FREDRIC L. CHEYETTE
Amherst College

THE ROYAL SAFEGUARD IN MEDIEVAL FRANCE

ESTRATTO DA
STUDIA GRATIANA XV (1972)
POST SCRIPTA
pp. 631-652

> " Philip, by the grace of God King of France, to his faithful seneschal of Carcassonne or his lieutenant.. . We order you to maintain the Regents of the Consulate of the Bourg of Narbonne in those just possessions which you discover they have and have had.. . and that you protect them from all manifest injury, violence, and oppression, and from undue innovations. . . (1).
>
> " . ..Immediately the said proctor... appealed viva *voce* to the king or to him to whom appeal must be directed, asking for record of the case and apostolos, . ..placing those of whom he was proctor and their supporters, councillors, and *fidejussores* in the protection of the king, warning the said lord judge, in the name of the king, not to innovate in any way to the prejudice of this appeal.. , " (2).

These two texts present two formulae for creating a royal safeguard in France around 1300. The first is an administrative, the second a judicial form. They have been selected at random from a large number of very similar texts, often distinguishable only by the proper names inserted at the appropriate places.

Among the devices by which the lawyers of the last Capetians fastened royal government on a not always willing realm, the royal safeguard stood out. Its prominence derived in part from the antiquity of the idea of royal protection, in part from the procedures thirteenth-century lawyers invented to enforce the idea. The Prince was protector of the Church, guardian of widows, orphans, and the weak. Ritual, confirmation of ancient charters, and equally ritual repetition of ancient political clichés had maintained this notion even in the darkest days of feudal fragmentation. The fourteenth-century formulae, however, and the administrative and judicial procedures they commenced, were largely variations — subtle in form and singleminded in purpose — on a Canon Law invention of the thirteenth.

The history of the safeguard is thus first of all a history of

---

(1) AN S4858 no. 49: letter of safeguard for the *regentes consulatum burgi* of Narbonne, 15 May 1308.

(2) BN ms. Doat 178 fos 124v-125: appeal of the proctor for the Count of Foix, 1305.

the formulae in which it was enshrined, a tale of diplomas and charters produced by royal, papal, and princely chanceries, or forged in monastic workshops. Through many centuries these formulae led a life of their own, giving voice to the fundamental belief in royal protection, while the social institutions to which they implicitly referred disintegrated and disappeared. It is one more story of medieval attachment to archaic modes of thought, of words that remained the same while the meaning that men attached to them changed utterly. It is likewise a story of how thirteenth-century popes and kings constructed new administrative machinery to give new consequences to ancient thoughts. Because protection of the Church and of the weak figured so largely in medieval ideology of kingship, the story of this vocabulary and of the administrative devices to which it came to refer is also — in small compass — the story of how monarchic government was transformed in the thirteenth century and how it won the allegiance of those over whom it ruled. For the safeguard played a leading role because it was accepted and used by the king's subjects, even by those who were constantly at odds with royal agents. Their acceptance of this device marked their implicit acceptance of royal sovereignty.

* * *

In the eyes of contemporaries, the royal safeguard of the fourteenth century descended from an unbroken tradition going back to the *emunitas* and royal *tuitio* of Merovingian Frankland (3). Medieval clergy and chancery clerks were as deeply conscious of this tradition as was any aristocratic house of its family tree,

(3) My account of the early history of *emunitas* and tuitio is derived largely from the following works: F. GANSHOF, *L'immunité dans la monarchie franque* in *Recueils de la Société* Jean *Bodin*, I' (1958) 171-216; L. LEVILLAIN, *Note sur l'immunité mérovingienne* in *Revue historique* de *droit français et étranger*, 4me sér., VI (1927) 38-67; J. SEMMLER, *Traditio und Königsschutz* in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kan. Abt., 45* (1959) l-33; H. HIRSCH, *Untersuchungen zur Geschichte des päpstlichen Schutzes* in *Mitteilungen des Instituts für Österreichische Geschichtsforschung*, *54* (1942) 363-433; H. APPELT, Die *Anfänge des päpstlichen Schutzes* in *Mitt. Inst. Öster. Gesch.,* 62 (1954) 101-111; W. SCHWARZ, *Jurisdicio* und *Condicio* in *Zeitschr. Sav.-Stift., Kan. Abt., 45* (1959) 34-98; E.E. STENGEL, *Die Immunität in Deutschland bis zum Ende des 11. Jahrhunderts*, I (Innsbruck, 1910), esp. 368ff. The earlier bibliography is fully summarized by GANSHOF.

and they just as carefully guarded the genealogy in ancient diplomas, both genuine and forged, repeatedly confirmed by successive kings.

The *emunitas,* granting immunity from taxes and freedom from judicial exploitation by royal officials, and the tuitio, affirming royal protection of the beneficiary, had been combined after 814 by the chancery of Louis the Pious. The type of formulae then invented — " sub nostra defensione et inmunitatis tuitione ", " sub inmunitatis nostrae defensione " — continued to appear in royal diplomas and charters for over three-and-a-half centuries. In 849 Charles the Bald took the monastery of Flavigny under royal *defensione et immunitatis tuitione* and ordered

> ***ut...*** *nullus episcopus* ***territorii*** *illius... ibidem aliquod praesumat exercere* dominium ***neque de rebus*** ejusdem *monasterii aliquid auferre...* ***aut*** *quippiam minuere* ***aut abstrahere*** *praesumat,* ***et*** *nullus judex publicus nec quilibet exactor* ***judiciariae*** *potestatis vel* ***ullus 0x fidelibus*** *nostris* ***in*** *ecclesias... seu.. possessiones* memorati ***monasterii.. . ad*** *causas* ***audiendas*** *vel freda* ***aut*** tributa *exigenda. . . aut* homines.. . *distringendos...* ***ingredi*** *audeat...* ***vel*** *exigere praesumat* (4).

