HISTORY OF PROCEDURE IN ENGLAND.

HISTORY OF PROCEDURE IN ENGLAND

FROM THE NORMAN CONQUEST

The Norman Period

(1066–1204)

BY

MELVILLE MADISON BIGELOW, PH.D.

Harvard University

BOSTON

LITTLE, BROWN, AND COMPANY

1880

CHARLES DICKENS AND EVANS, CRYSTAL PALACE PRESS.

In line 4, note, p. 224, for "same century" read "next century."

To the Norse names in "Thing" on p. 13, may be added "Thingwal" in Yorkshire. 1 Whitby Chart., p. 118 (Atkinson).

PREFACE.

ADJECTIVE law deals with the courts and with the conduct of causes; and writers on the Anglo-Norman period, especially the constitutional historians, have written of both of these subjects. But those who have heretofore written of the courts have presented only what may be called the layman's view. To complete the subject with the lawyer's side required, it was conceived, a fresh examination of the whole subject. The hope is indulged that, in the result, some service may have been rendered as well to the student of general constitutional history as to the student of the growth of a special system of law.

The constitutional historians have had something to say also of the conduct of causes in Norman times; but the same observation is to be made as before. They have written for laymen; or rather, constitutional history is not concerned with technical processes of law, and the conduct of causes has therefore fallen but partially within their province. As to German scholarship, that, in recent times, since the bringing to light of the mass of materials now available to all, has been directed to the elucidation of Germanic procedure, broadly, as a great branch of remedial law, developed and developing, and not to the conduct of causes in England. The present work, therefore, occupies new ground in this particular also.

It is hardly necessary to justify the profuseness of illustration in that part of the book which treats of the conduct of causes. It is difficult at best to realise the methods employed seven and eight centuries ago: the dry statement of the practice of such remote times would be almost useless. The author's purpose has been to bring the ancient methods of the courts home to the reader, and thus make his undertaking as far as possible a fitting success.

This would be enough for the author to say in his own behalf; and he will only add that the Appendix contains, after some records specially referred to in the text, a considerable collection of Norman writs and charters relating to litigation in the eleventh and twelfth centuries never before printed. These will be found to cast a strong cross-light upon much of the text, and to furnish invaluable aid to further study. They are the complement of the writer's collection in Placita Anglo-Normannica, and are designed, with that collection, to furnish the student with the best attainable materials for an exposition of the law books and court rolls of the Anglo-Norman period. The last of the records in the Appendix is worthy of special notice.

Oxford: *August 2nd*, 1880.

CONTENTS.

CHAPTER IX.

CHAPTER X.

HISTORY OF PROCEDURE.

CHAPTER I.

PRINCIPLES OF CRITICISM.

MATERIALS relating to litigation on English soil are insufficient to afford a complete view of the history of procedure during the Norman period. The substantial features of the procedure of that time, at least for that part of England lying South of Watling Street, may indeed be made out from English sources. This is fortunate, for English materials are alone decisive as to procedure in England. But English materials, unfortunately, often fail in respect of interesting and important details; such, for instance, as the pleadings in actions for disseisin "injuste et sine judicio," prior to the reign of Henry the Second. Can these *lacunæ* to any considerable extent be reliably supplied; and, if so, how?[1]

For supplying the want of material as to parts of the procedure in the *popular* courts, the most natural and reasonable course is to turn to the records of the pre-Norman period. The ancient procedure there ran its course with little interruption—certainly with no sudden change—during the Norman period. During the time of the Conqueror

[1] It will not be material if some of the grounds of criticism to be stated cannot at present be availed of: it is important to set them all out for completeness, and possibly for future use.

and of his sons Rufus and Henry, at all events, the Anglo-Saxon sources are safe guides to follow; safer far, certainly, than any other. The modification of the ancient procedure had been next to nothing in the eleventh century, and it was but slight during the reign of Henry the First. The ordeal probably declined in this reign as a mode of trial in civil cases, while the Norman duel correspondingly gained ground. The ordeal virtually disappears for civil purposes in the reign of Henry the Second. Compurgation and trial by party-witness, however, continued through the greater part of the Norman period with little or no change. Trial by party-witness probably began slowly to decline by the latter half of the reign of Henry the Second, when the recognitions came to play an important part in the administration of justice. It might be difficult, if not impossible, to prove such a decline, but it is certain that trial by party-witness did eventually die out, or rather became absorbed, mainly by the jury trial, partly by compurgation. The last-named mode of trial—the most tenacious of life of all the old modes—remained apparently unaffected until the Assise of Clarendon, *anno* 1166, re-enacted at Northampton ten years later. The adoption (or more likely the readjustment of the practice) of presentment and ordeal by these assises is said to have had the effect of abolishing the practice of compurgation in criminal cases in the Shiremots, though it continued in use in the many boroughs whose charters exempted them from the jurisdiction of those courts.[1] Even these changes involved no change in the mode of proceeding in a particular case over which the ancient procedure still prevailed. The ordeal was still the ancient ordeal, though its use had been narrowed; and the same was true of compurgation and party-witness.

[1] Stubbs, Select Charters, 151 (2d ed.). See the case of Ketel, Jocelyn de Brakelond, 74 (Camden Soc.). The subject will be referred to again in chapters viii. and ix.

The pre-Norman procedure does not sustain the same relation to the procedure of the royal courts of England after the Conquest as it does to that of the popular courts. The royal courts, unlike the popular tribunals, were not connected, it is apprehended, by an unbroken continuity with the courts of the ante-Norman period. Some semblance of the old Witenagemot still survived, and the King's Court (in the later sense of the term, i.e. so far as it was in the eleventh century distinguishable from the Witenagemot) had perhaps its counterpart in the pre-Norman Aula Regis and Thegnmen's Court. But the royal courts of justice (the King's Court and the Exchequer) of the Norman period were in no small degree distinct institutions, having a fresh beginning with the reign of William the Conqueror. Normandy would then appear to be the quarter to look to for supplying the wanting materials specially relating to the new features of the royal courts for the period under consideration.

This suggestion, however, must not be taken in any absolute sense. The procedure of the royal courts appears to have differed little from that of the popular courts, except in the general use of writs and in the more frequent resort to trial by recognition and by inquisition. Nor did the use of a writ imply any divergence in the pleadings from the procedure of the County, Hundred, and Manorial Courts. And even as to trials by recognition and by inquisition, which were by no means unfamiliar to the popular tribunals, though they were unknown in England before the Conquest, it is certain that when there were pleadings the parties came to issue in no different manner from that of other and ordinary modes in the popular courts. The Anglo-Saxon procedure, though perhaps it cannot be said to have passed on by unbroken continuity in the royal courts, was followed by something just like it, so far as the Anglo-Saxon procedure went; what was dissimilar lying mainly on the surface, by way of addition.

On the other hand it must not be supposed, in the absence of Anglo-Saxon records, that the Norman records furnish infallible suggestions in any particular as to what prevailed in England. The most that can safely be affirmed is that procedure in Normandy offered general types of procedure in England. When from the general type—as, for instance, the recognitions—we descend to details, the practice in Normandy alone will not justify an assertion that the same details prevailed in England. A few illustrations will enforce this observation.

By the law of Normandy he who was to wage the duel was permitted to hire a champion. "Dominus pro quo victus duellum subiit tenetur eidem solvere pro duello faciendo precium quod *promisit*." [1] But this was not lawful in England until finally (in effect) made so by statute in the latter part of the thirteenth century. Glanvill says that hired champions were sometimes brought into court, but adds that this was ground for objection by the adverse party.[2] It should be remembered that this difference in practice prevailed in respect of an institution which had been introduced into England from Normandy.

Again, the Norman writ de feodo et vadio was a petitory writ (a writ for the trial of the right of property); while the same writ in England was possessory. Glanvill says that if the tenant prevail in an action under this writ, "tunc is qui petit de cetero nullum habebit inde recuperare nisi per breve de recto."[3] It has also been supposed that a similar difference between the practice in England and that in Normandy prevailed as to the writ de feodo et elemosina; the writ being petitory in Normandy, but said to be possessory in England.[4] But while Glanvill treats of the proceeding under the head of

[1] Somma, part ii. c. 64, § 19. The reputation of the champions of Caen is well known.

[2] Glanvill, lib. 2, c. 3, § 10.

[3] Ib. lib. 13, c. 30, § 1.

[4] Brunner, Schwurg. 324.

the common recognitions (which were possessory), he says that if it be proved by the recognition that the tenement is a clerical fee it cannot afterwards be drawn over to (or treated as) a lay fee—"de cetero trahi non potest ad laicum feodum."[1] And Bracton in the next century speaks of the proceeding as petitory.[2] One point of contrast, however, appears to have prevailed, that whereas in Normandy the writ was available only to a tenant against whom a claim was set up that his tenement was frankalmoign,[3] in England either the demandant or the tenant could have the writ.[4]

Another and more striking contrast between the procedure of England and Normandy was that process in cases of dower in England was by the writ of right;[5] while in Normandy it was by recognition.[6] Not less interesting or important is the divergence concerning unanimity in the recognitions. Glanvill directly states that there must be twelve agreed persons on the inquest by the Magna Assisa;[7] and his language concerning the common recognitions fairly implies that unanimity was equally necessary with them; at all events, he says nothing to the contrary. Thus, speaking of the assise of mort d'ancestor, he says that the parties each being present, the case shall be decided by the oath of the twelve jurors, and according to their verdict.[8] And substantially the same language is used of other recognitions.[9] In Normandy, however, a verdict of eleven was sufficient for the common recognitions, though this appears not to have been the case with the Magna Assisa.[10]

This will suffice to show that inferences from usage in Normandy can be drawn only with the greatest caution. As has already been intimated, it will be fair to assume that a general type of trial which prevailed in Normandy prevailed

[1] Glanvill, lib. 13, c. 25.
[2] Bracton, 285 b.
[3] Brunner, 325.
[4] Glanvill, lib. 13, c. 23.
[5] Ib. lib. 6, cc. 4, 5.
[6] Brunner, 307; Somma, part ii. c. 36, § 7.
[7] Glanvill, lib. 2, c. 7, § 2.
[8] Ib. lib. 13, c. 11, § 13.
[9] Ib. c. 15, § 1.
[10] Brunner, 365.

in England, unless, as was probably the case with litigation over claims of dower, a usage had prevailed in England before the advent of the Normans.[1] Thus, if materials were wanting in England concerning trial by inquisition or by the recognitions, it would be safe to infer the use of such procedure as a type; though it would not be safe to infer the existence of the same details that were found in Normandy.

Other evidence, however, may concur with Norman usage to make it probable that Norman details were reproduced in England. Uniform appearance of the same details among all the Teutonic nations — which, however, would be a rare circumstance—would render it highly probable that the same thing took place in English procedure; though it should not be forgotten that the universality of the judicial duel among the Teutonic nations of the Continent did not prove its use in England before the Conquest, except possibly as a bare survival. Much more important, however, than general continental usage would be evidence of usage in England in the thirteenth century, corresponding with or suggesting the practice in Normandy. It is safe to affirm that nothing was brought into England from beyond the Channel after the year 1204, and little, if anything, for a third of a century before that time; and whatever therefore may be found in England in the thirteenth century of the same stamp as something existing in Normandy in the twelfth century may with tolerable certainty be set down as existing in England at that time. Indeed, the procedure in England of the first half of the thirteenth century may safely be invoked alone to illustrate much of the *ancient* procedure there, and also the duel; but nothing further.

Again, the general prevalence on the Continent of a

[1] As to questions of dower, these had been tried before the Conquest by the ordeal, compurgation, and party-witness; and afterwards the Normans succeeded in substituting for the old modes of trial the duel, as they did in all other petitory actions.

special type under a general class—of a species in a genus—would make it highly probable that that type was in use in England also, though the details of continental procedure could not be relied upon unless unvarying. Thus, it would be safe to assume the existence in England of the inquisitio de Coutume (inquisitio par turbe, des Gewohnheitrechtes), from its general prevalence on the Continent, even if there were no traces of it in modern English law; but the continental procedure was not uniform in details, and the practice in Normandy cannot therefore be assumed to have prevailed in England.

The use to be made of Norse material may be gathered from the next chapter.

CHAPTER II.

THE DANELAG.

THERE are indications of the existence, North and East of Watling Street, so late as the twelfth century, if not later, of a more or less distinct branch of Teutonic procedure. It is proposed in the present chapter to look into the nature and extent of these indications. But it may be observed at the outset that the Danish-Norse procedure (as the procedure referred to will be called) was probably a vanishing fact in English history at the time of the Conquest, and that its extinction was hastened by the ever-increasing contact with the more vigorous institutions and administration of the New Era. The interest that may attach to the subject is mainly of an antiquarian nature; but it is none the less worthy of study. If the Dane law did once flourish beyond Watling Street, as it clearly did at least in modified form, it failed to perpetuate itself, or to make any impression upon English procedure that can be recognised at the present day. That is the striking fact. Indeed, to show that the Danish-Norse procedure was without a lineage in England, is both the purpose and the justification of the present inquiry. To show this, it is necessary to examine (1) the question of its existence there, and (2) its probably characteristic features, for the purpose of satisfactory comparison and judgment. The Norse procedure

will be presented for comparison in future chapters. Danish procedure was distinctive in England only as it was Norse.

To what extent Danish-Norse procedure prevailed in England prior and subsequently to the Norman Conquest cannot be stated with certainty. Nor indeed can it be stated with certainty in what particulars the procedure of the Danes and Norwegians in England differed from that of the West-Saxons and Angles. The differences between the laws of the Danes and the Angles may safely be assumed to have been slight, both by reason of the nearness of their original homes across the German Ocean, and by reason of their very intimate relations upon common ground in England. There was probably a greater difference between the West-Saxon and the Danish laws.

Though Danes and West-Saxons (by which are here meant most of the inhabitants of South and South-West England) by no means kept aloof from each other, but on the contrary were constantly intermingling and taking up their abodes in each other's districts; still there was a definite line of geographical division between them, within which the mass of the respective peoples kept themselves. There was no such identity of territorial occupation by the West-Saxons and Danes as by the Angles and Danes. The mass of the West-Saxons kept to the South and West of Watling Street, the great Roman road from Dover to Chester, while the mass of the Danes kept to the North and East of it, in accordance with the boundary set by the treaty of Alfred and Guthrum.[1] This fact, in connection with the considerable separation of the continental ancestors of these peoples, would suffice to prevent a confident assertion of sameness of laws and institutions further than such as would reveal their relation to

[1] The boundary between the West-Saxons and Danes, as determined by the treaty between Alfred and Guthrum, diverged somewhat from Watling Street in the South-East. It extended "upon the Thames, along the Lea to its source, then right to Bedford, and then upon the Ouse to Watling Street."—1 Ancient Laws and Inst. 153 (Svo ed.).

each other as members in common of the family of Teutonic races.

It is impossible to arrive at any clear idea of the number of those who crossed the North Sea and made permanent settlements in England; but some general data are at hand which suffice to show that very great accessions to the population of the Middle, Eastern, and Northern districts were made. The most striking indication of the extent of the Danish-Norwegian settlements in England is found in the number of names of places of Danish or Norwegian origin. Of these there are said to be nearly fourteen hundred.[1] Of these fourteen hundred nearly six hundred are in counties lying South of the Humber; almost three hundred being in the single county of Lincoln, about one hundred and forty in the adjoining counties of Leicester and Northampton, and upwards of fifty in the counties of Norfolk and Suffolk. North of the Humber there are eight hundred local names of Danish-Norse origin. South of the Thames there are very few. Of the nearly six hundred names above mentioned, almost all are thought to be Danish. Of the eight hundred North of the Humber, nearly three hundred are probably Norwegian.

Now these localities having Danish-Norse names must have been either new settlements or old settlements with new names. If the former were the case, the population of such places must at first at least have been entirely Danish-Norse; and it is hardly likely that subsequent accessions were now largely from the South of England. There could have been no sufficient inducement for such a change of abode. The continuance of the foreign names is some evidence that no sweeping immigration from the South could have set in. It is

[1] Worsaae, Danes and Northmen, 71 (London, 1852, transl.). The figures of Worsaae appear to include names of the minutest places. According to the present writer's count, the Index of ancient Domesday for Lincoln has 160 local names in "by," 52 in "torp," and 14 in "holm" and "hou," a total of 226 of supposed Danish and Norse names. These several numbers agree very nearly with the enumeration of townships and parishes in Lincolnshire by the census of 1871; the total being the same, 226.

more reasonable to suppose that these settlements became the abodes of the new streams of Northmen that came to swell the population in those parts of England.

Many, probably most, of these settlements must have been new. The population of the North-East of England was small until long after the Norman Conquest; and there was probably no lack of vacant districts, sufficiently inviting, for the newcomers. To such places, Danish-Norse laws and institutions must, in the natural course of things, have succeeded.

But the conclusion can hardly be materially different if these were old settlements with new names, as was certainly the case in some instances.[1] The change of name could have occurred only by the driving out or supplanting the old population by the new, and the permanent occupancy of the localities by the latter. Now it is possible that in places in which, without driving out the old inhabitants, the new population supplanted the old, and fixed Danish or Norse names upon the settlements, the new population may soon have amalgamated with the old. Such an occurrence would be nothing new. But it does not follow that they would yield to the subject people their peculiar laws and usages, especially in the regulation of their own relations with each other. To suppose that the amalgamation, which certainly did take place at length very extensively, would be directly attended with such a result is to suppose something out of the natural course of things, and out of the range of experience, and hence of probability.[2]

The evidence of an extensive and widespread Danish-Norse population North-East of Watling Street is not, however, confined to names of places. In the central district of

[1] Northweorthig became Deoraby, i.e. Derby, and Streoneshalch became Whitby; the termination "by" being Danish, and signifying "town."

[2] The conquering Teutonic peoples, wherever they went, carried their procedure with them, even to Italy. The procedure of the courts of France (at least of Frankish France) was distinctively Teutonic throughout the middle ages, though the Franks rapidly amalgamated with the Latin-speaking Gauls, assuming their manners, civilisation, and language. The most striking feature of Teutonic institutions is Teutonic procedure. That was never abandoned.

Mercia and in Lincolnshire, the Danes were not only in possession of a great number of villages and rural estates, but they had also become masters of large towns, five of which were particularly distinguished as Danish, namely, Stamford, Leicester, Derby, Nottingham, and Lincoln—"The Five Burghs." These places belonged to the Danes as early as in the time of Alfred, and were conspicuous for their size, commerce, and wealth.[1] It has been suggested that they were like a little separate state, possessed in common of their own courts of judicature,[2] and other peculiar municipal institutions. The hostile and dangerous neighbourhood of the English would compel them to unite together as much as possible; "and for a very long period they formed the chief support of the Danish power in England. Protected by them from all attacks from the South, the Scandinavian settlers were enabled securely to continue establishing themselves in the more Northern districts."[3]

Besides the five burghs, the Danish-Norse people were possessed of the equally important town of Chester and the far more important city of York; and in these towns they exercised, we may well suppose, a similar kind of supremacy. Indeed, it has been said (perhaps somewhat strongly) that in

[1] Worsaae, 31. "Five towns, Leicester, and Lincoln, and Nottingham, so Stamford eke, and Derby, to Danes were erewhile, under Northmen, by need constrained, of heathen men, in captive chains, a long time; until again redeemed them, for his worthiness, the bulwark of warriors, offspring of Edward, Edmund king."—Anglo-Saxon Chronicle, *anno* 941. But the five burghs, "and all the Northumbrians," "and all the army North of Watling Street" readily submitted again to the Danish advance under Swegen seventy-two years afterwards.—Ang. Sax. Chron. *anno* 1013. This fact, in connection with the firm opposition of Southern England to Swegen, indicates the continuance of the Danish strength beyond Watling Street, and the weakness of the Anglo-Saxons in the same territory. The same five towns appear to be still under Danish control and institutions in the time of Domesday (*anno* 1085–86); at least the twelve "lawmen" of the Danes and the old confederation there appear.—Schmid, Gesetze, Einl. p. 52.

[2] See 1 Palgrave, Commonwealth, 51.

[3] Worsaae, 31. "Die fünf Burgen scheinen einen Städtebund gebildet zu haben, der, wenn nicht von dänischer Bevölkerung begründet, doch schon früh der dänischen Herschaft verfiel."—Schmid, Gesetze, Einl. p. 51.

about half of England the majority of the population was of Danish extraction, and was possessed of Danish laws and Danish characteristics.[1]

There is further evidence of Danish power and influence in the frequent reference in the charters and chronicles to Danes and Northmen of high position in England. To refer to a single illustration, in a charter of the year 997, recording a confirmation of a will before the Witan assembled perhaps in Essex, it is said that thegns were gathered there from afar, as well West-Saxons as Mercians, Danes, and Angles; showing that it was taken as matter of course that Danishmen of rank should be present.[2]

The names of some of the Danish-Norse towns are not without special significance. Towns are found in the North and East of England with names composed in part of the word "Thing," the Norse name for court. Thus, in Suffolk there exists a hundred called Thingoe, which is the subject of a charter by Edward the Confessor, *sub nom.* Thinghowe;[3] and that this was a seat of litigation appears from the language used concerning it.[4] The same is true of other places having the like name. The village of Tinghurste in Lincoln (?) is mentioned in a concord between the church of Lincoln and the monastery of St. Albans, *anno* 1162, the record of which is preserved by Roger de Wendover. "The present village of Thingwall (or the Thing-fields) in Cheshire was a place of meeting for the Thing, and not only bore the same name as the old chief Thing place in Iceland, but also as the old Scandinavian Thing places, 'Dingwall,' in the North of Scotland, 'Tingwall,' in the Shetland Isles, and 'Tynewall' or 'Tingwall' in the Isle of Man."[5] It should be added that the

[1] Worsaae, 180. Comp. Vigfusson's Cleasby, Icel. Dict. pref.

[2] Thorpe, Dipl. 541. [3] Ib. p. 418.

[4] "And ic an . . . . . the half nigende hundredes *sokne* into Thinghowe." In the old Latin version given by Thorpe, the language is "Annuo . . . . jura regalia viii. et dimidiam *placitorum* ad Thynghowe."—Thorpe, Dipl. 419.

[5] Worsaae, 158.

"Husting" belongs to the same category.[1] And it is significant that in Æthelred's laws concerning the five Danish boroughs, their court or assembly is called Burh-gethincthe,[2] that is, Burg-thing—a term seldom if ever used of the courts of the Anglo-Saxons. The term "Thing" in the sense of a court is indeed used in the laws of Hlother and Edric;[3] but these were the early laws of the Jutish kingdom of Kent.

There were also in the Danelag, it is stated,[4] certain larger Thing-meetings for the different districts, superior to the local Things; and it is strongly suggested that the Ridings—or, properly, Trithings—of Yorkshire and Lincolnshire were superior jurisdictions of this nature. It is said that in Scandinavia, and particularly in the South of Norway, provinces were divided not only into halves and fourths, but also into thirds, or Tredinger, perfectly answering to the English Trithings. And it was to these Tredinger that all appeals were carried from the local Things.

This last suggestion, however, is not material. It is enough that there is found to be a very extensive distribution in England of Danes and Norwegians, and that the name of the Norse court of justice frequently appears. Until some evidence is produced indicating that the people of such localities adopted the procedure of their English enemies, we must admit the view of the advocates of Danish influence in England, that these people probably observed their own peculiar usages.[5]

Of the existence of Danish law in England from the ninth until the middle of the twelfth century at least, there is also ample evidence in the Anglo-Saxon codes and in the

[1] York and Lincoln had "Hustings"; and the existence of a court in London of the same name seems to imply a stronger Danish element in the metropolis than is commonly admitted. The Anglo-Saxon word for "court," it need hardly be said, was "mot," usually with a prefix, "gemot."

[2] Anc. Laws, 292 (8vo ed.). [3] Ib. 30. [4] Worsaae, 158.

[5] "It is not probable that this condensed and conquering population [of Danes and Norwegians] should have entirely abandoned their ancient laws."—1 Palgrave, Commonwealth, 50.

so-called Laws of Henry the First (a custumal left in its present form perhaps about the end of the reign of Stephen [1]), though little is revealed therein concerning the actual nature of the Danish law.

In the laws made upon the final treaty of peace between Alfred the Great and Guthrum the Dane there is clear recognition of Danish institutions, and a total absence of attempt to impose new laws upon the people of Guthrum. Norse terms are constantly used by the side of the English to express the penalties imposed for the infraction of law. Where the English were to be liable for the "wer" or "wite," the Danes were to be liable for "lahslit;" the evident meaning of which is, that the law of the Danes fixed a certain penalty to the same offence, and that this penalty, and not the English, was to be inflicted in the Danish district. "If anyone withhold tithes, let him pay lahslit among the Danes, wite among the English. If anyone withhold 'Romfeoh,' let him pay lahslit among the Danes, wite among the English.[2] . . . If a lord oblige his theow to work on a festival day, let him pay lahslit within the Danish law, and wite among the English." [3]

In cases in which the value of the fine is named the amount exacted among the Danes is given as well as that imposed among the English. "If a mass-priest misdirect the people about a festival or about a fast let him pay thirty shillings among the English, and among the Danes three half marks." [4]

The laws of Edgar (A.D. 959-975) provided "that secular rights stand among the Danes with as good laws as they

[1] Portions of this collection were clearly of the reign of Henry the First, and perhaps the whole was founded upon some work of that reign now lost. A charter of Henry, issued between the years 1108 and 1112 (Stubbs, Sel. Ch. p. 104, 2d ed.), is spoken of as *recent* in the Leges, c. 7, § 1.

[2] Laws of Alfred and Guthrum, c. 6.

[3] Ib. c. 7. See also Laws of Cnut, Secular, cc. 15, 47, 49.

[4] Alf. and Guth. c. 3.

may best choose." [1] "Then will I that, with the Danes, such good laws stand as they may best choose, and as I have ever permitted to them, and will permit, so long as life shall last me, for your fidelity which ye have ever shown me." [2]

According to the custumal called Laws of Edward the Confessor, a work of the twelfth century, he who had thirty denariatæ in live-stock should, by the law of the English, pay a penny to St. Peter, and by the law of the Danes half a mark.[3] The law of the Danes concerning the penalty for injuries to the great highways and streams is also stated; and so of the slaying of villeins and socmen,[4] and of the breach of the king's peace given by his hand and seal.[5] There is also, in the same collection, a short chapter concerning the difference between the laws of the Danes and those of the West-Saxons concerning forfeitures or fines.[6] The laws of William the Conqueror treat in detail at the outset of the differences, in respect of penalties for breaches of the king's peace, between the Mercian law, the Dane law, and the West-Saxon law.[7] In the same collection the Dane law of warranty is referred to;[8] also the Danish penalty against a judge for rendering false judgment;[9] also the Dane law as to contumacy.[10] And it is directly stated that in the time of the Conqueror the law of the Danes and Norwegians prevailed in Norfolk, Suffolk, and Cambridgeshire.[11]

Finally, in the Laws of Henry the First the familiar statement is reiterated of the threefold division of the law of England, to wit, the West-Saxon law, the Mercian law, and the Dane law; and it is declared that "in many things they differ, but in many things they agree."[12] And there are many other references to the law of the Danes in the

[1] Suppl. to Edgar's Laws, c. 2.
[2] Ib. c. 12.
[3] Laws of Edw. Conf. c. 10.
[4] Ib. c. 12.
[5] Ib. c. 27.
[6] Ib. c. 33.
[7] Laws Wm. I. cc. 2, 3.
[8] Ib. c. 21.
[9] Ib. c. 39.
[10] Ib. c. 42.
[11] Laws of Edw. Conf. c. 30 (Rog. de Hov.)
[12] Laws Hen. I. c. 6, § 2; ib. c. 9, § 9.

same custumal, some of them referring to peculiarities of procedure.[1]

The references above given to the Anglo-Saxon laws would alone have been ample to prove the existence and authority of the Danish law North and East of Watling Street, and would have rendered the preceding inquiry unnecessary, had it not been important to ascertain the extent of Danish-Norse occupation. If this inquiry had led to the conclusion that the Danes and Norwegians had acquired but a small foothold, in a few scattered settlements, the references to the Dane law would have been of little significance. In such a case the Dane law would have fallen to the level of detached local customs, such as prevailed everywhere in England.

Conclusions based upon this inquiry must be cautiously drawn. It must not be supposed that pure Danish or Norse institutions prevailed to any considerable extent, if at all, in England. Time, separation from Scandinavia by a great sea, and contact with other institutions everywhere present, must have had a modifying effect. The Norse procedure did not, it seems, exist in perfect purity (that is, as it existed in Norway) even in Iceland. Trial by compurgation, in pure form, appears not to have prevailed there until after the union of Iceland with Norway in the latter half of the thirteenth century.[2] The Icelandic procedure especially, to which we shall largely refer, can be safely appealed to only as indicating, with probability, the essential features of the procedure of the peoples living North and East of Watling Street. It is not safe to affirm that the procedure of the Danelag or of the Norwegian districts was more than a species of the great Northern genus. In a word, then, pure Norse procedure probably never prevailed in England: Danish-Norse pro-

[1] Laws Hen. I. c. 11, § 11; c. 14, § 4; c. 34, §§ 1, 8; c. 66, §§ 5, 6 (procedure), 10 (procedure); c. 70, §§ 6, 8.

[2] See Vigfusson's Cleasby, Icelandic Dict., Eithr (oath), Kvithr (verdict); Viga-Glum Saga, transl. by Head, p. 117; Gragas, pref. by Schlegel, p. 84.

cedure probably did prevail there to some extent from the tenth to the middle of the twelfth century; but neither left a lineage.[1]

[1] We close this inquiry with a quotation from the learned dictionary above cited—not, however, subscribing to the view that the modern English jury is lineally connected with the Norse inquest. Nothing is more certain than that the modern jury is the outgrowth of the Norman inquisition, which, though somewhat resembling, is not the same thing as, the Norse inquest. But the Norse inquest, in modified form, prevailed, we may believe, in the North of England. "From the analogy of the Icelandic customs, it can be inferred with certainty that along with the invasion of the Danes and Norsemen the judgment by verdict was also transplanted to English ground, for the settlers of England were kith and kin to those of Iceland, carrying with them the same laws and customs; lastly, after the conquest it became the law of the land."—Vigf. Cleasb. Dict., Kvithr. The last clause may (like the preceding), be true, but the implication that the "judgment by verdict" was the *Norse* verdict is not true. The Norse inquest or verdict of twelve (tolftar-kvidr), however, was a near approach to the modern jury; but still it was not the modern jury or its original. The subject will be considered later, in the text, chapter ix.

CHAPTER III.

THE COURTS.

THE Courts of England in the Norman period were the Witenagemot, called both the Great Council (Magnum Concilium) and the King's Court in the twelfth century, the Ecclesiastical Court, the (lesser) King's Court, the Exchequer, the County Court, the Burghmot, the Hundred or Wapentake Court, the Manorial Court, and the Forest Court. There was no Court of Chancery by name in any part of the period. There was a chancellor indeed, as there had been before; but he exercised no jurisdiction as a judge in equity. He often sat in the superior courts; he was one of the established staff of the Exchequer, and he constantly sat with the other judges in the King's Court and in the Witenagemot, and in the twelfth century frequently went on circuit. But this was all. The nation, however, possessed a judge in equity in the king. The sovereign frequently acted in causes which in modern times would be considered equitable, as will hereafter appear. The courts themselves, also, including the Ecclesiastical Court, all exercised equity jurisdiction as occasion required, and had done so in pre-Norman times. There was nothing in the constitution of the ordinary tribunals of justice, or in any limits set to their jurisdiction or procedure, which could have prevented them from entertaining equity causes; and the

evidence that they did in fact entertain such causes is ample, as will appear in the chapter on the Writ Process.

The Witenagemot.

The Witenagemot of the Anglo-Saxon period was both a legislative and a judicial body, though its legislative function predominated. It was an "assembly of the wise men" of the nation, met to enact laws for, and look out for the general welfare and protection of, the nation at large, and incidentally to adjudge upon the disputes of the king's thegns and great men, cleric and lay. After the Conquest there was also a gathering from time to time of the king's "wise men" (under this and various other equivalent names), called as a body sometimes the Witenagemot, sometimes the King's Court, and sometimes (and in the twelfth century generally) the Great Council; and this body, like the old Witenagemot, transacted both legislative and judicial business, the former predominating over the latter.

The Anglo-Norman Witenagemot was only the successor of the Anglo-Saxon Witenagemot; it was not the same thing, either in constitution or in independence and authority. Its members for the greater part of a century were Normans mainly; and for nearly as great a period of time, they did little else, when acting in a legislative capacity, than to register the king's will. But we are not concerned in this book with that body as legislators: we are concerned with it only as a judicial tribunal. In this aspect, however, a distinction must be marked at the outset. We have said that this court was sometimes called (that is, by contemporary writers) the King's Court; but there was another court of the same period, often distinguishable, called also the King's Court. How then is it to be determined which body was intended when a writer of the time speaks of a trial in the King's Court? Sometimes, unfortunately, it is impossible to determine which is meant; the facts stated being insufficient to base a safe conclusion

upon. Sometimes, indeed, the distinction at best must have been shadowy.

The following generalisations will serve as a test for those cases in which sufficient facts are stated by the records or writers, the term Witenagemot being intended to include the Great Council: 1. The great assemblies at Easter, Pentecost, and Christmas, when "the king wore his crown," in the language of the time, were Witenagemots. 2. The same was true of any assembly of "all the king's great men" of the kingdom, whether convened in the interest in part of the church or not. 3. Such an assembly convened in the sole interest of the church was a Great Synod or synodal Witenagemot.[1] 4. An assembly engaged in the business of general legislation for the kingdom was a Witenagemot. 5. A court in which a great man of the church (e.g. the archbishop of Canterbury) was impleaded or was accused on behalf of the king was the Witenagemot.[2] 6. A meeting for business by the king's household and personal attendants was the King's Court as distinguished from the Witenagemot. 7. A body delegated to hold "royal pleas" apart from the king was also the King's Court in the same sense. 8. The county assembled to meet the itinerant justices of the king in the latter half of the twelfth century, and earlier, in the reign of Henry the First, was also the King's Court in this sense.

Having thus distinguished, so far as there was a distinction, between the body known as the Witenagemot or Great Council and the King's Court in the ordinary sense of later times, it remains to ascertain the jurisdiction of the former body as a judicial tribunal. It will not be necessary, it may be remarked, to treat of the procedure of this court, or of any of the lay courts, separately, as will be done in the case of the Ecclesiastical Court; the lay courts not being peculiar to each other in any such sense as they are different from the Ecclesiastical

[1] Compare Beornwulf of Mercia, Essays in Ang.-Sax. Law, 327, and Thorpe, Dipl. 70.

[2] See *infra*, pp. 23–25.

Court. It will turn out indeed, upon examination, that the procedure of the latter court did not differ substantially from that of the lay courts ; but that is a fact to be shown.

It should be observed at the outset that the Witenagemot, and, in the twelfth century, the Great Council as the same body, being an assembly of national legislators, had the right to take cognisance of any cause which a majority (with the king) voted to entertain, or proceeded, without question, to entertain. The body had not yet divided into two houses, one of which alone possessed judicial functions. But while the Witenagemot and the Great Council had the right to entertain jurisdiction of all causes, it in fact did not exercise such an authority. It was an aristocratic body, before which men of mean degree did not venture to appear, and from which they did not venture to seek favours. They had their own local courts for obtaining redress or relief, appointed for the very purpose. If indeed it happened that the local court was unable or unwilling to do justice by them, by reason of the rank or power of the defendant, or of the perversity or ignorance of the judges, or of want of jurisdiction, a remedy was provided by enabling the party to carry his cause to some other local court or to the powerful County Court, presided over by the king's own officer, the sheriff, and thence, if justice were still unattainable, to the King's Court, as distinguished from the Witenagemot.[1] The latter, as a judicial tribunal, appears not to have been a court of appeal, but an aristocratic court of original jurisdiction ; all appeals going, regularly, to the King's Court proper. Whatever the Great Court might have done, it appears never to have either called to itself cases from other courts or to have received appeals from judgments rendered in other courts ; except perhaps when sitting as a Great Synod.

When the accused was one of the king's great lay barons

[1] This drawing cases into the King's Court from the local jurisdictions will be considered later.

the trial, it is apprehended, was also generally, if not always, before the Witenagemot. The trial of Ralph Breton, earl of Norfolk, and of Roger de Breteuil, earl of Hereford,[1] for the Norwich treason to the Conqueror is stated to have been in the King's Court; but the court was a summoned council of the king's great men. The same appears to have been true of the court before which Waltheof, the last of the English earls, was tried as privy to the same treason as that found against the earls just named;[2] but the record is not full enough to be decisive. The cases of Robert Malet[3] and of Robert de Belesme[4] were also probably before the Witenagemot; though the record is not so clear as might be desired. The power and influence of the defendants, especially of Robert de Belesme, were such as to require the king to obtain the action and support of his entire baronage. Robert de Montfort is tried before a summoned assembly of great men for violating his oath to the king, Henry the First.[5] As to the trial of Henry of Essex[6] for treason to Henry the Second, the record simply states that the accusation was made "in conspectu principum terræ."

Trials between the king's great men, cleric and lay, were often brought before the Witenagemot. Thus, the case of Bishop Wulfstan v. Archbishop Thomas[7] was tried before the king, archbishop Lanfranc, bishops, abbots, earls, and great men. Although the case of Archbishop Lanfranc v. Odo[8] at Penenden Heath was brought before "the whole county," the court was much more than an ordinary County Court, both in respect of its members and of the subjects adjudicated upon. It was more properly the Witenagemot of Kent, possibly reminding the English participants of the

[1] Placita Anglo-Normannica, 11.

[2] Ib. 12. The trial appears at best to have been a mockery of law; though it is none the less a testimony to the hold which the requirements of the law had, so soon after the Conquest, upon the ruling class even when seeking the death of an Englishman.

[3] Ib. 82. [4] Ib. 83. [5] Ib. 94. [6] Ib. 210. [7] Ib. 2. [8] Ib. 4.

time when the county had been a nation of itself, with its own national Legislature. The case of the Archbishop of Canterbury v. The Abbot of Battel,[1] upon a question of wreck in the time of Stephen, appears to have been before the Great Council, though it is said to have been tried "apud regiam curiam." It has already been observed that spiritual causes were sometimes tried in the Witenagemot. Finally, it should be stated that Ralph Basset and the king's thegns held a Witenagemot in Leicestershire in the year 1124; "and there they hanged more thieves than had ever before been hung within so short a time, being in all four-and-forty men."[2] This is one of the latest mentions of the Witenagemot by that name. Thereafter it is the Great Council or (as before) the King's Court. And the language which tells of a Witenagemot in that year of 1124 is the language of an Englishman using the despised but still, among the people, cherished vernacular.

The king's personal causes were often tried in the Witenagemot, and always, it is apprehended, when the defendant was one of the great clergy. It is hardly to be conceived that a bishop, much less an archbishop, would, before the thirteenth century, be put upon trial in the smaller King's Court, composed as that usually was of the king's own retainers. It was "in aula regali," indeed, that William the Conqueror proceeded against his half-brother Odo, Bishop of Bayeux, but it was before an assembly of the first men of the kingdom ("congregatis . . . . primoribus regni")[3] which, if the attendance was general, as is implied, means the Witenagemot. The appeal of treason against William, Bishop of St. Carilef,[4] is said to have taken place before the King's Court; but the court consisted of the king's great men, the archbishops, bishops, earls, barons, and officers of the army. The case of Thomas à Becket[5] is so familiar as scarcely to

[1] Placita Ang.-Norm. 143. [2] Ang.-Sax. Chron. *anno* 1124.
[3] Placita Ang.-Norm. 291. [4] Ib. 307. [5] Ib. 213.

need mention. Although the king calls for judgment upon the archbishop on the ground that as his liegeman he had refused to stand to justice in his court ("in curia mea recusat"); and though the record states that the archbishop came to the King's Court in his chapel,[1] the court is the Magnum Concilium.

The Ecclesiastical Court.

The Ecclesiastical Court[2] was a court which had derived its authority and powers in the main from the immemorial usage of the church. The chief object which it had in view was the enactment of laws for the promotion of the spiritual welfare of Christians generally, of rules for the administration of church affairs by bishops and clergy, and for the discipline and conduct of the various orders of ecclesiastics. The nature of a council which had undertaken business of this sort was unmistakable. Whether composed exclusively of ecclesiastics or not, it was an Ecclesiastical Court in the legitimate sense.[3]

Had the church never assumed other authority than this, strictly interpreted, there would be no difficulty in deciding whether a particular court was clerical or lay.[4] But the Ecclesiastical Courts had a large share in the administration of justice in the Norman period (as in the earliest times), especially in criminal causes; and there are numerous

[1] Placita Ang.-Norm. 212. [2] A general term, used for convenience.

[3] In accordance with this test, the various litigations of the abbots of Battel, with the abbot of Marmoutier, with bishop Hilary of Chichester, and with Theobald, archbishop of Canterbury, on the question of the ecclesiastical independence of Battel Abbey, were ecclesiastical causes, notwithstanding the participation of laymen. The cases will be found in Placita Ang.-Norm. pp. 14, 156–159.

[4] Peter Blesensis (if the elder or younger Peter is the author of the work commonly attributed to one of them), writing on the canon law in the latter half of the twelfth century, says: "Nemo, militans Deo, implicat se negotiis secularibus. Unde non videtur quod ecclesiasticus judex debeat cognoscere de causis secularibus; ut de dote, de successione, de testamentis."—C. 10. But he adds that the bishop as judge might interfere "incidenter, et, ut generalius dicam, accessorie," but not "principaliter."

records of the twelfth century of synods, so named by ecclesiastics of the time who drew up the records and participated in the business of the courts, which exercised jurisdiction over purely temporal interests, such as the title to churches and lands. This raises a difficulty. How is it to be determined, in cases where a distinction existed, whether a court having under consideration the trial of a matter not of a spiritual nature was clerical or lay?

Six broad generalisations may be made, in part answer to the question. 1. A court composed entirely of ecclesiastics, to which laymen had not been summoned, was a clerical court. 2. A court composed entirely of laymen, whether ecclesiastics had been summoned or not, was a lay court or nothing. It was nothing if it attempted to make laws or to decide questions of a spiritual nature. 3. A court convened by virtue of the authority of, and in conformity with, a franchise (of sac and soc) was a lay court, though attached to a religious house. 4. A court convened by the king, justiciar, earl, sheriff, or other great man being a layman, for the trial of a temporal cause, though affecting the interests of the church, and though ecclesiastics were present, was a lay court, if laymen only or mainly were required to attend. 5. A court convened for the trial of alleged offences or of disputes *inter clericos*, or of delicts committed by laymen against the clergy or the church,[1] was an ecclesiastical court, if not coming under head 3 or 4, which would be rare.[2] If the trial was in a court coming under head 3 or 4, it was a clerical cause in a lay court. 6. The ordinary court of a bishop and his diocesan clergy was a clerical court, though laymen were permissibly

[1] Const. Clarendon, cc. 6, 10.

[2] The fact that punishment peculiar to the church was inflicted in a particular case did not necessarily imply that the Ecclesiastical Court had jurisdiction of trying the accused party, even though that punishment may have been inflicted upon a clerk, for the offence may have been committed against a layman. Laymen, too, were subject to the punishments of the church, though tried and adjudged (as in ordinary cases they were) in the lay courts.

present, and though lay causes were (by consent) brought before it.[1] The only remaining case is the difficult one—the nature of a court at which both ecclesiastics and laymen were present, or ecclesiastics alone, laymen in either case having been summoned; the court not having been convened by virtue of a franchise or of a command of the king or other layman. Such a court must, however, have been a clerical court, though concerned with the temporalities of the church. It must have been convened by an ecclesiastic; and not having assembled under a franchise, it must have met by virtue of the ancient judicial usage of the church, though not, perhaps, for purposes sanctioned by early usage. This will explain how certain of the courts of the reign of Stephen and of the early part of the reign of Henry the Second, to be referred to more particularly hereafter, are called synods, and are properly treated as Ecclesiastical Courts which have assumed jurisdiction belonging to the lay courts. The contention which led to the Constitutions of Clarendon[2] was in all respects a real one, and not a question of names; for a clerical court was by right under the control of ecclesiastics.

Difficulty in deciding as to the character of a court will still arise in many cases because of the record failing to give sufficient direct *indicia* by which to judge. In such cases the date of the litigation is worthy of consideration. If in the first third of the twelfth century or earlier, or if in the last third of the same century, it was probably a lay court, when concerned with temporal interests. It is certain, too, that there is some irregularity of proceeding throughout the Norman period. But this irregularity consisted almost always in the bringing of lay causes before a clerical court, seldom if ever the reverse, in the twelfth century.[3] Jurisdiction in such cases was probably matter of consent, except in the time of

[1] See Modbert v. Prior and Monks of Bath, Placita Ang.-Norm. 114.

[2] *Infra*, pp. 34–37.

[3] Battel Abbey was under the special protection of the king; which fact explains Abbot Walter v. Bishop of Chichester, Placita Ang.-Norm. 156.

Stephen and in the earlier years of his successor, a point to be considered hereafter.

The English ecclesiastical assemblies, in Norman as well as in later times, may be divided into National, Provincial, and Diocesan Councils. The former embraced, as the Anglo-Norman records sometimes say, "the whole clergy of the kingdom," which in fact means only the superior clergy, the archbishops, bishops, abbots, and it seems (perhaps by special invitation) the more eminent of the archdeacons, priests, and deacons. To these were often added the king and the greater of the laity; the whole being presided over by the archbishop of Canterbury, or by the king. The distinction between such an assembly and the Witenagemot, as we have elsewhere observed, would be hard to state. But a body of this description, though trials were sometimes prosecuted before it,[1] was convened mainly for legislative purposes; and we are not here specially concerned with it. The same may be said of Provincial Councils. By these are now meant the councils of the archbishoprics, or at least of several dioceses. Such appear to have been composed of the same material with the National Councils, and to have been concerned mostly, though not exclusively,[2] with church legislation. The Diocesan Councils are of greater interest in respect of matters of litigation. These were the County Courts and the Burghmots of the church, and were composed of the bishop and his superior clergy, the archdeacon, abbots, deacons, and sometimes "all the *clerici*" and the laity. It is of these we are mainly to speak.[3]

That these Diocesan Councils are the original of what since the last half of the twelfth century have been known as the Court Christian ("Curia Christianitatis")—*the* Ecclesiastical Court—is reasonably clear; but the history of the development of these councils, and of the settlement of their

[1] Placita Ang. Norm. 223, 224. [2] See ib. 161, 182–188, 189–196.
[3] See upon the whole subject Smith, Dict. Christ. Antiq. title Council.

judicial functions, resulting in a fixed judicial tribunal of the English Constitution, is very obscure. It is not clear, indeed, that (wholly apart from procedure in the strict sense) the Court Christian of Glanvill had assumed the fixed state which characterised it in the thirteenth century, with regular terms, and sessions for judicial purposes alone. The contrary is altogether probable. It can only be affirmed that it was by this time commonly convened and (in the bishop's absence) presided over by the archdeacon, as the bishop's minister,[1] and that it was an accompaniment of the King's Court, and sat as its complement whenever needed; also that such a court sat in the counties[2] in its own right, and in aid of the local courts and of the Eyre, as well as by specially granted authority.[3]

The jurisdiction of spiritual causes had doubtless always pertained exclusively to the clergy; or rather the clergy doubtless always had the right to exclude the laity from the judgment of spiritual causes.[4] As matter of fact, they did not usually exercise their jurisdiction over spiritual matters of general interest without the aid, or at least the presence, of the lay baronage. The king often, if not generally, sat in and perhaps sometimes presided over the church synods. This was certainly true when ecclesiastical questions were brought into the King's Court for determination, a matter of not unusual occurrence.[5] Whether the king possessed any legal voice in the deliberations of the synod, apart from the

[1] Comp. as to the Anglo-Saxon period, 1 Stubbs, Const. Hist. 233. Glanvill speaks of the ecclesiastical judge, as though the Court had by his time come to consist sometimes of a single judge.—Lib. 4, c. 9, § 3; lib. 10, c. 12, § 1. And he speaks of the judge of the Ecclesiastical Court as the bishop, or in his absence his official, that is, the archdeacon.—Lib. 4, c. 9, § 1; c. 10, § 1. In other cases he uses the plural, and quotes a writ of prohibition addressed, "Rex judicibus illis ecclesiasticis, salutem."—Lib. 4, c. 13. See also the next writ, c. 14.

[2] Glanvill, lib. 4, c. 9, §§ 1, 3; Placita Ang.-Norm. 150, 155. [3] Ib. 219.

[4] Peter Blesensis, cc. 16, 48, 51.

[5] See, for instance, Plaid et transaction en présence de Henry I., in the Appendix.

permission which was probably always accorded him, may be doubted; and the doubt is still stronger concerning the right of the laity generally to vote.[1] No doubt the laity present had the right to insist upon the clergy limiting themselves, in their exclusive jurisdiction, to legislation of a spiritual nature; and their voice, with that of the king, must have been heard in the synods at which they were present, in case of any serious attempt on the part of the spiritual baronage to extend their jurisdiction over matters temporal.

In the pre-Norman (as well as in the Norman) period the clergy sat also in temporal causes, having a voice therein to the extent, at least, of declaring the canon law, and of requiring suitors to yield obedience to the general law on pain of ecclesiastical censure. "The bishops sat in the popular courts," it is said, "as they sat in the Witenagemot, and in both with much the same power as the lay witan."[2] The Hundred and County Courts were attended as well by the parish priest as by the lords of the locality, the reeve and the four best men of each township.[3] It is doubtful if the bishop of the diocese was regularly present in the Hundred; but he was a member of the County Court.[4] And spiritual causes appear sometimes, by consent of the attendant clergy, to have been brought before these lay courts.

In the reign of the Conqueror a law in the form of a charter was promulgated by the king, "by the common counsel and advice of the archbishops, bishops, abbots, and all the nobles of the kingdom," by which a line was drawn between the judicial powers of the clergy and the laity in respect of spiritual causes; which line, as the law states, had not been observed, according to the canons, down to that time. This law required that spiritual causes should no longer be tried in the secular courts. It thus

[1] See 1 Stubbs, Const. Hist. 230; Smith, Dict. Christ. Antiq. title Council, pp. 481, 482, 485.

[2] 1 Stubbs, Const. Hist. 232. [3] Ib. 103. [4] Ib. 114.

made mandatory the trial of purely ecclesiastical causes in the Ecclesiastical Court; putting an end to the irregular practice which had prevailed theretofore. It did not, however, prohibit laymen from sitting in the clerical courts; nor was it understood to have any such meaning. Laymen continued to attend those courts, as before. Archbishop Anselm, for instance, caused the great men of the realm, lay and cleric, to be summoned to an ecclesiastical council at Winchester, *anno* 1102.[1] Nor did the charter profess to forbid the trial of ecclesiastical causes in the royal courts; its language referring apparently to the popular courts only. But it is more interesting to notice that the clergy were not forbidden to attend upon the lay courts. In the Laws of Henry the First, "the reeve, *priest*, and four best men of the township" still appear in the Hundred and County Courts, as in the Anglo-Saxon period.[2] In a word, the Conqueror's charter was intended to prevent the lay courts from acquiring jurisdiction over spiritual causes, not to prevent the clerical courts from acquiring jurisdiction over temporal causes; of which there was no danger at that time.[3]

Nor did this change of the law affect the rights of the clergy in their own courts as lords. In these private jurisdictions, attached to their estates, they continued to hold their secular courts and to exercise the same authority as that exercised in the private courts of the lay lords and in the Hundred Court. It is always to be remembered that the courts granted or confirmed by the king to religious houses were temporal and not spiritual courts. No franchise, it is apprehended, was ever granted by a temporal power for holding a clerical court. The authority of the church to hold courts was original and inherent.

[1] Ang.-Sax. Chron. *anno* 1102; Eadmer, Hist. Nov. 67; 5 Freeman, Norm. Conq. 147. See also Placita Ang.-Norm. 157–159.

[2] Laws of Hen. I. c. 7, §§ 7, 8. Further attention will be called to this fact at a later stage.

[3] The charter in full will be found in the Appendix, No. 1.

In respect of the subject-matter of jurisdiction permanently exercised by the Court Christian, this may comprehensively be stated to have embraced church law and the cure of souls. In the Conqueror's charter separating ecclesiastical from temporal jurisdiction, it was ordered that no bishop or archdeacon should further hold pleas in the Hundred Court concerning the laws of the church ("de legibus episcopalibus"), nor bring causes which pertained to the cure of souls ("ad regimen animarum") to the judgment of laymen.[1]

The latter head came finally, in the reign of Stephen, to include the punishment (1) of all offences by the clergy, of every nature; while from the first it included the punishment (2) of many offences committed by the laity. Then (3) by reason of having the charge of marriages and the burial of the dead, with jurisdiction of questions of legitimacy as pertaining to the cure of souls, the Ecclesiastical Court always had jurisdiction over disputes concerning the estates of decedents, though strangely enough not over questions of dower. In the reign of Stephen a great extension of jurisdiction was effected in matters of property; the ecclesiastical baronage finding the only protection to their temporal interests to be in the exercise of authority by their own court.

With regard to the first and third class of cases, the Conqueror's charter had some connection, perhaps, with results that the Conqueror doubtless little anticipated. Its natural effect is generally believed to have been to afford occasion to ecclesiasticism in England, in the favourable opportunity especially of Stephen's reign, to take and fortify a position such as it had never before fully assumed, not merely of absolute independence of the secular courts over the criminal offences of the clergy, but also over questions of the temporalities of the church.[2] A little latitude of construction of the

[1] Comp. Peter Blesensis, c. 15.

[2] In early times the clergy had exercised jurisdiction over small civil claims. "The Penitential of Theodore contains a provision that the bishop shall determine the causes of the poor up to fifty shillings, the king if the sum in question be greater."—1 Stubbs, Const. Hist. 232.

charter would make it include both of these cases; but the necessities of the time of Stephen were doubtless the real justification to the clergy for assuming jurisdiction over questions of property. The same jurisdiction would have been assumed, no doubt, without the Conqueror's charter.

Under the system which prevailed before the Conquest, and perhaps until the reign of Henry the Second, all clerical offences, great and small, which were not committed upon laymen, were indeed punishable only by ecclesiastical authority;[1] but if a man of the church committed an injury upon one of the laity, the punishment of the offence was committed to the secular courts.[2] On the other hand, offences committed by laymen against the church, such as the killing of a bishop, priest, deacon, or monk, were atoned for according to canonical law.[3] Disputes between men of the church were also to be settled within the church.[4] In causes concerning tithes, the *right of patronage*, and offerings, and causes between ecclesiastics, says Peter of Blois, "canones legibus imponunt silentiam."[5]

In the reign of the Conqueror, of Rufus, and probably of Henry the First, jurisdiction was exercised by the King's Court over the conduct of the highest dignitaries of the church, so far as it affected the king.[6] Stephen's arrest of the bishops is also familiar.[7] By the middle of the twelfth century, for the redress of criminal offences against laymen,

[1] "De his qui intra æcclesiam in gravibus vel in levibus commissis delinquunt, nichil vindictæ ad eos qui foris sunt."—Dialogue of Ecgbert, c. 8; Peter Blesensis, c. 16; Laws of Hen. I. c. 57, § 9.

[2] Dialogue of Ecgbert, c. 8; 2 Anc. Laws, 90 (8vo ed.).

[3] Ib. c. 12. King Stephen himself was summoned to answer before an Ecclesiastical Council for arresting and dismissing the bishops in the year 1139, and obeyed.

[4] Canons of Edgar, c. 7; 2 Anc. Laws, 247; Law of the Northumbrian Priests, c. 1; 2 Anc. Laws, 291.

[5] Peter Blesensis, c. 16; ib. cc. 48, 51.

[6] Placita Ang.-Norm. 391, 307; Eadmer, Hist. Nov. 37; 5 Freeman, Norm. Conq. 94; *post*, p. 48.

[7] But this was in violation of his oath of office. The view of the clergy may be seen in William of Malmesbury, Gest. Reg. *anno* 1139 (pp. 500–505, Bohn).

the temporal courts had still, indeed, a right to inflict punishment upon a clerical offender, but only after the Ecclesiastical Court had pronounced him guilty, deprived him of his order, and turned him over to the temporal courts as now virtually a layman, and punishable as such upon the next offence.[1] If the Ecclesiastical Court refused to try the offender, or failed to find him guilty, and also to degrade him and turn him over to the temporal courts, he had immunity from all outside interference.

This state of things existed at its height from the beginning of the reign of Stephen[2] until the tenth year of the reign of Henry the Second; when at last the storm that tore down the pretensions of the church burst over the head of Thomas à Becket, a storm hastened somewhat, perhaps, by the personal ill-feeling that arose on the part of the king from the moment when, in the year 1162, upon his election as archbishop of Canterbury, à Becket resigned the chancellorship without consulting the king. The result was the Constitutions of Clarendon, *anno* 1164.[3] From the very coronation of Stephen until that time the clergy of England were masters of the situation, judicial as well as administrative, a period of twenty-nine years.

These Constitutions were, as they purport, the result of an inquiry into the customs of England existing in the time of Henry the First, grandfather of Henry the Second; the former having died less than twenty years before the latter's accession to the throne, so that the old customs might be

[1] Roger de Hovenden, *anno* 1167.

[2] See Stephen's oath of office as king, to which position he could not have attained without the support of the clergy, especially of his brother, the papal legate, Henry, bishop of Winchester. He swore that the jurisdiction and power over beneficed clergy, and over all persons in orders, and their *property*, and the distribution of effects of the clergy, should be in the hands of the bishops. William of Malmesbury, Gest. Reg. *anno* 1136 (p. 493, Bohn); Stubbs, Sel. Ch. 120 (2d ed.). This is called his second charter.

[3] See Stubbs, Sel. Ch. 137–140. The Assise of Clarendon was another thing, being two years later.

easily ascertained. And these customs of the first third of the twelfth century were now to be renewed.[1]

How far the clerical position had been advanced since these customs prevailed, and how far, on the other hand, the revulsion now went, may be inferred from the very first section (or chapter) of the Constitutions; where it was deemed necessary to declare, in respect of advowsons and presentations to churches, that in case of disputes "between laymen, or between laymen and clerks, or between clerks," the same should be tried and determined in the King's Court.[2] The next section is not less significant in declaring that churches in the King's fee should not be given in perpetuity without his consent. The third section, however, is the one of special interest.

This section declared that clerks accused of any crime should be summoned by the king's justiciar into the King's Court, to answer there for whatever the King's Court should determine they ought to answer there, and (to answer) in the Ecclesiastical Court for whatever it should be determined (in the King's Court) they ought to answer there; yet so that the king's justiciar should send into the Court of Holy Church to see in what way the matter should there be treated; and if the particular clerk should confess or be convicted, the church should not thereafter protect him.

The sixth section provided how laymen should be accused and proceeded against in the Ecclesiastical Court, for offences, it should seem, committed against the clergy or the church. They were not to be put to trial on mere rumour.[3] The

[1] It would be a great mistake to suppose, with Phillips (1 Englische Rechtsg. 162, 163; 2 ib. 69), that any attempt was made to set aside the Conqueror's charter of jurisdiction, as will be seen by the statement of the Constitutions, *infra*.

[2] The state of the law on this point in the time of Stephen will be seen in the cases referred to hereafter, pp. 46, 47.

[3] "Laici non debent accusari nisi per certos et legales accusatores et testes in præsentia episcopi ita quod archidiaconus non perdat jus suum, nec quicquam quod inde habere debeat."

seventh provided that no one who held of the king in chief should be excommunicated or his lands put under interdict until the king should be consulted, "so that whatever belongs to the King's Court may therein be settled; and the same, on the other hand, of the Ecclesiastical Court." Appeals, by the eighth section, were to proceed (in ecclesiastical cases) from the archdeacon to the bishop, thence to the archbishop; and if the latter failed to do justice the parties were then to go before the king, that by his writ the controversy might be determined in the archbishop's court, and not proceed further (that is, to Rome) without the king's consent.

Section nine is interesting, both as limiting still further the claim to ecclesiastical jurisdiction, and as containing the first specific mention of the proceeding for determining whether a particular fee was eleemosynary or lay; for the effectual carrying out of which the writ de elemosina vel feodo of Glanvill was fashioned.[1] The section declared that if a dispute arose between a clerk (as plaintiff) and a layman, or between a layman (as plaintiff) and a clerk, about a tenement which the clerk claimed as eleemosynary, but the layman claimed as a lay fee, it should be settled by a recognition of twelve lawful men, by consideration of the king's chief justiciar, and before the justiciar himself, whether it was an eleemosynary or a lay fee. If it were declared to be the former, the case should then be pleaded in the Ecclesiastical Court; but if the latter, then, unless both should claim it of the same bishop or baron, the case should go to the King's Court. If both claimed of the same bishop or baron, the case should go to such person's (temporal) court.[2]

[1] It must not be inferred, however, that this was the beginning of such remedies. The subject will be considered in the chapter on the Writ Process.

[2] This section differs from the first in that the first refers to a dispute concerning the *title* to the advowson, while in this section the question referred to is how the title is held. And it should be noticed that if it were found that the fee was clerical, its administration, with the disputes relating thereto, was turned over to the Ecclesiastical Court. The guarded language of the chronicler in Abbot of Battel v. Alan de Bellafago, Placita Ang.-Norm. 245, accords, in reality, with this.—*Post*, p. 40, n. 5.

The tenth section provided that any person, whether of city, castle, town, or demesne manor of the king, who refused to obey the summons of the archdeacon or bishop for any delict for which he ought to answer to them, might be put under interdict. Such person could not be excommunicated, however, if the king's officer would compel him to come to satisfaction; but if the officer failed, then the bishop might proceed against the accused according to ecclesiastical law. This section, with the sixth, is of interest as showing that the Ecclesiastical Court was not to be shorn of jurisdiction over offences committed against the clergy or the church; for such must have been the delicts referred to.

Other sections of a more general character follow; the only remaining one of importance to the present inquiry being the fifteenth. Not a little has been heard concerning the attempt of the Ecclesiastical Court to obtain jurisdiction over the trial of actions for the breach of solemn contracts, on the ground that such acts were violations of faith, and hence sinful. The fifteenth section of the Constitutions of Clarendon appears to be the first distinct reference to this claim. "Pleas of debt," is its language, "which are due by pledge of faith, or without pledge of faith, belong to the king's justiciar."[1] This probably referred to pleas of debt between laymen or between a clerk and a layman. The Ecclesiastical Court appears to have retained jurisdiction of pleas of debt between the clergy;[2] such causes, with the complaints generally between the inferior clergy of a religious house, being tried, perhaps, before the dean or other superior officer of the establishment, as in later times.

[1] "Placita de debitis, quæ fide interposita debentur, vel absque interpositione fidei, sint in justicia regis."

[2] At the Synod of Winchester, *anno* 1175, eleven years after the Constitutions, it was decreed that in actions between clerks for the recovery of money, the party who should be the loser should be condemned to pay the costs. This was "to put a check upon litigation." The decree might have referred to causes in the temporal courts, but that is not its natural meaning.—Roger de Hovenden, *anno* 1175.

The repentance of the archbishop over his hasty signature to the Constitutions, the mutterings of the less courageous bishops who had barely assented, fearing to express any open disapprobation, and the absolution of à Becket from his oath by letters of the pope, are too well known to be dwelt upon. But an incident is given by Roger de Wendover, writing in the thirteenth century, which, if really subsequent to the Constitutions, as put by the chronicler, shows that the king had at first at all events gained a substantial victory. Roger tells us that in the same year the king, wishing always, as he asserted, to punish crimes with due severity, and that the dignity of all orders should be treated fairly, said that it was unreasonable that his justiciars should be obliged to hand over clerks, when convicted of crimes, to the bishop of the diocese, without punishment; and he decreed that all clerks taken in open crime should be handed over to the bishop, and those whom their bishops found guilty should be deprived of their orders in presence of his justiciar, and afterwards be delivered over to the King's Court. The archbishop, says the chronicler, maintained the opposite opinion, that none who were deprived of their orders for crime should receive any further punishment from a lay tribunal.[1] And this controversy, he adds, owes its origin to Philip de Broc, a canon of Bedford, who, when arraigned on a charge of murder, used contumacious language against the king's justiciar; which he was unable to deny when brought before the archbishop, wherefore he was deprived of his prebend, and banished for two years.[2]

[1] On the ground of the maxim, *Nemo bis vexari debet pro una et eadem causa.*

[2] Within a year after the Constitutions the king claimed and exercised criminal jurisdiction in the Royal Court over archbishop à Becket himself.—Placita Ang.-Norm. 213—the charge of peculation made at the council of Northampton. But this could hardly have been justified under the Constitutions; nor indeed did the king attempt so to justify it. Thomas pleads a discharge given on the day of his consecration, and insists that his answer shall be accepted. "Amplius," he says, "nolo inde placitare." This gives to the king the opportunity to say to his court, "Cite facite mihi judicium de illo, *qui homo meus ligius est, et stare juri in curia mea recusat.*" Compare the cases of Odo of Bayeux and William of St. Carilef,

This account, however, has not a little the appearance of something preliminary to, rather than consequent upon, the Constitutions; and the suggestion is strengthened by the more distinct statement of Ralph de Diceto, who, like Roger de Wendover, wrote in the thirteenth century. In one short paragraph the former tells of the council resulting in the Constitutions; and then, without saying, as Roger has added, "in the same year" as if they were subsequent, proceeds to report the facts mentioned by Roger. And instead of saying that the king "decreed" (*decrevit*) that clerks taken in crime, etc., Ralph says that the king "had decreed" (*decreverat*) in that way; the whole account as given by the latter, including the affair of Philip de Broc, being apparently an explanation of the causes which immediately led to the Constitutions.

The events which followed the recantation of à Becket, the murder at last of the archbishop, at which the king himself was suspected of connivance, and the humiliation of the king, need be referred to only as indicating the strength of the position which the church had acquired during the lawless reign of Stephen, and the greatness of the struggle necessary to dislodge it. And all the results as seen in the Constitutions seemed likely to be lost in the events following upon the murder of the archbishop. But while the king was humiliated to the last degree (he is said to have literally submitted to the stripes of the church), and though he solemnly promised to abrogate the Constitutions, so far as they were prejudicial to the church,[1] the fruits of victory finally remained with the opponents of clerical aggression; which, however justifiable under Stephen's oath of office, and in the perilous circumstances of Stephen's reign, had in the reign of Henry the Second, lost its justifying motive

Placita Ang.-Norm. 291, 307; *infra*, p. 48. The king stood upon authority, though in face of the facts his conduct was outrageous; and Thomas was an archbishop of Canterbury, not a suffragan.

