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THE ORIGIN OF THE COMMON LAW

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The leap forward which was taken in the development of the law and of the judicial system in England from the reign of Henry I to the end of Henry II's is to us surprising in every respect and in some almost incredible. From the death of Henry I to the writing of the book which we call Glanvill was almost exactly half a century. Of what was going on in the way of judicial change in the second half of this period, from 1160 to 1185, we have many and instructive glimpses. Of the first half, the period of Stephen's reign and of Henry's bringing England into order, we know practically nothing and yet the impression that we get is strong that the growth which begins to be evident soon after 1160 starts considerably in advance of the point which had been reached in 1135.

The stage of development in law and judicial institutions reached by the changes under Henry II is made abundantly clear to us in the remarkable and enlightening book of Glanvill. There is nothing which sums up in the same way the progress under Henry I. To find out what was done in his time we are shut up to a study of the rather scanty remainder of material from his reign, and to understand the relation of the facts this material gives us to the general evolution of which it probably is a part, we must study it in the light of the results attained in the last half of the century. Does it show that whatever movement we can detect was going on in a direction naturally leading to the results which occurred? To answer this question we have first a body of legal literature exceptional in amount for so early a date; second, a body of institutional material in writs and charters, smaller than we could desire, but greatly increased over the preceding period; and third, a single financial document from the end of the

reign, the pipe roll of 1130, especially valuable from the close connection existing then between judicial and financial administration.

In beginning our study it is necessary first of all to recall the fact, indicated by a study of the earlier period, that the changes in the judicial system which form the great constitutional advance of Henry II's reign were the natural and gradual culmination of a series of changes which began with the Norman Conquest. As has been before shown, the first instance of the use of the new judicial processes out of which Henry's reforms grew falls within half a dozen years of the battle of Hastings.¹ From 1072 on they never dropped out of use and, although we can trace them only at intervals, it is already to be seen in the evidence which we do have that their use was increasing and that they were growing more and more into a judicial system. Indefinite they certainly were and unfixed as yet, but still a complete judicial system was taking shape over against the older system of the popular courts as an alternative which might be used in many cases. A study of the writs of Henry I's reign, of which there is a great number, not as yet critically edited or dated, but brought together in Bigelow's *Placita Anglo-Normannica* of 1881, with many later additions now possible,² will show clearly both that they are a natural outgrowth of what was begun by William I and also that the development was already under way which was to result in the advance made by Henry II. If further we consider the development which goes on in Normandy under the father of Henry II,³ as we must, as an epoch in the growth of English institutions, then it becomes manifest how natural is the continuation of that growth under Henry II, and how broad a foundation had been laid in the past for his work.

Looking forward instead of backward, we are compelled to say that there is scarcely to be found in history a group of changes which make so little innovation upon what had gone before, and yet were followed by so wide reaching and profound results. This is true whether we consider them as individual institutions or in their united constitutional effects. Not merely do our judicial institutions and processes, writ and jury, the judge and his relation to the trial, the system of courts, and equity and the common law, come directly from these changes, but it was as a reaction against the strict centralization which they produced in the constitution, the transformation of the practical absolutism of the Normans into a constitutional absolutism, when that

¹ See Adams, *The Local King's Court in the Reign of William I* (1914) 23 YALE LAW JOURNAL, 490, 497.

² These may be noted from William Farrer's *An Outline Itinerary of King Henry the First* (1919) 34 ENG. HIST. REV. 303-382, 505-579; also published separately. This itinerary serves admirably as a general index to the documentary material of Henry's reign, with more careful dating than before, but hardly takes the place of critical *regesta*.

³ See Haskins, *Norman Institutions* (1918) 123-155.

came to be expressed in the sort of depotism to which the character of John gave rise, that the Great Charter was demanded and the foundation of free constitutional government was laid down.⁴

When we study these changes as they occurred under Henry II, we are studying law, but we understand only half their significance if we regard merely their judicial and legal results. I imagine it is possible to have our free constitution without our judicial system or our common law, but without the incidental results of the processes by which they were brought into existence under Henry II and extended in principle to administration under Richard I, it is doubtful if we should have had, it is difficult at least to see how we could have had, our present constitutional government as it was historically formed. Whether so much as this is true or not, it is at least true that, though we are studying in Henry's time judicial and legal institutions, we are really studying the history of our constitution in one of the most important periods of its growth.

