

## *The Origin of the Borough*

THE controversy as to the origin of the German towns goes on cheerfully. The matter in debate is many-sided, and the main questions are perplexed with collateral issues. The readers of this REVIEW have before now had occasion to wish that Dr. Keutgen would speak his mind at greater length than was possible in those notices of other men's books which he has contributed to these pages. This he has now done in a short but tightly packed book,<sup>1</sup> wherein he passes judgment on most of the theories that have come to the front within recent years. His work is critical and eclectic, and it assumes in its readers a familiarity with the outlines of the dispute. It is not, therefore, an easy book for beginners and outsiders; but one member of that class can say gratefully that he has found in it many passages that are interesting and helpful. Certainly it is a book which any one who is going to speculate about the origins of our English towns ought to have read. Of its bearing on English history I will venture to say a few words.

Any theory as to the origin of the *Stadt* (in English the borough) must answer at least one question of legal history. There may, indeed, be many questions of economic history to be solved—for example, whether we ought to treat as aboriginal those mercantile and industrial elements which are prominent in the boroughs of the later middle ages. But one question of legal history there undoubtedly is: When, why, how does the town become a jurisdictional unit, a district which has a court in and for itself? No mere accumulation of economic facts will enable us to answer that question. We are in search of a legal principle. It may be highly convenient that a thickly peopled spot should become a jurisdictional unit with its own court. But in the world of law things do not happen merely because they are convenient, and, after all, the world of law is a world of fact.

This, then, is one focus of the controversy. Now, of course it is allowed on all hands that when we speak of 'the' origin of 'the' *Stadt* or 'the' borough we are not thinking of every *Stadt* or every

<sup>1</sup> *Untersuchungen über den Ursprung der deutschen Stadtverfassung.* Von Dr. F. Keutgen. Leipzig: Duncker und Humblot. 1895.

borough. In particular we leave out of account the newer boroughs. When once some boroughs have come into existence, and a legal line has been drawn between *Stadt* and *Dorf*, between borough and rural township, then there can and there will be imitation. This point we need not labour; in England new boroughs have been made in this nineteenth century. Our interest lies in the oldest boroughs and in the days in which there could be no imitation, since there was nothing—at all events no borough—to imitate. In England we may exclude from our consideration more than half of those places which were boroughs when the boroughs first began to send burgesses to the king's parliaments.

This done, we cannot make 'the' borough court grow out of 'the' village court. In later times the village or township very often has a court of its own, a manorial court. In that case the village court may well become a borough court. Its lord grants a charter; he lightens the pressure of seignorial power; he consents to efface himself more or less completely, and to allow the quondam villagers to behave as burgesses are by this time behaving, to take the profits of the court, and so forth. But this almost certainly is not the history of the borough court in those ancient boroughs, the 'county towns,' which are throughout the middle ages our typical English boroughs. Unless our earliest evidence is very deceptive, we may speak of a time when the *burh* had a court, and the village, or *tún*, normally had none. If there are still among us any who would start from village courts as from primitive data, they can, indeed, afford to disregard a great deal of German and French controversy, but I cannot think that in other respects their lot is enviable.

The land becomes honeycombed with 'immunities' and sokens. But another lesson that we are learning from Germany (and Dr. Keutgen makes this prominent) is that the borough court is not the outcome of 'immunity.' As regards Germany this is a principle which must, so it seems, be fought for, because, as I understand, we first catch sight of the *Stadt* as a jurisdictional unit at a time when the jurisdiction over it has passed, or is in the act of passing, from the king or emperor to the bishop of the town, who is already a mighty 'immunist'; hence complications and equivocal documents. I believe that in England this principle could be made good in much simpler fashion. The typical ancient *Stadt* of Germany is a bishop's see, and at a very early time in its history its bishop becomes its lord. In England, on the other hand, very many of the boroughs which have every right to be regarded as ancient and typical never were bishops' sees, and never had over them any lord but the king. The town itself becomes honeycombed with sokens, but from age to age the borough court has only the king above it. It is not the outcome of immunity; there is no im-

munist. It belongs to that order of courts to which the shire moot and the hundred moot belong.

Why should the borough have a court? That there is an intimate connexion between the borough court and the special peace that reigns within the borough is not now to be denied. In England we begin to lose sight of that special peace (which, be it remembered, means specially severe criminal law) at a yet early time. In the twelfth century the whole of our criminal law was rapidly reconstructed on new lines. England was a small country, and its king was strong. Still in Domesday and elsewhere there are a good many relics of the old borough peace waiting for their collector; indeed it may be doubted whether the last of these relics will have disappeared until the enterprising burglar has 'done a burgling.' The English borough, like the German *Stadt*, has been the scene of specially severe laws against violence.