Three hundred and thirty-six years later, in 1181, Philip Augustus confirmed the *libertas sive immunitas* granted Charlieu by " our predecessor Carloman " and commanded

> *ut prioratus...* cum omnibus ***ad eas*** *pertinentibus nullus archiepiscopus vel episcopus, nullus judex publicus* ***aut*** *ipsius provincie* ***dux vel comes...*** *quolibet ingenio* ***audeat*** conturbare *vel aliquid* inde *abstrahere* ***aut*** *censum minuere, usurpare, commutare presumat, nec... prefatum monasterium temere perturbare* ***a u t*** *ejus possessiones auferre* ***v e l*** ***ablatas*** *retinere nec aliquibus vexationibus* ***fatigare.. . (5).***

The words were not identical (but even in the days of Charles the Bald, neither words nor general structure of these diplomas were fixed with absolute rigor) (6); the intended meaning had

(4) A. GIRY, M. PROU and G. TESSIER (eds.), *Recueil des Actes de Charles II le Chauve* (Paris, 1943-55), I, no. 117.

(5) H.F. DELABORDE, C. PETIT-DUTAILLIS, J. MONICAT and J. BOUSSARD (eds.), *Recueil des Actes de Philippe Auguste* (Paris, 1916-66), I, no. 20. See also nos. 22, 24, 25, 57, from the beginning of the reign, and no. 1371 from the end.

(6) See TESSIER's introduction to the *Actes de Charles le Chauve*, III, 227-236.

nevertheless remained the same. By the time of Philip Augustus, however, such archaic rhetoric was precisely a conscious archaism, an attempt by the royal chancery to claim as its own the prestigious ancestry of those nearly mythical kings and emperors. Underneath the diplomatic continuity the institution had long since changed, and other less formal products of the royal chancery clearly mirrored those changes (7).

Both protection and immunity had originally sprung from royal proprietary rights. Merovingian immunity was a privilege of the royal fisc, alienated with fiscal lands or extended to other property. Protection, *defensio, mundeburdum,* was originally granted only to those sanctuaries founded on royal lands or by the royal family, or taken over by the king through a formal *traditio* or confiscation. To have combined royal protection with immunity from subjection to royal officers may seem incongruous, but it was not. For protection sought to avert the danger that the heirs of founders and donors might seek to retake donated lands, and the risk that prelates or great lords might use their powers to convert those lands to their own private patrimony. As the reformers reminded Charles the Bald at the Council of Meaux in 845, his ancestors had given their protection " ut libera libertate remota spe hereditaria de illorum propinquitate ibidem religio observetur " (8). Protection granted the immunist the title of royal or papal property. Immunity argued, if it did not always effectively enforce, that counts and bishops — the public officers of the Carolingian Empire — should not twist their public powers for private gain.

Immunitas belonged to the world of the Carolingian state. The Carolingian *tuitio* belonged to that of the proprietary church. The former disappeared in the fragmentation of the tenth century, the latter tinder the onslaught of the Gregorian reform. The formulae, however, remained alive because they had attached themselves to new and vital interests. *Immunitas* founded and helped maintain immunist seignories; *tuitio* supported the collection of rights that ecclesiastical reformers could not wrest

(7) Note, for example, the freedom from *consuetudines* granted or recognized in *Actes de Philippe Auguste, nos. 57,* 105, 107, 187, 283, etc.

(8) Quoted by J. SEMMLBR, *Traditio und Königsschutz,* 11.

from lay — and especially royal — hands: rights of patronage and of spoliation, claims of *régale,* the special governance of " royal monasteries " (9). In the second half of the twelfth century these were still expressed in the language of proprietary right and royal foundation, as when in 1163 the archbishop of Tours appealed for help from Louis VI " a cujus largitione et sub cujus solius patrocinio nostra sunt omnia " (10). *Immunitas* continued an unimpaired career, referring now to the host of fiscal privileges monarchs might bestow on favored sanctuaries (11). Meanwhile, protection melted slowly into a quite different institution, calling for the intervention of royal agents rather than their exclusion. So slowly did this change occur, however, and so strong was the myth of continuity created by those Carolingian words, that ancient charters were still brought back for confirmation and used (as, for example, in 1260 by the Chapter of Autun) (12) to support claims unimagined by the original authors. Contemporaries, however, were surely unaware of the irony of their actions. For the old was still very much with them, and the new had yet to show its full productive powers.

When the new appeared, it came to answer the need for enforcement. Charlemagne had attempted to solve this problem by adjoining an advocate to every immunist. In time, however, especially in what would be northern and eastern France, these advocates had become lords, protection had become exploitation, and the protected yet another group subject to customary dues. Such " guards " continued, even in the thirteenth century, to be enfeoffed, exchanged, sued for, bought and sold (13). It is

(9) See, for example, M. PACAUT, *Louis* VII *et son royaume* (Paris, 1964), 91-107.

(10) *Ibid., 97.*

(11) *Actes de Philippe Auguste,* no. 33: *immunitas de vinis;* 105, 107, 187: immunity from *consuetudines* and tolls; 283: for ships of Bec. J.F.E. CASTAIGNE (ed.) *Chronique latine de l'Abbaye* de la *Couronne* (Paris, 1864), 136 no. 11: Hughes III de Lusignan grants immunity from *gardia, talia,* and pedagio (1267).

(12) A. DE CHARMASSE (ed.), *Cartulaire de l'glise d'Autun* (Paris, 1865), 238-239, 263. The Chapter of Autun, seeking to prove itself in the king's guard rather than that of the Duke of Burgundy, brought out an immunity diploma of Charles the Bald. The Duke's proctor replied " quod non utendo amiserunt privilegia sua ", and won his case. Yet what use could possibly have been demanded except for some positive action from the king or his agent specifically prohibited by the Carolingian immunity.

