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By FREDRIC L. CHEYETTE

I

One Monday in early Spring 1332 a galley commanded by two Genoese ran aground on the tiny island of Brescou in the Mediterranean, a mile or so off shore of the episcopal city of Agde. For some time the ship had been preying on merchant vessels and launching tip-and-run raids along the coast, even in the harbor of Aigues-Mortes itself. On the previous day a ship out of Marseille had been its victim, and crew, merchants and goods were on board when the galley met its end. The two Genoese captains and their followers were picked up by agents of the bishop of Agde. Accused of piracy, they were thrown into the bishop's dungeon. They did not stay there for long.[1]

Marauding pirates had threatened coastal traffic since time out of mind. But in recent years this meaningless war of prize and reprisal, marque and countermarque, hotheaded pursuit and noble robbery had become largely a Genoese export, and the Ligurian city's ebullient politics had made mercantile seafaring increasingly dangerous. The battle between Guelf "ins" and Ghibelline "outs," the one supported by King Robert, the others by King Frederick of Sicily, had been newly aggravated by the arrival of Louis of Bavaria on the peninsula to claim the iron crown of King of Italy from the hands of three excommunicated bishops and the Imperial title from the people of Rome. From time to time the Ghibellines profited from the absence of the Guelf fleet and attacked the harbor of Genoa, and a Guelf captain launched a retaliatory attack on one of the castles of the expelled nobility around Savona. But the Genoese were seamen above all, and the war could not be confined to the city's Riviera. When the Emperor Louis besieged Naples in 1328, the forty armed Genoese galleys sent to assist King Robert found themselves opposed by thirty-three Savonese galleys manned by Genoese Ghibellines sent to support Frederick and his Imperial ally. The Eastern Mediterranean was no refuge for either side. Ships from ports allied with the Angevins risked encountering Spinolas and Dorias. Spinolas and Dorias on their way back to Savona risked capture when passing through the seas of the kingdom of Naples. The coast of Provence and Languedoc was a Ghibelline hunting preserve. When bad weather brought bad crops in Languedoc, when men ate raw grass for want of grain and the starving died in the streets of the coastal cities, the war at sea stopped grain ships from Lombardy and Sicily. Relief had to be brought down the Rhone from Burgundy and the Comtat Venaissin. Between 1330 and 1333 the Parlement of Paris heard nine demands for marque against Ghibelline pirates,

[1] Details are given in Archives Nationales [hereinafter, A.N.], K 1176 nos. 36 and 38. Unless otherwise noted, facts about the arrest and the litigation that followed come from these two documents. The island is now only one kilometer from shore; but the shoreline has changed greatly since the 14th century. According to the bishop's advocate the island was about one-fifth of a league from *terra firma*.

among whom the names Spinola, Doria and de Mari figured prominently.[2] The situation in the Gulf of Lyon now resembled that in the Bay of Biscay and the English Channel; it also troubled the court of Philip of Valois. In 1330 the king called ambassadors from both parties to meet with him to see if peace could be arranged; but negotiations proved fruitless. The following year Robert of Sicily succeeded where the French king had failed. Piracy, however, now finding a new excuse in a Genoese war with Catalonia, continued unabated. Finally, early in 1332, royal letters ordered the seneschal of Carcassonne to exercise greater vigilance against the corsairs.[3] Prompted by these letters or by their endless hunger for another nibble at seignorial jurisdictions, the viguier of Beziers and his judge were soon at the door of the bishop of Agde demanding that the newly captured pirates be handed over to royal justice.

The bishop's men refused. In response the viguier called in royal sergeants, who broke open the bishop's prison and marched the accused off to Béziers. The pirates' possessions (including, presumably, most of their loot), which the bishop had seized by right of his justice, were seized in turn by the viguier and sold for the king's profit. The pirates were tried and found guilty. Seventeen were hanged at Béziers, ten at Vendres, and ten at Valras, their bodies exposed for the edification of others at sea who might come within eyeshot or hearsay of the king's gallows.

In matters of justice use meant everything. Should the bishop have let it pass, this one high-handed action of the royal viguier on another occasion might have become proof of royal seisin and a demonstration that the bishop had no rights, not only in the punishment of pirates, but possibly in other cases of high justice as well. The king's advocate might argue this case was exceptional, but nothing was less clear in the early fourteenth century than the limits that circumscribed high justice, or *merum imperium*, as it was called in the South, and another time this case's exceptional quality might be conveniently forgotten.[4] The bishop

[2] See, in general, L. Simeoni, *Le signorie*, I (1950), 104 ff, and V. Vitale, "Guelfi e Ghibellini a Genova nel duecento," *Rivista storica Italiana*, LX (1958), 525–541. For the warfare between Guelfs and Ghibellines in Genoa, Stella, *Annales Genuenses* [*Rer. Ital. SS.* XVII], *passim*, and especially cols. 1049, 1053, 1060; the two fleets on opposite sides in the war between Louis of Bavaria and Robert of Naples are described *ibid.* col. 1058; attacks in the eastern Mediterranean *ibid.*, col. 1059 and H. Furgeot, *Actes du Parlement de Paris*, 2me sér., (1920) no. 228. In Genoese annals the words "intrinseci" and "extrinseci" have a political as well as geographical connotation. For the marques delivered by Parlement, Furgeot, *Actes*, nos. 225, 228, 232, 252, 253, 254, 270, 414, 708, mainly as reprisal for attacks along the coast of Languedoc and Provence. A. Blanc (ed.), *Le livre de comptes de Jacme Olivier* (1899), pp. 502–507: an estimate of merchandise taken by Genoese from merchants of Narbonne *ca* 1300. Commercial relations between Marseille and Genoa were totally suspended in 1316 as a result of the Guelf-Ghibelline fight, and remained hazardous for the next fifteen years: E. Baratier and F. Raymond, *Histoire du Commerce de Marseille*, II (1951), p. 191. The famine is mentioned in Péjat, Thomas and Desmazes (edd.), *Le Petit Thalamus de Montpellier* (1840), p. 347.

[3] On the peace negotiations, *Ann. Genuenses*, cols. 1060, 1064; the war with the kingdoms of Majorca and Aragon, *ibid.*, col. 1065 and *Liber iurium Genuensis* II [*Historiae patriae monumenta* IX], col. 501. The letter to the seneschal of Carcassone: Bibliothèque Nationale, ms. Doat 52, fols. 192–196.

[4] On the difficulties of defining high justice, see B. Guenée, *Tribunaux et gens de justice dans le bailliage de Senlis* (1963), pp. 77 ff.

appealed to the seneschal of Carcassonne, charging the royal officers with "new impediment and disturbance" to his judicial rights. From the court of the seneschal he appealed in turn to the Parlement of Paris, which, during the winter term of 1333, sent a commissioner to make the inquest. A decision apparently never came. Year after year the commission was renewed, the commissioner eventually replaced, but the king's advocate, probably trying to force the bishop to buy a compromise, continually prevented any judgment. After 1346, the pirates long since rotted and their bones bleached, the case disappeared in the lacunae of the Parlement's records.[5]

When the case vanished, however, it left behind as judicial flotsam the briefs of the advocates for bishop and king.[6] These briefs, or rolls of "articles," as they were called in the jargon of the times, are of more than anecdotal interest. For the king's advocate chose to rest his case on the concept of sovereignty: sovereign legitimation of the violence of war and sovereign limitation of the violence of justice, implicitly assuming the intimate connection between the two. His argument reveals something of the complexity this concept had acquired as an everyday political instrument at the beginning of the reign of Philip of Valois. And the reply of the bishop's lawyer indicates the way it was changing the political assumptions even of those who had every reason to oppose royal claims.

The king's advocate had good cause to try to delay a decision on the dispute: the bishop's case was very strong. In June 1187 Bernard-Ato, viscount of Agde, on the eve of becoming a canon of the cathedral church, had given all he had within the diocese of Agde to the church. The donation was confirmed in July by Count Raymond of Toulouse and renewed immediately afterward in a much more formal and expansive charter by Bernard-Ato. During the hectic years of the Albigensian crusade, the bishop, like most of the great lords of the area, was forced to work out detailed compromises with successive overlords. In September 1219 bishop Thedisius signed a compromise agreement with Amalric of Montfort at Castelnaudary. In June 1224, with the help of the archbishop of Narbonne, he reached an agreement with Raymond of Toulouse — though not before the young Count had an opportunity to show off his military prowess, riding with his armed followers through the city on Palm Sunday shouting, "Toulouse, Toulouse." Five years later the bishop was negotiating with the Capetian agent in the area,

[5] A.N., X^{1a}8845 fol. 339, fol. 395: commission to Me Thomas de Monteferrario (1334); X^{1a}8846 fol. 68 (1335), fol. 239 (1337): the royal procurator had refused to accept a substitute for the original commissioner; X^{1a}8847 fol. 245 (1342): the royal procurator has been negligent; fol. 348 (1342), X^{1a}8848 fol. 81^{v} (1344), fol. 178^{v} (1345), fol. 314 (1346). All but a few scraps of the episcopal archives were burned on 24 pluviose An IV by the revolutionaries. "On a trouvé 17 cahiers des titres féodaux provenant de divers corps ci-devant ecclésiastique: il importe d'effacer jusqu'à la moindre idée de pareils titres qui ne tendent qu'à rappeler le règne affreux de l'esclavage." Any remaining records of this case probably disappeared in the auto-da-fé. (My warmest thanks to Monsieur André Castaldo of Agde for this information, and for having searched the Archives Municipales of that city and the Archives Départementales for any remaining traces.)

[6] A.N., K 1176 no. 36: articles of the king's procurator; no. 38: articles for the bishop; no. 37: rebuttal for the bishop; no. 39: reply to this rebuttal.

and in 1234 letters of Louis IX confirmed the agreement they finally reached. Through all the repeated rearrangements the bishops carefully retained the essential of their vicecomital prerogatives.[7]

These texts, preserved in the episcopal cartulary, seemed all the bishop needed to prove his case. There was not even a problem of interpreting vague or outdated terms. Though Bernard-Ato's charter of June 1187 spoke laconically of *omnes dominationes vicecomitatus*, the document of August 1187 was profuse: "the city and burgs of Agde . . . with all other castles, villas, and manses, churches, fortifications, fiefs and fiefholders . . . , the right to salvage wrecks, . . . civil and criminal cases and their execution. . . ."[8] Bishop Peter had been careful to have Count Raymond renounce all his claims to the viscounty. Bishop Thedisius won the same from Amalric of Montfort in 1219, and this agreement in turn formed the basis for the compromise with Louis IX. *Merum et mixtum imperium*, high and low justice, were specifically mentioned in the agreement with the young Count Raymond in 1224.[9] Whatever the phrase's possible meaning at the beginning of the fourteenth century, the bishop had it.

To these seemingly unimpeachable proofs the king's advocate replied with arguments that, as the bishop's advocate drily remarked, "consisted of law rather than fact." A singular statement to make in a law court, perhaps, but one that, as we will see, had its point. "The lord king is and his predecessors have been Emperors in their kingdom," the royal lawyer began. "Proof of this is not lacking." For this reason, he continued, the king has lordship and jurisdiction over the seas of his kingdom and the seacoasts. Warming to his subject with a prolixity that fourteenth century lawyers alone could appreciate, he came at last to the charters that apparently stood in the way of the royal claim.

If it appears that the Count of Montfort or anyone else made a compromise agreementwith a bishop of Agde concerning the land of Agde and the seas contiguous thereto, they could concede or agree to nothing concerning the seas of the realm in the aforesaid *sénéschaussées* to the prejudice of our lord and king or his royal, sovereign and imperial rights and jurisdiction, [for these] possessions and seisins . . . belong to the royal right by sovereign and imperial authority; they cannot be separated from the royal and imperial Crown and are imprescriptible.[10]

By 1332 the dictum *rex imperator*, the king is emperor in his kingdom, had be-

[7] *Gallia Christiana* [hereinafter, *G.C.*], VI *Instrumenta*, cols. 329, 330, 331–332: donations and confirmation, 1187; *ibid.* col. 334 and *Histoire générale de Languedoc* [hereinafter, *H.L.*], VIII, col. 725: *compositio* with Amalric of Montfort; *G.C.*, VI *Instrum.*, col. 336 and *H.L.* VIII, col. 802: settlement with the young Count of Toulouse (1224); *H.L.*, VIII, cols. 916, 976: settlement with the royal seneschal and with Louis IX (1229, 1234).