[1] See the purgation of the king, and the charter of absolution, Roger de Hovenden, *anno* 1172.

of self-preservation, and now threatened the welfare of the nation.[1]

An examination of Glanvill, who wrote near the end of the reign of Henry the Second, and more than twenty years after the Constitutions, will show that the king did not fulfil his promise, and that the victory remained on the side of reform, at least as to property causes; though for several years after the death of à Becket the king's fear of the pope caused him to yield to Rome when any direct attempt was made by the pope or by his legates to exercise judicial authority over property causes of the church.[2] But by the time of Glanvill the whole matter of advowsons and presentations was within the jurisdiction of the temporal courts, as regulated by the Constitutions. Glanvill says that if a dispute concern merely the last presentation, and the claimant allege that he or one of his predecessors in right had the last gift and presentation, the plea should be discussed by the assise appointed concerning ecclesiastical advowsons, namely, the assise de ultima præsentatione.[3] If the *right* of advowson were the sole object of dispute, the case also went before the temporal court for consideration.[4] This statement corresponds with the language of the first section of the Constitutions.[5] But the most significant statement of Glanvill

[1] The hasty and intemperate proceedings, called laws, instituted upon the flight of à Becket, had but a temporary effect, and need not be here considered. They may be found in 1 Phillips, Eng. Reichsg. 170, 171.

[2] An example may be seen in the case of Godfrey de Luci v. Abbot Odo, *anno* 1176, in which a question of property is brought to trial by the papal legate Hugezun before a *synod*, as a matter of course, though the validity of the king's act was directly involved and doubted. The case will be found in the Appendix, No. 3.

[3] Glanvill, lib. 4, c. 1; lib. 13, c. 18. [4] Ibid.

[5] *Ante*, p. 35. Abbot of Battel v. Alan de Bellafago, Placita Ang.-Norm. 245, was a case of this kind, tried in the King's Court about the year 1170. (It was near the close of the plaintiff's life; and he died in June, 1171.) The chronicler states that the trial was without detriment to ecclesiastical law or dignity, because the only question for the King's Court was, who made the last presentation. The trial occurred during the à Becket difficulty; and it was still thought necessary for the clergy to explain that such a proceeding in the King's Court did not involve an attempt by that court to determine upon the mode in which ecclesiastical pro-

occurs in chapter twelve of the same book just cited. It should be observed, he says, that it sometimes happens that one clerk sues another in the Ecclesiastical Court concerning a church. Should they, he continues, derive their titles through different patrons, the Ecclesiastical Court may, upon the demand of either patron, be prohibited from proceeding in the suit until it be ascertained in the King's Court to which patron the advowson of the church belongs. A writ of prohibition follows, and then another writ to be used in case of the refusal of the Ecclesiastical Court to obey the first.

Elsewhere Glanvill says that if a plea of an ecclesiastical fee arise between two clerks concerning a tenement held in frankalmoign, or if the tenant, a clerk, hold an ecclesiastical fee in frankalmoign, whoever may happen to be the demandant, the plea ought to be in the Ecclesiastical Court, *unless* a recognition should be demanded whether the fee be ecclesiastical or lay; which recognition must be in the King's Court.[1] This, in effect, is section nine of the Constitutions.[2]

The Pipe Rolls of this time confirm the statements of Glanvill. In the thirty-first year of Henry the Second (1184, a little before Glanvill's treatise was written), Simon de M. was found debtor to the king in ten marks for pleading in the Court Christian concerning a lay fee.[3] And still more explicit and striking was the entry that the *prior* of Worcester rendered account of ten marks for himself holding plea of a lay fee in the Court Christian.[4]

Again, in the case of an action brought by a creditor against his debtor for the recovery of payment of his debt, Glanvill says that upon the debtor's appearance in court—that is, in the King's Court—if the creditor has neither pledge nor sureties (from the debtor for the debt), nor any other

perty should be administered, when no question of the right of property was involved. Such explanations are to that extent an abandonment of the position of à Becket; while at the same time they fully justify the king's position.

[1] Glanvill, lib. 12, c. 25.
[2] *Ante*, p. 36.
[3] Placita Ang.-Norm. 278.
[4] Ibid.

proof, except the mere faith of the defendant, this will not be received as proof in the King's Court, a statement referring to the necessity of making a *prima facie* case. Glanvill adds, Yet he may proceed for the breach of faith in the Court Christian. But, he continues, though the ecclesiastical judge may hold cognisance of such crime, and either impose penance on the convicted party or *enjoin* him to make satisfaction, yet as to pleas of debt among the laity or pleas affecting tenements the Court Christian cannot, by reason of a *law of the kingdom* (the Constitutions of Clarendon), hold or decide them under the pretence of the party having pledged his faith.[1] Pleas of debt owed by the clergy appear to be excepted by Glanvill from the jurisdiction of the King's Court.[2]

The statement that the Ecclesiastical Court may enjoin the debtor to make satisfaction should be noticed in passing, as showing how that court might act as a court of equity in aid of justice in cases in which the temporal courts could not do justice;[3] of which defect in those courts, or rather in the rules of evidence, the passage reveals an instance which may fairly be assumed to be a type of other cases. It is probably safe to suggest that whenever a person had a just cause of action which, however, he could not establish in the secular courts for want of the required supporting evidence (evidence additional to his own statement), he could resort to the Ecclesiastical Court, and, through the warnings or the censure, pains, and penalties of the church, obtain specific performance or compensation. This point will be alluded to again presently.

Only one short, and that unsatisfactory, book concerning crimes appears in Glanvill's treatise, the last one in it; and this makes no mention of crimes committed by the clergy.

[1] Glanvill, lib. 10, c. 12. [2] Ib. lib. 1, c. 3, § 1.

[3] Comp. Peter Blesensis, c. 10, that the bishop "potest cogere maritum prestare cautionem de restituenda dote."

But nothing is said to indicate that the law treated of was not general. There is, however, a passage in Roger de Hovenden, of the year 1175, some eleven or twelve years before Glanvill's treatise was written, and before the king had fully recovered from the consequences of the murder of à Becket, in which we are told that the pope's legate Hugezun "gave permission to the king to implead the clergy of his kingdom for offences against his forests and taking venison therein." This passage shows the extreme to which the king had at first been driven by the à Becket catastrophe. It is probable that he had recovered himself by the time of Glanvill's book (perhaps *anno* 1186). Glanvill's silence as to clerical offenders may, however, indicate a prudent regard for the feelings of the king. Neither the Assise of Clarendon (*anno* 1166) nor that of Northampton (*anno* 1176) contains any reference to crimes committed by the clergy. Their language is, however, general as to criminal offences.

Further evidence of Henry's dread of the pope for some years after the death of à Becket is probably furnished by the case of Henry's son, "the young king" against his (the son's) vice-chancellor Adam, *anno* 1176.[1] Adam was a clerk, and was accused before a lay court on the Continent and found guilty of treason to his lord. He was saved from the gallows by the bishop of the place, who asserted that "clericum in sacris ordinibus constitutum a laico non posse judicari." This indeed was at Poictou; but the king, when he heard of the affair, appears to have been displeased, or more likely alarmed, and orders the offending clerk to be sent to him. The order was obeyed, but not without the infliction of great indignities upon the prisoner, including the sending him to the king in irons; in which condition the king refused to receive him. The king then directs that Adam be

[1] Placita Ang.-Norm. 314. The word "vice-chancellor" need not create surprise. The office was common at this time, but had no judicial significance.

given into the custody of the abbot of Hida at Winchester, "until he can speak with his counsel about the matter."

The exercise of lay jurisdiction over the clergy *in personam* was, it is true, a different thing from exercising jurisdiction over disputes of property claimed by the church. The jurisdiction of the church had become fortified by the usage of centuries and by the sanction of emperors, kings, and princes, as to the offences of the clergy;[1] but this case of the vice-chancellor was an appeal of treason, jurisdiction over which class of cases had belonged, unquestioned in England for more than a century, to the court of the offended party.[2] The case therefore merely indicates the temporary subjection of Henry to fear of the pope.

That the King's Court, or other lay court, had exercised jurisdiction over questions of church property prior to the reign of Stephen, both before[3] and after the Conquest, the evidence is decisive; and from the Conquest to Stephen this jurisdiction was substantially exclusive.[4] In the year 1070,

[1] See e.g. the decree of the emperor Julian *anno* 530. Cod. lib. 1, c. 29. The Constitutions of Clarendon were the late beginning of determined revolt against clerical privilege and priestly assumption of superiority over the State.

[2] *Post*, p. 48.

[3] See the Cases of Eadgar, Essays in Ang.-Sax. Law, 347, and Cod. Dipl. 1258; Bishop Æthelstan, Thorpe, Dipl. 375, and Essays, 363; Æthelred, Thorpe, 271, and Essays, 350; Godwine and Leofwine, Thorpe, 301, and Essays, 360; Ealdred, Essays, 368, and Cod. Dipl. 805.

[4] This may not have been the case before the Conquest. Many property causes of the church are recorded as having been brought before synods; but it is not clear that these synods were anything else than the Witenagemot. See the Cases of Offa, Essays in Ang.-Sax. Law, 316, and Cod. Dipl. 164; Archbishop Æthelheard, Essays, 317, and Cod. Dipl. 1019; Deneberht and Wulfheard, Essays, 320, and Thorpe, Dipl. 52; Beornwulf, Essays, 323, and Thorpe, 67; Wulfred, Essays, 324, and Thorpe, 73; and other cases in the Essays following these. It is, however, impossible to affirm that jurisdiction was not exercised in particular cases in *any* court by consent of the parties; but substantial unanimity as to the forum, as in the cases from the Conquest to Stephen, has a most persuasive bearing. As to clerical jurisdiction in these pre-Norman councils, Professor Stubbs says: "They seem also to have exercised a friendly jurisdiction in suits for property between different churches; herein acting rather as arbitrators than as judges, and probably expecting review or confirmation by the Folkmot or Witenagemot."—1 Const. Hist. 231. He also says that these councils were "scarcely distinguish-

at a great assembly, consisting of the king, archbishop Lanfranc, and the bishops, abbots, earls, and great men of the kingdom—the Witenagemot—bishop Wulfstan recovers church lands of archbishop Thomas of York.[1] Not far from this time the celebrated trial between archbishop Lanfranc and bishop Odo occurs, in a County Court at Penenden Heath; the suit being successfully brought for the recovery of lands and franchises of which the see of Canterbury had been disseised by Odo.[2] At the suit of the abbot of St. Augustine, *anno* 1076, the king sends a writ to his own justiciars for the relief of the plaintiff as to lands of which his church had been disseised.[3] Later in the same reign occurs the well-known case of Bishop Wulfstan v. Abbot Walter,[4] in which, before the king's justiciar and an assembly of "counties and barons," the plaintiff, as bishop, claims and recovers the right to lands and various services from the defendant as abbot. About the same time occur land suits in County Courts between bishop Odo and the same Walter.[5] At a County Court held at Kenetford, composed of abbots, sheriffs, and many knights, French and English, the abbot of Ely recovers various lands and franchises of which his church had been disseised at the Conquest.[6] In the reign of Rufus the abbot of St. Augustine obtains a writ from the king ordering an inquisition as to the customs which his church claimed in Newington.[7] In the same reign, the monks of St. Benet obtained from the king a writ requiring an assembly of the County Court of Hants, and an inquisition whether the land of Isham had paid rent to the monks in the time of the king's father.[8] Near the beginning of the reign of Henry the First a writ is obtained from the king, ordering an inquisition as to lands claimed by R. of Avranche

able from the separate Witenagemots. All these councils in many respects resemble the Witenagemots."—Ib. 230. "Mixed synods or rather Witenagemots."—Smith, Dict. Christ. Antiq. title Council, p. 480; see also ib. p. 485.

[1] Placita Ang.-Norm. 2. [2] Ib. 4. [3] Ib. 13. [4] Ib. 16.
[5] Ib. 20, 21. [6] Ib. 23. [7] Ib. 66. [8] Ib. 71.

and by the abbot of Abingdon.[1] About the same time abbot Faritius recovers judgment in several cases in respect of knight fees, in the presence, in one case, of sheriffs, justiciars, and barons, in another before bishops (one being Roger of Salisbury, the king's justiciar and treasurer, the reorganiser of the Exchequer) and many barons of the king.[2] A few years later the king by his writ commands Goscelin to go into the Manorial Court of the abbot of St. Augustine and there sue in respect of certain land of the church.[3] Abbot Faritius, about the year 1108, obtains a writ from the king against Robert Maledoit, commanding him to perform services due the abbot.[4] About the same time the king confirms a recovery of judgment in his court in respect of a prebend, the right over which was in dispute between the abbot of St. Augustine and the canons of St. Martin.[5] In the year 1109 abbot Faritius recovers judgment in the Exchequer as to a certain manor.[6] A great trial occurred in the year 1121, between the monks of Durham and the monks of York, concerning the right to a church, before an assembly of great men, apparently laymen, one, at least, a sheriff.[7]

Many other examples might be given of the reign of Henry the First to the same effect; and there is no known record at variance with the cases referred to. The trials held in the Ecclesiastical Court will all be found to have been purely ecclesiastical causes, or causes relating to offences *inter clericos*. Even in the reign of Stephen the King's Court did not lose its ancient jurisdiction: the Ecclesiastical Court merely assumed jurisdiction alongside of it, for the better protection, doubtless, of the secular interests of the church. Thus, there is a record of a litigation in the King's Court *anno* 1139, between the archbishop of Canterbury and the

[1] Placita Ang.-Norm. 73. [2] Ib. 75–78. [3] Ib. 90.
[4] Ib. 97. [5] Ib. 98. [6] Ib. 99, 100. [7] Ib. 117, 119.

abbot of Battel as to a question of wreck.[1] In the year 1141 there is a case of a writ of right, commanding the archdeacon of Canterbury to hear a cause as to land of the church.[2] The following year there occurred an inquisition as to the estate of R. P., deceased, held before barons and legal men of the church, clerks, and laymen.[3]

On the other hand, the first cases, since the Conquest at least, of trials of questions relating to church property in the Ecclesiastical Court occur in this reign. There is a record of an adjudication in the year 1145, in a public synod ("in publica synodo"), of the trial of the right to two churches.[4] In another synod, held the following year, judgment was rendered in a cause between the monks of Basseleeh and Picot, chaplain of St. Gundley, in respect of a certain chapel, its tithes, and cemetery.[5] About the same time a question of the title to certain manors was agitated and decided between bishop Ascelin and the monks of St. Andrew in a court of bishops, abbots, "and other religious men."[6] In the year 1148 an ecclesiastical cause relating to the status of Battel Abbey is tried in the *King's* Court[7]—perhaps because this monastery was under the special protection of the king. And thus the cases fluctuate throughout this reign of Stephen.

The same fact is observable during the first years of the reign of Henry the Second. The Constitutions alone would indicate this; but there are records of actual causes, distinctly establishing the fact.[8] Thus, a trial *anno* 1156 as to the title to the church of St. Gundley was held before a synod presided over by archbishop Theobald.[9] The same appears to have been true of the case of Church of York v. Church of Gloucester, except in its final stage.[10] Indeed, the practice did not entirely cease with the Constitutions. There is a record of a trial in the Spiritual Court in the year 1175 (nine years after

[1] Placita Ang.-Norm. 143.

[2] Ib. 146. The demand of a writ is of itself an appeal to the secular authority.

[3] Ib. 147. [4] Ib. 150-154. [5] Ib. 155. [6] Ib. 160.

[7] Ib. 156. [8] Ib. 174, note. [9] Ib. 182-186. [10] Ib. 189.

the Constitutions) as to a certain church, upon a commission of the pope.[1]

The records concerning offences of the clergy against laymen are not so numerous or decisive in respect of jurisdiction prior to the reign of Henry the Second; but such as we have indicate that the King's Court in some degree exercised the right to punish clerical offenders. So far as questions of treason and abuse of office held of the king are concerned, the records are sufficiently clear. The well-known encounter between William the Conqueror and Odo of Bayeux (his half-brother) in the King's Court, and that of Rufus and William, bishop of St. Carilef, in the same court have already been mentioned.[2] The Case of Bishop Remigius, in the time of the Conqueror, is still more to the point; since in that case the ordeal of fire was actually undergone on behalf of the defendant, who had been accused of treason to the king.[3] And Eadmer tells us that Rufus commanded archbishop Anselm to be ready to do right in the King's Court in respect of a complaint made concerning men sent by Anselm to the king for military duty in Wales.[4]

As to other great crimes, such as homicide, it has already been observed that the fact that the peculiar punishments of the church were inflicted in particular cases does not alone show that the offenders were tried in the clerical courts; for the offences may have been committed against laymen. Criminal charges (not of treason) against a bishop must, it seems, in the time of Henry the First, have been tried in the Ecclesiastical Court;[5] but as to men of the

[1] Placita Ang.-Norm. 219. We do not enter into the controversies growing out of sections of the Constitutions not relating directly to the jurisdiction of the clerical and lay courts. But what has been said may be sufficient to show that Mr. Green's broad statement (Short Hist. of the English People, p. 103) that "the legislation respecting ecclesiastical jurisdiction was wholly new" needs qualification; even if it be entirely true in respect of some of the illustrations he gives.

[2] Ib. 291, 307; *ante*, p. 24. [3] Ib. 30.

[4] Eadmer, Hist. Nov. 37; 5 Freeman, Norm. Conq. 94.

[5] Leges Hen. I. c. 5, § 24.

church of lower rank the records are not always explicit. Chapter lxxiv. of the Laws of Henry the First provides for penitential punishments of bishops, priests, and deacons who have committed homicide; but we are not told in what court the accused (not being bishops) were tried. There is no doubt, however, that all offences *inter clericos* were cognisable only in the Ecclesiastical Court.[1] If crime were committed upon a layman, the lay courts took cognisance of it.[2] As to offences committed by the clergy which did not affect laymen, though the clerical courts, as we have said, always had jurisdiction, it is not improbable that matters of this kind were often tried in the lay courts of the religious houses concerned. According to the Laws of Edward the Confessor (chapter iv.), *all* tenants of the church appear to have had, in the time of the Confessor, the right to a trial in the Ecclesiastical Court for alleged offences, and to resist being put upon trial in a lay court; but this was apparently an exceptional state of things.

There are indications that minor offences (delicts) of the clergy were in the time of Henry the First sometimes treated as subjects of lay cognisance, notwithstanding the language of the custumal bearing that king's name.[3] Thus, William of Jumièges obtains a writ concerning trespass against abbot Faritius in the year 1106.[4] There is another writ for an alleged trespass by the priests of St. Augustine in the year 1113.[5] In Abbot Peter v. Bishop Remelin,[6] in the same reign, the plaintiff recovers the body of a deceased person, carried away by force by the defendant, the trial being had before the king, archbishop Anselm, the earl of Meulan, bishops, abbots, and great men. The court appears to have been secular, for the earl of Meulan delivers the judgment.

[1] Laws Hen. I. c. 57, § 9; Peter Blesensis, c. 16; Dialogue of Ecgbert, c. 8.
[2] Dialogue of Ecgbert, c. 8.
[3] Laws Hen. I. c. 57, § 9. See also Dialogue of Ecgbert, c. 8.
[4] Placita Ang.-Norm. 93. [5] Ib. 110. [6] Ib. 136.

But how much of such exercise of jurisdiction was matter of consent, or of privilege, or of power, in the particular instance, cannot be known.

There was a second branch of jurisdiction in the Ecclesiastical Court which has played a less prominent, indeed, but far more permanent, part in English history. The Spiritual Court of England has jurisdiction at the present day of certain offences of the laity over which it exercised jurisdiction in the eleventh and twelfth centuries. Among these the chief are offences between the sexes, such as adultery and promiscuous intercourse ; though if the illicit act were accomplished by violence, jurisdiction over the offender belonged to the temporal court.[1] This branch of jurisdiction covered also proceedings in matters of marriage and divorce, an example of which may be seen in the case of Richard de Anesty v. Mabel de Francheville.[2]

Criminal intercourse of the sexes was probably always matter of clerical jurisdiction, though perhaps not exclusively so, for among the customs of Kent Domesday states that in cases of adultery the king was entitled to the man, the archbishop to the woman.[3] And this was substantially true in the twelfth century.[4] But when the king or earl was not interested, the jurisdiction was probably ecclesiastical, after the Conquest if not before.[5]

[1] Glanvill, lib. 1, c. 2 ; lib. 14, c. 6. [2] Placita Ang.-Norm. 311.

[3] 1 Domesday, 1. [4] Laws Hen. I. c. 11, § 5.

[5] A passage in Leges Hen. I. c. 7, § 3, may seem to indicate that the trial was in the popular court.—1 Stubbs, Const. Hist. 232, 233. But this passage only declares that the causes of the church are first to be tried, on the assembling of the County Court—"agantur itaque primo debita veræ christianitatis jura"—which appears to refer to the rights generally of the church as plaintiff and not merely to criminal forfeitures in which the church was interested. The church had, of course, the same right to sue in the popular courts as the laity. The Penitentials seldom speak of the forum. See, for example, 2 Thorpe, Anc. Laws, 82-85 (8vo ed.). But in the Dialogue of Ecgbert, c. 8, it is said that criminal offences of the sexes by persons within the church were of clerical cognisance.—2 Anc. Laws, 90. Professor Stubbs agrees that for the punishment of disobedience, heresy, drunkenness, and the like by the clergy there were special spiritual courts before the Conquest. "For such, then, it is probable that the

To the Spiritual Court appears also to have belonged the punishment of defamation until the rise of actions on the case,[1] when the temporal courts assumed jurisdiction, though not, it seems, to the exclusion of punishment by the church. The *punishment* of usurers, cleric and lay, also belonged to the ecclesiastical judges, though their movables were confiscated to the king, unless the usurer "vita comite digne pœnituerit, et testamento condito quæ legare decreverit a se prorsus alienaverit."[2] That is, it seems, the personal punishment was inflicted by the Ecclesiastical Court, but the confiscation of goods (when proper) was decreed by the King's Court.[3]

The third subject of jurisdiction of the Ecclesiastical Court has also remained in that court to the present day, namely, the decision of disputes arising over the estates of decedents. Wills had been unknown, it seems, among the Teutonic races before the introduction of Christianity; and the church, having brought into practice the usage of the Roman nation, naturally assumed and retained jurisdiction over questions arising from testaments, so long at least as no dispute over making the will or the right to make one arose.[4] Pleas

bishops had domestic tribunals not differing in kind from the Ecclesiastical Courts of the later age and of matured canon law."—1 Const. Hist. 233. But that the practice in respect of purely ecclesiastical causes *had* been irregular, that they had been brought before the lay courts at an earlier time, appears from the Conqueror's charter of jurisdiction.—*Ante*, p. 30. Appendix, No. 1.

[1] Under the Stat. of Westm. 2, c. 24, *anno* 1285.

[2] Dialogue of the Exchequer, Stubbs, Sel. Ch. 229 (2d ed.).

[3] Ib. 229, 230. The passages are somewhat obscure. The clause above quoted appears to indicate that wills were not ambulatory during the lifetime of the testator as in modern times. See also Placita Ang.-Norm. 249. But the language may imply a present disposition on the making of the will.

[4] Questions in advance as to the right to make a *proposed* will, were considered in the lay courts. See Placita Ang.-Norm. 249. Peter of Blois, as has before been remarked, *ante*, p. 25, n. 4, thought the ecclesiastical judge ought not to entertain jurisdiction of wills or of any other secular matter, except incidentally or accessorily. "Nemo militans Deo," he says, "implicat se negotiis secularibus. Unde non videtur quod ecclesiasticus judex debeat cognoscere de causis secularibus; ut de *dote*, de *successione*, de *testamentis*. Referre ergo arbitror, utrum de tali causa velit episcopus

concerning testaments, says Glanvill, however, in general terms, whether the question were if the will was good, or upon its interpretation, ought to be tried before the ecclesiastical judge.[1] And as questions of legitimacy in relation to the title to property also belonged to the Ecclesiastical Court,[2] so, to the extent of determining the question of bastardy or not, but no further, that court had jurisdiction of disputes over intestate property as well as over testamentary. The demandant in respect of lands alleged to have been given *in maritagio* could also, at his election, bring suit in the time of Glanvill in the Court Christian.[3] The jurisdiction, Glanvill tells us, was acquired from the mutual troth usually plighted. Nor was the ecclesiastical judge prohibited from holding plea in such matters, though the claim related to a lay fee, if it were clear that the demand related to marriage; unless the suit were brought against a stranger to the blood.[4]

The permanent results of the reforms instituted by Henry the Second in derogation partly of the recently assumed, partly of the ancient, clerical jurisdiction may be thus summarised: 1. All questions agitated concerning church property were relegated to the King's Court, or other lay court, in one form or another. 2. All offences committed by men in orders upon laymen were to be redressed alone in the lay courts. 3. Debts and demands in favour of laymen against clerics were to be sued in the same courts. 4. Redress by clerics against laymen, when it was not pursued for the mere purpose of punishing sin, was to be sought in the lay courts.

On the other hand the Court Christian still retained jurisdiction in the following cases: 1. Over offences between the clergy alone. 2. Over small debts and perhaps minor

principaliter cognoscere, an incidentur, imo accessorie, verbi causa cognoscendo de causa matrimonii, utrum debeat separari, potest cogere maritum prestare cautionem de restituenda dote. Sic igitur episcopus, non principaliter, sed incidenter, et, ut generalius dicam, accessorie, potest de civile causa cognoscere."—Peter Bles. c. 10.

[1] Glanvill, lib. 7, c. 8, § 1. [2] Ib. cc. 13–15. [3] Ib. c. 18, § 5. [4] Ibid.

property causes between the clergy. 3. Over matrimonial causes, the conduct of the sexes, defamation, usury, and wills. 4. Over (it seems) crimes committed by the laity, when jurisdiction was sought for the purpose of imposing ecclesiastical censure, admonition, or penitential punishment.

The jurisdiction of the Ecclesiastical Court having thus become settled before the close of the reign of Henry the Second, a way was found to keep that court within the limits fixed, to wit, by means of a writ of prohibition, issued from the King's Court;[1] a writ in use from the time at least of Glanvill, and probably earlier, until the present day—the last survival, almost, of the ancient equitable jurisdiction of the King's Court to require specific, personal obedience in an adverse party.

Besides cases in which there was a settled line of demarcation as to the jurisdiction of the Ecclesiastical Court and the temporal courts, there were cases, some of which have already been incidentally alluded to, in which the jurisdiction appears to have been shared between the king, or lord, or both, and the bishop or archbishop. There are certain pleas of Christianity, say the Laws of Henry the First, in which the king has a share in this manner: If the king permit anyone who has committed homicide within a church to make compensation for the act, the party must first pay to the bishop and the king the price of his birth, and so in-law himself; then he must pay five pounds for the peace of the church, and seek reconciliation of the church, as shall belong to it.[2] Again, as to the withholding of tithes by a tenant, the king's officer was to go to the land, and the bishop and the lord of the land, with the priest, were to take the crops and render to the church what belonged to it (that is, the tenth part, or tithe), and

[1] Glanvill, lib. 4, cc. 12–14; lib. 12, cc. 21, 22. A similar mode of restraining the other courts from encroaching upon the jurisdiction of the King's Court probably prevailed; as may be inferred from the special writ as to the Magna Assisa.—Glanvill, lib. 2, cc. 7, 8. Comp. App. No. 56.

[2] Laws Hen. I. c. 11, § 1.

leave the ninth part (that is, one of the ten parts, the tenth one having gone to the church) to him who had refused to pay his tithe; the rest, the other eight parts, they were to divide, the lord to have half and the bishop half, even though the tenant in default were a man of the king.[1] Romescot was due at the feast of St. Peter ad Vincula; and he who then withheld it must pay the money and thirty pence additional to the bishop, and fifty shillings to the king.[2] The penalty for withholding churchscot after the feast of St. Martin was similar.[3] In the case of adultery committed by a married man (*uxoratus*),[4] the king, as has elsewhere been stated, was to have the man, the bishop (not the archbishop, as in Domesday for Kent) the woman.[5] The man who committed perjury upon the Gospels was to lose his hand or half his were, this to be divided between his lord and the bishop.[6] The man who simply bore false testimony was not thereafter to be allowed to appear as a witness, and must pay to the king or the lord of the land "helsfang."[7] One who slew or maligned a man in orders should make compensation according to right; to the bishop payment according to the rank of the party slain or injured; and to the king or lord the full sum for the breach of peace; or he must deny with full "lada."[8] One who unjustly held "Dei fugitivum" must give him up "ad rectum" and make payment to the proper person, and to the king according to his wergeld; and anyone who kept an excommunicated person or an outlaw was to perish without pardon. Every payment (permitted in such a case) was to be divided between the church and the king.[9] And, generally, in causes

[1] Laws Hen. I. c. 11, § 2. [2] Ib. § 3. [3] Ib. § 4.

[4] This shows the difference between the canon and the (Roman) civil law; by the latter only the (married) woman could commit adultery. See Smith, Dict. Christ. Antiq. title Adultery.

[5] Laws Hen. I. c. 11, § 5.

[6] Ib. § 6, from Laws of Cnut, Sec. cc. 36, 37. See also Edw. Sen. c. 3; Æthelstan, lib. 1, c. 25; Bracton, 185, § 2.

[7] As to this term, see Glossary to Thorpe, Anc. Laws, vol. ii.

[8] Laws Hen. I. c. 11, § 8; c. 66, § 1; Laws of Cnut, Sec. c. 44.

[9] Hen. I. c. 11, § 14.

for which compensation might be made, the lords of lands could take a pecuniary fine, according to the law of the locality.[1] There is no evidence of any change of the law in these matters during the twelfth century.

In what court or courts such mutual demands were enforced does not clearly appear; but it is not unreasonable to suppose that either party might take the first step, the bishop in his own or in a lay court if he preferred, the lord in his own or perhaps in the bishop's court, and the king in his own court. Prior to the reforms of Henry the Second, a fixed, specific right of action appears always to have involved jurisdiction in the superior of the party entitled to the right, or in the party himself when he had a court of judicature; and it would follow, it seems, that either the bishop, lord, or king could sue in his own court if jurisdiction had not already been entertained by either of the others in behalf of all. Where, however, the offence out of which the common claim proceeded was within the sole soen of a franchise, as, for example, a theft within the league of St. Edmund, the thief having been taken there, the party having the local jurisdiction must have proceeded in order to fix the specific amount of the fund to be divided; and if he did not so proceed, and the king was interested, the party holding the soen was probably liable to a mulct to the king.

The elaborate system of procedure in the Ecclesiastical Court made known by the text-books was unknown to the lawyers of the Norman period;[2] though it is not unnatural to presume that, alongside of agencies at work on the Continent, the seeds of that system were sown by the teaching of Vacarius at Oxford, in the later years of the reign of Stephen. This learned man is said to have published, while there, nine

[1] Hen. I. c. 11, § 15.

[2] The church courts of England perfectly understood the canonical division of petitory and possessory actions as early as the year 1203, and probably long before. Chron. Evesham, 130 (Rec. Com.). The subject will be referred to again in the chapter on the Writ Process.

books on the Roman Law, composed of materials from the Digest and Code.[1] But his expulsion by Stephen, or his enforced silence at all events, prevented the accomplishment of any immediate results.[2] There had, however, always been an "ordo judiciarius" in the trial of ecclesiastical causes, conformity to which was generally required by the canon law;[3] and to the nature of this *ordo* we now direct our inquiry.

The materials for reconstructing the old ecclesiastical procedure are fragmentary; but if not sufficient to fully set forth its details, they are enough to clearly indicate its general nature. Suit was begun by simple summons — whether executed upon the defendant in person, as in the temporal courts, or by letters placed upon the altar, as, sometimes, in the thirteenth century, the records do not state, but probably in the former manner—and never by distress. The formality of a summons, however, was probably dispensed with in cases of complaints made at synods, at which both parties were present and prepared for the cause; as may be inferred to have been the case in Archbishop Roger v. Bishop Geoffrey.[4] Summons, as in the temporal courts, was to be made "once, twice, and thrice," unless sooner obeyed; after which time, if the defendant failed without excuse to appear, he was in contumacy, as in the lay tribunals.[5]

[1] "Suggestione pauperum de Codice et Digesta exceptos ix. libros composuit, qui sufficiunt ad omnes legum lites quæ in scolis frequentari solent decidendas si quis eos perfecte noverit."—Duchesne, Hist. Norm. Script. p. 983 (Paris, 1619); Wenck, Vacarius, p. 2. See also 1 Stubbs, Const. Hist. 494, note.

[2] "Tempore regis Stephani a regno jussæ sunt leges Romanæ, quas in Britanniam domus venerabilis patris Theobaldi, Britanniarum primatis asciverat. Ne quis etiam libros retineret edicto regio prohibitum est, et Vacario nostro indictum silentiam; sed Deo faciente [favente?] eo magis virtus legis invaluit, quo eam amplius nitebatur impietas infirmare."—John of Salisbury in Biblioth. Patrum Max. xxiii. p. 404 (Lugd. 1677); Wenck, Vacarius, pp. 31, 32.

[3] Peter Blesensis, c. 3. Exceptional cases are mentioned in the chapter cited and in c. 4. See also ib. cc. 42, 44; Regino de Synodalibus Causis, pp. 399, 400 (Wasserschleben).

[4] Placita Ang.-Norm. 223.

[5] As to contumacious absence, see Peter Blesensis, cc. 58-60; Carta Willelmi, App. No. 1; Battel Abbey Chron. 79 (Ang. Christ. Soc.); Regino de Synodalibus Causis, pp. 330, 331.

The archdeacon, acting for the bishop in his absence, held the ordinary clerical court of a diocese,[1] as the steward (dapifer) held the lord's lay court; and the defendant chose judges to sit with the archdeacon. Nor could a cause proceed, if objection were made, before this was done.[2] The pleadings in private causes were probably conducted to an issue in formal manner by oral plaint and defence, much as in the temporal courts;[3] though there is reason to suppose that there was more freedom from rigid formalism of language. Certain it is that nothing is said in the records concerning miskenning (mistake of language in pleading) in the pleading of ecclesiastical causes before the thirteenth century. And in great public causes, such as questions of ecclesiastical authority and independence, turning upon charters or other documentary evidence, the pleadings lost all rigidly formal character, being swallowed up in the arguments presented by the parties,[4] as appears to have been true also in like causes before the lay courts.[5] And in some cases of prosecutions for aggravated offences the "ordo judiciarius" was abandoned altogether.[6]

No ecclesiastical cause was to be tried (ordinarily, it seems) without an "accusator" present in court;[7] and the accusers and witnesses (a term which included compurgators) were to be legal men, confronting the defendant in court, and free from infamy, suspicion, or manifest taint, since priests

[1] As to the early mode of holding the bishop's courts in making the circuit of his diocese, see Regino de Synodalibus Causis, pp. 206–216 (Wasserschleben).

[2] Leges Hen. I. c. 5, § 5; c. 33, § 5; Excerpts of Ecgbert, c. 143; 2 Thorpe, Anc. Laws, 120. Comp. Edw. Conf. c. 36, as to lay causes.

[3] See, for example, the Case of Matilda, Placita Ang.-Norm. 79, referred to at length *infra*, p. 63; Leges Hen. I. c. 5, § 1.

[4] See Richard de Luci v. Odo, App. No. 3; Hist. Mon. de Bello, 78 *et seq.* (Ang. Christ. Soc.).

[5] Trial by charters, issues of law, and other questions for the judges, appear to be the only cases in which arguments were possible under the Teutonic procedure.

[6] Peter Blesensis, cc. 3, 4.

[7] Leges Hen. I. c. 5, § 7; Regino de Synod. Caus. 495. See Peter Bles. cc. 4, 11. Accusation *inter clericos* was to be in writing, at least on the Continent. Regino de Synod. Caus. pp. 399–401.

could not be accused by men who could not be priests.[1] But, further, it seems that laymen were not allowed to accuse clerks in the Ecclesiastical Court, or clerks to accuse laymen.[2] If many criminal charges were brought against clerks by accusers (that is, by the same accuser, and perhaps against the same clerk), failure in one of the cases required that the rest should be dropped.[3] A bishop was not to be adjudged guilty except by seventy-two witnesses, nor an archbishop by any number (in an ordinary court). Forty-four witnesses were necessary to convict a priest "cardinalis"; twenty-six a deacon "cardinalis"; and seven a sub-deacon or clerk of lower order.[4] If a bishop had deviated from the faith, and after private admonition appeared incorrigible, he was to be accused before the highest men of the church, or before the pope.[5] If he were accused of certain crimes, he was to be heard by all the bishops "in provincia," and not to be found guilty until legitimate accusers were present, men of his own county (or country, "comprovinciales"), and not foreigners.[6] And in the case of a priest or any clerk accused by the people ("a populo," by the popular voice, without a special "accusator"), if there were no certain witnesses of the offence charged, who knew of the truth, the accused was to make oath of his innocence, calling God to witness of the truth;[7] which shows that formal accusation by an accusator was not always necessary.

The case already referred to of Archbishop Roger v. Bishop Geoffrey[8] shows the general character of pleadings in private causes in the latter half of the twelfth century, or, to be precise, in the year 1176. The parties had come together in a council held at Winchester before the king,

[1] Hen. I. c. 5, § 9.

[2] Ib. § 8; Excerpts of Ecgbert, cc. 44, 45; 2 Thorpe, Anc. Laws, 121.

[3] Hen. I. c. 5, § 10. [4] Ib. § 11. [5] Ib. § 25. [6] Ib. § 26.

[7] Ib. § 27. These passages from the Laws of Henry I. are for the most part taken from ancient canons of the church, as may be seen by an examination of the Dialogue and the Excerpts of Ecgbert, 2 Thorpe, 87–127. [8] *Ante*, p. 56.

bishops, and great men, assembled for the purpose of effecting a reconciliation between the archbishop and the bishop as to a scene of alleged violence in London.[1] It seems, therefore, to have been an ecclesiastical council. The short account of the case states that the archbishop complained to the king before the assembly that Geoffrey, on the occasion referred to, laid violent hands upon him; which charge was traversed by a direct denial. And the defendant therefore proceeds to purge himself in the sight of the king and bishops present, "in the word of truth, according to law," upon the Gospels placed before him.[2] This was declared by the archbishop of Canterbury to have been legally done; whereupon the parties were reconciled.[3]

The appointment of a second or trial term must have been necessary in many, indeed in most, cases; for accused clerks, like laymen, were commonly required to produce compurgators or witnesses, and sometimes to undergo the ordeal—that of bread or cheese, called the "corsnæd" in Cnut's laws, peculiar to the clergy, or the iron[4] or water ordeal, perhaps. Either form of proof ordinarily required preparation. This involved the declaration of a medial, as opposed to the final, judgment; in which, as will hereafter be seen to have been the practice in temporal causes, the court laid down a rule declaring who should bring the proof, when he should bring it, and of what it should consist. The question of the burden of proof, in the peculiar sense of the procedure of the Norman period—that is, which one of the parties should furnish the particular test or proof required by the

[1] 1 Twysden, Script. 1109.

[2] "Quod Eliensis episcopus expresse negans, in conspectu regis et episcoporum circum astancium sacrosanctis evangeliis coram eo positis, de hoc in verbo veritatis legitime se purgavit."—Placita Ang.-Norm. 224.

[3] It is not stated whether the defendant appeared with compurgators; but it is probable he did. In another case (if there is not a mistake in the date) between the same parties it is said that the defendant acquitted himself "cum centissima manu presbiterorum."—2 Anc. Laws, Glossary, Oath.

See Case of Bishop Remigius, Placita Ang.-Norm. 30.

court for deciding the cause—could arise only when the action was to be tried by compurgation, party-witness, or ordeal; all of which modes of trial prevailed in the clerical courts. The other modes of proceeding were not party-proof, but inquiries into the whole truth. This was as true of trial by charters as of trial by inquisition or recognition. In a matter of charters, if but one of the parties had a charter, he produced it without regard to the state of the pleadings: if both parties had charters, both produced them for the consideration of the court.

As to party-proof, however, the rule in most cases required the party making the last good pleading, in answer to a presumption against him, to substantiate the same by the prescribed proof, otherwise the opposite party might prove *his* allegation; as will later be seen to have been the rule in the lay courts. Perhaps there were no real exceptions to this rule.[1] The law above quoted concerning the number of witnesses required to prove bishops, priests, deacons, or the lower clergy guilty of crimes appears merely to indicate the value of the oath of denial of such persons respectively; not that they could not still produce witnesses or make other proof of innocence when the accuser brought forward sufficient witnesses to prevent the efficacy of mere denial on oath. The procedure appears to have been this, that the accused cleric gave simply the oath of denial in case the accuser failed to produce the stated number of witnesses, and that he (the cleric) added to his own oath such other evidence as the court might by law prescribe, when the accuser produced the number of witnesses necessary for conviction in a case defended. Thus, in the case of Archbishop Roger v. Bishop Geoffrey,[2] several times referred to,

[1] Peter of Blois mentions some exceptions to the following proposition: "Regulare est, ut qui allegat ignorantiam, eam probare compellatur." But the exceptions are where there can be no presumption of knowledge. Proof was never necessary unless a presumption was raised against the party.

[2] Placita Ang.-Norm. 223.

the defendant gives his oath of denial; and this was sufficient because the plaintiff had not brought forward witnesses, or witnesses enough.

If it were clear that the term "synod" was used in a strict sense in the pre-Norman records, such could be referred to as very satisfactory confirmation of this rule concerning the ecclesiastical procedure of the Norman period; for though the higher English clergy had been supplanted by Normans before the end of the eleventh century, there is no reason to suppose that ecclesiastical procedure in Normandy differed materially from that in England. It had the same origin, and was mainly under the same influence. But the records of clerical litigation in England before the Conquest generally relate to the temporalities of the church; and though such litigations are often said to have been before synods or synodal councils, the records strongly suggest the Witenagemot.[1] The Witenagemot itself, however, might be a clerical as well as a lay court. The witan of the kingdom might be assembled as a Great Synod, to legislate for the church, as well as to legislate for the people at large; and hence the practice before such a body cannot be without significance. The record of some of the cases, however, is clear. Thus, in the Case of Beornwulf of Mercia,[2] the assembly is described as "*pontificale* et synodale conciliabulum." Suit was brought by the monastery of Berkeley against bishop Heaberht for possession of the monastery of Westbury; and the oath-proof was given to the defendant, who held a charter.

This rule that the last good pleading gave the case into the hands of the party who made the pleading is illustrated by the cases of the trial of the Albigensians for heresy in the years 1176 and 1178; which, though they occurred at Toulouse, may safely be considered as exhibiting the pro-

[1] See *ante*, p. 44, n. 4.

[2] Essays in Ang.-Sax. Law, 327, and Thorpe, Dipl. 67, *anno* 824.

cedure of the Ecclesiastical Court in England as well. In the first trial, after the accused had been inquired of concerning their belief (for the purpose apparently of enabling the accuser to make a formal accusation), and judges had been chosen by both sides, and the pleadings on the one side and on the other set forth with argument and authorities (the question being one of law), judgment is pronounced against the defendants in an argued ruling of the court, resembling an opinion in the Law Reports of the present day. Thereupon the defendants turn to the people present and make a statement of their belief, at variance, as it seems, with what had been already stated by them or imputed to them on the trial; and this statement, notwithstanding its apparent irregularity, seems to have been deemed a good answer (a "traverse") to the accusation and judgment. It was not enough, however, that they had verbally answered the charges preferred; they must also prove their answer. For this an oath was required, and this the defendants refused to give, basing their refusal on the scriptural injunction against swearing.[1] Authorities are again quoted against them on this point, and an additional judgment of heresy is now pronounced.

The second trial further and more definitely illustrates the same feature of the procedure. In this instance they deny at the outset of the accusation the imputed heresy; and although their present statement was doubted, "the cardinal and bishops ordered them to swear that they believed in their hearts as they had confessed with their lips. But they," as Roger de Hovenden says, "like men of distorted minds and crooked intentions, were at length unwilling to abandon their heresy where any semblance of authority seemed to aid their crass and drowsy intellects, using as an excuse the words which the Lord is mentioned in the Gospel as having said, 'Swear not all.'" There is nothing to indicate that the oath

[1] Comp. Peter Blesensis, c. 35.

was to be promissory,—that they would conform to the faith in the future,—in which case of course it would lose all significance as an illustration of the point under consideration. The defendants deny the truth of the accusation, and are asked to swear to their belief as stated in the denial.[1]

What has been said shows that the party-proof of the temporal courts,[2] in all its forms, was in use by the clergy. Trial by inquisition and recognition prevailed also in the Ecclesiastical Court. The Case of Matilda[3] affords a graphic view of that mode of procedure at the very beginning of the twelfth century (*anno* 1101), and deserves to be stated at length. This was the famous case of the English lady who, as the result of the decision, was joined in marriage to King Henry the First. She had been charged by the Normans, who opposed Henry's marrying a lady of English blood, with having taken the veil of a nun; and as she had finally accepted the king's proposal, it became necessary for her to show that she was eligible for marriage. She accordingly lays her case before archbishop Anselm, stating that she had indeed, in her youth, sometimes appeared veiled, but that she was then under the charge of an aunt, who, to protect her from the libertinism of the Normans, had occasionally placed a piece of black cloth over her face. This, however, she had, as she affirmed, always refused to wear, and had torn it off as soon as her aunt was out of sight.

Anselm, unwilling to act alone in the matter, now summons a council of religious persons, bishops, abbots, and even (as was common) nobles, and other men of orders to try the question raised against Matilda. The cause was brought before the court in accordance with the prescribed course ("juxta præscriptam seriem");[4] and competent witnesses ("idonei testes") were present to support the statements of

[1] Both trials as here stated will be found in Roger de Hovenden, under the years 1176 and 1178. [2] See chapter ix. [3] Placita Ang.-Norm. 79.

[4] This no doubt refers to the formal plaint made by some Norman, and the defence by Matilda.

Matilda. Two archdeacons, whom Anselm had sent to Wilton, where Matilda had been brought up, to ascertain the truth, testified "publica voce" that they had made most diligent inquiry of the women there, and that there was nothing opposed to what Matilda affirmed.[1] The facts had now been found, and the only remaining question was whether, as matter of church law, Matilda had, upon the facts, barred herself from the right of marriage. The rest of the case is not without interest, and may be added. Anselm submits the law question to the judges, and, that they may deliberate wholly uninfluenced by him, then withdraws. The matter is considered in his absence, and an unanimous decision reached, based upon a precedent (upon similar facts) afforded under Anselm's predecessor, Lanfranc, that Matilda was at perfect liberty to marry if she chose. Anselm is called in, the decision stated, and the precedent rehearsed; the judges, however, declaring that the case would have been equally clear without the precedent. Matilda is then brought into court and informed of the decision. She thereupon offers to confirm the same by oath or in any other manner prescribed by ecclesiastical law, but is told that nothing more is necessary.[2]

The most complete view of ecclesiastical purgation is found in the Ecclesiastical Laws of Cnut, chapter v., "De Purgatione Ordinatorum,"[3] which though perhaps relating to the government and discipline of the members of monasteries and other religious houses, and not primarily to the diocesan court of the bishop or archdeacon, probably reflects the procedure of the latter court, with which we are mainly concerned.

[1] Here is an exemplification of the modern jury in its most essential features. The archdeacons are the jury (recognitors), appointed by a disinterested party. They inform themselves as to the facts through credible witnesses, and report accordingly; and their verdict settles the facts. They are not under oath because they are men of high position in the church. The subject of the jury will be considered in another chapter.

[2] For continental documents illustrating the like procedure, see Regino de Synodalibus Causis, lib. 2, c. 2; and see Dove, Zeitschrift für Kirchenr. v. 23; Brunner, Schwurg. 463.

[3] 1 Thorpe, Anc. Laws, 362; 2 ib. 522.

It is there declared that if "a priest who lives according to rule is charged with an offence and with evil practices, and he knows himself innocent thereof, let him celebrate mass if he dare, and clear himself on the housel [eucharist] in a simple suit; and in a three-fold suit [that is, in a heavy accusation] let him also, if he dare, clear himself on the housel with two of his fellow-ecclesiastics. If a deacon, living according to rule, be accused in a simple suit, let him take two of his fellow-ecclesiastics, and with them clear himself; and if he be accused in a three-fold suit, let him take six of his fellow-ecclesiastics, and with them clear himself, and be himself the seventh. If a secular mass-priest be charged with an offence, who has no regular life, let him clear himself as a deacon who lives a life of rule; and if a friendless servant of the altar be charged with an offence, who has no support to his oath, let him go to the corsnæd ordeal, and then fare as God will, unless he may clear himself on the housel. And if a man in orders be charged with the feud ["fæthe"], and it be said that he was perpetrator or adviser of homicide, let him clear himself with his kinsmen, who must bear the feud with him or make compensation for it; and if he be kinless, let him clear himself with his associates or betake himself to fasting, if that be necessary, and go to the corsnæd ordeal, and fare as God may ordain. . . . And if a mass-priest stand anywhere in false witness or in perjury, or be cognisant and perpetrator of thefts . . . . if he desire to clear himself, let him clear himself according to the degree of the deed, either with a three-fold or with a simple purgation, according as the deed may be."[1]

Depositions were often sent to the court by the clergy in civil cases, and usually closed with or contained the formula of the appeal or plaint of a plaintiff in a lay court—"and this I am prepared to prove"[2] or "to prove as may be ordered,"[3]

[1] Much of this may also apply, probably, to the trial of clerics in the lay courts.
[2] Placita Ang.-Norm. 194, 195. [3] Ib. 196.

or "to prove in the sight of all, at a place and time."[1] On one occasion the deponent offers to undergo the ideal of iron, or whatever equity should dictate, nothing hesitating.[2] The same practice of sending depositions had prevailed, as might be supposed, before the Conquest.[3]

Trial by record, called "lex recordationis" in law books of the thirteenth century, was the decision of a question at issue by proof of a judgment, or of pleadings or proceedings, according to the nature of the question, in a previous cause between the same parties or others under whom they claimed, as at the present day, though the litigation itself must generally, in the absence of an enrolment, have been proved by witnesses, as in the lay courts.[4] Indeed, this oral proof of the prior cause was itself the record, the *recalling* it to mind. That this form of trial prevailed in the Ecclesiastical Court in England the Case of Matilda furnishes indirect evidence. The judgment referred to in that case was cited as a precedent of law merely, and not, since it was *inter alios*, as *res judicata*, and inapplicable to prove any fact now in issue. But the use of the precedent shows the value attached to a former decision; and what was said or done on a previous trial could not have been held in lighter esteem than in the lay courts.

In contrast with the foregoing kinds of trial must be mentioned trial by charters, in which commonly, as in questions of law, the decision devolved upon the judges. As for trial by charters, documentary evidence had been introduced into use in the lay courts, it seems, by the church probably with the conversion of the people, as the most satisfactory of all modes of ascertaining the truth; and wherever it could be used in ecclesiastical causes, it was no doubt received with like favour. Its uses in such causes, prior to the reign of Stephen, however, when trials of property interests first came into general vogue in the Court Christian,

[1] Placita Ang.-Norm. 193, 194. [2] Ib. 196. [3] Thorpe, Dipl. 378, 379.
[4] See Placita Ang.-Norm. 290, for such a case in a lay court.

must have been somewhat limited. From that time on the use of charters in that court was frequent; and when the issue in a cause turned solely upon a document, other modes of proof, except by witnesses (who were frequently called in support of the charters),[1] must have been dispensed with and the case decided by the court, as questions of law were determined.

A good illustration of trial by charter in the Ecclesiastical Court will be found in the case heretofore referred to, of Godfrey de Luci v. Abbot Odo.[2] This was an action for a moiety of the living of Wye, claimed by the plaintiff under the king, and withheld by the defendant on the ground of the invalidity of the plaintiff's title, and the ancient title of the defendant. It was, therefore, in reality a lay cause under the Constitutions of Clarendon and under the later law. It occurred, however, *anno* 1176, during the eclipse of the king's independence, consequent upon the death of à Becket; and jurisdiction was entertained by order of the pope's legate, Hugezun, without question, before a general synod of "the whole clergy of the kingdom." But though it was properly a lay cause, and though the king's own grant was freely questioned, there is nothing to indicate that the procedure as to the charters was at all unusual.

The court having convened, the plaintiff, who was abroad, appeared in the person of a procurator; who opened the cause by producing letters patent from Godfrey, authorising his appearance. He then proceeds to state the plaintiff's case in language free from technical formalism; declaring that during a vacancy by death in the defendant's abbey (Battel), to which Wye had been attached, the king had granted him the church at that place, including the moiety of the living in question. So saying, he exhibits the king's

[1] Placita Ang.-Norm. 27 ("per cartas suas et per testes suos"), 151, 152.

[2] The case will be found in the Appendix, No. 3. For other examples of trial by charters in the Ecclesiastical Court, see Abbot Gausbert v. Bishop Stigand, Placita Ang.-Norm. 15; Abbot Walter v. Bishop of Chichester, ib. 156.

charter of gift. He then proceeds to assert that Godfrey was now inducted, upon the king's presentation, by Richard, archbishop-*elect* of Canterbury; who gave letters under such seal as he then had, "for he was not yet come to full authority." The letters are produced. The procurator then proceeds to declare that the archbishop, upon consecration, confirmed his late act by a new institution, and shows the charter. He now demands, upon these allegations and documents, full possession, and adds, what is worth noticing, the statement: "And full possession being had, if any question arises against us, I am ready to reply to the abbot and monks, and to make satisfaction according to due course of law"—a common phrase, it is apprehended, in lay causes.[1]

The suggestion of a plea to the jurisdiction of the court seems not to have occurred to the defendant, though he was in great straits over the situation. At all events, no such step was taken. The defendant's answer, made by counsel, was in the nature of a demurrer (to evidence) argued at length. "Fearless alike of the king, of the archbishop, of the great men, and of all their retainers, master Gerard expressed himself with ready speech on behalf of the abbot." He denied the right of the king to give the vacant church as he had attempted to do; and the institution by the archbishop was argued to have been null, especially by reason of a particular declaration of the pope. The defendant's position could not be overturned; and (with a prudent regard for the king's seal) the case was now, by advice of the court, compromised.

Here then was trial by oath (including compurgation), witnesses, ordeal, inquisition, recognition, record, and by charters, as in the lay courts. Trial by duel alone was wanting. This had always been discountenanced by the church; and it was, possibly, owing to the opposition of the English clergy that the judicial duel played no part in the Anglo-

[1] See Privilegium Raimundi, in the Appendix, No. 2.

Saxon procedure.[1] At all events, decrees forbidding the clergy from engaging in battle were numerous.[2] Thus closely did the procedure of the Ecclesiastical Courts conform to that observed in the temporal courts; a fact which does not cause surprise when it is known how extensively the canon law itself was permeated at this time with Teutonic influences.[3]

Appeals could be taken at any stage of an ecclesiastical cause; to the bishop if the trial was in the archdeacon's court; to the archbishop and his bishops if the cause was in the court of a particular bishop; and to the pope if it was in a general council or synod of the church, or in the special court of the archbishop.[4] It was not necessary for a party to await a judgment of the court before taking an appeal, even to the pope. He could do this at the very outset of the cause, or at any time in the progress of the trial; and both sides could appeal in one and the same cause. An example may be seen in the case of The King v. Bishop William of St. Carilef,[5] *anno* 1088, of an appeal to the pope by the defendant in the course of a cause; another in the case of The King v. Thomas à Becket,[6] *anno* 1164, of the same kind; and another in the case of Richard de Anesty v. Mabel de Francheville,[7] *annis* 1158–1163, of like appeals by both parties.

Irregular and frequent resort to appeals, however, resulted in abuses requiring the correction of the church. At a council convened by the pope in the year 1179, one of the decrees

[1] See the suggestion of a learned writer in the London *Athenæum* for July 19, 1879. "We have no doubt," he says, "of the original existence among the English of trial by battle. . . . The influence of the bishops in the Witan over the written legislation of the kings, and the declaration of the law in the County and Hundred Courts by the bishop or archdeacon along with the earldorman, easily account for the disappearance of an institution abhorred by the church."

[2] See, for example, Excerpts Eegb. c. 155; 2 Thorpe, Anc. Laws, 124; c. 161; 2 Anc. Laws, 126.

[3] For example, see Regino de Synodalibus Causis, pp. 226 *et seq.* 332 (Wasserschl.). [4] Const. Clarendon, c. 8.

[5] Placita Ang.-Norm. 307, 309. [6] Ib. 213. [7] Ib. 311, 313.

promulgated recited that a very reprehensible custom, by reason of irregular appeals, had sprung up; bishops and even archdeacons, fearing that an appeal might be taken in causes before them, having proceeded without notice to pronounce sentence of suspension and excommunication. On the other hand, ran the decree, others, dreading the sentence of their superiors, interposed their appeals without difficulty, usurping the right as a defence to their iniquity; whereas appeals were instituted as a safeguard for the innocent. Therefore, to the end that neither the sentence of the prelate might be used to oppress those subject to him, nor those subject enabled at their sole option, under pretext of an appeal, to escape correction by their superiors, it was decreed that prelates should not pass sentence of suspension or of excommunication without first issuing canonical admonition (unless the fault was such as of its own nature to require that penalty)[1]; nor should those who were subject seek to take refuge in an appeal before the commencement of a trial. If, however, anyone should feel obliged to appeal, then a competent time was to be named for him within which to prosecute it. If he should then neglect to prosecute his appeal within the time named, the bishop should be at liberty to proceed with the trial. And if after taking an appeal the party appealing did not appear, but the other party did, the latter should be entitled to his costs against the former if he was able to pay them. And finally it was enjoined that monks and men of inferior order, when about to receive correction for their excesses, should not appeal at all against the discipline of their prelate and chapter, but submit humbly and dutifully to the same.[2]

The punishments following conviction were all of a penitential nature; though if pecuniary damage had been

[1] Cases in which the "ordo judiciarius" was omitted.—*Ante*, p. 56.

[2] Roger de Hovenden, *anno* 1179. See further as to appeals, Peter Blesensis, cc. 43, 59. The latter chapter treats of appeals by contumacious persons.

inflicted, compensation was also enjoined. Chapter lxxiii. of the Laws of Henry the First, concerning homicides committed by the clergy, will afford a sufficient illustration of the nature of ecclesiastical punishments. "If a bishop commit homicide, let him be deposed and repent for twelve years, seven on bread and water, and for five years let him fast three days in a week, and the rest of the time eat common food. If a priest or monk slay a man, let him lose his orders and repent for ten years, six on bread and water, and for four years let him fast three days in a week, and the rest of the time eat his own food. If a priest wound a man, let him fast for one hundred days. If a deacon slay a man, let him be deprived of his orders and repent seven years, four on bread and water, and for three years let him fast three days in a week, and the rest of the time eat common food. If a clerk slay a man, let him repent for six years, four on bread and water, and for two years let him fast three days in a week. If a layman slay a man, let him repent five years, three on bread and water, and for two years let him fast three days in a week. If anyone slay a man in orders or his next of kin, let him leave his country and go to Rome, and report to the pope and his council. Of adultery, or fornication, or lying with a nun, let the like penitence be made."[1]

As an auxiliary to the secular courts, the Ecclesiastical Court (of the bishop or archdeacon especially) must, within its proper jurisdiction, have been of the greatest service. Without it, provincial administration of justice at least must have been very defective. It was a court of equity to remedy such difficulties as have been noticed, arising from the rules of evidence in the lay courts;[2] but if a suggestion is justified from the turbulence of the Norman period, the power and haughtiness of the rich, and their frequent defiance of the law

[1] For a more detailed view of penitential punishment, see Regino de Synodalibus Causis, pp. 216 *et seq.* 310 *et seq.* 388–392 (Wasserschl.).

[2] Ib. p. 251, c. 97.

—enforced by the chief ground for the exercise of chancery jurisdiction in the early history of the Court of Chancery[1]—the Ecclesiastical Court may have served the purpose of a court of equity in other respects certainly not less important.[2] The dread of ecclesiastical pains and penalties operated in the middle ages as a wholesome restraint upon lawlessness. Before the Conquest the bishop had sat with the sheriff in the County Court, and the parish priest with the reeve in the Hundred Court, to aid in the administration of justice, not so much, it appears, in the capacity of judges as, by the voice of the church, to compel respect and obedience to the law. And the clergy continued to sit in the secular courts throughout the Norman period. As has already been stated, the Conqueror's charter of jurisdiction did not require the clergy to cease attendance upon the lay courts. In point of fact they appear to have attended more numerously after the Conqueror's law than before.[3]

In the time of Henry the First the bishops and vicars *inter alios* were expressly enjoined to be present at the County Courts, and to strive diligently that the poor should not suffer by the escape of evil men from punishment, the depravity of oppressors, or the setting at naught of the judges.[4] In the interminable litigations in which Battel

[1] The early jurisdiction of the Chancery was more frequently exercised in favour of the poor and weak against the rich and powerful than in any other way.

[2] Comp. Regino de Synodalibus Causis, p. 245, c. 80; p. 329, c. 296.

[3] See Placita Ang.-Norm. 2, 4, 23, 36, 69, 78, 100, 113, 133, 136, 176.

[4] "Intersint autem episcopi, comites, vicedomini, vicarii, centenarii, aldermanni, præfecti, præpositi, barones, vavasores, tungrevii et ceteri terrarum domini, diligenter intendentes ne malorum impunitas aut graviorum pravitas vel judicum subversio solita miseros laceratione conficiant."—Leges Hen. I. c. 7, § 2. See another passage to the same effect, ib. c. 31, § 3. The position of the church may be seen in the statement following the one just quoted, to wit, that pleas pertaining to the rights of the church were first in order (Laws of Edw. Conf. c. 3), then pleas of the king. This part of the Leges appears to have been written before the middle of Henry's reign; for there is a plain reference to a charter of the king as "recent," which was issued between the years 1108 and 1112; Stubbs, Sel. Ch. 103, 104. The statement of Thorpe (1 Anc. Laws, pp. 514, 534, 613, 8vo ed.), impeaching (not the genuineness, but) the correctness of these passages is based upon a misconception of the Conqueror's charter; which, as has repeatedly

Abbey was involved in the twelfth century, the Ecclesiastical Court was often invoked, apparently in aid of the temporal courts. In the turbulent reign of Stephen, the parson of the church of Middlehale—a church given to Battel Abbey by Rufus—having died, Robert de Crevequeor usurped the right of presentation, and granted the church to the canons of Leeds in Kent. The abbot of Battel seeks restitution of Robert and the canons in vain. Now he seeks "royal justice," and then ecclesiastical ("quæritur hinc justitia regalis, inde ecclesiastica"); but by reason of iniquity it could not be had. Upon the accession of Henry the Second the abbot sues again, now in the King's Court, now in the Ecclesiastical; from which latter court an appeal is taken by both sides to the pope. The pope sends the case back with his mandate directing a trial of the cause by two English bishops. The defendants elude the pope's mandate in every way, until finally, after manifold fatigues, the bishops are commanded, both by apostolical and royal authority ("tum apostolica tum regia auctoritate"), to hear and decide the cause. The defendants still refuse to appear; but no further delay could be allowed, "and the judges, observing the manifest contumacy of the other side, were very determined concerning the right of the abbot and convent of Battel. Sentence was therefore given with apostolical authority" in favour of the abbot.

Immediately following is an account of a dispute between the same abbot and a certain priest named Roger, who had withheld from the abbot rent due to the monastery. The abbot institutes legal proceedings to enforce payment; and when at length Roger finds himself unable to resist, knowing

been said, did not forbid the attendance of the clergy upon the secular courts. The idea of some persons that Henry I. had reunited the spiritual and temporal jurisdictions is based upon the same error. It would have been strange indeed if a priest (for such the author of the Leges clearly was, as see c. 5, much of which is the homily of a priest), writing on law and procedure, and frequently quoting the old laws, had not been familiar with the Conqueror's charter.

that he should be expelled from possession of his church (the subject of the rent) "with ecclesiastical censure," he yields and makes due amends.

Subsequently, in the reign of Henry the Second, the same church, upon the occasion of the death of the incumbent, was seized by Haymo Peché, lord of the manor in which it was situated, and a clerk presented by him without the consent of the abbot. The latter again seeks redress, now from the King's Court, now from the Ecclesiastical; complaining on the one hand of the violence of Haymo and on the other of the intrusion of the clerk, who had been inducted by orders of the king. The whole case was finally determined in a special session of the Ecclesiastical Court, upon papal mandates obtained by the abbot; the judge (Gilbert, bishop of London) declaring in favour of the plaintiff, and removing the clerk by apostolical authority, and restoring the church to the abbot. Another difficulty arose after the death of the parson now instituted over the church by the abbot; the same clerk before rejected again seizing it under the support of Haymo. The matter is now brought before the King's Court alone, and there decided again in favour of the abbot.[1]

The cases, or the first two certainly, were tried before the adoption of the Constitutions of Clarendon; and it may therefore be said that they only serve to show that the Ecclesiastical Court at that time exercised jurisdiction of disputed rights of presentation and of debts due from one church to another. But while they do show this important fact, they also show that the King's Court entertained concurrent jurisdiction, without the ability at times to enforce justice. Hence the necessity of resorting to the Ecclesiastical Court. The usefulness of such examples could not have been lost in other cases, when violence set at naught the administration of law by the temporal courts. Whether a bishop or priest

[1] Hist. Mon. de Bello, 113–119 (Ang. Christ. Soc.); Placita Ang.-Norm. 174, note, and 245.

acted alone or in solemn court is immaterial: in either case judicial functions were assumed. The warning, censure, or excommunication was the act of a judge.

The King's Court.

With the Norman Conquest the King's Court proper became a disturbing and an uncertain influence in administration. It appeared furnished with new processes of law, and with claims to jurisdiction of unknown extent. It early showed a disposition not to be restricted by the limits of the old Aula Regis, which had been content with exercising jurisdiction over the king's great thegns and offences touching the personal rights and dignity of the king. What the new court was, and by what means it made its way among and over hostile jurisdictions existing on every side, and clinging to their ancient privileges with the tenacity of imperilled existence, and how it finally established its own supreme and almost universal authority, are now to be considered.

The inevitable result of the gradual change from localisation to centralisation, indeed the inevitable accompaniment of the change in its later stages, as part of that change, began to manifest itself long before the Conquest, not only in the redress of rights specially appertaining to the Crown, and of infractions upon its dignity, but also in the interference, occasionally, of the king in the local and provincial (county) administration of justice.[1] But it was reserved for the Norman kings to make direct way for the great jurisdiction of the royal tribunals, by systematic encroachment upon the jurisdictions of the popular and franchise courts; a fact, however, not fully manifested before the twelfth century.

The King's Court proper of the Norman period has sometimes been called a committee of the Witenagemot or

[1] Mr. Freeman has traced the matter down to the Conquest, and, somewhat generally, afterwards.—5 Norm. Conq. 298, 299.

of the Great Council; but the expression is so inapt and misleading that no considerations even of convenience should permit its use. A committee is the delegate of the superior body, working for it, and subject to its order and control. The King's Court stood in no such relation to the Great Court. It was in no sense the delegate of that court; it was not created by it, and it did not act for it. It was coeval in the (Anglo-Norman) Constitution with the Great Court itself; it had sprung at the same time from the same parentage, the Conquest. It had therefore the same right to exist; and its functions could not be abrogated without its own consent, that is to say, the consent of the king. It was not from the indistinct and flickering representative which the King's Court had in the pre-Norman Theningmannagemot (Thegn-men's-Court),[1] or from the more distinct Aula Regis of the Confessor, that the King's Court had derived its origin: it was from the strong arm of conquest and of the Conqueror that both that and the Great Court obtained their power and authority. The King's Court represented the king: when he was not present, it was his delegate alone. In its relation to the Great Court, it was simply a smaller body of great men attendant upon the king, who had their place also in the larger court. Its composition will be noticed later.

