possesses well-deserved authority on the subject of the forest law, does not tend to prevent this confusion. Although royal parks often appear in the documents he has edited, he deals in his introduction only with the parks of subjects. It is of these that he is speaking when he says (p. cxxii): "The park was not subject to the forest law."
3. In France itself the meaning of the word changed—a fact which has caused many blunders. It was only in the sixteenth century that "garenne" acquired the almost exclusive sense of rabbit-preserve. See the remarks of Olivier de Serres, *Théâtre d'Agriculture,* ed. 1805, II., 62 sqq. There were certainly "garennes à connins" in the Middle Ages, but the word "garenne" had the quite general meaning of "game preserve." See, among others, a document published in De Maulde, *Condition forestière de l'Orléanais*, p. 491: "... ius habendi garennam ad *grossum animal*"; and an *arrêt* of the Parlement of Paris, dated 1270, in *Olim*, I., 835, no. xlix: "... in loco ubi rex habet garennam suam ad grossam bestiam et minutam."
4. As Mr. MacKechnie asserts (*Magna Carta,* p. 493).
5. From the examples in the documents published by Mr. Turner, we have selected three of different periods: i. In 1209, in the pleas of the Forest held at Shrewsbury, Hamon Fitz-Marescat was tried for stealing hares in the warren of Bulridge (Turner, p. 10).—ii. In 1255: the offence was the theft of four hares in the warren of Somerton; the presentment was made by the verderers; the chief offender being a clerk of the king's court, the case was adjourned. The inquisition had been held in the ordinary way (pp. 41 sqq.). The title of the document from which this illustration is drawn runs: *Placita foreste in comitatu Sumerset,* and the sub-title: *Placita de warrena de Sumerton.* The document also summarises an inquisition held concerning a hare found dead, and conducted like inquisitions on beasts of the Forest found dead.—iii. In 1286: *Placita Foreste apud Huntyndone. . . . Placita warrenne de Cantebrigge* (pp. 129—131). This record is the most elaborate of the three, and also the most striking, for it certainly looks as if this Cambridge warren lay quite apart from any forest. Evidently a large number of arrears had to be cleared off and delicate points decided. The justices of the Forest, sitting at Huntingdon, tried a large number of cases of hare-poaching and gave decisions on claims put forward by the inhabitants. See below, n. 4.

a warren which was entirely subject to the forest law.[1] Such cases were, however, exceptional. Offences against rights of warren had, as a rule, to be tried in the ordinary courts of law.

The question whether all the royal demesne was regarded as warren has been investigated by Mr. Turner, who concludes that the king would probably not consider his own lands to be warren unless they were sufficiently well stocked with game to make hunting worth while.[2] Nevertheless we find Edward I taking care to specify in 1305 that he had right of warren on all his demesne lands.[3] From the beginning of the Norman period, moreover, private warrens had existed only by royal grant. It may safely be inferred from this that the king could claim right of warren over the whole realm. And as a matter of fact, he did establish warrens for himself in all parts: as late as the end of the thirteenth century he is found defending his right of warren in lands which did not belong to his demesne.[4]

The king's right of warren

In short, the king apparently claimed the right of the

1. In 1227 Henry III disafforested the warren of Staines, in Middlesex. His charter shows that the warren had been subject to the forest law (Turner, p. cviii; cf. *Rot. Lit. Claus.* II., 197).
2. Turner, p. cxxxiii.
3. *Statutes of the Realm,* i, 144.
4. We have a very characteristic document of 1286 concerning the royal warren at Cambridge: "Johannes Extraneus, dominus de Middilton, Warinus de Insula, dominus de Ramton, et templarii de Daneye clamant habere libertatem warrenne in terris suis infra warrenam predictam domini regis; et sepius cum leporariis suis ceperunt plures lepores in eisdem terris suis pro voluntate sua. . . . Ideo preceptum est vicecomiti quod faciat venire predictos Johannem et Warinum et eciam preceptorem ad ostendendum warantum si quod inde habeant, vel ad satisfaciendum domino regi de transgressione predicta . . ." (Turner, pp. 130—131.) See also (p. 131) the claim of the Abbot of Ramsey.