[8] *G.C.*, VI *Instrum.*, cols. 331–332.

[9] See note 7.

[10] ". . . potius in iure quam in facto consistat. . . ." A.N. K 1176 no. 37; ". . . dominus noster Rex est et sui predecessores Reges fuerunt reputantur et reputabantur imperatores in Regno suo et per totum Regnum et districtum suum et limitum suorum et quod hec sunt notoria per totum Regnum nec indigent probationem." ". . . articulata supra . . . pertinent ad jus regale superioritatis et imperialis auctoritate que abditari non possunt a corona regali et imperiali et imprescriptibilia existunt": *ibid.* no. 36, articles, 1, 39 and 40.

come a lawyer's commonplace. Its very appearance in this case testifies to that: neither the pirates nor the judicial rights of the bishop of Agde, after all, were of any particular political or financial importance. It was already a stock phrase from the storeroom to be used when nothing more convincing was at hand. This very commonness, indeed, is what makes the case interesting. From the Canonists of the late twelfth century, by way of Innocent III's *Per venerabilem* and the writings of thirteenth-century glossators, the doctrine that the king of France recognized no superior — and its theoretical consequences — had indeed come a long way.[11] Schoolboys who had heard it from their masters at Bologna, Montpellier, and Orleans were now practitioners turning glossators coinage to good use. The doctrine had both expanded and descended.

That the Crown possesses certain inalienable rights was likewise no novel idea. Seventy years earlier Henry of Bracton in England had brought the idea out of the schoolroom to base an important part of his theory of franchise upon it. In the 1280's the lawyers of Edward I had tried (though without success) to put Bracton's theory into practice in their *Quo warranto* campaign. And in 1329 Pierre de Cuignières cited the doctrine to the assembled Council of Vincennes to oppose the pretensions of church courts. As for the glossators, their count of inalienable rights of sovereignty by this time might run into the hundreds.[12]

For his generalities the king's advocate had to do little more than consult a thesaurus of contemporary clichés. But what of the peculiar specifics of this case? Here, the matter was somewhat different. Early fourteenth-century lists of sovereign prerogatives, such as that of Lucas de Penna (sixty-seven), though they included numerous rights that most holders of *merum imperium* in Languedoc would have disputed (such as the exclusive right to create notaries) and many others whose only interest was their antiquarian derivation from Roman texts, said nothing about either seacoasts or pirates.[13] Nor did the standard gloss. The word *littus* provoked Accursius (summarizing Bolognese doctrines early in the thirteenth century) and Bartolus (doing the same in the mid-fourteenth) only to generalize vaguely that the seacoast's "protection and jurisdiction belongs to the Roman People."[14] Jacques de Révigny may have attributed jurisdiction over

[11] See, in general, G. Post, *Studies in Medieval Legal Thought* (1964), pp. 453–482 and the works there cited. On its later use in Parlement, see A. Bossuat, "Le formule 'Le Roi est Empereur en son royaume'," *Revue historique de droit français et étranger*, 4me sér. XXXIX (1961), 371–381. Bossuat's conclusions are supported by this case.

[12] P. Riesenberg, *Inalienability of Sovereignty in Medieval Political Thought* (1956); Bracton, *De legibus et consuetudinibus Angliae* fol. 14, (ed., Woodbine, II [1922], p. 53); D. Sutherland, *Quo Warranto Proceedings in the Reign of Edward I 1278–1294* (1963), pp. 13–15, 71 ff.; F. Olivier-Martin, *L'assemblée de Vincennes* (1909), pp. 118, 122–123.

[13] Lucas de Penna, *Lectura . . . super tribus libris Codicis* (Lyon, 1538), fol. 276; to C. 12, 35, l.14.

[14] See the *Glossa ordinaria* to Digest 1, 8, 2, *litora*: "communia sunt quo ad usum et dominium . . . sed quo ad protectionem sunt populi Romani," and Digest 1, 8, 3, *lapilli et gemma*, Digest 43, 8, 3, *arbitror*, Code 7, 37, 3, *omnia principis*, glossing the statement "cum omnia principis esse intelligantur": "etiam quo ad proprietatem . . . Sed Bulga. contra etiam ibidem, et hic expone, ad protectionem vel iurisdictionem. sic et littora Romana imperii dicuntur populi Romani"; and Bartolus's commentaries to the same texts: Bartolus a Saxoferrato, *In secundam Codicis partem* (Venice, 1575), fol. 58; *In primam ff. partem*, fol. 29; *In primam ff. novi partem*, fol. 134.

the sea to the Emperor, but if he did, neither Baldus nor Bartolus thought it worth their trouble to expand upon.[15] Bartolus remarked once in passing that "the Venetians claim to have jurisdiction in their seas by long custom." But nothing more. Perhaps he recalled Alexander III's legendary grant of lordship on the Adriatic to Venice. Perhaps a memory lingered of the day when Genoa boasted to Barbarossa that by her own efforts the sea had been made safe from Rome to Barcelona, and every man could rest under his fig tree and vine: a task the Empire had not accomplished.[16] Clearly, neither pirates nor admirals were uppermost in the commentators' minds. The royal lawyer of 1332, when he turned *Rex imperator* and inalienability to this particular use, was not borrowing quite so directly from men of learning. From Roman law he took vocabulary and maxims, but his doctrine's particular shape had a certain degree of novelty, even though probably not of his own invention. It was a novelty derived from the exigent logic of fourteenth-century politics passed through the Romanized filter of sovereignty. Theories were one thing, use another. Theories did not work by themselves; but neither were practitioners unthinking machines. It was in the way they applied the simplicities of the school to the complexities of daily routine that the lawyers the Valois inherited from the last Capetians showed their inventiveness. Nothing suggests that either the Agde case or the lawyer who handled it were anything but routine. Precisely this makes the event revealing.

Along the way from his initial assertion of the king's *imperium* to his argument that this sovereignty was inalienable (items 39–40), the king's advocate advanced several other major points. The king's admirals exercise and conserve the royal and imperial sovereignty of the sea (item 4); the king alone has authority to punish illicit use of arms (items 5–6) and to issue letters of marque (item 8); he has the "right of wreck" along the coast (items 9–11, 17 and 18) and various other *iura regalis preeminencia* (item 16); at Aigues-Mortes he has the only "general port" in the *sénéchaussées* of Carcassonne and Beaucaire (item 16); and finally, the pirates had uttered "most grievous and unheard-of blasphemies" against the king, even threatening to kill him, thus committing the crime of *lèse-majesté* (art. 27).[17] Did anything other than the sea and armed attack connect all these arguments? How were they associated with inalienable sovereignty of the sea? And why, of all things, introduce an admiral with his special jurisdiction, when no admiral had been seen exercising justice along this coast, and when it was the very ordinary viguier and the judge of Béziers who had acted for the king?

To find the answers we must leave the lawyers and return for a moment to the pirates. For pirates, as we have seen, were no ordinary run of gangsters. Violent

[15] ". . . mare est commune quo ad usum, sed proprietas est nullius: sicut aer est communis usu, proprietas tamen est nullius, secundum Iac. de Ra. sed iurisdictio est Caesaris": *Additio* to gloss on Digest 1, 8, 2, *litora* (ed. Antwerp, 1576, col. 116). The opinion is mentioned by neither Bartolus nor Baldus in their commentaries on this law.

[16] Bartolus a Saxoferrato, *In secundam ff. novi partem* (Venice, 1575), fol. 130^{v} (to Digest 47, 10, 1.14); E. H. Byrne, "Easterners in Genoa," *Journal of the American Oriental Society*, XXXVIII (1918), 177. My thanks to Robert Lopez for bringing this quotation to my attention.

[17] A.N. K 1176 no 36.

they were, and what they committed were called in lawyer's Latin "*rapinas, invasiones, depredaciones, prisias, reprisilias, marchas, et alia maleficia et illicita.*" But their acts were as often an excuse for war as for judicial action, and as often settled by a peace treaty as by a criminal court. Violence in the Middle Ages, as in our own day, could be quite respectable. It was a way of life shared by noblemen and thugs. Though monarchies and principalities had made their way, with the aid of the Church or at its behest, by suppressing violence or inventing substitutes, this aristocratic propensity remained a hard political fact. The very emphasis given the French king's right to prosecute those who bore illegal arms and the frequency with which laymen and clergy, nobles and burgesses were hailed into court for doing so, is evidence enough. But the key word here is "illegal": *armorum congregatio illicita.* No one in the Middle Ages was a pacifist. Popes in their decrees clanked swords as well as keys, and monks rode off in arms to burn down rival neighboring chapels. Not all violence had to be suppressed — only some. The problem was: Which?[18]

II

St Augustine, in the *City of God*, recounts an exchange between Alexander the Great and a pirate who had been seized:

> When that King had asked the man what he meant by keeping hostile possession of the sea, he answered with bold pride, 'What thou meanest by seizing the whole earth; but because I do it with a petty ship, I am called a robber, whilst thou who dost it with a great fleet are styled emperor.' [19]

There is no retort of this kind on record for the thirteenth century. Nor did any mediaeval pirate manage to style himself Emperor. A number, however, managed to claim the title "Admiral to the Emperor," not to speak of "Admiral to the King" of France and of England. Alamannus da Costa, a "famous prince of pirates" took the title "by the grace of God, the king, and the community of Genoa, Count of Syracuse and *familiaris* of the lord king." Thrown out of Sicily by Frederick II, he received the support of the pope, but was captured by the Venetians and imprisoned in an iron cage.[20] The step from rapacity to respectability — and back again — was easy to make. It was easy in part because piracy was not necessarily a dirty word nor a pirate automatically a criminal.

[18] E. Perrot, *Les cas royaux* (1910), pp. 158 ff.; see, for example, the condemnation of the monks of St Martial of Limoges, A.N. X[1a] 5 fol. 185[v], and of the prior and convent of St-Ayoul de Provins, *ibid.* fols. 282[v], 389, X[1a] 6 fols. 21[r], 22[r–v]; Innocent IV, among others, defended clerical violence under certain circumstances (he was, after all, a lawyer and a politician) in his commentary to *Extra.*, II, 13, 12: *In quinque Decretalium libros . . . commentaria* (Venice, 1570), p. 141.

[19] St. Augustine, *The City of God* IV, 4 (trans., M. Dods, Modern Library ed., pp. 112-113). He probably took the story from Cicero, *De Re Publica*, III, 14, 24.

[20] E. Kantorowicz, *Frederick the Second* (tr., E. O. Lorimer, 1931), pp. 122–123 and the *Ergänzungsband* to the German edition (1931), pp. 48–49; J. F. Böhmer, *Regesta imperii* (edd., Ficker and Winkelmann, 1892–94), no. 12370. Da Costa was excluded as "comes Siracuse" from the treaty of 1208 between Genoa and Marseille, along with the "cursales qui in Siciliam morantur vel consuetudinem habent": *Liber iurium Genuensis* I [*Historiae patriae monumenta* VII] cols. 539–540.