Under special commissions, the jurisdiction of the court was limited to the trial of such causes as had been delegated to the special members of the court. The ordinary King's Court, however, the full court sitting with the king, exercised a jurisdiction limited in fact only by the king's will. That is, there was nothing to prevent the king from drawing into his court all the causes of the people; and on one pretext or another he did seriously invade the jurisdictions of other courts, especially of the Manorial Courts. This practice had

[1] See 5 Freeman, Norm. Conq. App. note NN. This court was already enlarging in the time of the Confessor, and must finally have become the most important judicial tribunal of the kingdom had there been no Conquest.

become such a grievance to the baronage in the reign of king John that it was made a clause of Magna Charta that the writ of præcipe should not be allowed to anyone concerning any frank tenement, whereby a freeman might lose his court.[1]

This writ of præcipe was suited to the bringing of any cause relating to lands into the King's Court, wherever the lands lay, and whoever had primary jurisdiction over questions relating to them. When anyone complained to the king or to his justiciars, says Glanvill, concerning his fee or his freehold, if the complaint were such as was proper for the determination of the King's Court, or the king was *pleased* to have it decided there ("vel dominus vex velit in curia sua deduci"), this writ of præcipe was granted.[2] The writ directed the sheriff to command the defendant to surrender, without delay, to the plaintiff the land in question; and if he failed to do so, to summon him before the king or his justiciars, at a certain time and place, to show why he had failed.[3] There was another writ of præcipe of a similar character, designed to give the King's Court jurisdiction over the debts of the laity.[4] These writs were not limited at all to the king's tenants in chief; and hence it is evident that the proceeding was an invasion of the jurisdiction of the private courts of the baronage, unless indeed they were granted only on a failure of justice in the local court.[5] There is no evidence that this was the ground of the writs; and the passage above quoted from Glanvill, showing that the first-named writ of præcipe was issued at the pleasure of the king, indicates that that was not. Glanvill would not have used such an expression of a case in which the king was in duty bound to grant the writ; however true it is that the king's writ at this time was always matter of grace.[6] These writs were the more

[1] Magna Charta, c. 24. [2] Glanvill, lib. 1, c. 5. [3] Ib. c. 6.
[4] Ib. lib. 10, cc. 1, 2. [5] Even then it was a novelty. See *infra*.
[6] "Der König hat das Recht, jeden Process über ein liegendes Gut aus dem Untergerichte zu evocieren und an das Königsgericht zu ziehen."—Brunner, Schwurg. 405.

desirable in that they gave the aid and security of trial in the most powerful judicial tribunal of the land. Whether the plaintiff who had thus brought the defendant before the King's Court under the writ for the recovery of lands could have the benefit of the peculiar procedure of that court, the recognitions, is not clear. An eminent writer has stated that he could.[1] But there is ground to question this statement. The writ was a writ of right, as the plaintiff counts upon his right of property, and tenders the duel.[2] Unless therefore this fact were accidental, and the plaintiff could now, in ordinary course, have a new writ demanding a recognition, being content (for the Magna Assisa was for defendants) to sue for seisin,[3] the plaintiff had gained nothing in point of the mode of trial. And if the plaintiff wished to try seisin only, why did he not in the first place obtain a writ of recognition, instead of taking upon himself such unnecessary trouble and expense? The natural purpose of the præcipe was to try the right of property; and the plaintiff must (unless he had acted in ignorance) have changed his mind in afterwards seeking a recognition. However, the party would have no difficulty in obtaining a writ of recognition if he were ready to pay the (arbitrary) price demanded by the king.[4] It may be added that it is not improbable that the advantages of the new procedure of the King's Court may explain the outcry sometimes raised against the assises and other novelties of the reign of Henry the Second; the objection probably springing from the private jurisdictions.[5]

Jurisdiction obtained by the King's Court in this way may be called the extraordinary jurisdiction of the court. It was acquired by direct usurpation, in derogation of the rights of the popular courts and manorial franchises, upon

[1] Brunner, Schwurg. 406. [2] Glanvill, lib. 2, c. 3.

[3] The writ of recognition "de feodo vel laico" appears to have resulted in determining the right of property: Glanvill, lib. 13, c. 25; Bracton, 285 b; *ante*, pp. 4, 5.

[4] See the chapter on the Writ Process.

[5] See 2 Houard, Anc. Lois, 287; Brunner, Schwurg. 301.

the sole authority of the king; giving us a glimpse of the extent to which the royal prerogative had been pushed after the Conquest. But this was not the limit of the usurpation of jurisdiction by the King's Court. All of the manorial writs (writs *to* the manors) issued by the king or justiciar provided that if the lord addressed failed to do justice (the "nisi feceris" clause) in favour of the party who sought it, the king's officer (the sheriff or justiciar usually) should do it. In so far as this resulted in drawing a cause into the King's Court—and it was through this clause, along with the writs of præcipe, that the private courts ultimately fell into decay—it was a novelty and a usurpation. There is nothing to show that causes could be taken from the Manorial Courts to the king for trial before the Conquest. The Thegn-men's Court and the Aula Regis appear to have been aristocratic courts of original jurisdiction only, or at all events having appellate jurisdiction only over disputes of the king's thegns. Indeed, it follows, if this observation be correct, that the entire jurisdiction exercised by the King's Court after the Conquest, except as to disputes between his tenants in chief, and matters affecting the king, was extraordinary, being a usurpation of the authority of other courts. The provision of the old Anglo-Saxon law that cases should be taken to the king only upon failure of justice in the local jurisdiction does not imply that the cause was then to be tried in *his* court, but only that he would take measures to see that the cause was fairly tried, probably in the local court, or in the Hundred or County Court.

The jurisdiction of the King's Court, including the king's prerogative, according to the Leges Henrici Primi—a custumal partly of the early years of the reign of Henry the First, and completed, as we have it, before the reforms of Henry the Second, if not before his reign—embraced the following matters: The preservation of peace with security, breach of the king's peace given by his hand or writ, danegeld, pleas of

contempt of the king's writs or commands, slaying or injuring the members of his household, disloyalty and treason, contempt or evil speaking of the king, "castellatio trium scannorum" (an expression the meaning of which is not understood"),[1] outlawry, theft punishable with death, murder (secret slaying), counterfeiting of the king's money, arson, housebreaking, assault in the king's highway ("forestel"), the fyrd or expedition, the harbouring of runaways, premeditated assault, robbery, destroying of ways, invasion of the king's land and property, treasure-trove, shipwreck, "algarum maris" (a term of doubtful meaning),[2] rape, invasion of forests, reliefs of the king's barons, fighting in the king's house or precincts, the breaking of the peace *in hostico*, failure to repair fortresses or ships, having and keeping (that is, harbouring) a person excommunicated or outlawed, breaking of pledge, fleeing in a land or naval battle, unjust judgment, failure of justice, and perverting the king's law. All army-ways (places for the execution of criminals) were in the king's socn. The king was the special protector of all men in orders, strangers, poor persons and mean, who had no protector. Pleas relating to such matters, it is added, are the king's own pleas, and do not belong to sheriffs, apparitors, or to his ministers.[3] Following this category there is an enumeration of certain rights of the king personally in respect of pleas pertaining to the church, arising apparently in the Court Christian; a matter heretofore considered.[4]

Most of the particulars of the foregoing catalogue must have been special subjects of the king's socn in the Anglo-

[1] Schmid does not know its meaning: Gesetze, 442, note, and Glossary, Castellatio. See also Spelman, Glossary, Castellacium; 1 Thorpe, Anc. Laws, 518, note (8vo ed.).

[2] See Thorpe, Glossary to Anc. Laws.

[3] Leges Hen. I. c. 10. *Quære* as to the meaning of "apparitores" in this connection. See the acts of Fule, apparitor, in the Case of Ailward, Placita Ang.-Norm. 260. In the Glossary to Stubbs, Select Charters, the word is said to mean a summoner; but it seems to have a wider meaning here, if not in Ailward's Case.

[4] *Ante*, pp. 53, 54.

Saxon period as well as after the Conquest. A new phase of the *murdrum* had come to pass in the stringent, but necessary, legislation of the Conqueror for the protection of his Norman followers in England. The old law had been that the king was entitled to a fine of forty-six marks against the hundred or wapentake which did not produce the slayer;[1] after the Conquest it was proclaimed, upon a presumption not unnatural under the circumstances, that when a person was found slain, and the slayer was not produced, the person slain was considered to have been a Norman, and a fixed fine of forty-six marks, as before, imposed upon the hundred or wapentake, but finally varying in different localities according to the frequency of such cases.[2] By the last quarter of the twelfth century, the time of the Dialogue of the Exchequer, the distinction in blood between Norman and Englishman had almost faded out; but the fine was still imposed in all cases of secret slaying, upon the old presumption.[3] Still, if in fact it could be proved that the person slain was of English blood alone, the act was not *murdrum*.[4] The *murdrum* must, however, have been more a matter for the Eyre, after the establishment of provincial visitations, than of the central King's Court.

In the time of Glanvill, the King's Court had criminal jurisdiction of causes of treason to the king's person, of sedition in the kingdom or army, of the fraudulent concealment of treasure-trove, of breaches of the king's peace, of homicide, of arson, of robbery, of rape, of forgery and counterfeiting (*crimen falsi*), and of other things of a like nature.[5] From this last general enumeration were excluded theft, scuffles, blows, and wounds, as being within the sheriff's jurisdiction; though the last three offences were cognisable in the

[1] Laws Edw. Conf. c. 15.

[2] Laws Wm. I. c. 22; Hen. I. cc. 91, 92; Dialogue of the Exchequer, lib. 1, c. 10; Stubbs, Sel. Ch. 201 (2d ed.).

[3] Dialogue, *ut supra*.

[4] Bracton, 135 b; Fleta, lib. 1, c. 30.

[5] Glanvill, lib. 1, c. 2.

King's Court if alleged to have been committed against the king's peace.[1]

As to civil pleas, the King's Court had at this time cognisance of causes concerning baronies, advowsons of churches,[2] *status*, when the question was one of freedom or servitude,[3] dower when the widow had received nothing at all, breaches of fines (concords) made in the King's Court, matters of homage, reliefs, purprestures (boundaries), and debts owing by the laity. And to these were added causes relating to seisin, tried by process of recognition,[4] and causes relating to the right of property arising under the writ of præcipe, already referred to as extraordinary process. The recognitions mentioned by Glanvill were the assise of mort d'ancestor, of the last presentation to a church, de clerico vel laico feodo, whether anyone were seised of a freehold on the day of his death as of fee or as of pledge, whether anyone were under age or not, whether any one died seised of a certain freehold as of fee or as of ward, and whether anyone presented the last parson to a church, by virtue of the fee that he held in his demesne, or by virtue of a wardship (the difference between the second and the last being this, that in the former case the question was which of two claimants had had the last presentation, and in the latter the character under which an admitted presentation had been made), and the assise of novel disseisin.[5]

The fact has often been pointed out by competent writers that the Norman kings of England, among other means adopted for strengthening their position, sought the support of the people, and to this end not only refrained from overturning the local and popular courts, but even encouraged the exercise of jurisdiction by them in matters of litigation.

[1] Glanvill, lib. 1, c. 2.

[2] As to cases affecting the church, see the consideration of the jurisdiction of the Ecclesiastical Court.

[3] Glanvill, lib. 5, c. 1. [4] Ib. lib. 1, c. 3. [5] Ib. lib. 13, c. 2.

In a charter issued between the years 1108 and 1112, pointing apparently to obstacles put in the way of the old popular courts, the king orders that the County and Hundred Courts thereafter sit in the same places and at the same times as in the time of King Edward, and not otherwise; and that all of the county should attend those courts as in the time of the Confessor.[1]

But this must not be understood as implying too much. It was equally important to strengthen the influence of the King's Court. This court must be made to the king what the Duke's Court in Normandy was to the duke, and, on a far greater scale, what the Manorial Court was to the lord of a franchise. Like these courts, it must further be made profitable to its head: litigation must be brought there. How the jurisdiction of a local court could be covertly invaded and taken away at the very beginning of the Norman supremacy by virtue of the "nisi feceris" clause of the king's writ, has already been noticed; how later, perhaps not until the reign of Henry the Second, the local and popular courts could be directly ousted of their jurisdiction by the king's writs of præcipe, has also been remarked; and how in the same reign an effectual mode of bringing questions of seisin, which certainly had been proper and actual subjects of litigation in the local courts, into the King's Court through the recognitions has also been alluded to. Most questions relating to real property were now brought within the jurisdiction of the King's Court; and this too without legislation aimed at the authority of the local courts. And with the right to bring into the King's Court, under the nisi feceris clause, a trial of the right of property in lands went the right to draw to the same court, in the same way, all litigations touching rights growing out of the tenure of lands, e.g. of rent withheld.[2] And then, just as there was introduced alongside of the manorial writ of right as to lands a præcipe

[1] Stubbs, Sel. Ch. 104 (2d ed.).

[2] Glanvill, lib. 12, cc. 1–8.

quod reddat, as to lands, to give the King's Court jurisdiction regardless of the question whether the local and sheriff's courts (for the case usually went from the local court to the sheriff in the County Court and then to the King's Court—in each case by virtue of a nisi feceris clause) had done justice or not, or had been asked to do so; so, alongside of the manorial writ of right as to rent or services, there was introduced a præcipe quod reddat concerning debts (of the laity) generally, giving the King's Court original jurisdiction in the same manner.[1] Jurisdiction in property causes was completed by the writ of dower unde nihil, the King's Court arrogating exclusive jurisdiction when the widow applied for a writ, claiming that she had received nothing at all of her dower.[2] By such means, without the aid of literal statute, the King's Court established its jurisdiction over nearly all civil questions; over all, indeed, that did not belong exclusively to the Court Christian.

But one step more was necessary to give the King's Court universal jurisdiction, under forms outwardly regular. Jurisdiction of crimes, from theft to homicide, had been assumed in the course, if not from the beginning, of the Conqueror's reign. This was certainly true of the higher crimes; but assaults, blows, and trespasses generally remained as before the Conquest, cognisable solely by the local courts, except when the parties were the king's tenants in chief. Glanvill, as we have seen, tells us how the King's Court was enabled to complete the circuit of its jurisdiction and encroachment, and to draw to itself the trial of delicts. To the sheriff in the County Court, he says, pertains the cognisance, in case of failure of justice in the Manorial Courts,[3] of scuffles, blows, and wounds, unless the plaintiff allege that the act was "de pace domini regis infracta." A short allegation—a pure

[1] Glanvill, lib. 10, cc. 1, 2. [2] Ib. lib. 6, c. 14.

[3] "Per defectum dominorum," the substantial equivalent, it seems, of the nisi feceris clause in the manorial writs.

fiction, also—was sufficient to prevent a defendant from successfully pleading to the jurisdiction of the King's Court. The hint was readily availed of; and before the end of the twelfth century parties appear in the King's Court trying cases of trespass de bonis asportatis, of false imprisonment, and the like.[1] It should be added, however, that the records, by their silence, leave it uncertain whether the parties may not have been of such rank as to entitle them to sue in the King's Court.[2] Be this as it may, it seems clear that that court had found the means in Glanvill's time, if not earlier, of entertaining jurisdiction of trespasses to the person or to the property of an individual. The phrase "in pace domini regis"—*within* the peace of the king—is predecessor of and equivalent in legal effect to the later phrases "in pacem" or "contra pacem domini regis;" for the defendant, having committed the act while *within* the king's peace, had therefore committed it against the king's peace. The term was merely jurisdictional in its origin. There was no limit of pecuniary value, it may be added, to the trial of causes of this kind in the King's Court before the thirteenth century.

Thus, by the writ process generally, partly by virtue of an insidious clause in the manorial writs of right, partly by open usurpation under the writs of præcipe, and partly by the use of a fiction in a plaintiff's appeal of trespass or theft, was finally obtained the jurisdiction which has supplied the superior courts of England and their new successor with business until the present day. Out of this jurisdiction of the King's Court was set apart, or rather fixed, by Magna Charta, the hearing of common pleas at Westminster, resulting in the Court of Common Pleas, with concurrent jurisdiction with the elder court; and later the Court of Exchequer, by the use

[1] Placita Ang.-Norm. 285; 1 Rot. Cur. Reg. pp. 4, 11, 14, 17, 112; 2 Ib. 120, 121.

[2] In some cases the term "in pace" is omitted from the rolls, and in some cases it appears there. It would seem unnecessary to use the term when the parties were the king's tenants in chief, while the contrary would be true if they were not.

of a more ingenious and not less effectual fiction (the fiction of king's debtor) than the one which in Glanvill's time had been resorted to by the King's Court, carried away from the parent court such civil causes as litigants chose to take to the Exchequer, without, however, depriving the King's Court of any part of its jurisdiction. The Court of Exchequer thereby regained the jurisdiction which it had begun to exercise concurrently with the King's Court in the twelfth century, but which had, apparently, been largely taken away upon the establishment of the Court of Common Pleas (or rather, probably, by reason of the familiar clause of Magna Charta which resulted in that court) [1] and abrogated by the Articles upon the Charters in the twenty-eighth year of Edward the First. It need only be added that the fluctuation of jurisdiction over matters pertaining to the church and the clergy has been considered in treating of the Ecclesiastical Court; and also that the King's Court entertained causes which in modern times would be termed equitable,[2] a matter further considered in the chapter relating to the Writ Process.

As distinguished from the Great Court, the King's Court, as has already been stated, was a smaller body; it was of indeterminate number, composed ordinarily of the king, justiciar, and the chief of the king's household and immediate retinue—"the great officers of the household, the justiciar, chancellor, treasurer, and barons of the Exchequer, with such of his clerks as the king might summon"[3]—or of persons specially delegated to hold royal pleas. It had no invariable staff of judges before the last quarter of the twelfth century, but changed with times and circumstances, and the king's

[1] Madox took the same view. He says: "But it seems the Exchequer was understood to be forbidden to hold common pleas by those general words in the clause which appoint that from henceforth common pleas should not follow the King's Court, but be held in a certain place, to wit, the Bank."—Hist. Exch. 145 (fol. ed.); and see ib. 544, 594-602.

[2] See Placita Ang.-Norm. 221, 241; *post*, App. No. 56.

[3] Preface to vol. ii. p. 74 of Stubbs's ed. of Benedictus.

pleasure. It was presided over by the king in person, or, in his absence, by his great justiciar; the second man in the kingdom until the time of William Longchamp in the last decade of the twelfth century.[1]

But there were two courts of the king, not reckoning the Great Council or the Exchequer. There was a court which attended the king's person—the one just described—which was the King's Court by distinction; and there was also a court held from time to time in the counties by delegates of the king, sent out usually from the court which attended his person, which was also the King's Court. The former body continued to be of indeterminate numbers and membership, so far as history informs us, until the year 1178; when a third royal court of litigation was created. By the counsel of the wise men of the kingdom the king now selected five men, two clerks and three laymen, all of his own private household, and ordered them to hear all the complaints of the people and to do right.[2] It was also ordered that the five should not leave the King's Court (that is, they should always attend the king), but remain there to hear the causes of the people. What is also of special interest, it was further provided that if any question arose before them which they could not decide, they were to present it to the king, and then it should be determined as seemed good to him and the wise men of the land.[3]

This last-named provision was a substantial, or rather a

[1] In the absence of the king the justiciar was first in the kingdom, his powers being viceregal and nearly universal. Longchamp, bishop of Ely, arrogated to himself both the office of chancellor and that of justiciar (the chancellorship had before his advent become worthy the position of an archbishop), holding the justiciarship, however, only during 1190–91, but holding the chancellorship from 1189 to 1197. The justiciar still retained most of his ancient powers through the first third of the next century; but the position of chancellor was greatly enhanced in dignity under Longchamp. From the very outset of his appointment as chancellor, the justiciar (Hugh of Durham) became jealous of his power.—2 Benedictus, 101 (Stubbs's ed.). See further as to Longchamp's position, ib. 108, 109, 143, 158, 207, 210–222.

[2] 1 Benedictus, 207. [3] Ibid.

partial, repetition of a clause in the Assise of Northampton, *anno* 1176. At the council which resulted in the statutes known by that name, the kingdom had been divided for judicial purposes into six parts, over each of which three persons had been assigned as justiciars of the king. These judges were to decide all suits involving half a knight's fee and less; unless the complaint was so important that it could not be decided without the king, or unless it were such that the judges should report it to him, or to those who should be in the king's place (in his absence), by reason of the judges' doubts.[1]

These provisions are the first mention that has come down to our day of anything like revisory authority over the King's Court. The earlier provision (*anno* 1176) cannot create surprise, since the questions referred to would arise on the circuits; and such especially as might affect the rights of the king or of his great men ought not, judging from the ancient rights of the king and of his tenants in chief, to be determined elsewhere than before the central court attending the king's person. And it was natural, further, that the judges should have the right to report questions of difficulty to the same body. Nor, indeed, rightly considered, should the later provision (*anno* 1178) create surprise. The court was indeed the central court of the king; but it was a new creation, partly taking the place of the larger body which had hitherto constituted the King's Court *par excellence*, and which now, it may be observed, became the germ of the King's Council of the thirteenth century.[2] And whether the five had been and were still members of the larger body (they probably were), or were new men entirely—in either case it would not be safe to give the new court unlimited jurisdiction.

The provisions referred to do not, it will be noticed, provide for any appeal in the proper sense of the term, but

[1] 1 Benedictus, 110.

[2] The Great Council was of course the original of Parliament.

only for a reservation of difficult and important causes for the decision of the whole court; which may now be called, from its later name, the Council. Still, we are probably justified in looking upon these provisions as the origin and germ of an appellate jurisdiction above the (smaller) King's Court.[1] The smaller court appears to be the direct original of the modern King's Bench;[2] which therefore, unlike the original King's Court, if this be true, is a tribunal of legislative creation.

In the course of the next year, however, the kingdom was divided into four circuits, each with five justiciars of the king, except the fourth (Northern) circuit, to which six were assigned, Glanvill being one of them, and becoming in the following year chief justiciar. These six, the assignment declared, were constituted justiciars in the King's Court for hearing the complaints of the people—"Isti sex sunt justitiæ in Curia Regis constituti ad audiendos clamores populi."[3] The meaning of all this appears to be that the arrangement about the five of the previous year, that they should not depart from the king, was changed, and that the six acted both on circuit and in the presence of the king, in the latter case as the *Bench*.[4] Of the later history of the court in the twelfth century, we have no information beyond an occasional allusion; as when Benedictus tells us that Richard the First, upon his departure for the Holy Land (*anno* 1189), made Hugh, bishop of Durham, chief justiciar, and appointed as his associates Hugh Bardolf and William Bruer.[5] This shows that there was still no fixed number of judges in the Bench.

This smaller court may well be called a judicial committee of the larger body;[6] which latter (from being the King's

[1] See 2 Benedictus, pref. 76; Stubbs, Sel. Ch. 23 (2d ed.).

[2] See 2 Benedictus, pref. 75; Hardy's Introd. to Close Rolls, 95–105 (8vo ed.).

[3] 1 Benedictus, 239.

[4] This has been, it seems, truly suggested to be the meaning of the "justiciarii sedentes in banco" of Glanvill, lib. 2, c. 6, lib. 8, c. 1, and lib. 11, c. 1.—2 Benedictus, pref. 75.

[5] Ib. (text) 101.

[6] 2 Ib. pref. 75.

Court, which it is still sometimes called) becomes now the King's Council, more familiar in the history of the following century, but to be distinguished from the Great Council. The great justiciar, as a natural, though not as an immediate consequence, becomes degraded from first officer of the realm to the position of chief justice of a purely judicial tribunal, and one not of last resort.[1] But one step was needed to place the chancellor above him in rank, and to substitute him to the justiciar's position of second man of the kingdom. That step was taken when the chancellor became presiding officer (in the king's absence) of the King's Council; and this step followed soon after the death of Glanvill, when the office of chancellor (which was soon followed by that of justiciar) fell to William Longchamp, the chief minister of Richard the First.[2]

From the time, then, of the creation of this smaller delegate court attendant upon the king's person, we have what almost immediately came to be called the Bench, and what, as we have several times observed, came afterwards to be called the Council. Records early in the thirteenth century, long before the establishment of any new staff of judges as the judges of the Common Pleas (to which court the term Bench—"in banco"—has sometimes been supposed to apply, from the time of Glanvill) constantly distinguish between the two courts. Thus, in a writ issued by Henry the Third, in the third year of his reign, to the justices itinerant for Kent, the king orders the justices to stay all demands preferred before them concerning franchises by the archbishop of Canterbury, by Geoffrey, Earl of Clare, or by others, until the fifteenth day after the feast of St. Hilary "before our Council at Westminster." In like manner if any difficult pleas arose before them, such as they could not easily deter-

[1] Hubert de Burgh, chief justiciar from 1216 to 1232, is considered to have been the last of the ancient justiciars uniting political with judicial powers.—2 Benedictus, pref. 77.

[2] *Ante*, p. 87, note.

mine "without the advice of our Council," they should also stay these causes for trial at the same time and place.[1] The reservation, it will be noticed, is to the King's Council, not to the Bench; and this appears to have been the uniform practice of the time.

It may sometimes be difficult, especially in the twelfth century, to distinguish between the Exchequer and the Council, if there were any great distinction in point of *personnel*. The same persons frequently sat in different characters in the courts. The Exchequer was composed, *inter alios*, of barons attending regularly, *ex officio* or by special summons, at Easter and Michaelmas, upon the king; and these were the persons, with still others, especially the higher clergy, who constituted the fluctuating body of the Council. Before the men composing either of these bodies, but often sitting in the hall of the Exchequer at Westminster, at the close of the fiscal terms of Easter and Michaelmas, or at other times, common pleas were frequently tried; the court being sometimes designated as the King's Court at Westminster "ad Scaccarium,"[2] and sometimes simply as the King's Court at Westminster.[3] The Exchequer may be distinguished from the *delegate* body when the membership is disclosed, as well as when the record shows that the particular proceeding was an accounting of the revenue; and in a case of this latter kind, the body may of course be distinguished from the Council. So, too, when, upon completing the accounts of the *fiscus*, members of the same court continued to sit for the hearing of common pleas, it was still called a session of the court "ad Scaccarium." This was sometimes true even when the body sat for the hearing of common pleas at a time entirely distinct from the fiscal sessions of the Exchequer.[4] There appears to be only

[1] Madox, Hist. Exch. 367 (fol. ed.). [2] Placita Ang.-Norm. 267. [3] Ib. 276.

[4] See 2 Rotuli Curiæ Regis, 155, *Hilary* term, essoins (excuses for non-appearance) taken "coram domino G. et baronibus de Scaccario."

a question of names in such a case. Sitting for judicial purposes within the hall of the Exchequer, the body would naturally be considered as the Court of Exchequer, though it might have been sitting elsewhere the day before with the king in council.

The central King's Court sat at times and places suited to the king's convenience and pleasure, when he was in England. It followed the king in his uncertain progresses until Magna Charta required the holding of common pleas "in aliquo loco certo."[1] Judging from the Rotuli Curiæ Regis and the Placitorum Abbreviatio (both of which begin with the sixth year of Richard the First),[2] there must have been a large amount of litigation in the court, requiring protracted and frequent sessions; but the uncertainty of place and time of the king's movements must have operated greatly to the detriment both of persons actually litigating in the court and of persons desiring to do so. The sessions of the Eyre in the counties, and the stated terms of the fiscal court, the Exchequer, at Westminster, were the necessary resort of many litigants in this state of things; a matter to be adverted to again in treating of the Exchequer. What was the state of things when the king was absent from England does not appear. But it seems not improbable that the court was then more stable, having sessions, whenever necessary, at Westminster, under the justiciar.

Of the other royal court, held in the counties, away from the king's person, there are traces as early as in the reign of Rufus; and probably, if all were known, iters of the judges might be found to have been made in the reign of the Conqueror. Indeed, this early date for occasional iters can

[1] Magna Charta, c. 17.

[2] The rolls of the King's Court began at least as early as the seventh year of Henry the Second (1160). At the end of the Appendix, No. 56, there will be found a transcript from the MS. roll of Michaelmas, 9 John, quoting pleadings from a roll of that early time.

be assigned with some degree of confidence, with the suggestion of Domesday book before us. It is certain that the commissioners of the Great Survey had frequent occasion to consider questions of property affecting the interests of the king, or of his tenants in chief. Thus, almost at the beginning of the Domesday record there appears a report of a trial relating to customs taken in Kent from foreign merchants by an officer named Bruman, in violation of the rights of the church of the Trinity and of the monastery of St. Augustine. And as a result of the confession of the defendant, the church and the monastery had their customs "judicio baronum regis qui placitum tenuerunt."[1] To this could be added many other cases decided during the survey touching claims of the king or of his chief barons.[2] Nor, indeed, was the idea of the judicial iter wholly new in England at the Conquest.

Not a few of the trials in the counties, during the reign of the Conqueror, were held by the king's immediate justiciars away from the king; some of them rising to the dignity of Witenagemots, as has already been pointed out.[3] Others were smaller bodies. There was a trial at a court of three counties, held at Kenetford, in the year 1180, for the hearing of extensive claims of the church of Ely, almost attaining to the rank of a Witenagemot. Among those present were the king's justiciar, bishop Geoffrey, three delegates of the king, and many sheriffs.[4] The case of Bishop Wulfstan v. Abbot Walter[5] was tried before the same justiciar, by virtue of the king's writ; and the case of Gundulf v. Picot[6] was tried in Cambridge, under the king's writ, before his justiciar Odo; the king himself being interested, but not being present. But these are isolated cases; and there is no indication of any system of circuits in this reign.

The earliest record of anything like a modern judicial iter by the royal justiciars appears to be that of the case of The

[1] Placita Ang.-Norm. 37. [2] Ib. 37-61, 293-307. [3] *Ante*, p. 23.
[4] Placita Ang.-Norm. 22. [5] Ib. 16. [6] Ib. 34.

King v. Abbot of Tavistock,[1] in the latter part of the reign of Rufus, *anno* 1096. That record exhibits the king sending bishop Walkelin and his chaplain, the hated Flambard, into Devonshire, Cornwall, and Exeter, to hold royal pleas. But this is all that is known of the reign of Rufus. The earliest Pipe Roll[2] in existence is of the thirty-first year of the next king, Henry the First; and this exhibits a system of iters by the royal justiciars in full and regular working order.[3] This, it is reasonable to assume, continued through the remaining five years of that reign, and until the anarchy of Stephen and Matilda; when it certainly ceased. The system was renewed by Henry the Second, as early as the second year of his reign, from which time the Pipe Rolls begin again, and continue without interruption thereafter.

The earlier iters of this reign, however, were mostly fiscal, and held generally by the sheriffs, and were not marked with the perfectness which characterised them in the latter part of the reign of Henry the First. It was not until the year 1166 that the judicial eyres, held before deputed *justiciars*, become annual and general.[4] From this time the system has continued until the present day, though not without much change in the adjustment of the machinery.[5]

The results of the reintroduction by Henry the Second of the system of provincial visitations by justiciars from the central court of the king are as important as the causes leading to the system are easy to seek. The sheriffs were, indeed, the king's *missi*, whether considered as the vicecomites of Normandy or as a continuation of the pre-Norman shire-reeves, who long before the Conquest had become the king's officers. But the sheriffs were hereditary officials. Though

[1] Placita Ang.-Norm. 69.

[2] The Rolls of the Pipe contain entries of the fiscal proceedings of the Exchequer.

[3] See 1 Stubbs, Const. Hist. 391. [4] 2 Benedictus, pref. 64.

[5] The facts are traced by Professor Stubbs in his preface to vol. 2 Benedictus, pp. 57 73, and in 1 Const. Hist. 604, 605.

subject to removal, they were not assigned for temporary duty, but for service of indefinite duration; and this gave them ample opportunity for personal promotion and for oppression and extortion, which they seldom failed to improve. They went the fiscal circuits of the king, and sometimes the purely judicial; but the king was defrauded, and the people cried out against their abuse of office. The remedy was most natural. The king sent out the trusted men of his own immediate court, and others in whom he had confidence, to hold the provincial Eyres; and from being at first chiefly fiscal visitations, it was found desirable to give the iters a wider scope, and allow the people of the counties the benefits of the peculiar procedure and the more ample protection of the King's Court. The result was that before the end of the reign of Henry the Second the chief feature of the iters was the hearing of common pleas and judicial causes generally; and this result was encouraged in the most decisive way, to the extent of making direct inroads upon the jurisdictions of the courts of franchise.

Ralph de Diceto is the chief authority in support of the cause above assigned for the re-establishment of the iters of the royal justiciars, so far as the *king* personally was affected by the conduct of the sheriffs. He tells us graphically that having upon inquiry found the sheriffs intent mainly upon their own personal interests, the king, growing more and more anxious for the common welfare, committed jurisdiction in certain places to other faithful men, that the known advent through the counties of the power of the public might strike terror to delinquents, and that those who retained the royal revenues in their own hands, and injured the majesty of the prince, might incur the king's wrath. And the remedy appears from de Diceto to have been faithfully applied.

But the king's own men were not allowed to stay long from the royal presence; Henry endeavouring, by frequently changing his delegates, to secure the best possible results.

"Now he sends out abbots, now earls, now chaplains, now men of his household, now his most intimate companions to hear and try causes." Finally he appoints (though temporarily, it seems) the bishops of Winchester, Ely, and Norwich as archjusticiars ("archijusticiarios") of the kingdom. By these and their associate judges causes were decided, certain matters being reserved, however, for the hearing of the king, as provided by the Assise of Northampton above referred to.[1]

Of the outcries of the *people* against the sheriffs, and of the willingness of the king, for the moment at least, to give heed to the same, the Inquest of Sheriffs gives ample evidence. Upon the king's return to England, in the year 1170, after an absence on the Continent of four years, he holds a Great Council at London, and there in answer to general complaint removes nearly all the sheriffs of the land, and orders them to give pledges to answer for their wrongful conduct. This, however, was followed by a restoration of some of the parties to their old positions; when they made good their revenge upon the people.[2]

The sheriffs were not, however, the only offenders. As has been intimated, the king could not fully trust his own special justiciars. These also were found oppressing the people, and willing apparently to defraud the king. We have seen that at the council of Northampton, in the year 1176, the kingdom was divided into six circuits, with three justiciars assigned to each.[3] But this arrangement was short-lived. In the year 1178 the king caused an inquiry to be made concerning these judges, if they had treated well the men of the kingdom. In answer, he learned that the land and the people were sorely oppressed by reason of the great number, to wit, eighteen, of justiciars; and it was upon this occasion that the

[1] These passages of de Diceto may be found in 1 Twysden, Script. 605, 606, and are also briefly quoted in 2 Benedictus, pref. 72.

[2] Placita Ang.-Norm. 216. See the entire inquest in Stubbs, Sel. Ch. 147–150.

[3] *Ante*, p. 88.

central court of five was established. The passage referred to is not clear upon the question whether these justiciars had been guilty of misconduct; but they appear to have been removed, and fluctuation in the justiciars going the iters continued.[1]

The Pipe Rolls show that the itinerant justices were occupied with the hearing of legal causes of all kinds, and that the peculiar process of the central King's Court was in use before them.[2] Three or four examples will suffice. Geoffrey de D. was accounted as debtor in three marks in the tenth year of Richard the First (1198), for having the justiciars itinerant *inquire* in what manner a certain recognition was taken against him in the earl of Mortain's court, during the war between the king and the earl; which recognition, as Geoffrey alleged, had been taken contrary to law.[3] In the Northampton iter, Walter T. and his son John gave ten marks in the first year of John (1199), to have an inquisition by oath of the burgesses of Northampton, to find certain facts in issue concerning the leaded house of Northampton; among other things, if King Henry, father of the present king, had dismissed the demandants because they had not rendered at the appointed time the *auxilium* required of them.[4] In the Kent iter of the seventeenth year of Henry the Second, Walter, son of A., rendered account of five marks for having a recognition of the county concerning land of R.[5] In the Hampshire iter of the twenty-second year of Henry the Second, William, son of S., promised ten marks for having a recognition of certain lands in Normandy.[6] These examples might be multiplied indefinitely. The Assise of Northampton assigns for the Eyre recognitions of the seisin of heirs and other cases.[7] And in

[1] See 2 Benedictus, pref. 70, 71.

[2] See various cases in Placita Ang.-Norm. 268–278, and in chapters 12–14 of Madox. [3] Madox, Hist. Exch. 299 (fol. ed.). [4] Ibid.

[5] Placita Ang.-Norm. 271. [6] Ib. 273.

[7] Assise North. c. 5; 1 Stubbs, Const. Hist. 617.

the *agenda* of the Eyre, *anno* 1194, besides recognitions in general, the Magna Assisa is mentioned as within the jurisdiction of the judges, where the amount in controversy did not exceed a hundred shillings; an amount raised to ten pounds four years later.[1] The whole *agenda* of this Eyre of 1194 will be given later, in treating of the County Court; to which part of the present chapter the reader is referred for some further consideration of the relation of the Eyre to the ancient court of the county.

To the ordinary judicial business of the Eyre, the "perlustrantes judices," as the judges were often called, especially in the Dialogue of the Exchequer, united a variety of duties pertaining to the interests of the king. Indeed, they, with the sheriffs, were the king's representatives through the counties for all matters of the Crown. While gradually, by act of the king, superseding the sheriffs[2] in judicial business (except in the ordinary County Court), they were also exercising jointly with them most of the duties which had formerly been performed by the sheriffs alone. Among other functions, they appear to have constituted a sort of limited Court of Exchequer for the county, not, indeed, as possessing the functions of the real court of that name, but as exercising an oversight of the interests of the treasury in the counties, and often adjudicating upon claims of, if not against, the king. In a word, using the term Exchequer in the modern sense, as meaning a judicial tribunal, with jurisdiction of fiscal matters, it may be said that the Eyre was both the Court of Exchequer and the King's Court for the counties, besides having the consideration of much business not of a judicial character. The Rotuli Curiæ Regis are a continuous exemplification of this fact in both particulars at the close of the twelfth century, representing also the greater part of the reign of Henry the Second.

[1] 1 Stubbs, Const. Hist. 617; Sel. Ch. 259, 260 (2d ed.).

[2] The gradual limit of the sheriffs' judicial functions, from the first half of the reign of Henry the Second, is traced by Professor Stubbs, 1 Const. Hist. 606, 607.

How far the causes above mentioned operated to effect the next movement—perhaps not next chronologically—in favour of the exercise of the royal jurisdiction in the country, to the degradation of the local franchises by one step further, is not altogether clear. The causes which, through the Assise of Clarendon, *anno* 1166, led to the opening of the Manorial Courts for the visitations of the sheriffs and the royal justiciars, are not distinctly stated. The assise begins with the mere statement that its provisions were enacted for the purpose of preserving peace and keeping justice. To this end it was decreed that inquiry should be made on oath in every county and in every hundred, by twelve legal men of the hundred, and by four legal men of every vill (manor),[1] whether anyone had been accused of being a robber, or a murderer, or a thief, or a harbourer of robbers, murderers, or thieves, since the king was crowned. And this inquiry was to be conducted before the justiciars (itinerant) or before the sheriffs.[2] Nor did the matter stop here, or end by putting the accused under bonds to answer before the local court: on the contrary, the justiciars proceeded to try and determine the causes thus brought within their jurisdiction.[3] If, however, the lord of a man taken, or the lord's steward or his men, demanded the accused on pledges within three days, he was to be given up with his chattels, until he made his law (by the ordeal?).[4] The next article of the statute gives us a view of the division of jurisdiction, or rather of function, between the sheriffs and the justiciars, showing that, in ordinary matters at least, the duties of the sheriffs on the Eyre of the justiciars were ministerial, and not judicial. Thus early was the change coming about which was at last to strip the sheriffs of their ancient function of judges. The clause referred to provided

[1] "Constantiensis episcopus . . . . ducenas et octoginta *villas* (quos a manendo *manerios* vulgo vocamus) obtinuit."—Orderic Vitalis.

[2] Assise of Clar. c. 1. [3] Ib. c. 2 *et seq.*

[4] Ib. c. 3. If found guilty, the accused was then, it seems, turned over to the justiciars for punishment, who also probably took his chattels in the name of the king.

that, when a (person accused of being a) robber, murderer, or thief, or a harbourer of such, was taken, then, if the justiciars were not to come soon into the county in which the accused was taken, the sheriff was to make the fact known (*mandet*) to the nearest justiciar. The justiciars should then inform (*remandabunt*) the sheriffs where they desired that the accused should be brought before them.[1] The sheriff should then bring them before the justiciars; and two legal men of the hundred and vill where the accused were taken should appear before the justiciars to record (report) the presentment of the hundred and county. And then the accused were thus to make their law (the ordeal) "before the justiciars."[2]

The next article of the Assise is important and emphatic on the point of jurisdiction. It declared that as to those who had thus been taken under the oath of the sixteen men no one should have court or justice or chattels except the king, in his own court, before his justiciars.[3] But this was not all. The following article directed that as to those prisoners who had been taken otherwise than upon the oath of the sixteen, the sheriffs should still bring them before the justiciars without any other summons; and that all persons accused as robbers, murderers, or thieves, and those who had harboured them, whether taken by this oath or not, should be given into the custody of the sheriffs.[4]

It was further provided that all persons should attend at the court for making this oath, and that no one should stay

[1] The original reads: "Si justitiæ non fuerint tam cito venturi in illum comitatum ubi capti fuerint, vicecomites *mandent* propinquiori justitiæ per intelligentem hominem, quod tales homines [sc. roboratores etc.] ceperint; et justitiæ *remandabunt* vicecomitibus ubi voluerint quod illi ducantur ante eos." In connection with the clause "quod tales homines ceperint"—"that they have taken such men"—the natural meaning is that the sheriffs "shall report" and the justiciars "shall reply." The meaning "to report" is common to "mandare" in the middle ages. "Mandate mihi magnitudinem terræ," Placita Ang.-Norm. 25. So in c. 17 of this same Assise.

[2] Assise of Clar. c. 4. Compare the *agenda* of 1194, *post*.

[3] Ib. c. 5. See Dial. Exch. lib. 2, c. 10 (Stubbs, Sel. Ch. 225, 228).

[4] Ib. c. 6; Assise North. c. 12.

away by reason of any franchise, court, or jurisdiction which he had.[1] And, still more stringently, it was decreed that no one within any town or without, not excepting even the honor of Wallingford, should refuse to allow the sheriff to enter his court or land for taking the view of frank-pledge.[2] And the same provision is repeated still more definitely in another article, in respect of persons accused of being robbers, murderers, thieves, or the harbourers of such, and in respect of outlaws and of persons accused of violating the king's forest laws.[3]

The reason for the general and frequent iters of the justiciars which date from this time now sufficiently appears. A jurisdiction had been created for them, though at the expense, and intended expense, of the local franchises. The uncertain state of things introduced with the Conquest by the addition of the disturbing influence of a court not to be restrained by any ascertainable bounds had now come substantially to an end. The king had succeeded at last in building up and establishing a jurisdiction for his own courts, not merely where he chanced in person to be, but in every part of the kingdom, over causes of all kinds, civil and criminal, legal and equitable. The machinery of the King's Court, as fashioned and set into operation by Henry the Second, has been preserved in substantial integrity to the present day. There have been some additions to it; but

[1] Assise of Clar. c. [2] Ib. c. 9.

[3] Ib. c. 11. See the whole Assise in Stubbs, Sel. Ch. 143–146. But some of the franchises held out against the entry of the sheriffs. See the case of the liberty of St. Edmund, Jocelyn de Brakelond, 98, 99 (Camden Soc.), *anno* 1202. "Vicecomes, sciens quod non potuit intrare libertates Sancti Edmundi," etc. On another occasion, perhaps *anno* 1191, a windmill having been erected by a neighbouring proprietor, to the detriment of St. Edmund, the abbot addressing the offender, says: "Senex es, et scire debuisti quod nec *regi* nec *justiciario* licet aliquid immutare vel constituere infra bannamleucam [the *league*, territory, surrounding and belonging to the monastery] sine abbati et conventu."—Joc. de Brakel. 43. See also 1 Rotuli Curiæ Regis, 426, *anno* 1199, where William de Braosa says that neither king, sheriff, nor justiciar has any right to enter his liberty; and the sheriff refused to enter even under the king's writ.

there have been few changes of a permanent nature until within half-a-dozen years.

As to the relation in which the Eyre stood to the popular courts, or Folkmots as they are often and aptly called, the provisions already referred to of the Assise of Clarendon show that the justiciars itinerant exercised concurrent criminal jurisdiction in the counties with that of all the other courts; and passages in the Pipe Rolls, without number, show that this was equally true of civil jurisdiction.

The Case of Geoffrey de D., referred to on a preceding page,[1] affords decisive evidence of the revisory jurisdiction of the Eyre over causes tried in the franchise courts; the judgment of the court of so powerful a man as the earl of Mortain, the king's brother John, being there made the subject of inquiry. Nor is there any reason to suppose that the statements of Glanvill concerning appeals from the local, through the County, to the King's Court,[2] mean that litigants in the country must pass by the Eyre in appeals, and carry their causes from the provincial courts directly to the central court of the king. The Eyre itself was often called the County Court, and was doubtless included in it by Glanvill. The familiar practice of later times probably had its beginning with the establishment of the judicial iters. The king's tenants in chief could perhaps refuse to go before the justiciars itinerant; but the causes and appeals of all others were certainly entertained by them.[3]

It only remains to say that the coming of the justiciars

[1] *Ante*, p. 97.

[2] Glanvill, lib. 12, cc. 1, 7. Glanvill merely says that the causes *may* be transferred "ad capitalem curiam domini regis;" as was done in the case of John the Marshal, Placita Ang.-Norm. 212.

[3] The superior jurisdiction of the justiciars itinerant is spoken of as matter of course by Jocelyn de Brakelond, p. 100, *anno* 1202. "Comitatus vero posuit loquelam in respectum usque coram justiciariis errantibus." See also 1 Stubbs, Const. Hist. 607. The tenants of escheated honors, who were bound to attend the visitation of the justiciars, did not by the escheat become tenants *in capite* of the king.—Dialogue of the Exchequer, lib. 2, c. 24; Magna Charta, c. 43; 1 Stubbs, Const. Hist. 401.

into the counties was announced to the sheriffs in advance, and that they proceeded thereupon to summon the county; all freemen being required to attend, including, as we have seen, those who were exempt by special franchise from attendance upon the popular courts. The court, therefore, though a court of the county, was not the ancient Shiremot. The latter court, indeed, still had its own sessions, but it was bound to give way to the superior jurisdiction of the king's justiciars, in case their visitation occurred at the time for the session of the ancient court.

The Exchequer.

The Exchequer, as it existed throughout the twelfth century, was the work, largely, of Roger, bishop of Salisbury and treasurer to Henry the First, so far as its fiscal character and incidents are concerned. It became gradually, to a limited extent, a court for the trial of common pleas in addition to its chief function; or rather the trial of common pleas came to be permitted before the Exchequer. But it is improbable that this was any part of the scheme of its famous reorganiser.

Of the existence of some institution, prior to the reign of Henry the First, for the regulation of matters of the royal revenues we might be certain even if the records of the time did not tell us of a Thesaurium; but as to details concerning the machinery and working of the same, we are left in comparative ignorance.

The Dialogue of the Exchequer, written in the year 1177, by Richard, bishop of London, grand nephew of the reorganiser of the court, himself also treasurer to the king, is the great storehouse of information concerning the court of Roger; and that gives us, also, some information of the predecessor of the Exchequer, the Treasury, and of the causes which led to the substitution of the better machinery. The author says[1] that, according to the report of the fathers, silver

[1] Dialogue of the Exchequer, lib. 1, c. 7; Stubbs, Sel. Ch. 193. The Dialogue is to the Exchequer what Glanvill is to the King's Court.

and gold, in the primitive state of the kingdom after the Conquest, were not paid by the tenants to the king from the royal manors (the old folkland) but provisions only; out of which the necessities of the royal household were supplied. And persons were deputed to ascertain how much should be furnished from each estate. But for the purpose of money payments to be made by the king, gold and silver were paid by reason of pleas and offerings ("conventiones"[1]) had in the kingdom, and from the cities and towns in which agriculture was not practised.

This institution, the author continues, lasted throughout the reigns of the Conqueror and of Rufus; and he adds that he himself had known men who had seen provisions brought, in the eleventh century, from the royal estates to the court. The officers of the royal house brought in a certain amount of wheat from every county; and from every county divers kinds of meat, fodder for horses, and other necessaries were due. These were paid in upon an established *modus* for each article; the royal officers computing the matter to the sheriff (who had brought the articles) by reducing their value to a money basis ("in summam denariorum"); for a quantity of wheat, e.g. for bread for a hundred men (daily?), one shilling; for an ox *pascualis*, one shilling; for a ram or sheep, four pence; for provender of twenty horses, four pence.

Afterwards, when the king (the sequel shows that Henry the First is meant) found it necessary to put down warlike uprisings on the Continent, there arose the greatest need of money to accomplish his objects. In the meantime a multitude of complaints from the tenants reached the King's Court, or, what to the king was more annoying still, ploughshares were frequently offered to him in his journeyings as a sign of the failing of agricultural industry. The people complained of being oppressed by infinite demands for provisions. Influenced by these complaints, the king took counsel of his

[1] What these were will be seen later.

great men, and appointed persons of prudence and discretion through the kingdom to go about and make inquiry at each of the estates, making a computation of the amount of provisions which was being required, and reducing the same to a money value. For the total sum which arose from all the estates in any county, these persons now ordered that the sheriff of that county should be held to account at the Exchequer ("ad Scaccarium"); from which expression alone it would appear that this was during the reign of Henry the First, before whose time that name was not used, at least in England.[1] It was further decreed that the sheriff should pay "ad scalam," for every pound of money value, six pence. It was soon found necessary further to decree that the ferm of the manors should be paid not only "ad scalam," but also "ad pensum," because, it seems, of the clipping of the money. This mode of accounting was retained in the Exchequer for several years. Hence, says the author of the Dialogue, from whom we continue to translate, it will often be found written in the ancient *rolls* of that king ("regis illius") "in thesauro c. libras ad scalam [liberavit], vel, in thesauro c. libras ad pensum."

Meanwhile, adds the writer, a prudent man, foreseeing in counsel, discreet in speech, and in all great matters of business especially distinguished,[2] was called by the same king to his court; who growing in favour with the king, the clergy, and the people, was made bishop of Salisbury, and received the highest honours. He had very great knowledge concerning the Exchequer, and it was clear from the rolls themselves that the Exchequer flourished very greatly under him. The Dialogue then proceeds with the reforms instituted by Roger in respect of the kind of payment made by way of revenue; especially the testing of the money by melting it.

[1] See 1 Stubbs, Const. Hist. 377, note, 378, note.

[2] Before his accession to the throne, the king is said to have been first struck with the expeditiousness of Roger, while a clerk near Caen, in saying the mass, and at once called him to be his chaplain.—William of Newburgh, 144; William of Malmesbury, Gesta Reg. pp. 441, 442, note (Bohn).

This is all, or nearly all, we know of the Treasury; but it is sufficient to indicate that the efforts of Roger were devoted mainly to reforms—to making the existing machinery more effective than he found it—rather than to the creation of a new system of finance. There had been a central court of the *fiscus* in the eleventh century, composed of royal officers ("regii officiales"), as there was in the twelfth century, under Roger's reforms; and to this body the sheriffs, then as afterwards the taxgatherers, made, as they did in the time of Henry the First and Henry the Second, their report and received their discharge or not according to the particular case. There is every reason to suppose, also, that the court acted judicially, and not merely as a body of auditors, as well before the time of Roger as afterwards. Through this Treasury of the first Norman kings the Exchequer of Henry the First is thought to have unbroken connection with the Anglo-Saxon Hord; one of the special features of the Exchequer, the blanch-ferm, being the result of a state of things peculiar to the ancient monetary system of the kingdom.[1]

Concerning the Exchequer of Roger our information is ample. The Dialogue goes into minute details. Not only is the meaning of the term "Scaccarium" unhesitatingly given, the familiar one of the *chequered* cloth with the game of chess,[2] but speaking of it physically, it is described as a table, whose precise dimensions are stated, and the fact mentioned that it was surrounded by a rim of a certain height, to prevent the treasure from falling off. Whatever was done by common counsel at this table was said to have

[1] See Stapleton's Introd. to the Norman Exchequer Rolls; 1 Stubbs, Const. Hist. 378, note. The blanching, as described in the Dialogue, was the testing of the money by fire, a thing unknown, it is said, in Normandy, and introduced into England in consequence of the monetary system of the Anglo-Saxons. The German writers have thought the Exchequer a bodily importation from Normandy. 1 Gneist, Verwalt. 194, 201; Brunner, Schwurg. 154.

[2] "Scaccarium lusile," Dialogue, lib. 1, c. 1; Stubbs, Sel. Ch. 171 (2d ed.).

been done "ad Scaccarium," as formerly it was said to have been done "ad Taleas," at the Tallies. The Dialogue informs us that in another sense the Exchequer was composed of an upper and a lower room; the table being situated in the former, around which sat the court, while the lower room was used for purposes of testing the money. The order of sittings about the table is also described, with the official names of the occupants, and the order of precedence.

Inquiring as we are into the judicial aspects of the Exchequer, the membership of the court is the only one of these curious details with which we are concerned. The presiding and in all respects most distinguished officer of the body was the king's justiciar; that is to say, when the king himself was not present. He (the justiciar) sat at the head of the table. First, at his left, sat the chancellor, "ratione officii," if he happened, says the Dialogue, to be present. Next to the chancellor sat the constable; after him two chamberlains; and next came the marshal. When these were absent, others sometimes took their place; and sometimes even when they were present the king deputed others to sit in precedency of them. This completed the first of the four sittings or sides of the room. At the head of the left side of the table sat the clerk or other servant of the chamberlains, with counter tallies "de recepta." Then, after seats for certain ones who did not sit *ex officio*, but were specially delegated by the king, there was a place in the middle of the side for the one who put in position the matters of account for the counters. Other persons, not *ex-officio* members, followed; and then at the end of the seat, the principal secretary ("clericus qui scriptorio præest"). At the right side of the chief justiciar, next to him, sat (at this time) the bishop of Winchester, not *ex officio*, but by a new law; so that he might be next to the treasurer and carefully scrutinise the writing of his roll; the document to which is given the name of Pipe Roll, or Roll of the Pipe, from its form. Next sat the treasurer at the head of the

right-hand side seat, whose duty it was to exercise most diligent care over all that was done, as being the person to render account to the king if need were. His clerk sat next, acting as writer of the roll of the treasurer. Then another scribe, the writer of the chancellor's roll, and then the chancellor's clerk, who looked diligently to see that his own answered to the other (the treasurer's roll) in all respects, so that not an iota might be wanting ("ut nec iota unum desit"). At the end of this seat sat the constable's clerk, a great man, full of business in the King's Court, but holding office also here, acting either in his own person, or, if the king needed him elsewhere, by a discreet clerk. At the head of the fourth side of the table, opposite the justiciar, sat (at this time) master Thomas Brown ("Brunus"), with a third roll,[1] who also had been added by a new law, "hoc est," adds the author of the Dialogue, "a domino rege nostro," a man of great skill, whom the king had brought from Sicily. Next to him sat the sheriffs and their clerks, prepared with tallies and other necessary things, to render their accounts.

Such in outline was the court which exercised at the same time judicial and supervisory powers over the returns of the government revenues. A more particular description of the special functions of each of these officers follows. The chancellor was first in rank of those on the left of the justiciar, as his seat would indicate; and he, we are told, was a great man both in the Exchequer and in the King's Court, commonly spoken of in the Dialogue as The Court. Without his consent no important business could be transacted; but this was true (only?) while he sat in the Exchequer. The custody of the king's seal, kept in the treasury, belonged to him; and so did the custody of the second roll above-mentioned. In case of a mistake by the treasurer the chancellor or his clerk could correct him, but if the treasurer

[1] The reason for having three rolls was expressed by the proverb, "Funiculus triplex difficile solvitur."

should refuse to make a change, the matter must be brought for argument and decision before the barons.

The constable's position at the Exchequer was that of a witness, with the justiciar, of the writs issued from the treasury and of certain of the accounts for those who rendered them; for, it was said, there ought to be two subscribing witnesses to all writs of this kind, according to ancient usage ("ex antiqua institutione"). In this particular the practice of the Exchequer differed from that of the King's Court, and the greater importance attaching even in the latter quarter of the twelfth century to the proceedings of the *fiscus* than to those of a court of general litigation strikingly appears. The constable, with his clerk and the marshal, also attended to the payment of the stipendiaries, and had various other duties of no legal interest.

The marshal among other things had charge of the tallies[1] and of the king's writs "de computandis, vel perdonandis [i.e. discharges], vel dandis," as to things required of the sheriffs by summons. If a debtor was to be taken into custody for not satisfying the summons upon him, he was given into the hands of the marshal, and when the court adjourned for that day the marshal might put him into the public prison; but the debtor was not to be put in chains or thrust into the lowest place, but placed by himself or "supra carcerem." It also belonged to the marshal, after the account of the sheriff, or "custos," or other person sitting at the accounts, was passed, to receive in public the party's oath, that he had rendered an honest account, according to his conscience. If the person accounting was still held by any debt, he added that he would not depart from the Exchequer, which was said to mean the league ("leugata") of the town in which it was sitting, unless to return on the same day, without permission of the barons. He also received the

[1] What the tally sticks were, see Madox, Hist. Exch. 708 (fol. ed.); 1 Stubbs, Const. Hist. 379; Dialogue, Stubbs, 181, 182 (2d ed.).

summonses made to the next term of the Exchequer, signed "a latere sigilli regii," and delivered them to the usher of the upper room, to be sent through the country.

The treasurer's duties were of course of the highest importance. So far as the present inquiry is concerned with them, they began with receiving the accounts of the sheriffs. The treasurer and the sheriff were indeed the chief players in the game of chess. When the court was assembled the treasurer inquired if the sheriff was prepared to render his account. If he answered, "I am ready," the treasurer said: "Tell us then, in the first place, if the 'eleemosynæ, decimæ, liberationes' have been attended to, and if given [named] lands stand as in the last year." If the sheriff answered in the affirmative, the treasurer's secretary followed carefully the roll of the last year for the purpose of writing down the appointed matters, the treasurer looking on to see that the hand of the writer made no mistake. These things having been attended to, the treasurer inquires of the sheriff if he has expended anything of the ferm of the county under the king's writ, in addition to the established matters. Whereupon the sheriff delivers to the chancellor's clerk, one by one, the writs sent him by the king, and the clerk, as he reads them openly, delivers them to the treasurer, that he may put the proper words, according to the form of the writs, for the writing of his roll; for, as the Dialogue states, the treasurer prescribed the language to be used, and the other secretaries, as well as his own, received the same from him. As to this matter, the treasurer had to take great care not to discharge some one who was still liable, or to make one liable who ought to be discharged; for such was the authority of his roll that it was not lawful to contradict or change it, except in a case of manifest error, patent to all. Nor ought it to be changed unless by the common counsel of all the barons, and during the same term of the court. After the adjournment of the court it was not lawful for

anyone except the king (who in this matter could do what he pleased, "cui super his licent quæcunque libent") to change the writing of a roll of the last or even of the present year.

The roll, it will thus be observed, became *res judicata* at the close of the term, beyond the recall of the court itself; but the king had the power afterwards, like a modern judge in equity, except that he acted at his will (a fact which everywhere reappears in matters judicial until the thirteenth century, and should be sufficiently observed), to order a change of the record. There was no situation in which the kingdom was without the principle of equity.

It pertained to the chancellor's secretary to write the writs of the king that issued from the Treasury concerning those things which, by the consideration of the barons during the sitting of the Exchequer, ought to be paid out by the treasurer and chamberlains, but not the general writs de computandis or perdonandis. It was his duty also, when the sheriff's accounts were passed, and the debts due the king taxed, concerning which summonses were required, to write the summonses carefully for transmission throughout the kingdom.

The chancellor's clerk had similar duties in many respects to those of the treasurer. He might correct the mistakes of the treasurer, as has been observed; and his first duty was to follow the treasurer in everything done in the court, especially in the matter of the writing of the rolls and writs. He carefully watched the writing of his secretary to prevent mistakes, and scrutinised diligently the roll of each year until satisfaction had been made by the sheriff concerning the debts there stated, for which he was summoned. Then, as has been stated, when the sheriff was ready to account for what he had done by virtue of special writs of the king, the clerk received from him the king's writ of summons, and pressed him concerning the debts named therein, saying: "Render account to such an amount of this or that." He now cancels debts

paid in full by drawing a line through them. He was also charged with correcting and sealing the writs.

The constable's clerk was an important officer in the King's Court as well as in the Exchequer. He took part with the great men in the most important matters, and the king's business was transacted with his consent. It was his duty to go to the Exchequer for the king with the counter-writs ("contrabrevia," copies, after the service of the originals), concerning those matters only which had been transacted in the court; for the fines imposed in the King's Court were to be accounted for in the Exchequer.

Little of legal interest attaches to the other officers, except perhaps the usher. The duties of this officer are for the most part sufficiently indicated by his title ("ostiarius," doorkeeper). But some of his ordinary duties were connected with the inner working of the court; which the author of the Dialogue proceeds to state. The barons, we are told, were wont to go to the usher whenever a doubtful question was proposed before them, to be admitted to a private room where the matter could be considered by them alone, and also so that the taking of the accounts might not be hindered in the meantime. Here, it is to be presumed (if not generally, in the Dialogue), we are to understand by the "barons" the judges, to the exclusion of the merely ministerial officers, who may be considered in part as auditors of the accounts. And this is confirmed by the statement that to them, that is, to these barons, was referred every question which arose. This appears to furnish not only good ground for asserting as to fiscal, not to speak of other matters, a division of functions into auditorial and judicial—as to which indeed there could be no doubt—but also the general basis for the division, in respect of *personnel*. And on this division of functions, the final separation of the body into a *fiscus* solely and a judicial tribunal took place. The name "barons" was always retained by the judges; but that is merely an historical fact.

The usher further received the summonses which were made and signed by the marshal, as has been stated; and when the session was adjourned for the term, he served them either in person or by some faithful messenger throughout the land. He also convened the sheriffs, by orders from the justiciar, when they were wanted.

The judicial feature of the Exchequer as such was peculiar. What has already been said is sufficient to indicate this. But this was not all. The procedure throughout had its special aspects, which found no perfect counterpart in the other courts either in the twelfth century or in later times. The sheriff or other party bound to account was proceeded against as a debtor to the king; and it might very naturally be supposed that the constantly recurring causes of this kind, with the writs "of course" which attended them, making such actions of debt probably far more familiar to the judges than the corresponding actions in the other courts, would have led, if not to a substitution of the procedure of the Exchequer in debt, at least to a modification, under the hands of the judges, of the popular procedure. But nothing of this sort appears to have taken place, and the other courts—so strong was the hold of custom—continued to use the ancient procedure, as if the Exchequer were not in existence. Indeed, when the Exchequer itself emerged somewhat later into a court for the trial of litigated causes, including common pleas, it was with the procedure of the Folkmot and the King's Court.

The procedure against a party bound to account for the ferm of a county or burgh began by a summons, the writ of debt of the Exchequer. No one was bound to come to court as a debtor to the Crown unless summoned by a writ bearing "the image of the royal authority;" and some came, says the Dialogue, to sit and judge, others to pay and be judged. The barons came as judges *ex officio*, or by special command of the king; while the sheriffs and many others came to pay and be judged, some to make voluntary offerings (for having,

hastening, or delaying justice in the other courts), some to make necessary payments. And it was essential in every summons to state how much was (deemed to be) due at the instant term, with the "cause" thereof; as "have this or that sum, for this or that cause." No demand, as a rule, could be made, for example, of a sheriff concerning anything due from any debtor in his county concerning whom no mention was made in the writ of summons, though there were payments which the sheriff had to provide and account for, as to which the summons was silent.

Summons to a sheriff was made by a writ in the following form, the writ of debt above referred to: "H. rex Anglorum, illi vel illi vicecomiti, salutem. Vide sicut teipsum et omnia tua diligis, quod sis ad Scaccarium ibi vel ibi, in crastino Sancti Michaelis, vel in crastino clausi Paschæ, et habeas ibi tecum quicquid debes de veteri firma vel nova, et nominatim hæc debita subscripta; de illo x. marcas pro hac causa, et sic deinceps."[1] Then followed a category of all the debts *seriatim*, with the causes, as contained in the great annual roll heretofore mentioned; and to these items there were added from the lesser rolls of the itinerant justices all that was enrolled as due through the counties and taxed *a majoribus*. All these being put down in order, the writ formally closed with these words: "Et hæc omnia tecum habeas in denariis, talcis, et brevibus et quietantiis, vel capientur de firma tua; teste illo vel illo, ibi ad Scaccarium."

How the sheriff appeared and was addressed by the treasurer as to the appointed alms, tithes, and liveries, which appear not to have been set out in the writ (such, of course, not being debts, but payments made by him), has been stated. Then he is asked by the treasurer what moneys he has expended under special writs of the king; which matters also, it seems, were not contained in the writ of summons. Having answered this question and produced his vouchers

[1] Dialogue of the Exchequer, lib. 2, c. 1; Stubbs, Sel. Ch. 211 (2d ed.).

(the king's writs) and such other evidence of the payments as the case required, and proceeded similarly with certain other items, the writ of summons is finally reached, with which alone we are now concerned. Of the items charged in the summons, that concerning pleas and conventions ("de placitis et conventionibus"), the last item of all, shows fully the procedure. The chancellor's clerk now takes the writ (the treasurer apparently having had it before him, for the preceding items) and presses ("urget") the sheriff concerning each charge set down, saying: "Redde [compotum] de illo x. libras; pro hac causa." This, of course, answers to the count in an ordinary action for debt. The sheriff's answer is usually a confession and payment in whole or in part, and is written down by the clerk accordingly, thus: "N. reddit compotum de x. l. pro hac causa." In some cases his answer to the demand would be that he had been discharged by writ of the king, which would be produced; and then the entry was, "N. reddit compotum de x. l.," adding the cause, and concluding, "Per breve regis ipsi N. x. l., et quietus est." In other cases it was, "In perdonis per breve regis" so much "et debet" so much.