The expansion of earlier practices in the reign of Henry to which we may attribute these results concerns not so much the actual content of the law, regulating conduct and business, substantive law, as it does the administration and enforcement of the law through the judicial system and processes. They were primarily and in their character institutional rather than legal changes and were accomplished through new regulations in regard to the writs, the jury and the system of courts. Combined together and regarding strictly the institutional and not the constitutional results, they gave rise to the English common law, which also took up into itself a body of pre-existing substantive law which had not been affected by these changes. Regarded from this point of view, as giving rise to the common law, these institutional changes established three things which may be stated in this way: first, new courts of more extensive and summary powers; second a new method of getting the defendant or the accused before the court;

⁴It must be understood that to deny a reactionary character to ch. 39 of Magna Carta, as is now often done, is not to deny the reactionary character of the whole movement of which Magna Carta is a result. The enduring centralizing effects of the Carolingian constitution, from which these institutions came, and especially of the *missi*, the Anglo-Norman itinerant justices, are admirably described by Brunner: "Schärfer als jede andere Einrichtung kennzeichnet das missatische Institut den Geist der karolingischen Verfassung. Als des Königs unmittelbare Stellvertreter brachten die *Missi* in Staat und Kirche die Reformgedanken des Königtums zur Geltung und machten sie eine Centralisation der Verwaltung möglich, wie sie kein germanischer Staat des Mittelalters aufzuweisen hat, mit Ausnahme der normannischen Staatsbildung, die auf fränkischer Grundlage erwachsen. Die lange daurende Nachwirkung, welche die fränkische Rechtsentwicklung nach Auflösung der Monarchie in den daraus hervorgegangenen Reichen hinterliess, beruht zum guten Teile auf dem tiefgreifenden Einflusse, den der fränkische König durch seine *Missi* auf die Provinzialverwaltung ausübte." 2 *Deutsche Rechtsgeschichte* (1892) 195.

and third, a new method of proof. In other words these are again: the itinerant justice and common pleas courts, the writs, and the jury in their later forms, including the assizes, and these were only extended applications of the courts of the king's commissioner or *missus*, the writs, the jury and the recognitions of William I's time.⁵

Plainly these changes concerned procedure and, putting them together, it can readily be seen that they furnished a nearly complete substitute for the old judicial system in which procedure was as strongly emphasized as in the new. But it is equally clear that they furnished no substitute for the old substantive law and scarcely any addition to it. At the end of the reign of Henry II it was possible to try a case to judgment and execution with hardly any use of the old procedure;⁶ but it was not possible to try it without constant recourse to the old substantive law as defining and determining rights and obligations. Upon such subjects as the holding, transfer, renting and inheritance of land, the property, inheritance and dower rights of women, debts, contracts and distraint, personal status, the obligations of the warrantor, the right of advowson, and many such topics of substantive law, the new law had nothing to say. It might be true that there was here and there during the period some modification of the law of these things, made generally by special enactment,⁷ but such modifications were by the way, of minor importance, and they were not necessary parts of the new whole. That provided new courts and new remedies but not new definitions of right.⁸

It is clear then that the new common law considered as a whole comes from two different sources; its substantive law from one source and its adjective law from another. Its adjective law as made a part of

⁵ See *supra* note 1.

⁶ It should be said by way of qualification that the old method of making judgment by the decision of the body of suitors who formed the court had not changed. See Adams, *Procedure in the Feudal Curia Regis* (1913) 13 COL. L. REV. 277, 293. In BRACTON'S NOTE BOOK (1887) pl. 67, of the year 1219, in the case before the itinerant justices it is plainly the county which makes the judgment. The justices are fined, not because they made the judgment, but because they did not instruct the county that the evidence was insufficient and the verdict of the jury incomplete. The division of functions is clear. The justices declare the law; the assembly makes the judgment. The Carolingian *missus* asks the assembly or the *scabini* to form the judgment. Brunner, *Forschungen* (1894) 242; see *infra* note 14.

⁷ See some of the instances enumerated *infra* note 29.

⁸ It is desirable to hold in mind the fact that for a long time the new system was only an alternative one. No one was in any way obliged to make use of it who did not wish to do so. Adams, *The Origin of the English Constitution* (1920) 146. The old courts and the old processes still remained open and were indeed in constant use during most of the thirteenth century and in occasional use still later. In the king's council, great and small, the head and summit of the popular courts, the new procedure did not establish itself, and their representatives to-day, the House of Lords and the Privy Council, in important particulars still use the old.

the national judicial system was new; its substantive law as defining rights and obligations was old, that is, it was old as compared with the new judicial system which could now be used to enforce it. It belonged in the time of the old judicial system of the popular courts which was now beginning to be pushed out of use. But it was not itself pushed out of use with the old system to which it originally belonged. Taken up by the new system, it formed nearly the whole of the body of substantive law which was enforced by the courts, at least until the first great legislative age of English history, which was opened by the statute of Marlborough in 1267.