All the known Sicilian admirals of Frederick II were Genoese. Most of them trained for the post in the profession of pirate. Henricus Piscator is a good example. Son of a notable Genoese family, he first appeared on the scene in 1204 as Count of Malta, sending ships to aid Alamannus da Costa conquer Syracuse from the Pisans. In 1206 he put together a fleet and took Crete — in his own name — from the Venetians. When he was forced out two years later, he negotiated a treaty of alliance with Genoa as equal to equal and for another ten years attempted to reconquer the island. Meanwhile he supported himself by piracy, sometimes in his own name, sometimes in the name of Genoa. Family connections helped him along: he married a daughter of William Grassus, another famous pirate and admiral of Sicily from 1194 to 1201. This relation may have won him his appointment to the same post by Frederick II in 1221, a post he held until his death. We should therefore not be surprised to find Frederick ordering in 1239 that no Sicilian was to engage in piracy without the authorization of his newly appointed admiral Nicolas Spinola.[21]

To modern eyes this sending the goat to guard the cabbage patch seems incongruous. But it was peculiar neither to Sicily nor to the thirteenth century. An English chronicler of the early thirteenth century referred to the men of the Cinque Ports as "*pirates regis.*" A half century later, Simon de Montfort, bidding for the support of these same towns, raised a tax on ecclesiastical possessions so the Portsmen might equip *innumeras classes piraticas*. Venice was arming its own pirates by 1300. In the early fourteenth century members of the Alard family from Winchelsea were alternately mayors, admirals and pirates; the admirals of Phillip the Fair were sea-borne *entrepreneurs*, under contract to the king: interested mainly in the profits of prizes. What was true of the great captains was also true of smaller fry: men accused of robbery and murder at sea went free if they enlisted to rob and murder in the king's name.[22] And in 1337, when Phillip of Valois sought an admiral to command his Channel fleet, he found no one better than Pietro Barbavaira, a Genoese who had been plundering French shipping that very year in the sea off Aigues Mortes.[23] With Barbavaira we come back to those

[21] W. Cohn, *Die Geschichte der sizilischen Flotte unter der Regierung Friedrichs II.* (1926), pp. 90 ff, esp. 93–106; N. Alianelli, *Delle antiche consuetudini e leggi marittime delle provincie napolitane* (1871), p. 180.

[22] K. M. E. Murray, *The Constitutional History of the Cinque Ports* (1935), pp. 33, 38; F. Sassi, "La guerra di corsa e il diritto di preda secondo il diritto Veneziano," *Rivista di Storia del Diritto Italiano*, II (1929), 113–114; A. Dumas, *Etude sur le jugement des prises maritimes en France jusqu'à la suppression de l'office d'amiral* (1908), p. 44; R. G. Marsden, *Documents Relating to Law and Custom of the Sea*, I [Navy Records Society, XLIX] (1915), pp. 31, 99 n. 1 (goods captured *more piratico*); R. Lopez, *Dieci documenti sulla storia della guerra di corsa* (1938), pp. 9 ff. (contracts to arm ships *ad modum cursus*); J. Heers, *Gênes au XVe siècle*, p. 304 n. 9 (contracts of sale *morum piratarum*). For a later period see generally Heers, *Gênes*, pp. 300–307 and F. Braudel, *La Méditerranée et le monde méditerranéen à l'époque de Philippe II* (1967) II, 190 ff.

[23] Froissart, *Chroniques* (ed., S. Luce, 1869), I, pp. 153, 406 and p. ccxxvii, n. 2; M. Géraud (ed.), *Chronique latine de Guillaume de Nangis*, II (1843), 156. Letters of marque issued by the Parlement against the Genoese in reprisal for piratical acts of Barbavaira and his brother Johannes Pelati (19 July 1337): B. N. ms Mélanges Colbert 414, no. 109. Barbavaira had been at this work at least since 1333: Furgeot, *Actes du Parlement de Paris* no. 708. For an earlier example see the letter of Philip IV

Genoese who in 1332 unintentionally gave the Valois lawyer a chance to discourse upon sovereignty. All these pirates "assume[d] more plainly the name of kingdom . . . not by the removal of covetousness, but by the addition of impunity." And this made the task of distinguishing violence from violence all the more difficult.

If pirates turned admiral and admirals played pirate, what was the line where wrong became right? The question was made yet more puzzling by the commonplace and generalized marauding that went under the name of marque and reprisal. By the late thirteenth century, however, lawyers, ambassadors, and scholarly theorists had made the required distinction — in terms from which the lawyer of 1332 distantly drew his doctrines. They answered simply — and the simplicity of their argument gives it vigor even in the twentieth century — that it is not the act that renders itself legitimate, nor the actor, but the authorization. Rightful violence belongs only to him who has no superior and to those he appoints. Only Emperor and kings, and the admirals, judges, and assorted officials bearing their commissions, have the right to victimize their fellow men. This applied, in the end, both to war and to justice, and thus, at Agde, both to admiralty and to marque, the royal lawyer's two major arguments. In intentional confusion the scholars' distinction advanced the monarchy's control of warfare and the expansion of royal justice.

There was nothing inevitable about this idea. All of modern political thought, to be sure, has retained the monopoly of legitimate violence as an essential attribute of sovereignty — largely as a consequence of what we are about to see. In the thirteenth century, however, other alternatives were equally possible. The theorists' distinction had to make its way against serious resistance. For it attacked the nobles' way of life, drove a breach into their power to command and punish, stole from them an important part of what made them in their own eyes and in the eyes of their fellow men, lords, nobles, the leaders of society. "By our custom," wrote Beaumanoir in the mid-thirteenth century, "all gentlemen may wage war." As their right, and perhaps their most important one, it ennobled them: neither burgesses nor those "in another's power" could do so.[24] And this right to war was not widely distinguishable from the violence of justice. War was an alternative to justice; it was also an extension of justice by other means. One thinks immediately of the "wager of battle" Beaumanoir describes as a gentleman's argument at law and the number of times men on trial in Parlement for illegally parading in arms defended themselves by saying that they were merely exercising their judicial rights. For in fact, though all men distinguished the

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to the seneschal of Carcassonne, at the request of the consuls of Narbonne, ordering him to take action against Surlion Grimaldi, brother of "Renerii Grimaudi amiraldi nostri," who had robbed Narbonese merchants at sea of 3000 l. t. worth of goods: Blanc, *Le livre de comptes de Jacme Olivier*, p. 539. Toward the end of Philip's reign three other members of the Grimaldi family, Franceschinus, Luchinus, and Andreas were exercising their profession against the merchants of Piacenza; see the merchants' undated complaint to the bishop of Soissons (probably Gérard de Courtonne), Arch. Nat., J 895 n° 6bis.

[24] Ph. de Beaumanoir, *Coutumes de Beauvaisis*, 1671–1673 (ed., Salmon [1900], II, pp. 356–357).

exercise of justice from the exercise of war, thought forms molded by the ancient "right to command" still blurred the line between the two. With perfect clarity Beaumanoir in his chapter on High and Low Justice discussed the right of the Count of Clermont and others who "hold in Barony" to summon men to stand castle-guard and their right to appropriate their vassals' fortresses in case of necessity. Innocent IV found it equally cogent to argue that a prelate who had temporal jurisdiction could take up arms against his disobedient subjects, *dummodo iurisdictionem indicendi bellum habeat*; and, even if he did not have the right to wage war, to take up arms nevertheless, "for in such cases he does not make war, properly speaking, but executes justice." North and South, in France, "high justice" included the right to marshal one's men for war.[25] The theorists thus had launched an attack on a broader front than may at first appear.

The attack of the king's viguier and advocate on the high justice of the bishop of Agde aptly symbolized the more general campaign: launched as it was across the field of piracy. The violence of justice and the violence of war, marque, and piracy were Siamese twins. To control one was to limit the other. Mediaeval lawyers knew this; so undoubtedly did gentlemen who prized their noble rights. The profound change in attitude the lawyers' doctrine demanded from high-justicer lords was symbolized, as we will see, by the response of the bishop's advocate. Admiralty jurisdiction and monopoly of marque were not extraneous to the royal advocate's argument: they were at its heart. We must therefore look at each of these in turn.

III

"The king and his predecessors," said the king's advocate in 1333,

> are and have been, by themselves and through their officials, in seisin and possession from time immemorial of lordship and jurisdiction, sovereignty and resort, over the seas of their kingdom; . . . of guarding those seas by day and by night and having admirals of the kingdom's seas. . . . [And these admirals] are and have been from ancient times in seisin and possession of guarding the said seas by day and by night, in the name of our lord king and for him, . . . to conserve possession and seisin of his rights of royal and imperial sovereignty.

The argument, in a case of piracy, seems normal enough. But was it? For one thing, it had not been an admiral, but the royal judge and viguier of Béziers who had taken the pirates from the bishop's prison and hanged them. For another, there is no trace of an admiral exercising jurisdiction along this coast during the first half of the fourteenth century. Complaints about pirates went to ordinary

[25] *Ibid.*, 1662–1665 (ed., Salmon, II, pp. 351–352); Innocent IV, *In quinque Decretalium libros . . . commentaria* (Venice, 1570), fol. 141, commenting on II, 13 *De restit. spoliat.*, 12 *Olim*; Arch. dept. de l'Aude, H 595 no. 2: Philip IV confirms the sale of Tuchan to the abbey of Fontfroide, reserving cases of heresy, rape, arson, counterfeiting, carrying illicit arms, murder, homicide, *exercitum et cavalcata* (1308); Bibl. Nat., ms Doat 49, fols. 289, 296, 309: the royal viguier had made a public proclamation summoning men to the royal army at Arras on the grounds that the jurisdiction of the Viscount of Narbonne was in the king's hands (1302); P. C. Timbal, *La Guerre de Cent Ans vue à travers les registres du Parlement* (1961), pp. 59, 160.

royal officials or to Paris.[26] When the royal advocate spoke of the king's admirals guarding the coast, he was probably not talking about an actual functioning official jurisdiction. But whether he was or not, he was referring most directly to something quite different. He was raising a series of arguments that had raged between the French court and the English, arguments over piracy in the Bay of Biscay and the Channel and marauding along the borders of Aquitaine. For three decades these arguments had led both sides deep into claims of sovereignty. They had welded to those claims a newly created office of admiral, an office at whose heart was the theorists' distinction: the sovereign commission that legitimized his acts. By 1332 these arguments were there for all to use.

The word "admiral" came to Europe from Sicily. There, as a latinization of the Arab "emir," it had been given as a title to the commanders of the royal fleet. The crusading fame of one of these, Margaritus of Brindisi, "prince of pirates" and *familiaris* of the king, spread the title and its function northward. A Venetian "admiral" is mentioned in 1208, a Pisan in 1210, a Genoese in 1226. In 1246 two Genoese became the first to bear the title Admiral of the king of France (though not until 1270 does it appear in French sources). It took another half-century for the term to reach England.[27]

In the early fourteenth century, however, "admiral" was still only an honorable synonym for *magister* and *capitaneus* and, in France at least, it was not yet restricted to a naval command. Only with Hugh Kieres in 1336 are there signs that the admiralty was becoming an "office" with its own particular privileges; only with Louis d'Espagne in the 1340's is there evidence of a special jurisdiction. The office of admiral may thus be the rarest bird in the mediaeval administrative bestiary: one that was created in theory before it was instituted in practice.[28]

To be sure, the Sicilian admirals, whose offices were curial as well as military, exercised judicial powers. Nicolas Spinola, named admiral in 1239, was given not only jurisdiction over the crews of the royal fleet but also the exclusive right to grant reprisals, to license pirates and to hear civil and criminal cases involving

[26] The complaint against the Grimaldi addressed to royal *enquêteurs*, Arch. Nat. J 895 no. 6*bis*; others obviously addressed to Paris (Blanc, *Livre de comptes*, p. 529; Bibl. Nat., ms Doat 52, fol. 192^{v}) from where the royal answer came. No mention of an admiral in the grants of marque listed above n. 2, no trace in the archives of Narbonne or in the documents copied in the Collection Doat emanating from the coastal regions. The two acts known in which Florent de Varennes took part as *Admiratus domini Regis* (1271) have nothing to do with the sea or the sea coast: L.-R. Ménager, *Amiratus-'Αμηρᾶς. L'Emirat et les origines de l'amirauté* (1960), pp. 149–150.