In some cases it happened that the sheriff had not collected the tax due from a particular person; and he was allowed to plead the fact if he could explain it. If he answered that he had made diligent but ineffectual search for goods of the person in question, the treasurer would say, "Be careful, for you must make oath of this matter," and adding, "When you have given the oath, you shall confirm it *corporaliter*."[1] But if the sheriff replied, "I am ready," the taking of the oath was postponed to the end of the accounting, when in any case he was bound to swear the truth of his answers.

Such was the course of proceeding in a typical case in the Exchequer as a *fiscus*. In form it differed widely from a plea of debt in the King's Court; but yet not so much in substance.

[1] This probably refers to the ceremony of the oath. Comp. pp. 120, 121.

The sheriff is summoned into court by his creditor, the king, for a variety of debts due by him as collector of the revenue; each one of which may be taken as a separate legal demand. The defendant confesses judgment as to one, pleads the king's own discharge as to another, and affirms as to a third that by the exercise of all reasonable diligence he was unable to collect the sum charged. And then, to establish the truth of any defence, such as the last, he makes oath and offers to prove the same "corporaliter." This entitles him to a discharge, so long as there is no such evidence against him as to bar him from giving the oath, and no one appears to contest it with an offer of the duel. The chief difference in substance between this and an ordinary plea of debt contested between lord and man is, that in the latter case the plaintiff would tender the duel with his demand, and that the defendant (in the time of Henry the Second) would have the choice of accepting the tender or of putting himself upon the Grand Assise as to the question of right.

Summons in the foregoing form appears by inference from the language of the Dialogue to have been in use in the time of Henry the First; so that if this be true, writs de cursu are older in the Exchequer than in the King's Court. The author says that as new diseases require new remedies, so there was added to the summonses, by a new law, "hoc est, post tempora regis Henrici primi," this subscript: "Si forte de alicujus debito summonitus es, qui terram vel catalla non habet in baillia tua, et noveris in cujus baillia vel comitatu habuerit; tu ipse vicecomiti illi vel ballivo breve tuum hoc ipsum significes, deferente illud aliquo a te misso, qui ei breve tuum in comitatu, si potest, vel coram pluribus liberet." [1]

The cause of this addition to the writ need hardly be suggested; but the picture is so vividly drawn, and the facts so far exceed the suggestion of our times (unless they find a parallel in the American excise), that the digression of a

[1] Dialogue, lib. 2, c. 1; Sel. Ch. 212.

moment, if it be digression, may be suffered. The proceedings ad Scaccarium were directly noised abroad, and the consequence was that the report of the summonses to the individual debtors reached their ears in advance, long before the summons in fact reached the county; and immediately every man set his house in order. The granaries were emptied, and the movables scattered hither and thither or transferred to safe places. The tenant now sat in his empty house, awaiting in security the coming of the sheriff and the other officers. The sheriffs of the adjoining counties were powerless: they could not levy upon the goods of non-resident debtors not enrolled upon their lists. And by such artifice the authority of the royal summons was for many years eluded with impunity.[1]

The law required no impossibilities in those days more than in these; and the sheriff was permitted in proper cases to excuse (essoin) himself from personally answering the summons served upon him, provided always he sent on the money collected. This he sent by legal men, who bore also his letters of excuse to the justiciar; which they were to confirm by oath *corporaliter*, if the justiciar desired. He was thus saved from a fine; but these persons could not undertake the rendering his account, though in his letters he had said: "Mitto vobis hos servientes meos N. et N., ut loco meo sint, et quod ad me pertinet faciant, ratum habiturus quod ipsi fecerint." No one but his eldest son, except by special writ of the king or by authority of the chief justiciar in the king's absence, could undertake his accounts.[2]

Among the lawful excuses of the sheriff, besides the sickness of himself, and of his eldest son when deemed nigh unto death, and of his wife when confined, he could sometimes excuse himself by reason of his duty to his lord, to whom by reason of tenure he owed his first duty after his allegiance to his king. Such a case arose when the lord had summoned

[1] Dialogue, lib. 2, c. 1; Sel. Ch. 212.
[2] Dialogue, lib. 2, c. 4; Sel. Ch. 218.

him to come and aid him in a cause in which the former had been drawn into court as to his whole fee or the largest part of it; provided the cause could not be delayed. Another case of excuse arose when his lord, weighed down with infirmity, wished to make a will in the presence of his men, and to this end had called the sheriff to him with his other tenants. And a third case arose upon the death of his lord, or his lord's wife or son; when it was his duty to attend the obsequies.

The profits of the county jurisdictions, called the ferm ("firma"), were put down separately in what was called the "rotulus exactorius;"[1] while the other subjects of revenue were enrolled in annual and other rolls. The ferm was a fixed minimum, which was often increased by the diligence of the justiciar. The annual rolls were subject to variation, according to the needs of the king. These were made up of the scutage, the *murdrum*, the danegeld, essarts, purprestures, escheats, census of the forests, and pleas and conventions; though scutage and danegeld were exceptional taxes. Each county appears to have been separately charged in the annual roll with its proportion of these several items, in the lump at first; and then, upon the adjournment of the (Michaelmas) term, the amount fixed upon each county, with the subjects thereof, was taken out of the annual roll and copied down in shorter rolls by the treasurer's clerks. After this was done those of the court whom the "majores" called went aside, and considering each county by itself, determined in the case of every tax-payer for how much he ought to be summoned; having regard to the condition ("qualitatem") of the person and to the nature ("qualitatem") of the business and cause for which he was bound to the king.

The result was that two classes of writs of summons, of which we have had some hints already, were issued; one to the sheriff, containing the itemised sums to be collected from each of the debtors of his county as determined in the manner

[1] Dialogue, lib. 1, c. 18; Sel. Ch. 209.

just mentioned, an example of which writ we have already seen; the other to the individual debtors themselves, corresponding to the items of the summons to the sheriff. No example of this latter writ is given, nor is it anywhere described; but it issued in the king's name, it may be inferred, and required the debtor to make payment to the sheriff on pain of compulsion. If the tenant had any excuse or answer to make in whole or in part to the writ, this was probably made by him at the coming term of the itinerant justiciars. Here would then be a session of an inferior Exchequer, as has elsewhere been suggested, corresponding in some respects to the central court about the king.

If a particular debtor failed to obey the summons to pay, and made no appearance before the itinerant justiciars, it was the duty of the sheriff to proceed to make forcible collection of the sum named, if sufficient property were to be found. Levy upon and sale of the debtor's property were to be made. This, however, was to be done in a specified manner, and it behoved the sheriff to warn the sellers to observe the same. Movables were first to be sold, sparing oxen of the plough, that the cultivation of the soil might not be prevented and the means of future coercion of the debtor taken away. Still, if the movables levied upon were insufficient to pay the demand, then oxen of the plough were to be taken; and if still there was a deficit, the officers were to go to the land of the debtor's *adscriptitii*, and proceed to sell their movables, observing the same order as before; for such property was known to belong to the lord or debtor. When this was done the law required the sellers to desist whether full satisfaction had been made or not; unless scutage were demanded of the lord. In that case if a tenant *in capite* had not paid this special tax, the chattels of his knights could be taken as well as his own goods and those of his *adscriptitii*. But the chattels of the lord's knights were not to be sold until after the sale of the lord's. And if the knights had paid to the lord the

produce of their fees, and would give security to prove this, the law prohibited any sale of their chattels.[1]

When such proceedings failed, it was the sheriff's duty to make diligent inquiry to ascertain if anyone in his county owed the debtor anything, or had any property of the debtor in his hands; and in case such a person were found, he was required to pay the amount of the debt, or to turn over the debtor's property held by him to the sheriff, to the amount of the debt, and the party was then discharged as to his own creditor; the modern process of garnishment.

A person of such rank as to hold a barony of the king was treated with a consideration which men of lower rank, even tenants in chief, did not receive. All below the holders of a barony appear to have stood upon a common level as to the requirement of the personal summonses; their duty was to make payment or to show some just excuse for not doing so. A person, however, who held a barony, upon hearing the summons, was entitled to pledge his faith, either in his own person or in that of his steward (*œconomus, senescallus*), in the hand of the sheriff that he would make settlement in respect of the sum demanded and of the summons on the day of accounting before the barons of the Exchequer. This pledge of faith was to be received by the sheriff in open County Court, before the eyes of all, so that if the party giving it should wish to deny the fact, the (verbal) record ("recordatio") should suffice against him; which is an interesting illustration of a general limit upon the right of proof by oath, a limit prevailing in all the courts in favour of an offer of the witness of the community. If the sheriff confessed that the oath had not been taken in this way, he was adjudged to have done nothing; and he himself was then to make good the amount required, according to the words of the writ, "vel capientur de firma tua."[2]

[1] Dialogue, lib. 2, c. 14; Sel. Ch. 237.
[2] Dialogue, lib. 2, cc. 19, 20; Sel. Ch. 240.

If, however, after the sheriff had received the oath in due form, such party failed to appear at the accounting when required by the herald's voice, and made no satisfaction in person or by procuration, the sheriff was adjudged to have done his duty; and the matter was directed by the treasurer to be kept by itself in memoranda of the Exchequer for consideration at the end of the term. Then, taking counsel together, the judges imposed a severe punishment upon the delinquent. But if, after the sheriff's account was passed, the party came and made satisfaction, then, as matter of favour on the part of the judges, he could be absolved.[1]

If the party came to court on the appointed day and did not deny that he had pledged his faith, but still failed to make satisfaction, he was to be detained, if a lord (of lands), at the Exchequer during the session, giving his faith in the hands of the marshal not to go beyond the league of the place without permission of the barons. If at the end of the term he had not made satisfaction, he was to be kept in a safe place under a liberal custody ("sub libera custodia") until the king himself, if present, or, if not, the justiciar with his associates, should decide what should be done with a man who had thus pledged his faith and had not fulfilled his promise. If a knight or other person, his steward, who had given the pledge for him, came and did not offer satisfaction, he should be taken for the breach of faith and given into the custody of the marshal, to be put in chains and sent to prison after the close of the term. But a knight who had pledged his faith concerning his own debt, and had not kept his promise, was, after the dissolution of the court, to be kept in free custody, not in the prison but within the walls of the prison grounds, after making oath *corporaliter* that he would not leave without permission of the king, or of the president of the court, i.e. the justiciar. For the king had decreed that everyone of the dignity of knighthood, if accounted poor by the sheriff

[1] Dialogue, lib. 2, c. 20.

and by the vicinage, should not be cast into prison for his own debt, but should be kept in free custody as stated. But he who, by command of his lord, had pledged his faith, and then on coming to court had failed to satisfy the claim, was to be imprisoned, whether a knight or not; and the sheriff's officers were to be directed to seize his goods and sell them, bringing the proceeds to the Exchequer. The party thus in default was also to be fined, according to the extent of his property, for breaking his faith, and was not to be permitted to pledge his faith again concerning the same debt, even if his lord commanded.

The relation of the Exchequer to the other courts of the king, that is, to the central court which attended him and to the Eyre, may be inferred from remarks upon the pleas and conventions. The former term ("placita"), as used in the Dialogue and in the Pipe Rolls, meant the pecuniary fines imposed in the royal courts proper, central and itinerant, and in such other jurisdictions as were in the ferm of the sheriff, perhaps only the County Court (which in a measure was a royal court, the king being entitled to the third penny therefrom). The "conventiones" are described as spontaneous offerings ("oblata spontanea"); but in a peculiar sense. They were of two classes, "oblata in rem" and "oblata in spem." The former were offerings for having some franchise, or fee, or ferm in the gift of the king, or for the custody of some minor until he arrived of age, or for anything else obtainable, tending to promote the party's welfare or honour. The offerings might or might not relate to the administration of justice, according as a franchise of jurisdiction were sought or not. The "oblata in spem" were the offerings heretofore mentioned, for having, hastening, or delaying justice in the courts. In so far as payment was not made directly to the king in full equivalent and discharge for the object sought, it devolved upon the sheriffs, in connection often with the justiciars itinerant, to make collection

through the counties according to the nature of each particular case and the agreement as to payment.[1] Through whom the fines imposed in the King's Court, payment of which was not at once made, were reported to the Exchequer does not clearly appear. Perhaps it was through the constable's clerk, who as we have seen was much occupied in the King's Court as well as in the Exchequer. It was his duty, among other things, to sit in the Exchequer with the counter-writs concerning the things done "ad curiam."[2] Probably, however, such debtors themselves were individually summoned to the Exchequer to account there.

Some examples from the Pipe Rolls will serve to show more definitely the relation of the Exchequer to the other courts, by showing what particular matters could be adjusted only in that court. In the thirty-first year of Henry the First, William of St. E. and Jordan, his son, were reported to the Exchequer as owing ten marks of silver for having right concerning land of Roger, uncle of Jordan; and if they succeeded in recovering they were to pay twenty marks.[3] Tierric, son of R. F., in the same year, owed ten marks of silver for having right concerning his inheritance.[4] Robert, son of G., rendered account as to a charge of two ounces of gold, to recover his land by his body; for which he paid thirty shillings "et quietus est."[5] Ralph B. rendered account of ten marks of silver that he might not plead concerning his land in his lifetime; of which sum he paid into the treasury forty shillings, and owed seven marks of silver,[6] which shows the value of the silver mark to have been thirteen shillings and four pence. Robert G. rendered account in respect of a war-horse that he might not plead concerning land which Richard of H. claimed against him.[7] Matthew de V. was reported as owing one hundred measures of wine

[1] Dialogue, lib. 2, c. 12; Sel. Ch. 232, 233.
[2] Dialogue, lib. 1, c. 6; Sel. Ch. 189. [3] Placita Ang.-Norm. 140.
[4] Ibid. [5] Ib. 141. [6] Ibid. [7] Ibid.

for the concord of a duel.[1] These were all cases of the thirty-first year of Henry the First.

The following were cases of the reign of Henry the Second: In the second year of this king (1156) the sheriff of Norfolk rendered account of eight pounds seven shillings and four pence of the assise of the county.[2] The sheriff of Suffolk rendered account in the Exchequer of fifteen pounds and seventeen pence of the assise of the county and of the *auxilium* of Ipswich.[3] The same sheriff, at the same time, rendered account of five marks of silver of the assise of Ipswich; also one hundred marks of silver for a false judgment.[4] Richard de Luci, the justiciar and also sheriff of Essex, rendered account of fourteen pounds two shillings of the assise held by the chancellor (Thomas à Becket) and Henry of Essex. "In perdonis per breve regis comiti Warreno xiv. lib. et ii. s. et quietus").[5] Henry of Essex, sheriff of Buckingham and Bedford, rendered account of one hundred marks of the assise of the two counties.[6] In the session of the next year after these entries the sheriff of Surrey rendered account of fifty-two shillings of the assise of the bishop of Chichester.[7] A year later Robert, son of G., rendered account of forty marks of silver of the assise of Rutland.[8]

Turning now to the entries in the unpublished rolls, the following may be noticed: The sheriff of Lincoln a few years later than the foregoing entries rendered account of chattels of fugitives and of men who had perished in (consequence of failure in) the water ordeal.[9] Adam, son of A., rendered account of one hundred marks to have record of the King's Court concerning a plea between himself and Agnes of R.[10] Hugh of K. was found owing a mark for absenting himself from the duel.[11] William of O. owed twelve marks for default

[1] Placita Ang.-Norm. 142. [2] Pipe Roll, 2, 3, & 4 Hen. II. p. 7.
[3] Ib. 9. [4] Ibid. [5] Ib. 17. [6] Ib. 23. [7] Ib. 94. [8] Ib. 145.
[9] Placita Ang.-Norm. 268. [10] Ibid. [11] Ibid.

of prosecuting his suit.[1] Robert of H. accounted for one hundred and six shillings and eight pence promised for putting off a plea between him and Ralph M. to the term of the Exchequer ("usque ad Scaccarium").[2] Reimund de B. owed twenty marks for the appeal by W. (who had turned king's evidence) of forgery.[3] Ralph de F. owed ten marks for hastening judgment of Richard the Smith, who had appealed him and his men of taking a stag (in the king's forest, perhaps), and then retracted his appeal.[4] Michael de S. rendered account of forty shillings because he did not have before the justiciar a man whom he had pledged.[5] One of the sheriffs rendered account of eight pounds for false judgment of a duel.[6] Roger de E. rendered account of half a mark for refusing to answer in the court of the dean of Waltham according to the king's writ, to which he saw no seal.[7] Hugh B. rendered account of ten marks for deferring a recognition "usque ad Scaccarium."[8] Swetman K. was debtor in half a mark for leaving the King's Court without permission.[9] Joslin of H. rendered account of twenty shillings for falsely accusing Osbert L. of the death of a person, and not having his warranty.[10] Robert, son of E., was debtor in five marks that a plea between himself and Hugh M. might be tried before the justiciar in the Exchequer.[11] The dean of Wells rendered account of four marks for casting one of the king's servants into prison.[12] William B. was debtor in one hundred marks for a fine which he made with the king concerning a "jurata" made about him ("de jurata facta super eum") in the Inquisition of Sheriffs of England by Walter of the Isle and Eustace son of Stephen[13]; the earliest mention of a *jurata* by that name, so far as the writer is aware, that has been noticed, being in the year 1172.[14] Robert of L. rendered

[1] Placita Ang.-Norm. 268.
[2] Ib. 269. [3] Ibid. [4] Ibid. [5] Ib. 270. [6] Ibid. [7] Ibid.
[8] Ibid. [9] Ib. 271. [10] Ibid. [11] Ibid. [12] Ibid. [13] Ibid.
[14] The Inquest of Sheriffs was *anno* 1170. Sel. Ch. 147.

account of three marks and a half concerning P. and five others for judgment of iron twice carried with one heating.[1]

The foregoing cases were before the Exchequer from the twelfth year of Henry the Second until the twenty-first. These examples will be closed with a few special illustrations of the complementary relation of the Exchequer to the King's Court, and of the dependence of the latter court upon the former for the final execution of process relating to the king's revenue. Of the pleas of William, son of R., and Bertram de V. and William B. in the King's Court, William G. rendered account of ten marks and a hawk for imprisoning G. of York.[2] William of C. rendered account for retracting a plea against earl Simon in an assise.[3] Oger, son of O., rendered account of half a mark for the enrolment of a chirograph concerning a final concord made in the *hall* of the Exchequer (as it seems) at Westminster in the twenty-eighth year of Henry the Second before R. of Winton, Geoffrey bishop of Ely, Ranulf de Glanvill, the king's justiciar, and Richard, the treasurer,[4] Geoffrey de Luci, R. son of Renfrid, Michael Belet, Geoffrey de Colvill, R. de Geddingis, Gervase of Cornhill, Osbert, son of Hervey, and other barons and justiciars of the king there and then present.[5]

But the Exchequer began even in the reign of Henry the First to present another face. We have already noticed the trial of common pleas in that court. The earliest record of the kind now known is, as might be expected, somewhat obscure. It relates to a trial that occurred in the year 1109; which must have been soon after the advent of Roger of Salisbury, the reorganiser of the court. In that year the

[1] Sel. Ch. 147.

[2] Placita Ang.-Norm. 272. [3] Ib. 274.

[4] This Richard was the author of the Dialogue.

[5] That the cause made the subject of the concord in this case was business of the King's Court appears probable from the fact that it related to a plea of dower "de rationabili parti," and the added statement that the same was "in curia domini regis"; which in view of the subject-matter of the suit could not mean the (fiscal) Exchequer.—Placita Ang.-Norm. 276.

abbot of Abingdon recovered judgment as to the manor of Lewknor in the hall of that court; and what, besides the date, shows that the trial could not have been long after the new administration is the fact that in the record of the cause, a writ by queen Matilda, the court-hall is spoken of as the Thesaurum. It is highly probable that such a trial there was no new thing.

The writ of the queen is interesting as possibly indicating one of the motives for trying common pleas in the Exchequer; to wit, because the Domesday book was kept there, and could there be used in evidence, when the evidence of its entries was required to establish a title. The writ is as follows: "Mathildis, Angliæ regina, Roberto episcopo Lincolniensi, et Thomæ de Sancto Johanne, et omnibus baronibus, Francis et Anglis, de Oxenefordscira, salutem. Sciatis quod Faritius abbas de Abbendona in curia domini mei et mea apud Wintoniam, *in thesauro*, ante Rogerum episcopum Salesberiensem, et Robertum episcopum Lincolniensem, et Richardum episcopum Lundoniensem, et Willielmum de Curcio, et Adam de Porto, et Turstinum capellanum, et Walterum de Gloecestria, et Herbertum camerarium, et Willielmum de Oileio, et Goisfredum filium Herberti, et Willielmum de Enesi, et Radulfum Basset, et Goisfredum de Magnavilla, et Goisfredum Ridel, et Walterum archidiaconum de Oxeneford et *per Librum de Thesauro*[1] disratiocinavit quod Leuecanora manerium suum nihil omnino debet in hundredo de Perituna facere; sed omnia quæ debet facere, tantummodo habet ecclesia de Abbendona x. et vii. hidas. Testibus Rogero episcopo Salesberiensi, et Willielmo de Curci, et Adam de Porto; apud *Wincestriam*."[2]

Whether this was not merely a session for convenience in the treasury hall of the royal court for the trial of common pleas is not clear. Indeed, it is impossible at present to affirm the existence of any distinction so early as this in member-

[1] Domesday book kept at Winchester. [2] Placita Ang.-Norm. 100.

ship between the body which composed the fiscal court as such and that which composed the king's tribunal of general pleas. The most that can safely be said is that the king's judiciary at this time (as afterwards) were engaged in two kinds of duties, fiscal business and general litigation, and that the writ just quoted shows that litigation was sometimes conducted in the fiscal hall as well as in the king's palace.

The next mention we have of the trial of an ordinary plea in the Exchequer is more definite. It is in a writ of the same reign, addressed by the king to the same Richard, bishop of London. In this writ the court is expressly called the "Scaccarium." The writ ran thus: "Mando tibi ut facias plenum rectum abbati W., de hominibus qui fregerunt ecclesiam suam de Wintonia noctu et armis. Et nisi feceris, barones mei de Scaccario faciant fieri, ne audiam clamorem inde pro penuria recti."[1]

There are no further records as yet known of common pleas "ad Scaccarium" before the reign of Henry the Second. The regular sessions of the court were probably broken off during the anarchy of Stephen and Matilda, at least after the arrest by Stephen of the treasurer (the same Roger, bishop of Salisbury, already mentioned) in the year 1139. From this time until the second year of the reign of Henry the Second we know little or nothing of the court even as a *fiscus*. The Rolls of the Pipe begin with the year 1156, saving the single roll of the thirty-first year of Henry the First; the treasurer's roll being absolutely complete from that time and the chancellor's nearly so.

We have already seen indications in these rolls of the trial of common pleas at the Exchequer. Many entries of the same nature might be found in the rolls of the later years of Henry the Second.[2] Nor are the chronicles of the period

[1] Placita Ang.-Norm. 127.

[2] The student must, however, beware of the word "placitum" or "placita." In the rolls this term often means *fines* or merely *business*.

wanting in examples. The Chronicle of Abingdon contains an account of a case before Glanvill when chief justiciar and, as such, presiding officer of the Exchequer, *anno* 1185. The abbot of Abingdon having deceased, the king, taking the abbey into his own hands, gives the same into the charge of Thomas of Esseburn; who thereupon proposes to take possession of the whole property, including that which pertained to the prior and monks. Complaint is made before Glanvill and the judges "ad Scaccarium;" and the prior and monks, having established their rights against the claim of Thomas, obtain from the justiciar a writ in the nature of the modern writ of injunction, by which Thomas was notified that the property of the plaintiffs must be kept separate from that pertaining to the abbot, and commanded not to lay hands upon the former, but permit the plaintiffs to have full right and power over both their tenements and their tenants.[1] This case is of special interest as showing that the Court of Exchequer exercised, among its other functions, a jurisdiction which in later times pertained only to the Court of Chancery; a court as yet without existence, as has already been remarked.[2]

It only remains to explain how the Exchequer came to be made use of in the trial of private causes. A suggestion has already been made which would account for some of the causes there tried, namely, the need of making use of Domesday book in the trial of questions of ancient demesne; and this book appears to have been kept always in the treasury, first at Winton (Winchester), whence it was called "Liber Wintonius," and afterwards at Westminster. But such cases could not have been numerous, and further explanation is necessary. This, it is apprehended, can be satisfactorily made.

In the first place, convenience may occasionally have caused the royal court of general litigation to sit in the hall

[1] Placita Ang.-Norm. 234. [2] *Ante*, p. 19.

of the Exchequer; when of course the tribunal would still be the King's Court as distinguished from the Exchequer. But, further, as to common pleas before the fiscal judiciary, this body was composed of persons who constituted the council; to which difficult cases were by law to be taken. And, finally, it is safe to say that the grievance against king John as to "communia placita" was founded upon no new state of things. The King's Court—the central court of the king—had, it is true, always been a court for the trial of pleas between man and man; but it is equally true that its sessions had always been subject, both as to place and time, to the king's pleasure and convenience, when he was in the kingdom. This must have been a source of constant annoyance to litigants who desired the advantage of the royal process in the trial of their causes. The remedy, when the Eyre was not at hand, was found in the Exchequer, when it could be had. This court sat regularly, at Easter and at Michaelmas, as the writ of summons heretofore quoted shows.[1] But the first and chief business of the court was fiscal; and those who obtained permission to sue "ad Scaccarium Paschæ" or "Michaelis" must wait until the regular business and session of accounting were finished before they could be heard. Hence it was, probably, that the final concord in the case of Oger above mentioned is stated to have been made "in crastino Sancti Andreæ." But the sessions of the Exchequer —the Michaelmas session at least, at which term the accounts were taken[2]—were tedious; and it is not to be supposed that it would be an easy matter to hold the judges together after they had finished the business for which they had assembled. The trial of common pleas there must consequently have been a matter of special grace, not readily obtained. However, the needs of litigants and the necessities of the king

[1] *Ante*, p. 114. See also the Dialogue, lib. 2, c. 2; Sel. Ch. 212.

[2] As to the preliminary work of the Easter term, see Dialogue, lib. 2, c. 2; Sel. Ch. 212.

combined to make cases of the kind of increasing frequency; and the result was to make the Exchequer like the King's Court, to some limited extent, a court for the trial of common pleas at Westminster. The difficulty, however, of inducing the judges to remain after the accounts had been passed must have remained to the last; and the King's Court continued to follow the king in his varying progresses. The familiar clause of Magna Charta concerning the holding of common pleas in some certain place was the consequence.[1] Common pleas, however, did not, it seems, wholly cease in the Exchequer until the very end of the thirteenth century; when the Articuli super Cartas forbade the holding of them thenceforth before that court. From the twenty-eighth year of Edward the First the Exchequer became purely a fiscal court, and so remained until the invention of the familiar fiction of king's debtor.

The County Court.

The County Courts of the Anglo-Saxon period continued to exist throughout the period of the Norman supremacy, and with no constitutional change before the last decade of the twelfth century. The charter already referred to, by which William the Conqueror sought to separate more fully the clergy and laity in matters of litigation, related, as we have seen, to spiritual causes only. The bishops and other clergy continued to exercise their right to sit with the sheriff and earl in the County Court, as before the Conquest. The first legislative change directly affecting the ancient court of the counties occurred in the year 1194, when the sheriffs were prohibited to sit as judges therein, and the holding of pleas of the Crown was committed to officers to be chosen (three knights and a clerk), the coroners of the thirteenth century.[2]

[1] "Communia placita non sequantur curiam nostram sed teneantur in aliquo loco certo."—Magna Charta, c. 17.

[2] Capitula placitorum coronæ regis, cc. 20, 21; *infra*, p. 138.

But while the County Courts suffered no loss of dignity by reason of legislation, they did suffer in common with the other local jurisdictions, by reason of the gradually overshadowing influence of the King's Court, and the general desire of litigants to resort to that court for the trial of their causes. The Shiremot, however, suffered less than the other Folkmots.

Throughout all the changes effected by the rise and establishment of the jurisdiction of the royal tribunal, the County Court still maintained much of its ancient authority and usefulness, as numerous records show. The king himself sometimes made use of it for purposes both judicial and fiscal, long before the systematic establishment of the judicial Eyre. Henry the First ordered the continuance of the sessions of the county as in the time of Edward the Confessor. "I command," he says in a writ to bishop Samson, Urse, the sheriff, and others, of Worcestershire, "that from this time my counties and hundreds sit in those places and at the same terms as in the time of king Edward, and not otherwise. For I shall have them sufficiently summoned for my royal necessities, at my own will. . . . And I will and command that all the people of the county go to the County and Hundred Courts as they did in the time of king Edward."[1]

The county, further, was not unfrequently assembled during the reigns of the Conqueror and of his sons, before the system of the Eyre, as occasionally before the Conquest, by the king's mandate for the trial of causes between his subjects alone. The court before which the case at Penenden Heath was tried was perhaps more a Witenagemot than an ordinary County Court;[2] but the trial between Wulfstan, bishop of Worcester, and Walter, abbot of Evesham, occurred in a County Court at Worcester, by virtue of a writ in which the king directed his

[1] Stubbs, Sel. Ch. 104 (2d ed.). This writ seems to be referred to in the Laws of Hen. I. c. 7, § 1, and is there stated to be general and *recent*. The writ was issued between the years 1108 and 1112; from which the date of this part of the custumal may be approximately inferred. See also Laws Wm. I. iii. c. 14.

[2] Placita Ang.-Norm. 4; *ante*, p. 23.

justiciar, Geoffrey of Coutances, to preside in his own (the king's) place.[1] Rufus orders William de Cahannis to assemble the shire of Hants for the determination of the question whether land of I. had been subject to the monks of St. Benet in the time of the Conqueror.[2] And Henry the First commands the sheriffs of Buckingham and of Oxford to assemble their counties, and require the men to speak the truth concerning a claim between R. of A. and the abbot of Abingdon to three virgates of land.[3]

In their ordinary work the County Courts convened at stated times and places,[4] at the summons of the sheriff; and speaking generally they were attended by the sheriffs as presiding officers,[5] and by bishops, earls, vicars, hundred-men, aldermen, prefects, bailiffs, "barons," vavasours, town-reeves, and other lords of lands,[6] but not by villeins, cottagers, *ferdingi* (freemen of the lowest grade), or lower men.[7] The priest, reeve, and four best men of a town were to be present ("assint") for all who were not specially summoned, in the necessary absence of the local baron and of his steward.[8] The passage to this effect in the Leges leaves the nature of representation somewhat in doubt. The villeins and other classes but partially free were not specially summoned, clearly; and these are probably, in part at least, the persons to be represented.[9] Those specially summoned must come or suffer fine: they could not excuse themselves by calling upon the priest, the reeve, and the four men to represent them. The only way by which the fully free could avoid attendance was by compounding the matter with the king. Between the villeins, who seem to have been the pre-Norman ceorls, and

[1] Placita Ang.-Norm. 287. [2] Ib. 71. [3] Ib. 74. [4] Laws Hen. I. c. 7, § 1.
[5] See 1 Stubbs, Const. Hist. 606. [6] Hen. I. c. 7, § 2. See also c. 31, § 3.
[7] Ib. c. 29, § 1. [8] Laws Hen. I. c. 7, § 7.
[9] "Regis judices sunt barones comitatus, qui liberas in eis terras habent, per quos debent causæ singulorum alterna prosecucione tractari; *villani* vero, vel *cotseti*, vel *ferdingi*, vel qui sunt viles vel inopes persone, non sunt inter legum judices numerandi; unde nec in hundreto vel comitatu pecuniam suam vel dominorum suorum forisfaciunt, si justiciam sine judicio dimittant."—Ib. c. 29, § 1.

the four larger landholders, there was a great mass of "minuti homines" (mean men), who now stood perhaps in the position of the old ceorls; but these, judging (if we may) generally from several entries in the Pipe Rolls, were required to attend at the County and Hundred.[1] Hence the representation could not have been for them. Peculiar local customs, however, everywhere prevailed; and special entries in the rolls cannot be implicitly relied upon as proving a general, much less a universal rule.

The statement further in the passage in question that the reeve, priest, and four men represented the lower classes *when* the baron and his steward were necessarily detained, probably does not mean that the attendance of such representative persons was dependent upon the absence of the baron and steward, but that if the latter were (excusably) absent, then the lower classes, such as were represented by the baron or his steward, when present, were to be represented by the delegates attending with the parish priest.[2] And if this be true, it follows that this delegation (being regularly present) properly and always represented others than those represented by the barons.

The classes who constituted the court, with a voice in the decision of questions, the "judices," the "judices et juratores," and the "minuti judices et juratores," of the Pipe Roll of Henry the First,[3] were the body of landholders above the

[1] See 1 Stubbs, Const. Hist. 396.

[2] The "representation" of these classes, whether by their lords or by the priest, reeve, and four men, was apparently protective merely; finding practical expression only when men were brought before the Hundred, or possibly before the County, charged with the commission of some offence, for want of jurisdiction or for failure of justice on the part of their lords. See Laws Hen. I. c. 8, § 3, quoted *infra*, p. 143. Representation could mean nothing as to them in other matters, since they were not (to use a modern term) constituents.

[3] See 1 Stubbs, Const. Hist. 396, 397. The familiar entry in the Pipe Roll of 31 Hen. I. as to compounding attendance should not be overlooked. "Judices et juratores [the general suitors and those sworn to present criminals?] Eboracisciræ debent c. lib., ut non amplius sint judices nec juratores."—Placita Ang.-Norm. 142; Pipe Roll, p. 34. See Brunner, Schwurg. 354, 355; 1 Stubbs, Const. Hist. 396, 397. See also as to fines for non-attendance upon the Hundred and County, Laws Hen. I. c. 29, §§ 2, 3; c. 53; Laws Wm. I. iii. c. 14.

villeins in rank, from the mean men to the sheriff and lords not possessed of a criminal jurisdiction, excluding the king's tenants *in capite*, and from the parish priest to the bishop. These, save the clergy, were bound to attend, unless they could present a satisfactory excuse or the king's writ of exemption.

In the time of Henry the First the Shiremots met, like the Burghmots, twice a year;[1] but by the end of the twelfth or early in the thirteenth century monthly sessions were held.[2] Causes were taken to the County Court for failure of justice in the Hundred and Manorial Courts, either, as it seems, by the sole act of the complaining party or by writ of the king, addressed to the sheriff. Original jurisdiction, to a limited extent, appears also to have been entertained. In the charter of Henry the First above referred to, the king declares that causes arising between the vavasours of two lords should be tried in the County Court; and the same was true in the time of Glanvill.[3] The allusions in Glanvill to the sheriff's jurisdiction generally relate, however, to the appellate jurisdiction of the county. The crime of theft is stated without qualification to belong to the jurisdiction of the sheriff;[4] but this could hardly have been intended in the broadest sense. The jurisdiction of such matters certainly belonged in the first instance to the lords within whose domains the theft was committed;[5] but if the theft were not committed within a private jurisdiction, or if the thief succeeded in making his escape, and justice could not be had upon him in the place in which he had taken refuge, or if for any other reason justice could not be had upon him in the local court, the case was probably brought before the County Court.[6] Each of the other cases mentioned in that connection by Glanvill as

[1] Laws Hen. I. c. 7, § 4. [2] 1 Stubbs, Const. Hist. 605.

[3] Glanvill, lib. 12, c. 8. But see Laws Hen. I. c. 25, probably wrong. See also c. 57, § 1, where the matter is differently stated.

[4] Glanvill, lib. 1, c. 2. [5] Laws Hen. I. cc. 25–27; c. 57, § 3; c. 61, § 9.

[6] Ib. c. 26.

within the sheriff's jurisdiction (scuffles, blows, wounds, the writs of right and villenage), is stated to be so on account (i.e. in case) of the failure of justice in the local courts,[1] unless the question of villenage be an exception.[2] Elsewhere Glanvill says that when a person complained that his lord exacted customs and services not due, or greater services than he ought, or when the complaint concerned a villein-born, or when any other matter arose of which the sheriff had the king's writ or that of the justiciar, giving him jurisdiction absolutely, or conditional upon the failure of another to do right; in any of these cases the sheriff might entertain the cause.[3]

In important causes the freemen of several counties were often convened. An example of the time of the Conqueror will be found in the case of Bishop Wulfstan v. Abbot Walter,[4] in which there was a great assembling of neighbouring counties and barons before the king's justiciar, the bishop of Coutances. In the case of Bishop Odo v. Walter of Evesham,[5] five shires were present and participated in the cause; and afterwards the same cause was tried over again before seven shires.[6] But the practice appears to have become less frequent in the twelfth century.

Thus far, however, of the *ancient* County Court held by the sheriff. A system of visitations of the counties by itinerant justices was in regular operation, as we have seen, at least as early as the thirty-first year of Henry the First. The entire circuit of the counties was made by these justiciars independently of the ordinary sessions of the Shiremot. Discontinued during the disturbance of Stephen's reign, the visitations were renewed by his successor; and as early at least as the year 1159 there were "errantes justitiæ" by name; these, however, being the sheriffs themselves. From

[1] Glanvill, lib. 1, c. 4. [2] Ib. lib. 5, c. 1; lib. 12, cc. 9, 11.
[3] Ib. lib. 12, c. 9. See also lib. 9, cc. 8, 10.
[4] Placita Ang.-Norm. 16, 17. [5] Ib. 20. [6] Ib. 22.

that time on there were stated, and at one time in the reign of Henry the Second very frequent, iters; the persons making them being called "perlustrantes judices," "barones errantes," and finally, in the year 1176, "justitiarii itinerantes," a term which in the Anglicised form of "justices in eyre" has continued until the present day.[1] By this time the judicial functions of the sheriff had come to be restricted in ordinary cases to the regular session of the ancient court of the county.

The courts held by these itinerant justices of the king possessed a dignity altogether above that of the ordinary judicial assembly of the county. These were the king's courts held in the counties. The shire assembled (at the summons of the sheriff, as in other cases) to meet the royal judges with a more perfect representation than attended the ordinary assise held by the sheriff. The private jurisdictions, exempted from the regular session of the county, made part of the court held by the itinerant justices. The representation is said to have been thoroughly organised; "side by side with the reeve and four men of the rural townships appeared," says a distinguished writer, "the twelve legal men of each of the chartered boroughs which owed no suit to the ordinary County Court."[2] The old Shiremot, indeed, with its ancient constituency, with the bishop, earl, and chief men of the county sitting with the sheriff, still continued to exist; but the great men of the provinces, who sat in it with exalted authority, were not the judges of the king's provincial jurisdiction, except by special appointment. "The constitutional presidents" of the county were for the most part set aside for men fresh from the side of the king.[3]

[1] The change in name, as Professor Stubbs has suggested, may indicate the loss of judicial function which the sheriff was gradually sustaining. In 1194, as we have said, it was provided that sheriffs should no longer hold pleas in their own counties; and finally Magna Charta took away their right to hold pleas of the Crown altogether. But these provisions did not fully effect the purpose. See 1 Stubbs, Const. Hist. 605-607.

[2] Ib. 607.

[3] 5 Freeman, Norm. Conq. 299. See *ante*, pp. 95, 96.

The nature of the business transacted in the counties before the itinerant justiciars may be seen in the *agenda* of the year 1194. Aside from some special, temporary provisions, the *capitula* may be taken, probably, as a fair exemplification of the work of the Eyre for the last forty years of the twelfth century. The *capitula* are prefaced with a most important statement as to the election of a grand jury. The form of proceeding in pleas of (i.e. business concerning) the king's crown, says the document in question, began thus: In the first place four knights were to be elected from the whole county, who, on oath, were to elect two legal knights from each hundred or wapentake, and the latter were then to elect, on oath, ten more knights from their several hundreds or wapentakes, or if knights were wanting, legal and free men; so that the twelve might together give answer in all *capitula* of every hundred or wapentake; a provision, we may venture to suggest, to be read in connection with the twelve senior thegns of Æthelred's law, with the "juratores" of Henry the First, with the twelve legal men of the hundred and the four legal men of the township of the Assise of Clarendon, and with the *twelve knights* of the Assise of Northampton; the whole forming an evenly progressive history of the grand jury to the end of the twelfth century.

The *capitula placitorum coronæ regis* follow: 1. The first matter was the placita of the Crown, new and old, and all (business) that had not been finished at the last Eyre. 2. Then all recognitions and all placita that were sent before the justiciars by writ of the king or chief justiciar, or by the chief court of the king. 3. Escheats that had fallen after the king (Richard the First) had gone to Jerusalem; what were then in the king's hand, and whether they were still in the king's hand; all escheats which had passed out of his hand, how and by whom and into whose hands they had fallen, and who had the issues thereof and how, and their value then and now; and if there were any escheat which belonged to the king but was not in his hands. 4. Churches in the gift of the king.

5. Custody of boys, so far as the same pertained to the king. 6. Marriage of girls and widows, so far as the same pertained to the king. 7. Malefactors, and those who had harboured them or colluded with them. 8. Forgers. 9. Slayers of Jews, who they were; pledges given the slain Jews, their chattels, lands, debts, and charters (concerning the debts); who had these things, and who owed the slain, and how much, and who had the issues. All the pledges and debts of the slain Jews were to be taken into the king's hand; and they who were present at the killing and did not make fine (i.e. compound) with the king or his justiciars were to be taken and not released except by command of the king or of his justiciars. 10. All aids given for the redemption of the king (from captivity in Germany), who had promised money and how much, and how much they had paid and how much they still owed. 11. The partisans of earl (afterwards king) John, who of them had compounded with the king and who had not. 12. The chattels of earl John and of his partisans, which had not been turned over to the use of the king, and how much the sheriffs and their bailiffs had received, and who had given anything contrary to the ancient customs of the kingdom. 13. Lands of earl John, his own, those held in ward and in escheats, and his gifts, and the reason thereof. These and all gifts of John were to be taken into the king's hand, except gifts confirmed by the king. 14. Debts and fines due John, and for what reason; and what were to be exacted for the king's aid. 15. Usurers, and the chattels of those (usurers) who were dead. 16. Wine sold contrary to the assise, and false measures of wine and of other things. 17. Those who had taken the cross, and had died before undertaking their journey to Jerusalem, who had their chattels, what they were, and how much they amounted to. 18. The Magna Assisa in cases of lands of the (annual) value of a hundred shillings and less. 19. Defaults. 20. Besides these matters as *capitula* for the inquiry of the justiciars, there were to be

elected in every county three knights and one cleric as keepers of placita of the Crown; an office which grew into that of coroner in the next century. 21. No sheriff was to act as justiciar in his county, or in any county which he had held since the king's first coronation. 22. All the cities, town, and demesne possessions of the king were to be subjected to talliage. 23. This article is more lengthy. By it it was provided that the appointed justiciars, together with the bailiffs of William of the Church of St. Mary, of Geoffrey FitzPeter (afterwards, in the same reign, chief justiciar), of William de Chimelli, of William Bruere, of Hugh Bardulf, and of the local sheriffs, were to cause the knights of the county to be summoned, to come at a day and place named, and before the justiciars to cause them to swear to do their utmost towards augmenting the king's wardships and escheats, omitting nothing for fear or favour. The said knights *nominati* were, on oath, to elect twelve legal knights, or free and legal men, if knights could not be found for the purpose, through the parts of the several counties in the iter of the said justiciars; which knights also were to swear to do their utmost towards augmenting the king's wardships and escheats in their districts. And these latter knights were, on oath, to elect out of the free men in the escheats and ward-property such as were necessary to aid them in the king's business. Then follow certain regulations as to the escheats and ward-property. Most diligent inquiry was next to be made concerning the assised rent of the several demesne manors, how much all other assessed property in the manors was worth, how many carucates of land there were, and how much they were worth, "not estimating them at the price of twenty shillings merely, but according to the state of the land, whether it was good or bad, and whether it had increased or decreased in value." Similar inquiry was to be made concerning chattels. 24. This article related to debts due the Jews, the pledges held by them, their lands, houses, rents, and possessions, and the regulations required in the making of

loans by them to Christians. 25. Finally, it was directed that the inquisition should be delayed, which was to have been had concerning exactions and taxes by all the king's bailiffs, justiciars, sheriffs, constables, foresters, and their servants, since the first coronation of the king, why such were taken and by whom, and of all chattels, gifts, and promises made by reason of the seisin of lands given earl John and his retainers, who received them, what they were, and of how much worth.[1]

The Burghmot.

The Burghmots, called also Hustings,[2] were courts of the same dignity and authority as the ordinary County Courts, being established for, or having from early times been held in, those cities which had municipal privileges distinct from and independent of the body of the county. There is nothing in their judicial aspect to call for special remark.

The Hundred or Wapentake Court.

The Hundred Courts, called Wapentake Courts in the North or Danish-Norse districts of England, being courts of one or more (usually several) townships, continued after the Conquest with no further constitutional change than was effected by the Conqueror's charter concerning jurisdiction of spiritual causes.

These courts, like those of the county, were held at stated terms, but met every month. Summons of attendance preceded the session by six or seven[3] days. The lords of lands not possessed of a jurisdiction of their own, exclusive of that of the hundred, or the stewards of such lords, and (in some sort by way of representation) the parish priest, the reeve,

[1] Stubbs, Sel. Ch. 259–263 (2d ed.).

[2] This name is still preserved in the United States in the Court of Hustings of Richmond, Virginia.

[3] In the printed Laws of Hen. I. c. 7, § 4, the time is said to be six days, but one MS. says seven days; and with this agrees the passage in c. 51, § 2.

and four best men of each town in the hundred, attended.[1] The attendance of all full freemen appears to have been required, as at the County Court.[2]

Presided over by the bailiff of the hundred,[3] causes without the jurisdiction of the Manorial Courts, such as questions arising between the tenants of different lords, and all the causes of the tenants of lords not possessed of a jurisdiction, and also, as appears from the Rotuli Curiæ Regis, appeals *de pace regis infracta*,[4] probably in minor cases, were brought before this court.

The judges in the Hundred Court were the body of suitors themselves, and these, as intimated, were the same persons who appeared accumulatively in the County Court. So, too, several hundreds were sometimes convened for the trial of a cause, as in the case of the counties; one of the occasions mentioned for this being the want of judges ("penuria judicum") in a particular trial.[5]

The Laws of Henry I. show the existence also of another court of the hundred, or rather of another session of the Hundred Court, which was held by the sheriff twice a year for the purpose of taking the view of frankpledge (or ten-manne-tale), in the interest of police regulation.[6] This was the session called in later times the Sheriff's Tourn. All the freemen of the hundred, those who had fixed dwellings and those who had not, were to assemble in their hundreds to see, among other things, if the decennaries were full, and what ones, and how and for what reason, were not full or were overfull. The headman, one selected from the best men in all the

[1] Laws Hen. I. c. 7, §§ 4, 7; c. 51, § 2.

[2] See e.g. the writ of Henry II. to all barons, vavasours, and lords of lands within the wapentake of W., commanding their attendance at a "plea and wapentake" of the bishop of Lincoln, and to do their duty there, on pain of distraint of their goods.—Placita Ang.-Norm. 139. See also 1 Stubbs, Const. Hist. 398; Pipe Roll 31 Hen. I. pp. 71, 151, fines imposed upon the mean men ("minuti homines") for default of the Hundredmot.

[3] 1 Stubbs, Const. Hist. 398. [4] 1 Rot. Cur. Reg. 205, 207.

[5] Laws Hen. I. c. 7, § 5. Comp. c. 29, § 4. [6] Ib. c. 8, § 1.

hundred, was to be present with his nine; and the calderman, whose endeavour was said to be to promote the laws of God and men by watchful observance, was to be summoned. It was the duty of the court to see that everyone of the age of twelve years and upwards was in the *decima* or frankpledge, who cared to be reckoned worthy of "were," "wite," or the rights of a freeman.[1]

It is further, but rather obscurely stated, that every lord should have with him at (probably) this session of the hundred such as were accountable to him for offences committed; to have them stand to right, or to render account for them.[2] This statement (the first part of which is taken from the laws of Æthelred and the laws of Cnut)[3] probably refers to lords of lands who had no right of sac and soc. Persons who came into the county to visit, having no lands, were to be brought to justice in public by those who were entertaining them in case they committed any offence.[4]

The Manorial Court.

The Manorial Courts were generally courts of the same rank as the Hundred Courts, just as the Burghmots were of the same rank as the County Courts. But as they were often created by royal charter, the exact extent of their jurisdiction, as well as the nature thereof, can only be known, when special, by inspection of the king's grant,[5] or by the practice of the particular franchise. These courts were attached to the possessions of lords of lands and of monasteries, and in many cases, especially in the case of religious houses, had existed before the Conquest; and many of them appear to have been independent of the Hundred, and some of them even of the (ancient) Shiremot.

[1] Laws Hen. I. c. 8, §§ 1, 2. [2] Ib. § 3.
[3] Æthelred, i. c. 1; Cnut, Sec. cc. 19, 28.
[4] Laws Hen. I. c. 8, § 4, from Æthelstan, i. c. 8.
[5] See 1 Stubbs, Const. Hist. 399.

The manors had anciently, it seems, been townships; and the courts, though perhaps derived from ancient Townmots, were the natural development of the manorial system and of the existence of great religious houses.[1] There existed in every manor a private court, in which was transacted business relating to the interests of the manor, including the enforcement of the tenure and other obligations of the tenantry. There was also generally, not always, a criminal jurisdiction connected with the court, possessed usually of a similar jurisdiction to, and created or become independent of, that of the Hundred Court.[2] Some of these manorial jurisdictions were great baronial franchises, excluding altogether the ordinary courts both of the hundred and the county, and apparently even the king's justiciars, until the reforms effected by Henry the Second.[3] The townships appear to have had no courts possessed of full judicial functions.[4] The parish meetings for town administration probably served all ordinary purposes.

The Forest Court.

The Forest Courts were royal courts held by the foresters or by the sheriffs of counties within which the king's forests were situated. They had exclusive[5] jurisdiction of wrongs of every kind committed therein in violation of the king's sole right to the proprietorship, possession, and enjoyment of the forests.[6] All suitors of the County Court and those re-

[1] See 1 Stubbs, Const. Hist. 399.

[2] Laws Hen. I. c. 27. This must have exempted them from attending the *leet* of the hundred.—1 Stubbs, Const. Hist. 399.

[3] Assise of Clar. Stubbs, Sel. Ch. 238; *ante*, p. 101.

[4] The "Tunscipesmot" of the charter by Richard I. to Wenlock Priory (1 Stubbs, Const. Hist. 399) is generally understood to be a mere affair for the regulation of the police and town matters.

[5] See 1 Stubbs, Const. Hist. 403; Assise of the Forest, Sel. Ch. 156 (2d ed.).

[6] "Placitum quoque forestarum multiplici satis est incommoditate vallatum: De essartis; de cessione; de combustione; de venacione; de gestacione arcus et jaculorum in foresta; de misera canum expeditacione; si quis ad stabilitam non venit; si quis pecuram suam reclusam dimisit; de edificiis in foresta; de summonicionibus supersessis; de obviacione alicujus in foresta cum canibus; de corio vel carne inventa."—Hen. I. c. 17. But these general terms are doubtless to be understood of infractions of the forest laws.

quired to meet the justiciar's itinerant were bound to attend.[1] These courts were, in a word, a kind of inferior and limited Exchequer, established and managed partly in the interests of the royal treasury, but having this distinction from the Court of Exchequer, that their object was the punishment of offenders and the infliction of fines for wrongs committed with respect to one particular subject, the forests. The jurisdiction of the Forest Courts was mainly *ex delicto*, the only exception perhaps arising from cases of leases or privileges of portions of the forest and of the clearings (essarts) on payment of rent or tax; while the jurisdiction of the Exchequer as a *fiscus* was mainly *ex debito*, arising partly upon the engagement of the sheriffs with respect to the ferm of the counties, including the collection of the king's share of the fines inflicted in the courts, and partly upon special obligations of individual debtors, discharged directly at the court.

The procedure of the Forest Courts, when it took its legal course, was probably conformed to that of the popular courts.[2] Their jurisdiction appears, however, to have been summarily exercised. There is no indication of the existence of stated terms for trials, and the probability is that the forester, sheriff, or his officer was in little danger of punishment if he pronounced speedy and heavy judgment on behalf of the king against an unfortunate trespasser of mean degree.

The jurisdiction of the foresters arising *ex debito* was also exercised in a summary manner, sometimes even against the great. Indeed, there was strong and continuous outcry in all directions against the forest administration. Few men were more powerful than the abbot of Battell, and the foresters

[1] 1 Const. Hist. 608; Sel. Ch. 156.

[2] The Case of The Fifty Men, Placita Ang.-Norm. 72, accused of violating the forest laws in the time of Rufus, and compelled, as in other cases, to undergo the ordeal, was probably tried in a Forest Court. The king certainly was not present.—Eadmer, p. 48.

did not fear to make harvest of his rich estates within their jurisdiction. "There was in the time of Henry the Second," says the chronicler of Battel Abbey, "a certain Alan de Neville, chief forester of the king, who took advantage of the power given him to vex all the counties of England, maliciously, with innumerable and unheard-of claims. Because he feared not God or man, he spared not ecclesiastical or secular dignities." And he proceeds to narrate, "among other works of iniquity," the levying by Alan upon sums of money, in the king's absence from the country, upon exempt clearings of the abbot, as essarts, and doing so against the will of the tenants; "pro exartis *vi* exegit." The abbot, hearing of the affair, finds redress only by sending one of his monks to the Exchequer, whither the money had been taken by the sheriffs, and there exhibiting his charters;[1] but Alan was considered a faithful, if a somewhat zealous, servant, and the office of forester became, or continued to be, hereditary in his family.[2] In making up an estimate of the prime movers in the legal reforms of the reign of Henry the Second, as men actuated by a sincere love of justice and a desire to promote the interests of the people by making justice more certain of attainment, even within a very limited sphere, the administration of the forest laws (and not merely the laws themselves) as permitted, if not fostered, by the king, cannot be left out of the account.

[1] Placita Ang.-Norm. 173.

[2] Lower, Chronicle of Battel Abbey, 122, note. The chronicler says that he pleased the king during his (Alan's) lifetime, but that, upon his death, when the brethren of a certain monastery sought a portion of his substance for their house, the king showed his regard for his late forester by replying: "I shall have his wealth, but you may have his carcass, and the devil may have his soul."

CHAPTER IV.

THE WRIT PROCESS.

In a previous chapter we have seen the part played by the writ process in making a pathway for the jurisdiction of the King's Court. We have now to consider the English history of the writ itself. We are to show not only that the old writs "de cursu," in existence when actions on the case were first authorised, were not created by a stroke of the pen, or imported into perfect form from Normandy, but also how, though of continental origin, they were gradually developed on English soil, out of rough and even shapeless material. The result, it is apprehended, will be a not unimportant step in the history of the modern forms of action. It will show that the forms of action not founded upon the Statute of Westminster II. (*anno* 1285) did not take their rise in the writ; that it was originally, indeed entirely foreign to any purpose of the writ to set forth the formal language of an action.[1] It will appear that its connection with forms of action was a late affair, later in the main than the Norman period. Something will thus have been accomplished towards establishing the proposition that our oldest common-law forms of action are

[1] For example, the characteristic words of the modern writ of right, "plenum rectum teneas," as will be seen, were used in the Norman period, not only in all real but even in personal actions.

the direct lineal descendants of the Germanic formulæ of pre-Norman and Norman England. The writ and the count are two converging forces, approaching almost to contact by the time of Glanvill, fully meeting only in the next century. But the count is unbroken from Alfred to Victoria.

Before attempting, however, to trace the development of the writ process, a classification of the materials is necessary, in order to fix upon an intelligible basis of investigation. A proper analysis of the materials will disclose the fact that two entirely distinct classes of writs reached an established form by the time of Glanvill; and that of the two other classes, certain writs of one of them passed over, by a change in the party addressed, into one of the first two classes above mentioned, while the last of these classes was not, in any just sense, judicial process at all.

This analysis, besides removing the confusion of a mass of writs spread out in no other than chronological order, will also show that an antecedent lineage for a particular writ in Glanvill cannot be made out by an arbitrary piecing of writs, wherever one can be found containing any resemblance to another,[1] but that, on the contrary, each class must be kept by itself, or its connection with another carefully pointed out, when such connection exists. The absence of materials in a particular case will alone justify transporting one class of writs into the borders of another, except in the instance above alluded to, where one class develops into another. We turn now to the analysis.

The first branch of the writ process, in point of importance, embraces the various writs of summons. Summons of the defendant into court continued to be made by the plaintiff in causes before the popular courts, after the Conquest as before; this part of the procedure, as we shall later see, being a private,

[1] For example, the writs for the redress of trespass, which issued to the local courts, strongly resemble the writ of right used in those courts; but they cannot properly be used to establish a development of the latter, when at all events there is sufficient material in the writs of right themselves.

extra-judicial matter. In the royal courts, however—that is, in the King's Court and, in the twelfth century, in the Eyre and in the Exchequer—a new system, which has ever since prevailed, came into use, or rather was in use in the first-named court, to a greater or less extent, from the time of the Conquest, to wit, summons by the subordinates of the sheriff or other chief officer of the king. This was effected by virtue of a writ issued by the king, or by his justiciar, or by some chief member of the king's household, in the king's absence, as by his wife or son. There were also writs of summons of the vicinage, for the purpose, for example, of a general inquisition as to a particular fact, or of a special recognition, such as that of mort d'ancestor or the Magna Assisa; which writs were issued and served in the same manner as those just mentioned. These writs, with rare exceptions, were process of the royal courts only, and for the greater part, of the King's Court; and all were "de cursu" in the time of Glanvill, using that term here and elsewhere in the sense merely of "fixed" in respect of form.

Besides this ordinary process of summons, there was a special system of writs of the kind in the Exchequer, as we have already seen. These and other writs de cursu were in use in the Exchequer as long as the ancient system of administering the revenue continued; but they have no bearing upon the present inquiry. They had no connection with ordinary judicial process, and they are only mentioned now that their existence may not be thought to have been overlooked.

Reserving the subject of the rise of the writ of summons of Glanvill for later consideration, a distinction should here be pointed out. A writ of summons must, indeed, from the first have contained a definite statement of the subject-matter or cause of action. The defendant was entitled to know the nature of the plaintiff's demand, that he might be able to answer it in court, or, if he did not dispute it, that he might

have an opportunity to pay it intelligently. And when summons was thus effected by virtue of a writ, the act was performed (not as by the old procedure, by the plaintiff, but) by persons[1] whose knowledge of the cause of action must generally have been obtained from the writ.

But it does not follow that the writ would employ the language of the plaint. The summoners were not interested in that, and it was no part of the writ in Norman times to instruct them or the plaintiff in such matters. Whatever formalism of language, if any, was necessary in making the summons, the summoners, it is to be presumed, were bound to be familiar with. A single example from Glanvill will show that, even in his day, the writ did not employ the technical language of the count. A writ of præcipe in the King's Court, as to an advowson, ran as follows: "Rex vicecomiti salutem. Precipe N., quod juste et sine dilatione dimittat R. advocationem ecclesiæ in villa illa, quam clamat ad se pertinere et unde queritur, quod ipse injuste deforciat; et nisi fecerit, summone per bonos summonitores eum, quod sit ea die coram nobis vel justiciis nostris ostensurus, quare non fecerit. Et habeas ibi summonitores et hoc breve."[2]

The count, however, was thus: "Peto advocationem illius ecclesiæ sicut jus meum, et pertinentem ad hereditatem meam, et de qua advocatione ego fui seisitus, vel aliquis antecessorum meorum fuit tempore regis Henrici avi domini H. regis vel post coronationem domini regis, it ideo seisitus ad eandem ecclesiam vacantem presentavi personam aliquo predictorum temporum," etc.[3]

The second branch of the writ process is what for convenience we shall call manorial and vicontiel writs. Questions relating to the title to lands as between the tenants of a manor or of a religious foundation, questions arising out of the tenure of lands, and questions relating to the conduct of

[1] The "good summoners" of the old writs.
[2] Glanvill, lib. 4, c. 2. [3] Ib. c. 6, § 2.

tenants, such as alleged trespasses, were, as we have seen, cognisable in the local courts, when not drawn into the King's Court by the king's writ. In case of a failure of the local court to do justice in respect of a complaint within its jurisdiction, the complaining party had the privilege of recourse to the king for his writ, commanding the lord of the manor or the head of the religious house, or if necessary, some other person specially delegated for the purpose, generally the sheriff in the County Court, to do "full right" or to "do justice" on behalf of the plaintiff. These are the writs of "justicies" of later times.

The king's writ is here seen in its most advantageous light. There was no way, without the royal mandate, of compelling the local courts to do justice on behalf of their suitors; and to require parties to resort to the King's Court in case of failure of justice at home would have resulted, often, in the total defeat of a just demand. It is perhaps upon such a ground that we are to understand the writs issued to the sheriff or other local officer, when justice could not be obtained in the Manorial Court of the plaintiff's lord. It is improbable that the Shiremot had lost its ancient, inherent jurisdiction to act upon a failure of justice in the lower courts; and the king's writs to the sheriff, it is apprehended, are commands implying a reluctance to act, rather than commissions of authority.

A few instances of true writs of *commission* to try causes occur in pre-Norman times in England. In a case, *anno* 1011, between bishop Godwine and Leofwine,[1] the plaintiff claimed that the defendant had disseised him (or rather, his predecessor) of land at S. And the record proceeds to state that the case was made known to the king (Æthelred), who thereupon sent his writ and seal to archbishop Elfric, commanding him that he and his thegns in East Kent and in West Kent justly decide between the parties by plaint and by

[1] Thorpe, Dipl. 301.

defence.[1] Two or three other records of a similar import exist; but the practice was probably exceptional until the advent of William the Conqueror, when it became common. The practice had prevailed extensively on the Continent; but it is not necessary to suppose that the idea had been borrowed in the Anglo-Saxon period. It was in the natural course of things. The king's duty to his subjects required him to see that justice was dispensed; and as his own court did not undertake small causes, and as it would be unjust in many cases to require suitors, with their witnesses, to go there, his only course was to commission special judges to do what the local court had failed to do.

It was not an uncommon thing for the king or justiciar to address his mandate directly to a recusant defendant, requiring him to do what the plaintiff prayed, or rather, what the king was pleased to order. Of a similar nature were writs issued to the king's judges, or to his officers and bailiffs generally or in particular, commanding them to do, or more commonly to refrain from doing, and to prohibit others from doing, certain specified things, or to respect certain specified rights. Such writs are the third branch of the writ process. Writs of this class never became de cursu as a whole, but some of those addressed to defendants passed over into de cursu writs of the second class, to which the whole of this third class bore some likeness. Such will be considered in treating of the manorial writs; and a further reference will be made to them towards the close of the present chapter.

The connection of the writs addressed to a defendant with the manorial writs—the connection by which they pass over into the de cursu writs of the second class—is found in a "nisi feceris" clause, which all the writs having such a connection possess. The defendant was commanded, e.g., to

[1] It is not without interest to notice that the record of this case shows that the use of the writ was attended with no change in the mode of trial common to such cases. The writ was simply a special grant of jurisdiction.

perform services due by him to the plaintiff, "et nisi feceris," said the writ, the sheriff or some other person named would compel him. Then, if the defendant disobeyed the writ, another writ of the second class, de cursu in Glanvill's time, was granted when needed, in accordance with the warning of the clause referred to. It will further be seen, when the investigation of these writs is reached, that they ran in the same general form at last, as might be expected, with the manorial and vicontiel writs. The only essential difference between the two, as has been intimated, is that one commands a party defendant to do something, and the other commands someone else to compel him to do it.

There was still another branch of the writ process. Sometimes a person was able to obtain from the king at the outset a writ in the nature of final process, like a modern writ of execution, without a trial before the courts. Of this nature may possibly be the writ in Abbot Scotland v. Hamo,[1] by which William the Conqueror commanded Lanfranc, Geoffrey of Coutances, and others, to cause the plaintiff to have seisin of the town of Fordwick, of which he had been disseised. There is no mention of trial had or to be had concerning the plaintiff's claim; though this fact is not conclusive that the writ was not part of an ordinary judicial proceeding.[2]

It is unusual, however, for a true writ of final process to omit all mention of the trial and judgment—or, rather, there are many writs of execution which do refer to judgment obtained—and it is hardly probable that all the writs of this kind which make no mention of a trial were issued upon judgment rendered in the courts. The writ in favour of the monastery at Abingdon against claimants under Modbert (?)[3] can hardly be mistaken. Henry the First therein directs Hugh of Bocland to go to Abingdon and give reseisin to the

[1] Placita Ang.-Norm. 13.

[2] This, like the writ in the case of Modbert v. Prior and Monks of Bath, Placita Ang.-Norm. 114, is perhaps an instance of a conditional mandate.

[3] Placita Ang.-Norm. 111.

monastery of all the lands which Modbert had given away or mortgaged, or had bought from anyone and given to another; language which fairly excludes the idea of a trial.

If, however, there be doubt as to the foregoing cases, the case of the Church of Abingdon v. William[1] is clear. The record of the case declares that after the death of abbot Faritius, William complained to the king (Henry the First) concerning a mill of which he said he had been disseised by Faritius; "wherefore by the king's command he was put in seisin thereof." But afterwards, so the record proceeds, "by intercession of the monks through Walter, chaplain of William of Bocland, the king, having learned the truth, commanded that the church have seisin again."

There is very clear evidence of the same nature in a case of the abbot of Crowland.[2] The abbot had been disseised of certain lands by execution upon judgment of court obtained by the prior of Spalding. Conceiving his monastery to have been made the subject of an unjust judgment, the abbot proceeds to the court of the emperor of Germany, where the king (Richard the First) was then held in captivity, and having persuaded the latter (with a consideration, no doubt) of the justness of his cause, obtains from him a writ addressed to the archbishop of Canterbury, the king's justiciar, in which the latter is commanded without delay to restore the abbot to seisin of the lands in question. And upon the abbot's return to England he presents the writ to the archbishop, who thereupon sends it to the sheriff of Lincoln, with an order to execute it. And "the undersheriff, Eustace, therefore, on behalf of the king and his justiciar, caused solemn reseisin of their marsh to be made to the abbot and house of Crowland at the beginning of Lent."[3]

[1] Placita Ang.-Norm. 130.

[2] Though this case is in the false Ingulf's Chronicle of Crowland, there is no ground known to the writer for doubting the genuineness of this particular record.

[3] See also 1 Rot. Lit. Claus. 99, *anno* 1207: "Terra illa fuit in manu comitis Leicestrie Simonis quem de terris suis precepimus [king John] disse'siri." As to the sale of justice, see *post*, pp. 186–190.

Sometimes, however, writs of this kind, when addressed to persons possessed of a judicial franchise, were treated as not peremptory, and the disputed claim put in trial; as in the case of Modbert v. Prior and Monks of Bath.[1] In that case the king's son sent a writ to the bishop of Bath, then holding his court, in these words: "Præcipio ut saisias Modbertum juste de terra quam tenuit G. de S., sicut hæreditavit eum in vita sua." The bishop said, "Si tamen justum est, acquiesco," and then laid the case before his court. And the king confirmed the judgment rendered, though the result was against Modbert.[2]

The practice of granting writs of execution without trial in the courts appears to have been common, so as to have become one of the chief grievances of the baronage and commonalty against king John; resulting, with other like influences, in the famous article of Magna Charta by which it was provided that the king should not disseise or imprison his free subjects unless by the legal judgment of their peers or the law of the land.[3] This ancient prerogative of the king, however, was extinguished only after a long and determined struggle, of which Magna Charta was but the beginning. It was not until the reign of Edward the First that the constitutional change was finally settled. The root of this

[1] Placita Ang.-Norm. 114.