(13) N. DIDIER, *La* garde *des églises au XIII^e siècle* (Grenoble, 1927), 123-126, 143-146.

doubtful that they served any longer to protect. In the absence of agents on the spot, the late twelfth- and early thirteenth-century princes who sought to convert their traditional role as protector of the Church into current political coin could only try to pursuade or cajole potential evil-doers into restraining their aggressive appetites. They could order land restored and clerics released under threat of seignorial ire and loss of favor. They could warn, as Louis VII did some minor Limousin noblemen, that an abbey " belongs to the dignity and protection of our crown,.. [and] we consider all oppressive injuries they suffer as attacks on us " (14): it was a refrain often repeated in letters of kings and counts (15). They could even add vivid variation:

> Let all our friends and supporters know that we will consider anyone who invades [those rights and lands] in our protection as having done something much worse than if he had killed our horse between our legs (16).

As a last resort, however, when warnings fell dumbly and cajolery failed, they could only gather an army and march. Louis VI and VII did this often enough, but it was hardly a means of effective administration (17).

Both the ancient formulae and the ancient problem of enforcement were thus very much alive when towards the end of the twelfth century new judicial organization and the first steps towards a viable administrative structure began to afford new possibilities. Side by side with the still vigorous Carolingian tradition a new set of formulae began to appear, timidly at first, vague and ambiguous, awaiting the clarity that thirteenth-century lawyers would finally give it.

(14) A. LEROUX, E. MOLINIER, A. THOMAS (eds.), *Documents historiques concernant la Marche et le Limousin* (Limoges, 1883-85), I, 169 no. 52.

(15) *Actes* de *Philippe Auguste*, nos. 60, 161, 187, 215, etc.; *Ordonnances*, VIII, 310 (Richard II, no date); P.A. VERLAGUET (ed.), Cartulaire *de l'Abbaye de Bonnecombe [Archives historiques du Rouergue*, V, Rodez, 1918-25], nos. 20, 21, 22 (1222-1242), 30, 31, 32 (end of the eleventh century); J. GUICHARD (ed.), *Cartulaire de Notre-Dame* de *Prouille* (Paris, 1907), I, no. 81 (1217); P.A. VERLAGUET (ed.), *Cartulaire* de *l'Abbaye de Silvanès [Archives historiques du Rouergue,* I. Rodez, 1910], no. 504 (1214).

(16) *Cartulaire* de Bonnecombe, no. 33: charter of Raymond VI of Toulouse (1221).

(17) A. LUCHAIRE, Louis *VI le Gros* (Paris, 1890), lxvii ff., cix ff.; PACAUT, Louis *VII,* 84-90.

The new type of formula might best be called an administered safeguard, for it prescribed in some manner the action an agent was to take in the event of its violation. The earliest example I have found of such a safeguard is an undated letter of Philip of Alsace, count of Flanders and Vermandois from 1168 to 1191, in favor of the *domus de Neppe,* ordering his agents (*servientes*)

> de *omnibus* de *quibus prior vel fratres eiusdem* domus ***vobis conquesti fuerint plenam*** eis absque *dilatione satisfactionem exhibeatis* (18).

The instructions are vague, but the vocabulary, already technical, strongly suggests legal proceedings. With Philip Augustus there can no longer be any doubt. Alongside the diplomas in the archaic mode, alongside laconic letters stating only that the beneficiaries were in the king's " custody and protection " (19), the royal chancery began with increasing frequency to instruct baillis and prévots on their judicial duties towards those in the royal guard. The formulae remained fluid (after 1190 one special set of clauses was commonly used for monasteries in the Cistercian order (20), but those for others showed no formal consistency); they were also none too precise. The intent, nevertheless, was always the same: whenever requested, the king's officer was " to do justice " and force those doing violence to pay due amends (21).

The royal guard, however, did not yet bring with it a monopoly for royal jurisdiction. Barons were gently prodded, but their rights of justice were expressly maintained. The king's guard worked its effect only for those lands and rights " in potestate nostra " (22). It was a recognition of political fact. The

(18) BN ms. Picardie 238, no. 5. A nineteenth-century hand has dated the document 1168, though on what grounds is hard to say.

(19) *Actes de Philippe Auguste, nos.* 12, 61, 218, 302 etc.

(20) *Ibid., nos. 337, 339, 340, 347, 348, 350, 352,* 1129.

(21) *Ibid.,* no. 489, for Ourscamp, is typical: " Mandamus vobis... quatinus universa que pertinent ad domum... manuteneatis et, per potestates vestras, ab injuriosa molestatione deffendatis...; quociens vero de justicia requisierint, ipsis maturam exhibeatis justiciam " (1195). Sometimes the connection of guard and justice is made even *more* direct, as in the letter of Louis IX (1232) for Foigny: " . ..omnes res et catalla... quas habent in potestate vestra infra preposituras vestras per ius custodiatis et defendatis quamdiu parati sint iuri stare coram vobis ". BN ms. Picardie 289, no. 115.

(22) *Actes de Philippe Auguste,* no. 215: " et si quis in jurisditionibus vestris constitutus rebus... injuriam inferre voluerit, res eorum... manuteneatis " (1187); no. 337 and others

old words continued, possessions were still to be protected " as our own ", but the old proprietary consequence of royal *tuitio* had disappeared. Protection no longer made ecclesiastical property the king's; that tradition had long since flowed into the separate streams of *régale,* royal monasteries, and other customary rights. When the late thirteenth century made breach of the royal guard a royal cause, it was on a different ideological base, an outgrowth of procedural invention and an act of political will. The reign of Philip Augustus was only a beginning, vague and tentative. Only at the end of his grandson's reign would some progress be made.