[27] For a history of the term in Sicily and its spread through Europe in the 13th century see Ménager, *Amiratus-'Αμηρᾶς* R. G. Marsden, *Select Pleas in the Court of Admiralty*, I (1894) [Selden Society, VI], pp. xii ff.

[28] The *Grandes Chroniques*, for example, speak of Philip of Valois "creating and ordaining admirals on land and on sea" in 1339: Viard (ed.), *Les Grandes Chroniques*, IX, 141. One of the earliest signs of the admiralty becoming an office with privileges in England is a *Quo warranto* proceeding of 6 Ed. II in which an individual was summoned to answer by what warrant he claimed freedom from tolls in Dover, "per qua libertate habenda clamat esse admirallus ejusdem ville": *Placita de Quo Warranto*, p. 321. See also the introduction to Marsden, *Select Pleas*. On the emergence of an admirals "office" and admiralty jurisdiction in fourteenth-century France see A. Dumas, *Etude sur le jugement des prises*, pp. 48 ff.

them. This Sicilian practice was known in other Mediterranean lands and may have been the ultimate source of European admiralty jurisdiction.[29] But if so, the route it took was long and very devious and it suffered a significant sea-change in transit. For one of the first, if not the earliest appearance of admiralty jurisdiction in northern Europe was in a theoretical form, in the course of diplomatic confrontation in 1306. From this moment on, admiralty jurisdiction was inseparably joined to the doctrine of sovereignty.

In the spring of 1306, representatives of Edward I and Philip the Fair met at Montreuil-sur-Mer. They gathered there to try to settle claims for the maritime losses English and French subjects had suffered during the war that three years earlier the Peace of Paris had brought to an uneasy close.[30] These commissioners were presented with a petition which has been known since the seventeenth century as the *Fasciculus de superioritate maris*. Sir Edward Coke used this document to prove the antiquity of admiralty jurisdiction. Prynne and Seldon used it to prove that Britannia ruled the waves. What, in fact did it say?

The petitioners styled themselves the

> proctors of the Prelates, Nobles and Admiral of the sea of England and of the communities of the cities and towns and of the merchants, mariners, messengers, pilgrims and everyone else of the Kingdom of England and other lands subject to the lordship of the King of England and of others, such as the fleets of Genoa, Catalonia, Spain, Germany, Zeeland, Holland, Friesland, Denmark, Norway, and other parts of the Empire.

The title was a program all by itself, and its audacity continued through the text. The king of England, they argued, had peaceful possession of the "sovereign lordship of the sea of England, with all its islands and belongings." This he had acquired "by ordaining laws and statutes and general and particular prohibitions concerning both his own subjects, and those of others passing through those seas and by exercising high and low justice in accordance with those laws and prohibitions." And the king's admirals, like those of his ancestors, had the "sovereign guard and justice" on that sea.[31]

[29] Frederick's grant of admiralty jurisdiction to Nicolas Spinola was directly copied by the Aragonese kings in the fourteenth century: Winkelmann, *Acta imperii inedita* (1880–1885), no. 1001, p. 763, note; and Cohn, *Geschichte der sizilischen Flotte*, p. 85. It was only partially followed by the Angevin monarchs of Sicily and Provence: C. Minieri-Riccio, *Cenni storico intorno i grandi uffizii del Regno di Sicilia* (1872), pp. 17–19 (1269); Alianelli, *Della antiche consuetudini*, pp. 186 (1305), 189 (1307); L. Cadier, *Essai sur l'administration du royaume de Sicile* (1891), pp. 287–290.

[30] For what follows concerning the "Process" of Montreuil, see G. P. Cuttino, *English Diplomatic Administration, 1259–1339* (1940), chapter 3; on the "Process" and its diplomatic context see P. Chaplais, "Règlement des conflits internationaux franco-anglais au XIV^e^ siècle," *Le Moyen Age*, LVII (1951), 269–302 and esp. pp. 279 ff.

[31] Coke seems to have followed a corrupt later fourteenth-century copy for his edition, which is unintelligible in some parts (*Fourth Part of the Institutes*, pp. 142–144). Here is the essential theoretical statement as it is found in P. R. O., Chancery Diplomatic Documents 32/19/1: " . . . que come les Rois Dengleterre par raisoun du dit roiaume du temps dount il ny ad memoire du contraire eussent este en paisible possessioun de la soveraigne seignorie de la mier Dengleterre ove touz les isles et les apportenaunces per ordinance et establicement des lois, estatuts, et defenses comunes et privees sur toute maniere des gentz taunt dautre signurie come de lour propre par illeqes passaunz et per soveraigne garde ove toute manere de conisaunce et iustice haute et basse sur les dites lois, estatutz,

These must have struck the French as outrageous assertions, as outrageous as the demand these same proctors made for £4,200,000 in reparations for losses caused by the Scots. The object sought was simple and straight-forward: the English claims against the French should be heard by an English court without the interference of the bi-partite commission. The petition's purpose was to deny the arbiters any competence. The French captain, Rainier Grimaldi (a Genoese, naturally), had justified his attacks on English shipping by his commission as admiral. Because the English king is sovereign in these seas, said the English proctors, Grimaldi had wrongly assumed this office. He should be condemned and his prizes handed over to the cognizance of the English admiral to whom, as appointee of the king, all justice on the seas belongs.[32]

In formal terms the negotiations at Montreuil were a legal suit, a "process," and all this elaborate argument was procedurally nothing more than preliminary manoeuvering designed to disqualify the judges. Gratuitous though it was, this English assertion of sovereignty and admiralty jurisdiction forms an important strand in our story. The commissioners apparently decided they were competent to hear the facts of each case and both sides submitted their individual petitions. Inevitably, nothing ever came of them; like the claims arising in Poitou and Agenais and along the Gascon border, they accumulated over three decades until they were lost in the outbreak of open war. But as the claims were repeated, so was the argument about sovereignty of the seas. It formed the English counterpoint to the constant French insistence on their king's sovereignty and right to jurisdiction over Aquitaine, for thirty years an accompaniment to the most important political issue facing the Capetian and Valois monarchy. No one in royal service during those years could have remained ignorant of the debate or of its implications.

From Philip the Fair to Philip of Valois the French position in these disputes remained essentially unchanged. In time of war and when making a treaty or compromise agreement, the king of France and the duke of Aquitaine are equals. In time of peace the French king has *superioritas* over the duchy of Aquitaine and all the rights of jurisdiction both immediate and appellate pertaining thereto. From proceedings before royal commissioners along the border to the most

ordenaunces et deffenses et par touz autres faits quiex a la generalte de sovereigne seignurie appartenir porrount en leux avanditz. Et A de B. admiraud de la dite mier deputez par le dit Roi Dengleterre et touz les autres admirauls par mesme celui Roi et ses auncestres iadiz Rois Dengleterre deputez eient este en paisible possessioun de la dite sovereigne garde ove la conisaunce et iustice et touz les autres apportenaunces avantdites forprise en case dappel et de querele faite de eaux a lour soverens Rois Dengliterre de defaute de droit ou de malvais iuggement et especialment per empeschement mettre et iustice faire et surte prendre de la pees de toute maniere des gentz usaunz armes en la dite mier ou menans niefs autrement apparreillez ou garnies que nappartenoit au neff marchande et en touz autres points en quiex homme poit avoir resonable cause de suspecioun vers eaux de robberie ou meffaitz."

[32] *Ibid.*; Coke, pp. 143–144: "Monsieur Reynier Grimbaus maistre de la navye du dit Roi de Fraunce que se dist estre admyrail de la dite mier . . . contre le fourme et la force de mesmes lalliance . . . loffice damirautee en la dite mier par commission du dit Roi de Fraunce torsecousement emprist et usa. . . . Parqoi les dits procurours . . . prient que deliverance dewe et hastine des dites gentz ovesque lour biens et marchandises ainsi prises et detenues faicez estre faite al admirail du dit Roi Dengliterre a qi la conisance de ceo apertient de droit . . . sans distorbaunce de vous. . . ."

formal diplomatic encounters the argument was always the same: the king is Emperor in his kingdom and *dominus superior* and has no superior in temporal affairs. For purposes of display it could be fired with outraged *grandeur*. "You are ignorant and stupid," said the French chancellor to King Edward's ambassadors in 1324, "in allowing yourself to speak on the part of a vassal and subject to the King of France, who is Emperor in his kingdom and has no sovereign under God, about the wrongs done to his royal majesty. He will not allow himself to be judged by his subject. He will give no redress but by right of his sovereign lordship."[33]

The English, in response, could either accept the Capetian argument or else claim sovereignty to be their own. The first was hardly conceivable for the court of the Edwards, which was quite as deeply infused with Romanizing ideas as was that of Philip IV. The second was the one they chose. Difficult with respect to the Aquitaine, for which the English kings had consistently done homage and recognized by treaty their position as vassal of the king of France, the claim of sovereignty was ready-made for the high seas, which were, as far as both Roman and feudal law were concerned, *res nullius*. But how prove this sovereignty in due legal form? Here past usage came to the rescue: a valid argument in both French and English courts for claims to jurisdiction. The English lawyers had but to lump together the many occasions the English kings had granted safeguards to persons crossing the Channel, had regulated commerce moving in and out of their ports, had heard cases of piracy that their own or foreign merchants had submitted to them, and had appointed wardens and admirals to guard the coast. None of these actions, of course, had been *derived* from a theory of sovereignty of the sea; but once that theory was constructed they could be used as its demonstration. This was clearly how the *Fasciculus de superioritate maris* came to be put together. The various royal acts concerning the sea, the appointment of special officers to keep guard along the coast and to command the fleet (men newly dubbed "admiral"), and the occasions when the court had commissioned these men to hear cases of piracy, all suddenly fell into place as proof of high and low justice over the sea and the right (how strongly Romanized is the vocabulary) "to interpret, declare and correct laws, statutes and edicts" concerning the sea.[34] That they were fit into a single theory of sovereignty was, of course, of major

[33] The French position is discussed by Chaplais, "Conflits francoanglais," esp. pp. 283–284. In 1334 a French royal proctor arguing before royal commissioners sent to determine wrongs committed on the Gascon frontier began his articles: "Et primo . . . quod idem dominus Rex Francie est princeps et dominus superior et eius predecessores . . . fuerunt ab antiquo principes et domini superiores in regno suo Francie nec in ipso Regno habet seu habere cognoscet dictus dominus Rex nec eius predecessores habere seu cognoscere consueverunt umquem aliquem superiorem in temporalitate sua": P. R. O., Chancery Diplomatic Documents, 28/3/37. The incident of 1324, as recounted by the English ambassadors, is in P. Chaplais, *The War of Saint-Sardos* [Camden Third Series, LXXXVII] (1954), p. 186.

[34] For the Wardens of the Cinque Ports, see Murray, *Constitutional History of the Cinque Ports*, chapter 6; for jurisdiction over crimes at sea, see Marsden, *Select Pleas*, pp. xv ff. and Marsden, *Law and Custom of the Sea*, pp. 7, 10, 12, etc.; for an early trial for piracy before the Warden of the Cinque Ports, see P. R. O., *Lists and Indices*, 49, p. 154.

importance. These were not then discreet rights to control commerce, protect merchants, or hear disputes people chose to bring to the king. Such actions were merely particular expressions of a single sovereignty: one that was indivisible and could be shared with no one else. Thus the French "admiral" had "usurped" his office; his actions were illegal because his commission had not come from the true sovereign. Jurisdiction over prize claims belonged to the English admiral, the agent of the sovereign of the English seas, alone.