By general consent Glanvill's *Tractatus de Legibus et Consuetudinibus Angliæ*, written probably between 1185 and 1190, is regarded as the first in the series of great books on the English common law. There was, however, an earlier period which may be considered roughly the first quarter of the twelfth century when there was a remarkable activity in writing books about English law. In that time or only slightly outside its limits, seven books were composed, or collections put together, purporting to give contemporary law. They were, as now entitled: *Hic intimatur*; *Leis Willelme*; *Quadripartitus*; *Leges Henrici*; *Instituta Cnuti*; *Consiliatio Cnuti*; and *Leges Edwardi Confessoris*.⁹

The general presumption which these books create is that they were designed to give the contemporary law actually in force; or that it was thought they would be useful books for those who for any reason needed to know what the law was by which the courts of the time were guided. In one of them, the *Leges Henrici*, this intention is so plainly implied as to be more than a presumption.¹⁰ When we come to examine them in detail, however, we find that without exception what they record is either Anglo-Saxon law or law purporting to be made or accepted by William I. At the date when they were written, especially at the date when the longest and most instructive of them, the *Leges Henrici* and the *Leges Edwardi Confessoris*, were written, there had been a very considerable development of the new prerogative justice. The writ as a judicial process was in frequent use and was beginning to show signs of growth upon its formal side;¹¹ inquisition by a jury to establish facts in litigation was not uncommon; iters by royal justices to hold the new courts in the counties were probably not yet made the regular rule but they were common enough to show that such a step was near;¹² and royal commissioners to hold local

⁹ I Liebermann, *Gesetze der Angelsachsen* (1903) 486-619, 627-671.

¹⁰ Cf. *Leges Henrici*, c. 8, 7; I Liebermann, *op. cit.* 554, and Liebermann, *Ueber Leges Henrici* (1901) 44, notes 5-9.

¹¹ See *infra*, note 21.

¹² Bishop Stubbs's argument, *Lectures on Early English History* (1906) 154, 155, based upon *Leges Henrici*, 10, 4 and 19, 1 (I Liebermann, *Gesetze der Angelsachsen*, 556, 559) for the activities of the itinerant justices under Henry I,

king's courts were frequently appointed.¹³ The new justice was far from being a fixed part of the constitutional system, far from being a substitute for the older judicial organization, but it seems to us as if it were already so prevalent on every side of legal administration that it could not escape the notice and remark of any contemporary interested in practical legal matters, especially not of a king's justice. When we add that all the writers of Henry I's time show themselves to be more interested in adjective than in substantive law, the fact that in them all there is scarcely a reference to the new prerogative justice in any of its particulars becomes significant.¹⁴

It becomes exceedingly significant when we consider the case of the *Leges Henrici*. If there is among these writers any one who could contest with Glanvill the honor of opening the series of great writers on the English common law, it is the author of the *Leges Henrici*. His

must be given up, since these clauses are dealing not with jurisdiction but with revenue. 3 Liebermann, *Gesetze der Angelsachsen*, 318. They do not mean that the king's pleas shall not be heard by the sheriffs *ex officio*, but that the proceeds of these pleas are not to be reckoned in the sheriff's farm unless there has been a special agreement that they shall be. The king's pleas were at this time unquestionably heard by the sheriffs *ex officio*. They go back, though not the whole list of them, into a time when there were no itinerant justices and no royal commissioners hearing pleas of any kind and they would naturally pass with other functions of the sheriff into the Norman period. For the approach to regularity of the iters of the justices, compare the entries concerning them in the pipe roll of 1130 with similar entries in the pipe rolls of Henry II, 1160 to 1170.

¹³ See an interesting chronicle account of one of these courts, of the last part of the reign of Stephen, strikingly like those of the time of William I (*supra* note 1), published by Miss Helen M. Cam in (1924) 39 *ENG. HIST. REV.* 568-571.