[2] This may be an instance of a practice that afterwards prevailed in Normandy under the writ of præcipe, which was treated as a conditional mandate. See Brunner, Schwurg. 330–332.

[3] "Nullus liber homo capiatur, vel imprisonetur, aut dissaisiatur . . . . nisi per legale judicium parium suorum vel per legem terræ."—Art. 39. As to the expression "per legem terræ," which has caused so much discussion in the law books, and generally been interpreted by the courts to mean that defendants in criminal cases must be tried by jury upon presentment or indictment, it may be observed that jury trial in criminal cases had not come into use at this time, except as matter of special grace on the part of the king. It was not until after the abolition of the ordeal (*an.* 1215–16) that trial by jury began to come into use in criminal cases; and even then it could only be resorted to by consent of the prisoner. Hence the origin of *peine forte et dure* to compel him to consent. The expression "per legem terræ" simply required judicial proceedings, according to the nature of the case; the duel, ordeal, or compurgation in criminal cases, the duel, witnesses, charters, or recognition in property cases.

enormous evil probably lay in the old and common but reprehensible practice of the kings in taking money for hastening, having, or delaying justice.[1] We shall have nothing further to say of writs of this class. They could not become de cursu.

Turning now to the history of the writs which became de cursu, and beginning with the second class, the manorial writs of right, it should be observed at the outset that prior to the reign of Henry the First (1100–35), as far as existing materials indicate, the writs generally fail to give us any clear light as to the nature of the action involved in a particular case, except when there is a direction for an inquisition. Even the subject-matter of the suit, not to speak of the cause of action, was often very vaguely stated. Technical language, having any significance in respect of the mode of trial, was entirely, or almost entirely, wanting. And even where some term occurs in a particular writ suggestive of the technical language of later process, it would be unsafe to infer that the writ points to the mode of trial required by the subsequent writ to which a resemblance is seen. In one of the earliest English writs, William the Conqueror orders Geoffrey, bishop of Coutances, to be present at a plea between Wulfstan, bishop of Worcester, and Walter, abbot of Evesham, "et, ut *plene* episcopus Wulstanus suam *rectitudinem* habeat, stude."[2] This may suggest the "plenum rectum teneas" of the writ of right; but the process which actually followed was

[1] The Pipe Rolls are full of such cases. See instances in Placita Ang.-Norm. 140, 141, 269 (R. de F. debet x. marcas, pro festinando judicio suo de R. F.), 273; Madox, Hist. Exch. ch. 12, p. 293 (fol. ed.). The result is hinted at in the Dialogue of the Exchequer, lib. 2, c. 23 (Stubbs, Sel. Ch. 242, sub fin. 2d ed.), where it is said: "In spem vero dicuntur offerri, cum quis exhibendæ sibi justitiæ causa, super fundo vel redditu aliquo regi summam aliquam offert; non tamen ut fiat, *ne in nos excandescas, et venalem penes eum* [sc. regem] *justitiam dicas, immo ut sine dilatione fiat.*" That which follows this quotation should be specially noticed, as showing that the king was accustomed to act judicially of his own right. Delay of the courts was equally purchasable.—Madox, 309. The Dialogue was written *anno* 1177, nine or ten years before Glanvill's treatise. Glanvill puts the king's charter on the level with a judgment.—Lib. 13, c. 11, § 6.

[2] Placita Ang.-Norm. 287.

that of party-witness, and not the duel.[1] With the reign of Henry the First, however, a change appears, and language characteristic of the later writ of right is found in writs which would naturally be followed by the duel. It should be observed, however, that the duel did not become an established, prescribed mode of trial in real property causes in England before the twelfth century. It was a new and disturbing force with the Conquest, and was continually jostling and jostled among other modes of trial until the reign of Henry the First, if not later. This fact would make it difficult at best to trace the English writ back of the reign of Beauclerc into the period of shapelessness.

The writ of right, as it appears in Glanvill, was granted for the trial in a manorial or other local court[2] either (1) of a right of property in lands, such as a claim of frank tenement or dower, or (2) of a right to things connected therewith of an incorporeal nature, such as services due by reason of tenure; differing in form accordingly. In either case it was directed to the lord of the manor, or other proprietor, of whom the land was held; or in case of his inability or want of disposition to do justice, to the sheriff in the County Court, or to some special delegate. The characteristic language of Glanvill's writ for the recovery of lands (the growth of which writ will be first considered) appears in the words with which it begins: "Præcipio tibi quod sine dilatione *plenum rectum teneas* N. de decem carucatis terræ," etc. The italicised words gave the writ, even in Glanvill's time, the technical name of "writ of right" ("breve de recto"), because they called in terms for a trial of the "full right" (that is, the right of property) to the land in question. It is fair to presume that earlier writs of the twelfth century, containing the same command, employed the words in the same sense, and thus looked to a trial of the right of property.

[1] Placita Ang.-Norm. 17, 18.

[2] There was another and different writ of right in the King's Courts, described by Glanvill in his first book, the præcipe quod reddat. See *ante*, p. 77.

The first writ to be noticed is granted by Henry the First, perhaps in the year 1108, in favour of the abbot of Abingdon, and addressed to J. de S. as *defendant*. It is therefore an example of the third class of writs. The writ runs thus: "Præcipio tibi ut *plenum rectum* facias[1] Faritioabbati et ecclesiæ de Abbendonia de terra quam abstulisti eis, quam R. de C. dedit ecclesiæ in eleemosyna; et nisi sine mora feceris, præcipio quod W. G. faciat, et si ipse non fecerit, H. de B. faciat, ne inde clamorem audiam pro recti penuria."[2]

The defendant fails to obey the writ, and another is issued to W. G., according to the intimation of the first writ. The language of the second precept is substantially the same as that of the principal writ; but it should be given for comparison with the writs which are to follow. The king says: "Præcipio ut *teneatis plenum rectum* Faritio abbati de Abbendonia de terra quam R. C. posuit ad Abbendonam vestra concessione, et unde ecclesia fuit saisita; et ita facite, ne inde clamorem audiam pro recti penuria."[3]

The next writ of this kind is granted by Stephen in the year 1141. It is addressed to the archdeacon of Canterbury, and proceeds thus: "Præcipio tibi quod sine dilatione et escampa[4] *teneas plenum rectum* abbati Sancti Augustini et monachis de ecclesia, de Newyntone; ne super hoc inde clamorem audiam."[5]

The last writ prior to Glanvill is executed by Robert, earl of Leicester, the king's justiciar, *anno* 1162, to R. of W., and is as follows: "Præcipio quod sine dilatione *plenum rectum teneas* Roberto de M. de terra quæ fuit Willelmi de M., fratris ejus, de D. cum pertinentiis suis, quam clamat tenere de te. Et nisi feceris, R. de V. faciat. Et nisi fecerit, ego faciam fieri."[6]

[1] The difference between "plenum rectum *facias*" and "plenum rectum *teneas*" should be noticed. The latter is an order to entertain a suit; the former, merely to do right. But the terms are not always used with discrimination.

[2] Placita Ang.-Norm. 99. The "ne inde clamorem" clause became one of the most familiar clauses of the writs.

[3] Ibid. [4] Evasion. [5] Placita Ang.-Norm. 146. [6] Ib. 210.

All of the foregoing writs bear a sufficient resemblance to each other to be classed together, and to be called from the characteristic words in each of them, "writs de recto." Glanvill's writ of right in full is as follows: "Rex comiti W. salutem. Præcipio tibi quod sine dilatione teneas plenum rectum N. de decem carucatis terræ in M., quas clamat tenere de te per liberum servitium [various alternative tenures are here inserted], quas R. filius W. ei deforciat. Et nisi feceris, vicecomes de N. faciat, ne amplius clamorem audiam pro defectu justitiæ."[1]

The resemblance between this and the preceding writs is so striking as not to require more than a cursory reading. The variations, however, show that there was no prescribed form of writ before the time of Glanvill; and Glanvill's writ shows that the form finally established was an easy adaptation of the language of the older writs.

The foregoing writ of right had an offshoot in a writ for the redress of trespasses. Such wrongs were commonly redressed in the local court of the district where they were committed; and in such cases no writ was used. When, however, the lord of a *locus* failed to do justice by the injured party, resort was had to the sheriff in the County Court, or to some specially delegated person. In the latter case the plaintiff obtained a writ from the king commanding the person delegated (as in the manorial writ of right) to "do full right" to the plaintiff.[2] A single example will serve to show the near relation of this writ for the redress of trespass to the writ of right mentioned. The following is perhaps of the year 1108: "H. rex Angliæ, Rogero episcopo Salisb. salutem. Mando tibi quod *plenum rectum teneas* abbati de A. de hominibus meis de F. de fœno suo, quod vi ceperunt de prato suo."[3]

[1] Glanvill, lib. 12, c. 3.

[2] See Placita Ang.-Norm. 89 (both cases), 98 (second case), 127, 166.

[3] Ib. 98. Roger, bishop of Salisbury, was at this time justiciar as well as treasurer, and his hand may probably be seen in the development and regulation of process in the King's Court as well as in the reorganisation of the Exchequer.

Sometimes in these writs, for "plenum rectum," we have "plenariam rectitudinem,"[1] or "plenam justitiam;"[2] but the variations are as slight as in the contemporaneous writs of right already considered. As trespasses, however, came to be redressed more and more in the king's courts, these manorial writs appear to have undergone much change in form after the Norman period, assuming at length the language of the count.[3]

We have already seen that by an allegation of breach of the king's peace, trespasses, which primarily belonged to the local courts, were redressible in the King's Court in the time of Henry the Second, if not earlier.[4] But no very general advantage appears to have been taken of this privilege before the thirteenth century. At all events there is no indication in the twelfth century of the existence of the familiar writ of trespass of later times, in any settled form. Some approach to the modern form may, however, be seen in appeals and writs of the last quarter of the twelfth century.[5]

The writ of right for the enforcement of services due by reason of tenure and the writ of right for money-debt are closely related. They grew out of common, or rather out of general nebulous materials, and were undistinguishable until about the time of Henry the Second, as will appear from an examination of the writs themselves. The modern action of debt is lineally descended from the second of these writs, and is therefore in its origin, what that always was, a real action.

The earliest of these writs extant in England is of the year 1106, and is directed by the king to Gotselin de Riparia. It is in this language: "Præcipio ut faciatis Faritio abbati de Abbendona tale servitium de feudo quod de eo et de abbatia sua tenes, quale fratres tui fecerunt antecessori suo A.[6] Quod

[1] See Placita Ang.-Norm. 89. [2] Ibid. [3] Fitzherbert, Nat. Brev. 194.

[4] *Ante*, pp. 84, 85; Glanvill, lib. 1, c. 2. For an example, see Placita Ang.-Norm. 285, *anno* 1195.

[5] See Placita Ang.-Norm. 239, 283, 285

[6] Athelelm, predecessor of Faritius.

nisi feceritis, ipse abbas inde te constringat per feudum tuum."[1]

The writ, it will be observed, is addressed to the defendant, being a warning to perform engagements of tenure on pain of distraint; the usual consequence in some form of disobedience in such cases. It belongs to the third class of writs, as do most of those which follow.

The next writ in favour of the same party, directed by the king to another tenant, is to the same effect, though somewhat differently expressed. It is as follows: "Præcipio tibi ut abbati Faritio facias servitium terræ quam tenes, sicut tui antecessores fecerunt tempore Adelelmi abbatis. Et nisi feceris, tunc præcipio ut abbas pædictus de terra sua quam tenes suam voluntatem faciat."[2]

The following writ was granted about the year 1110 by Roger, bishop of Salisbury, the king's treasurer and justiciar, against two tenants of the church of Abingdon, jointly sued for money-debt due by express contract of tenure. The writ is substantially the same as the foregoing, and serves to confirm the statement above made that the writ of debt was originally undistinguishable from the writ concerning services by reason of tenure. The precept runs thus: "Præcipio vobis quod reddatis ecclesiæ de Abbendona rectitudines, quas illi debetis de ecclesia vestra Kingstuna. Et nisi feceritis, Ilbertus decanus interdicat divinum officium apud Kingstuna."[3]

The next writ, issued by the king, perhaps *anno* 1111, is of a different nature, but should be noticed in this connection. Instead of being directed to the tenant, it is directed to the lord of the lands (abbot Faritius), and belongs therefore to the second branch of the writ process. It proceeds thus: "Si Hugo filius Turstini noluerit facere servitium quod terræ suæ tibi pertinet, in operatione parcorum et pontium, et de omnibus aliis rebus, tunc præcipio ut tu ipse inde justitiam facias, ut omnia quæ facere debet, faciat."[4]

[1] Placita Ang.-Norm. 92. [2] Ib. 97. [3] Ib. 105. [4] Ib. 109.

Another writ was issued by the king in favour of Faritius, requiring the same Hugh to pay money-dues. This writ is directed to the tenant, and proceeds as follows: "Præcipio tibi ut ita geldas cum Faritio abbati de Abbendona, sicut geldare solebas, et ita ne amodo terra sua sit esnamiata pro terra tua super decem libras forisfacturam meam. Quod nisi cito feceris, Albricus de B. te constingat per pecuniam tuam ut cito facias, et ita ne inde amplius clamorem audiam super decem libras forisfacturæ."[1]

The next writ is addressed by Henry the First to all tenants of the bishop of Lincoln in the wapentake of W., and runs thus: "Præcipio quod omnes veniatis ad placitum et wapentachium episcopi Lincoliensis quod de me tenet, per summonitionem ministrorum suorum; et faciatis ei omnes rectitudines et consuetudines in omnibus rebus quas eis debetis, de terris vestris ad illud wapentachium, ita bene et plenarie sicut unquam plenius fecistis Roberto episcopo vel alicui antecessori suo, et quas juste facere debetis: et nisi feceritis ipse vos justiciet per pecuniam vestram donec faciatis, ne perdam pecuniam meam quam episcopus mihi inde reddere debet."[2]

The next writ is issued by Henry the Second, *anno* 1160, and directed to the tenant. It is as follows: "Præcipio quod juste respondeas abbati Sancti Augustini de operibus expensis de parte tua terræ de P., sicut tu et antecessores tui solebatis facere tempore regis Henrici avi mei; et nisi feceris, vicecomes Cantiæ faciat fieri, ne amplius inde clamorem audiam pro penuria recti."[3]

The same king directs the following writ to the tenants of the abbot of Gloucester, within the town: "Præcipio vobis quod reddatis abbati Gloucestriæ de terris quas de ipso tenetis omnes consuetudines et rectitudines quas inde solebatis reddere tempore avi mei regis Henrici; quia de illis quæ ad jus ecclesiæ pertinent, nullam quietudinem vobis concessi."[4]

[1] Placita Ang.-Norm. 110. [2] Ib. 139. [3] Ib. 207. [4] Ib. 254.

The last writ before Glanvill's treatise is of the year 1180, and is witnessed by Glanvill himself. It is addressed by the king to the men of Thanet, tenants of the abbot of St. Augustine, and is as follows: "Præcipio vobis quod juste et sine dilatione faciatis præfato abbati, domino vestro, omnia servitia et consuetudines et jura quæ ei facere debetis de feodis vestris, et quæ predecessoribus suis facere solebatis; et nisi feceritis, vicecomes de Kent faciat fieri, ne inde amplius clamorem audiam pro defectu recti."[1]

Glanvill's treatise contains no writs of this kind addressed to the defendant. But writs addressed to the sheriff, implying the refusal of the defendant to perform the services or to pay the money due the plaintiff, are given. The following is one: "Præcipio tibi quod justicies N. quod juste et sine dilatione faciat R. consuetudines et recta servitia, quæ ei facere debet de tenemento suo, quod de eo tenet in villa illa, sicut rationabiliter monstrare poterit eum sibi debere, ne oporteat eum amplius inde conqueri pro defectu recti."[2]

Glanvill's writ of debt for money due by loan is process of the King's Court. It appears to be one of the writs heretofore mentioned by which the King's Court acquired jurisdiction of causes which formerly belonged exclusively to the local courts. The writ referred to is as follows: "Rex vicecomiti salutem. Præcipe N. quod juste et sine dilatione reddat R. centum marcas quas ei debet, ut dicit, et unde queritur quod ipse ei injuste deforciat, et nisi fecerit, summone eum per bonos summonitores quod sit coram me vel justiciis meis apud Westmonasterium a clauso Paschæ in quindecim dies ostensurus quare non fecerit."[3]

The first of these two writs is but slightly varied from those which precede it, though the variation is sufficient to show the freedom of the process from fixed formalism. The second writ varies more from its predecessors; but the divergence marks little more than the fact that Glanvill's writ is

[1] Placita Ang.-Norm. 225. [2] Glanvill, lib. 9, cc. 9, 10. [3] Ib. lib. 10, c. 2.

process of the King's Court. Such process, as a remedy, was at some time new to the *King's* Court; but it is conceived that it was new only to the forum. The remedy itself, we apprehend, was not new as a form of action. Debts had always been created by mere loan of money, and payment enforced by the local courts; and though the manorial writs above quoted as to money dues were issued to enforce dues arising by reason of tenure, it is hardly supposable that when the debt arose from a loan or the like—the subject of the last quoted writ from Glanvill—any materially different process was sought from the king on failure of the local courts to do justice. The language of the writ of debt of Glanvill, from the words "et nisi fecerit" on to the end, is the peculiar language of process of the King's Court; but the first half of the writ is of the same tenor as the manorial process, and serves somewhat to confirm the view that the writ of Glanvill is an adaptation of ancient process, and not the creation of a new form of action.[1]

It should be added that Glanvill has also a writ of right for debt, which may be compared with the writ of Roger, bishop of Salisbury, above quoted. There is a gap of at least seventy years between the two writs; during which time such writs may have diverged from the others which we have quoted. At all events Glanvill's writ is modelled after another class of precepts, to wit, the general writs of right heretofore quoted. It runs as follows: "Rex N. salutem. Precipio tibi, quod sine dilatione plenum rectum teneas N. de centum

[1] The writ not being new, there is no need of supposing the creation of any new form of action. Indeed, the practical difficulties in the way of introducing any new form of action in those times of the supremacy of usage must have been fairly insurmountable. Remedies grew, but were not made before the thirteenth century. Invention did not come before the reign of Edward the First. Usage then first began to yield to statute. Nor would an entirely new writ in Glanvill's time (if such there were) necessarily imply a new form of action. For every common violation of law there was an ancient, established form of plaint. And it may be added that in all the remodellings of process this underwent no further change than was inevitable by mere lapse of time.

solidatis redditus in villa illa, quam clamat tenere de te per liberum servitium, etc. Et nisi feceris, vicecomes Oxonie faciat, ne amplius inde clamorem audiam pro defectu recti."[1]

It is sufficient to say that the modern writ of debt did not spring from this writ. The history of the modern writ may be thus summarised: 1. A period in which the precept was formless, unsettled material. This was coming to an end in the time of Henry the First. 2. Then a period tending to distinct settlement of form, during which there is little difference between a writ for the non-performance of services due by reason of tenure and a writ for the non-payment of money loaned. This ended in the time of Henry the Second. 3. The time of Glanvill's treatise, when each of these writs assumes definite form and becomes de cursu; the writ for money loaned being the parent of the modern writ of debt.

Before leaving the writs of right of the foregoing class, it should be noticed that, dissimilar from the writ of right of debt as the familiar writ of entry of modern times might at first be considered, the latter writ appears in fact to have been framed directly from one of the writs of debt; the difference between them being scarcely more than the matter of a single word. Glanvill's writ "de summonendo creditore de restituendo vadio debitori" is as follows: "Rex vicecomiti salutem. Precipe N. quod juste et sine dilatione reddat R. totam terram (vel terram illam in villa illa) quam ei *invadiavit* pro centum marcis, ad terminum qui preteriit, ut dicit, et denarios suos idem recipiat vel quam inde acquietavit, ut dicit, et nisi fecerit, summone eum per bonos summonitores," etc.[2]

By the substitution of the word "dimisit" for "invadiavit" and omitting the (for the writ of entry) inappropriate clause "et denarios . . . . ut dicit," the writ is verbatim the writ of entry of Bracton[3] and later times. Thus this writ is as nearly

[1] Glanvill, lib. 12, c. 4.

[2] Ib. lib. 10, c. 9. See c. 7 as to the converse case of the creditor.

[3] Bracton, 317 b, 318.

related to the old (Glanvill's) writ of debt as detinue is to the modern writ of debt; and it is actually nearer to the form of Glanvill's writ of debt than is the very offspring of that writ, the modern writ of debt.[1] Out of the writs of right, therefore, have arisen the (manorial) writ of trespass, the writs of debt and of detinue, and the writ of entry.

The history of Glanvill's writ of right "ne injuste vexes," which was intended to restrain landlords from oppressive exactions upon their tenants,[2] though it has not the interest attending connection with more modern process, affords an equally clear illustration of the growth of the English writs. The number of writs in the *nature* of the writ referred to is almost without limit, and their variations in form are very great; but it will not be necessary to refer to any that are not in the direct order of development towards Glanvill. These writs belong to the third branch of the writ process; mandates addressed to defendants, or to persons who might be defendants,[3] including commands and prohibitions.

In a writ addressed by William the Conqueror to his justiciars, he says: "Defendite ne Remigius episcopus novas consuetudines requirat infra insulam de Heli. Nolo enim ut ibi habeat, nisi illud quod antecessor ejus habebat tempore regis Edwardi, scilicet qua die ipse rex mortuus est, et si Remigius episcopus inde placitare voluerit, placitet inde sicut fecisset tempore regis Edwardi, et placitum istud sit in vestra præsentia."[4]

The next is by the same king, and is addressed to the abbot of Peterborough. It is as follows: "Mando tibi et præcipio ut permittas abbatem Sancti Edmundi sufficienter accipere de petra ad ecclesiam suam sicut hactenus habuit, et non amplius sibi impedimentum facias in adducendis petris ad aquam, quam antea fecisti."[5]

[1] See Fitzh. Natura Brevium, 273. [2] See Magna Charta, c. 10.

[3] The writs to the king's officers *infra* are probably both commands to them in the nature of injunctions and also commissions of authority to them to restrain the acts of others. [4] Placita Ang.-Norm. 27. [5] Ib. 32.

The next writ to be noticed is by Henry the First, *anno* 1110. It is addressed to all the king's barons, sheriffs, and servants, and proceeds thus: "Prohibeo ne aliquis disturbet ullo modo carreiam Sanctæ Mariæ de Abbendona, nec aliquid aliud quod sit dominicum abbatis vel monachorum ejus, vel per terram vel per aquam disturbet."[1]

In a writ similarly addressed, Henry the Second says: "Præcipio quod abbas et monachi de Gloucestria habeant et teneant aquam quæ currit per abbatiam suam bene et in pace et juste et integre, sicut habuerunt melius tempore Henrici regis, avi mei. Et prohibeo ne quis disturbet cursum illius aquæ, desicut ivit tempore Henrici regis, avi mei, super decem libris forisfacturæ."[2]

In another writ addressed to the same persons, the same king says: "Præcipio quod permittatis abbatem et monachos Gloucestriæ facere et habere bene et in pace et juste piscariam suam de Bramptona in eodem loco ubi fuit tempore regis Henrici, avi mei; nec inde eos disturbetis, nec aliquam eis injuriam vel contumeliam faciatis."[3]

In still another writ addressed to the sheriff of Hereford apparently about the same time, the king says: "Præcipio quod juste deducas abbatem et monachos Gloucestriæ de una hyda terræ de la Hyde quam tenent. Et prohibeo ne ipsi inde injuste vexentur, vel in placitum ponantur, aut in aliquas consuetudines quas facere non solebant tempore Henrici, avi mei. Et nisi feceris, justitia mea faciat, ne amplius inde clamorem audiam pro penuria recti."[4]

The last writ to be noticed before the time of Glanvill is the following, by the same king, addressed to Adam de Port: "Prohibeo tibi ne injuste vexes, vel vexari permittas, abbatem Gloucestriæ de libero tenemento suo de Litletone, nec ab eo inde exigas, vel exigi permittas, consuetudines vel servitia quæ inde facere non debeat vel solebat, nec ullam ei inde injuriam vel molestiam facias aut gravamen. Et nisi feceris vicecomes

[1] Placita Ang.-Norm. 105. [2] Ib. 253. [3] Ib. 256. [4] Ibid.

de S. faciat, ne inde amplius clamorem audiam pro defectu recti vel justitiæ."[1]

This writ differs only in the slightest possible manner from Glanvill's writ,[2] and may here be taken for it, to save unnecessary repetition. The writ is without date, and may possibly be of Glanvill's time; but the probability is that it is earlier.

The common writs for the return of fugitives, also of the third class, may next be noticed. About the year 1107, Henry the First issued three writs of this kind in favour of the abbot of Abingdon; each differing somewhat in form from the others. The first is addressed to all the king's sheriffs and officers in whose bailiwicks fugitives of Abingdon might be found, and runs thus: "Præcipio vobis quod plene et juste faciatis habere abbati Abbendone omnes fugitivos suos, cum tota pecunia et catallo suo, ubicumque ipsi inventi fuerint; et prohibeo ne aliquis eos ei vel pecuniam suam super hoc injuste detineat, super decem libris forisfacturæ."[3]

The second writ is addressed to Hugh of Bocland, Robert de F., and others named, and proceeds: "Præcipio vobis ut juste et sine mora faciatis redire ad abbatiam de Abbendona omnes fugitivos suos, et cum tota pecunia sua, ubicumque sint, et ita ne inde amplius clamorem audiam pro recti penuria,[4] et nominatim hominem qui est in terra *Roberti de F.*, et cum tota pecunia sua."[5]

The third writ is addressed generally, and runs as follows: "Præcipio vobis ut sine aliqua mora faciatis habere Faritio abbati de Abbendona omnes homines suos, qui de terra sua exierunt de Walingeford propter herberiam curiæ meæ, vel propter alias res, et cum omni pecunia, ubicumque sint."[6]

The next writ is dated in the year 1175, the year before

[1] Placita Ang.-Norm. 252. [2] Ib. 315. [3] Ib. 94.

[4] This clause indicates that the writ was not final process after judgment in the court.

[5] Placita Ang.-Norm. 95. [6] Ibid.

the Assise of Northampton, at which Glanvill was appointed one of the three justiciars for the northern circuit.[1] This writ, after a general address, proceeds thus: "Præcipio vobis quod juste et sine dilatione faciatis habere R. abbati de Abbendonia omnes nativos et fugitivos suos cum catallis suis, ubicumque inventi fuerint in bailliis vestris, nisi sint in dominis meo, qui fugerunt de terra sua post mortem regis Henrici, avi mei; et prohibeo ne quis eos injuste detinent, super forisfacturam meam."[2]

This writ varies even less from Glanvill's writ than it does from the preceding precepts. The writ in Glanvill is addressed to the sheriff; it adds the words "et cum tota sequela sua" (i.e. with all their issue); and for the limitation clause "post mortem regis Henrici, avi mei," substitutes "post primam coronationem meam."[3] In other respects the writs are exactly alike.

We proceed now to the first branch of the writ process, to wit, the writs of summons; the question for consideration being whether the recognitions of Glanvill have probably gone through a course of development similar to that of the writs already examined. The only one of the recognition writs of which there exists material for pursuing such an inquiry is the writ of novel disseisin; and the material suited to the thorough study of this writ even is not abundant. Indeed, no such material is known to exist as that which has been used in the examination of the several writs heretofore under consideration. Those writs were process for instituting suits in the County, in the Hundred, or Manorial Courts, affecting for the greater part religious houses; and they were preserved as part of the muniments of title of those corporations. The writ of novel disseisin, however, issued as process for the trial of a cause in the King's Court, where the religious houses,

[1] 1 Benedictus, 108; *ante*, p. 89.
[2] Placita Ang.-Norm. 220. [3] Glanvill, lib. 12, c. 11.

which would be most likely to preserve the writs, seldom litigated. Actions affecting realty were brought then as now where the land lay; and as the courts of franchise possessed or readily obtained jurisdiction over causes affecting their interests, there was ordinarily no occasion for resorting to the King's Court for trials of that sort. Then, the final adoption of the writs of Glanvill rendered it useless to preserve, among the records of the King's Court, the old and superseded writs. The consequence is, that no writs of novel disseisin, in the strict sense of the term (as process of the King's Court), are known to exist, except those given by Glanvill. It cannot therefore be decisively and finally demonstrated that Glanvill's writ of novel disseisin was a development in regular course from older material. But it can be made to appear more than probable that this was the case; or rather it can be shown to be highly probable that the writ referred to was an adaptation of the essential features of earlier process.

It is the general opinion of competent writers that the recognitions of Glanvill, in the form in which they appear in Glanvill's treatise, are of the reign of Henry the Second, or at all events of the latter half of the twelfth century; one writer thinking they shortly antedate the accession of that king to the throne of England.[1] Now it is only necessary to show that writs exist among the monastic records which served, though in no fixed mode, the same special purpose, the redress of disseisins, as did the writ of novel disseisin, and that these writs, in all their stages, make use of language characteristic of the writ under consideration, to make it reasonably safe to infer a connection between them and the writ of novel disseisin. Or rather, it will be safe to infer the existence of similar writs in the King's Court, of which the monastic writs mentioned[2] are an imitation; which writs in the King's Court will supply most if not all that is wanting

[1] Brunner, Schwurg. 302-304. [2] Writs *to*, or in favour of, the monasteries.

in the monastic precepts to make a perfect model of the writ in question. The writs directing the trial of a cause in the County, Hundred, or Manorial Courts, it must be remembered, are issued for the mere purpose of requiring or authorising the trial, and contain no further directions; while the writs of the King's Court are directed to the procedure with which the particular suit is to be brought to trial, specifying the precise nature of that procedure and the steps to be taken to carry it out. The latter writs always contain an order of summons; the former seldom.

The characteristic language of Glanvill's writ of novel disseisin (apart from the language which makes it process of the King's Court) is found, as in the writ of right, in the words with which it begins: "Questus est mihi N. quod R. *injuste et sine judicio dissaisivit* eum de libero tenemento,"[1] etc. The italicised words were now the language only of a trial of seisin; that is, of a possessory action. They never occur in any writ in Glanvill except in that of novel disseisin; nor is there any known writ prior to Glanvill in which those words are used where the trial can be shown to have concerned anything more than seisin, unless the writ were double process.[2]

It is by no means certain, however, that trials of the *right* of property may not sometimes have taken place under the process which we shall endeavour to show was the nearest relation to the original (if it were process of the King's Court instead of manorial or vicontiel process, it would, in our view, be the actual original) of the process of novel disseisin. The writs to which we refer merely informed the sheriff, or other person addressed, of the complaint, by a party named, of a disseisin "injuste et sine judicio," and by implication or by express language required him to try the cause if a defence were made. Unlike the later writ of novel disseisin,

[1] Glanvill, lib. 13, c. 33.

[2] As in Abbot Walkelin v. Turstin Bassett, Placita Ang.-Norm. 197.

there was usually no direction for a recognition, nor indeed for any particular mode of trial. There is a suggestion of the cause of action, and a command to put the demandant into seisin again if the same be established. All else is left for development and determination at the trial. The pleadings may then assume a form leading to the duel, or the issue may turn upon the interpretation or the existence of charters, just as we shall hereafter see might be the case under the writ of novel disseisin ; or the case may be such that the court would order a trial by inquisition, recognition, or party-witness. And in either of the latter cases, though the question ordinarily put is a simple question of fact (e.g. Was the demandant in peaceable possession at such and such a time, and did the tenant disseise him ?), it *may* be a question of the right of property (e.g. Of whose tenure *ought* this land to be ?).

Inasmuch, then, as no recognition, generally speaking, was summoned in advance, that is, by virtue of the writ, what happened in Glanvill's time could not have happened in the first half of the twelfth century or before ;[1] to wit, the setting aside of the recognition because, upon the issue afterwards joined on the pleadings, a question had arisen different from that for which the recognition had been summoned, and for the answer of which the particular recognitors, as acquainted with the fact, had been chosen. Glanvill's recognition proceeded under the question implied by the writ, or not all ; and the purpose of the writ failed with the failure of the recognition.[2]

The result is, that if our view of the connection of the earlier writs in question with Glanvill's writ of novel disseisin is correct, an important change had in the meantime transpired in the mode of procedure. We say in the mode of procedure, for the writ underwent little change in respect of

[1] Unless of course the writ *did* prescribe a recognition.

[2] This subject will be further considered in a future chapter.

form, except by way of adding the summons of the recognition. The formal, characteristic language of the old writs is still used in the later precept. That addition to the writ, however, produced clearly all the change that had occurred in the procedure. Take it away from the mandate, and nothing of substance remains but the form of the older writs ; to wit, the statement of a complaint of a disseisin "injuste et sine judicio," with a command to put the demandant into seisin again, subject of course to the result of the trial. The change referred to consisted in the general adoption of possessory actions.

When and how had this change of procedure come into operation? This is a question that has never been conclusively answered ; nor can it be so answered upon any evidence now known. A suggestion may, however, be ventured which, so far as the writer is aware, has not before been made. Vacarius taught the Roman law at Oxford in the closing years of the reign of Stephen, beginning perhaps in the year 1149.[1] In the course of his labours he composed nine books out of the Digest and Code ; and one of his chapters bears the title of the corresponding head in the Digest, "De *actionibus* et obligationibus." This title in the Digest, as is well known, treats only of the division of actions into real, personal, and mixed ; and the same, it may be presumed, is true of the chapter in the (unpublished) MS. of Vacarius. But when lecturing upon actions, Vacarius could hardly have avoided teaching of the other division of actions, that of the canon law, to wit, into petitory and possessory actions.[2] At all events, it is clear from the writers of the time, John of Salis-

[1] Upon this subject we refer generally to Wenck's Vacarius.

[2] This distinction of the canon law as to actions was perfectly understood in the church courts of England at the beginning of the thirteenth century.—Chron. Evesham, p. 130 (Rec. Com.). And there is good reason to believe that it had then been understood there for half a century, and that it was *adopted*, or perhaps *adapted*, into the temporal courts from Rome. The only question is, when and how this was done.

bury in particular, that, notwithstanding the inhibition of the teaching and use of the Roman law which followed upon the work of Vacarius, an interest in the study of that law was excited among the clergy, which went on regardless of the inhibition, and of the burning of books. The distinction between actions petitory and possessory, it must be believed, was thus learned by those who were the chief men of affairs at that particular time more perhaps than at any other. The clergy had preserved the only semblance of order and good government during the turmoil of Stephen and Matilda; and it was through their power and intervention that the peace of Wallingford had been effected and the succession of Henry the Second settled. These men were foremost in the state in the earlier and formative years of Henry's reign; and if it should turn out that, in the execution, gradually carried out, as they were, of the reforms provided for by the peace of Wallingford and Winchester (*anno* 1153), which occurred four or five years after Vacarius began to teach at Oxford, the clergy had suggested that, without doing violence to English procedure, the nicety and precision of the Roman classification could be established in England, it would not be matter of surprise. The courts and the people were perfectly familiar with inquisitions and recognitions; the clerical courts had constantly made use of them during the late anarchy,[1] regarding them, we may well believe (since they were men of sense and intelligence), as the most satisfactory modes of trying causes when there were no charters; and it would be a natural and an easy matter to tack the order for a recognition *permanently* upon the existing writs of disseisin.[2] And if the precedent of similar action in Normandy was already before them, as has been thought by several

[1] *Ante*, p. 63.

[2] For what we know of the peace of Wallingford, see Roger de Wendover, *anno* 1153; 1 Twysden, Script. 527; 1 Stubbs, Const. Hist. 332–334; 5 Freeman, Norm. Conq. 220.

eminent writers,[1] the result would be all the more probable.[2] It is possible, however, that the attainment of the Roman system was accidental.

This change merely supposes that what was occasional, or rather, frequent, but not uniform and stable, was now made the established order of things in actions for disseisins; not, however, that the writs were to be had as matter of right, as will hereafter be seen, but that, when authorised to issue, they were to take the now established form. That writs ordering recognitions for the trial of disseisins were in use in England prior to the reign of Henry the Second, and that therefore the newly-established writ of novel disseisin was no essential innovation upon the ancient procedure, may now be shown.[3]

The principle of Glanvill's writ of novel disseisin was that of an inquiry *per patriam* (that is, by a body of men of the community sworn to speak the truth *de visu et auditu*[4])

[1] The evidence of this, however, is slight and unsatisfactory.

[2] It would certainly be not less interesting if it should appear that the Magna Assisa was also one of the results of the reforms agreed upon in the peace of Wallingford. For seventeen years property litigations had been conducted in the clerical courts, as we have seen in another chapter (*ante*, pp. 34, 37); and the duel, we may well believe, was not permitted in such cases. What more natural than that the clergy should now have insisted upon carrying this reform into permanent effect, so far as the circumstances and prejudices of the times would permit? And for this they would have the precedent of not a few of the king's writs, as we shall see later on.

[3] In a collection of "Assisæ" attributed to David I., king of Scotland, from the year 1124 to the year 1153, writs both of novel disseisin and of mort d'ancestor are spoken of and regulated by name; but the language used shows that the article could not have been earlier than the last quarter of the twelfth century, even if so early as that. The article is as follows: "Statuit dominus rex quod brevia de morte antecessoris et nove dissaisine nunquam erunt placitata per calumpniam petentis nisi tantum per assisam bone patrie et non alitur quia illi duodecim qui electi sunt de bona patria ad assisam faciendam dicent solummodo suum veredictum secundum punctos et articulos utriusque brevis et secundum hoc indicabitur partibus."—Assise Regis David, c. 35; 1 Acts of Parl. of Scotland, 325.

[4] The distinction between a mere inquisition and a recognition was that the former might be held by the court itself as the inquisitors; while a recognition was effected by a chosen body of men, not sitting as part of the court. An example of the former may be seen in Glanvill, lib. 2, c. 6. Both made *inquiry* as to the facts in dispute, but the recognition had to *report* (*recognoscere*).

as to how the seisin stood at some stated previous time. The question was, Was the demandant (or his predecessor in right) in peaceable possession at such and such a time? This principle of the writ of novel disseisin was indeed as old as Domesday in England, and much older on the Continent. We turn now to the ancient records; and first to the informal writs of the eleventh century.

In one of the earliest English writs extant, issued for the recovery of lands, William the Conqueror thus addresses his justiciars, archbishop Lanfranc, Roger, earl of Mortain, and Geoffrey, bishop of Coutances: "Mando vobis et præcipio ut iterum faciatis congregari omnes scyras quæ interfuerunt placito habito de terris ecclesiæ de Heli, antequam mea conjux in Normanniam novissime veniret. Cum quibus etiam sint de baronibus meis qui competenter adesse poterunt, et prædicto placito interfuerunt, et qui terras ejusdem ecclesiæ tenent. Quibus in unum congregatis, eligantur plures de illis Anglis qui sciunt quomodo terræ jacebant præfatæ ecclesiæ die qua rex Edwardus obiit, et quod inde dixerint ibidem jurando testentur. Quo facto restituantur ecclesiæ terræ quæ in dominio suo erant die obitus Edwardi, exceptis his quas homines clamabant me sibi dedisse. Illas vero litteris mihi signate, quæ sint et qui eas tenent." [1]

The essential feature of this writ is the direction for an inquiry upon testimony of the vicinage concerning lands which had been the subject of an unsatisfactory trial; the inquiry being ordered in respect of the title on the day upon which Edward the Confessor died. The title as it then existed was to prevail, except in cases of gifts made by the king since the Conquest.[2] Disseisins prior to that time, if any, were to be disregarded, if the occupant was then peaceably possessed: later ones were within the letter of the writ.

[1] Placita Ang.-Norm. 24.

[2] This was made the basis of decision in all the disputes noticed in Domesday.

Domesday book contains numberless cases of this sort, though no writs have been preserved.[1]

In immediate connection with the foregoing writ there is another relating to the same lands, addressed by the Conqueror to the same persons in this language: "Facite simul venire omnes illos qui terras tenent de dominico victu ecclesiæ de Heli, et volo ut ecclesia eas habeat sicut habebat die qua Edwardus rex fuit vivus et mortuus, et si aliquis dixerit quod inde de meo dono aliquid habeat, mandate mihi magnitudinem terræ, et quomodo eam reclamat, et ego secundum quod audiero aut ei inde escambitionem reddam, aut aliud faciam. Facite etiam ut abbas Symeon habeat omnes consuetudines quæ ad abbatiam de Heli pertinent, sicut eas habebat antecessor[2] ejus tempore regis Edwardi. Præterea facite ut abbas saisitus sit de illis theinlandis quæ ad abbatiam pertinebant die quo rex Edwardus fuit mortuus, si illi qui eas habent secum concordare noluerint, et ad istud placitum summonete W. de G. . . . et alios quos abbas vobis nominabit."[3]

Beyond the fact that inquiry is directed as to the state of the tenure at a prior specified time, there is nothing in either of these writs in point of *form* in common with the later real property writs; and they are here quoted partly for the purpose of showing the kind of material from which we must start in the study of the history of writs for the trial of seisin; in other words, the shapelessness, looking to form, of process of the kind in the eleventh century. It should be added that these writs, as their terms fairly imply, relate in fact to disseisins; from which kind of wrongs the church at Ely had suffered greatly after the Conquest.[4]

[1] See Placita Ang.-Norm. pp. 38–40, 50, 53–56; Appendix C. pp. 293–307. Seisin itself might be decided by the duel in some cases. Earl Alan v. Wido, Placita Ang.-Norm. 60. Such indeed would always be the result upon impeaching the word of a witness.

[2] This word uniformly means "predecessor" in the language of the Norman period, and not "ancestor" in the sense of modern times.

[3] Placita Ang.-Norm. 24. [4] Ib. 22.

The essential fact with regard to the foregoing writs is that they contemplate a trial of the question stated in them by the testimony of witnesses in some form, and that that question is a simple, single question of fact. The decision would determine nothing but that question of fact, if the terms of the writ were followed, and such a decision did not necessarily determine the right of property. Hence the process in *effect* was like that of the later novel disseisin. If the writ were granted after an issue joined upon the matter of the right of property, the question of title turning solely upon the question stated in the writ, then the decision would reach the right; but the writ was granted at the outset, before the pleadings. In the ordinary course of things a property writ did not at that time issue in advance with a direction to try the right by inquisition or recognition.[1] Indeed, when in later times the Magna Assisa was introduced, the writ for the recognition of "the greater right" was granted only after issue upon the pleadings.[2]

What form of trial in fact followed after the issuance of the writs quoted does not appear; nor would that be material unless it were clearly stated that the particular form of trial had was a recognition, summoned in accordance with the terms of the mandate. Even in the time of Glanvill, as we have already observed, the course of a cause begun by a writ for the trial of a question of seisin could be entirely deflected by the defendant's plea on the appearance of the recognitors. From a simple question of seisin, the cause might turn into a question of the right of property.[3] But this put an end to the recognition, and other process followed.[4] The recognition proceeded only when the original question suggested by the writ—whether there had been a disseisin of the plaintiff without authority of law—remained to be put to the jurors.

In the absence, then, of complete records of causes (and

[1] Some exceptions will be noticed later.
[2] Glanvill, lib. 2, c. 3, § 2.
[3] Ib. lib. 13, c. 11, §§ 3, 4; c. 20, § 3.
[4] Ibid.

we generally have only the writ), the investigation and conclusion must be based mainly upon the language of the writ. Thus far we certainly have none of the technical language of the writ of novel disseisin of Glanvill.

No distinction was made, it seems, before the middle of the twelfth century between disseisins of lands and of movables, such, for example, as ships; and writs for the redress of disseisins of personalty may therefore be quoted in the present connection. The abbot of St. Augustine had been disseised of a ship in the time of the Conqueror; to recover which he obtains from the king's son the following writ addressed to the sheriff of Kent: "Præcipio quod præcipias Hamoni, filio Vitalis, et probis vicinis de S., quos Hamo nominavit, ut dicant veritatem de nave abbatis de Sancto Augustino, et si navis illa perrexit per mare die qua rex novissime mare transivit, tunc præcipio ut modo pergat quousque rex in Angliam veniat, et interim resaisiatur inde abbas prædictus."[1]

Here was clearly the whole principle (as to movables) of Glanvill's novel disseisin. A recognition is summoned in advance to answer a particular, simple question of fact, of *recent* date, knowledge as to which was the basis of the election of the recognitors; and it would seem to follow, as it did with Glanvill's writ, that if at the trial an issue were raised different from that involved in the question of the writ, the recognition must have been set aside as unqualified to decide the case. But that such a turn did not occur, and that a recognition (probably) tried the question of the writ, appears from another writ, issued afterwards by the same son of the king to the sheriff of Kent, as before, in these words: "Præcipio quod resaisias abbatem de Sancto Augustino de nave sua, sicut ego præcepi per meum aliud breve, et sicut recognitum fuit per probos homines comitatus, quod inde abbas erat saisitus, die qua rex mare novissime transivit; et in pace teneat."[2]

[1] Placita Ang.-Norm. 33. [2] Ibid.

This second writ does not indeed state that a recognition took place, but the language used, "et sicut recognitum fuit," is the language usually applied in later times to that mode of trial; and this taken in connection with the direct command in the first writ to summon men "quos Hamo nominavit," leaves little room for doubt that the trial was by recognition. But even if it was by community (party) witness, the fact would still remain that a simple question of the recent seisin was the only question put. However, we have yet no characteristic, formal language.

The two following writs of Henry the First indicate somewhat of change from the shapelessness of the foregoing. They do not, indeed, resemble either of the preceding ones; nor is either of them used as a perfect precedent of the other. There is, however, sufficient resemblance between them to be worthy of notice; and the suggestion of Glanvill in the one, "unde ipsi sunt injuste et sine judicio dissaysiti," and in the other, "si sine judicio dissaysisti abbatem," is to be observed.[1]

The first of these writs is addressed to Walter, son of Wisceo, and runs thus: "Præcipio quod juste et plene resaisyas abbatem et monachos Gloucestriæ de terris et ecclesiis et decimis et omnibus rebus quas pater tuus eis dedit in elemosinam, unde ipsi sunt *injuste et sine judicio dissaysiti*; et bene et in pace et juste et honorifice teneant, sicut ipsi hoc dirationare poterint per suos legales testes quod pater tuus eas eis in elemosinam dedit; et nisi feceris, episcopus Sancti David faciat ne ipsi quicquam perdant pro penuria recti vel justitiæ, neque ego amplius inde clamorem audiam."[2]

The other writ, addressed to William, the constable, is as follows: "*Si sine judicio dissaysisti* abbatem Gloucestriæ de

[1] This expression, used possibly in a technical sense, occurs in England as early as in the reign of Rufus. See Placita Ang.-Norm. 308. And it is not improbable that we should find it in writs of the eleventh century if more were known. It cannot be positively affirmed that technical language was unknown to the writs of that time without a knowledge of all that were used; but those that we do know are shapeless and untechnical.

[2] Ib. 128.

Coleby quod pater tuus dederat monachis Gloucestriæ in elemosinam, tunc præcipio quod eum juste inde resaysias, et teneat ita bene sicut tenuit die qua pater tuus fuit vivus et mortuus, ita ne super hoc amplius ei injuriam facias, ne sine justo judicio dissaysias. . . . Et nisi feceris, justitia mea et vicecomes faciant."[1]

Passing over the reign of Stephen, as wanting in writs of the kind under consideration, we come to the time of Henry the Second. Here we shall find the course of development renewed at the very outset; almost every writ for the recovery of lands pointing directly to Glanvill. The two following writs of the king were executed in the course of one and the same litigation, perhaps in the year 1154:

The first is addressed to the sheriff of Berkshire, and proceeds thus: "Si abbas de Abbendonia *injuste et sine judicio dissaisatus est* de terra sua de Mercheham et de Middletona, et de Appelford, tunc præcipio quod eum inde sine dilatione et juste resaisias; et teneat ita bene et in pace et juste sicut ecclesia de Abbendonia melius eam tenuit tempore Henrici regis, avi mei; . . . et nisi feceris, justitia mea faciat fieri."[2]

This writ having been disobeyed, a second, in the nature of an *alias*, is addressed to the sheriff of Oxford and his officers, and runs as follows: "Præcipio vobis quod si abbatia de Abbendonia *injuste dissaisiata est* de ecclesia de Mercheham et pertinentiis suis, et de una hida terræ et dimidia in Middeltuna, et de una hida in Appelford, sine dilatione eam inde resaisiatis, et in pace tenere faciatis, sicut melius tenuit tempore Henrici regis, avi mei; et nisi feceritis, justitia mea faciat."[3]

These writs were succeeded within a few years by the following, issued by the king and directed to the sheriff of Berkshire and his bailiffs: "Si ecclesia de Abbendona habuit decimam de Mercham ad luminare ecclesiæ, tempore Henrici regis, avi mei, et anno et die qua fuit mortuus et vivus, et post,

[1] Placita Ang.-Norm. 130. [2] Ib. 169. [3] Ib. 170.

et inde *sit dissaisita injuste et sine judicio*, tunc præcipio quod sine dilatione inde eam resaisiatis ; et ita bene et in pace et libere et juste et quiete tenere faciatis sicut melius et liberius tenuit tempore Henrici regis, avi mei."[1]

About this time the abbot of Abingdon was disseised of a market at Abingdon by a temporary mandate of the king, on complaint of men of Wallingford that the abbot was not entitled to it ; his prescription, as they affirmed, not running back to the reign of Henry the First. The abbot now procures, in turn, a writ from the king, ordering a recognition upon this very point of the duration of the prescription ; and on that point the recognition proceeds. The writ of course omits to speak of the disseisin as "injuste et sine judicio," because it was effected by the king's own order. It is addressed to the justiciar, Robert, earl of Leicester, and runs thus : "Præcipio ut, convocato omni conventu [comitatu ?] B., xxiv. homines de senioribus qui Henrici regis, avi mei, tempore fuerunt, eligere facias. Qui si jurare poterint quod in diebus ejus plenum mercatum in A. fuerit, ita sit et nunc. Si vero nec viderint, nec jurare poterint, ut rectum est, prohibeatur, ne amplius inde clamorem audiam."[2]

The last writ of this reign to be noticed before quoting Glanvill is the following, addressed by the king to Ralph Suessio : "Si monachi de Abbendonia *sunt dissaisiati injuste et sine judicio* de terra Nigelli de Colebroc quam clamant, tunc præcipio quod juste et sine dilatione eas inde resaisias, sicut inde saisati fuerunt tempore regis Henrici, avi mei ; et nisi feceris, justitia vel vicecomes meus faciat fieri."[3]

In a series of writs relating to disseisins, therefore, from the time of Henry the First to about the fifth year of Henry the Second, possibly a little later, we have the technical, characteristic language of Glanvill's writ of novel disseisin ; with at last a state of tolerable regularity in the whole make-up of the precept. And in the next to the last writ, the whole

[1] Placita Ang.-Norm. 197. [2] Ib. 200. [3] Ib. 250.

writ of Glanvill, save its verbal aspect, is barely escaped by the accident that the disseisin could not be spoken of in the usual way. With these precedents before the reformers of the time, especially with the writ as to the market of Abingdon, or others like it, of which there were doubtless not a few, the establishment of Glanvill's writ was an easy matter, and not open to objection as a foreign (Roman) innovation. We now quote Glanvill's writ in full.

The following is his writ applicable to a case of disseisin of pasture lands: "Rex vicecomiti salutem. Questus est mihi N. quod R. *injuste et sine judicio disseisivit* eum de communi pastura sua in illa villa quæ pertinet ad liberum tenementum suum in eadem villa post ultimam meam transfretationem in Normanniam. Et ideo præcipio tibi, quod si præfatus N. fecerit te securum de clamore suo prosequendo, tunc facias duodecim liberos et legales homines de visineto videre pasturam illam et tenementum et nomina eorum imbreviari facias et summone illos per bonos summonitores quod tunc sint coram me vel justiciis meis parati inde facere recognitionem."[1]

It will be seen, as we have previously stated, that Glanvill's writ makes use of all the technical language of the writs above quoted, except the nisi feceris clause; which would of course be inapplicable to process of the King's Court.[2] If the writ had stopped with the first sentence, it would have been substantially and technically like the manorial writs, though expressed with more precision; but what follows, apart from the order of a recognition, is nothing more than is contained in other writs issuing for the trial of causes in the King's Court. Nothing therefore has been added to the manorial writs, or rather to the writs presumed to exist and to furnish models for the manorial writs, except the command for a recognition.

[1] Glanvill, lib. 13, c. 37.

[2] A nisi *fecerit* clause occurred in the writ of right issuing from the King's Court, but that had reference to another matter.—Glanvill, lib. 1, c. 5.

It could probably be shown without much difficulty that the principle of each of the recognitions of Glanvill had been in use in England ever since the Conquest. Domesday was itself a great inquisition; and it contains many cases which were litigated apparently under the new procedure. There can be little doubt that the variety of causes thus determined in the taking of the survey was sufficient to furnish examples of the principle of all the recognitions of the twelfth century. The almost uniform inquiry put to the community as to a disputed claim to property in Domesday was, How stood the case "tempore regis Edwardi?"; just as in the time of Henry the Second the question put to the recognitors in most cases was, How stood the case in the lifetime of A., or in the time of Henry the First, or before the king's last voyage to Normandy?

Inquisitions and recognitions in a great variety of cases continued throughout the reigns of the Conqueror's sons and of his grandson, as well as of the reign of Henry the Second. The following writs, not before quoted, may be specially noticed:

In the year 1094, William Rufus to the sheriff of Kent: "Fac recognosci per homines hundredi de M. quas consuetudines abbas Sancti Augustini habere *debet* in villa de N., et quas olim habuit. Et tales fac ei habere sine mora et nominatim de isto auxilio, sicut olim habuit."[1]

It will be noticed of this last writ that the inquiry directed to be made relates to the customs which the abbot of St. Augustine *ought* to have in N. The case of The Monks of St. Stephen v. The King's Tenants[2] is of the same import. A writ of Henry the First, perhaps *anno* 1124, in like manner directs R. B. "inquirere per legales homines de O. quod habere *debeat* [abbas Vincentius] curiam suam."[3] A writ of Geoffrey, earl of Essex, contains the following direction: "Fac recognosci per vicinum et probos homines illius provinciæ, si quinque acræ terræ quas W. L. tenet et illos inde

[1] Placita Ang.-Norm. 66. [2] Ib. 119. [3] Ib. 121.

dissaisivit, quas illi canonici calumniant, *sint* de eorum tenuera ; et si recognitum fuerit, fac inde eos saisiri."[1]

Not a few of the records of Domesday are of a similar nature to the writs quoted. Thus, in the case of a claim of Ralph Pagenel against the church of St. Peter of York to six oxgangs of land in M., "homines qui juraverunt dicunt *esse* Sancti Petri."[2] Another case is still more definite. "Socam quam clamat G. T. in Birland, dicunt esse *debere* episcopi Dunelmensis in Houedon."[3] In another disputed claim, the men of the hundred "nesciunt quis eorum habere *debeat*."[4] Again, "sex bovatas terræ in Rudetorp quas clamat archiepiscopus testantur [homines de hundredo] Gisleberti Tison esse *debere*."[5] In another case the men swore that certain land in dispute "regis esse *debere*."[6] In another case "homines de treding dicunt quod non *debet* habere (R. de B.) nisi socam in C."[7] In another "affirmant homines de treding quod archiepiscopus *jure debet* habere hanc socam."[8] In another "wapentac portat Widoni testimonium quod *jure ejus sunt* tres carucatæ terræ."[9] But whether these findings may not have gone beyond the question actually submitted, as might be the result in any clear case, it is impossible to say. The questions have not been preserved.[10]

The language of the writs last quoted, in its natural and probably true import, requires or permits a determination of the present right to the subject of dispute, and not merely the seisin. No distinct, simple question of fact is put ; and it could not surpass the terms of the writ to submit the question of property. Writs having this kind of language were a clear precedent for the Magna Assisa, the reform of Henry the Second by which the tenant in a writ of right or in a præcipe quod reddat was enabled to escape the duel, and put himself upon a recognition as to "the greater right" to the property ;

[1] Placita Ang.-Norm. 160. [2] Ib. 47. [3] Ib. 48. [4] Ib. 50.
[5] Ibid. [6] Ib. 51. [7] Ib. 55. [8] Ib. 58. [9] Ib. 60.
[10] As to questions of right of property under this and the earlier Germanic procedure of the Continent, see Brunner, Schwurg. 47, 122, 176.

only that these writs went further than the Magna Assisa in that they were given to the plaintiff, while that was ordinarily available only to the defendant. It was probably considered impracticable in those times to make a settled policy of an occasional proceeding, such as that evidenced by the foregoing writs. The duel was now too firmly rooted to be struck away at a blow.

Except as touching a sentiment of national feeling in an Englishman, it is of no special importance whether the recognitions of Glanvill were in use a short time in Normandy before they were introduced in their settled form in England or not. They were at all events, it is conceived, a development from common Norman and English materials. But if we would arrive at a correct conception of the amount of legal progress made in the twelfth century, a question arises, relating to the adoption of the recognitions in England, of great importance; to wit, the significance of the step as to the *right* to have process from the King's Court.

The only point of importance made in the argument for the priority of Normandy in respect of the recognitions (not of course to *prove* that priority[1]) is that they were invented, or rather fashioned, by Henry the Second before he had ascended the throne of England, for the purpose of giving his people in Normandy the use as matter of right of what had theretofore been mere matter of grace.[2]

That this view of the object of the settlement of the form of the recognitions cannot be sustained, or that, at all events, it failed of accomplishment, is, in our opinion, clear, for the

[1] The priority of Normandy as to the *principle* of the recognitions is questioned by no one: whether the particular fixed recognitions of Glanvill were first put into form and use in Normandy is another question. But the question is of little importance. Whether first put into final shape in Normandy or in England, it is apprehended that we have shown that they were the result of a gradual development, and not the *creation* of specific reform. The point now to be made, however, is that these recognitions were not put into set form for the purpose of making justice (so far) free and equal; that they were no more to be had as matter of right now than before.

[2] Brunner, Schwurg. 303, 304.

following reason. The fees paid for having recognitions were of widely varying amounts. There appears to have been nothing like uniformity in regard to them; and the sums paid, as reported in the Pipe Rolls, are generally, if not always, high. They seldom fall below ten shillings (a very large sum, surely, in those times), and sometimes are as high as sixty pounds, certainly an enormous price for having that form of justice which was to be had as matter of right. The more common fees in Normandy ranged from twenty to forty shillings.[1]

Now this variation applied to the familiar recognitions of Glanvill. No distinction is made in favour of the process supposed to have been fashioned in the interest of the people and to be had as matter of right. There is another fact that, in this connection, is not without some significance. The writers of the thirteenth century state that the recognitions were introduced in the interest of the poor and feeble, especially for widows and orphans, against the rich and powerful.[2] But, aside from the fact that even the lower fees of the Exchequer Rolls were very high, there are instances where the heaviest fees are paid by the very class to be specially protected. Thus there are several entries in the Norman Rolls for the year 1180, where widows paid high sums "pro habenda recognitione de dote."[3] In one case the sum of two marks of silver[4] was paid; while in another case the great price of sixty pounds was exacted.[5]

The same irregularity in the price of writs prevailed in England until well on in the thirteenth century, at least. The following are examples of sums paid for having inquisitions

[1] See the examples given by Brunner, Schwurg. 307. These were the fees accounted for at the Exchequer by the sheriffs. It may be that smaller fees were paid directly to the king and not accounted for in the *fiscus*; but that would not affect the view taken in the text.

[2] See also Glanvill, lib. 2, c. 7, as to the Magna Assisa.

[3] In England the process in cases of dower was the writ of right.—Glanvill, lib. 6, cc. 4, 5; *ante*, p. 5

[4] 26s. 8d. [5] Brunner, Schwurg. 308.

or recognitions: Walter, filius A., pays five marks "pro recognitione comitatus habenda de terra de R."[1] William, filius S., owes ten marks "pro recognitione quam habuit de terra de T."[2] William, filius U., owes one hundred shillings "pro habenda recognitione de maritagio matris suæ."[3] Mauricius de W. owes three marks "pro habenda recognitione de i. carucata terræ in H."[4] William de H. pays five marks "ut inquiratur per legales mulieres si Emma de S., quæ dicitur peperisse, haberet puerum annon."[5] Henry de M. owes forty shillings "pro habenda recognitione de morte W. fratris, de ii. jugis terræ."[6] Hugh, filius R., owes one mark "pro recognitione i. masagii in civitate L."[7] William de L. pays fifteen marks "pro habenda recognitione de terra de B."[8] Robert de H. pays thirty-two pounds four shillings and eight pence "ut habeat assisam de morte W. fratris sui de feodo ii. militum et dimidii in S."[9] Humphrey B. pays forty shillings "pro recognitione de feodo dimidii militis."[10] Henry de K. and his wife pay forty shillings "pro habenda Magna Assisa de i. hida terræ in C."[11] Henry, filius A., owes ten "fugatores pro recognitione feodi i. militis."[12] William W. pays four pounds six shillings "pro habenda recognitione de visineto si appellatus fuit per A. neene."[13] William O. owes one hundred shillings "ut inquiratur si fuit cum comite Johanne contra regem."[14] Robert de E. pays one hundred shillings "ut inquiratur utrum R. C. et W. et H. appellent eum de roberia et latrocinio per invidiam vel atiam, annon."[15] Henry de B. owes ten marks "pro habendo brevi de morte antecessoris."[16] Walter and John T., his son, owe ten marks "pro habenda inquisitione per sacramentum legalium hominum burgi de N. si domus plumbata in N. fuerit jus Julianæ matris ipsius Johannis, quæ mortua est, et cum ea data in maritagio prædicto Waltero."[17] William de S. owes ten "bisantia pro habenda recognitione de

[1] Placita Ang.-Norm. 271. [2] Ib. 273. [3] Ib. 274. [4] Ib. 276. [5] Ibid. [6] Ibid. [7] Madox, Hist. Exch. c. 12, § 2; fol. ed. p. 297. [8] Ibid. [9] Ibid. [10] Ib. 298. [11] Ibid. [12] Ibid. [13] Ibid. [14] Ibid. [15] Ibid. This suggests the later writ de odio et atia. [16] Ibid. [17] Ib. 299.

dimidia virgata terræ in W."[1] Alice de B. and others owe ten marks "pro habenda Magna Assisa . . . . de c. acris terræ de gavelkinde in B."[2] Galfridus M. owes thirty marks "pro habenda recognitione de terra de C."[3] John de M. A. owes ten marks "pro habenda inquisitione si ecclesia de L. sit amota a feodo ipsius . . . . injuste et sine judicio,"[4]—the writ of novel disseisin. Earl Patricius pays forty marks and four palfreys "pro habenda recognitione . . . . si E. avunculus . . . . patris comitis Patricii fuit saisitus in dominico suo sicut de feodo de villa de B."[5] The abbot of St. Edmund owes fifty marks "pro habenda inquisitione . . . . utrum mercatum quod monachi de E. de novo habent . . . . sit ad ocumentum . . . . Sancti Edmundi necne."[6]

These are some of the cases between the seventeenth year of Henry the Second (1170) and the fourth year of John (1203). Many other cases of the purchase of writs at the like irregular rates could be added as enforcing the meaning of the clause of Magna Charta concerning the sale and denial of justice. It is worth notice that if it be true, as is generally believed, that the knight's fee had a fixed valuation at this time—it had not a fixed acreage—there is convincing evidence in the examples above given that the sum to be paid for a real property writ was not dependent upon the value of the land in litigation. Thus, Robert de H. pays thirty-two pounds four shillings and eight pence for an assise of mort d'ancestor concerning two-and-a-half knights' fees, while Humphrey B. pays but forty shillings for a recognition concerning half a knight's fee. Henry de K. pays the same amount for having the Grand Assise concerning a hide (one hundred acres) of land.

If, however, it be said that the price of the writ varied with the *means* of the party together with the amount involved[7] in the particular litigation, the answer is, that the new regulation then amounted to nothing; for this was always true, before as

[1] Madox, Hist. Exch. *supra*. [2] Ibid. [3] Ibid. [4] Ib. 300.
[5] Ibid. [6] Ib. 301. [7] See Brunner, Schwurg. 308.

well as after the reign of Henry the Second. All that was ever necessary to obtain an inquisition or a recognition was to pay enough to satisfy the king's demands. There was little restraint upon his will in such matters, so far as history indicates. Besides, no great progress in the reform of the law in this respect was made until the matter of having justice ceased to be the subject of a price, even though the price were proportioned to the sum involved and the means and merits[1] of the plaintiff. The idea that litigants were to be taxed as such, and that too without uniformity, for purposes of general revenue, and not merely to the extent of the cost of the clerical and ministerial work[2] required in the course of an action, was never abandoned or relaxed in the twelfth century, even if the justice of it was questioned.

It was not Henry the Second, in the middle of the twelfth century, much less the youth Henry, Duke of Normandy, but Stephen Langton, more than sixty years afterwards, at the head of the clergy, baronage, and people of England, who struck the effectual blow at the vicious practice (prerogative[3]) of selling justice. "Nulli *vendemus*, nulli negabimus aut differemus rectum aut justiciam"—the most familiar passage of Magna Charta — has an unmistakable meaning.[4] The practice, introduced by the Conqueror, of setting a price upon the dispensation of justice in the new forms continued without intermission until a power had arisen strong enough to assert its right to stamp it out. No successor of the Conqueror ever willingly relinquished it.

It is highly probable, indeed it is almost certain, as we

[1] Comp. Dialogue of the Exch. lib. 2, c. 23; Stubbs, Sel. Ch. 243 (2d ed.).

[2] It is more than doubtful if other costs of the judiciary should be put upon litigants. The judiciary is part of the general government administering both the civil and the criminal law in the interest of the State, as well as of litigants.

[3] King John was right in a strictly legal point of view. He was only defending a prerogative as old as the Conquest. But the day of such things was now well-nigh past.

[4] Madox has also enforced this view in the last section of the twelfth chapter of his History of the Exchequer (p. 314, fol. ed.), as a result of the teaching of the facts presented in that chapter.

have already seen, that some special regulation of the form of the writs used for recognitions was made in the reign of Henry the Second. We have already ventured the suggestion that an admiration for the Roman system of actions may have influenced the movement. The *result*, even if accidental, certainly was to fix the Roman system of possessory and petitory actions definitely in English procedure. The regulation would also operate in the interest of the clerks of the courts, as a saving of time and labour. It may also be believed, perhaps, that the advisers of the king hoped to secure a more just and equal administration of justice for litigants; and possibly the king may have given his sanction to this purpose. But the time was not ripe for the consummation of such an end. The king's pecuniary needs were too urgent to permit an abandonment of a bad policy for a sentiment; and there was no party as yet strong enough to compel him.