In the history of the safeguard, the reign of Louis IX is a dark age; we do not even dispose of a catalogue of royal acts. It is thus impossible, for the moment, to trace the geographical spread of the royal guard or to know how this spread was related to the extension of the royal domain and to royal policy in the great fiefs. By 1225, clergy were requesting the king to send agents to intervene on their behalf (23); and those requests were undoubtedly gladly met. But as late as 1267 there seems to have been no significant change in the formulae of guard or the legal procedures that followed from them (24).

Then suddenly in the reign of Philip III, the chancery defined with new precision what the royal agents' actions were to be (25).

of the Cistercian group: " Hoc autem dicimus de rebus que in nostro dominio constitute sunt. Si quis vero de rebus fratrum... in potestatibus nostris constitutus aliquid sine clamore ceperit, tantum de rebus malefactoris capiatis... quod res eisdem sine mora restituatur et forefactum emendetur. Si quis vero de baronibus nostris vel aliquis de terris eorum aliquid injurie... inferre presumpserit, volumus ut ipsi... super emendatione injurie... quantocius conveniantur et ut eisdem res que ablata sunt restituantur et forefactum emendetur ". (1190); see also nos. 411, 518, 541, etc.

(23) A. TEULET, Layettes *du Trésor des Chartes* (Paris, 1863-1909), no. 1737.

(24) See, for example, the commission to a guardian issued by the chancery of Alfonse de Poitiers in A. MOLINIER, *Correspondance administrative d'Alfonse de Poitiers* (Paris, 1894), II, no. 79. Other mandaments from the same year (no. 36, for example) indicate that the automatic summary procedure had not yet been established, and that a formal judicial complaint was still required. The royal court, however, was already experimenting with just such summary procedure in the context of the safeguard: A. BEUGNOT (ed.), *Les Olim* (Paris, 1839-1848), I, 635 no. 7 (see below, n. 48).

(25) The earliest example I have found of a letter of safeguard using the crucial technical vocabulary is a letter of Philip III for Fontfroide in 1279: " ab iniustis et manifestis iniuriis et violenciis aut gravamina contra iusticiam [deffendetis]... que si sic illata fuerint ad statum debitum reducatis...; contained in a *vidimus* by Louis X (1315), AN J 352, fo 104v, no. 206.

A new procedure was invented. And the formulae then adopted — the formulae with which this essay began — remained, with only small variation, the standard for the remainder of the Middle Ages. The ancient diplomas of immunity and *tuitio,* the vague instructions to do justice, were finally supplanted. Why, after so many centuries, did this change suddenly occur? What was its significance ?

When the lawyers of Philip III replaced the ancient Frankish formulae and the vague instructions of their immediate predecessors with the craggy legalisms they held so dear, their purpose was clear. Here as elsewhere they were bent on introducing the technical, the bureaucratic, the term of art, into what had been the loose and sometimes ambiguous language of government. Their aim was to give legal and administrative strength to the pious desires of an earlier age. Here, as elsewhere in the thirteenth century, to change a language was to create an action. Their source, in this case, was Canon Law. Their model was the ecclesiastical conservator. A comparison of a fully developed letter of safeguard with Innocent IV's decretal *Statuimus ut conservatores* (1254) is sufficient demonstration.

> Statuimus, ***ut conservatores, quos*** *plerumque concedimus,* a manifestis iniuriis ***et violentiis defendere possint*** quos eis committimus ***defendendos.*** *Nec* ad *alia,* ***quae*** *iudicialem indaginem exigunt,* suam *possint extendere* ***potestatem (26).***
> ***Nos... gardiatorem...*** concedimus; *mandantes ipsi... quatinus religioses viros priorem* ***et*** conventum... *predicti* ***in suis iustis posses***-&o&bus... manuteneat, ab ***iniuriis et violenciis manifestis*** *defendat nec sibi permittat fieri* ***aliquas indebitis novitates... Nolumus*** *tamen* ***quod de hiis que*** cause *cognicionem exigunt* ***se aliquatenus*** *intromittat* ***(27).***

To royal lawyers looking for a way to enforce the king's guard, the pope had given a solution ready-made, worked out to the last detail. They had only to adopt it.

The interpretation of *Statuimus ut conservatores* posed no

(26) ***In VI°,*** I, xiv, c. 1. According to Bernardus of Compostella, who *was* in *a* position to know, " de talibus conservatoribus nihil habebantur ante istam constitutionem ". Harvard Law School ms. 71, fo 2.

(27) Philip V for Notre-Dame de *Quercu,* 1317: BN ms. lat. 4763, fo 36v.

major problems. Innocent himself glossed it at length; so did Bernardus of Compostello the Younger, Hostiensis, Martinus de Fano, and Johannes Andrea (28). In explaining its content we can do no better than take its author as our guide. Conservators, Innocent tells us, are sometimes given to protect against thieves and usurpers, sometimes to prevent the violation of privileges, and sometimes generally, to protect against all injuries. Their powers are restricted, however, to preventing or correcting *manifest* injuries. They can threaten someone about to act wrongly, if they happen to be present. But after the event they can only summon the accused and ask if he confesses. Should he confess, conservators can order restitution and excommunicate to enforce it. Should the accused deny it, however, or claim he acted justly, conservators can do nothing more; the aggrieved party must then begin legal proceedings in a regular court (29). For " manifest injuries " as the canonists defined them by the mid-thirteenth century, were a singularly restricted class of events.

The basic definition of " manifest " was given by Innocent III in a letter of 1207 included in the Decretals of Gregory IX (30). Johannes Teutonicus soon afterwards incorporated it into a distinction between *fama, manifestum,* and notorium; a distinction that quickly became commonplace. The three, in effect, were grades of public knowledge. *Fama* is the vaguest — it can derive from knowledge or suspicion and from a known or unknown source.

Manifestum is something known that can be proved, and is called *notorium* when evident by confession, by previous proof, or by the evidence of the thing itself, as when, says Hostiensis, a cleric has a concubine in his house, in his bed, and at his table, and children cry around his fire (31).