None of this debate was forgotten during the ensuing decades. Each time negotiations on the outstanding problems between the two courts recommenced the English once again pulled out their claims to sovereignty and admiralty jurisdiction.[35] Their instruction was not lost on the French. Its use in 1332 by the king's advocate against the bishop of Agde is a demonstration that the theory of admiralty jurisdiction as an integral part of sovereignty had found its way into the stockpile of all-purpose lawyers' maxims. The argument was essentially the same as that which Edward I's lawyers formulated in 1306. Admiralty jurisdiction and the "guard of the sea" is a sovereign right, delegated by the king to his admiral, and shared by no one else. It overcomes all lesser claims to jurisdiction. Edward's lawyers used it to argue the incompetence of the bi-partite commission at Montreuil; the lawyer of Philip of Valois used it to defeat the bishop's claim to high justice. Where the sea frontier of the kingdom was concerned, the theory of admiralty jurisdiction had become an integral part of the doctrine of royal sovereignty. During the next few decades the claim would be extended to the northern shores as well. And before long in both France and England genuine courts of admiralty would give body to these theoretical pretensions.[36]

Be an admiral a pirate or not, his acts were rightful and his jurisdiction legitimate because he was the sovereign's agent. What he did was authorized. To us the idea may seem reasonable, or at least not unusual. To men of the fourteenth century it must have had an air of novelty. But those who invented it were not really innovating; they were following a trail already opened by learned discussions of a related problem: the commonplace violence that went under the name of reprisal and marque.

IV

Prisias, reprisilias, marchas — prizes, reprisals, and marques. To the men of the later Middle Ages, these terms all referred to the same thing.[37] If a man from

[35] See, for example, P. R. O., Chancery Diplomatic Documents, 27/11 (1319): "Item quo ad illum effectum quod superioritas maris Anglie et ius admirallatus in eodem cum omnimoda cognicionis et cohercitionis potestate que ad leges statuta et edicta puplica et privata per dominum Ricardum quondam Regem Anglie . . . condita . . . poterant pertinere . . . et pertinere solebant. . . . " Similar sentiments are expressed in P. R. O., Chanc. Dipl. Doc. 27/5/24.

[36] Marsden, *Select Pleas in . . . Admiralty*, pp. xl ff.; A. Dumas, *Etude sur le jugement des prises*, pp. 58 ff.

[37] The distinction made by P. Timbal, "Les lettres de marque dans le droit de la France médiévale," *Recueils de la Société Jean Bodin*, X: *L'Etranger*, p. 111, between marque as a "voie de droit," and reprisal as "liée à l'état de guerre," is a modern one scarcely emerging in the fourteenth century and not yet associated with distinct terminology. Both Bartolus and Baldus are concerned with defining

one city, Bologna, let us say, was injured, defrauded, or robbed by a man of another city, Florence, for example, he might recoup his loss or avenge his injury on the goods of his injuror's compatriots. The Bolognese — with the law on his side — could get his money by taking the goods of any Florentine. The same was true in the case of uncollectable debts. When a Florentine banker or merchant operating abroad went bankrupt, all Florentines living or trading in the places he did business were liable to see their goods seized to pay his creditors.[38] It happened indeed that innocent people lost not only their goods but their freedom as well on such account.[39] To excuse such action, give it official sanction and officials' aid, city magistrates, high-justicer lords, and kings and their officials had issued letters of marque at least since the late twelfth century.

The injury that brought reprisal into play could take place anywhere, but it probably most often occurred at sea. Depredations there were clearly considered inevitable and reprisals their inevitable consequence. When, shortly before the dissolution of the Order, Jacques de Molay, Master of the Knights Templars, prepared a memorandum for Clement V on sending an expedition to the Holy Land, he specifically recommended that a captain be chosen "who would not fear losing his temporal goods to the power of the maritime cities." Above all, the captain should not be a Templar or a Hospitaler knight, for "if the galleys should injure the Genoese or Venetians, they would take reprisal (*recurrent*) on [Templar and Hospitaler] ships and goods, and thus the Orders could incur great damage."[40]

Because depredations were inevitable and bad debts likewise, it was long common for mercantile powers to seek to guarantee by treaty that justice would be done their subjects and reprisals avoided. Such treaties, of course, were not always observed; then each could only warn his own merchants to pack and get out before reprisals were launched. The disruption of trade and the problems this caused to princes making increasing use of "Lombard" bankers may well be imagined: by the middle of the thirteenth century arrangements were sometimes

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the legal limits of *represaliae*, and for Bartolus all such attacks on innocent people for the faults of others are related to war: *Tractatus represaliarum* in Bartolus a Saxoferrato, *Consilia* (Venice, 1575), fo. 120. The terms were used interchangeably—*Ordonnances des Rois de France*, XIII, p. 367: "per marques, contramarques et represailles . . . ," "attendu que matiere de marques est une espece de guerre . . . " (1443); Marsden, *Law and Custom of the Sea*, p. 19: "litteras marquandi seu gagiandi" (1293); *Glossa ordinaria* to the *Liber Sextus*, 5, 8 *cap. unicum* (Paris, 1585, col. 687): "si aliquis subditus unius principis delinquat et non possit haberi iustitia de eo . . . princeps alterius dabit ei represalias . . . et istud appellamus marcham." For a discussion of the law of marque during truces see M. H. Keen, *The Laws of War in the Late Middle Ages* (1965), pp. 218–238.

[38] A. Sapori, *La crisi delle compagnie mercantili dei Bardi e dei Peruzzi* (1926), pp. 133 ff. Reprisals were granted for debts as well as spoliation; see G. I. Cassandro, *Le rappresaglie e il falliamento a Venezia nei secoli XIII–XVI* (1938), pp. 13 ff., an argument confirmed by such mediaeval commentators as Guilielmus Durantis, *In sacrosanctorum Lugdun. conc. sub Greg. X . . . commentarius* (Fani, 1569) fol. 99^{v}: "Sed quid si iudex auferentis, vel iniuriantis et debitum reddere nollentis requisitus . . . negligit facere iustitiam . . . " In the case of Italian firms north of the Alps, reprisal might be launched against all "Lombards" upon the bankruptcy of one: A. Sapori, *Studi di storia economica* (1955), II, 1062.

[39] E. Boutaric, *Actes du Parlement de Paris* (1863–67), no. 6916.

[40] Baluze, *Vitae Paparum* (ed. Mollat), III, 149.

negotiated to substitute a less chaotic way of satisfying creditors and settling claims, establishing a flat rate tax on goods moving in and out of the ports involved to pay those who otherwise would have demanded reprisals.[41]

Despite all its disadvantages, however, reprisal was a practice that still had centuries of life before it. Neither princes nor merchant cities could easily relinquish its use. For, on a broader scale, reprisal was a political weapon: marque, prize, whatever the name, it was also the merchant's and mariner's form of war.

Contemporaries conceived of it in precisely this way. Though fourteenth-century lawyers called reprisal a special form of *pignoratio* — the taking of security by an injured party to guarantee payment of damages — they were also acutely aware of the difference: reprisal involved not just the injuror, it involved his compatriots as well.[42] For this reason it was a weapon of war and a cause of war. A seizure might be made by the injured man himself or by officials of the prince or government authorizing the marque, but that made little difference in the character of the act. In treaties between maritime powers the same "injuries, damages, and offenses" that might justify the grant of a letter of marque were lumped with *depredationes*, *rapinae*, *extorsiones*, and *represaliae* as *casus belli*. When war ended or alliances shifted the problems reprisals raised had to be settled. Treaties had to specify that "murder, robbery, or other trespass" committed by men of one side against the other would not alter the "alliance, peace, and friendship" between the high contracting parties.[43]

These provisions were necessary because reprisal went far beyond the limits of the commercial world. Whether in the English Channel, the Bay of Biscay, or the

[41] G. I. Cassandro, *Le rappresaglie e il falliamento*, pp, 7–12, whose examples go back to the early twelfth century; A. del Vecchio and E. Casanova, *Le rappresaglie nei comuni medievali* (1894), pp. 62–63, find the first sign of such regulation of reprisals in a treaty of 836 between Naples and the prince of Benevento. For other 12th- and 13th-century examples see *ibid.*, pp. 68 ff.; Blanc, *Le livre de comptes de Jacme Olivier*, pp. 290, 292, 295, 301, 345, 393 (treaties between Narbonne and Pisa, Nice, Hyères, Toulon, and Vintimille, twelfth and thirteenth centuries). The last of these treaties contains a tax as a substitute for reprisal. Bibl. Nat., ms Doat 51, fol. 215: two merchants of Narbonne are ordered by a consul of Narbonne to leave Genoa with their goods and *familia*; another Narbonese had obtained a letter of marque against Genoa, thus placing all Narbonese in Genoa in danger of reprisal (Sept. 1304). A variety of other techniques were tried to limit the use of marque and the consequence of piracy: suspending their use for a term of years (Marseille); limiting their application to certain highways on a rotating basis (Florence); setting up a special court (the *Officium Robarie* at Genoa); appointing consuls in foreign ports to negotiate disputes. See J. Eiglier, *Etude historique sur le droit de marque ou représailles à Marseille aux XIIIme, XIVme, et XVme siècles* (1888), p. 9; del Vecchio and Casanova, *Rappresaglie*, p. 78; L. de Mas Latrie, "L'Officium Robarie ou l'office de la piraterie à Gênes au Moyen Age," *Bibliothèque de l'Ecole des Chartes*, LIII (1892), 267–270. R. Lopez, *Studi sull'economia genovese del Medio Evo* (1936), pp. 16 ff.; Baratier and Raynaud, *Histoire du commerce de Marseille*, II, p. 188. In 1443, disruption of trade was still given as a reason for more strict control of reprisal: *Ordonnances des Rois de France*, XII, 367–369.

[42] *Liber Sextus*, 5, 8, *cap. un.*: "Etsi pignorationes, quas vulgaris elocutio repressalias nominat. . . ."; Baldus, *Super decretalibus*, at *Extra*. 2, 28, 55 (ed. Lyon, 1564, fol. 247 no. 23): "Represalie autem vocantur pignorationes. . . ."

[43] *Liber iurium Genuensis*, II, cc. 501 ff.: E. Baluze, *Vitae Paparum Avenionensium* (ed. G. Mollat, 1921), III, 192–193; Rymer, *Foedera* (London, 1816), I, ii, 852, 861. In the sixteenth century it was still the practice to contract exemption from piracy by treaty. S. Bono, *I corsari barbareschi* (1964), pp. 92–94.

Mediterranean, when a mariner attacked a "friend's" ship he either paid damages or returned the stolen prize. But "enemies" were fair game.[44] The problem, of course, was to decide who were friends and who were enemies: which was but another side to the distinction between legitimate violence and illegitimate. Like the latter, it was not always an easy distinction to make. Letters of marque might excuse such action on some occasions. "Open war," the solemn renunciation of homage, might do so on others.[45] These, however, were only symbols; and in symbols, both religious and martial, the Middle Ages were very rich. The rites and rituals of war at sea added their own confusion to the game.

Here, for example, is a description given by sailors of Bayonne and the Cinque Ports of an engagement in the Bay of Biscay.

> The Normans, with all the haste they could, left the river Charante, and as soon as they were out of the river they had the wind from the south to go to the coast of Brittany where your subjects lay at anchor. And there . . . they came with 290 ships well equipped with men-at-arms, sheltered castles fore and aft, castles at each masthead, banners of red sendal flying. . . . And these banners are called 'bausans,' or by the English 'streamers'; and everywhere amongst mariners they mean death without quarter and war to the knife. . . . And your subjects defended themselves, and . . . in no other way could they have escaped death.