¹⁴ There are unconnected references in the *Leges Henrici* to single features of the new procedure. Summons by writ is barely mentioned, 41, 6. The justice summons to his county court and whoever so summoned does not attend is guilty of contempt of the king, 53, 1; *cf.* 42, 2; 52, 1. The king's justice is referred to often, sometimes the specially appointed, probably itinerant, justice, 66, 9, more often doubtless the sheriff commissioned as justice, but only two passages are of real significance. In 31, 2 we are told that when opinion is divided among those who make the judgment (*judices*, the assembly or the committee standing for the assembly, 29, 1b) "the opinion of the better shall prevail, that which seems more satisfactory to the justice," clearly even if it is that of minority—a very welcome indication of the function of the royal justice before he acquires the power of making the judgment. Certainly in case the opinion is that of a minority, it must be the decision of the justice that a judgment has been reached. In a certain case of doubtful evidence, a jury is to be chosen from the better men, chosen probably by a king's justice, since the jury is still a royal process only, and apparently by virtue of his general commission without a special writ, 42, 2a. This is the only reference to the jury in the book. The reference to the use of juries by William I to compile the old laws of England in the unhistorical introduction to the *Leges Edwardi Confessoris* is evidence that the writer was familiar with such a use to which the jury might be put, but is hardly evidence of that use of the jury in judicial procedure in which we are here interested.

book with all its limitations is a most interesting one. It is of about the same length as Glanvill; it fits into the same general framework of things; it deals with many of the same topics; it has, like that book, much feudal law and much non-feudal mingled together; it is by a justice of the curia regis and emphasizes the superiority of the king's law; it deals at length with the boundary line between private jurisdiction and the royal jurisdiction; and it occupies in regard to all these topics much the same point of view as Glanvill. The book also clearly reveals the high ambitions of its author. He had read some books of canon law and had been interested in the discussion he found in them of the ultimate principles of jurisprudence. He had reflected upon the English law which he had administered as a king's justice.¹⁵ He had a dim conception of the philosophy of law, and the ideal which he held up before himself was a scientific treatise on the English law in which he should show its relation to the fundamental principles of jurisprudence and as a practical matter should classify its actions. He hoped to accomplish something like what Bracton attempted nearly a century and a half later under happier auspices. But the task was too great for him and the fault was not entirely his. The undeveloped and transitional character of the law of his day, the lack of unity in it as a whole, the contradictions in it as he found it even in details, though he may not have been quite conscious of these defects, affected the training to be derived from its study and inevitably limited the possibilities of the mind which derived its material from reflection upon it. It was too difficult a task to bring into scientific order a body of law which was an inharmonious mixture of two or three different legal systems and, as it was written down at least, of more than one stage in the development of the same system.¹⁶

When we compare these books with Glanvill's *Treatise* these characteristics of the best of the writings of Henry I's time stand out still more clearly. Two inferences are especially important for our present purpose. One is that in the earlier period the new prerogative justice had not yet reached a point where it gave any indication of what its future was to be or even impressed itself as a matter of interest

¹⁵ Liebermann, *Ueber Leges Henrici*, *supra*, 44-45.

¹⁶ The payments in kind for various ranks under the name of "relief," specifically provided for in *Leges Henrici* c. 14, belong to a stage in the development of feudalism far in the past of the Norman feudalism of the writer's own time, which he faithfully depicts elsewhere. William II's writ for the collection of relief in the bishopric of Worcester, of 1095 (Round, *Feudal England* (1895) 308-311, *cf.* Hubert Hall, *Eng. Hist. Doc.* (1908) (269, note 1) shows the practice of money payments well established. This writ was printed by Bigelow, *op. cit. supra*, xliii, with comment on it in relation to the relief and to Flambard's system. The payment of relief in horses and arms, as recorded in the *Leges Henrici* and Cnut, from whom the passage is mainly borrowed, is quite consistent with a feudalism which had developed out of the comitatus side only of feudal origins, but not with Norman feudalism.

upon students of the law who were engaged in its practical enforcement and deeply interested in procedure. The men most likely to understand what these innovations would mean and to describe them in the books they were writing gave no indication that they were conscious of their existence. The other inference is that in the half century or a little more before the writing of Glanvill's book the advance in the development of these institutions must have been exceedingly rapid. The new justice was as entirely the only justice for Glanvill as the old was for the author of the *Leges Henrici* or of the *Leges Edwardi Confessoris*. Further, the law which Glanvill writes is no longer an inharmonious mixture thrown together unblended, from different sources and different stages of the history of the same source. Glanvill's law, while it can be analyzed to show clearly enough the different sources from which it comes, impresses us as we read it as a wholly consistent and homogeneous body of law grown into one organic whole as if from the hand of a single legislator.¹⁷ These two things have happened in the half century: the new justice has become the ruling judicial system of the kingdom and the law which it enforces has been fused into a whole, unified and self-consistent.