(28) Bernardus of Compostella: Harvard Law School, ms. 71 fo 2; Hostiensis: *In sexturn decretalium librum commentaria* (Venice, 1581) fo 7v; Johannes Andreae: *Glossa* ordinaria to I, 14, cc. 1 and 15 of the *Liber Sextus.* The gloss of Martinus de Fano is mentioned by Johannes Andreae in a note to Guil. Durandis, Speculum *Iuris* (Frankfort, 1592), fo 26. I have been unable to locate a copy.

(29) Innocent IV, *In quinque Decretalium libros... commentaria* (Venice, 1570) fos 90v-91, and ms. Fulda D. 10. [My thanks to Professor Stefan Kuttner for allowing me to use his microfilm of this ms. and for bringing the Harvard ms. of Bernardus of Compostella to my attention].

(30) Extra., V, 40, c. 24.

(31) *Glossa ordinaria* to the *Decretum Gratiani, Causa* II, ***quaestio 1, c.*** 15, *Manifesta;*

When Innocent IV used the term " manifestis *iniuriis* " he therefore meant something quite specific: the conservator could take action only in cases where the facts were confessed, had already been proved by court decision, or to which he himself was a witness. The conservator's powers were thus seemingly quite limited, as those who glossed *Statuimus* were indeed well aware. In an attempt to save the office from being still-born, they all insisted that the conservator could at least try the issue of whether the act complained of was manifest or not (32). Considered in this way, however, the decretal seems to fall among those issued at the Council of Lyons whose purpose was to limit exceptions to episcopal jurisdiction (33).

Yet the office was not totally useless. Its limitations were a source of strength, the pruning necessary for innovation and growth. Many cases of injury, perhaps even the majority, were not the arbitrary and gratuitous explosions of evil will that monkish moralists were pleased to portray; they were rather the outcome of confused, ambiguous and disputed rights, in which the attempt of one lord to exercise jurisdiction, collect rents, or harvest grain, was interpreted by another as theft of property or armed invasion. In this case, as the glossators saw, the accused would show neither reluctance nor compunction in confessing his action, but would both admit it and defend it as his right. Such cases would thus fall squarely within the limits of the conservator's powers, for confession made the action " manifest ". The conservator could thereupon legitimately threaten the defendant with excommunication unless he showed readiness to defend his claim in court (34). The new ecclesiastical office

Henricus de Segusio, *Summa aurea* (Basle, 1573), col. 683; Henricus de Segusio, In *tertium decretalium* librum commentaria (Venice, 1581), fo 6v. Without exception the glossators of *Statuimus* interpreted *manifestum* to mean *notorium.*

(32) Bernardus of Compostella, for example: " Et si dubitetur an iniuria vel violencia sit manifesta, quia pars altera hoc negat, cum per negacionem res fiat dubia... ipsi conservatores cognoscere debent (alia inutile esset eorum officium, quia quilibet hoc negaret), sicut iudex potest cognoscere an sua sit iurisdictio ". Harvard Law School ms. 71, fo 2.

(33) H. WOLTER and H. HOLSTEIN, Lyon *I* et Lyon *II* (Paris, 1966), 82.

(34) Innocent IV, Commentaria, fo 91: " Item non dicuntur habere iudicialem indaginem ex vi literae, sed ex consensu partium. quia est inculpatus, dicit,' ego feci utens iure meo, et hoc paratus sum probare', et convenit, quod iudex de hoc cognoscat: quia aliter *cum* factum sit notorium, excommunicabit conservator ". Hostiensis gives a slightly different

became, in effect, an instrument to force into a court of law those disputes over rights and property that so often led to rapine and open warfare. When the lawyers of Philip III and Philip IV adopted it to the royal purpose, they used it in the very same manner, but modified to work even more effectively.

The king's men made four important changes; they radically lowered the position of the conservator (renamed " guardian ") in the social and administrative hierarchy; they invented the ritual of placing the royal symbol on the protected property; they invented a procedure to follow when the guard was violated; and they offered the royal safeguard to all who might appeal to a royal court. It goes without saying that royal agents also sought on every occasion to enlarge the meaning of " breach of the king's safeguard ". For the purpose was to bring violence to justice: to the king's justice alone, and to the profit of the king's treasury.

In 1256 Alexander IV had decreed that only prelates or cathedral canons might be chosen as conservators. The legislation was repeated by Boniface VIII and included in the *Liber Sexus* (35). Prelates and canons, of course, were busy men, rarely in the vicinity of the sanctuary they were supposed to guard (for they could not be the subjects of the person or sanctuary they were charged to protect) (36), and not likely to appear at work day in, day out. The guardians appointed by the king,

version of what happens in such circumstances: " Quid si iniuriator confitetur factum sed asserit hoc iure fecisse? Planum est quod per talem responsionem et negationem fit res dubia... et ideo hanc questionem talis conservator nec examinare nec diffinire poterit tanquam iudex. Debet tamen advertere qualitatem facti, nam si confiteatur praedam et insultum publice factum, quomodo potest hoc iuste fecisse, nam talia omni iure damnata sunt, ut patet per multa exempla... Dicas quod hoc potest esse iustum quia probat vel allegat quod authoritate iudicis hoc fecit... Sed quid si conservator ita dicat iniuriatori, ' Carissime, ego ne scio *si* hoc fecisti, vel si hoc iuste fecisti, sed ego moneo te, quod si hoc fecisti iniuste usque ad tale tempus satisfacias, quod si nec adhuc feceris, assigno tibi ad idem, et eodem modo talem, et talem terminum peremptorium '. Planum est quod monitio ista non est iniusta sed iusta... et ideo si iniuriator confidat de iure suo sic poterit apellare. ' Domine, quia vos monetis me super dubio de quo non constat vobis, nec ego de iure meo possum coram vobis, qui nec iudex estis, fidem facere... a vobis appello ad Papam in scriptis offerens quod coram ipso vel delegato suo sufficienter ostendam de iure meo ' ". Henricus de Segusio, *In sextum librum commentaria*. (Venice, 1581), fo 7v.