All this occurred in time of peace. But because of the nature of the attack, claimed the men of Edward I, they were not bound to make restitution for any wrongdoing;

> since it is the custom and law of the sea that whenever the said 'bausan' is flown, neither party, either on one side or the other, is required to make restitution or recompense for anything that is done or captured; that when that banner is hoisted it is the custom and the law of England, that if a man kills another or does anything like that in defending himself, whether there be war or peace at the time, he is not held responsible.[46]

The custom of the sea they alleged seems confirmed by a story Froissart places in 1332. The king of Scotland was on his way to refuge in France. Near the

[44] Alianelli, *Delle antiche consuetudini*, p. 180 [Sicily, 1236]; E. Heyck, *Genua und seine Marine im Zeitalter der Kreuzzüge* (1886), p. 183 [Genoa]; F. Sassi, "La guerra di corsa," pp. 103–104 and *passim* [Venice, 1232 and later]; Marsden, *Law and Custom of the Sea*, p. 42 [England, 1296]. Goods of all Frenchmen, lay and clerical, were seized by Edward III immediately after the confiscation of Guyenne in 1337: E. Déprez, *Les préliminaires de la Guerre de Cent Ans* (1902), p. 157. For an example of piracy as blockade in the Genoese-Catalonian war of the early 1330's, see R. Cessi, *Politica ed economia di Venezia nel trecento* (1952), pp. 114–115. The rapacity of fourteenth-century mariners towards everyone, friend and foe alike, is illustrated by the actions of a British fleet in 1325. Putting into the friendly harbor of Bordeaux, they proceeded to sack the city: P. Chaplais, *The War of Saint-Sardos* pp. 209, 222, 227.

[45] A fleet under Hugh Kieres "guarded the straits and the passages between England and France" (we may easily imagine what that meant) from early 1337, but waited, says Froissart, for the news that Edward had defied Philip VI before raiding the coast and pillaging Southampton: Froissart, *Chroniques*, I, 153, 158, 406, whose dating of these events, to be sure, is rather confused. Naval attacks began on English territory immediately after the confiscation of Guyenne; Kieres attacked Southampton only in late 1338 or early 1339: E. Déprez, *Les préliminaires*, pp. 156, 159, 244 n. 1, 250. For Froissart, writing much later, the connection between Edward's *défi* and the raids must have seemed obvious.

[46] Marsden, *Law and Custom of the Sea*, pp. 50 ff.

mouth of the Thames his ships were caught by a strong wind that forced them toward Margate.

There the Normans and Genoese were sailing, trying to find Englishmen; and when they saw the Scottish ships they were overjoyed, believing them to be English. They ran up their banners and pennants and set off in pursuit.

The Scots, thinking their pursuers to be English, though they were far outnumbered, decided to fight to the death. They dropped their anchor and "as gentlemen should," ran up their banners of Scotland and their pennants, 'et bouterent hors, comme bonnes gens, les bannierrez d'escoce et leurs pignons." Pirates and prey recognized each other just in time, called off the fight, and the Norman-Genoese fleet accompanied the young David Bruce to the French coast.[47]

Unlike letters of marque, these banners and pennants were self-justifying gestures, the seaborne equivalents of the rituals of chivalric warfare, announcing the will to fight, the ensigns of war-worthy men. Their use was undoubtedly sanctified by immemorial tradition. But the ungoverned freebooting they covered, like the freebooting covered by the shadowy boundary between "friend" and "enemy," between "war" and "peace," caused no end of trouble to the rulers of France, England, and the Italian cities. Royal courts and communal governments had to answer the complaints of foreign merchants or risk reprisals against their own, reprisals that could degenerate into continuous violence with all the disruption of trade and revenues that this entailed. Freebooting could likewise create an excuse for serious political crises. At the beginning of the fourteenth century Philip IV used the activities of the sailors of Guyenne to justify confiscating the Aquitainian fief. And for the next four decades piracy provided problems for kings and their officials on both sides of the Channel and a continuous reason for diplomatic travels, conferences, and memoranda. Some means of control had to be found; and, whatever the means, a justification for it. As so commonly at this moment in time, both the means and the justification were found in the learned glosses of the professors of law. Their discussions of just war and reprisal gave royal servants the intellectual handle by which to grasp a solution. For what royal agents sought and found in the works of the Schoolmen was a way to distinguish war from peace and to bring reprisal under regulation: regulation that would be in the sure hand of the monarchy.

To the legal glossators and commentators around the turn of the fourteenth century the problem of reprisals was as much moral as legal. Indeed, it could hardly have been otherwise. Two *Authentica* had expressly condemned reprisals, and phrases scattered through the texts as well as two entire titles of the Digest had virtually turned that condemnation into a maxim. To the voice of the Emperors the Council of Lyon of 1274 had added its own, damning the practice in the name of natural equity and threatening with excommunication and interdict those who granted or took reprisals on the clergy.[48] Yet the use of marque was

[47] Froissart, *Chroniques*, I, 430; David Bruce actually arrived on 14 May 1334: E. Déprez, *Les préliminaires*, p. 119, n. 4. The *Grandes Chroniques* do not mention the pirate story: J. Viard (ed.), *Les Grandes Chroniques de France*, IX (1937), 141.

[48] This, at least, is the way mediaeval glossators and commentators read Novella 52, *Ut non fiant*

common, and glossators and commentators, Romanists and Canonists, strove to justify it. The texts, furthermore, had made the nature of the problem unambiguous: "non enim habet rationem alium quidem esse debitorem alium vero exigi, sed nec alteri molestum esse pro altero," as a *Novella* of Justinian had put it.[48] Yet this was precisely what reprisal involved — making the innocent suffer for the guilty. With the weight of imperial and conciliar authority against it, what could make reprisal legitimate?

To be sure, the maxim that the innocent should not suffer for the guilty, for all its natural equity, was sometimes set aside. Guilielmus Durantis, glossing the constitution of the Council of Lyon, had no trouble listing the exceptions: heirs punished for the crimes of their parents, lords punished for the crimes of their slaves, illegitimate children punished for the sins of their fathers.[50] Exceptions to the rule, however, were not by themselves enough to justify the peculiar exception represented by reprisals. What was needed was a theory that would remove the moral stain from this form of violence; and interdict and just war pointed the way.

By the beginning of the fourteenth century the solution had been clearly formulated. Johannes Andreae presented it at length in his Wednesday lectures on the title *De regulis iuris* of the *Liber Sextus*.[51] For him, there were really two problems. The first was to show that the "innocent" victims were themselves involved or implicated in the injustice that gave rise to reprisal. The second to demonstrate that the person ordering reprisal could legitimately do so. The first was the more novel—and strikingly in contrast to Innocent IV and Guilielmus Durantis, who had swept this issue under the rug despite its prominence in the texts. As he passed in review the rules of law, equity and reason that reprisals violated, Johannes Andreae became most eloquent, and his solution saved at least the appearances of his moral unease.[52] To excuse reprisals was nonetheless his goal, and a whole battery of theoretical arguments helped him succeed. Just as his solution to the second problem, following his predecessors, was expressed primarily in terms of the superior judge, and ultimately of the prince, so his answer

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pignorationes, the *Authenticum Habita* of Frederick Barbarossa, incorporated into the Code, 4, 13, phrases such as "hoc iniquum iudicantes ut alieno odio alius praegravetur," in Code, 3, 28, 33, and the *tituli* 12 and 13 of Book 4 of the Code. See Guilielmus Durantis, *In sacrosanctum Lugdun. conc. sub Greg. X . . . Commentarius* (Fani, 1569) fol. 98^{v}. The *Novella, Ut non fiant pignorationes*, the *Authenticum Habita*, and Code 3, 28, 33, served Jacobus de Arena and Jacobus de Belvisio as pretexts to compose treatises on reprisals to which both Bartolus in his *Tractatus represaliarum* and Baldus in his commentary on Code, 4, 12, *in auth. Sed omnino* refer. The Canon of the Council of Lyon is in the *Liber Sextus*, 5, 8, *cap. unicum*.

[48] *Novella* 52 ("Stereotype" ed. Berlin, 1928, p. 297).

[50] G. Durantis, *In sacrosanctum Lugdun. conc.*, fol. 99.

[51] For what follows see Johannes Andreae, *Aureum comentum . . . super Regulis iuris quod nuncipatur mercuriales* (Pavia, 1483) sign. i.6-k.1: commentary to *Liber sextus*, V, 12 *De Reg. iuris*, 23 *Non debet aliquis*.

[52] He concludes that it is legitimate to grant reprisals against the individual who has done the injury, against all officials refusing to do justice, against the community refusing to do justice, against a lord and those of his subjects aiding him, against a principal debtor and those holding his goods, but not against "singulares personas que non delinquerunt," though who these might be in view of the list, is rather obscure.

to the first was couched in terms of the community, the solidarity among its members and its responsibility for the actions of its rulers; the entire problem was thus seen in terms that would become intrinsic to the sovereign state, in terms of the sovereign ruler and the complicity of the ruled in what he does.

Of the arguments in favor of reprisals Johannes Andreae emphasized three: when a lord or people refuse to do justice to a guilty subject they make his guilt their own; the negligence of a *rector* works harm on his citizens as the negligence of an agent works harm to his principal; and finally, the wrongdoing of an individual is said to be the wrongdoing of a community when the important people or the greater part of the community are involved.[53] All these depended in turn on a proposition long since explicit: reprisals were not simply vengeance, they were to be launched only "against a negligent lord and city, after they have been summoned [to do justice] and after the injured party's judge has declared the guilty city and lord negligent and in default." The injury being punished was thus not the original fraud, bad debt or robbery but the failure of a judge to do justice. When a Florentine robbed a man of Bologna, other Florentines were not presumed to be implicated in the crime. But when the judge of Florence neglected or refused to bring the criminal to justice, his fellow-citizens were all at fault. When a ruler or judge did not punish a guilty subject, all his subjects were made guilty. The reasoning that made a judge the spokesman of his community (as long as the community remained silent), that made a ruler the agent of his corporate subjects, that made the "greater and weightier part" the representatives of the whole, all led to this conclusion: citizens are not innocent of the acts of their rulers. Violence against them could thus be justified. Furthermore, the theology of just war was there to add its weight to the argument, especially the statement of St Augustine, picked up by Gratian, that those wars are just "which avenge the injuries caused by those people and cities who, requested, neglect to chastise wrongs done by one of their members or to return what was wrongfully taken." To the men of the fourteenth century the phrase must have seemed divinely inspired for precisely this occasion.[54] Though in 1300 reprisals were not yet themselves considered acts of war they were ultimately excused on the same grounds.[55]

[53] " . . . quia punitur aliquando qui alienam culpam facit propriam nam quando civitas dominus vel populus negligit de subdito iusticiam facere . . . delicto consentire videtur . . . "; "patet quod etiam non improbans approbare videtur; . . . et ideo canon permittit bellum contra tales moveri quod isto casu iustum dicitur, XXIII qu. 2, *Dominus.*" "Item non mirum si negligentia rectorum nocet civibus cum etiam negligentia procuratoris noceat domino . . . et imputent sibi qui tales eligerunt. . . . Item propter delictum singularium civium reliqui et civitas privantur dignitate episcopali . . . et fortius propter delictum rectorum . . . " "Adducitur quod sententia lata contra civitatem vel populum ligat singulos propter iuris impossibilitatem: supra eodem li., [5] *De sententia excomm.*, [16] *Si sententia*; erit ergo idem hic propter impotentiam facti, cum ista duo equiparentur: supra [*Extra.*], [I, 3] *De rescriptis*, [13] *Scisciatus*; nec mirum quia ex delicto singularium dicitur universitas delinquere scilicet cum id aguntur maiores vel maior pars universitatis. . . . "

[54] *Decretum*, Causa XXIII, qu. 2, c. 2.

[55] Thus Johannes Andreae at the end of his discussion in the *Mercuriales* argues that since the canon *Dominus noster* declares it legitimate to wage war against a city neglecting to do justice, it is therefore legitimate to take reprisal. For him the two are still distinct. Nor was the analogy universally accepted. Guido de Baysio commented on *Dominus noster*: "Et nota quod per hanc litteram quidam

References to Gratian's *quaestio* on just war were constant and eventually acted on the whole concept like a magnet: by the time Bartolus wrote his treatise on the subject at mid-century, reprisals had been assimilated to war.

Under certain circumstances the innocent were no longer free of guilt. But who had the right to punish them? Here again the legal commentators fell back on the doctrine of just war. Already at mid-century Innocent IV, analysing the problem of spoliation, had argued that anyone may go to war in his own defense, "though this is not war properly speaking, but defense." Where one cannot recover his goods and rights otherwise, he may also appeal to arms if he obtains the authority of his superior. That authority is necessary, however, "because no one may derogate from the laws without the authority of the legislator."[56] None of this directly concerned reprisals, but Guilielmus Durantis adopted it for that purpose anyway; and there it remained.[57] To recover one's goods by way of reprisal the authority of a superior was necessary.