When we come to raise the question whether we can determine exactly how these two results were accomplished in that half century before Glanvill, that book is again our guide to the answer. First as a matter of historical explanation it cannot be too strongly emphasized that the book, if it was written by Glanvill, reveals clearly the fact that a king's justice, a chief justiciar of the kingdom even, in the last quarter of the twelfth century was mainly interested in procedure. The book is first and foremost a book of procedure. Whoever wrote it, the essential fact is the same, for beyond doubt it was written, if not by Glanvill himself, at least with his sanction and probably with his guidance and advice. The inference from these facts is, I think, not to be questioned. Procedure was the one chief interest, and it attracted chief interest to itself because it was the impelling and formative influence which had made the book possible. The book which records the result of the great transformation of the preceding generation in the supremacy of the new justice shows unmistakably that the transformation which had been wrought was a transformation of procedure. The

¹⁷ The book was from the hand of a writer to whom the law was not a mass of detached fragments still bearing the marks of their distinct origins, nor framed of separate pieces still showing joints however cunningly carpentered together, as it was in general to the writer of the *Leges Henrici*, but from one who has come to feel the law as a consistent unity with no consciousness of the sources from which it has come. It is interesting to note that in this characteristic of organic combination into a unified whole the first part of the Norman *Très Ancien Coutumier* (Tardif, *Coutumiers de Normandie* [1903]) which is a little later in date than Glanvill, and the Lombard *Libri Feudorum* (Lehmann, *Das Langobardische Lehnrecht* [1896]) of the next century plainly reveal the patching together of material of various origins not yet merged into a common unity.

new justice was new on its procedural side. Almost the whole of its substantive law was old.

If now we analyze Glanvill in search of an especially impelling and creative element of procedure, it becomes instantly apparent that what claims the writer's first and constant interest is the writ. The book is primarily a book of writs. The active agent in it is the writ. Whatever departure from the old system of justice is to be made, whatever innovation is to be introduced, or has been in the past, whatever thing of any kind is to be done, the writ is the instrument by which it is accomplished.¹⁸ Further Glanvill implies that this process of change by which the system he describes has been built up may go on indefinitely by means of new writs which are easy of formation.¹⁹ Glanvill leaves no doubt that it was the writ which was the compelling force by which the new justice was made the ruling judicial system at the end of the twelfth century. How that was done, it is not necessary to show here by the history of specific writs like the writ of right or the writ *praecipe*. Their operation in extending the jurisdiction of the prerogative courts is well enough known.²⁰ What I wish to do rather is to emphasize the fact that in transforming the judicial system of the kingdom from the Saxon system of nationally unorganized popular courts into the closely organized and even centralized system of later times the active agent which was used to bring the change about was the writ.

Originally the writ was any written command of the king addressed to any one, official or non-official, directing him to do any kind of thing. There is no evidence that at first fixed forms were used in the composition of the writ. Each new one was written to fit the occasion, seemingly as if no one had ever been drawn up before.²¹ No classification of

¹⁸ See 1 Pollock and Maitland, *History of English Law* (1895) 130; Adams, *Origin of the English Constitution* (1920) 111, and note 4.

¹⁹ Glanvill, II, 13; XII, 3; XIII, 34.

²⁰ I have endeavored in *The Origin of the English Constitution*, *supra*, to make the operation and effect of these writs clear to one who reads without technical knowledge.

²¹ Reference here is not to the diplomatic forms which distinguish the writ from the charter. These are fairly well fixed in the time of William I, though there is in them also no fixity of language. The command which follows the greeting is given in a considerable variety of words, and *precipio* has as yet gained no lead over *volo* and *mando*. The reference is to the formulae which later denote the purpose of the writ like those of the writ of right or of novel disseisin. The formula so frequent in later writs of right, "ne amplius clamorem audiam pro defectu justicie," occurs in briefer form in one writ of William I's (Davis, *Regesta Regum Anglo-Normannorum* (1913) App'x, no. XXIX). In this occurrence it is probably a Frankish reminiscence and is hardly used like a formula with a specific intention. See an example of a writ of right of Stephen's in informal, almost conversation, shape. 2 GLOUCESTER CARTULARY (1865) 96-97. See Maitland, *Forms of Action* (1909) 315.