The history of several classes of writs has now been examined, down to the close of the reign of Henry the Second; the result of which can scarcely be considered matter of doubt. The English writs in question, save, perhaps, the Magna Assisa writ, were not, according to the results of this investigation, created by Glanvill or by any other person, but passed through a natural development from shapelessness and lack of formal language to something like definiteness of framework, prior to the appointment of Glanvill as chief justiciar. Probably before his time, and under the administration of his predecessor, Richard de Luci, the materials at hand were from time to time subjected to general revision, and put into the final form in which they appear in Glanvill's book.

It must be conceded that few clear prototypes of the other familiar recognitions of Glanvill (mort d'ancestor, de ultima presentatione, and utrum aliquis sit infra etatem) can be found among known English materials; though we have

already remarked that it would not be difficult to find sufficient evidence in litigation of the principle involved in them. We are not justified in supposing that the progress indicated in the adoption of them was anything more than had been the case in respect of the writ of novel disseisin; a regulation of process. In no significant sense were these new writs obtainable as matter of right; and it is extremely improbable that they were made *uno ictu*. Violations of the rights for the redress of which they were used had not arisen upon a sudden.

Besides the formal writs, there are, it will be remembered,[1] others, belonging to the third class, which never became de cursu. Some of these were of a kind which in modern times would be called equitable. The most numerous were what may be termed writs of protection. These writs are interesting as being the forerunners of modern writs of injunction, and perhaps of the protective process generally of the early Chancery.

Among the examples, the Conqueror issues a writ (already quoted) in favour of the church of Ely, addressed to Lanfranc, bishop Geoffrey, and Robert, earl of Mortain, in these words: "Defendite ne Remigius episcopus novas consuetudines requirat infra insulam de Heli. Nolo enim ut ibi habeat nisi illud quod antecessor ejus habebat tempore regis Edwardi,"[2] etc.

The following, quoted once before, is by the same king, being addressed to the abbot of Peterborough: "Mando tibi et præcipio ut permittas abbatem Sancti Edmundi sufficienter accipere de petra ad ecclesiam suam sicut hactenus habuit, et non amplius sibi impedimentum facias in adducendis petris ad aquam, quam antea fecisti."[3]

Rufus issues the following to Walter, filius Oteri: "Mando tibi et præcipio ut abbati Abbendonæ permittas habere suam

[1] *Ante*, p. 152.
[2] Id. p. 166; Placita Ang.-Norm. 27. A similar writ follows on p. 28.
[3] Ib. 32; *ante*, p. 166.

terram et suam silvam omnino liberam, præter silvestram silvam, et pascuam suorum hominum habeat in prædicta silva; et vide ne amplius de hac silva vel terra injuriam abbati facias."[1]

Henry the First to W. de Montefichet: "Permitte esse in pace terram de Langleia, quam regina Mathilda, uxor mea, dedit in eleemosynam Sanctæ Mariæ de A., sicut melius umquam fuit in pace tempore antecessoris tui,"[2] etc.

The same king to Ared, his falconer, and to all his foresters: "Volo et præcipio ut omnia ligna et virgus, quæ fuerint data, vel vendita hominibus abbatis F. de A. ad opus suorum operum, sine omni impedimento et disturbatione possint ea conducere in pace quocunque voluerint."[3]

King Stephen to his sheriffs and bailiffs and the townsmen of Canterbury: "Prohibeo ne aliquis prohibeat quin homines civitatis C. et provinciæ eant et veniant ad molendinum quod concessi et dedi Deo et ecclesiæ Sancti Augustini infra civitatem C., cum blado suo ad molandum,"[4] etc.

Early in the reign of Henry the Second, Nigel, bishop of Ely, "et baro de Scaccario" (as he describes himself in the writ), issues the following to the sheriff of Gloucester: "Præcipimus tibi ut facias monachos de Bordesleia tenere suam terram de Cumbe bene et in pace, sicut saisiti sunt per breve regis,"[5] etc. This writ is of interest as suggesting the exercise thus early by the Court of Exchequer (of which Nigel was the chief financial member) of *quasi* equity powers. There is difficulty, otherwise, in explaining the authority of the bishop of Ely to issue a mandate to a sheriff in one of the western counties. Nigel was neither chancellor nor chief justiciar; and he acts expressly as a member of the Exchequer. We shall presently see another clear instance in that court, somewhat later in date.

The last writ to be noticed is the following, directed by Henry the Second to Jordan de S.: "Præcipio quod juste manuteneas abbatem et monachos G. de elemosina mea et

[1] Placita Ang.-Norm. 64. [2] Ib. 91. [3] Ib. 96.
[4] Ib. 159. See also 166. [5] Ib. 188, *anno* 1156.

antecessorum meorum de C. quam H. rex, avus meus, eis confirm[ab]at carta sua, nec permittas quod aliquis eis injuriam faciat, vel contumeliam,"[1] etc.

This class of writs never became de cursu; and that accounts, in part at least, for the fact that the Court of Chancery subsequently acquired exclusive jurisdiction over such remedies. Had the writs of protection become de cursu, the Provisions of Oxford (to be further considered hereafter) would not have cut down the jurisdiction of the royal courts in this particular.

Equity jurisdiction in the modern sense being considered as resting upon the idea that parties owe no obedience to the specific orders of a common law court—that is, that the common law courts lack the power of coercing obedience by orders *in personam*[2]—there is evidence, apart from that exhibited in the foregoing writs, and more directly to the purpose, of the exercise of equity powers by the superior courts of the Norman period.

In the case of the Prior and Convent of Abingdon v. Thomas de Esseburn,[3] the Court of *Exchequer*, by Glanvill, having given judgment in favour of the plaintiffs, "præcepit etiam prædicto Thomæ, qui præsens erat, ut quoniam rationes nostræ,[4] sicut per nos coram eo [Glanvill] sufficienter probatum erat, separatæ sunt a rationibus abbatis, de his tantum quæ ad cameram abbatis spectant,[5] curam haberet. Ad ea vero quæ ad nos spectant manum non apponeret, sed plenum jus et potestatem, tam in tenementis nostris quam in tenentibus, nos habere permitteret. Dicebat enim *tota curia* quod periculo nostro fieret, si quid a custodibus regis temptaretur, quod abbatibus licere non debet."

[1] Placita Ang.-Norm. 250.
[2] Langdell, Summary of Equity Pleading.
[3] Placita Ang.-Norm. 234.
[4] The writer was a monk of Abingdon.
[5] The abbot had deceased, and his interest in the monastery had been taken into the king's hand by Thomas; who, however, had been seeking to get possession also of the entire property of the monastery. The suit in its essence was a proceeding for an injunction.

This was in the year 1185. Two years later the case of the Monks of Canterbury v. Archbishop Baldwin[1] came before Glanvill at Westminster, whether in the Exchequer or in the King's Court does not appear. In this case the monks of Canterbury had obtained a mandate from the pope, directing three abbots to restrain the archbishop from acts of alleged oppression. But while the three abbots "were in deliberation on the form of executing the pope's mandate," the archbishop obtained from Glanvill the following writ, addressed to one of them, apparently the leader in the interests of the monks: "Præcipio tibi ex parte domini regis[2] per fidem quam ei debes et per sacramentum quod ei fecisti, ut nullo modo procedas in causa quæ vertitur inter monachos C. et dominum C. archiepiscopum donec inde mecum locutus fueris."

This writ may contain a suggestion of the familiar writ of prohibition which the King's Court has always had jurisdiction to use over courts usurping its authority. In reality, however, it is another thing: it is not addressed to any court, but to an individual, appointed and seeking a mode to execute process on behalf of a court, the court of Rome.

But another writ follows in the same case, of which the suggestion mentioned cannot be made. This is also issued by Glanvill, and is addressed to the subprior and convent of the monastery; that is, to the parties complaining of the acts of the archbishop. It is as follows: "Præcipio vobis ex parte domini regis ne aliquo modo utamini contra dominum C. archiepiscopum aliqua perquisitione quam contra eum quæsistis, donec inde mecum locuti fueritis. Et tu supprior absque occasione et dilatione sis Londoniis in festo Sancti Jacobi cum consilio conventus tui, auditurus et facturus quod tibi dicetur ex parte domini regis, et ibi tunc tecum habeas

[1] Placita Ang.-Norm. 240.

[2] This was not done at any actual instance of the king, for he was then in Normandy.

perquisitiones quæ perquisitæ sunt contra dominum C. archiepiscopum." [1]

There can be no doubt of the meaning of such a writ; and as to the second part of it, addressed immediately to the sub-prior, it did not need the "sub-pœna" clause of the later chancery writ to make obedience compulsory. Refusal to obey the writ would be contumacy, the last offence, almost, known to the old law. Indeed, the contrast between the ancient practice of the courts, back to the earliest times, and the modern is nowhere so sharply drawn as in this matter of requiring specific obedience to the authority of the courts. Whoever refused to obey final summons even was in contumacy, and liable to the fate of the "wolf's head." [2] Obedience in all courts was the consummate requirement of the law.

We have now proceeded far enough with the investigation proposed at the commencement of this chapter to justify the statement of some conclusions; the first one of which has already been anticipated more than once.

1. Originally the writ had signified nothing in respect of the form of action in a particular case, or rather, it had no necessary connection with the formalism of the actual plaint or count (to use a later term), further than that it ordinarily specified the nature of the demand. The office of the writ was simply to set on foot a suit under supreme authority; and this continued to be the case until perhaps the thirteenth century. Few of the writs of Glanvill had become so fully formulated as to show the technical language of the count: that was for the most part a matter of later times, involving another advance in the framework of the writ process. We may also venture to affirm again, in this connection, as a reasonable inference from what has been seen of the devious course of the writs, that the formalism of an action was shown

[1] In this connection the writs to defendants, quoted *ante*, p. 152, may be referred to for comparison.

[2] See the last chapter of this book, at the end.

only by the count, and not (before the thirteenth century) by the writ. The writ advanced at last to the count, but only by slow and halting steps. The English forms of action are older than the oldest formal writs. Behind the obscuring veil of the writ process, the ancient formalism of the Folkmot, modified somewhat by time, somewhat by the new procedure, but still in its essential integrity, went on until at last the old plaint had faded into the later count.

2. Throughout the Norman period the king's prerogative to issue writs at will was unquestioned. There is no evidence that the adoption of the writs of Glanvill laid any restriction upon the king in this particular.[1] He continued to issue writs whenever it suited his pleasure or answered his pecuniary needs. The king sanctioned the use of the writs of Glanvill; and probably his justiciar generally felt bound to follow them. The court clerks certainly were bound to do so. Suitors must have had to go to the king (or possibly to the Council) for writs adapted to special and peculiar cases. This must have been the case from the time when writs assumed the state of settled forms of action. But the fact that special application must be made to the king, or, in his absence, to the justiciar, for special writs must have made such applications exceptional; and actions "on the case," to borrow a modern term, could not at this time have played a very general part in the administration of justice.

No limitation, however, had yet been placed upon the royal prerogative; and the kings of England continued to issue special writs, without any effectual restraint, until after the middle of the thirteenth century. In the year 1258 the Provisions of Oxford were promulgated; two separate clauses

[1] Compare Glanvill, lib. 1, c. 5, for instance, where it is said that the king, if he *wish*, may give a writ to a party seeking a trial in his court. So, too, the king's charter could be set up in bar of a recognition (Glanvill, lib. 13, c. 11), which before Magna Charta could always be obtained for a price. Indeed no inquiry could be made into the king's charters or acts even in the time of Bracton.—Placita Ang.-Norm. 28, 29; Bracton, 34.

of which bound the chancellor to issue no more writs except writs "of course" without command of the king and of his Council present with him.[1] This, with the growing independence of the judiciary on the one hand, and the settlement of legal process on the other, terminated the right to issue special writs, and at last fixed the common writs in unchangeable form; most of which had by this time become developed into the final form in which for six centuries they were treated as precedents of declaration.

The result was that within thirty years it became necessary to pass a statute to put the procedure of the courts upon its ancient footing. The Statute of Westminster II. c. 24, *anno* 1285, authorising actions on the case, was only an attempt to return to what had existed throughout English history until writs of course, supplemented by the restrictions contained in the Provisions of Oxford, had tied the hands of the courts. In so far as the attempt was a failure, the result was the

[1] "Ceo jura le chanceler Engletere. Ke il ne enselera nul bref fors bref de curs sang le commandement le rei et de sun conseil ke serra present."—Ann. Monast. 448. "E ke il [le chanceler] ne enseler hors de curs par la sule volunte del rei; mes le face par le cunseil ke serra entur le rei."—Ib. 451.

That these clauses were aimed, in part at least, if not mainly, at judicial process, seems clear both from the Provisions themselves, especially in connection with the Provisions of Westminster (made in pursuance of the former), and the circumstances which called them forth. The Oxford articles are largely occupied with regulations for the administration of justice in the courts; while those of Westminster are given up to minute and extensive ameliorations of procedure. To understand the restriction upon sealing writs out of course to refer to judicial process is in keeping with the tenor of the Provisions. The strongest evidence as to the purpose of the clauses in question, however, lies in the circumstances under which the Provisions of Oxford were promulgated. The Provisions point in terms to Magna Charta, which had failed of its object. Justice was still sold and denied by the king at his pleasure.[1] The courts must now not only be put into the hands of men representing the baronage and commonalty, but the exclusive right of such to settle the disputes brought to litigation must at length be asserted and upheld. This could not be effectually done if the king retained and continued to exercise his ancient prerogative of issuing writs at will. Hence the clauses abridging his prerogative. Litigation was to be forced into the courts, where justice was not sold or denied for money.

[1] "Nulli vendemus, nulli negabimus . . . . rectum aut justiciam," had the present king (Henry the Third) as well as his father said.

natural consequence of the state of things following upon the use of the writ process, and finally established by the Provisions.

Such was the history of the development of the writ process in England until the end of the twelfth century;[1] and it may now be inquired what purpose had been served by its introduction and use. Prior to the Conquest, writs were almost unknown in England as judicial process. No use for them had been found, except for authorising the trial of a cause before some special delegate not possessed of the requisite jurisdiction. It served this purpose afterwards usefully, upon a more extensive scale; but it was now the embodiment of the principle that the king personally was the fountain of justice. It was, indeed, the symbol and expression of arbitrary power. It expressed the king's sole right over the dispensation of justice, a right which the king exercised on his own terms until Magna Charta was extorted from John. The sale and denial of justice for money were chief features in the use of the writ; and the very term by which at the present day process is said to be obtained—the purchasing of a writ—points to one of the main purposes to which, in England, it was directed from the beginning. The writ certainly was no part of what by some has been called "the consummate wisdom" of the common law.

This, however, is but a half truth; and to stop here would be to leave a false view of the uses of the writ. The most salutary result accomplished in the history of English jurisprudence was the establishment of the (nearly) universal jurisdiction of the King's Court, including both of its branches, the central court about the king's person (with the Exchequer and the Council) and the Eyre. The appearance of the King's Court, with its unwillingness to be cramped by the limited jurisdiction of the old Theningmannagemot and of the Confessor's Aula Regis, was, indeed, as we have seen in a previous chapter,[2] a disturbing element; but the disturbance

[1] And in one particular for nearly a century later. [2] *Ante*, p. 75.

affected in the main only the local franchises, whose exclusive privileges were fatal to the existence of national power. The nation, and in the end certainly the people through the counties, were vastly benefited by the breaking down of the exclusive jurisdiction of the manors. Legislation was indeed necessary, as we have seen,[1] to open the franchises to the sheriffs and justiciars itinerant; but how far the King's Court, by means of the writ process, was able to accomplish the result has been pointed out.[2] It was largely, indeed mainly, by this process that the wholesome jurisdiction of that court was built up and established. And this was the case not only as against the franchises, but also as against miscarriages of justice in the popular courts of the county and the hundred.[3]

[1] *Ante*, p. 101. [2] Id. pp. 77–79. [3] Id. pp. 79, 83, 84.

CHAPTER V.

DISTRAINT.

THE distinction which prevails in the English law between actions of contract and actions of tort is, from an historical point of view, as well as internally considered, clearly marked. In the earliest of the Germanic codes, the Salic law, breaches of contract were attended with a substantive right of distraint, while torts were not;[1] and this distinction, under modifications, has continued throughout the history of the English law. The fact of the existence of a right to distrain upon cattle damage-feasant has no bearing against the correctness of the distinction; which right, if not *akin* to the notion—it did not spring from it probably—that a thing, whether an animal, a slave, or an inanimate object, which had done damage to a man, might be appropriated by him in compensation, was at all events only a special exception, dictated as well by good sense as by human nature. The cattle were

[1] In Normandy distraint was exercised in cases *ex delicto* in the thirteenth century. —Summa, lib. 2, c. 8, in 7 Ludwig's Reliquiæ, pp. 159 *et seq.* Whether this was as a substantive proceeding or as auxiliary to summons does not clearly appear. But the subject there begins with the sentence: "Justiciatio est coactatio super aliquem facta *ut juri pareat* ex commisso." See also §§ 5, 9, pp. 160, 161. Glanvill also speaks of distraint in a case *ex delicto* (assault by a tenant upon his lord), but the distraint appears to have been auxiliary, upon failure of summons.—Lib. 9, c. 1, § 8. Criminal distraint is of course another thing. As to civil distraint generally, comp. the *pignoris capio*, Gaius, lib. 4, cc. 26–29, 32; Keller, Der Römische Civil Process, § 20.

upon the premises of the injured party, and already in his hand, by the act or fault of the owner; and they were most naturally detained until compensation was made for the damage they had done. Nothing was taken out of the hand of another. Exceptions of this sort, the promptings of human nature, are to be looked for in the case of every rule.

This substantive right of distraint, though it was enforced by leave of court, as will be seen, was an entirely different thing from auxiliary distraint following upon ineffectual summons to court. Substantive distraint was, like foreign attachment at the present day, a distinctive mode of suit, corresponding to, and running parallel with, the institution of suit by summons. Auxiliary distraint was a secondary matter, resorted to because of the failure of summons. Substantive distraint was designed to compel speedy payment of a debt, auxiliary distraint to compel the party for any cause to come into court. By the one mode of redress a creditor obtained immediate security for the payment of his demand; while the other was not granted until after the third or fourth disobedience of summons. But there was no determination upon the rightfulness of the demand in the taking of a distress, though all the forms of the law of distraint may have been properly observed, any more than there is in a modern attachment or distress. The legality of the claim could afterwards be tested by the party distrained replevying; the result of which would be to bring the matter before the court for trial.

There is no greater mistake, it is apprehended, than to suppose that private distraint as it has existed in modern times in England and in America—distraint made without judicial permission—is archaic, as having been transmitted in its present form from the period of supposed early Anglo-Saxon law. The time perhaps was, when non-judicial distress was exercised among the Germanic peoples; but that time was prehistoric, and is only matter of inference from the course of events in actual history, and not capable of proof. But

whether private distress once prevailed or not, it is certain that from the time when the Germanic nations first appear in legal history until the period of which we are writing, distraint between freemen of the same gau, hundred, or (later) municipality[1] was lawful only when effected under judicial authority. In the earliest of the German codes it is declared that if anyone should distrain his debtor without authority of a judge, he should lose his debt, though he had acted in ignorance merely.[2]

The later Germanic codes are not so clear, but there is no instance, so far as the writer is aware, in which it is said that distraint can be made without license of court. Whenever anything is said upon this point, there is always a prohibition of proceeding in that way; and some of the prohibiting edicts clearly relate to substantive distraint. As to the case of auxiliary distraint, there is no doubt of the requirement of judicial authority in all cases. It will be necessary to quote the Continental codes upon the subject of substantive distraint, since the English law, as given in the custumals, is meagre, and probably relates only to auxiliary distraint, with the exception of a single passage in the Laws of Henry the First.

In the Laws of the Ostrogothic kings, we find the following provisions: We deny license to anyone to take distress at his will: if there be cause for it, the authority for doing it belongs to the judge.[3] If a *creditor* take by force from his debtor property not *obligatas* to him (the creditor), he must restore the same within a year under a fourfold penalty: after a year he

[1] Comp. Customs of Newcastle-upon-Tyne, *temp.* Hen. I. "Burgenses possunt namiare foris habitantes infra suum forum et extra, et infra suam domum et extra, et infra suum burgum et extra, sine licentia præpositi, nisi comitia teneantur in burgo, et nisi in exercitu sint vel custodia castelli. Super *burgensem* non potest burgensis namium capere sine licentia præpositi."—Stubbs, Sel. Ch. 111 (2d ed.).

[2] "Si quis debitorem suum per ignorantiam *sine judice* pignorare præsumpserit antequam eum nesti canthechigio [putting him under the ban], et debitorem perdat, et insuper similiter si male pignoraverit," etc.—Lex Sal. c. 74; Hessels and Kern, 408.

[3] Edicta Regum Ostrogothorum, c. 123; 1 Canc. Leges Barb. 12.

shall pay *in simplum*.[1] According to the Laws of the Lombards, if anyone having a debtor call ("appellet") him once, twice, and thrice, and he does not pay the debt, or arrange the matter ("composuerit"), then may he distrain him in his property such as it is lawful to distrain.[2] If anyone has presumed to distrain another for any debt or *caussa* before he has demanded ("pulsaverit") him the third time, "pignus, quod ante contestationem tulerit, sibi nonum (vel *novum*) reddat in potestate domini sui."[3] If anyone take away another's mares or swine in the name of distress for debt ("pignoris nomine") without the king's order, he must die or pay nine hundred shillings, half to the king, half to him from whom he took the *pignus*.[4] If anyone has distrained tamed horses or oxen or cattle of the yoke without the king's order, he must pay ninefold.[5] The next chapter but one is of interest, in stating the procedure in a particular case. If any freeman, who is a debtor, has no property except horses or oxen tamed, or cows "junctorias," then the creditor should go "ad sculdasium,"[6] who is appointed in the place, and state that he has nothing else than the things just mentioned. Then the "sculdasius" takes the oxen or horses and puts them into possession of the creditor (to remain) so long as he (or the debtor?) acts justly. If the "sculdasius" delay to do this, he must be amerced in the king's palace in twelve shillings; and after justice has been done, let the *pignus* be restored.[7] If anyone has distrained ("pignoraverit") another before the time appointed for payment, and the fact is proved, let him compound the distress ("pignus") eightfold.[8] We are willing to grant to all free persons that no public judge or public servant shall

[1] Edicta Regum Ostrogothorum, c. 124; 1 Canc. 12.

[2] Leges Langobardicæ, c. 249; 1 Canc. 84.

[3] Ib. c. 250; 1 Canc. 84. There is some variance in the MSS. as to the clause quoted, but nothing to affect it as to the point under consideration.

[4] Ib. c. 253; 1 Canc. 84. [5] Ib. c. 254; 1 Canc. 85.

[6] The "sculdasius" appears to have been an inferior magistrate; "pedaneus judex."—Du Cange.

[7] Ib. 256; 1 Canc. 85. [8] Liutpr. lib. 5, c. 12; 1 Canc. 111.

distrain them contrary to law, to wit, in cattle. Nor are they to be forced ("cogantur," i.e. it seems, distrained in property) to come to pleas except thrice a year, etc.[1]

In the Laws of the Bavarians it is decreed that no one may distrain ("pignorare") without leave of the judge; and then follows a decree that contumacious persons who refused to come to court and do right might be distrained ("distringatur": the change of words should be noticed. "Pignorare" is dropped when the distraint is not for debt.).[2] If anyone has distrained ("pignoraverit") another contrary to law, without the duke's leave, he must return the *pignus* without injury.[3]

That distraint of property was a legal mode of coercion in England prior to and during the Norman period is directly shown by the custumals; but whether substantive distraint was in use the custumals prior to the twelfth century afford no certain evidence. The only pertinent mention of civil distraint of property prior to the Conquest is in the Laws of Cnut; and the provision there pretty clearly relates to auxiliary process. "Let no man take any distress, either in the Shire or out of the Shire [gemot], before he has thrice demanded his right in the Hundred [mot]. If at the third time he have no justice, then let him go at the fourth time to the Shiregemot; and let the Shire appoint him a fourth time. If that then fail, let him take leave, either from hence or thence [that is, anywhere] that he may seize his own."[4] This provision reappears in the same language in the so-called Laws of William the Conqueror.[5]

[1] Lothar. c. 74; 1 Canc. 205.

[2] Lex Bajuvariorum, tit. 12, c. 1; 2 Canc. 380. As to the word "distringere," see 2 Canc. 73, 74, 160, 184, 195, 261; 3 Canc. 275, 334; 4 Canc. 101, 476.

[3] Ib. c. 3. See also cc. 4, 5; 2 Canc. 381. See further 3 Canc. 69; 4 Canc. 19, 124; 5 Canc. 361. "Pignus est quod datur propter rem creditam, quæ dum redditur, statim pignus aufertur."—Ib. 375. We refer the student to Sohm's Procedure of the Lex Salica generally, especially to the opening sections, e.g. § 3.

[4] Laws of Cnut, Secular, c. 19. Comp. Laws of Ine, c. 9. "If anyone take revenge before he demand justice, let him give up what he has taken," etc. And see St. Marlborough, *anno* 1267, 1 St. of the Realm, p. 19. "Et nullus de cetero aut districtiones faciat per voluntatem suam absque consideratione curiæ domini ultiones regis," etc.

[5] Laws of Wm. I. i. c. 44.

This is all that is to be found in the custumals prior to the Leges Henrici Primi; and there is nothing sufficiently specific there to found a broad conclusion upon. The first passage in point to be quoted is to the following effect: It is not lawful for anyone, without judgment or license, to distrain ("namiare") another in his own (the distrainer's) or another's (fee ?).[1] But this passage, given here in full, is contained in a chapter on summons to the Hundred ("De Summonicione Hundreti"), and follows directly after a provision that every man should be summoned to the County Court seven days before the session. The other passage is to the following effect: From him who, when summoned to the Hundred [mot], refuses to come without any true, necessary cause, let there be taken of his own (property) thirty shillings value, the first and the second time, and let there be distraint in the Hundred [mot]; and let him be sent away to the day of trial or of payment on the giving of security, and being in seisin (again) plead, and let it (the fine for the last default, it seems) be for his full wite ("pro capitali suo"), and let this distress not be taken beyond the hundred.[2] These provisions are in cognate chapters, and it is fair inference that the first as well as the second relates to auxiliary, and not to substantive, distraint.

The only passage which gives any hint of distraint for debt (substantive distraint) is the following: "Let no one presume to take away from justice or *from his lord* a distress, whether it has been seized justly or unjustly, but let him seek it again justly by offering security and a term for making satisfaction."[3]

It is certainly not a little strange to find no more definite mention than this of substantive, civil distraint in either the pre-Norman or Norman codes of England. The evidence of

[1] Laws Hen. I. c. 51, § 3. "Et nulli, sine judicio vel licencia, namiare liceat alium in suo vel alterius."

[2] Ib. c. 29, § 2.

[3] Ib. c. 51, § 5. See further the passages following concerning the forcible recovery of a distress.

the custumals does not justify an assertion of the use of such a procedure before the time of Henry the First. That it did exist at and from this time is clear; the chroniclers now coming to our aid upon the subject. And it is hard to believe that it was an importation from the Continent after the Conquest. The absence of any mention of it in the Anglo-Saxon codes is more remarkable than the absence of any allusion to the duel, because of the stronger probability of its existence. But if, as is most probable, substantive distraint for debt was in use in England before the Conquest, there is strong reason in what has gone before for supposing that it could be exercised only upon authority of court.

In the earliest case of distraint for debt mentioned in the accounts of litigation in England under Henry the First, it is not clear whether the distraining party had obtained leave of court or not. The record merely states that abbot Faritius of Abingdon (who died *anno* 1117) ordered all the movables to be found upon the land of one of his tenants, in arrears of rent, to be distrained.[1] In other cases of the same reign the necessity of obtaining judicial authority to distrain is indicated. The same abbot in the year 1106 obtains a writ from the king commanding a tenant to perform the customary land service due the plaintiff; otherwise the abbot *should have liberty* to constrain him by his fee.[2] Within half-a-dozen years abbot Faritius obtains another writ from the king, commanding a recusant tenant to pay his dues on penalty of distraint by the king's officer.[3] The same king grants his writ in favour of the bishop of Lincoln, commanding all who hold lands of him within a certain wapentake to come into

[1] Ermenold v. Abbot Faritius, Placita Ang.-Norm. 131. We *conjecture* that this was a case of distraint at the sole will of the abbot, against a weak tenant, and that it furnishes a suggestion as to the origin of the practice in England of private, non-judicial coercion between landlord and tenant.

[2] "Quod [servitium] nisi feceritis, ipse abbas inde te *constringat* per feudum tuum."—Faritius v. Gotselin, Placita Ang.-Norm. 92.

[3] Faritius v. Hugh, Ib. 109. A writ follows authorising the abbot himself to do justice upon Hugh.—Ib. 110.

the bishop's court and there do right in respect of their lands on pain of distraint of goods.[1]

At the time of Glanvill's treatise, whatever may have been the case in earlier times, judicial distress was common process by lords against their homagers. But no evidence is yet furnished of extra-judicial distraint. After stating that the law permits a lord by judgment (i.e. by leave) of his court to distrain his homager to appear in court to answer charges, Glanvill says that the lord may also by law distrain his men to answer for default of services, without a writ of the king or of his justiciar.[2] In another chapter, which probably explains this last statement, he says that lords may of right, without writ of the king or justiciar, *but by the judgment of their own courts*, distrain their tenants to compel payment of reasonable aids.[3]

That the (presumed) pure archaic form of distress did not exist in England in the time of Henry the Second, for debt *not* arising between lord and man, is pretty clear from the instructive Case of Ailward.[4] Here was primitive distraint (if distraint without license ever prevailed) in plainest form. But it proved a very unfortunate undertaking for the distrainer. Ailward was creditor of a recusant debtor, and at length determined to secure himself. For this purpose, he goes to the house of his debtor in the latter's absence, and tearing off the lock (for the house had been locked by the owner), he takes the same *in pignus*, and entering takes possession of an auger and some gloves, and departs.

The breaking of the house was certainly a high-handed proceeding; but it is evident that this was not done with any felonious intent, since the record states that the things carried off (at least the lock, and doubtless the auger and gloves) were taken as security—"in pignus"—for the debt. Nor does the housebreaking appear to have been considered in the accusa-

[1] Bishop Robert v. Men of W. Ib. 139.
[2] Lib. 9, c. 1, §§ 8, 9; Beames's transl. 221.
[3] Ib. c. 8.
[4] Placita Ang.-Norm. 260.

tion which followed. The charge was solely the larceny of things of small value by a thief caught in the act ("fur manifestus"); and the offence deemed so slight that the public accuser (*apparitor*) suggested the addition of other charges, so as to subject the offender to mutilation. This was done; the additional charges being also of the commission of thefts, with no mention (so far as the record shows) of the housebreaking. But the result of this attempt at "primitive distraint" was judgment that the offender must undergo the ordeal of water, and this was followed by conviction and mutilation.

The precise nature of the preliminaries to distraint required by the early English law is not certainly known. The Salic law required the creditor in the *fidem facere* to go with three witnesses ("rachimburgii") to the house of the debtor and there make demand of payment. The witnesses accompanied the creditor for a double purpose, first, to be able to testify that the proper formalities of law had been observed, and secondly, to fix a price or valuation upon the goods to be distrained.[1] The demand of payment was called the *testare*.

Upon the debtor's refusal to comply, the creditor summons him to the Hundred Court (Mallus or Mallum). Having come to court, the creditor proves by the oath of himself and his witnesses the legality of the steps taken, and the debtor's refusal to make payment. Then, supposing the debtor does not propose to contest his liability,[2] he addresses the president of the court, called the thunginus, thus: "I call upon you, Thunginus, to strictly oblige ('nexti canthicus') my adversary who has made a promise to me and owes me a debt"—not, it

[1] "Si quis ingenuus aut letus alteri fidem fecerit, tunc ille cui fides facta est, in xl. noctes aut quomodo placitum fecerit quando fidem fecit, ad domum illius cum testibus vel cum illis qui precium adpreciare debent venire debet, et si ei noluerit fidem factam solvere, . . . solidos xv. culpabilis indicetur super debitum quod fidem fecerat."—Lex Sal. c. 50, § 1; Hessels and Kern, 316–324.

[2] Sohm appears to think there could be no denial of the debt at the Mallus, further than to produce the royal rescript against the proceeding.—Gerichtsverfassung, 62, note. But this is by no means clear.

should be observed, to pay the debt, but to fix upon him the disability of *lis pendens* (in modern phrase); in other words, to restrain him from disposing of his property, and the thunginus answers: "I strictly oblige him in this respect, in accordance with the Salic law."[1] Then the creditor must give notice of the act of the thunginus, requiring all persons to refrain from buying or distraining upon his goods until payment of the present claim.[2] Whereupon he proceeds directly to the debtor's house, before sunset, taking witnesses with him, and makes another demand of payment. Upon refusal, he tarries till sunset; and this adds to the debt the sum of three shillings. The same ceremony precisely is twice repeated (supposing payment to have been refused each time) at intervals of a week's time; and the result is an addition of nine shillings to the debt.[3]

Payment being still refused, the creditor, after the third waiting till sunset, receives permission to distrain upon his debtor's goods, and proceeds to do so in accordance with the appraisement of the rachimburgs who attended him at the first *testare*. Some question has arisen (upon what directly follows in the Lex Salica) if the seizure now granted is not after all made by the reeve;[4] but the better opinion is that the passage following relates to execution at the second term, after the promise to abide judgment.

The language, though meagre, of the English custumals concerning auxiliary distraint, to which reference has already

[1] "Si adhuc noluerit conponere quod debet, ad Mallum eum mannire debet et sic nexti canthichius mallare debet: 'Rogo te thungine ut nexti canthichius gasacio [adversary] meo illo qui fidem fecit et debitum debet,' et nominare debet quale debitum debeat unde ei fidem fecerat. Tunc thunginus dicere debet: 'Nexti cantichio ego illum in hoc quod lex Salica habet.'"—Lex Sal. c. 50, § 2; Hessels and Kern, 316–324.

[2] "Tunc ipse cui fides facta est testare debet ut nulli alteri nec solvat nec pignus donet solucionis nisi ante ille impleat quod ei fidem fecit."—Ibid.

[3] See the passages immediately following those here quoted. On the words "solem collocare," see Hessels and Kern, 516, § 185.

[4] Comp. Laws of Bavarians, c. 7; 2 Canc. 380, where distraint is said to be by the judge. But that may mean only the permission of the judge to the party.

been made, makes it probable that the foregoing fairly represents the process of substantive distress in England. The same procedure probably prevailed as to loans. The Salic law, which must again be appealed to in the absence of better evidence, presents the *testare* part of the process in full, but omits the rest. The law declared that one who refused to pay for or return a thing loaned to him should be summoned to court. To this end, the plaintiff, as in the case above presented, went with witnesses to the house of the defendant, and, on demanding his dues, waited till sunset. Seven days afterwards he does the same thing, and at the end of another week repeats the formality, waiting each time till sunset with his witnesses;[1] the effect of which is to add nine shillings to the amount of the defendant's liability.[2]

The remainder of the process of satisfaction is not directly stated, but there are indications that it was the same as in the *fidem facere* above presented. The plaintiff summons the defendant into court, and upon his failure to contest the claim, calls upon the thunginus to restrain him from alienating his property, and obtains an order to proceed to private distraint.[3] If the loan consisted of goods still in the possession of the defendant and obtainable, it is probable that seizure was made of these: in other cases, of course, the defendant's own goods must have been taken.

The observance of all the formalities of the law was, in the early times as well as in the later history of the English law, a matter of the utmost importance to the creditor. He not only lost the goods seized in case he had made a false step, but he was also subjected to a fine in favour of the debtor,[4]

[1] Upon refusal the plaintiff each time says: "Quia res meas noluisti reddere quas tibi prestiteram in hoc eas tene nocte proxima quod lex Salica continet."—Lex Sal. c. 52. [2] Ibid. [3] Sohm, Procedure, § 6.

[4] "Se quis debitorem suum per ignorantiam sine judice pignorare præsumpserit antequam eum nesti canthechigio, et debitum perdat et insuper similiter si male pignoraverit cum lege conponat, hoc est capitale et xv. solidos culpabilis judicetur." Lex Sal. c. 74; Sohm, Procedure, § 6.

just as in later times the landlord, in the like event, became liable as a trespasser in respect of all acts subsequent to the misstep, sometimes a trespasser *ab initio*.

Another action in which private seizure as substantive process was a mode of bringing suit by the early English law, was the proceeding for the recovery of movables lost or stolen from the owner or lessee. And for the purpose of the plaintiff's case it was immaterial whether the goods or animals had been lost or stolen, though as a matter of fact, if the chattels when found by the owner or lessee were not surrendered, the accusation following was theft. The same was true when a person into whose lands lost animals had been traced by the plaintiff refused to allow search therein, or to make search himself, or to deliver the animals.

The first step of the plaintiff who had missed his property was to raise the cry ("hue and cry"),[1] and to call upon his neighbours to follow the trail with him—*vestigium minare* of the Salic law. The laws of Æthelstan declared that "every-one who hears the call should be ready to aid another in pursuing the track, and in riding with him as long as he knows the track; and after the track has failed, always let one man be found where there are many people, as well as from a tithing where there are less people, for the riding or going—unless there is need of more—wherever it is necessary, and where all choose."[2]

Edmund's laws declare that "it has been decreed concerning the pursuit and search for stolen cattle, that the pursuit be carried on to the vill, and that there be no assault or any prevention of the way or search. And if the track cannot be traced out of the land, let accusation be made wherever there is suspicion or doubt."[3] When the cattle had been traced into

[1] The "harou" of Normandy, sometimes thought to be a call to Rollo, but probably without foundation.

[2] Laws of Æthelst. (Judicia Civitatis Lundoniæ) v. c. 4.

[3] Laws of Edm. c. 3, § 6.

another jurisdiction ("stæth"), it was provided by the Ordinance respecting the Dunsetas, that the owner should commit the tracing to the men of the country, or show by some mark ("mid mearce") that the pursuit was right. "Let him then take to it who owns the land, and have the inquiry to himself, and nine days afterwards compensate for the cattle, or deposit an under-pledge on that day, which shall be worth half as much again as the cattle; and in nine days from that time let him redeem the pledge by lawful payment. If it be said that the track is wrongfully pursued, then must he who traces the cattle lead to the boundary ('stæth'), and there himself, one of six unchosen men who are true, make oath that he, according to folk-right, makes lawful claim on the land, as his cattle went thereupon."[1]

If the search led to a man's house, the plaintiff had the right, according to the laws of Burgundians, to require that the doors should all be opened, the outer and the inner, otherwise the occupant (unless he delivered the property) was to be deemed the thief.[2] The same was true under the Ribuarian code;[3] and there is no reason to suppose that the law was different in England. The Salic law placed a fine of sixty-two shillings and a half upon the occupant for closing his house to the plaintiff;[4] but this merely represented the highest fine that could be imposed upon the thief.[5]

But the plaintiff had no right to make forcible entry into a house to search for his property: it was enough for him that the law pronounced the occupant the thief, and subjected him to the liability attaching thereto. If the plaintiff forced an entrance, he was liable, by the Ribuarian law, to a penalty of fifteen shillings.[6]

Having discovered his property, the plaintiff was to put

[1] Dunsetas, c. 1.
[2] Laws of the Burg. c. 16, § 1.
[3] Laws of the Rib. c. 47, § 2.
[4] Lex Sal. c. 66, Hessels and Kern.
[5] Sohm, Procedure, § 10; and comp. Lex Sal. c. 2, § 17; c. 3, § 8; c. 4, § 5.
[6] Laws of the Rib. c. 47, § 3.

his hand upon it by way of claim, and summon to court the party in whose possession he had found it. The object was to bring the possessor and the chattel before the tribunal, in order there to test the truth of the plaintiff's accusation and claim.[1]

A third kind of substantive process of distraint, of the Norman period, was what was called in the Salic law the "ligare." This was criminal process, the term "ligare" itself indicating its characteristic feature, to wit, the binding of the defendant; which was lawful either when he was taken in the act or caught on the pursuit.

Like the procedure for the recovery of movables, the *ligare* was begun (when the party was not taken in the act) by raising the hue and cry; and it was incumbent upon all who heard it to join in the pursuit. He who heard the cry and failed to follow was to pay a fine to the king, unless he could purge himself of the presumed violation of law.[2] And on the other hand, he who, without pursuit and cry, apprehended a thief and delivered him to the person from whom he had stolen was entitled to receive from him the sum of ten shillings at the first court, or, if justice were not then granted him, forty shillings at the next court.[3] But if a man met a thief and permitted him to go without raising the cry, he was liable to the thief's wergeld, unless he could prove that he did not know the man to be a thief.[4]

The subject is well illustrated by the Case of Ailward,[5]

[1] Sohm, Procedure, § 10.

[2] "Qui, clamore audito, insequi supersederit, de sursisa erga regem emendet; nisi se juramento purgare potuerit."—Wm. I. i. c. 50.

[3] See Kelham's ed. of the laws of the Conqueror, c. 5. "Is qui prehenderit latronem absque secta et absque clamore, quem dimiserit ei cui damnum fecerit, et venerit postea, justitiam postulaturus, rationi conveniens est, ut det x. solidos de hengwite et finem faciat justitiæ ad primam curiam, et si confirmetur in curia, absque licentia justitiæ, sit forisfactura de xl. solidis."—Comp. ib. i. c. 4, in Thorpe and in Schmid.

[4] "Si quis latroni obvians, sine clamore eum transire permittit, in forisfactura sit ad valenciam latronis; nisi juramento probaverit quod eum latronem esse nescivit."—Wm. I. i. c. 49.

[5] Placita Ang.-Norm. 260.

already referred to for another purpose. Ailward breaks into his debtor's house, in the latter's absence, to obtain security for his debt, but being discovered flees, and is pursued and caught by the debtor, having in his hands property of the latter. Ailward having apparently resisted capture, the debtor, after wounding him on the head with a stone, draws a knife (*cultellus*) and thrusts it into the creditor's arm and then secures him and takes him to the house he had broken into, and there binds him as a thief manifest, "cum concepto furto." Charges of the commission of other offences having been added, so as to subject the party to mutilation, a pack containing skins, a cloak, some linen cloth, and a gown, was hung upon his neck, to which was added some sharp instrument, the whole probably representing what he was charged with stealing; and in this condition he was brought before the County Court at Bedford on the following day.[1]

The debtor probably incurred no liability for the wounds inflicted upon the alleged thief, since it was lawful even to slay a thief if he fled or resisted capture. "If anyone," said the law of Ine, "claim the wergeld of a slain man, he [the slayer] may prove that he killed him as a thief,"[2] and he swore (or might swear when such were the fact) that he killed him in flight.[3]

The Case of Ailward is of further interest as an illustration of the Germanic rule that when the accused was taken in the

[1] The passage deserves literal quotation. "Qui [i.e. the debtor] insecutus eum comprehendit, et cotem a manu bajulantis extorquens caput vulneravit. Extractoque cultello brachium transfigens, eum quasi furem manifestum cum concepto furto reductum *ligavit* in domo quam fregerat. . . . Posita est itaque juxta ligatum sarcinula pellium, lænæ, lintei, togæ, cum ferramento quod volgonium vulgus appellat. Postera die ad cognitionem Ricardi cujusdam vicecomitis militumque comitatis cum prædicta sarcinula ductus est, quæ et collo ejus appensa est."

[2] Ine, c. 21.

[3] Ib. c. 35. "Qui furem occiderit, licet ei probare jurejurando, quod eum fugientem pro fure occidit." See also cc. 12, 16; c. 28, § 1; Æthelst. (Jud. Civ. Lond.) v. c. 1, §§ 1, 4.

act, he could be brought to trial immediately, not being entitled to demand a term preceded by a fixed delay. If, in such cases, according at least to the Salic law, the court were not in session, the neighbourhood immediately convened to give judgment upon the flagrant act.[1]

[1] Sohm, Procedure, § 17.

CHAPTER VI.

SUMMONS.

PRIOR to the Norman Conquest, personal summons to the trial of a cause was always a private, extra-judicial act, performed by the plaintiff; and this continued afterwards to be the case to some extent in all the courts except in the superior tribunals of the king. The same, indeed, was probably true to some extent, for a considerable time, even in the King's Court: probably at first this was the usual practice of the suitors there. But as time progressed, the custom of sending summons by an officer furnished with the king's writ became established, and finally entirely superseded the ancient mode.

But there was a general summons, also, which concerned the entire community; the common summons to the Eyre, County, Burghmot, or (it seems) Hundred, which was proclaimed through the cities, boroughs, and markets. This summons, being publicly made, could not be denied, in distinction from the special summons to a particular trial; though essoins could be sent for absence in the one case as well as in the other.[1]

Private summons was effected, according to the laws of Henry the First (which may be taken as representing upon

[1] 2 Nichols, Britton, 339.

this point, probably, the entire Norman period), by the plaintiff proceeding with witnesses to the house of the defendant, and, after having made demand of payment without avail, requiring the defendant to come to court. "He who was resident at his own house," says the custumal referred to, "ought to be summoned for every plea with witnesses;"[1] whose duty it was to see that the steps required by law were duly taken, and then to give evidence thereof before the court. If the defendant were at home, summons was to be made openly to him, or to his steward, or to his family. A term of seven days was to be allowed for appearance if the defendant were in the county; if in the next county, a term of fifteen days; if in the third county thence, three weeks; if in the fourth county, four weeks. More time than four weeks was not to be allowed him wherever he might be in England, unless a competent essoin detained him. If he were beyond sea, he was to be allowed six weeks and a day for coming to and crossing the channel, unless he were in the king's service, or unless sickness or a storm or some other sufficient cause further delayed him.[2] A defendant could not, in the first instance, be required to come into court immediately, except in criminal cases when he was taken in the act, or apprehended upon a charge of theft, murder, treason, robbery, outlawry, housebreaking, arson, or counterfeiting.[3]

If a person held several estates as tenant of different lords, and was impleaded by any of his lords, he was to be summoned at the estate which he held of the plaintiff, wherever it was, and not elsewhere.[4] If the defendant held several fees of one lord, he was to be summoned at such fee as the lord chose.[5] And a person who held several estates in the county, that is, it seems, within and beyond the hundred in which he resided,

[1] Laws Hen. I. c. 41, § 2. [2] Ibid.

[3] Ib. c. 47; c. 61, § 17. In these cases the accused was at once put upon trial, and that without counsel. In other cases he was entitled to take counsel of his friends and relatives.—Ib. c. 46, § 3; c. 48, § 1; c. 49, § 1; *post*, p. 229.

[4] Ib. c. 41, § 3; c. 55, § 1. [5] Ib. c. 41, § 4.

was to be summoned at that estate at which he dwelt with his family, even though he were sued about another.[1] The cause was to be tried in ordinary cases (that is, when the parties did not hold of different lords) in the forum of the locality where the demand arose, unless resort was had to the King's Court.[2]

The proceeding being summons to court upon refusal of payment, and not intended to lead to distraint, nothing more could be done after the summons until the day set for the court. If the defendant then appeared, the case proceeded to the pleadings. If he did not appear, the plaintiff must summon him again as before to another term, and, in case no essoin had been sent, require him, besides answering, to pay the fine of thirty pence, imposed by law for refusing to obey the first summons. If he failed to appear, without excuse, at the second term, he was liable to another fine of thirty pence, unless he had a lawful essoin ; and then, as it seems (the Leges are not clear upon the point), he could be distrained in the Hundred Court. The plaintiff, however, was to surrender the distress to him upon his producing pledges, and then, being in seisin again of his property, he was entitled to plead ("saisiatus placitet") at the day for pleading or for paying his fines ("emendandi").[3] In the King's Court of the time of Glanvill distress followed, at least in cases of writs of right, only upon the fourth ineffectual summons, as will be seen presently.

Great stress was laid upon this right of the party to replevy his property; and a digression may for convenience here be made. Upon a tender of pledges, the defendant could not be impleaded by the creditor or other plaintiff who had distrained unless the latter would return the property. "Let no one while disseised plead," that is, be compelled to plead, said the Leges,

[1] Laws Hen. c. 41, § 5. Comp. Bracton, 333 b; 2 Nichols, Britton, 340; Fleta, 378, § 4.

[2] "Et ibi semper causa agatur ubi crimen admittitur."—Laws Hen. I. c. 5, § 12. "Actor forum rei sequi debet."—Placita Ang.-Norm. 240, note.

[3] Laws Hen. I. c. 29, § 2.

"unless the suit is brought about the disseisin itself,"[1] that is, to recover seisin; as in the later writ of novel disseisin. "And after anyone disseised has pledged his law or right to his lord, and has added sureties if necessary, he ought to be put in seisin."[2] The common entries in the Pipe Rolls of fines paid or due to the king, for permission to plead "saisiatus," seem to refer to the same principle of law. Thus in the year 1175, Glanvill, when *custos* of the honour of earl Conan, rendered account in the Exchequer of a payment of ten marks by William de L. "ut [Willielmus] placitaret saisitus de terra sua."[3] In like manner William del L., the same year, rendered account of five marks "ut placitet saisitus de terra sua."[4] The meaning appears to be that the party was to have seisin of his lands, which perhaps had been distrained, and then stand to right at the plea of the person professing a claim. The entries in the rolls imply a refusal upon the part of the distrainer to surrender the property, and a resort thereupon to the king's writ to compel him.

A similar result may have occurred when a powerful tenant had forfeited his tenure, but refused to restore possession to his lord, holding it, e.g., on account of some claim against his lord which the latter denied. The tenant, on the analogy of the cases mentioned, would be required to surrender the estate to the lord from whom he had received it, and then the latter might be impleaded as to the tenant's claim. This, indeed, is conjecture; but there is an entry in the Pipe Roll of the year 1174 which, besides being interesting in itself, lends some support to the suggestion ventured. Silvester de Bray, says the entry, was accounted debtor in the Exchequer in forty shillings, that he might be in seisin of his mortgage of S. when impleaded about it ("ut placitet saisitus

[1] Laws Hen. c. 53, § 5; c. 61, § 21.

[2] Ib. c. 53, § 5. The expression "*legem* vel rectum domino suo *vadiaverit*" did not refer to the final act of compurgation, but to the pledge given to make it.

[3] Placita Ang.-Norm. 273. [4] Ibid.

de vadio suo de S.")[1] That is, before the mortgagee in possession, to use a modern term, could be allowed to prefer a claim to the premises he must surrender the property to the mortgagor from whom he had received it. If this interpretation be correct, the existing doctrine of the estoppel of a tenant to deny his landlord's title has (supposing there has been no severance of continuity between the ancient "estoppel" and the modern) an ancient lineage.

The right of being in seisin when impleaded appears in another form in Glanvill. If in a writ of right in the King's Court the tenant, summoned the fourth time, failed to appear or to send a valid essoin, the land was distrained into the *king's* hand. Still, if the tenant now appeared within fifteen days, he was permitted to replevy his property, on giving pledges and accounting for his failure to obey the summonses.[2] Being thus *saisiatus*, he was entitled to plead. This leads to the further remark that replevying was a condition imposed upon the defendant as well as a privilege, when the distraint was effected under process of law for the defendant's default of appearance; a condition upon the performance of which his right to defend the suit now depended.

The author commonly reputed to be Peter of Blois, writing, it seems, in the time of Henry the Second,[3] refers to this subject in the same way, both as to ecclesiastical and temporal causes; going, however, beyond the terms of the English law. He says that when a priest has been instituted into a church in an unlawful manner, without the consent of the bishop or the archdeacon, and the bishop or archdeacon has expelled him without judicial process ("sine ordine judiciario"), there was a question whether the priest ought to be restored to possession; but it was his opinion that he ought to be immediately restored, because of the illegal

[1] Madox, Hist. Exch. 297 (fol. ed.). [2] Glanvill, lib. 1, c. 16.

[3] This would be the case probably whether he was the elder or the younger Peter.

expulsion, and a plea then preferred against him. "In secular causes no one was to be expelled from a possession except by process of law, however bad the possession might be. Nor was a person when expelled bound to answer before restitution," according to the canons, except in actions of inheritance.[1] By the English law of the time of Glanvill, however, the writ of novel disseisin failed if the defendant set up a title to the property in question; a thing which he was permitted to do and thus terminate the recognition elected to try the simple question of disseisin.[2] The person, therefore, who had been disseised, though violently, by another who had a better right could not recover the possession by mere virtue of the disseisin.

A person might appoint his steward or other servant an attorney to receive summons for him and to take his place for all purposes; and service upon such person, made before witnesses, was valid whether reported to the defendant or not. And if the attorney failed to appear at the plea, judgment could be had for the default.[3] That is, as it seems, the party in default was to be amerced: final judgment upon the plaintiff's demand could not be declared at the first default nor even judgment of distraint, as we have seen. The custumal of Henry the First adds that if the principal suffered damage at the hands of his attorney by non-appearance, he should "speak with him about the matter."[4] The attorney

[1] Peter Blesensis, c. 42. See *post*, p. 362.

[2] Glanvill, lib. 13, c. 38, § 2. The fact that the defendant could succeed, and yet that he might be amerced for a violent disseisin, shows this. The subject will be referred to again in a later chapter. Any of the possessory recognitions could be defeated, it seems, by a defence of title. See e.g. as to the assise of mort d'ancestor, Glanvill, lib. 13, c. 10, §§ 3–8.

[3] If the attorney were appointed in court "ad lucrandum vel perdendum," appearance and defence were to be made by him.—Glanvill, lib. 11, c. 1, § 1. But if he were appointed only to receive service, appearance by him could not, it seems, be entered for the principal. It is hardly necessary to say that the term "attorney" is not used in the modern sense.

[4] Laws Hen. I. c. 42, § 2.

was to notify his lord by a faithful messenger if he were unable to appear.[1]

If anyone had been impleaded according to law, "of pleas named," and failed to appear at the appointed term, he incurred penalties in all the pleas of which he had been impleaded by name, unless he had been detained by a lawful excuse. But it was one thing to be summoned by a man's lord to come to him on this or that day to answer a plea named to him, and another thing to be summoned when no plea was named. If pleas were named, and the party made default, he was to pay his "overseunesse" according to the custom of the place,[2] and be summoned to appear at another day. Then he should exculpate himself of the plea or make compensation, unless he could send a good essoin.[3]

Summons was a matter to be distinctly proved, and hence was made in the presence of witnesses. These, from being merely witnesses before the middle of the twelfth century, afterwards assume the ancient part of the plaintiff and become themselves summoners (in addition to being witnesses of the summons) by the time of Glanvill—the "good summoners" of the familiar writs. How the change had come to pass is not known; nor is it known to have extended beyond the royal courts. Probably the ancient practice still prevailed in the popular courts. In the Ecclesiastical Court of the thirteenth century, as well as in the superior temporal courts of the time, the summoners become a distinct class of officers; and it is not improbable that this was also the case both in the clerical courts and in the royal tribunals of the time of Glanvill.[4]

[1] Laws Hen. I. c. 42, § 2.

[2] The amount of this fine varied with the rank of the party and the court, as well as with the place.—Laws Hen. I. c. 34, § 3; cc. 35, 36.

[3] Ib. c. 50.

[4] The need of "*good* summoners" may find an explanation in the writers of the thirteenth century. It was found necessary for the ecclesiastical councils to interfere with the corrupt practices of summoners, and make better provisions

Whether the summons to a particular plea was required to be made in a set formalism of words is unknown; probably it was not, but all that can be certainly affirmed is that it must have sufficiently described the cause of action as to identify it, and have required the party on refusal of the demand to appear before such a court on such a day, there to hear judgment.[1]

In the Norse procedure the summons was executed in precise, established form, varying only as the difference of fact required. In the Icelandic Njal-Saga there is an account of a suit of Gunnar against Hrut for the recovery of Unna's dowry. Unna had been the wife of Hrut, but had obtained a divorce by the aid of her father Mord, who was accounted a great lawyer. Having then secured a divorce for his daughter, Mord wished now to recover the dowry which he had given with her to Hrut; but upon making demand for the goods, he was met by the defendant with a challenge to the duel. Mord, being old and no match for Hrut, declined the duel, and soon afterwards died. Unna as his heir now hands over the suit[2] to a powerful man named Gunnar, who is advised by the great lawyer Njal to disguise himself as a pedlar from the

concerning summons. See 3 Matthew Paris, 89, 90 (Bohn). As to the legal sense of the word "good," see Hengham Magna, c. 5; 2 Nichols, Britton, 330. The summoner was an unsavoury creature in the time of Chaucer, who wrote in the latter part of the same century.

> "Now certes" quod this somonour, "so fare I;"
> I spare nat to taken, God it woot,
> But if it be to hevy or to hoot,
> What I may gete in conseil privily;
> No maner conscience of that have I;
> Nere [but for] myn extorcioun I myghte nat lyven,
> Nor of swiche japes [such tricks] wol I nat be shryven.
> Stomak, ne conscience, ne knowe I noon;
> I shrewe [curse] these shrifte-faders everychoon."
>
> Canterbury Tales (Friar's Tale), 11,476–11,484.

[1] "Suum judicium auditurus," referring to the medial judgment. See chapter ix.

[2] As in the appointment of an attorney in England "ad lucrandum vel perdendum," noticed hereafter.

North, and go with others to the house of Hrut. Njal says that conversation will in the evening turn upon the case of Mord, which had become famous, and of Hrut's success, of which Hrut was very proud. Gunnar must then request Hrut to tell him how Mord might still have taken up the suit at another Thing, as Hrut had said he might have done. Hrut, complying with the dangerous request, will say: "In this suit I must be summoned so that I can hear the summons, or I must be summoned here in my lawful house"—in which particular the agreement of the Norse procedure with the English law will be noticed. Gunnar will then desire Hrut to repeat the proper summons, and then "I," he is instructed to say, "will say it after thee."

"Then Hrut," says Njal, "will summon himself; and mind and pay great heed to every word he says. After that Hrut will bid thee repeat the summons, and thou must do so, and say it all wrong, so that no more than every other word is right. Then Hrut will smile and not mistrust thee, but say that scarce a word is right. Thou must throw the blame on thy companions, and say they put thee out, and then thou must ask him to say the words first, word by word, and to let thee say the words after him. He will give thee leave, and summon himself in the suit, and thou shalt summon after him there and then, and this time say every word right. When it is done, ask Hrut if that were rightly summoned, and he will answer, 'There is no flaw to be found in it.' Then thou shalt say in a loud voice, so that thy companions may hear, 'I summon thee in the suit which Unna, Mord's daughter, has made over to me with her plighted hand.'"

The advice is faithfully carried out, and Gunnar "repeated the summons a second time, and this time right, and called his companions to witness how he summoned Hrut in a suit which Unna, Mord's daughter, had made over to him with her plighted hand." [1]

[1] 1 Dasent, Burnt Njal, ch. xxii.

The Norse procedure did not require personal summons in divorce cases. In the suit by Unna for divorce from Hrut, the plaintiff is instructed by her father to proceed as follows, in the absence of her husband, upon whom she has practised a pretty deception: "When men ride to the Thing, and after all have ridden from the Dales that mean to ride thither; then thou must rise from thy bed and summon men to go along with thee to the Thing; and when thou art all-boun, then shalt thou go to thy bed, and the men with thee who are to bear thee company, and thou shalt take witness before thy husband's bed, and declare thyself separated from him by such a lawful separation as may hold good according to the judgment of the Great Thing and the laws of the land; and at the man's door [the main door of the house] thou shalt take the same witness. After that, ride away" to the Thing. "Into his hands thou shalt never come more."[1] The advice is implicitly followed; and Unna then goes to the Hill of Laws at the Althing, and declares herself separated from Hrut. This was a valid proceeding, and effectual for the purpose.

It has been said that in suits for homicide no summoning of the defendant was necessary, because the slayer, guilty of manslaughter only, had openly avowed the killing as soon as it had been done.[2] Failing to do this, his act was murder. The reason assigned, however, is not satisfactory, since, though the slayer had confessed the act, he may have considered it justifiable, and refused to make compensation. It would then be necessary for the next of kin to summon him to the Thing, unless they chose to take vengeance. The avowal of the slaying would appear to have affected only the nature of the offence and the guilt of the slayer.

The proceedings preliminary to the trial before the Althing are related in two cases in the Njal-Saga, first in the suit for Hauskuld's slaying, and again in the chief suit of the

[1] Njal-Saga, ch. vii. [2] 1 Dasent, Introd. Burnt Njal, 145, note.

saga, that of Mord v. Flosi, for the slaying of Helgi, Njal's son. The entire record, as modern lawyers would say, is set out in the latter case.

The first step taken was that whereby Helgi's next of kin, Thorgeir, Thorir's son (Njal having perished in the burning of his house in the same general catastrophe), gave over the suit to the lawyer Mord. "Then Mord took Thorgeir by the hand and named two witnesses to bear witness 'that Thorgeir, Thorir's son, hands me over a suit for manslaughter against Flosi, Thord's son, to plead it for the slaying of Helgi, Njal's son, with all those proofs which have to follow the suit. Thou handest over to me this suit to plead and to settle, and to enjoy all rights in it, as though I were the rightful next of kin. Thou handest it over to me by law, and I take it from thee by law.'" [1]

After taking witness of the assignment of the suit to himself, Mord calls men to bear witness of the first step necessary in every suit by the next of kin for homicide; and the exactness of the formula is worthy of notice. "I call you to bear witness," said he, "that I give notice of an assault laid down [i.e. declared] by law against Flosi, Thord's son, for that he dealt Helgi, Njal's son, a brain, or a body, or a marrow wound, which proved a death wound; and from which Helgi got his death. I give notice of this before five witnesses." Here he names them all. "I give this lawful notice. I give notice of a suit which Thorgeir, Thorir's son, has handed over to me."

Again he named men to "bear witness that I give notice of a brain, or a body, or a marrow wound against Flosi, Thord's son, for that wound which proved a death wound, but Helgi got his death therefrom on such and such a spot, when Flosi, Thord's son, first rushed on Helgi, Njal's son, with an assault laid down by law. I give notice of this before neighbours"—naming them—"I give this lawful notice. I give notice of a suit which Thorgeir, Thorir's son, has handed over to me." [2]

[1] Njal-Saga, ch. cxxxiv. (Dasent). [2] Ib. ch. cxxxiv.

This notice of suit is taken before neighbours on the spot where the deceased lay, with the body exhumed. The next step is to summon the neighbours to give their verdict at the Althing; the number of whom was to be not less than five nor more than nine. Beginning as before, and as always, Mord again calls men "to bear witness that I summon these nine neighbours who dwell nearest the spot"—naming them all—"to ride to the Althing and to sit on the inquest to find whether Flosi, Thord's son, rushed with an assault laid down by law on Helgi, Njal's son, on that spot where Flosi, Thord's son, dealt Helgi, Njal's son, a brain, or a body, or a marrow wound, which proved a death wound, and from which Helgi got his death. I call on you to utter all those words which you are bound to find by law, and which I shall call on you to utter before the court, and which belong to this suit. I call upon you by a lawful summons; I call upon you so that ye may yourselves hear; I call upon you in the suit which Thorgeir, Thorir's son, has handed over to me."[1]

The same formula is repeated with the variation used in the second notice of the suit; to wit, putting the wounds first and the assault second.[2] Thus is the suit set on foot and made ready for proceedings before the court. At this stage the cause must be dropped for the present.

[1] Njal-Saga, ch. cxxxiv. [2] Ibid.

CHAPTER VII.

THE ISSUE TERM.

In ordinary cases arising under the ancient, popular procedure—excepting the prosecution of criminals caught *flagrante delicto*, and (by the laws of Henry the First) of theft, murder, treason, robbery, outlawry, house-breaking, arson, counterfeiting, and capital crimes generally, in which cases the accused was to be put upon trial at once, without even counsel[1] —a litigation passed through two stages, each requiring a distinct term.[2] At the first term the pleadings were conducted to an issue, followed by the medial or proof judgment, addressed to the final test or verdict, and by the giving of security to furnish the required proofs. At the second term the test was undergone or the verdict given, supposing the party or parties to have fulfilled the terms of the pledge of security.

Cases arising under the recognitions of the latter half of the twelfth century, including also the occasional examples of the same mode of trial from the time of the Conqueror to Stephen, were peculiar. The medial judgment, instead of being declared by the court, was virtually declared in advance, by the king's writ. This was always the case in the distinctive

[1] Laws Hen. I. c. 47. Counsel was allowed in other cases. Ib. c. 48, § 1; c. 49, § 1; c. 61, § 17; *ante*, p. 218, n. 3. [2] Comp. ib. c. 61, § 19.

recognitions of Glanvill. But the writ was granted on *ex parte* application, as in the modern times; the question (virtually) submitted to the recognitors, therefore, not arising upon the pleadings and issue. And when the cause came on for the pleadings, the result might be, or rather, if pleadings were then had, it always was, an entirely different issue from that implied in the writ; in which case the writ and recognition were dropped, as we have seen,[1] and the cause then went on as in other cases. The court declared the medial judgment, security was (it seems) newly given,[2] and the final trial came off at the next term. When, however, no pleadings were had, the recognition proceeded to a verdict at the same term in which the pleadings would have been heard if undertaken. There was thus but one term for causes tried by this form of action; unless the day set for the election of the recognitors, to which the tenant was to be summoned, and at which security of prosecution was first to be given by the demandant, is to be treated as a term.

Supposing a general term of court to have arrived, the hearing of plaint and plea in common causes between suitors was preceded or accompanied by the hearing of essoins. These were excuses of various kinds sent to the court for failure to appear in answer either to the general summons of the community, hundred, or county, or to the special summons by a plaintiff. The most of them were such as to be classed under the following heads: 1. De servitio regis. 2. In Terram Sanctam. 3. De ultra mare. 4. De malo lecti. 5. De malo veniendi. The last two are often called by Glanvill, Ex infirmitate de reseantisa and Ex infirmitate veniendi.

Actual examples of these essoins may be found almost without number in the (published) Rotuli Curiæ Regis of the sixth

[1] *Ante*, pp. 171, 172.

[2] Security of prosecution had originally been given by the plaintiff as a condition to his having a recognition. The new security would be to perform the requirement of the medial judgment.

and tenth years of Richard the First and the first year of John. They are there given in extensive groups. Thus, in the sixth year of Richard essoins were taken at Westminster on the thirteenth of October, filling four pages of the printed text,[1] immediately following which are essoins of the fifteenth of the same month, occupying nearly a page. On the twentieth of the month essoins were taken which occupy the two following pages. On the twenty-seventh, directly following in the Rotuli, are nearly four pages of like proceedings. Seven pages of essoins are of the third of November, followed by nearly two pages of the sixth of that month. Then upon the ninth, tenth, eleventh, and twelfth of the same month, essoins follow, occupying more than six pages. After this they continue on different days until the seventh of December, occupying in all forty-two continuous pages.