This in turn raised a question: whose superior? The judge or ruler of the man who is injured, or the superior of the negligent judge? For Guido de Baysio and Johannes Andreae after him this was still a problem. If war cannot be waged and therefore reprisal not be levied unless there is no judge before whom the negligent judge can be cited, legitimate reprisals would be extremely rare. For "in the absence of a secular judge an ecclesiastical judge can always be called upon." Johannes Andreae suggests, though not very firmly, that only where the negligent judge is effectively sovereign, where he has no effective superior, may reprisal be granted against his subjects by a judge who is not his superior.[58] The problem was, of course, that grant of reprisals looked like an act of jurisdiction. And how could the judge of the injured person exercise jurisdiction over people who were not his subjects? This question Johannes Andreae left to his successors to solve. The solution was already present in the commentary of Innocent IV that Guilielmus Durantis had taken over for his exposition of reprisal. War, "properly so called," can only be waged by the prince who has no superior, he had argued. Otherwise, such action was either the exercise of a legal jurisdiction and thus not properly called war, or else it had to be waged with the authority of a superior (for reasons we have already seen).[59] If reprisals were excusable only on the grounds that would make a war just, because directed against otherwise innocent people, they too would have to be granted by a sovereign prince. Reprisals thus became the action of one sovereign against another. Not acts of jurisdiction but acts of war.

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excusare nituntur consuetudinem Italie in qua per civitates repressalie conceduntur. Sed contra *extra. li. VI., de iniuriis, etsi pignorationes* . . . ubi reprobantur eo quod sint legibus et iuri naturali contrarie. . . . Sed hec littera si bene videatur et intelligatur nullo modo contradicit. Sed hoc vero imperat divina revelatione fieri debeat. Hac ratione excusati fuerunt iudei qui expoliaverunt egiptios de precepto domini." Guido de Baysio, *Rosarium decretorum* (Venice, 1481), sign. qqq.

[56] Innocent IV, *In quinque Decretalium libros . . . commentaria* (Venice, 1570), fol. 141, commenting on II, 13 *De restit. spoliat.*, 12 *Olim.*

[57] G. Durantis, *In sacrosanctum Lugdun. conc.*, fol. 100.

[58] Johannes Andreae, *Mercuriales*, sign. k.1., citing Guido de Baysio, who makes a similar argument in his *Rosarium decretorum* at XXIII, qu. 2, c. 2.

[59] Innocent IV, *Commentaria*, fol. 141.

This was precisely the doctrine that Bartolus put forward in the middle of the fourteenth century.[60]

Only he who had no superior could appeal in the last resort to arms and reprisals. Such the greatest canonists of the turn of the century implied and Bartolus and Baldus a half-century later expounded at length. The reasoning behind the argument was clear. Marque, an act of war in which the innocent suffered, could only be considered just when all judicial attempts to recover from the guilty had proved vain and all appeals proved fruitless. The doctrine was itself a reflection of current practice, at least in some quarters. Italian cities were so restricting their grants of reprisal in the early thirteenth century; so were other Mediterranean lords. From the beginning of the fourteenth century the Parlement of Paris was issuing letters of marque only after admonitions to the appropriate foreign judge had proved unavailing. The correspondence from court to court, even when the individuals originally involved were of no great account, could sometimes become voluminous and continue for years. When great banks and important sums were implicated, negotiation was a matter of state.[61]

Yet despite the satisfaction such ideas must have given fourteenth-century Romanists, both Bartolus and Baldus were strikingly ambivalent. Neither their training in imperial law nor their well-developed political doctrines had rendered them insensitive to the world in which they lived. And, as Bartolus remarked, reprisals were not daily occurrences in the Roman Empire; they were in his own day.[62] The issue was of particular importance to the international merchant-bankers of Italy and their clients, especially after the collapse of the Bardi and Peruzzi in the 1340's. The control the great houses exercised over their communal governments virtually immunized them to judicial attacks in their local courts and erected governing boards and judges as obstacles to their creditors.[63] Reprisal was thus in practice not the last but sometimes the only recourse. Of this the Italian lawyers could hardly have been unaware. The question of just war with its problem of sovereignty, said Bartolus, is the concern of theologians. Whether reprisal is licit in civil law is another question. In the first place reprisals are not an institution of canon or civil law but of divine law and the *ius gentium*. And by the law of peoples, he continued, striking a very Hobbesian note, "an individual may declare war against all to protect his person and his goods

[60] Bartolus a Saxoferrato, *Tractatus represaliarum*, in *Consilia, quaestiones et tractatus* (Venice, 1575), fol. 120. Like other doctrines, this could be cited by practicians when the need arose. In the late fourteenth century Marseille sued Arles in the court of the Count of Provence over the claim of Arles to grant letters of marque against the men of Marseille. The syndics of Marseille argued that marque is "quedam belli indictio ut dicunt doctores," and that "tale bellum indici non potest nisi per illum qui habet supremam potestatem." Since both Marseille and Arles were subject to the Count, Arles was not supreme. Marseille won its case. Eiglier, *Droit de marque*, pp. 14 ff.

[61] See del Vecchio and Casanova, *Rappresaglie*, pp. 72 ff.; Eiglier, *Droit de marque*, p. 31; Boutaric, *Actes du Parlement de Paris*, no. 3583, 3590 (1309), 5052 (1317); the correspondence between the court of France and the court of Aragon over reprisals against the Narbonese, Blanc, *Le livre de comptes de Jacme Olivier*, pp. 584–632; the correspondence with the Signoria of Florence discussed in Sapori, *La crisi . . . dei Bardi e dei Peruzzi*, pp. 186 ff.; also Dumas, *Jugement des prises*, pp. 31 ff.

[62] Bartolus, *Tractatus*, fol. 119^{v}.

[63] Becker, *Florence in Transition* (1967), I, *passim* and esp. pp. 158–159.

when neither the aid of a superior nor any other remedy is to be had." Thus both the problem of jurisdiction over those not one's subject and the related requirement of sovereignty were put aside. The judge granting reprisal, he said, "steps into the place of the negligent judge."[64] But he does so by right of the law of peoples. Thus cities by statute could give their magistrates the right to grant marques.[65] Baldus, writing after Bartolus, required only that the judge granting reprisal possess high justice: "merchant consuls and guild officials cannot [do so]."[66] Why this refusal to stand exclusively on the doctrine of sovereignty? Why this ambivalence?

First of all, talk of sovereignty raised a practical issue. When one spoke of him who had no superior, did he mean *de jure* or only *de facto*? In an Italy of city communes and petty despots, this was a very practical question. It was answered in the only practical way. Where there was no effective superior, reprisal was legitimate. What mattered was who wielded "the power of the sword." In fourteenth-century Italy these were clearly the *potestates terrarum, sibi ipsis imperantium.*[67] By arguing thus, the Postglossators only recognized a custom by then two centuries old: Italian cities had issued letters of marque at least since the late twelfth century.

French cities had done likewise. In the late thirteenth century the Viscount of Narbonne, the archbishop, and even the city consuls could still wage campaigns of marque and counter-marque, and in the mid-fourteenth century negotiate with the Byzantine Emperor to limit reprisals.[68] They were surely not unique: for many French cities and lords possessed "the power of the sword." In the king of

[64] Bartolus, *Tractatus*, fol. 120.

[65] *Ibid.*, fol. 121.

[66] Baldus, *Super quarto Codicis* (Lyon, 1564), fol. 25; commentary to the *Authenticum Sed omnino*, Code 4, 12.

[67] *Ibid.*: "Circa personam iudicis quero, quis magistratus possit concedere represalias: Rn. ratione capture persone debet habere merum imperium. . . . ; ergo non omnis magistratus municipalis potest represalias concedere ut puta consul mercatorum vel camerarii artium: sed solus iste magistratus qui loco presidis est, quique habet hodie gladii potestatem, ut sunt hodie potestates terrarum sibi ipsis imperantium. . . ."

[68] Bibl. Nat., ms Doat 51, fol. 9: the archbishop of Narbonne had seized a Genoese galley because other Genoese merchants had refused to pay the archbishop's *leuda* at Aigues Mortes; the royal viguier at Aigues Mortes had taken reprisal in consequence on Narbonese merchants; the archbishop and viscount had seized Aragonese ships because other Aragonese had refused to pay tolls; again reprisal had been taken on Narbonese merchants (1292). Blanc, *Le livre de comptes de Jacme Olivier*, pp. 523–529: treaty between the consuls of the Cité and Bourg of Narbonne and the community of Tortosa ending a series of mutual reprisals (1303). Bibl. Nat., ms Baluze 82, fol. 48: "vidimus" in 1364 by two officials of the viscount's court of an imperial Golden Bull in Greek "which we cannot read" and in Latin, granting Narbonese merchants, among other things, freedom from reprisals for damages done by Narbonese pirates. For other thirteenth-century examples see P. Ourliac, "La condition des étrangers dans la région toulousaine au Moyen âge," and P. C. Timbal, "Les lettres de marque dans le droit de la France médiévale," *Recueils de la Société Jean Bodin, X: L'Etranger* (1958), pp. 106, 109 n. 2, 114 ff., and 112 n. 1 where a case of 1335 is cited in which the Count of Porcien affirmed before the Parlement that by custom "if a high-justicer lord is asked by another to restore certain *prises* and he refuses, the latter may take the former's goods or those of his subjects as 'surety' [*gages* i.e., *pignorationes*]." For the twelfth century, see del Vecchio and Casanova, *Rappresaglie*, pp. 72–73.

France, however, they also possessed a superior. The specific relationship of high justice to sovereignty was therefore likewise an issue; and this, as we shall see, was at the heart of the argument between the bishop of Agde and the king's advocate in 1332. The high-justicer lord had a superior. But what did that mean? What were its consequences? What — in institutional terms — was the content of sovereignty? For the moment we need only note that high-justicer lords issued letters of marque, and Baldus late in the fourteenth century recognized such issuance as legitimate. It was, said Bartolus, only when no statute (for which one could easily read "custom") gave the power to a particular judge, only when one had to fall back on the *ius commune*, that an injured person seeking a letter of marque had to go to him who had no superior.[69]

There was also a more technical issue, nowhere explicit in the writings of glossators and Postglossators, but which seems to have been at work, adding confusion to their problem and ambiguity to their solutions. Neither thirteenth-century glossators nor Baldus nor Bartolus made any distinction between marques granted individual merchants for uncollectable specific damages and debts and the more generalized marauding on "enemy" merchants and shipping that also went under the name of marque and reprisal. They did not, in all probability, because one slipped so easily into the other.[70] Yet there was an important difference, revealed by the texts of letters of marque and late thirteenth-century court cases.

Here, for example is a letter issued by John of Brittany, lieutenant of Edward I in Gascony in 1295:

Bernard Dongresilli, citizen and merchant of Bayonne, has come unto us, and has by proofs shown that, whereas some time since he loaded in Africa in a ship of Bayonne . . . , 174 great baskets of almonds, 150 crates of Malaga grapes, and 490 frails of Malaga figs [all of] which he had bought with his own money in Africa; and that he, together with others of the same ship, sailed in her from Africa, with the said wares and much other merchandise on board, for England; [and] whilst they were lying at anchor in the said ship off the port of Lascoss, on the coast of Portugal, where they had gone for shelter from bad weather, intending to stay there until it mended, and where, whatever might be their fate at the hands of Providence, they little expected to be surprised or harassed by man, certain sons of perdition, coming out from Lisbon, made for the said ship in hostile fashion, and after spoiling the aforesaid merchant, and the others on board, of their ship, merchandise, and other goods, carried off the whole to the aforesaid city of Lisbon. . . . And the said Bernard claims that, by reason of the said spoil and robbery, he is damnified to the amount of 700 l. sterling, and he humbly prays that we shall grant to him authority to make reprisals (*licentia mercandi*) upon the men and subjects of the realm of Portugal, and particularly on those of Lisbon, and upon their goods, . . . on land or sea, until he shall have obtained full satisfaction for [the loss of] his goods so carried off as aforesaid. And we, considering the wickedness of the aforesaid robbers, in committing this spoil in time of peace, and having seen a letter under the seal of the council of Bayonne aforesaid, by which the mayor, jurats, and council, after having taken trustworthy proofs thereon, signify to our lord, the King, the truth of the premises, yielding to the prayer of the said merchant, have given and granted, and now give and grant to him, Bernard, his heirs, successors, and posterity,

[69] Bartolus, *Tractatus*, fol. 121.