(35) *In VI°*, I, 14, c. 15 and ed. FRIEDBERG (Leipzig, 1879), col. 981, note.

(36) Ibid.

on the other hand, were royal sergeants, often paid by those they protected, and present as long as danger and their wages lasted (37). They gave constant, visible force to the royal safeguard and a real presence to the royal name. So too did the *bacculum regis*. To see how this worked, let us follow a safeguard to its destination.

When the Regents of the consulate of Narbonne-Bourg received their royal safeguard in May 1308 (for these letters, like so many involving justice, were given to those who demanded them, though the addressee was a royal agent) they returned south to locate the seneschal of Carcassonne. He in turn, pleading other pressing business, sent the letter and his own instructions on to the royal baile of Narbonne, in whose presence they were published on August 2. The royal letters stated that the Regents were to be maintained " in suis justis possessionibus in quibus eos esse et fuisse inveneritis ". The first order of business was thus to find out the nature of those " just possessions ". After having the letters read, the Regents claimed to have the " government and correction " of the hospital and leper house of the Bourg. The baile thereupon turned to the friars and nuns of the hospital and asked if this were the case; when they replied that the Consuls indeed had this right and described in some detail what they were, he declared himself ready to protect those rights, placed the *bacculum regis* as a sign thereof on the hospital's walls, and ordered the notary to draw up an instrument relating all that had taken place. Baile, regents, notary, and witnesses then moved off to the leper house where they acted out exactly the same ritual (38).

The same procedure was followed whenever anyone's possessions were placed in the royal guard. Inhabitants were questioned, parchments with *fleurs-de-lys* were tacked to doors, willow-wood gallows painted with *fleurs-de-lys* were erected in town squares, and boards painted with *fleurs-de-lys* were attached to town gates (39). The point of this rite was two-fold. First

(37) The following letters, at least, call for the beneficiary to pay the guardian's wages: AC Narbonne AA92 (1333), AN JJ64, fo 421. Was it the rule or the exception?

(38) AN S4858 no. 49.

(39) These are mentioned in a notarial record of 1337: AD Aude H13. Other examples of placing the guard: BN ms. Melanges Colbert 413, no. 866 (1315), BN ms. lat. 9191 (1328), AC Narbonne AA91 (1315), AN L572, no. 4 (1338).

of all, as the documents constantly reiterate, " so that neither man nor woman may claim to be ignorant " of the fact that the beneficiary was in the king's guard (40); so that all may realize they would have to face the king's agents and a heavy fine if they did anything wrong. It was probably a powerfully dissuasive force, and complicated the game of rival jurisdiction that neighboring lords continually played. Why else would the consuls of Narbonne seek from the king the privilege of having the *fleurs-de-lys* portrayed on the rods their officers carried if not as additional armament in their constant skirmishes with the officers of the archbishop, the viscount, and the lords beyond their walls (41)? But there was a second reason, no less important: the inquiry that began the rite gave the opportunity for those with rival claims to oppose the guard and thus, in effect, to provoke a possessory suit in a royal court. Failure to oppose when the king's guard was announced was considered to be tacit consent (42); so those who felt threatened would have to seize the opportunity or quickly demand that the guard be removed if they were not present to oppose it initially (43). Inquiry and the ritual of placing the royal staff thus only served to strengthen the function that the king's guard had borrowed from the papal: for the greater peace of the kingdom and profit of the king's treasury, to force into a court of law those disputes that might lead to violence. This was also true of the guardian's assignment, and rapidly led to the invention of a new and popular class of judicial actions.

Like the ecclesiastical conservator on which his office was modeled, the guardian was restricted to acting only in cases of manifest injury (44). His lowly status in the hierarchy, making him the man on the spot, made this restriction less serious.

(40) AD Aude H13 (1337).

(41) AC Narbonne AA unnumbered (1313).

(42) AN L572, no. 4: safeguard for St. Eustache, Paris. BN ms. lat. 9191: the royal rods were placed in favor of the Archbishop of Narbonne, " nulla discutione vel cognitione precedente ". On appeal to the royal court at Béziers, the Viscount succeeded in having them removed.

(43) AD Aude H146: Niger de Niort sues to have the royal guard of the castle of Blomac, in favor of La Grasse, removed (1287).

(44) See note 27.

For he was much more likely to be eyewitness himself to the events he was called upon to correct. Eyewitness or not, if the violation was manifest, he could force restoration and order a fine to be paid the king. But what if the guardian found before him a defendant who denied violence, or claimed he was acting in his own right? On this the letters of commission were clear: " Place in our hands, as superior, those goods about which dispute arises, assigning a suitable day for the contending parties to appear before the ordinary judge of the locality " (45). No longer was it required, as with the ecclesiastical conservator or the guardians appointed during earlier reigns, that the party injured bring formal complaint before the competent court, or that the accused appeal from a threatened condemnation. Violation of the guard brought an immediate summary inquiry. Were there any dispute over what took place or who was right, a day was immediately set for trial. Meanwhile the disputed goods were " in the king's hand ", as sovereign, and recredencia — effective use of the property during trial — was allowed the party with the best *prima facie* case.