A good instance of the development of the writ, indicating and no doubt fol-

the early writs is possible. If we say that a given writ of William I's is the ancestor of a class of later writs, we do so because the business it initiates belongs to that class of writs, not because the formula peculiar to the class is used. Though in the phrases used some later formulae are foreshadowed, yet they were not used as formulae at that time. There had not yet been experience enough in their use to suggest that the writ should be made more specific in form and that permanence of form would be a convenience. In the next reign phrases begin to be repeated in the way of formulae, but it is the reign of Henry I that is the period of real progress in fixing the form of writs and so of preparing the way for an arrangement into classes.

The development of writ forms and writ classification is slow, but from the very beginning the compelling and directing force which is behind the writ is evident. It is the royal authority, the king's absolute power. The writ is the one formal instrument which, in advance of the formation of the constitutional absolutism which was to result from its use, was employed by the king as the instrument of his authority. It was a serious matter to disobey the king's formal mandate. "Contemptus brevium" was a king's plea, added to the Saxon pleas, after the analogy of the "dispectus litterarum regis" of the Frankish law and putting the offender "in misericordia regis."²² In the writ *praecipe*, which was the weapon of the most formidable attack of the twelfth century upon the independence of the baronial jurisdiction, the legal justification for setting the baron's court aside was found in the obligation of every man to obey the king's command. If the defendant does not do justice as directed, the sheriff is com-

lowing an increasing clearness of purpose, is that of the writ of novel disseisin. Compare (1) LXVI and LXVII of Davis's *Regesta*, App'x, (Round in (1914) 29 ENG. HIST. REV. 349), which show, so far as language goes, prerogative reseisin after recent disseisin with no provision for a trial (See Davis, App'x, LXIII and I *Cartularium de Rameseia* (1884) no. 157). (2) A writ of Henry I, 1 GLOUCESTER CARTULARY, no. 202 (Bigelow, *op. cit. supra*, 128), which shows a distinct advance in form and does provide for a trial. (3) A writ of Stephen's printed by Round, *Commune of London* (1899) 114, note 3, less satisfactory in form but providing for a trial, and another, *ibid.* 114, less advanced. (4) Two Abingdon writs of early Henry II, 2 ABINGDON CHRONICLE (1858) 222, 223 (Bigelow, *op. cit.* 169, 170) which show some advance especially in clearness. Bigelow says, at 173, that this is the "first appearance of the perfect, or nearly perfect, writ of novel disseisin."

To compare with these writs is an interesting judgment of a baronial court in France of about 1132, Langlois, *Textes Relatifs a l'Histoire du Parlement* (1888) no. VII, p. 13, pronouncing a restoration of seisin, leaving the question of *ius* to be settled by a later action, which seems also to be the implication in some of the writs cited above. Of equal interest is a writ of Geoffrey de Mandeville of Stephen's time directing in plain terms a recognition to be made of an alleged disseisin. 3 Howlett, *Chronicles of Stephen, Henry II and Richard I* (1886), xxxvii, and see Howlett's text. This writ is also in Bigelow, *op. cit.*, 160, and I Madox, *Exchequer* (1769) 108, note k.

²² Brunner, *Schwurgerichte* (1872) 77.

manded to summon him to come before the king or his justices "ostensurus quare non fecerit," to explain his disobedience. If it is well known that he will not do the act of justice called for in the first part of the writ and that, when he appears before the king's justices, he will not in form explain his disobedience but answer in regular pleadings in a civil suit, these things do not obscure the legal right upon which the king's action rests. The writ, the instrument from the beginning of the king's absolute prerogative, was the active agent by which the whole structure of prerogative justice was built up into a national system of justice, taking the place of the old system of the Saxon popular courts.

But if the writ was agent and process, it had very substantial materials with which to work in building up a new judicial system. The court of the king's commissioner held in any locality of the kingdom was a *curia regis*, that is, it was not subject to the defects and limitations of the popular county court. The court which met the commissioner was the old ideal county court; all exemptions and liberties which cut into the assembly of the sheriff's ordinary court were suspended.²³ The law which the court applied and enforced, while it was the old local law,²⁴ was that local law supplemented and possibly overruled in some particulars by the superior and uniform king's law. When the presiding justice was a commissioner specially sent for the purpose, like the itinerant justice, he stood distinctly, sometimes in early writs by explicit declaration in his commission, in the place of the king and enjoyed extensive powers in issuing summary processes and in guidance concerning the law.²⁵ In the jury was provided a method of proof by getting at the knowledge of the locality about the exact facts at issue in place of the older methods of compurgation, which at best merely got the opinion of the community concerning the credibility of the parties, or of the ordeal as an appeal to heaven in which even in the twelfth century men were beginning to lose faith.