[70] In 1363, for example, Niccolò Acciaiuoli, citizen of Florence and Grand Seneschal of Naples, threatened to take reprisal on the goods of Florentines in Naples and Provence for the injuries done him and, if this did not amount to enough, to arm galleys to prey on ships carrying Florentine goods: Sapori, *Studi di storia economica*, I, 140.

liberty to make reprisals upon people of the realm of Portugal, and particularly upon those of the city of Lisbon . . . to retain and keep them for himself, until he and his heirs or successors or posterity, shall be fully satisfied for [the loss of] his goods so spoiled . . . together with expenses reasonably incurred by him in that behalf. [And] These presents shall endure for five years, or so long as it shall be the pleasure of our aforesaid lord, the King and Duke, or ourselves.

All royal officials were asked to give "aid and assistance" in executing the marque.[71]

The right to make reprisal, it will be noted, was given to an individual and his heirs, for a specific number of years, and only up to an amount equal to the damages he had suffered. It was also given specifically in time of peace and was subject to royal revocation. In all these respects it was different from another form of reprisal described in a case of 1293.

In this case, heard by English arbiters, the roles of prey and predator were reversed. Two ships carrying Spanish and Portuguese merchants to Flanders were spotted by sailors from Bayonne, who captured and plundered one of them. The goods on the other ship were transboarded in Brittany to an English vessel, presumably to avoid detection; but this ship was forced by rough seas into Portsmouth where the Bayonnese had brought their first prize. There the Gascon sailors had the sheriff of Southampton seize the Spanish and Portuguese goods. To justify their actions, the men of Bayonne related the following story to the arbiters King Edward appointed to decide who should get the goods. The King of Castile, they said, had had proclaimed throughout his lands that all burgesses of Bayonne found anywhere within the lands subject to him would be beheaded and their goods seized. "Because of this a great slaughter has been made of Bayonnese sailors and their goods plundered to the amount of 20,000 marks." They called another merchant of Bayonne (not one of the pirates) to testify that 3000 marks worth of goods had been taken by Spaniards and Portuguese from one of his ships when it put into Lisbon. The whole story makes one question the "state of peace" proclaimed in the marque delivered to Dongresilli two years later. But such were the difficulties of distinguishing war from peace at sea. The action taken by the pirates of Bayonne and the sheriff of Southampton was clearly reprisal. (*Lucrari*, "to take booty," was the word they used; but the vocabulary in these matters was not yet a technical jargon.) Yet the right to make reprisal was apparently claimed — and accepted — for all burgesses of Bayonne. The two pirates did not assert that they themselves had been injured by the King of Castile or by any Spaniard, and the merchant who had been despoiled in Lisbon received — at the king's command — only £250 from the prize, presumably as a pay-off for his testimony. The right was unlimited both in time and in amount. All this was so, apparently, because reprisal was being taken against *inimici*. The Portuguese's best defense was that "they were never enemies of the lord King nor of the burgesses of Bayonne."[72]

The right of reprisal or marque existed in a no man's land between judicial action and war. The actions these merchants, officials, and pirates took in the

[71] Marsden, *Law and Custom of the Sea*, pp. 39–41.

[72] *Ibid.*, pp. 12–18.

name of reprisal all so testify. In this no man's land, however, the attack on the Spanish merchants was clearly close to war, the letter of marque for Dongresilli a quasi-judicial act. Although they do not mention this difference, Baldus and Bartolus may have had it in mind when they refused to accept wholeheartedly the doctrine that only the true sovereign could grant reprisals. The warlike versions of reprisal would have put reason on the side of Innocent IV and his followers, assimilated the legal aspects of reprisal to the legal aspects of the just war. But the practical issues raised by insolvent bankers would have argued for more expeditious procedures enabling creditors to demand the right of reprisal from a local judge, to collect their debts by marque before all possible victims disappeared, to "declare war against all" themselves to protect their goods. Similarly, the limitation inherent in this form of reprisal might have made it seem more judicial and less military. The great Florentine bankruptcies of the 1340's and the chaos that followed the Plague in 1348 made these practical issues very vivid. Their effect had surely not yet dissipated in 1353 when Bartolus wrote his treatise on reprisals or several decades later when Baldus wrote his: the standard texts for centuries to come.

As the fourteenth century progressed, the difference between reprisal and reprisal became more and more marked. By 1400 generalized marauding that could not be excused by a state of open war risked being dealt with as common robbery. At the same time, in France and England letters of marque came more and more under royal monopoly and regulation.[73]

The stages by which this took place have never been explored, but the motives of merchants and monarchs to bring it about seem fairly clear. With a letter of marque in his posssession a merchant could request an official to seize the goods that were his due. This was without doubt easier than seizing the goods himself and probably made fist fights and litigation less likely. In the competition to provide this service royal officials were undoubtedly better placed. For a high-justicer lord could only command his own local officials to assist the aggrieved merchant, but a royal letter commanded throughout the kingdom. To merchants involved in kingdom-wide or in international trade, this was an important consideration. Only a letter from the king of England could effect reprisal in both Bayonne and Southampton; only a letter from the king of France could effect it in both Boulogne and Aigues-Mortes. The monarchy had the same competitive advantage here as in other areas of judicial administration.

The monarchy's interest in controlling marque was likewise clear. Reprisals disrupted trade from which kings drew important tax revenue. In the event of an economic debacle, such as the Florentine bankruptices in the 1340's, when unrestrained reprisal endangered all Florentine activity abroad, the kings might likewise find themselves deprived of the bankers on whose loans and administrative activity they so much depended. Most of all, reprisals caused political troubles, strained hard-won alliances, endangered truces. As the war between Valois and Plantagenets came more and more to dominate European politics and finance these were no small considerations.

[73] See Timbal, "Lettres de marque," pp. 118 ff.; M. Keen, *Laws of War*, p. 233 and esp. n. 2. As Keen shows, however, the royal monopoly was not complete, despite royal regulation: *ibid.*, 223 ff.

By the end of the century the royal monopoly was apparently achieved. There is no indication, however, that it was yet a reality in 1332. Why then did the king's advocate in the dispute with the bishop of Agde claim it was? Clearly he was making a debating point, one he did not expect to prove, meant to serve only as an argument by analogy. The nature of the argument seems to be this: The bishop's possession of high justice cannot be denied. Pirates, however, are not ordinary criminals. Jurisdiction over them can only belong to the sovereign, to one having no superior, for hanging them and seizing their goods is similar to reprisal; it is like an act of war. It therefore belongs to a domain of violence outside of ordinary jurisdiction, a domain in the sovereign's monopoly. The argument was extreme — a radical departure from the current conception of high justice which encompassed both jurisdiction and making war, more extreme than Romanists' statements about marque and reprisal. No wonder the bishop's advocate refused to accept it, "supposed" the assertion of royal monopoly "only for the sake of argument" and then denied its consequences.[74] Yet no other argument would have served the royal lawyer's purpose. That it could be made in such a commonplace and laconic manner shows how far the idea of sovereignty and its possible institutional realizations had progressed by 1332 among ordinary royal officials. That its consequences were immediately comprehended by all concerned shows the effect this had had on the men whose daily work brought them in touch with the government.

V

When the king's lawyer in 1332 brought up the arguments of marque and reprisal, of admiralty jurisdiction and guard of the sea, he was appealing to a conception of sovereignty with a generation of solid development behind it . . . and an equally solid future. The conception was explicitly territorial: the seas protected were the seas and boundaries "of his kingdom." It asserted that the king had no superior in temporal affairs. But it also had at its core another claim that would become an integral part of the modern idea of sovereignty: it asserted that certain forms of violence — war and the quasi-war of marque, reprisal, and piracy — were royal monopolies. The conception was thus an instrument of political constraint against such lords as the kings of England, as it was for the English against the kings of France. It was also a political instrument usable against every noble in the kingdom who saw in high-justice and its military extensions the rights that separated him from the common crowd. What were the reactions of these noblemen? Undoubtedly they varied. And for long, undoubtedly, many intentionally refused to recognize the implications of royal claims: in 1366 Thomas of Uldale could still assert that a treaty between the kings of France and England did not affect his private interests won by force of arms.[75] Nevertheless, the doctrine of sovereignty, aided by the lawyers, was slowly insinuating itself into the mental world of the nobility as well. The reply of the advocate for the bishop of Agde is a clear demonstration.

Throughout his rebuttal the bishop's advocate followed a single narrow path.

[74] A. N., K 1176 no. 37.

[75] Timbal, *La Guerre de Cent Ans*, pp. 456–462; see also Keen, *The Laws of War*, chapters 5 and 6.

The king, he said, may do many things "iure superioritatis maioris seu secundi ressorti et imperii" but without prejudice to lords having high and low justice. He granted all the general arguments made for the king, at least for the sake of argument; but he denied the consequences deduced. The king by his sovereign right may guard the seacoast and appoint admirals in time of war, he may perhaps grant marques and reprisals "que ex quodam more guerre procedunt," he may have jurisdiction over piratical depredations "by way of marque or otherwise since this pertains to the rights and defense of the realm," he may perhaps have all the other rights the royal advocate claims, but none of these touch the high and low justice of the bishop, which is all that is at issue in this case. Repeatedly he admitted the king's "sovereign imperial rights." But these rights did not defeat the bishop's justice. In institutional terms all those rights gave the king, at least as far as the captured pirates was concerned, was the right of appeal, of "second resort." Sovereignty and the right to hear appeals were synonyms. Repeatedly the bishop's advocate drove this point home.[76]

To be sure, this was a lawyer's brief. The bishop's advocate felt it most prudent to sidestep the issue of law his opponent wished to raise, to restrict consideration to the "factual" question of who possessed high justice. For on this question he possessed an impregnable defense. That he argued the case on such narrow grounds is not surprising. It reflects, nevertheless, a change in attitude. Something called sovereignty was recognized, and along with it a Romanized right of appeal. There was nothing "feudal" about these *iures secundi ressorti et imperii*. The king's preeminent rights in defense of his realm and a Romanized right of appeal: together they brought to sovereignty the monopoly of legitimate force. But both now here were recognized by a lawyer *defending* a nobleman's high justice. The royal imperial right to appellate jurisdiction, a right whose claim had repeatedly brought war to the borders of the Gascon fief, the king's opponent himself insisted on in order to save his immediate right to high justice. For the sovereign monarchy the major conquest had been made and legitimized.

To the bishop's advocate, as to the king's, the doctrine of sovereignty was no novelty. Though the king's lawyer had left unexpressed the full sweep of this doctrine, it was immediately recognized as the implication behind the list of royal rights. By 1332 sovereignty, like violence, was a fact of political life. All that remained was to work out the details.

* * *

Such was the historic role of pirates and admirals in the Middle Ages: bringing terror to the sea and its coasts, but also bringing forth from the customs of Italy a doctrine of sovereignty and an institution to embody it that were destined to become major features of the European world. If the pirate captain whose ship ran aground on the island of Brescou in 1332 had had better fortune, he might have ended his life as Admiral of the King, rather than swinging on the king's gallows.

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[76] A.N., K 1176 no. 87. Rebuttals to articles, 3, 4, 7, 8, 13, 14, 16.