The procedure was precise and rapid. It was also, by the reign of Philip IV, exactly the procedure called for in cases of *novelleté.* Beaumanoir gives us our earliest description. The plaintiff in *nouvele dessaisine,* he relates, must speak as follows: " Sire, ves ci Pierre qui m'a dessaisi de nouvel de tel chose... de laquele j'avoie estk en saisine an et jour pesiblement. S'il le connoist, je requier a estre resaisis. S'il le nie, je l'offre a prouver ". The judge (the Count, in Beaumanoir's case) must then force the defendant to confess or deny, allowing at most only a day to see the disputed object. If the defendant confesses, he pays a fine, and the plaintiff wins. But if both parties claim last *saisine,* proof must be seen, the judge must take the object disputed into his hand, and give recredencia where it is due (46). In time, with the gradual development of Romano-Canonical procedure in the royal courts, complications were added. Before too long, the preliminary functions Beaumanoir assigned the Count as judge would be filled by an ordinary sergeant, but the

(45) One example among many: BN ms. lat. 4763 fo 36v (1317).

(46) Philippe de Beaumanoir, *Coutumes de* Beauvaisis, nos. 959-960. (ed. SALMON, Paris, 1899-1900, I, 487).

essential distinction remained: the immediate inquiry on the complaint was supposed to be " summary and complete "; only when denial of wrong or assertions of opposing right made the case doubtful (i.e. no longer " manifest ") did it go to trial under the full panoply of procedural complications, Meanwhile the object disputed was " in the king's hands " and its use was temporarily regained by the party with the apparently better case (47).

Exactly when were these procedures introduced in France? What was the precise chronology of their alteration and development? Did the safeguard with its guardian precede the complaint en *novelleté*, or viceversa? These questions, unfortunately, I cannot answer. Nor, perhaps, will they ever be answered: the documents that might respond are spread throughout the archival deposits of France, and who knows what existed in those that have disappeared? It seems most likely, however, that both the safeguard with guardian and the procedure en *novellete*' emerged at the same time from a common source. For certain judicial commissions of the early years of Philip IV do not distinguish clearly between the enforcement of safeguard and hearing cases of *novellete*' (48), and throughout the fourteenth century (and probably beyond) complaints of violation of safeguard went hand in hand with complaints of *novellete*'. Behind that common source, as we have seen, was Innocent IV's decretal *Statuimus*.

In its new administrative dress, the safeguard rapidly became one of the monarchy's most saleable products. It was sought not only by the king's traditional clerical clientele, but by travelling merchants and the towns where they dwelt, noble widows and noblemen (49). The most vivid testimony to its acceptance is the speed with which the procedures associated

(47) See the ordonnance on procedure in *novelleté*: AN Xla 12, fo 73r-v.

(48) For example, a commission to the bishop of Carcassonne and the sénéschal of Périgord to investigate a complaint of the abbot and convent of Figeac in 1293: AN J342, no. 8. A very early example is a decision of the king's court in 1265: " in quantum tangebat abbatissam, que est de garda Regis, determinatum fuit... quod ballivus domini Regis accederet ad locum, et vocaret partes, et, si inveniret factum tale sicut abbatissa proponebat, preciperet comiti quod... hoc factum emendari faceret... si vero ballivus non inveniret hoc factum ita manifestum, referat ad curiam inquestam inde factam ". *Olim*, I, 635.

(49) Safeguard for merchants of Piacenza mentioned AN J895, no. 6bis; safeguard for town of Nonnette: AN J1046 nos. 2, 3; for Ghent: AN JJ53 fo 85 no. 197; some of those for Narbonne have already been mentioned. Safeguards for noblemen: BN ms. lat. 11017, fos 52, 63v; BN ms. Perigord 51, fº 144. Request for safeguard from a widow: AD Doubs B491. A chancery formula book from circa 1370 gives a special safeguard form for widows and orphans under age: BN ms. lat. 4641, fo 6v.

with it became part of local custom. In 1336, for example, the curé of St-Eustache in Paris obtained the king's safeguard for himself and had a royal *pennonceau* suspended from the tower " visible from outside through a window ". Enraged at what they considered an attack on their fiscal rights over this church, the dean and chapter of St-Germain-l'Auxerrois marched in with ladders one day during high mass and had a royal sergeant remove the flag " kissing it and shouting ' God grant the King long life ' ", as he took it down. Arraigned before the *prévot* of Paris on charges of breaking the royal guard, they argued that " by the very well-known custom of Paris, ' when someone is placed in the king's guard those whom he fears are notified by word- of mouth and the guard is published in public places ' ", but the royal insignia is not placed on the building. The deans and chapter won their case (though the custom could hardly have been very well known if the Chancery issued the appropriate letters and the *prévot* executed them) (50). It would be interesting to know by what decisions of court or chancery such customs came into being. Whatever they may have been, use had made them custom.

The most potent of all inducements to use this new instrument, however, was the monarchy's introduction of the safeguard into appellate procedure. As a consequence of the guard, the appellant was exempted from the jurisdiction of the court he had appealed from. How this came about cannot yet be described; for it is intimately related to the gradual introduction of appellate procedures in France in the thirteenth century, a subject still shrouded in almost total darkness. Two things are certain, nevertheless: it was a royal invention, contrary to the clear provisions of Roman Law and only distantly related to Canon Law; and it was essentially political in purpose.

Ulpian was categorical: when a person had appealed from a particular judge, he could not refuse to stand trial before that same judge in other cases. If he felt the judge was prejudiced against him, he could always appeal again (51). The medieval

(50) AN L572, no. 4.

(51) *Digest, 49, 12.*

Glossa Ordinaria could find no exceptions to the rule. Canon Law was a bit more lenient. If one is accused of a crime before a judge from whom he has appealed in another case, wrote Ricardus Anglicus, following Alexander III, he could claim the judge was suspect and refuse to appear (52). What Canon Law allowed, the courts of Philip IV and his successors commanded. North and south, when a person appealed, he placed himself in the king's guard, ordered the judge to do nothing to his prejudice, and effectively escaped that judge's jurisdiction until the appeal was heard and decided (53). By 1316 it was customary in some areas to commission special judges to hear other cases involving those who had appealed (54). And even before that, loud complaints were heard of guardians who were acting like judges (55). The justification may have been the same as that given by Pope Alexander: a judge appealed from is a judge suspect. But the political advantage to the monarchy was glaringly apparent. When appeal came from a court in a major fief, it gave an opportunity to dispatch a royal sergeant into this quasi-independent land, to set up the royal banner or rod with *fleurs-de-lys,* to make evident to all — as the very words of procedural instruction declared — that the king indeed was sovereign there as elsewhere: that goods were *in manu sua tanquam superiorem.* Nor can there be any question that the rule was invented with political purpose. For Guillaume du Breuil makes a curious distinction in discussing it.