The following will serve as specimens: Henry de P. essoins himself de malo lecti upon the third day (of the term appointed) before a plea at D., in Yorkshire, against Brian, son of Ralph, of a plea of land, by (his messengers) John de C. and Hudard de D. Four knights are then sent (to ascertain the facts), and if there be no illness ("languor"), then let him be at Westminster on the Sabbath next after the feast of St. Edmund, one month hence.[2] Peter of F. puts in his place (as his attorney) Walter de F., who essoins himself (i.e. Walter[3]) de malo veniendi against Ralph de R. of a plea of land by (his messenger) Adam de R., and Ralph (the other party, demandant or tenant) puts in *his* place Elias for hearing his day; pledges being given in the octaves of All Saints. Roger, son of R., essoins himself de malo veniendi against William de P. of a plea of warranty of land, by Walter de C. Andrew de C. essoins himself de malo veniendi against the prior of M. of a plea of rent, by Roger de M. Reginald H. essoins himself——[4]

[1] 1 Rotuli Cur. Reg. pp. 95–99.
[2] Ib. 95. The other cases referred to immediately follow.
[3] Glanvill, lib. 11, c. 3, § 1. [4] *Sic.*

de malo veniendi against Gilbert de C. and Matilda de M. of a plea of appeal, by Matthew, son of R., and a day is given them (to appear) on the morrow of All Saints at Westminster. Richard de E. essoins himself de malo veniendi against William B. of a plea of land, by Ralph B. Philip H. essoins himself de malo veniendi against Robert de H., by Walter de B. (and day is given him) on the morrow of All Saints at Westminster. Walter de F. (essoins himself) de malo veniendi against Milo (?) and Milo of St. M. and Ralph of St. M. of an appeal, by William le F., and pledges are given (to prosecute) at the octaves of All Saints. Hugh M. (essoins himself) de malo veniendi against the same persons, by Robert, son of R., and pledges are given for the same term at Westminster. Thomas de S. (essoins himself) of the same against the same persons, by William, son of R. Pledges given for the same term at Westminster. Richard de H. (essoins himself) de malo veniendi against Walter, son of E., of a plea of land, by William de N. Pledges given (for trial) in the octaves of All Saints. Ralph de P. (essoins himself) de malo veniendi against Robert E. of a plea of land, by Adelstan de W. Pledges given (for trial) on the morrow of All Saints at Westminster. Odo de K. (essoins himself) de malo veniendi against Geoffrey de C. of a plea of land, by John de M. and Pagan de M., and awaited an essoin until the fourth day, and Geoffrey came not nor essoined himself, and he was the demandant. Judgment that Odo go without day, and let Geoffrey have such recovery as he ought to have ("et Gaufridus habeat talem recuperacionem qualem habere debet"). Reginald de A. (essoins himself) that he is in the king's service at Canterbury, against Thomas de B. of a plea of homage, by Turstan le V., and Thomas essoins himself de malo veniendi against the same (Reginald), by William H. Pledges in respect of the essoin to be at Westminster on the morrow of All Saints.

The foregoing essoins are given as they stand in the Rotuli, without omission. The following are selected from

those of the same year, as of some special interest in the study of the proceedings of the courts generally, as well as of essoins: William de K. (essoins himself) de malo veniendi against Herbert de St. Q. of a plea of appeal, by Ralph de F. A day is given them in the octaves of All Saints. And Stephen de F. and Robert de D. were of the same appeal, and came not nor essoined themselves, and they were attached by their pledges (given at a previous term, to bring their proofs or to establish their defence otherwise). And it was considered that Stephen and Robert be taken, so that they might be there at the said term. And so the sheriff was commanded.[1] Osbert de L. essoins himself de malo veniendi against the abbot of B. of a plea of taking his chirograph (fine and concord), by Jordan de L.[2] Cecilia de M. de malo veniendi against the brethren of the Temple of a plea of land, by Walter . . . . of the Temple, and the brethren came not nor essoined themselves, and they were the plaintiffs; and she waited for an essoin until the fourth day. Judgment that Cecilia go without day, and the templars have such recovery as they ought to have.[3] Peter B. de malo veniendi against Christina, who was wife of William, of a plea of dower, by Ralph, son of T. Pledges given (to be in court) on the next Lord's day after the feast of St. Luke the Evangelist in fifteen days.[4] Nicholas de F. de malo veniendi against Robert de F. of a plea of appeal, by Robert, son of R. And the abbot of St. Edmund sought his court thence (that is, claimed jurisdiction of the cause) at an hour and term (named). Day is given them in the octaves of St. Hilary at Westminster.[5] Hugh de L. de malo veniendi against the friar of L. of a plea of presentation of a certain church, by R. le M. Pledges given (to be in court) at the vigil of Sts. Simon and Jude in fifteen days.[6] William de L.

[1] 1 Rotuli Cur. Reg. 98. This appears to be a stage of the case of Hubert v. Stephen, Placita Ang.-Norm. 285; 1 Rotuli, 38; *post*, near the end of this chapter.
[2] Ib. 99. [3] Ibid. [4] Ib. 100. [5] Ib. 102. [6] Ib. 103.

essoins himself on the third day before a plea de malo lecti at M. W. against Hubert de H., of a plea of *warrantia cartæ*, by Alard R. and Clement de B.[1] Hamo, son of H., de malo de ultra mare, that he is in the service of the king, against Mabel de la W., of a plea of dower, by Roger, son of W., and R. Considered that the land be taken into the king's hand then, and Hamo be summoned to be at Westminster on the morrow of St. Andrew.[2] Alan, cleric de H., essoins himself de malo veniendi against John de G. and Anneis his wife, of a plea of a charter, by Amiot le P. (Alan), not having a writ (of summons). Summons was proved by Richard de W. and William de S., and they (John and his wife) came not nor essoined themselves.[3] William de B. de malo veniendi against Hugh de C., of his judgment and record, by Geoffrey de B. "In itinere."[4] Walter H., on the third day before a plea, de malo lecti at B., against John de B. and Richard, son of G., by John de C., and Osbert, son of H. Considered that there was no (good) essoin, nor could he say any more why the assise ought to stop. Recognition summoned to be (heard) at Westminster on the feast of St. Martin in fifteen days.[5] Gilbert M. de malo lecti, on the third day before a plea at S., against Cecilia de H. and Robert, her champion, of a plea of the duel, by Roger C. and Geoffrey M. Considered that there was no essoin because of breach of the king's peace, and Cecilia has a writ to the sheriff to have the said Gilbert at Westminster to make his duel at the feast of St. Martin in fifteen days, and that he have the pledges of the said Gilbert then there for hearing their judgment why they had not the man whom they pledged.[6] William C. de malo veniendi of a plea of land, against Luke de C., by Roger, son of W., and Luke was plaintiff, and he (William) waited for an essoin his fourth day. Let William go without day, and Luke have such recovery as he ought to have.[7] Thomas de T. de malo

[1] 1 Rotuli Cur. Reg. 106. [2] Ib. 108. [3] Ibid. [4] Ib. 109. [5] Ib. 110. [6] Ibid. [7] Ib. 111.

veniendi against Ralph M., of a plea of imprisonment, by Hugh T. Ordered that the sheriff cause four men of the town of Oxford to come and answer why the citizens did not come at the day given them in bank, and that Thomas then be there, on the morrow of St. Martin in fifteen days.[1] Margaret, daughter of W., essoins herself de malo veniendi against Theobald W., of a plea of marrying without license, by Brown de S.[2] Master John C. essoins himself de malo veniendi against Emma de C., of a plea of dower, by Gerard, son of G. Without day, because Emma had not her warranty, and considered that she (still) have it if she wish.[3] Robert of St. John de malo veniendi against Richard, son of R. de T., of a plea of land, by Richard T. Pledges given (to be in court) on the next Lord's day before Natale at Westminster, and Olive, wife of Robert of St. John, came and said that neither she nor her lord was summoned except in the vigil of St. Edmund, and that the summons was not legal. Considered that the sheriff be summoned to be at the said term at Westminster to answer concerning that summons.[4] Hugh, son of W., essoins himself against William W., of the church of St. Mary, of a plea of the separation of the chapel of C. from the mother church of H., by Roger D.[5] The abbot of Thorney de malo veniendi against William de C., of a plea of the repair of the bridge of Huntingdon, by Robert de S.[6] Master Henry de L. essoins himself de malo lecti on the day before a plea of appeal at Winton, against Juliana and Robert, her husband, of a plea of land, by Richard W. and Hugh, their man. No (good) essoin, and ordered that the sheriff have him on the day of St. Hilary in fifteen days at Westminster to hear his judgment, and put his surety in pledge that he be at the said term to show why he had not the man whom he pledged.[7] William de B. essoins himself de malo lecti on the third day before a plea of appeal at M., against Christiana D.

[1] 1 Rotuli Cur. Reg. 112. [2] Ib. 114. [3] Ib. 126. [4] Ib. 127.
[5] Ib. 132. [6] Ibid. [7] Ib. 133.

of a plea of dower, by Richard de B. and Ralph de B., and the land was taken into the king's hand on the day of St. Catherine, by default of the said William, and Hugh de E. (?) and H. (?) came at an hour and sought it. Let him have it by replevin, and answer to Christiana, and let the said Christiana have seisin "de parte Willelmi."[1] John de S. de malo veniendi against John de F., of a plea of appeal, by Geoffrey de B. Pledge given (to be in court) on the day of St. Hilary in fifteen days, and John de S., the appellor, came not nor essoined himself, and John, the appellee, waited his fourth day. Judgment that John (de F.) go without day, and John de S. be in mercy.[2]

The foregoing, it will be observed, are all essoins in actual causes. The essoins for failure to answer the general summons of the community are very few as compared with the other class; the meaning of which most likely is, that the absence of ordinary freemen could scarcely be noticed, rather than that almost every freeman of the district was present.[3] The following are the essoins of the same year for non-attendance upon general summons: William de V. de malo veniendi *against the court*, of common summons, by Ralph de C. and Richard de L.[4] The abbot of Croiland de malo veniendi against the court, of common summons, by Nicholas de C.[5] Adam de B. de malo veniendi against the court, of common summons, by William, son of R., and William C.[6] Robert de C. de malo veniendi against the *sheriff*, of a plea of summons.[7]

[1] 1 Rotuli Cur. Reg. 134. The MS. is obscure as to some of the words.

[2] Ib. 136.

[3] It may well be doubted whether there was anything like universal attendance of the freemen throughout the sessions of the Folkmot. Agriculture and business generally would be jeopardised too much to require it. The people may have generally attended the first day or two: the law could hardly have required more than that, except of parties litigant. The above-given essoins, it must be remembered, are of the royal courts; but if *parties* were so largely absent from those courts, what might be expected of general attendance at the Folkmots? Fines imposed for leaving court without license, however, imply a requirement to remain at court; but permission to depart or to stay away was obtainable.

[4] Ib. 104. [5] Ibid. [6] Ibid. [7] Ib. 112.

There are also two essoins simply "against the court," one by a certain viewer ("quidam visor"),[1] the other by an essoiner,[2] without stating whether in answer to general or special summons, and one sent against the court from master Herbert "de lege sua facienda."[3]

The examples quoted show that persons summoned specially as defendants were bound, upon the non-appearance of the adverse party, to wait until the fourth day after the appearance-day, if they would save themselves from difficulty. If they left the court before that day, the plaintiff might appear within the time and then have the defendant put in mercy for a default. If the plaintiff did not appear within the four days, the defendant was entitled to go *sine die*; and if the plaintiff had failed to send an essoin within the time, he was to be amerced. The effect of the essoin, it may be added, was not unlike that of a motion at the present day for a continuance. It was allowed either party, and resulted in postponing the cause; but each essoin by the defendant was to be followed by a new summons.

The number of essoins allowed by law before a party could proceed directly with his cause was, in the royal courts, a point of great nicety, not to say of vexation. In the popular courts of England there appear to have been no fixed limits to the number of lawful essoins. Nothing short of the king's writ (or possibly a judgment of the court) appears to have been sufficient to put an end to them, so long as they were proved true and were individually good. Causes in the popular courts were by means of essoins sometimes postponed a most unreasonable length of time. Even the king's ordinary writ was not sufficient to limit them. In the case of the Abbot of Abingdon v. Turstin[4] the king had "once and again" directed the trial of an alleged wrongful disseisin before his sheriff of Berkshire in the County Court. But the

[1] 1 Rotuli Cur. Reg. 105. [2] Ib. 113. [3] Ib. 98.
[4] Placita Ang.-Norm. 167, 169.

defendant, says the record, conscious of his guilt, "feigning now the king's business, now this and now that occasion, craftily eluded the county for upwards of two years." The case of Richard de Anesty v. Mabel de Francheville[1] is still more remarkable. The number of apparently vexatious essoins and delays, with changes of venue and appeals to the pope, covering a period of five years, is bewildering, if not incomprehensible. To put an end to this sort of vexatious manœuvring a peremptory writ of the king, ordering the party to appear and plead without further delay, was sometimes required. In ordinary cases, however, there was probably very little difficulty of this kind, owing to the privilege had by the adverse party of making inquiry, through men sent by the court, into the truthfulness of the excuses furnished, and of treating the party as in contumacy, if they were false, in case he did not now at once appear.

In the King's Courts the essoins came to an end at the furthest with the third excuse. If, on the expiration of the third term[2] set, each with its four days from the appearance-day named, the party failed to appear in person or to send an attorney, the court ordered that he be required to come in person on another day, or send a fit attorney to gain or lose for him. If he appeared at the fourth term, he was then to prove the truth of each previous essoin by the oath of himself and another, and on the same day make answer to the suit. If he did not appear at the fourth term, in person or by attorney, the tenement (supposing the suit were for the recovery of land) was to be taken into the king's hand, whence it could only be taken by appearance within fifteen days, exculpation of default, and replevin. The essoiners by whom the party reported his excuses to the court, were at the same time to be taken as in default, and detained by the sheriff;

[1] Placita Ang.-Norm. 311.

[2] The word "term" ("terminus") commonly meant, at this time, simply a day appointed, rather than the general session of the court.

a writ in the nature of the later writ of deceit being issued against them.

Supposing, still, a suit about land, the premises were now to remain in the king's hand, as has been intimated, for fifteen days, unless the defendant appeared and replevied them in the meantime; but if within that time he did not appear, seisin was to be adjudged to the plaintiff. The judgment did not, however, prevent the losing party from suing out a writ of right, and trying the title to the land. And if within the fifteen days, the defendant appeared in court and desired to replevy the premises, he was to be commanded to appear at a fourth term and have justice there. If he appeared in accordance with the order, and found pledges to abide by the judgment to be rendered, he was to have seisin again. The party might then deny all the summonses and essoins, or he might acknowledge the first summons and warrant the three essoins, and save the fourth term by the king's writ of warranty.

Such was the intricate course of procedure concerning essoins in the King's Court in a writ of præcipe, as set out in the first book of Glanvill's treatise; and to add to the annoyance, an essoiner was himself permitted to send an essoin, of which we have seen examples.

In the recognition of mort d'ancestor the tenant might essoin himself twice, but no more; on the arrival of the third term set, the recognition could be taken regardless of the absence of the defendant. In no recognition where seisin alone was in question were more than two essoins allowed. In the recognition of novel disseisin no essoin was permitted; but before proceedings could be had under the writ, the defendant must have been summoned on two different days. On the third day the recognition was taken.[1]

If a minor prayed a recognition of any kind against a person of full age, the defendant was denied an essoin; and

[1] Glanvill, lib. 13, c. 7.

the recognition proceeded upon the first day appointed by the summons, whether the defendant appeared or not ;[1] unless, indeed, he appeared and pleaded some matter in derogation of the recognition. But if the case were reversed, and a recognition sought by an adult against a minor, the latter might avail himself of the right to essoins in the usual manner.[2]

Another important branch of the proceedings of the term was the fixing of amercements. The Rotuli Curiæ Regis of Richard the First contain, under the title Placita Coronæ, a great number of examples. The following Amercements of Hertford[3] may be quoted to show the nature of the fines commonly imposed: Hundred of Hodesdon (amerced) in one mark for murder, liberties (i.e. franchise) excepted. Land of the hospital in R. (amerced), half a mark for the flight of Ralph, a rustic. William de M., half a mark because he did not have (in court) the man whom he had pledged. Hundred of Hertford, twenty shillings for murder, liberties excepted. The frankpledge of Richard C. de S., half a mark because it had not the man whom it had pledged. Askill B., half a mark for wine sold contrary to the assise. The town of Hodesdon (being) land of Alan de B., half a mark for the flight of Ernold, son of H. The town of Aldeham, one mark for the flight of Simon and Edmund, his brother. The frankpledge of Odo de L., half a mark for the flight of Walter (the) Cook. The town of Munden le F., one mark for the flight of Callus de M. The hundred of B., one mark for murder, liberties excepted. The frankpledge of Adam B., half a mark for the flight of the *said Adam*. Then follow amercements of fourteen persons for wine sold contrary to the assise ; after which: Geoffrey de la M., half a mark for a dyke unjustly raised. Gerard de F. was to be amerced at the Exchequer for a disseisin. Richard, son of W., half a mark for a disseisin. Walter de H., half a mark for a disseisin. Henry, merchant of St. Albans, half a mark for an unjust sale

[1] Glanvill, lib. 13, c. 12. [2] Ibid. [3] 1 Rotuli Cur. Reg. 168.

of bread. Richard de F., half a mark because he did not prosecute his suit. Robert clerc de P. de T., half a mark for a disseisin. Alan, son of G., half a mark for a default. Reginald de A. to be amerced at the Exchequer for a disseisin, in one hundred marks. The county, in sixty marks for discharge from carucage and hidage. Among the amercements of Essex are fines imposed upon eight tithing men and their decennaries for flights.[1] Ralph de A. was amerced in a mark for a false clamor. Christopher de B., in half a mark for leaving court without license.[2]

The regularity of these amercements in amount is noticeable. However dissimilar the offences, the normal fine imposed is half a (silver) mark; and the variance, it may be presumed, was caused by the special circumstances of the particular case.

Besides amercements for matters within the immediate notice of the Eyre, some of the foregoing examples show that there were cases brought to the notice of the justiciars from without. This was partly, if not mainly, done by jurors chosen through the hundreds, as was provided in the *agenda* of 1194; the reports being commonly given first under the same head of Placita Coronæ. The Rotuli contain many examples; of which the following of the tenth year of Richard the First fairly represent the whole: Hundred of Odesey.[3] The jurors say that John, son of L., and Alice, daughter of S. were drowned in the mill-pond of E. And Englishry was not reasonably presented. (Judgment) murder. The same jurors (say) that a certain woman was found dead in the fields of E., and it is not known who she was, and no one is accused thereof. Judgment, murder. The same say that malefactors slew William (the) Smith in his house at S., and bound his son Richard and wounded A. and A., and it is not known who did it. And Englishry was not presented. Judgment, murder. In the fields of C. a certain man was found slain, and it is not

[1] 1 Rotuli Cur. Reg. 173. [2] Ib. 174. [3] Ib. 159.

known who he was or who killed him. Judgment, murder. The same say that Ralph, a rustic, is fugitive "pro malo recto" (i.e. *rectato*, accused) and was at R. in the frankpledge of the hospitallers. Judgment, that the land of the hospitallers in R. be in mercy for his flight; and his chattels were worth two shillings, whence the sheriff, Hugh de Nevill, ought to answer. Hundred of Edwinstree.[1] The jurors say that in the grange of the monks of C. at T. two mendicants there receiving hospitality slew a third, and it is not known who they were. Judgment, murder. The same say that Luke de B. appealed Walter de M. and Geoffrey T. of the theft of an ox, (that) Walter essoined himself de ultra mare, and Geoffrey came not, and his pledge was William de M., and he is in mercy. The same say that the said Luke appealed the said Walter that within the king's peace and in felony he robbed him of Felicia, his wife, and of his seal, and of his goods to the value of one hundred shillings, and this he offered to prove by the consideration of the court at the advent of the justiciars (in eyre). At Hadham, a town of L., a certain man was found slain, and it is not known who he was. Judgment, murder. And (Richard S. was put in pledge for his death, and his pledges were Ralph F. and Robert Q., and they are in mercy because they have not him whom they pledged[2]) the jurors did not afterwards accuse Richard. Judgment that Richard go quit. Hundred of Hertford.[3] The jurors say that in the forest of C. a certain man was found slain, and it is not known who he was. Judgment, murder. At W. Ralph and S. were slain at night in their house by a certain malefactor receiving hospitality there. Englishry was presented. The same say that at B. Roger G. slew Andrew, a merchant, and fled and was outlawed, and that he remained at S. in land of the abbot of Westminster. And the chattels of the fugitive were worth two shillings, whence Hugh de Nevill (was to account at the

[1] 1 Rotuli Cur. Reg. 160. [2] This parenthesis is a cancellation.
[3] 1 Rotuli, 161.

Exchequer), and he was in the frankpledge of Richard C., and (that) he is in mercy. Arnulf, son of H. de H., is a fugitive for robbery, and was out of frankpledge in Hodesden. Judgment that the town is in mercy for murder. Hundred of Dacor.[1] The jurors say that in the fields of W. a certain infant was found dead, and it is not known who it was. Englishry was not presented. Judgment, murder. The county declares that Thomas P. was accused of robbery and of housebreaking, and was taken and put in gaol in the time of Robert de L., then sheriff, and it is not known what has become of him. Robert says that he was dismissed on bail in the County Court, the names of the bail being Richard de H. and five others named. And they defend that they did not go his security, and put themselves upon the county. And the county declares that they did not. Judgment, Robert in mercy.[2]

The following like reports of local affairs, somewhat more full, are of the tenth year of Richard (1198): The jurors say that in the town of K. William H. was found dead of cold, and no one is accused thereof. Englishry was not presented. Judgment, murder. William de P., an officer of the hundred, (says) that four neighbours had been attached for the death of that person; and he brought four men who had not been attached. And William P. was then sheriff, and Robert de L. under him, and no one answers for them, and it is testified by the county that no one was attached in the matter. William is in mercy for a false presentation.[3] In the town of B. William de S., a lunatic, was found dead, and it is not known of what race ("unde," whether of Norman or English descent) he had been born. Englishry was not presented. Judgment, murder.[4] The jurors say that William N. appealed William de B. and Robert, his son, that in the peace of the king, wickedly, and in housebreaking, they robbed him of six shillings and six pence worth of his chattels, and of his custody

[1] 1 Rotuli, 162. [2] Ib. 164. [3] Ib. 203. [4] Ibid.

robbed him of twenty-four bidentes, and broke the doors of the house in his custody, and the hinges, and other things to the value of ten shillings, and (that) he had offered to prove by his body by consideration of the court. (They say that) William and Robert defended all, word for word, and they say that Mauricius, "victricius" of the said William (defendant), held of his fee, who having died, (the defendant William) acknowledged that he was of his (the appellor's) fee, and a certain neighbour of his (defendant's). Alexander, son of Philip, procured from him pasture in the same fee for twenty-five sheep, and afterwards came the said William le N. (the appellor) to that fee and carried off the said sheep, and put them in another fee, and detained them so that the said William de B. and Robert, his son, came to William, son of G., an officer of the hundred, and retook the sheep through him by replevin, and the officer testifies this. And the whole county testifies that he (William le N.) had appealed the men "ex more solito." (But) it was considered (by the Eyre) that there was no (good) appeal against them. Judgment that William le N. be in mercy for a false appeal, and William and Robert be quit thereof.[1] (The jurors say, that) Robert F., a robber, had appealed Walter de B. of complicity (in the crime) and of flight. And he was in the frankpledge of William B. and of Elias R., and they are in mercy. And the said Robert had appealed L. S. and R. H. of complicity. And the jurors say that there was no evil accusation against L. or R. S. Judgment that R. S. efforce their pledges, and so let him be under pledge. And in like manner L.[2]

The jurors who make these reports possess functions including indeed, but at the same time far greater than, those of the modern grand jury. Aside from their duties as jurors of presentment in the modern sense, under the Assises of Clarendon and Northampton, they form part of the king's fiscal machinery in the counties, acting in aid of the justiciars

[1] 1 Rotuli, 205. [2] Ib. 207.

in Eyre in rendering the administration of the revenue efficient. The plan of the *agenda* of the Eyre of 1194, heretofore quoted, is thus shown to be merely an example, as we have suggested it was, and not some peculiar requirement of a single year. And there is good reason to believe that earlier jurors of presentment exercised similarly extensive functions. It was incumbent upon the justiciars in Eyre from the first to ascertain everything (not within the sole province of the sheriffs) that was of concern to the king; and this could only be done through local jurors. The reports of these jurors, it is worthy of mention, of whatever nature, were called "placita coronæ;" a term not yet used in the sense now attached to it. It simply meant business of concern to the Crown, reported to the Eyre by the jurors as having transpired in the particular district since the last visitation or report. The "pleas of the Crown" in the modern sense (i.e. common criminal prosecutions) appear to have been tried mostly in the popular courts, before the coming of the Eyre, at least in the time of the Rotuli Curiæ Regis (1194–1199); and considered merely as prosecutions of crime, these were not "placita coronæ" at all. Most prosecutions of crime were carried on, even in the Eyre and in the King's Court, by private appeals, or by appeals largely in the interest of some local franchise or lord of lands; though the king also might have an interest in the result.

The only other feature of the term to be noticed before resuming the development of the procedure in a common plea is the appointment of attorneys in the place of plaintiff or defendant, to gain or lose. Of acts of this kind the Rotuli also furnish many examples;[1] but the subject has been sufficiently considered elsewhere, and it is only necessary to mention it here. It should also be observed, in order, that the great feature of the term of the King's Court and of the Eyre is the appearance of the assise in recognitions. This, however, is

[1] 1 Rotuli, 165, 178 (10 Rich. I.).

reserved for consideration later. These four subjects, essoins, placita coronæ (including amercements direct and upon reports from without, and reports upon matters generally relating to the interests of the king), appointment of attorneys, and assises under the recognitions, embrace, with the hearing of common pleas in general, most of the ordinary judicial business of the regular term. But other business in great variety, relating to public interests, was also transacted. The separation of the judiciary from the legislative and municipal branch of government, it need hardly be said, had not yet taken place.

Turning now to the consideration of the common pleas and supposing the defendant to have appeared in a particular, case, the pleadings are opened by the plaintiff, demandant, or appellor, setting out his demand or appeal. This in common actions was done in language formulated by ancient usage, and requiring great exactness of statement. The defendant was under no liability to the plaintiff through the process of the courts except that fixed by law. Legal process was an innovation upon the ancient right of private redress, a right not yet obsolete; and the plaintiff acquired no greater benefit in court than the law in express terms gave him. The defendant therefore deemed himself entitled to take advantage of the slightest flaw or miskenning of his adversary.[1]

The question of the origin and significance of the formal language itself is another matter. The fact that much of it in the Anglo-Saxon and early Norman period, like certain formal parts of general grants, especially those conferring jurisdiction, was of a rhyming nature has often been alluded to. Of the Anglo-Saxon oath-formulas it has been observed that it is impossible to read them without perceiving at every turn their rhythmical quantity and alliteration. "An ear any way accustomed to Anglo-Saxon poetry will easily detect the

[1] Fine for miskenning (mistake of language in pleading) was abolished in London by Henry I. See the Charter to the Citizens of London, Stubbs, Sel. Ch. 108 (2d ed.). Other towns probably obtained a like exemption.

disjointed members of their poetic formulæ, and instinctively arrange them in the order in which they ought to stand."[1] Neither the metre nor the alliteration, however, is constant; and the latter, when it does occur, is said to be usually unlike the common poetic alliteration, having no "chief letter" in the second line.[2] It is proper to add, that the use of this kind of alliteration, as well as final rhyme, in early laws and judicial documents was common to all the Germanic including the Scandinavian nations.[3] This may not be very satisfactory as an explanation of the special formalism of the earlier Germanic pleadings; but it is about as far as explanation can yet go.

Under this formalism of plaint, or rather in it, forms of action existed as distinctly as they have existed in modern English law. Indeed, as we have more than once stated,[4] modern English forms of actions are lineally descended from them; and this, too, with no greater change than had been effected upon the English people themselves in the same course of time. There was never any sudden change from the Germanic to the modern formulæ. A gradual progress from the one to the other may be traced from the pre-Norman through the Norman period to the time of Edward the First, when the modern forms of action may be considered to have assumed their definite type.

The subject is somewhat obscured by the introduction of the writ process after the Conquest, and the peculiar history and development of writs into their final, settled form. But if it be remembered that the writ did not, before the thirteenth

[1] 1 Anc. Laws and Inst. 178, note (8vo ed.). [2] Ibid.

[3] Ib. see Grimm's Deutsche Rechts-Alterthümer, p. 6.

[4] Wherever a formula, in whole or in part, appears, its relationship to an earlier one, if known, appears; and the requirement of almost literal accuracy in the use of the same is constantly enforced. There was no interval of disuse, and there was no legislative change. Bracton in the thirteenth century uses language of the very same tenor as that used before the Conquest and afterwards down to his own time. He gives the form of appeal, for instance, in the case of an approver (one who has turned king's evidence) against his accomplice, and adds that he must state the formula without variation or any change.—Bracton, 153.

century, have any necessary relation to the formulæ of pleading (further than to indicate in most cases the nature of the suit), and that the formulæ of plaint and defence proceeded as in the time anterior to the general use of writs, this obscurity will be eliminated. The technical words of the modern declaration begin to appear in the language of the ancient plaint long before they appear in the writ.

The pleadings in criminal and *quasi*-criminal, and perhaps in some other, cases were begun by a fore-oath ("for-ath," "antejuramentum") on the part of the plaintiff, or by something tantamount thereto (as by showing a wound to the court in the case of an action for a battery), which, with witnesses or compurgators, accomplished the purpose of making a presumption against the defendant, or, as would be said in modern times, of making a *prima facie* case. This fore-oath contained a statement of the cause of action, and also a solemn assertion that the suit was not instituted out of fraud, deceit, or craft. The reason for this is obvious. Upon an issue raised by the defendant, it devolved upon him to give security, either by personal sureties or oftener by putting his property in pledge, to furnish the proof of his innocence, so that, had it not been for the oath with its consequences, men of property would constantly have been at the mercy of the evil-disposed. "Also we have ordained," said the laws of Edward the Elder, "if there were any evil-minded man who would put another's property in 'borgh' (pledge) for 'wither-tihtle' (lit. cross accusation, here false accusation, opposed to the truth), that he should then declare on oath that he did it, not from any knavery, but with full right, without fraud and guile, and that he (the defendant) then should there do as he durst with whom it is attached; 'like as he it owned, so he it vouched to warranty.'"[1]

Two forms of oath used under this requirement of law have

[1] Edw. I. c. 1, § 5. The words of the last clause are words of defence used in the pleading.

been preserved. "Thus shall a man swear," reads the title to the first, "when he has discovered his property and brings it in process ['on gange']. By the Lord, before whom this relic is holy, so I my suit prosecute with full folk-right, without fraud and without deceit, and without any guile, as was stolen from me the cattle N. that I claim, and that I have taken with N."[1] The reply by "the other's oath with whom a man discovers his cattle," was as follows: "By the Lord, I was not at rede nor at deed, neither counsellor nor doer, where were unlawfully led away N.'s cattle. But as I cattle have, so did I with right obtain it." And then follow these alternative special pleas: "And: as I vouch it to warranty, so did he sell it to me into whose hand I now set it. And: as I cattle have, so did he sell it to me who had it to sell. And: as I cattle have, so did it come of my own property, and so it by folk-right my own possession is, and my rearing."[2]

The other form of oath for the plaintiff is given under the title, "The oath of him who discovers his property, that he does it neither for hatred nor for envy," and is as follows: "By the Lord, I accuse not N. either for hatred or for envy, or for unlawful lust of gain; nor know I anything soother; but as my informant to me said, and I myself in sooth believe, that he was the thief of my property."[3] The denial by "the other's oath that he is guiltless" was as follows: "By the Lord, I am guiltless, both in deed and counsel, of the charge of which N. accuses me."[4]

These replies appear to have been the exculpatory oaths, and not merely the issue-answer of the pleading term; for the oath last quoted is followed by another given by a compurgator of the defendant. "His companion's oath who stands with him" was: "By the Lord, the oath is clean and unperjured

[1] Oaths, 2; 1 Anc. Laws, 179. In the case of a suit for stolen property, the owner, in the time of Æthelstan, took five neighbours with him, one of whom should swear with him, when the property was found, that he was putting his hand upon his own.—Æthelstan, i. c. 9.

[2] Oaths, 3. [3] Ib. 4; 1 Anc. Laws, 181. [4] Ib. 5.

which N. has sworn."[1] But the defendant's plea was of course substantially, if not verbally, the same at the issue term as at the trial term.

Whether an oath that the plaintiff was not actuated by fraud or guile was required in other than criminal and *quasi*-criminal cases does not appear. There would be equal occasion for it in civil actions. As between lord and man, however, in actions for non-payment of rent, or non-performance of services and customs, it probably could not have been required; but all that can be said beyond this is that the passages in which the fore-oath is mentioned relate to crimes. "Let single lad [purgation]," say the Laws of Cnut, "be preceded by a single fore-oath, and a threefold lad by a triple fore-oath. And if a thegn have a true man to take the fore-oath for him, be it so. If he have not let him begin his suit himself, and let no fore-oath ever be omitted."[2] In the laws of the Conqueror it is declared that the appellor of theft shall swear by seven legal men that neither for hatred nor for any other cause has he accused the defendant, except according to law.[3] The laws of Henry the First, like those of Cnut, declare that a simple lad shall be preceded by a simple fore-oath, and a triple lad by a triple fore-oath. "And let no fore-oath ever be excused."[4] It may be added that in the case of accusations by men of the church against inferior laymen, and perhaps of laymen of rank against men of mean degree, the oath, on the exhibition of a wound (if the action was for a battery), was perhaps sufficient, without witnesses or compurgators, to make a *prima facie* case against the defendant.[5]

To make a *prima facie* case in a civil action relating to real or personal property or to debt, the plaintiff generally appeared at the first term with charters or with one or more

[1] Oaths, 6; 1 Anc. Laws, 181. [2] Cnut, Secular, c. 22.

[3] Wm. I. i. c. 14. [4] Hen. I. c. 64, § 9. Probably this refers only to appeals; not e.g. to actions for debt.

[5] Comp. the case of civil actions *infra*, and the offer of an appellor to make proof as a maimed man.—1 Rotuli Cur. Reg. 60, Richard de W., and latter part of the present chapter.

witnesses *de visu et auditu*; of which there are not wanting actual examples.[1] But the testimony of these witnesses at the issue term did not constitute proof. The unsupported allegation of the plaintiff was insufficient to compel an answer;[2] and, unless the plaintiff could call in aid the ecclesiastical judge,[3] the defendant was at once entitled to judgment.[4] The evidence of charters or of witnesses was added so as to make for the purposes of the issue term, like the fore-oath in criminal cases, a presumptive case against the defendant. It availed nothing at the trial term.[5]

There was one exception, however, to the rule requiring a plaintiff to bring charters or witnesses before the court at the issue term, and that was when he was a person of such position, as compared with the defendant, as to make it derogatory to his dignity to require support at the first term to his allegation. When the plaintiff was lord of the manor and the defendant was one of his common men, or when the plaintiff was an officer of the treasury or keeper of the royal forests, his unsupported allegation was sufficient to require the defendant to make answer.

Such at least was the rule in Normandy in the thirteenth century. The Somma says: "Notandum eciam est, quod nullus in curia sua teste indiget contra eum quem accusat. Vox enim sola domini curiæ in eis quæ ad ipsum pertinent, sufficit ad accusationem subditorum."[6] As to fiscal officers it was said: "Li foretier n'amenront pas tesmoing seur le mesfet

[1] See Placita Ang.-Norm. 17, 38. [2] Glanvill, lib. 10, c. 12. [3] Ibid.

[4] See e.g. the case of Abbot Gausfrid and the Abbot of Marmoutier, Placita Ang.-Norm. 122, in which the plaintiff lays claim to spiritual authority over the abbot of Battel, and is called upon to furnish charters or witnesses to substantiate his claim; failing in which, judgment is given for the abbot of B. at the first term. Comp. also c. 38 of Magna Charta: "Nullus ballivus ponat de cetero aliquem ad legem [the ordeal] simplici loquela sua, sine testibus fidelibus ad hoc inductis."

[5] See Brunner, Schwurg. 170.

[6] Somma, lib. 2, c. 63, § 5. This, however, was subject to limitation. "Li sires aura sanz tesmoing le serement de son homme une foiz en l'an."—Marnier, Etabl. et Cout. p. 29.

de la forest, ni le prevost en leur prevosté, ne li sergent en leur sergenteries."[1]

An illustration of the general practice deserving special mention is found in the demand of the duel by the plaintiff in a writ of right. The plaintiff brings forward one or more witnesses to substantiate his claim and compel an answer; the witness supplementing the plaint of his principal thus: "Hoc vidi et audivi et esgardium curiæ super hoc facere sum paratus." An example may be seen in the case of Bishop Wulfstan v. Abbot Walter, *temp.* William the Conqueror.[2] The record says: "Et inde sunt legitimi testes apud nos, milites, homines Sanctæ Mariæ, et episcopi, qui hoc *viderunt et audierunt*, *parati hoc probare* per sacramentum et *bellum* contra Rannulfum," etc.

Unless the defendant (in the writ of right) belonged to the class of persons exempt from the duel (women, men above sixty years of age or physically incapacitated to fight, or of the religious order[3]), or had charters, he was bound to accept the offer of battle (before the Magna Assisa) or confess judgment. If he resisted the plaintiff's claim, he now denied the plaint word for word, adding, "quod paratus sum defendere versus eum per corpus meum."

The requirement in Normandy was that in weighty cases the defendant should "ad singula verba accusantis respondere et ea rememorare." But in other cases, at least when the accused answered without counsel, he was permitted to make a short and comprehensive denial. "Ego pernego per eadem verba, per quæ me repetatis;"[4] adding the "paratus sum" clause above quoted.

If the appellant (in Normandy) did not care to resort to trial by duel, he closed his plaint with the words, "et hoc paratus sum esgardium curiæ facere."[5] And his witness then

[1] Marnier, p. 130. [2] Placita Ang.-Norm. 16, 19.

[3] Notwithstanding the fact that such persons might fight by champion, it seems that they were never bound to do so. [4] Brunner, Schwurg. 171.

[5] It is of interest to notice that this formulary of closing the plaintiff's case is

said: "Hoc est verum; vidi et audivi et esgardium curiæ super hoc facere eum paratus."

The case, supposing the defendant to have traversed the demand, was now at issue, and it only remained for the court to pronounce judgment as to the mode of proof, the time when the proof was to be furnished, and (when the duel was not ordered) which party was to furnish it. The last-named feature of the case depended upon the nature of the suit and of the issue joined. It will be considered in the following chapter.

It should be observed that the issue appears to have been joined upon the statement of the witness, and not upon that of the plaintiff. The defendant denied, it is true, the plaintiff's statement, but he denied it, it seems, as affirmed by the witness.[1] This tends to account for the fact that the witness becomes a champion. The champion appears properly, and perhaps in earlier times solely, as a witness; and as it is his testimony, and not the plaintiff's count, which makes the proceeding effective, he is the person to be opposed.

When it came to pass that a father could require his son to defend the claim of a particular person, just as he (the father) as an eye and ear witness could have done, the first step was taken which finally resulted in doing away with the ancient rule that the champion ought to be a witness. The champion still took an oath that he had "heard and seen" the truth, or that his ancestor desired him to deraign it, until in the reign of Edward the First the practice had become so general of employing persons as champions who were not witnesses in the one sense or the other, that the champion-

the original, or rather the antecedent, of the formula of modern pleading, "and of this the plaintiff puts himself upon the country;" though the more ancient form has itself been preserved in the closing language of the appeal, "and this he is prepared to prove as the court may direct," a formulary which continued to be used until the abolition in England of appeals for murder and felony in 1819.

[1] The defendant in Normandy denied the language, both of the plaintiff and of the witness.—Brunner, Schwurg. 172.

oath generally amounted to perjury. By the Act of Westminster I. c. 41, the champion was relieved of the necessity of taking an oath; though the ancient principle that the champion ought to be a witness still manifested itself in frequent expressions of opposition to paid champions.

In order to show more accurately the state of forms of action in the twelfth century, and to lay a foundation for comparison (at another time) with the plaint and plea of later times, it becomes necessary to quote more at length from some of the records of the period. Unfortunately, no complete formulæ in use in England after the Conquest, of an earlier date than the time of Glanvill's justiciarship (*an.* 1180–1189), have been preserved; but the last twenty years of the twelfth century may be safely taken as representing, in respect of the formulæ to be quoted, the entire reign of Henry the Second.

Glanvill has given the form of count used in three of the real actions of his time, to wit, in the general writ of right, in the writ of right of advowson, and in the writ of right of dower. In the first of these actions the demandant counted as follows: "I demand against this H. half a knight's fee, in such a vill, as my right and inheritance, of which my father (or my grandfather) was seised in his demesne of fee in the time of king Henry the First, or after the first coronation of our lord the king, and whence he took the profits to the value of five shillings at least,[1] as in grain, hay, and other produce; and this I am ready to prove by my freeman J., and if any accident happen to him, by such a one or by a third (and the demandant may thus name as many as he may choose, though only one of them shall wage the duel) who saw this or heard it." Or the demandant might use other words, thus: "And this I am ready to prove by my freeman J., to whom his father when on his death-bed enjoined by the faith which a son owes his father that if he ever heard a claim concerning that land,

[1] The esplees, a momentary seisin being insufficient. See Bracton, 372b, 373.

he should prove this as that which his father saw and heard."[1]

The demandant's claim having thus been made, it was at the election of the tenant either to defend himself by the duel, or to put himself upon the king's Grand Assise and thus require a recognition to ascertain which of the two had the greater right to the land in dispute. If he elected the former mode, he was to deny the alleged right of the demandant word for word, as the demandant set it forth. If the tenant preferred to put himself upon the Grand Assise, the demandant had the right to show cause against the assise proceeding; but the objection was to be taken after the election of the recognitors and upon their appearance to give answer as to the right in question. The same practice prevailed in the case of the possessory recognitions, and will be illustrated presently.

In the claim of a *right* of advowson, the demandant said: "I demand the advowson of this church as my right and pertaining to my inheritance, of which advowson I was seised (or one of my ancestors was seised) in the time of king Henry the First, grandfather of our lord king Henry (or after the coronation of our lord the king); and being so seised, I presented a parson to the same church when vacant, at one of the above-mentioned periods. And I so presented him that upon my presentation he was instituted parson into that church; and if anyone will deny this, I have some credible men who both saw and heard the fact, and are ready to prove it as the court shall award, and particularly such and such persons."[2] The tenant might defend as in the writ of right above referred to.

The claim for dower was expressed more briefly. "I demand," said the widow, "such land, as appertaining to such land, which was named to me in dower, and of which my husband endowed me at the door of the church the day he espoused me, as that of which he was invested and seised at

[1] Glanvill, lib. 2, c. 3. [2] Ib. lib. 4, c. 6.

the time when he endowed me."[1] This proceeding was against the tenant as well as against the heir; but it was chiefly against the heir in ordinary cases, i.e. when the tenant did not claim in his own right, paramount to the heir.[2] The latter was separately summoned, and on failing to appear or to send an attorney after three essoins, might be distrained in his fee or attached by pledges (it was not clear which was the proper course). If the heir on appearance conceded the widow's claim, it was his duty to recover the land from the tenant or give her an equivalent. But he might deny her claim and bring the matter to the determination of the duel; provided the widow produced in court persons who had heard and seen the endowment, or some competent witness who may have heard or seen the act by the ancestor of the heir, at the church door, at the time of their espousals, and be ready to prove such fact against him. This part of the widow's plaint, serving the necessary purpose of making a *prima facie* case for her, was probably added to the demand above quoted, as in the counts already presented.

The following were the pleadings in an actual cause of "reasonable dower" in the year 1194; and they are of special interest as showing that the practice of bringing the *secta* was in familiar use in the twelfth century: Emma,[3] who was wife of Ralph, son of R., seeks against William, son of Ralph, her reasonable dower which pertained to her of the frank tenement which was of the said Ralph, formerly her husband, in N. (and in other places named). And William comes and says that Ralph, his father, gave the said Emma, on the day when he espoused her, a certain vill, namely H., in dower, and she thereupon held herself quitted, and of this he brought his suit ("sectam produxit") which was then present, and besides he said that she, after the death of his father, was put in seisin

[1] Glanvill, lib. 6, c. 8. Comp. Regiam Maj. lib. 2, c. 16.

[2] See for an example of resistance by the tenant, 1 Rotuli, 20, "Matilda uxor Walteri," etc.

[3] Rotuli Cur. Reg. 145.

thereof, and took the esplees as long as she wished, and if the *secta* which he brought did not suffice, he put himself upon the good men who were present at the espousals and upon that neighbourhood. And Emma defends all, and says that she was never endowed of that vill, nor did she hold herself quitted, and that she was endowed of the third part of all the land which Ralph, her husband, had, and of this she brought her suit ("produxit sectam") which was present at the espousals, and besides the suit which she brought she puts herself upon a legal jury of that county. Emma puts in her place M. to gain or lose at the coming of the justiciars. Let an assise be had by good men of the neighbourhood.

The following are the pleadings in a record of the same year, arising in a cause which afterwards would have been called a writ of entry: Walkelin,[1] son of En., seeks against Geoffrey, son of El., half a hide of land, with pertinents, in F., as his right and inheritance, of which his father En., of whom he is the near heir, was seised in his demesne as of fee on the day when he took his journey towards Jerusalem, in which journey he died; in which land the said Geoffrey had no entry save by Silvester, uncle of the said Walkelin, who (S.) had him (W.) in ward while he was within age. Geoffrey comes and defends that he had no entry in the said land by Silvester, and says that he has many lands in the said town of F., and seeks a view of that land. Judgment that he have view, and a day is given to them on the morrow of St. Hilary at Westminster, and in the meantime they have license of concord.

In proceedings instituted by process of recognition there were no pleadings before the appearance of the recognitors, come to make answer of the matter submitted to them.[2] Glanvill says nothing of any except upon the return-day of the assise. The writs given by him indicate that there was no summons of the tenant to anything except to the hearing of the answer of the recognitors; though he tells us in his text

[1] 1 Rotuli Cur. Reg. 91.

[2] Comp. *ante*, pp. 229, 230.

that the tenant was summoned to be present at the election of the jurors. The writ to summon the recognitors, however, was peremptory, and there was no chance for pleading then. The writ itself appears to have supplied the place of pleadings, issue, and medial judgment. But it would have been unjust to force the tenant to trial upon what at most was an imputed traverse of the matter submitted to the recognitors by the writ, when he might not have cared to dispute the plaintiff's allegation (e.g. of a disseisin), but still might have had a good defence in avoidance of it; and an opportunity was accordingly given him when the demandant brought his writ into court ("tulit brevem") upon the return-day and demanded the hearing of the recognition.

The course of the procedure under a writ for any of the recognitions appears to have been as follows: The demandant goes with his process (obtainable from the king or justiciar) to the sheriff in court, and there gives security, as in other cases, to prosecute.[1] An election is then had before that officer, according to the command of the writ, of twelve free and lawful men of the neighbourhood (prior to the time of Glanvill the number was irregular, and it still varied somewhat), prepared on oath to make return upon the particular matter submitted in the writ. The tenant was summoned to this election; but though he did not appear, the election still proceeded. No essoin was received to postpone the business. The names of the recognitors were imbreviated by the sheriff, and, as it seems from the Rotuli Curiæ Regis,[2] pledges were taken from them, to secure their attendance and answer upon the return-day. After the election the tenant was summoned

[1] It seems that the security to prosecute was sometimes given before the writ was granted.—1 Rotuli Cur. Reg. 7. The giving of security, however, was a condition to obtaining a recognition.

[2] 1 Rotuli, 377. "Summoneantur plegii prædictorum recognitorum," in an assise of the last presentation. Glanvill is silent on the subject. It appears to have been regarded necessary to take pledges at every new stage of the proceedings, to prevent a miscarriage of the proceedings.

by the sheriff to appear upon the day named in the writ, before the king or his justiciars, to hear the answer of the recognition. He was now allowed two essoins, except in an assise of novel disseisin; in which no essoin was permitted. On the third day set, at the latest, whether the tenant were present or not, the demandant, if the finding was in his favour, brought his writ into court and called for the answer of the jurors ("assisam petit"). The presiding judge then asked the tenant if he could show any cause why the assise should not proceed. At this point, supposing the tenant to object to hearing the return, he improves his opportunity to set up matter in avoidance of the plaintiff's case. He of course is unable to plead a traverse: the question of fact raised by the writ has already been found; and the finding is now to be against him if the assise proceeds. He had not in fact, however, traversed the plaintiff's case, or otherwise pleaded; and hence he is now allowed to make his defence, if he has one.

The recognition in ordinary cases, in the time of Glanvill, consisted of twelve persons; and their answer was required to be unanimous. If, upon the return-day, some asserted their ignorance as to the fact in issue, they were set aside and their place supplied by others, until twelve were found who did know of the fact, and agreed upon it. In like manner, if the recognitors disagreed, others were to be added to their numbers until twelve persons were obtained, if possible, agreeing with the one side or the other.[1] Prior to Glanvill's time, the number of recognitors varied greatly, as has been stated, but what the rule as to unanimity may have been does not appear. It would seem, however, judging from the analogy of compurgation and witnesses, that if there was not at least a substantial agreement in the truth of the allegation of the party who had sought the recognition, his case must have failed.

The reason why there were no pleadings before the election of the assise may be conjectured. If the demandant were

[1] Glanvill, lib. 2, c. 17.

then to count, and the tenant to plead, it would result that the tenant would always have it in his power to escape the assise, even though he should merely plead a traverse of the matter submitted by the writ and alleged in the count; for according to the rules of pleading which had prevailed from the earliest times, and still prevailed, the party making the last good pleading was entitled to bring the proof. Hence a traverse of the demandant's case would have ended the assise, unless the tenant now agreed to submit the issue to that mode of trial. He would have the right to require the court to declare the medial judgment, giving him a trial by any mode allowed him by law in an action under the ancient procedure.

Any plea on the part of the tenant upon which an issue could be joined differing from the question which had been submitted to the jurors had the effect of putting an end to the recognition. Among the pleas available for this purpose Glanvill says that the tenant in an assise of the last presentation might admit that the demandant's *antecessor* made, indeed, the last presentation as the real lord and the eldest heir, but that he afterwards transferred the fee, to which the advowson was appendant, to the tenant or to his *antecessores* (predecessors) by a good title. Thus the assise, says Glanvill, was terminated, and a contest made possible upon the new matter. Either of the parties might thereupon have another recognition upon the question of fact now brought in issue. In like manner either of the litigating parties might admit that the other or one of his *antecessores* made the last presentation not as of fee, but as of ward, and might lawfully demand a recognition upon this point.[1]

Glanvill says that in an assise of mort d'ancestor, though the tenant should concede the seisin of the demandant at the time alleged, the assise may still be terminated for many causes. If, for example, it should be alleged by the tenant that the demandant was seised after the death of his father, or

[1] Glanvill, lib. 13, c. 20, §§ 3, 4.

of any one of his ancestors, and while the demandant was in such seisin that he had done some act to debar himself of the right to have an assise, as if he had sold, given, quit-claimed, or otherwise lawfully disposed of the land in question to the tenant; then the assise should end.[1]

What follows is interesting as showing that an assise in which seisin only was in question might terminate in a trial of the right of property. Should such a defence as one of those just mentioned be set up in bar of the assise, Glanvill tells us that recourse might be had to the *duel*, or to any other usual mode of proof consistent with the practice of the court when the *right* to any property is in question. The same is true, he says, in case it should be alleged by the tenant that the demandant had, on a former occasion, impleaded him, when a fine was made between them in the King's Court, or that the land belonged to the tenant by the decision of the duel or by a judgment. Villenage also, if pleaded and proved in court, took away the assise. A plea of bastardy had the same effect. The king's charter also, in which the land in question had been specifically named or confirmed to the tenant, terminated the assise; a fact serving to explain the provision of Magna Charta against the right of the king to disseise his subjects without process of law.[2]

Again, if it were conceded that the ancestor upon whose seisin the demandant founded his claim had a certain limited kind of seisin, such as one derived from the tenant himself by reason of a pledge or loan or something of that sort, the assise terminated, and some other proceeding followed suited to the nature of the new matter.[3] Consanguinity also took away the assise; as where the demandant and tenant were sprung from the same stock from which the inheritance had descended, the seisin of which was in question, and such fact had been pleaded and proved in court. So of a case which showed that the demandant's title had been derived through

[1] Glanvill, lib. 13, c. 11. [2] Ibid. See *ante*, pp. 155, 156. [3] Glanvill, *supra*.

a gift by the eldest son to a younger son, who had died without leaving an heir of his body; since the same person could not be both heir and lord of an estate. The same was true on proof that the demandant was formerly in arms against the king.[1]

The Rotuli Curiæ Regis contain many examples of pleadings of this kind. The following may be presented: Pagan[2] of L. brought a writ[3] of novel disseisin against William M. of his frank tenement in B., and William M. comes and says that the king gave to him all the lands and all the rights of earl Richard de S., with the son and heir of earl Richard, and when he came and received the homage of the free tenants of fee of that honour, no one appeared for that fee (claimed by the plaintiff) and he, William, caused the said Pagan to be summoned upon that fee once and again and a third time to come and do to him what he ought to do, and he came not nor sent anyone for himself, and by consideration of his (defendant's) court that fee was distrained for want of chattels thereon. (Replication, apparently after some interval, in which the action is shifted to meet the plea, the recognition terminating:) And the son of Pagan, put in place of his father, comes and says that when he knew that that fee was taken in the hand of the said William M., he (the son of Pagan) went to him and sought the fee by replevin and could not have it, and he says that he ought not to hold that fee of the said William but of Ralph de la K., and vouches him to warranty, and still seeks the fee by replevin. (Judgment) let him have it by replevin. And day is given them on the day of St. —— in fifteen days, at Westminster, to have then his warranty.

The cases in the Rotuli, however, usually begin with a statement of the appearance of the assise, come to give a verdict, as in the following: The assise[4] comes to report

[1] Glanvill, lib. 13, c. 11.
[2] 1 Rotuli, 62, *anno* 1194.
[3] "Tulit brevem" was used, it seems, in a literal sense at this time.
[4] 1 Rotuli, 74, 75, *anno* 1194.

("recognoscere") if Geoffrey, son of Peter,[1] disseised unjustly and without a judgment the abbot of W. of his frank tenement in W. after the first coronation of the king. Geoffrey says that the assise ought not to be had thereon, because when the king gave the land of earl William de M. the said Geoffrey[2] had that land in his own hand, and he gave it to him, and he made his charter to him to that effect, which he offered, that what he has pertains thereto, and that he had seisin of that land by writ of the chancellor, then justiciar, directed to O., son of William, then sheriff of Essex, who gave him seisin thereof. The abbot says that Geoffrey had seisin in the land of the said earl William at the feast of St. Peter ad Vincula, and that the said Geoffrey afterwards disseised them (the abbot and earl William?), and of this he puts himself upon an assise. The assise is deferred until the octaves of St. Hilary, at Westminster, and then let the parties come to hear their judgment, and let the assise not come.

The following pleadings in an assise de ultima præsentatione are of the same year (1194): The assise[3] comes to report what patron in time of peace presented the last parson to the church of T., which is vacant, as is said, the advowson of which John de T. claims against the abbess and nuns of St. Edward. The abbess comes and says that the assise ought not to be had thereof, because the writ says that legal and free men of the vill of T. only should be recognitors in this assise, and the men are not of the vicinage, as they all are men of the said John who demands the assise. It was considered that the assise thereof terminate, and that John have a writ which speaks of men of the vicinage of T.,[4] and cause an assise to come at the feast of St. Hilary, in fifteen days,

[1] Was this the justiciar, Geoffrey FitzPeter?

[2] There is, apparently, an error in the MS. here, which says "ipsi," and the real meaning is not certain.

[3] 1 Rotuli, 65.

[4] This refers to the writ of enrolment of the names of the recognitors, not to the original writ, which was good.

at Westminster. The abbess puts in her place Gilbert, son of W., to gain or lose, if she were not able to be present.

Another case of the last presentation, in which the recognitors are allowed to answer, *anno* 1198: The assise[1] comes to report what patron in time of peace presented the last parson, who is dead, to the church of B., which is vacant, as is said, the presentation of which Philip de B. claims against the prior of L. The jurors say that Walter, son of P., made the last presentation to that church, in the time of king Stephen, and that he created the first and last parson. It was considered that Philip have his presentation, and that the prior seek his (writ of) right if he wished.

An example of the pleadings in an assise of mort d'ancestor may be seen in the following case of the same year: The assise[2] comes to report if William, father of J., was seised in his demesne as of fee of two carucates of land, with pertinents, in T., on the day of his death, and if he died after the first coronation of king Henry, father of our lord the king, and if the said J. is his nearest heir; which land Thomas, son of W. de M., holds. And the said Thomas comes and says that the assise ought not to be had thereof, because the said J. and his brother *primogenitus* impleaded the said Thomas of the said land by a writ of right; so that by that plea the said piece of land remained to them, and afterwards they took for the said land two marks of silver and one "chazurum," and this he offers to prove against him as (required) by the consideration of the court, but he offered no proof. And J. comes and defends that he had no brother *primogenitus* lawfully born, and that he never in any court quit-claimed that land, nor received two marks or any money for it, and this he offers to prove by his certain freeman. And Thomas said nothing against that defence or offered anything, nor produced a *secta* that the said J. had a brother *primogenitus*, nor any court in which there was a plea between them, nor (said)

[1] 1 Rotuli, 141. [2] Ib. 139.

when any fine was made between them. It was considered that J. have his seisin thereof.

In the following case of the same kind, *anno* 1198, the tenant disposes of the assise as to *himself* by a voucher to warranty: The assise[1] comes to report if William, father of Richard, was seised in his demesne as of fee of three acres of land, with pertinents, in Milton on the day of his death, and if he died after (the king's) coronation ; which land Gilbert, son of A., holds. Gilbert comes and vouches to warranty thereof William, son of R. de C., by his charter which he has and keeps of his gift and warranty. Day is given them at Greenwich on the morrow of St. Leonard. The same day is given (to the assise) to report.

A double voucher to warranty may be seen in an assise of novel disseisin by Ralph C. against William, son of A.[2] The assise having come to make answer, William comes and says that he holds that tenement of Richard T. for a term, and vouches him thereof to warranty, who comes and warrants (it) to him, and says that the assise ought not to be had thereof because the said Ralph is a villein, and that the abbot of St. Albans recovered him in the County Court as his villein, and he vouches the county thereof. The county comes and testifies this. Judgment that Robert (a mistake for Ralph) take nothing because he is a villein, and that he be in mercy for a false claim.

Both of these cases go to show that the mere fact of a voucher to warranty did not put an end to the assise. The vouchee is put into the place of the party vouching, and the assise stands equally ready to report against him ; who may defend against the answer of the recognitors in the same manner as if he were the tenant.

Voucher to warranty, or invoking the defence of a legal "auctor" in reply to an action for the recovery of property *in specie* was probably a primitive proceeding of Germanic law.

[1] 1 Rotuli, 195. [2] Ib. 153, 154.

It is certainly general to the Germanic codes which succeed the Lex Salica. Its application in the earliest times, before land had become the subject of property among the Teutonic peoples, however, must have been chiefly confined to actions for the recovery of personalty. In the period of which we are writing, as well as for centuries before, vouching to warranty was practised alike in actions for the recovery of realty and of personalty. The object of the proceeding in either case, as against the claimant, was to free the defendant from the consequences of the alleged theft in the case of personalty, and of a wrongful occupation in the case of realty. If the vouching was successful, the defendant was saved a mulct for wrongdoing. The object as against the vouchee was, in case the voucher received the property in question from him by a purchase, to require him to protect the defendant in his possession, or, on failure so to do, to compel the vouchee to make him good with other property, if possible, of the same value.

Glanvill has set out the procedure in vouching to warranty of land, in his third book. It was as follows: The presence of another party, he there says, becomes no less necessary than that of the tenant, if the tenant declare in court that the property in dispute is not his own, and that he holds it merely as a loan, or as hired, or as a pledge, or as committed to him in custody; or if he allege that the property is his own, but that he has a warrantor from whom he received it, whether as a gift, or sale, or in exchange, or the like. If the tenant took the latter course, the warrantor was to be summoned (as would be true also under the former course), and the plea commenced anew against him. The tenant, however, was to have a reasonable time allowed him to bring the vouchee into court; and besides he was allowed three essoins as to himself and as many as to his warrantor. When the vouchee now appeared, he might plead in the same manner as the tenant had done; he might declare that the property belonged, or had belonged to

him, or the contrary. In the latter case, the tenant, who had falsely asserted that it belonged to him, should thereby lose the land irretrievably, and be summoned to appear in court and hear his judgment.

If the vouchee took upon himself the warranty, he became thereupon a principal party in the suit, and the remainder of the cause was carried on in his name, and proceeded just as if he were the original defendant. He might himself vouch another to warranty or claim the property as his own by manufacture or rearing, according to its nature. If he declined to assume the warranty, the property, as has been stated, was adjudged to the demandant; and the plea of warranty now proceeded between the voucher and the vouchee. The matter might thus come to the decision of the duel if the tenant were prepared with a lawful witness to make proof, who was willing to undertake it; or if the tenant had a charter, the case could be decided by that. If the tenant now prevailed, the vouchee was bound to give him an equivalent to the property lost, supposing the vouchee possessed the means.

If it happened that the warrantor failed to appear at the summons of the defendant, the latter had a writ directing the sheriff to summon him. The warrantor might now essoin himself until the fourth day, when he was bound to appear or send an attorney. If he did neither, the tenement was taken into the king's hand, notwithstanding the hardship (not overlooked by Glanvill) to the tenant who was not yet in default.

It was always advisable for the tenant to vouch his warrantor, for otherwise, if he took it upon himself entirely to dispute the demandant's claim, whether by the duel or by the Grand Assise, as he might do without his warrantor, and failed, he could make no claim against the warrantor.

Sometimes the demandant claimed the land as the fee of one lord and the tenant as the fee of another. In such a case both the lords were to be summoned into court, that no

injustice might be done them in their absence. They also had their three essoins, after which they must appear or send an attorney; otherwise, in the absence of the tenant's lord, the case proceeded without him. The result was that if the tenant then prevailed, he was now to hold of the king for the default of his lord until the latter made good his default. If the lord of the demandant finally absented himself after his essoins were exhausted, or without essoining himself, it became a question what should be done. Glanvill, however, says that if he had essoined himself, the essoiners should be taken into custody and the demandant himself attached for his contempt of court, and thus compelled to appear and excuse himself if he could.

If the lords both appeared in court, the tenant's lord took the place of the tenant in the pleading, in case he assumed the warranty, or he entrusted his case to the tenant, as he was disposed. If the lord declined the warranty, the tenant lost the land, and the lord lost the latter's services. So, too, the matter might be interpleaded between the tenant and his lord, provided the tenant declared that his lord had unjustly failed of the warranty; unjustly for this reason (as his complaint proceeded to state) because he or his ancestors had performed such and such services to the lord or his ancestors, as lords of that fee, adding that of this fact he had those who had heard and seen it, and in particular a competent witness to prove it, or some other sufficient testimony ready to be adduced as the court should direct.

A similar proceeding prevailed as to the demandant's lord. If he assumed the demandant's warranty, he could take up the cause or leave it to the demandant. If he declined to warrant the claim of the demandant, the latter was to be amerced to the king for a false claim.

It should be added that at this time the right of voucher did not depend upon the existence of any actual warranty in the modern sense. It arose upon the mere ground of lawfully

(i.e. innocently) receiving property from another ; the person who delivered it to an innocent party being always bound to protect that party in respect of his possession. This was the meaning of warranty from the earliest times until long after the Anglo-Norman period. It was perhaps a survival of the ancient notion of warranty that always found a warranty implied in the "dedi" of a feoffment.

The proceeding by which a tenant put himself upon the king's Grand Assise, to test the right of property by a jury, instead of by the duel, was accompanied by a writ in which the sheriff was commanded to prohibit the demandant from subsequently impleading him in the local court, when the cause had been instituted there as by a writ of right.[1] The election of the assise is shown by the following case, as well as by Glanvill: Roger, son of E.,[2] Albric de H., Luke de L., and William de P.—summoned to elect twelve knights of the vicinage of T. for making a Grand Assise of one carucate of land, with pertinents, in T., which H., bishop of Exeter, claimed against Robert B. and Emma, his wife, as to which Robert and Emma, his wife, put themselves upon a Grand Assise, and demanded record to be made thereof whether the said bishop had the greater right of holding that land in demesne, or they (to hold) of him—came and elected the following (here are given the names of twenty knights[3]). A day is given them at the advent of the justiciars in those parts. Emma puts in her place Robert, her husband, thereof to gain or lose.

What happened in case of the non-appearance of the tenant by the fourth day, for the election of the Grand Assise, may be seen by the following case of the year 1198: Geoffrey,[4] son of S., and Agnes, his (G.'s) wife, plaintiffs, offer themselves

[1] Glanvill, lib. 2, c. 8. See App. No. 56. [2] 1 Rotuli, 140; Glanvill, lib. 2, c. 11.

[3] This is explained by Glanvill, who says that it was usual, in the absence of the tenant from the election, not to confine the number to twelve, but to elect as many more as would certainly satisfy the absent tenant upon his return to court.—Lib. 2, c. 12, § 2. [4] 1 Rotuli, 199.

on the fourth day against Richard B. and Lecia, his wife, tenants, of a plea of electing twelve knights for making a Grand Assise of half a virgate of land, with pertinents, in B., as to which the said Richard and Lecia, tenants, put themselves upon the Grand Assise of our lord the king, and demanded a recognition to be had thereof whether they had the greater right in that land or the said Geoffrey and Agnes. Richard afterwards comes and defends all summons for himself and for his wife, who came not nor essoined herself. Judgment, let Richard wage his law with the twelfth hand at Greenwich, and let Lecia be summoned that she be there to show why she did not keep the day given her in the advent of the justiciars in Essex. The same day is given to Geoffrey and Eustace, son of E., "in banco," and Ralph de O. by his essoiner, and Robert of L. is attached to be there then to show why he did not keep his day, and for electing the twelve knights together with the said three knights.

The following case shows the result of a default of the demandant at the time for electing the Grand Assise: Emma de R.[1] offers herself on the fourth day (after the day for the election) against Robert de B. concerning a plea of the Grand Assise of four carucates of land, with pertinents, in R., and he came not nor essoined himself, and he was demandant. Judgment, let her go quit, and Robert be in mercy for his default.