Whence this special peace? Here we come upon the dazzling *Marktrechttheorie*. Any one who has read Sohm's brilliant essay will echo the words in which M. Pirenne (*Revue Historique*, liii. 78) has recently described its impetuous force. *On est subjugué, bon gré mal gré*. We abandon with regret this beautiful dogma; still in the end we abandon it. Objections to it have been collecting in many quarters; they are well stated by M. Pirenne and by Dr. Keutgen; several of them seem to me unanswerable, and in particular I cannot believe that in England the market ever was the legal essence of the borough. Of course it was not this in the later middle ages. The mere 'market town' is one of the things that we contrast with the borough. For all legal purposes it is a village; it has only the constitution of a village, but once or twice a week a market is held in it. Then, again, the borough as such has no-market; the right to have a market is a separate 'franchise,' which ought to have a charter behind it. Lastly, the market jurisdiction is distinct in kind from the jurisdiction of the borough court. To all this we may add the difficulty, on which many have commented, of making the essentially temporary market peace grow into the eternal peace of the borough.

It is here, so I think, that Dr. Keutgen has performed his greatest service. He has insisted that, whatever else the German *Stadt* may be, it is a burg. He very truly remarks that in English this truth becomes a truism. Our English equivalent for *Stadt* is 'borough,' or, to put it another way, those thickly peopled spots which have a special peace, a special law, an urban constitution, those thickly peopled spots which are not mere villages or townships, are boroughs. That is their legal name; in the middle ages it is also their common, their only name, for every village is a 'town.' Is it not, then, rather with a *Burgfriede* than with a *Marktfriede* that we have to start?

I think it must be allowed that here in England in the days of

the Germanic invasions, and for some time afterwards, the word *burh* meant simply stronghold, and carried with it no hint of thick population, or, it may be, of any population at all. The map of England seems to tell us this. The hilltop that has been fortified is a *bury*. Very often it will give its name to the neighbouring village. But we have a large number of places whose names end in *bury*, *borough*, *burgh* which are not to all appearance connected with ancient camps, and have never been, so far as we can tell, peculiarly populous villages. There are, I believe, some two hundred and fifty villages (to say nothing of hamlets) which thus by their names aspire to be boroughs. In Essex, again, it is common to find some house or group of houses bearing the name of the village in whose territory it is situated with the word 'bury' by way of distinctive addition. Thus in Harlow there will be Harlowbury, in Netteswell there will be Netteswellbury, and so forth. On the other hand, it is not a little remarkable that in the first flight of those places which became legal 'boroughs' hardly more than three—namely, Canterbury, Salisbury, and Shrewsbury—assert their right to be boroughs in their very names. This, by the way, is but a poor tale to set off against Augsburg, Regensburg, Strassburg, Magdeburg, Hamburg, &c. So our map seems to tell us that the legal differentiation of borough from village, though indubitably ancient, is by no means primeval.

There seems, however, to have come a time here in England when *burh* acquired a new sense, or rather underwent a specification. We may reasonably ask whether this process was not closely connected with that striking phenomenon, the extremely artificial character of a great deal of our old English political geography. Let us look at the boroughs and counties of Middle England as they appear at the date of the Norman Conquest. One might think that godless French republicans had been here already, so mechanical, so rationalistic, so utilitarian is the allotment. Each shire has its borough, in general its one and only borough, just in its centre, or, in other words, each borough has its shire arranged neatly around it; the borough gives its name to the shire; the borough is the *chef-lieu* of an *arrondissement*. Have we not here the outcome of a deliberate military policy? Is not each district to have its stronghold, its place of refuge? What is all this *burh-bót* of which we hear, this duty from which no landholder is to be exempt? Is it not the duty of the men of the shire to maintain the fortifications (primitive enough) of the borough, the one borough, of the shire?

Another striking sight meets our eye in the boroughs of Domesday Book. The *barones comitatus* have, and their predecessors, the great folk, hallowed and lay, of the old English shire, have had, houses and burgesses in the county town. These town houses, these burgesses, are often reckoned as belonging 'for rating pur-

poses' to rural manors of their lords which lie many miles away from the borough. What did the Anglo-Saxon thegn want with a town house? He was not going to spend 'the season' there in order that he might take his wife and daughters to the county balls. Then, again, your ceorl who was 'thriving to thegn right' was expected to have a *burh-geat-setl*, and what is this but a house in the gate of the *burh*? Is it not a duty of *burgward* which obliges the thegns of the shire to have houses and dependents in the *burh* of the shire?

If such a train of thought as this has occurred to us, much of what Dr. Keutgen has written about the deliberate and systematic foundation of burgs in Saxony will seem to us suggestive and luminous. To me it seems that we enter on a new and a very hopeful line of speculation when we shift our attention from markets and handicraft and commerce to the military character of the ancient *burh*. For one thing, we are thus enabled to obtain our special peace, and our specially royal peace, on cheaper terms than those that are offered by the *Marktrechttheorie*. The fictitious royal presence we can obtain, and the royal court which is a public court, co-ordinate with the hundred moot. We have all read how the sphere of the king's peace is measured outwards from his *burh-geat*. We know how in later days any spot at which the peripatetic king may be is the centre from which the jurisdiction of a special tribunal, the court of the king's own household, radiates outwards. Whatever be the oldest application of the word *burh*, the *burh* which becomes the legal borough (in general a 'county town') is a very royal place. It has been created, or at all events is being maintained, as a matter of national importance; it is maintained 'at the expense of the nation' by the duty of *burh-bót*. This, so it seems to me, is what in later days prevents the borough from being engulfed in the system of land-ownership and manorial jurisdiction.