> If appeal is made from judges in *pays* de *droit ecrit,* whether royal or other, the appellant is exempt from their jurisdiction only in the case on which appeal has been made... (56). This is not true however, when appeal is made from the court of a peer of France or his judge: because, whether in pays de *droit ecrit* or pays *coutumier,* an appellant is always exempt from the jurisdiction of a peer and all his judges in all cases, both as plaintiff and as defendant (57).

Why make this distinction but with the intent to use it as a battering ram against the walls of major seignorial jurisdictions? And batter they did — in Brittany, in Valois and Anjou (58), and especially along the frontier of Aquitaine. From the reign of Philip III, when Edward I was warned not to injure Gaston of Foix, who was under royal guard *ratione appellationis,* through the reign of Philip IV and his sons, to the outbreak of hostilities, complaints about the royal safeguard for appellants played a constant accompaniment to the negotiations of the Plantagenets with their overlords (59).

By the end of the reign of Philip of Valois, protests from high-justicer lords had reached such a pitch that the king was forced to restrict grants of safeguard to " clergy living clerically, orphans, widows and other weak persons " and to the king's immediate subjects. The memory of this ordonnance survived in the Chancery's formulae books into the fifteenth century (60). Appropriate letters of revocation were thus apparently available for those who felt their judicial rights attacked. But crafty lawyers and the Parlement of Paris quickly found the way to make all appellants the king's immediate subjects, neatly bypassing the intent, if not the letter, of the ordonnance (61).

* * *

What general conclusions can we draw from this story? The safeguard, I suggest, first, by its derivation from an ancient

(52) L. WAHRMUND, *Quellen zur Geschichte* des *römisch-kanonischen Prozesses im !Mittelalter,* II, part 3, 88; *Extra.* II, 28, c. 6.

(53) All records of appeal contain the appropriate phrase. For a possible difference between pays de *droit écrit,* and pays *coutumier, see* below, n. 56.

(54) AN J163, no. 78; BN ms. franpais 5512, fo 11.

(55) BN ms. Moreau 643 fo 342 (1313).

(56) DU BREUIL curiously cites Digest 49, 11 as his reason for the procedural distinction, a text that must have been taken to justify placing appellants in the royal guard, He does not mention *Digest 49, 12,* which clearly prohibits such exemptions. I have found no case to either prove or disprove his assertion.

(57) GUILLAUME DU BREUIL, *Stilus* Curie *Parlamenti,* 21, 1 (ed. AUBERT, Paris, 1909, 152).

(58) AN J241, no. 22; J163 no. 78; 5178, no. 63[2]; BN ms. lat. 11016, fo 87r-v; BN ms. franpais 5512 fo 6.

(59) AN JJ45, fo 41v-42 (1309); JJ49 fo 45v (1313); BN ms. lat. 5954 fo 9v: regulation by Louis X of safeguard on appeals from Aquitaine; P. CHAPLAIS, *The War of Saint Sardos* (London, 1954), 44; Y. RENOUARD (ed.), *Gascon Rolls, 1307-1317* (London, 1962), 578, no. 19; see also E. DÉPREZ, *Les préliminaires* de la *Guerre* de *Cent* Ans (Paris, 1902), 9.

(60) I have been unable to find the text of this ordonnance. It was issued prior to 1348, since it is mentioned in the case below (n. 61). It is mentioned in the formulae for revoking safeguards in BN ms. lat. 4641 fo 23r-v (circa 1370) and BN ms. lat. 13868 fo 8v [fifteenth century).

(61) The archbishop of Bourges vs. the consuls of *Casulis,* AN Xla 12, fo 242 (1348).

and essential royal obligation — protection of the Church; second, by its openness to the ideological movements that swept the Middle Ages — the Gregorian Reform and the revival of the Two Laws; and third, by the relative precision with which we can date its major changes, provides a gauge by which we can measure and define the growth of royal government in France.

In the twelfth century, still searching its way between the high demands of the Carolingian tradition and the total absence of a power base beyond the royal domain, the monarchy found itself with no middle ground between persuasion and military force. It could argue or attack. Once it had established agents in the countryside, other possibilities emerged, but almost a century was required for it to invent the ways to exploit them. The techniques the monarchy finally developed were tributaries to learned law. They were not slavish copies, however. Royal lawyers expanded and refined what they had borrowed to suit Capetian political aims. Finally, these techniques were rapidly adopted by the king's subjects, even by those who had reason to oppose: the quotation with which this article began is a striking demonstration.

In 1303 the Count of Foix was deep in litigation with the monarchy, trying to maintain his pretence of quasi-independence on the Pyrenean frontier. Yet, fighting a judgment against himself in a royal court, he appealed and placed himself in the king's guard. This indeed may be the clue to the safeguard's popularity. It could be used with equal ease against royal agents as against anyone else; it was offered by the monarchy as protection against its own men, when such was needed. And so the monarchy lost a little but gained much. It provided a shield from arbitrary demands and gratuitous acts. Yet those who hid behind this shield, by that very act, were forced to recognize that the king was *superior*, that they were appealing to him as sovereign. Refined and politically perfected, these new techniques planted the symbols of monarchy deep in the countryside and, with them, the political doctrines of the schools.

Abbreviations: AN = Archives Nationales, Paris
BN = Bibliothèque Nationale, Paris
AD = Archives départementales
AC = Archives communales

End of Article