²³ Very likely it was considered that as the new courts and processes were not an outgrowth of the older judicial system but came from a wholly different origin, arising from an exercise of the king's prerogative, nothing in an earlier grant of liberty released from them. The suspension of the liberty was no violation of the grant. The suspension is indicated in Henry I's writ regarding the local courts, Stubbs, *Select Charters* (1913) 122; in *Leges Henrici*, cc. 7, 2; 29; 31, 3; and in *Assize of Clarendon*, cc. 5, 8; 9; 11; cf. *Très Ancien Coutumier*, c. XLIV. Quite naturally in an age of special privileges the principle was not maintained. New exemptions began at once to be granted which did relieve from attendance on the new courts and from service on assizes and juries, and continued to be freely granted during the century which followed Henry II. See the *Petition of the Barons*, 1258, c. 28, for the effect of these exemptions on the business of the county court. Stubbs, *op. cit.* 378.

²⁴ Glanvill, XII, 23.

²⁵ See the powers assumed by the justice in the case of *Bishop Gundulf against Picot*, Adams, *op. cit. supra* note 1, at p. 505, note 38, and on the duty of the justice to instruct the court in the law, see *supra* note 6.

The jury accounts for what popular support there was for the new justice and explains the current which began to set out of the old courts into the new, for in that more primitive period the man who was confident that he had a good case was anxious to get a jury trial if he could. So it is to be remembered that the new judicial system was not built up by the prerogative power alone, but that power reinforced by a better law, a better court, more summary processes, and a superior method of proof.

But the importance of these facts in themselves and as historical explanation should not lead us to forget that procedure is after all only the practical method by which the law is applied and enforced. It is not the real substance of the law. It is not substantive law. The new procedure was the one great interest of the time, but the growth of the new procedure into a national system made possible another transformation in the end of even deeper significance, the bringing of Saxon and Norman substantive law together into a unified national law, as they appear in Glanvill. To understand how this was brought about we turn again to the adjective side of law. It was in the prerogative courts that this process of unification was accomplished.

For the ordinary sheriff's county court the normal law was the Saxon. According to that law would be determined all cases naturally falling in that court. The feudal law, or the new Norman law, would come into the county court probably not at all or rarely, and then it would not be into the ordinary county court but into the court of a king's commissioner using the machinery of the county court to hold a local *curia regis*.²⁶ All the usual cases under feudal law, which would include practically all cases relating to land, were provided for in the private courts of the lords or directly, if important enough or involving a question of title held from the king, in the great or small *curia regis* as the king's court for the whole kingdom. In this way it is highly probable that, without saying anything about it, the Norman conquest made a division of jurisdiction from the beginning. The law regulating the ownership of land ceased to be Saxon; it became feudal.²⁷ All cases regarding it would fall naturally into the feudal courts, royal or private, and, while not in any formal way withdrawn from the old local courts, would appear there no more.²⁸ Such a practical separa-

²⁶ As in a case arising between the vassals of two different lords, or one of default of right on the part of the lord.

²⁷ See, for a discussion of this question, Adams, *op. cit. supra* note 1, at p. 503, note 34.

²⁸ The baronial court is a local court, coördinate, for the cases falling in it, with the county court though not in the same system of justice. The court rolls of the next century show that a good deal of litigation concerning land took place in county courts, but they give no evidence that it came into them as courts of first instance. Much the larger proportion of such cases plainly appears in these courts through the operation of writs of right and there is a clear presumption

tion of courts and of law we suspect from the peculiarities of the *Leges Henrici*, and such a separation of jurisdiction and of law would continue with no progress toward a unification of the two systems, so long as each set of courts confined itself to its own business, and no courts arose trying at once and on the same footing both kinds of cases. It is the increasing frequency of the use of the court of the king's commissioner or *missus* which brings about the union. Primarily in the Norman state this was a feudal court for feudal cases and, so far as we can now see, it was pressure from increasing business of this feudal kind that forced the development forward, but this justice court, as a King's court, was just as normally a national court for all kinds of cases under any kind of law locally recognized. In the *curia regis*, general or local, there was no ground on which a distinction of jurisdiction, feudal or non-feudal, or of law, Saxon or Norman, could be maintained. In the king's court, under the king's justice, the two systems melt into one homogeneous whole for that court and, because that court appears everywhere, for the whole kingdom. That is, it becomes the common law.