Let me endeavour to explain myself. The king is the lord of the borough. But the borough of which the king is lord is not a tract of soil. I am speaking of the great ancient typical boroughs. In later days there may often, in the earlier days there may sometimes, be boroughs of which the king is lord in every sense; he is the landlord of each burgess; each burgess holds his tenement immediately of the king. So also in later days we may find boroughs of which some other person is the lord. But in the ancient boroughs, the county towns, this was not the normal state of affairs at the date of the Domesday survey or at any later time. Of course when the feudal theory had been pressed home the king appeared as the lord, the ultimate lord, of every inch of soil in the borough. But he was this only in the sense in which he was the lord of every inch of soil in his realm. The important point is that many

of the burgesses in a royal borough were not the king's immediate tenants; they did not pay their rents to him. The burgesses were a tenurially heterogeneous group. Some of them were reckoned to belong to divers distant rural manors of the *barones comitatus*. In later days the thread of tenure which connects a given burgess with the king will often run through the lord of a great honour. So the borough court is not founded on a tenurial or feudal principle; the burgesses are not peers of one tenure; but the borough court is a link between them, and above that court stands the king, who takes its profits. Thus in the king's hand 'the borough' becomes a 'thing incorporeal,' like a hundred or a county, and the king can let it to farm. Ultimately the burgesses will become its farmers. Jurisdictional unity coupled with tenurial or proprietary heterogeneity is what we have to account for in our ancient boroughs. The structure of the borough is not very like the structure of a manor; it is far more like the structure of a hundred. The court that gives it its unity, and in course of time becomes the centre and organ of burghal liberty, seems from the first to be a national court. I believe that, for England at all events, Dr. Keutgen is pointing in the right direction when he suggests that the *Burgfriede*, or special royal peace conferred upon fortified places which are military units, units in a system of national defence, is the original principle which serves to mark off the borough from the village.

The prominence given to the burg and its peace is, if I am not mistaken, the newest and most distinctive feature of Dr. Keutgen's work. About other matters he is, as already said, critical and eclectic. As regards the economic history of the towns, so many different theories are before the world that probably the time for a wise eclecticism has come. One writer will attribute a larger, another a smaller place to the mercantile element, or again to the element of voluntary association which produces gilds; but then it is by no means unlikely that this difference of opinion represents a real difference between the history of different towns. I think, however, that Dr. Keutgen must be right when he insists that, if once we can account for the borough court, we may for the rest think of the borough community as being essentially similar to the other communities of the land. There is a great deal of English evidence which tends to show that the borough community was regarded as being at bottom one and the same thing as a village community. The borough is a privileged township; but none the less, or rather all the more, it is a township. In the thirteenth century we are quite right in speaking of the community of London as a *villata*, and this is sometimes done in official documents; but the community of Little Peddington also is a *villata*. At a time when most villages have courts, manorial courts, there is the utmost difficulty in drawing a well-principled line between the

humbler boroughs and the mere townships; the sheriffs can draw an unprincipled line pretty much where they please. And then gradually the word 'town,' which has belonged to every village in the kingdom, is exclusively appropriated by those larger 'towns,' many or most of which are boroughs. All this would surely have been otherwise if men had felt that there was some radical difference between the *Dorfgemeinde* and the *Stadtgemeinde*. As the borough grows in size and power, the borough community becomes much more complex than the village community. For many purposes the borough likens itself to a hundred, and for those purposes the various 'wards' or parishes within the borough begin to look like the townships which make up the hundred. Many problems remain to be solved. To me it seems that, whatever may be the case of the *Rat* in Germany, the borough council of our English towns grows out of the borough court. When first we meet with a select group of twelve burgesses which is beginning to be a council for the borough, its primary duty still is that of declaring the judgments or 'deeming the dooms' of the borough. To account for the formation of this group of doomsmen is by no means easy; still we may doubt whether even here we have a phenomenon that is only to be found within borough walls. It is not unknown that a rural hundred will have just twelve doomsmen, and that the duty of providing them will be allotted among the great landowners of the hundred in a manner that looks extremely artificial. On the whole, the structural peculiarities which distinguish the borough community seem to disappear somewhat rapidly if we endeavour to pursue them behind the age of borough charters; *die Stadtgemeinde ist der Landgemeinde gleichartig*. The notion of a township which is also a hundred *vel quasi* is a good, though perhaps not an all-sufficient, clue.

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