There were united then in Glanvill streams from two sources of substantive law, Saxon and Norman, to form the greater stream of English common law which flows from this point on without an interruption. To these sources must be added a third whose contribution was just beginning to be received, legislation,²⁹ for although the early

that in all cases the county court is the king's, not the sheriff's. The writ of right of course indicates an original baronial jurisdiction.

²⁹Glanvill knows a considerable body of legislation and is well aware of its effect. In II, 7 is the well known passage in praise of the grand assize which is stated in correct technical phrase to have been granted "de consilio procerum," as if the writer had a copy of the document before him, like the ordinance of William I on the ecclesiastical courts, or was familiar with its language. In the same ordinance apparently, the penalty of those jurors who swear falsely in the assize "ordinata est." II, 19, 1. To this assize had been added, at another time it would seem, "quedam constitutio" to limit the number of possible essoins. II, 12, 2. Still another question had arisen, evidently in the experience of the writer with the assize, which could be, but had not been, settled. II, 21. "Statutum est etiam in regno domini Regis" that those clerks who had been presented to churches by those who had usurped the right of advowson during time of war should hold them during their lives. IV, 10, 2. By assize, "de consilio regni inde factam," record in the king's courts had been granted to minor courts in several specified cases. VIII, 8, 3. A "general assize" might have been made to equalize through all the counties the amercement falling to the sheriff in a certain case. That is a statute would override the differences of the local laws. But none has yet been made on the subject. IX, 10. The court Christian has been forbidden to hear pleas of lay debts or tenements on the ground of faith pledged. X, 12, 1. The other forms of jury trial to which the name assize became permanently attached, besides the grand assize, the three possessory assizes, and the assize *utrum*, are discussed in Book XIII and their legislative character recognized, "ex beneficio constitutionis regni," but it is evident that the distinction which was later made between them and the recognitions called for by a new issue raised in the course of the pleadings, which were called *jurata* to distinguish them from the assizes, was not yet sharply made. Glanvill seems to

statutes were in their practical effect in the courts like those of to-day statutes and not common or customary law, that is they overruled all other law, the important ones of this period all became in the process of interpretation and application absorbed into and indistinguishable parts of the thirteenth century common law. In other words the new body of law which appears thus formed in Glanvill was from its birth, to change the figure, a living thing. It began at once to grow in the two ways by which it has ever since continued to grow, by the power of natural expansion from within through judgments rendered and precedents established and by accretion from without by legislation. By a date hardly more than a century after Glanvill its natural growth had so changed the body of the law that both the great elements of which it had originally been composed, as they appeared in Glanvill, had almost disappeared from sight. The Saxon had disappeared more completely than the feudal or more accurately perhaps survived in less conspicuous features of the law. But the feudal was hardly less changed for, while it is true for example that the feudal is clearly enough the foundation of our land law, it is also true that the feudalism of the great land statutes of Edward I's reign would have been thought in Glanvill's time a strange feudalism, a distinctly emasculated feudalism. Glanvill marks the beginning of the common law upon its substantive side by the union of earlier elements and reveals clearly the sources from which they came, but it was a living not a dead law which he recorded, and the rapid life of the thirteenth century soon left his book behind and his law in the form in which he wrote it. His adjective law, which formed the other great side of the common law, changed less from what he wrote, as is natural perhaps in matters of form, and many of Glanvill's writs though divided and subdivided may be recognized in common usage down to our own time.³⁰ If it were possible for Glanvill to attend the session of a common pleas court in any English-speaking country of the present day, except perhaps in those few places where the Roman law prevails, he would see and hear much that would make him feel at home.

class them all together in XIII, 2, and in XIII, 13, he calls one of them *assisa*. Perhaps it was still fresh in mind in Glanvill's time that all uses of the jury had been granted by a legislative act. XIII, 11, 11 is an exception which must have been made such in the legislation creating the assize, or added to it later, and it would probably be later in date than the great rebellion of 1173-1174. XIII, 11, 12 states that the assize also will not lie in case of a burgage tenement "per aliam assisam ex causa majoris utilitatis in regno constitutam." According to XIII, 32 the time within which a disseisin must have taken place to come within the assize had more than once been fixed "a domino rege de consilio procerum." The use of the jury of accusation, as provided for in the Assize of Clarendon, is not clearly referred to by Glanvill except in the passage concerning the punishment of usurers, VII, 16, 3, and its legislative character is not mentioned, unless it be indirectly referred to in XIV, 2. A reference should be added to XIV, 3, 2.

³⁰ Compare the medieval and the modern writs in 1 Holdsworth *History of English Law* (1903) App'x.