These cases furnish occasion to remark upon a difference which prevailed in respect of the election of the assise in possessory actions and in the Magna Assisa. In both cases the election is, indeed, held at the instance of the demandant; but the situation is wholly dissimilar in them. In the possessory recognitions it is the demandant who has sought the assise; and he is therefore expected to be present, while the tenant must be formally summoned. In the case of the Grand Assise, however, it is the tenant, ordinarily, who has sought

[1] 1 Rotuli, 334, *anno* 1199.

the recognition; and it would seem that he should be expected to be present at the election, and that the demandant should be summoned. On the contrary, however, as we have just stated, the demandant calls, not indeed for the assise, but for the election; and the tenant must be summoned as in the other case. The proceeding is this: The tenant (e.g. in a writ of right) puts himself upon the Grand Assise, and then sues out process of prohibition against proceedings in the local court. He is then protected until the demandant appears in court and prays a writ requiring the election of the assise by the four knights.[1] This writ (like the writ in the possessory recognitions) requires also the summons of the tenant to be present at the election.[2] Another difference now appears. The absence of the tenant from the possessory recognitions, it will be remembered, had not the effect of postponing the election; no essoin being allowed. But in the Magna Assisa, owing probably to the greater significance of the trial, essoins were allowed the tenant to the number of four by the old practice, and to the four knights also there might be at least one essoin. Glanvill, however, tells us that a law had been passed by which the court was authorised, in its discretion, to expedite the cause, and permit the election to proceed on the appearance of the four knights, whether the tenant were present or not.[3] It may be added that the four persons named at the close of the last case but one appear to be the four knights. The failure of the demandant to appear at the election, it may also be noticed, would result in leaving the tenant in lawful possession, protected as he would be by his writ of prohibition. Whether the demandant could essoin himself from the election is not stated. He might essoin himself from the return-day of the assise; though the tenant could not.[4]

The following is a return of the Grand Assise: The Grand

[1] Glanvill, lib. 2, c. 10. Sometimes there were six or more instead of four. Ib.
[2] Ib. c. 12. [3] Ibid. [4] Ib. c. 16.

Assise[1] comes to report if Wido de O., tenant, has the greater right of holding two virgates of land, with pertinents, in (a cause in) the court of Baldric, son of B., who claims them against him by a writ of right, or Baldric (holds them) in demesne. The jurors say that Wido has greater right of holding that land of him than Baldric in demesne. Judgment that Wido hold in peace and Baldric be in mercy for a false claim, and receive the homage of Wido thereof in his court.

The tenant might object to the return of the Grand Assise as well as to that of a common assise. It was a valid objection, for instance, that the parties were of the same blood and sprung from the same kindred stock from whence the inheritance (supposing the suit to relate to land) itself descended. If the demandant took this objection, the tenant must have admitted or denied it. If he admitted it, the right to an assise was lost. A question then arose for determination within the court, as Glanvill tells us, which of the parties was the nearer to the original stock.[2]

The statement by Glanvill which follows is also interesting as bearing upon a subject already considered, the burden of proof. One of the parties having shown to the court upon legal inquiry that he was the nearer to the original stock, he was entitled to furnish proof of his title, *unless* his adversary could allege some good reason why the party had lost his supposed right, whether for a time or for ever, or show that his ancestor had done so; as by a gift, sale, or exchange of the land.[3] The proof belonged to the party who had made the last good allegation. If the adverse party set up any fact sufficient to repel the presumption of title raised by the evidence of nearness of kin, the matter might by force of the pleadings be determined by the duel.[4]

[1] 1 Rotuli, 329, *anno* 1199.

[2] According to Beames, Glanvill even calls this a question of law (Beames's Glanv. p. 51); but that is a mistranslation. The expression is "tunc legitime inquiretur," which of course only means that the matter shall be lawfully examined.

[3] Glanvill, lib. 2, c. 6. [4] Ibid.

If the party who had put himself upon the assise denied all relationship between himself and the demandant, or if he insisted that they were not sprung from the same stock from which the inheritance descended, recourse was to be had to the common kindred of both parties, who were to be called into court to give testimony upon the point in issue. If the relatives agreed in affirming that the parties were descended from the same stock from whence the inheritance came, this was conclusive; unless the party against whom they had decided persisted in his assertion. In that case recourse was to be had to the vicinage, whose testimony, if on the same side with that of the neighbours, was decisive. If there was a disagreement of the relatives, recourse to the vicinage was necessary; and the parties were to abide by the verdict given.[1]

The inquisition having been made, if the parties were found to have sprung from the same stock from which the inheritance came, the assise was at an end, and the question proceeded as has been stated *supra*, in speaking of the burden of proof. If the contrary were found, the demandant who had taken the objection to the assise lost his suit. If, however, nothing intervened after the defendant had put himself upon the king's assise, the question of right was settled as effectually as it could be settled by the duel.[2]

Suit could be instituted in the popular courts, and as yet in the Eyre, after the ancient practice, without a writ; and when so instituted, even in a cause embraced within the scope of the recognitions, pleadings were necessary at the outset. But now, if the cause were one proper for a recognition, the *tenant* had the right to put himself upon an assise of the neighbourhood, if the demandant did not elect an allowable mode of trial; and this, too, without putting himself upon the Grand Assise. This is a most interesting phase of the procedure. Cases of this kind show the adjustment of the new

[1] Glanvill, lib. 2, c. 6. [2] Ibid.

procedure of Henry the Second to the ancient procedure of the kingdom. The old plaint is retained, and with it the old plea; the latter being supplemented with, or changed at the conclusion by, a demand for a recognition.

The following is an example of this mode of pleading: Joanna,[1] who was wife of Henry de L., complains that Reginald de B. disseised her of half a virgate of land, with the pertinents, in L., after the justiciars itinerant were last in those parts. And Reginald comes and defends that he did not disseise her thereof, as she says, and of this he puts himself upon a jury of the neighbourhood. And the said Joanna in like manner puts herself upon a jury of the neighbourhood. Day is given them for receiving the assise in the octaves of St. Hilary, at Westminster.

The significance of the pleadings in this case cannot be overlooked. The plaint and plea are so suggestive of later pleading that the evidence of the record itself is necessary to assure a lawyer of the present day that it is of the time of Richard the First; and on the other hand there is good reason to believe that, apart from the tenant's act of putting himself upon a recognition, the pleadings were not different from those of the time of the Conqueror or of his predecessors. The teaching of this case, as to the continuation of the ancient formulæ, in connection with the new process, might probably be enforced by other records of a like nature.

The following example of (it seems) the ancient procedure in a case of disseisin, in which the new process makes no appearance, may be referred to: Moses,[2] who was prior o Coventry, and the convent of the said place seek their seisin of the barony of Coventry, which he (M.) held in the time of king Henry, father of king Richard, and after the first coronation of king Richard, and of which they were ejected, after the first coronation of king Richard, by force and with-

[1] 1 Rotuli, 55, *anno* 1194.
[2] Ib. 3, *anno* 1194; Abbreviatio Placitorum, 5.

out judgment, against the canons of Coventry, and whereof the said prior did homage to our lord the king. And the canons came and said that they did not hold (any) of the barony unless in frankalmoign, and if they held anything of that barony, that was in the hand of another and not in theirs. And because they hold nothing unless in frankalmoign, they demand a trial in the Court Christian, and are not willing to answer thereof unless in the Court Christian, by the consideration of the court. Day is given them on the sabbath next after the feast of St. Edward, in fifteen days, at Westminster, to hear their judgment.

The plea to the jurisdiction appears to have been overruled, for the Rotuli contain another entry, within six weeks, of the appearance of an assise to report whether the defendants had unjustly and without a judgment disseised the plaintiff.[1] The defendants must therefore have put themselves upon a jury, after the plea to the jurisdiction was overruled, as in the preceding case *supra*, or the pleadings which we have just quoted must have been had under a writ of novel disseisin, on the appearance of the assise; of which there is no evidence, and against which the presumption from the record is strong. A writ of novel disseisin, however, may have been obtained by Moses after the foregoing pleadings; but it would be difficult to understand the step.

These records illustrate the pleadings in real property actions of the last half of the twelfth century. It remains to present examples of the pleadings in appeals of robbery, assault and battery, trespass to property, and demands of debt. In these will be found the originals of such of the like common actions of modern times as antedate the Statute of Westminster II. (*anno* 1285), under which actions

[1] 1 Rotuli, 66; Abbrev. Plac. 5. The first pleading in the Abbrev. Plac. closes with a statement that pledges were given by both sides, which, if given after the pleading as indicated, would imply that the suit was begun without a writ. The demandant's pledges must have been given before the pleading, if he sued under the recognition process.

on the case arose; to wit, the various forms of trespass, and the actions of debt, detinue, and covenant. It is hardly necessary to say that actions for unliquidated damages for the breach of promises to do or not to do acts not relating to the *tenure of land*, were as yet unknown to the English law. The pressing occasion for such actions had not yet arisen. All obligations solvable in money, in chattels, or in services, at this time were *real* obligations, incurred in return for a *thing* received. Breach of contract of sale made no exception to this rule. The contract was not enforceable without a delivery of the property or payment of the price in whole or in part or the giving of earnest. Then the property passed; and if it had not been delivered, the purchaser sued for the possession, or the vendor for the price if it had been delivered. The purchaser who had given earnest might, however, depart from his engagement by abandoning the earnest; probably incurring a penalty.[1] Breaches of engagement of fealty, not entered into by reason of tenure, were treason.

In the Case of Gilbert de Plumpton,[2] tried in the King's Court *anno* 1184, Glanvill, perhaps on behalf of the king, appeals (or procures the appeal of) the defendant of carrying off and marrying a young heiress in the gift of the king, and of breaking several gates and carrying off a hunter's horn at the same time; charging the whole to have been done in larceny and robbery. The precise form of the appeal is not given in the record; but the language preserved is technical and doubtless gives the substance of the formula. Glanvill, says the record, was urgent that the defendant should be condemned to death; "imponens illi quod ipse puellam quandum de donatione regis, filiam R. de G., rapuit et sibi in uxorem retinuit; et quod per noctem fregit sex portas patris ipsius puellæ, et abstulit ei unum cornu venatorium et unum capistrum etc., et prædictam puellam. Adjecit etiam

[1] Glanvill, lib. 10, c. 14. [2] Placita Ang.-Norm. 233.

quod hæc omnia in latrocinio et roberia asportavit." But the said young man "omnia quæ ad vim et latrocinia et roberiam pertinebant, modis omnibus, defendebat, et super hoc se juri stare obtulit."

The prototype of an action of trespass de bonis asportatis may be seen a shade nearer in the case of Hubert of St. Q. v. Stephen of F.,[1] *anno* 1194. The record states that Hubert appeals Stephen and others that they came into his land at B. "cum vi et armis et robberia," and craftily and against the king's peace carried off his chattels, to wit, turf to the value of sixty shillings, and took the same into the court of the said William (one of the defendants); and this he offers to prove by W. N., who was *custos* of the said land, against the said William and by R. de St. M. against Robert (another defendant) who saw him in "in vi illa."

The sheriff testifies that he could not find Stephen; but William comes and defends the felony and robbery and everything word for word, and says that the turf which he carried away he carried away from his own frank tenement and fee, and not from the fee of Hubert. Hubert replies to the latter part of the plea that he had dug and made the turf after the king set out from Germany, freely, in peace, and without any claim made by William, but that after the king crossed into Normandy, William had carried it off. The other defendant, Robert, defends the whole appeal, word for word.

When anyone was charged with the commission of a high crime, such as plotting sedition or the king's death, and was accused by the public voice, and not by an appellor, he was either attached by proper pledges (bail) or imprisoned. Then the truth was inquired of by many and various inquisitions and questions before the justiciars, of the men, no doubt, of the vicinage; the court taking into consideration the reasonable indications and the suggestions making for and against the accused.[2] This was for the purpose, it seems, of deter-

[1] Placita Ang.-Norm. 285. [2] Glanvill, lib. 14, c. 1.

mining whether there was a sufficient presumption against the party to justify the court in sending him to the ordeal; to which, when there was no appellor, persons sufficiently accused must go if they disputed the accusation. The result of the inquiries thus made by the judges, if they appeared to sustain the accusation, corresponded to the finding of the twelve legal men or knights under the Assises of Clarendon and Northampton, if indeed the inquiries were not prosecuted by reason of the presentation by one of the same bodies of men.

If, however, an appellor ("a certain accuser") appeared in such a case, he was to be attached by pledges to prosecute, if he could find pledges; if not, he was to be taken at his word, as was also true in all cases of pleas of felony. Indeed, it was the usual course to trust to the party's promise to prosecute, lest men should be deterred from making accusation. The accused was then, as in the other case, attached by pledges or cast into prison.[1] The usual essoins having been cast, the parties appear, and the accuser prefers his charge; as that he had seen, or by other mode approved in court most certainly knew, that the accused had plotted or done something towards the king's death or to promote sedition in the kingdom or army, or to have consented or to have given counsel or delegated authority towards such object, and that he was prepared to prove this according to the consideration of the court. Then if the accused denied everything in court in legal manner, the issue went to the decision of the duel, unless the accused was incapacitated by sex, age, or mayhem.[2]

The following pleadings in common criminal appeals are from the Rotuli Curiæ Regis:

William de R.[3] appealed Adam of T. that he threatened him, and that by him and of his sending were burned the houses of Richard, his father, and their arms were carried off

[1] In cases of homicide, pledges were not permitted: Glanvill, lib. 14, c. 1, § 4.
[2] Ib. §§ 5-8. See also upon this subject Bracton, 118 b, 119, to the same effect.
[3] 1 Rotuli, 29, *anno* 1194.

and the men within the houses slain, to wit, Ralph, the reeve, and Geoffrey, a deacon, and a certain woman Lenio, and that those malefactors who did this deed came from his house to the doing that deed, and to his house returned, and this he offers to prove against him by the consideration of the court, by his body, and he found pledge of prosecuting his appeal, to wit, Richard, his father. Adam comes and defends the whole, word for word, according as the court considered.

Richard de W.[1] appealed Reginald de A. and Roger, his brother, and Henry de M. and Walter, a clerk, that they willingly and being in the peace of our lord the king and by night and by a premeditated attack upon his inn in his land of (an omission), and wounded him and broke his bones, and carried off his chattels and two of his men murdered, and carried off "in saccos" certain rustics slain as his men, and this he offers to prove against them as a maimed man and a clerk in orders, but he showed no mayhem.[2]

Toui,[3] son of T., appealed Robert that being in the peace of the king he wounded him upon the head and robbed him of a cap of the price of five shillings and sixpence, and offers to prove (this) against him by his body. Robert comes and defends all, word for word. Day is given them on the day of St. Martin . . . . and meanwhile they have license of concord. And let there be an inquisition in the county whether the wounds were reasonably shown in the county, as he says.

In the following case the appellee, a woman, offers to defend her denial by the duel, if necessary, against one of her own sex; who of course would do battle by champion, if the duel were awarded by the court. Sarra de B.[4] appealed

[1] 1 Rotuli, 60, *anno* 1194.

[2] The meaning of this may be that, besides wishing to avoid the duel, the appellor had no witnesses or compurgators, and attempted to make a presumptive case against the defendant by alleging that he had been wounded; and this would have been effectual, had he been able to show the wounds. If he had sought only to escape the duel, it would have been sufficient for him to claim the privilege of his order.

[3] 1 Rotuli, 316, *anno* 1199.

[4] Ib. 77, *anno*, 1194.

Constance, who was wife of M., her son, that by her consent, and at her instance and request, malefactors came to the house of William, her husband, and wounded her, so that she was made bloody, and they committed robbery, and she showed the blood to Reginald and to the archbishop of Rouen, and this she offers to prove against her as a free woman, as the court may consider. Constance comes and defends all, word for word, by herself if she ought, or by others her free men, if the court so considered.

The Norse formula of notice of suit[1] in the case of Mord v. Flosi, already stated as to the preliminary extrajudicial proceedings, will close the consideration of the subject of criminal pleadings. It was as follows: Then Mord took witness (at the Hill of Laws, before the Thing) and said: "I take witness to this that I give notice of an assault laid down by law against Flosi, Thord's son, for that he rushed at Helgi, Njal's son, and dealt him a brain, or a body, or a marrow wound, which proved a death wound, and from which Helgi got his death. I say that in this suit he ought to be made a guilty man, an outlaw, not to be fed, not to be forwarded, not to be helped or harboured in any need. I say that all his goods are forfeited, half to me and half to the men of the quarter, who have a right by law to take his forfeited goods. I give notice of this suit for manslaughter in the Quarter Court into which this suit ought by law to come. I give notice of this lawful notice; I give notice in the hearing of all men on the Hill of Laws; I give notice of this suit to be pleaded this summer, and of full outlawry against Flosi, Thord's son; I give notice of a suit which Thorgeir, Thorir's son, has handed over to me." The formula is then repeated with the change of stating the wounds first and the assault second; and the case was then properly before the court. Flosi listened carefully (to detect any flaw), but said never a word the while.

[1] The subsequent pleadings are, for convenience, reserved for chapter ix.

Many other suits were then entered relating to the same feud and catastrophe; a whole day being thus occupied. One of these suits was by Thorgeir Craggeir, next of kin of the family of Njal, who thus declared: "I take witness to this, that I give notice of a suit against Glum, Hilldir's son, in that he took firing and lighted it, and bore it to the house at Bergthorsknoll, when there were burned inside it, to wit, Njal, Thorgeir's son, and Bergthora, Skarphedinn's daughter,[1] and all those other men who were burned inside it there and then. I say that in this suit he ought to be made a guilty man, an outlaw, not to be fed, not to be forwarded, not to be helped or harboured in any need. I say that all his goods are forfeited, half to me and half to the men of the quarter, who have a right by law to take his forfeited goods; I give notice of this suit in the Quarter Court, into which it ought by law to come. I give notice in the hearing of all men on the Hill of Laws. I give notice of this suit to be pleaded this summer, and of full outlawry against Glum, Hilldir's son."

The defence depended entirely upon detecting error in the pleading of the plaintiff; there being no dispute as to the facts or the liability of the defendants. But no error was to be found, and the cases now stood for trial, without answer.

Examples of pleadings in England in actions for debt may be seen in the following cases, also from the Rotuli Curiæ Regis:

Elias de H.[2] demanded forty shillings rent *per annum* in K. and in B. against J. de A., which he ought to pay him annually on account of a fine made between the said J. and Thomas, father of Elias, in the court of king Henry, father of our lord the king, for six bovates of land and for a mill in S., which Agnes de A. holds for her life, and again ought the said Elias to have the said forty shillings, and he produces a chirograph which testifies this. And the sheriff testifies by his writ that the forty shillings' rent was taken into the hand

[1] Skarphedinn was a son of Njal.

[2] 1 Rotuli, 90, *anno* 1194.

of the king on the day of Venus next after the feast of St. Edmund by default of the said J. against the said Elias, and J. came within fifteen days and sought the said forty shillings' rent by replevin. It was considered that J. have by replevin the forty shillings' rent, and a day is given them on the day of St. Hilary in fifteen days, and in the meantime they have license of concord, and J. puts in his place for receiving the chirograph Hugh de B. or Ralph le F., and Elias puts in his own place in respect thereof Geoffrey de H.[1]

Humfrey de W.[2] demanded against Roger C. five shillings' rent and threepence in B. as his right and inheritance, which Warin, his father, loaned to William C., father of the said Roger, in the time of king Stephen, for a term which is passed as he says. Roger comes and defends his right and that loan, and says that he holds that rent as his inheritance and his own frank tenement, and offers to defend by Peter de W. as the court considered as (of a matter) " de longo tempore."

The nuns of H.[3] demand against Fulc, son of T., two marks' rent, to wit, one mark in E. and one mark in S., which Eustace de B. was wont to pay, which (marks) T., his father, gave them in frankalmoign and confirmed by his charter, which they produce. And Fulc comes and says that his father was seised thereof on the day upon which he was alive and dead, and he (Fulc) never had[4] seisin thereof, and that his father gave more than sixty shillings, the last third of all his land (to the plaintiffs), and he demanded judgment of the court whether he ought to warrant gifts of this kind, and besides he says that his sister was "familiaris" to his father, and had his seal at her pleasure, that she was a nun at H., and could seal what she would, and he did not defend (i.e. deny) the charter. They made a concord.

[1] It will be observed that, so far as the record goes, the procedure is the same as that described *ante*, p. 221, in an action for the recovery of land.

1 Rotuli, 410, *anno* 1199. [3] Ib. 427, *anno* 1199.

[4] There seems to be a mistake in the MS. or printed text. The latter reads "ille . . . . hũunt."

In the following case it will not be difficult to find a suggestion, if needed, of detinue, though the meaning of the plea is not clear: Richard de W.[1] puts all his land and whatever he has in pledge to convict Henry de M. that his (Richard's) brother handed over to him a war-horse on his march to Jerusalem, which he thus far detains. Henry defends and says that he gave to his own lord a palfrey for his march and his lord gave to him a trotting pack-horse. Pledges of Henry for standing to right (i.e. proving his plea), Roger E. and Albin.[2]

Apart from the medial judgment, it often happened that judgment was rendered at the issue term. Certain criminal cases in which the accused was at once put upon trial have already been mentioned.[3] There were three other classes of cases; first, confession of judgment by either party; secondly, judgment against a *plaintiff* for default of appearance; thirdly, judgment upon issues of law and upon such issues of fact as the court were competent to decide, when the court were prepared to decide them at once.

No reference to authority is needed to show that judgment might be confessed at the first term; but the records contain some striking examples, two or three of which, as serving to bring the procedure into clear outline, may be presented. Of these the case of Abbot Faritius v. William, the King's Chamberlain,[4] of the time of Henry the First, may be mentioned.

The defendant was tenant of plaintiff by knight service, and having failed to furnish his man when required, the abbot brings suit for the land held by him. To this end he brings forward his witnesses in the usual way, at the issue term (at least there is nothing to show that this was at the trial term),

[1] 1 Rotuli, 6, *anno* 1194; Abbrev. Plac. 5.

[2] If Richard's brother was Henry's lord, the meaning of the plea seems to be that Henry and Richard's brother simply exchanged horses.

[3] *Ante*, p. 229; Laws Hen. I. c. 47.

[4] Placita Ang.-Norm. 75.

to show that the land had furnished a knight in the time of the Conqueror; and his case was so strong that the defendant could not deny the allegation; and the plaintiff had judgment at once.[1]

About the year 1158 abbot Walkelin sues Turstin Basset, alleging that the latter has disseised him of a certain tithe, and summons him by the king's writ. Upon the reading of the writ, the plaintiff brings "the testimony of the whole county," which the defendant does not venture to deny, and judgment is given in favour of the plaintiff without further delay.[2]

In the case of the Abbot of St. Augustine v. Men of Thanet,[3] *anno* 1176, the plaintiff relies upon a former judgment in his favour as to the point in dispute; which the defendants are compelled to admit, and the plaintiff has judgment.

Not far from the year 1154, Robert de I. sues the abbot of Battel for trespassing upon land alleged to belong to the plaintiff and carrying off hay thence. This land had been laid off to the abbot in a trial that had just occurred with Gilbert de B.; and Robert of I. claimed that the boundaries had been improperly set and that part of his land had been given to the abbot. The abbot denies the claim and assertion, bringing to court with him the men who had laid off the boundaries, "iterato sacramentum præstare parati, se non quidem amplius, quinimmo ne sacramenti præstiti viderentur transgressores, minus justo suo ambitu conclusisse." This was, of course, sufficient to give the abbot the proof at the trial term; and the plaintiff thereupon secretly leaves the court and takes to flight, being adjudged guilty of a false plea.[4]

An important example of the year 1147 is furnished by the case of Bishop Ascelin and the Monks of St. Andrew;[5] a case showing that a bad plea might be treated as confession of judgment. The latter asserted that certain manors had

[1] See also the two following cases, ib. pp. 76, 77. [2] Ib. 197. [3] Ib. 224.
[4] Ib. 179. The plaintiff's flight is stated in the chronicle of Battel Abbey.
[5] Ib. 160.

been granted them by William the Conqueror, and by archbishop Lanfranc and bishop Gundulf; and they produced their charters in support of their allegation. Bishop Ascelin being unable to make any good and valid answer ("nichil firmum, nichil validum responderet"), judgment is at once given in favour of the monks.

The second class of cases, in which judgment is given for the defendant for default of appearance of the plaintiff, deserves some comment. The judgment was that the defendant go without day, and that the plaintiff and his pledges be in mercy for failure to prosecute. As a consequence of this judgment the pledges were attached to show cause at a day stated why they had not their man in court at the appointed time. This judgment the defendant was entitled to, as we have seen, upon the fourth day after the day set for appearance. A single example will serve sufficiently to enforce the right of the defendant and the consequences which befell the defaulting plaintiff and his sureties. Henry, son of W.,[1] and Hugh, son of B., and Ralph, his son, offered themselves on the fourth day against William de C., concerning a plea of appeal "de pace domini regis infracta," of which the said William appealed them, and he (William) came not or essoined himself, and a day was given to him (to answer for the default) before the justiciars at Northampton. Judgment that Henry, Hugh, and Ralph go quit, and that William be in mercy, and also his pledges, to wit, Godfrey de B. and Salædin de H.

The judgment, however, did not touch the merits of the demand, and the plaintiff, upon excusing or purging himself of his default, was permitted to renew his suit. This appears from the many entries in the Rotuli, some of which have already been quoted, in which the judgment declares that the defendant shall go without day, and the plaintiff shall have such recovery as he ought to have. A single example may be

[1] 1 Rotuli, 29, *anno* 1194.

here added. Day[1] was given to Alexander A. (plaintiff) and to William de C. (defendant) concerning a plea of the Grand Assise of a knight's fee in G. at the feast of St. Michael in fifteen days, and it was ordered that the assise come then, and at that day came William, and he waited until the morrow of the feast of (All) Souls, and Alexander came not nor essoined himself, and thereupon it was considered that William go without day, and that Alexander, who is plaintiff, have such recovery as he ought to have.

In the third class of cases a decision is reached at the issue term by reason of the pleadings raising a question of law or some question of fact which properly belonged to the court to decide. The case of Archbishop of Canterbury v. Abbot of Battel Abbey,[2] *temp.* king Stephen, turned upon a question of law, and was decided (without appointment of a trial term) just as a modern case of the kind would be decided, by a submission of the point of law in the question to the determination of the court, and not to some test imposed upon the parties. The defendant had seized upon wreck, in accordance with the ancient law of wreck as it had prevailed before the modification made by Henry the First. If the modified law still prevailed, the defendant was liable; if the old law, he was not. The defendant contended that with the death of Henry, Henry's law failed, and the ancient common law prevailed; and the court ruled that way.[3]

At the beginning of the reign of Henry the Second the abbot of Battel brought an action against Gilbert de Baillol for the recovery of certain lands, of which he alleged that the defendant had unlawfully disseised him. The plaintiff sets up title under charters; whereupon the defendant, observing that some of them are without seals, raises an objection, which

[1] 1 Rotuli, 24, *anno* 1194. [2] Ib. 143.

[3] There was indeed a second term in this case, but that was caused by a judgment by default at the first term, which default was now set aside. The term was not a trial term. For another case turning upon a point of law decided by the court, see Abbot of Abingdon v. Anskill, Placita Ang.-Norm. 62.

is overruled. No other defence being made, the plaintiff recovers judgment at the same sitting.[1]

Afterwards in Abbot of Battel v. Alan de B.[2] already referred to, the plaintiff claims the right of presentation to a certain church. The defendant sets up title under a charter purporting to have been executed by a predecessor of the plaintiff. The plaintiff questions the genuineness of the charter, and the whole court advise a compromise; which is agreed to, and compromise is drawn up at once.[3]

[1] Placita Ang.-Norm. 175. [2] Ib. 245.

[3] Comp. also the result of the plea of Ganelon, who is represented in the Chanson de Roland (latter part of the twelfth century) as appealed of treason by Charlemagne for the death of Roland. His answer is that Roland had done him wrong, whereupon he had renounced his fealty to him and given him the *diffidatio* (defiance), and hence, as he alleged, his offence could not be treason. "We shall take counsel of the matter," said the judges.—Chanson de Roland, 348 (Gautier). The judges were about to accept the plea, but the emperor virtually required them to overrule it.—Ib. 350.

CHAPTER VIII.

THE MEDIAL JUDGMENT.

THE parties having joined issue, the next step in the proceedings was what may be called the medial or proof judgment;[1] a step known in survival to living memory. Compurgation was abolished by act of Parliament in the year 1836; and the ancient right of trial by battle, after having long been forgotten, was successfully invoked in the year 1819,[2] and abolished in the following year.

This medial judgment was pronounced at the issue term, and is to be sharply distinguished from the final judgment pronounced at the trial term after the question at issue had been decided. The medial judgment merely determined what should be done upon the issue joined, when it should be done, and by whom it should be done. If, for example, the plaintiff had, in conformity with the law applicable to the particular case and to the parties, offered to prove by his witness and champion the claim set out by him and traversed by the defendant, the court, through the presiding judge, directed that security should be given and the duel waged at a subsequent day named (the trial term), between the plaintiff's champion and the defendant. If the ordeal were tendered, and

[1] The "Beweisurtheil" of the German writers.

[2] Ashford v. Thornton, 1 Barn. and Ald. 405.

the case were proper for that mode of trial, the judge set a day for the test and directed the party to give security to undergo the same. If the plaintiff or the defendant, upon a valid plea, had offered to prove his allegation by charters, the court required the giving of security for the production of the charters upon a day named; the judgment often providing for the production of charters by both parties. In case proof was offered properly, either by compurgators or by witnesses, the precise question in issue was set out by the court, and the person who was to sustain the burden of proof (the one who had made the last good allegation) was required, upon giving security, to appear upon a certain day with his compurgators or with his witnesses, and sustain the allegation in question. If the king or his justiciar had ordered a recognition, the writ stated the question to be answered, and, after security given, required the recognitors to be summoned to testify of the matter upon a day named.

Frequent examples of this step in the procedure occur in the records of the eleventh and twelfth centuries. In a case already referred to, Bishop Wulfstan v. Abbot Walter,[1] the record states that at a great assembly in Worcester, convened for the trial of this case, claim was made by the plaintiff to certain services, and witnesses offered who in the time of Edward the Confessor had seen and undertaken the said services on behalf of the bishop. This was denied by the defendant; and thereupon by order of the king's justiciar and the decision of the barons, the case went to judgment, i.e. to the medial judgment. "And because the abbot said that he had no witnesses against the bishop, it was adjudged by the wise men that the bishop should name his witnesses and produce them upon a day appointed, and by oath prove his words;" the abbot to bring such relics (for the bishop's witnesses to swear upon) as he could. Here will be distinctly seen the burden of proof, the theme of proof, and

[1] Placita Ang.-Norm. 16.

the time for making the proof. Whether security was required does not appear. The position of the plaintiff may have exempted him from giving it.

In the case of Modbert v. Prior and Monks of Bath[1] the plaintiff laid claim to certain land at Bath, to which the defendants claimed title, deraigning the same and offering witnesses present in court. This was sufficient to entitle the defendants to go to the proof; but their claim was violently opposed in the court, and an uproar followed. Besides, the plaintiff had come into court with a writ of seisin from the king's son, which, however, the presiding judge interpreted as merely intended as an alternative mandate, authorising, in case of refusal, a trial of the claim. The plaintiff insisted upon his claim; and the result at last was that, at the suggestion of the presiding judge, certain impartial senior men of the court went apart to consider of the matter. Upon their return it was announced that the plaintiff must, in support of his claim, name at least two free and legal witnesses from the *defendant's convent*, or a charter truly executed, and produce the same upon the eighth day thereafter; a judgment which the plaintiff could not perform.

The medial judgment is suggested by a single expression in the Case of Henry of Essex,[2] appealed *anno* 1163 of treason. The record states that the defendant, having denied the charge, "a short space of time afterwards" went to the duel. So in the Case of Ailward,[3] the defendant having been cast into prison on a charge of theft, is finally adjudged to undergo the ordeal. In the Case of Girard of Camvill[4] the defendant is accused of various crimes, and, having made answer, gives pledges for defending himself by one of his men. These examples might be indefinitely multiplied from the Rotuli Curiæ Regis and the Abbreviatio Placitorum. Indeed, every record or statement of the *trial* (in a literal sense) of an issue implies the medial judgment.

[1] Placita Ang.-Norm. 114. [2] Ib. 210. [3] Ib. 260. [4] Ib. 283.

We have already observed, on more than one occasion, that the question of the burden of proof was determined by the state of the pleadings. The proof was to be furnished by the party who had made the last sufficient allegation,[1] provided he offered, with his pleading, proof sufficient for the particular case. The result was often very different from what would occur at the present time.

A traverse (i.e. a general or specific denial) by the defendant in modern English pleading does not withdraw the burden of proof from the plaintiff: he must still prove his case. Under the ancient system, however, the burden followed the sufficient pleading; and the defendant who had traversed (1) an appeal, or (2) a presentment on behalf of the public, in the one case must make his proof (by the duel), and in the other was bound to exculpate himself, according to the terms of his defence. In other cases, however, a denial was often made when the defendant had no proof, for the purpose of preventing the implication of a confession of judgment or a fine for disobeying summons. The result was that the plaintiff was put to the proof of his case.

In the case of what would be termed a plea of confession and avoidance (the "exception" of the Roman procedure and its modern successors), there was no substantial difference between the ancient English and the modern English procedure; but the ground upon which the burden of proof has proceeded in the two cases is different. In the modern practice the burden of proof in such a case rests upon the defendant because he has "confessed" the plaintiff's declaration, but has "avoided" it by setting up some new affirmative matter, such as accord and satisfaction, which (if true) shows that the plaintiff's claim ought not to be enforced. In the ancient practice the burden of proof in such a case rested upon

[1] The same was true of the Continental procedure, the inaccurate conceptions of the earlier German writers having in recent years been fully demonstrated by Dr. Laband in his learned work Die vermögensrechtlichen Klagen, pp. 166 *et seq.*

the defendant on the same ground that it did in the case of a traverse, to wit, that the last pleading was a good answer to what had preceded.

In case of the non-appearance of the defendant, after the required summonses and permitted essoins, the court directed the plaintiff, except in cases of high crimes, to appear at another term and furnish his proof, unless he was then ready with it.[1] His count or appeal being the only allegation before the court, that allegation, in accordance with the general rule, must be established. If, however, the defendant appeared, he was bound to answer and make a sufficient defence, otherwise he was deemed to have confessed judgment; thus exempting the plaintiff from the burden of proving his allegation as he would have been compelled to do had the defendant stayed away from court.[2]

If the proceeding was a criminal one, and the defendant was prosecuted by presentment on behalf of the public, that is, of the king, the burden of proof again rested upon the defendant. The presentment, if properly made, raised a presumption of the guilt of the accused; and this presumption must be repelled to save him from conviction. And the same was true in the case of appeals, when the defendant was taken in possession of stolen goods, or of the bloody instrument with which a homicide had been committed. Such facts made a presumption of guilt; and the court declared that the defendant must exculpate himself as best he could. This practice was in perfect keeping with the general principle above stated: the defendant denies the accusation, and this requires him to go to the proof and establish his innocence if he can. Escape of those against whom there was the positive evidence of being taken in crime (of high degree), through this rule of the burden of proof, was prevented by the permission which the law gave to execute justice upon the criminal on the spot. But this

[1] See Placita Ang.-Norm. 151–153, *anno* 1145; 182, *anno* 1156.

[2] Laws Hen. I. c. 49, § 3; c. 52, § 1; and see examples given *infra*.

was not permitted in cases of mere delects unless the wrong-doer resisted arrest.[1]

The interest attaching to questions of proof will justify an examination of the materials upon which the general rule above stated is based. The practice in criminal cases, however, is so clear and well ascertained that it will not be necessary to examine the cases: it will suffice to make general reference to the Assises of Clarendon and Northampton, which, so far as the point under consideration is concerned, represent the state of the law throughout the eleventh and twelfth centuries. The closing sentence of the case of Gundulf v. Pichot,[2] in the time of the Conqueror; the Case of the Fifty Men,[3] in the time of Rufus; and the Case of Ailward,[4] in the time of Henry the Second, sufficiently show this.

Domesday Book contains a mass of materials bearing upon the production of proof in civil cases. William de C., for example, claims that certain land belonged to the manor of C., and brings witnesses of the best senior men of the county and hundred. Picot, the defendant, denies the claim and offers villeins, common people, and bailiffs who were ready to defend his denial by oath or by ordeal. This would have given the proof to Picot; but the plaintiff's witnesses objected to being opposed by the class of persons offered by Picot, unless required by the king. And the case stands over for his decision.[5]

The hundred of G. witness that two men belong to William of W.; but a man of the king offers the ordeal that they pertained to another manor in the time of king Edward. The record adds that the king takes the men into his hand; the meaning of which is, that the case is to be in abeyance until the ordeal is undergone by the party proposing it.[6]

Besides cases like the foregoing, the import of which is clear, there are many others in Domesday which close with

[1] Ailward's Case, Placita Ang.-Norm. 260. [2] Ib. 36. [3] Ib. 72.
[4] Ib. 260. [5] Ib. 38. [6] Ib. 42.

a mere offer of proof; the inference being that the offer is good.

To turn to later cases, one William lays claim to the manor of C. against the abbot and monks of Gloucester. The latter contest the claim, whereupon a term is set in the King's Court, and the defendants there prove their title by an eye and ear witness;[1] a perfect illustration of the rule under consideration.

The abbot of Battel lays claim against Alan de B. to the right of presentation to the church at M. Alan contests the claim under a charter by which, as he alleges, a prior abbot of Battel had conveyed the church to him. A term is accordingly set, and, the plea being good, Alan furnishes the proof—the charter referred to—and a compromise follows.[2]

In one or two cases the sufficient pleading did not, for special reasons, carry the right to furnish the proof. The offer of a charter by the plaintiff, the genuineness of which was not denied by the defendant,[3] is one case. It could not be disputed, except indeed by another charter. The record of the King's Court and of the Exchequer, as we shall see hereafter, was also unimpeachable. And if one of the parties to a cause should invoke such record to prove a thing said or done, the other did not, by denying the allegation, acquire the right to disprove it. Upon a simple traverse of the act or words, the affirming party was still entitled to call for the record of the court; the testimony of those present who were entitled to speak to the question. However, it seems that the opposite party could offer objection to the bringing of the record, such perhaps as illegality of the proceedings for want of summons; and upon such an objection, the party offering it would be

[1] Placita Ang.-Norm. 135. [2] Ib. 245.

[3] The genuineness of the seal might be disputed, and a successful impeachment in this direction destroyed the efficacy of the charter as evidence. But if the seal was genuine, there could be no impeachment of the document except by another charter.

allowed to establish it if he could. As to the record of most of the inferior courts (excepting certain proceedings in the County Court, of which hereafter), this was not conclusive, and a traverse carried the right to bring the proof. It is probable again that no one would be permitted, by a traverse, to deny the offered testimony of the whole community as to the holding of a court at a certain term. Another class of cases has been heretofore mentioned in which, against the offer of witnesses of rank, for example, a bishop, the party's traverse did not avail him to such an extent as would have been the case had common men been offered. He was not, however, cut off from the privilege attached to his pleading: he was only required to bring proof of great weight; a very large number of witnesses or possibly compurgators. If the party were a stranger in the district, it is probable that he was still entitled to wage the duel or go to the ordeal, according to the nature of the case, notwithstanding the rank of the witnesses offered against him. It is apprehended that in all cases in which the allegation in question was impeachable, a traverse carried the right of proof.

The party who had made the last good pleading was entitled to ask the court for a judgment according to law as to the mode of trial to be had. It was not within the arbitrary will or generally even in the discretion of the judges to order such a trial as they thought fit. In issues of right, the court was bound in ordinary cases to order the duel, unless the defendant had put himself upon the Grand Assise; when the court was bound to allow that mode of trial. The duel, it should be remarked, was required upon the tender of the plaintiff, when the defendant did not require a recognition by the Magna Assisa. This, however, was not because the proof belonged to the plaintiff, but because that was the constitutional mode of trial. That the proof belonged to the party who had last pleaded well, even in pleas of right, is shown by two circumstances; first, in that the court was

bound to award the Grand Assise upon the demand of the *tenant* and could not be required in the count of the demandant to do so (the demandant could require it by an appropriate replication to the defendant's plea, which fact itself illustrates the rule as to the proofs); and secondly, in that when the parties came on prepared for the wager of battle, the tenant was always sworn first, as will be seen in the following chapter. The duel might also be demanded, sometimes, in cases of theft,[1] in appeals of outlawry,[2] and, at least in the eleventh century, in trials of disseisin,[3] and, in the time of Glanvill, by pledges of debt.[4]

Indeed, as a rule, in all cases of appeals the court was bound, if asked, to award the duel; though it should be observed that trial by battle was an innovation in England, and not a few towns had obtained exemption from it. This was true of London,[5] Winchester,[6] Lincoln,[7] St. Edmundsbury,[8] and perhaps of Oxford, which possessed the same privileges in general as London.[9] An interesting example of such exemption has been preserved by Jocelyn de Brakelond. About the year 1198 a free tenant of the cellarer of the monastery of St. Edmund, named Ketel, who lived without the gates of the town (St. Edmundsbury), having been accused of larceny, was overcome in the duel and hung. But the burghers, says Jocelyn, taunted the men of the convent, saying that if Ketel had resided within the burgh, he would not have been required to wage the duel, but might have acquitted himself by the oaths of his neighbours (i.e. by compurgation), "sicut libertas est eorum qui manent infra burgum."[10] And this appears to have been the general law

[1] Laws Wm. I. ii. c. 1; iii. c. 12; case of Ketel, *infra*.
[2] Wm. I. ii. c. 3. [3] *Ante*, p. 177, n. 1.
[4] Glanvill, lib. 10, c. 5, § 7. See *infra* as to compurgation in such cases.
[5] Stubbs, Sel. Ch. 108 (2d ed.), charter of Hen. I.
[6] Ib. 266, charter of Rich. I. [7] Ib. 267, ib.
[8] Jocelyn de Brakel. 74 (Camden Soc.).
[9] Stubbs, Sel. Ch. 167, charter of Hen. II.
[10] Jocelyn de Brakel. *ut supra*.

as to the lesser crimes in the time of the Conqueror, if not considerably later.[1]

If in any of the foregoing cases the party who was to furnish the proof was a woman,[2] a maimed man, or a man above sixty years of age, the duel was not required. In the case of one who had suffered mayhem (by which was then meant the breaking of any bone or an injury to the head either by wounding or abrasion[3]) the party, in criminal cases at all events, was entitled to judgment of the ordeal; of hot iron if he were a freeman, of water if he were a rustic.[4] The same was probably true of men over sixty years of age, and of women. A man accused by a woman of the death of her husband could also exculpate himself by the ordeal.[5]

One who was accused of crime within the terms of the Assise of Clarendon or of Northampton was entitled to undergo the ordeal, when not caught in the act. This was also true of accusations of lese-majesty by the public voice, as we have seen,[6] and was probably true also of similar prosecutions of inferior crimes; though by the ancient procedure, still preserved in some of the towns, compurgation was allowed in most cases of crime.[7]

Compurgation was allowed also in delicts, in questions of warranty,[8] in denials of summons,[9] in exculpation of bail (pledges) or failing to produce their principal in court in criminal if not in civil cases,[10] to lords upon the escape of their servants charged with the commission of crime,[11] and perhaps (for the law was doubtful in the time of Glanvill) in cases of debt for money loaned,[12] but not, it seems, in debt for

[1] Laws Wm. I. i. c. 51. [2] Comp. Laws Edw. Conf. c. 19.
[3] Glanvill, lib. 14, c. 1, § 8. [4] Ibid. [5] Glanvill, lib. 14, c. 3.
[6] *Ante*, pp. 277, 278.
[7] Laws Wm. I. i. c. 14; Hen. I. c. 66, § 9, compurgation in appeals of theft, robbery, and burning; Wm. I. i. c. 15, violation of churches "aut alicujus cameram."—Ib. c. 51. [8] Ib. cc. 21, 45.
[9] 1 Rotuli, 200. [10] *Post*, pp. 306, 307. [11] Laws Wm. I. i. c. 52.
[12] Glanvill, lib. 10, c. 5, § 7. The practice was evidently in a state of transition at this time between compurgation and the duel; the former prevailing in the next century.

rent and customs due by tenure, between lord and man.[1] But compurgation was in transition throughout the twelfth century.

Parties always had the right to require a trial by charters. Strangers and others who could produce neither charters, compurgators, nor witnesses could demand the judgment of God, but whether they could elect between the ordeal and the duel does not appear.[2] In the eleventh century it is probable that an Englishman could elect the ordeal and a Frenchman (Norman) the duel. That was the case certainly in appeals between persons of the two races.[3] The practice of invoking judgment of trial by witnesses was apparently growing infrequent by the middle of the twelfth century. It is probable that it could still be demanded as formerly in any case in which the evidence of the community could establish a fact, such, for instance, as in a case of sale or rearing,[4] or in a question of freedom, or in public transactions generally; but compurgation and recognitions were coming to be preferred. Trial by recognition was usually settled by the king's writ; though it might also be demanded upon the pleadings of a cause in which an issue appropriate for it was joined.

In case of a division of the court as to the judgment to be pronounced, the majority governed.[5] But a denial of the right of a party to the particular mode of trial to which he became clearly entitled upon the pleadings, and the adjudication of some other mode, was a case of false judgment; a wrong of which the ancient records contain not unfrequent mention. This was the "false judgment" of which the injured party (who might be the party who was to furnish the proof, or the opposite party) had the right in the time of Glanvill to

[1] When the relation of the parties was not that of lord and man, with fealty and homage, compurgation was probably allowed. The duel, or the Grand Assise, as we have seen, was the mode of trial between lord and man in cases of rent and services.

[2] See Wm. I. i. c. 15.

[3] Laws Wm. I. ii. cc. 1–3.

[4] Laws Wm. I. i. cc. 21, 45.

[5] Laws Hen. I. c. 5, § 6.

appeal the court to wager of battle. "Though a court," says Glanvill, "is not obliged to defend its record by the duel, it is bound to defend its judgment by the duel."[1] In the eleventh century the judge was to be in the king's mercy in sixty shillings, and to lose his liberty, unless he could purge himself by showing that he had acted ignorantly.[2] By the laws of Henry the First the judge was to pay one hundred and twenty shillings, and lose his thegnship and all judicial dignity, unless he could obtain a discharge from liability from the king, or prove that he had acted in ignorance.[3] Between compurgation, the duel, and the ordeal, difficult questions must sometimes have arisen, and mistakes by unskilled judges not unfrequently made.

The law and procedure in respect of a complaint of false judgment in the time of Glanvill are thus laid down: If anyone should declare against the court for pronouncing a false judgment, alleging that it was false for this reason, that when one party had said thus, and the other answered thus, the court had adjudged falsely of their allegations by deciding in such words (the formula of the medial judgment), and that the court had given such false judgment by the mouth of N.; and if he were disposed to deny the charge, the other was prepared to prove it against him, especially by such a competent witness, who is prepared to prove it; thus the matter went to the decision of the duel.[4]

Glanvill raises a question whether the court was required to defend itself by one of its own members, or might do so by a stranger. The answer given by him was that the court should defend itself "maxime" by the person who had ren-

[1] Glanvill, lib. 8, c. 9, § 5. By the court's record was meant the proof of anything that had transpired at a previous session. It did not refer to any written memorial of the proceedings. The record (in this sense) of the King's Courts was alone indisputable, with some few exceptions.—Glanvill, lib. 8, c. 8; Laws Hen. I. c. 31, § 4; c. 49, § 4.

[2] Wm. I. i. c. 39. See also c. 42.

[3] Hen. I. c. 34, § 1.

[4] Glanvill, lib. 8, c. 9, § 5.

dered the judgment, that is, commonly by the presiding judge. If the court were convicted, the lord thereof ("dominus curiæ") should be amerced to the king and should for ever lose his court; a statement referring of course to an appeal of a Manorial Court. Indeed, the whole court were to be amerced. On the other hand, if the appellor failed, he was in consequence to lose his principal suit.[1]

[1] Glanvill, lib. 8, c. 9, § 6.

CHAPTER IX.

THE TRIAL TERM.

THE next step in the procedure was the appearance of the parties before the judges at the trial term. The medial judgment, as we have seen, must have directed a trial in one of the following modes, to wit, by compurgation, by witnesses, by charters, by record, by the ordeal, by the duel, or by inquisition or recognition. Each of these will now be considered in order, from the final point of view, the trial.

First, then, of compurgation. This, in its essential feature, consisted in the bringing forward of a specific number of persons, by the party adjudged to give the proof to make oath in his favour; the number varying in ordinary cases from one to forty-eight, being dependent upon the rank of the parties, of the compurgators (one thegn, for example, being equal to six villeins), the value of the property, if property were involved, and the nature of the suit.[1] These persons were to swear, not to the facts, but to the credibility of the party for whom they appeared; though knowledge of the facts was probably deemed an important consideration in making the selection.[2]

[1] Brunner, Schwurg. 49; Essays in Ang.-Sax. Law, 186; Schmid, Gesetze, Glossary, Eideshülfe, p. 564.

[2] Kritische Ueberschau, v. 204.

There appears to have been no class limitation in the selection of the compurgators: it was only necessary that those selected should be able to swear to the purity of their principal's oath. This would naturally require persons who were best acquainted with him, and would include his relatives,[1] neighbours,[2] and peers.[3] The compurgators, in the first half of the twelfth century and earlier, if not later, were either "electi" by the party making the proof, or they were "nominati" by the judge or sheriff; those "nominati," however, being subject to challenge for hatred or other good ground, as, for example, that they were not "legal men."[4] In some cases the number of nominate persons was greater than the number required, and out of them the principal was permitted to choose his men; but sometimes, possibly, in the triple purgations, the judge selected the actual compurgators.[5] Selection by lot was also in use. Thus, by the Dane law, in the triple purgation, the selection was made by lot out of forty-eight.[6] It may fairly be assumed that where a serious charge of crime was brought, and the presumption against the accused was strong, the selection was taken out of his hands, partly or possibly wholly, according to the nature of the case.[7]

[1] "Qui ex parte patris erunt, fracto juramento, qui ex materna cognatione erunt, plane se sacramento juratores advertant."—Hen. I. c. 64, § 4. See Law of Northumbrian Priests, c. 51.

[2] "Nominentur ei sex homines de eadem geburscipa, in qua ille residens est." Edw. i. c. 1, § 4. See Æthelstan, i. c. 9; Hen. I. c. 66, § 6.

[3] "Jurabunt, congruo numero consacramentalium, et qualitate parium suorum retenta."—Hen. I. c. 64, § 2. See Essays in Ang.-Saxon Law, 298.

[4] "Et ibi testes nominati et electi sunt habendi, nisi odium vel aliquid competens in nominacione proponatur, cur haberi non possint."—Hen. I. c. 31, § 8.

[5] "Nominentur ei xiiii. et acquirat ex eis xi."—Hen. I. c. 66, § 6. According to the same laws, § 9, in cases of theft, burning, robbery, and the like, "oportet, ut die congruo xxx. consacramentales habeat, quorum nullus in aliquo reculpandus sit, et cum xv. ex eis, quos *justicia* selegerit, sextusdecimus juret, sicut causa dictabit." But the "quos" may as well refer to the "xxx." as to the "xv." which would give the prisoner the selection from the whole number selected by the judge. This is Schmid's interpretation, without any suggestion of ambiguity.—Gesetze, 566.

[6] Ib. § 10. Election by lot is mentioned again in c. 64, § 1.

[7] See upon this subject Schmid, Gesetze, 566.

Whether such a practice prevailed in civil cases in the Norman period does not appear. Probably it did, in serious cases.

In small matters it seems that the oath taken was the "sacramentum planum," which is defined to be "non solenne, quod summarie et de *plano* præstatur, sine delectu verborum aut locorum."[1] In important causes the oath was "observatum" or "verborum observantiis," that is, with observance of a formula. In serious criminal cases triple compurgation corresponding to the triple ordeal was required, at least of the common people.[2] This appears to have been what was called the "sacramentum frangens" or "fractum." Between the extremes of the oath *planum* and the oath *fractum* appears to have fallen the oath *simplex*, supported by a less number of consacramentals than the last named, but still *observatum*. These are terms of the Laws of Henry the First;[3] but they probably represent, in substance, the whole Norman period. The law, however, varied much in details at all times in different localities.[4]

Before, however, the compurgators made the oath "observatum," the parties being before the court for the trial in conformity with the judgment delivered at the issue term, the presiding judge, according to the practice in Normandy, which probably prevailed also in England, asked the party who had given security to furnish the proof, if he was ready to make his law; "si il est garni et apparellié de feire sa lei."[5] Answering in the affirmative, the judge proceeded to declare the oath-formula to be sworn by him; which he repeated after the judge, word for word.

The compurgators' oath (*observatum*) then follows; the

[1] Anc. Laws, Glossary, Oath.

[2] Laws Hen. I. c. 64, § 2, as to Wessex; c. 66, § 10, as to Mercia. "Lad" or "lada" was exculpation either by compurgation or by the ordeal.

[3] See, e.g., c. 64. [4] Ibid.

[5] Cont. de la Vicomté de l'Eau de Rouen, art. 49, quoted by Brunner, Schwurg. 184. To "make one's law" was in the Norman period used also of the ordeal.—Assise of Clar. cc. 13, 14. Each was a *waging* of law.

Anglo-Saxon formula for which, perhaps, was: "By the Lord, the oath is clean and unperjured which N. has sworn."[1] This may, however, have been the formula used at the finding and claim of stolen goods, upon the introduction of the procedure called the anefang. But the compurgatory oath at the trial term could not have been materially different. The oath as made in Normandy has been preserved in two forms. According to the Grand Coutumier, one form was as follows: "The oath which G. has sworn he has sworn truly, so help me God and his saints;"—"Du serment que Guillaume a iure, sauffrement a iure, ausi m'aist Dieu et ces sains."[2] According to the Somma, "De sacramento quod T. juravit salvum juramentum juravit, si nos[3] Deus adjuvet at hec sancta;"[4] a translation merely of the foregoing. According to the Norman Coutumier de la Vicomté de l'Eau de Rouen, the form used in that district was: "Si me ait Dex et ces sains et tous autres que N. a dit voir de ce dont il a fait serement."

The compurgators, who in earlier times appear to have sworn with joined hands and united voice (a survival of which custom the Somma as above quoted may suggest), now swore separately, one by one, each repeating the same formula, with hand upon the Gospels: "Et doit chascun des tesmoins estre escari [separated] et oi par soi, sa mein mise sur le livre."[5] A single mistake in repeating the formula, whether made by the principal or by any of the compurgators, was fatal to the party's case.

This form of compurgation was, in Normandy and occasionally in England, called *lex disraisinæ*. It was a simple traverse of the plaintiff's case. When the defendant's answer amounted to what in modern pleading would be called confession and avoidance, the proof was in Normandy called

[1] 1 Anc. Laws and Inst. 181 (8vo ed.).
[2] Grand Cout. c. 85 (ed. 1523).
[3] Brunner well thinks this a mistake for "me."—Schwurg. 185, note.
[4] Somma, lib. 2, c. 19, § 4.
[5] Cout. de la Vic. de l'Eau de R. art. 40; Brunner, 185.

lex probabilis, a term seldom used in the English chronicles or charters. Of this there were in Normandy three classes belonging to the procedure by compurgation, and two to that by witnesses;[1] some of which certainly are to be found in England.

The first of these was sworn by a single person, and was commonly employed to establish the exemption of a franchise from some form of taxation. An English example may be found in the Church at Abingdon v. The King's Collectors,[2] *anno* 1119. The Abingdon church had previously, by decree of court, been exempted from geld, but the king's tax officers still levied sums of money from time to time, until at last complaint was made to the king. It was thereupon ordered, apparently by the Court of Exchequer, that some one person of the church should make oath to the exemption; and this was to be final. A County Court was accordingly convened by the sheriff, at which Roger de H., a homager of the monastery, "affidavit fidem in manu ipsius vicecomitis, vidente toto comitatu," that one hundred and forty hides of land belonging to the church ought to be exempt from tax.

Many writs of the kings also exist in which monasteries are exempted from customs and dues of various kinds, so far as their men can swear that they have been released from such burdens.[3]

The essoin de via curiæ was likewise sworn in Normandy with a single person (the bearer of the essoin) brought by the principal, or by the principal alone, according to the election of the opposite party. In case of the essoin de infirmitate two persons appeared before the court, the bearer of the essoin and a witness. A like practice prevailed as to proof of vouching to warranty. In other minor cases the oaths of three might be required, and in still others the oaths of five.[4]

This was the practice in Normandy in the thirteenth

[1] See Brunner, Schwurg. 186-189.
[2] Placita Ang.-Norm. 113.
[3] Ib. 88, 106, 126, 149, 203, 204.
[4] Somma, lib. 2, c. 62, §§ 3-6.

century. Among the cases in which the oaths of five were there required was the action for debt.[1] The Norman formula in this action, as given by the Somma, required the principal (if his defence was payment) to say: "Hoc audiant omnes, quod ego persolvi huic N. domino meo xxx. denarios, quos ei debebam, si Deus me adjuvet et sacrosancta." Then the first of the compurgators said: "De sacramento quod N. fecit salvum sacramentum fecit, si Deus me adjuvet et sacrosancta." And the rest followed "simili modo." It is added that the oath-makers, both in the *lex probabilis* and in the *lex disraisinæ*, ought to offer themselves and not be summoned or compelled to come into court.[2]

Compurgation appears to have been a permitted mode of trial in criminal cases generally in the first half of the twelfth century, and earlier; though it seems that instead of the "sacramentum frangens," or triple compurgation, the accused often preferred the ordeal, and succeeded in having it.[3] Thus between the ordeal and the duel, compurgation was gradually losing or shifting ground. Pledges in criminal cases, and perhaps in civil cases,[4] might acquit themselves by compurgation upon failing to produce their principals in accordance with the terms of their engagement. It was declared by the laws of William the Conqueror (a custumal of the twelfth century) that if anyone appealed of larceny or robbery was released upon pledge to have him before the court for justice, and afterwards fled, respite should be given to the pledging party, according to the Mercian law, for a month and a day to find the fugitive. If found within the time, he

[1] There is no evidence that any definite regulation as to number prevailed either in England or in Normandy, in actions of debt, before the thirteenth century. Probably there was no such regulation. Compurgation in debt was in an unsettled state in the twelfth century, as will presently be seen. The subject is referred to here mainly to show the Norman formula. [2] Ib. § 6.

[3] Hen. I. c. 64, § 1. The practice is here deprecated as wrongful. "Malorum autem infestacionibus, et perjurancium conspiracione, depositum est frangens juramentum, ut magis Dei judicium ab accusatis eligatur." As to the generality of compurgation in criminal cases, see ib. § 2. [4] *Infra*.

was to be delivered to justice; but if not, the party who had entered into the engagement of pledge was to swear with the twelfth hand ("duodecima manu") that when he made the engagement he did not know that the fugitive was a thief (or robber), that he did not flee by his counsel or aid, and that he could not produce him for justice.[1] What the West-Saxon and Dane procedure was is not stated; but probably it was the same. Differences relating to the penalty imposed upon the pledge for failing to perform his engagement are alone specified.[2] A lord might also prove his innocence of the escape of any of his servants (for all of whom he was responsible) charged with the commission of crime, by compurgation *manu sexta*, or by a fine paid to the king.[3] The same was probably allowed also to the headman of a frankpledge, upon the escape of one for whom the body was responsible.[4]

Compurgation continued to be employed in criminal cases, though within unsettled limits, being affected to an extent which cannot clearly be ascertained, by the encroachment of the ordeal and the duel, until the year 1166; when the Assise of Clarendon substituted the ordeal for it as to persons accused by the presenting jurors or by the public voice. Some of the boroughs, however, retained by charter the ancient usage, as we have elsewhere seen.[5] Trespasses and assaults were commonly tried in the manors, if not also in the superior courts, by compurgation throughout, probably, the eleventh and twelfth centuries. This was true, at least in the time of Glanvill, even in cases in which a tenant was accused of having laid violent hands upon his lord. The tenant was permitted to purge himself against the accusation of his lord by three persons ("tertia manu") or by as many as the court should award.[6]

This mode of trial was used also in civil cases throughout

[1] Wm. I. i. c. 3. [2] Ibid. [3] Ib. c. 52.
[4] Comp. ib.; Wm. I. iii. c. 14. [5] *Ante*, pp. 2, 296.
[6] Glanvill, lib. 9, c. 1, § 8. See also 1 Pike, Hist. of Crime, 123.

the twelfth century. In what was afterwards the typical subject of compurgation, the action of debt for money (not due by reason of the relation of lord and man), the practice as late as the time of Glanvill had not become settled; as has already been stated.[1] Glanvill says that it was a question whether in a proceeding against a surety the defendant could escape liability by denying the engagement by his own oath and the oaths of as many men as the court should direct, or whether the trial should be by duel. Some, he says, were of the opinion that the *creditor* was entitled to proof from the suretyship by compurgation, unless the surety, before it was finally proved in that manner, down to the moment of the compurgation, tendered the duel.[2] If, however, the creditor were able to produce a charter, the nature of the proceedings was changed to trial by charter.[3]

Trial by witnesses to the fact was very common both in the pre-Norman and in the Norman periods. Unlike compurgators who swore to their principal's credibility, witnesses to the fact swore to matters *de visu et auditu*. They differed, however, essentially from the inquisitors and recognitors of the time, and from modern witnesses. They gave their testimony in ordinary cases in accordance with the narrow formula of the medial judgment; they were not examined as to the facts; and they appeared (in this particular like modern witnesses) at the instance of the party for whom they testified. The judge might examine them as to their competency; but if this were established—if they were shown to be legal men of the neighbourhood—they were entitled to give answer according to the prescribed formula. They were triers, not witnesses in the modern sense; and few of the questions which arise at the present day upon the testimony of witnesses, such as the admissibility of evidence, could arise under the procedure of the Norman (or pre-Norman) period. Both civil and criminal

[1] *Ante*, pp. 297, 298. [2] Glanvill, lib. 10, c. 5, § 7.
[3] Ib. c. 12.

cases were tried in this way. Civil cases may be found in the records almost without number.[1]

Criminal causes were defended through trial by witnesses less frequently, it seems, than by other modes of trial; and before the close of the twelfth century charges of crime appear commonly, if not always, to have been defended by compurgation, ordeal, or duel. The procedure in a single criminal trial (apparently) by witnesses, has been preserved in the so-called Laws of Edward the Confessor; which may be taken to represent the period from the Conquest (and before) until the middle of the next century. The procedure relates to a charge by the relatives, male and female (in the proportion of two of the former to one of the latter), that their kinsman had been unjustly slain and laid among robbers. After the pledging of security by the accusers and by the accused, and defence alleged that the slain man had been justly slain, and justly lay among robbers according to law, as a robber, with a statement concerning the robbery and the manner of the slaying; the accused proceeded to name a chief judge, judges, and legal witnesses of the neighbourhood ("nominet justiciarium et judices et testes de vicinis legales").[2] That these "testes" were witnesses in the technical sense, and not compurgators, is made probable by the accused naming them, and by what follows. "And if they will warrant him that justice was justly done of the man for his robbery, the slayer shall be quit, and those who made the complaint shall pay the sum pledged."[3]

There were several classes of witnesses; transaction witnesses, *recordatores*, community witnesses, and witnesses whose rank and station entitled them to special consideration. The first class were those before whom sales were made, and other

[1] See e.g. Placita Ang.-Norm. 18, 31, 39, 53, 135, 152, 182, 188. The use of the word "testes" in the records is never decisive. That often meant compurgators. But those who "saw and heard" were witnesses in the technical sense.

[2] Compare, as to choosing a judge, *ante*, p. 57.

[3] Laws Edw. Conf. c. 36. As to what followed conviction, see ib.

business required to be transacted in public done; the second were those who bore record of the proceedings in a particular litigation when a question thereof was raised, the witnesses not consisting in England of any constituted body, but appointed upon the particular occasion out of the best men capable of acting; while community witnesses, as the term implies, were general witnesses of the neighbourhood, capable of giving testimony in all cases, probably even to *affercing* that of the first two classes, but not to taking their places.

When the witnesses were men of the church, or perhaps laymen of high rank, it was not necessary for them to appear at court and make oath in the common form. Such persons frequently, if not usually, sent their testimony to court in the form of a deposition, prepared in any manner they saw fit, and not necessarily conforming to the oath-formula of the court. The deposition was made without oath, but generally contained the offer to make its statements good, according to the judgment of the court, as in other cases. The records abound with examples.[1]

Apart, however, from the use of depositions, trial by witnesses, in its application to civil as well as to criminal causes, appears to have begun to lose ground as early as the middle of the twelfth century; its vitality *civiliter* being gradually absorbed on the one side by compurgation and on the other by the recognitions. But the chief use of witnesses, of whatever class, especially in criminal cases, appears to have been to enable a plaintiff or an appellor to make a presumptive case against a defendant or appellee, rather than as a mode of defence to an action. Indeed, witnesses appear to have been employed quite as often in the decision of incidental matters as

[1] See the depositions of bishop Geoffrey, Placita Ang.-Norm. 287; of Bernard of St. David, ib. 150; of Theobald, archbishop of Canterbury, ib. 150, 182; of Nicholas of Llandaff, ib. 184, 187; and the depositions in the case of Church of York v. Church of Gloucester, 189–196. In the last of these David of Worcester offers to undergo the ordeal in support of his testimony. See also the deposition of the earl of Hereford, ib. 258.

in the capacity of final triers of a cause, if not oftener. In the first and chief of these particulars, if not in the second, the use of witnesses continued unimpaired.

With compurgation and party-witness the Norse "buakvidr," or verdict of neighbours, may be compared. For this purpose the case of Flosi will be resumed; who, it will be remembered, was to be tried by an inquest of neighbours, witnesses to the slaying. There was, however, no defence to the merits, a fact not to be lost sight of. Flosi must be saved, if at all, by superior leadership in the intricacies and formalities of pleading. Still, all the steps appear which would be required in a case that was to stand or fall on the merits, save a denial or other answer to the accusation. It may be added that pleadings were conducted in such cases under the Norse procedure during what, in the more general Teutonic system, was the term for trial only. We have, then, in Flosi's case, a pleading and a trial term together.

The Althing having convened, lots are first cast as to the order of suits, in which Mord has the fortune to be first. He now takes witness that he excepts all mistakes in the words of his pleading, whether the words were too many or wrongly spoken, and claims the right to amend until he has put his words into lawful form. Then he takes witness that he calls upon Flosi to listen to his oath and declaration, and to all the steps that he may take. Thereupon Mord thus makes oath: "I take witness to this, that I take an oath on the book, a lawful oath, and I say it before God, that I will so plead this suit in the most truthful and most just and most lawful way, so far as I know; and that I will bring forward all my proofs in due form, and utter the mfaithfully so long as I am in this suit."

Then he speaks as follows, recalling all the steps taken: "I have called Thorodd as my first witness, and Thorbjorn as my second. I have called them to bear witness that I gave notice of an assault laid down by law against Flosi, Thord's son, on that spot where he, Flosi, Thord's son, rushed with an assault

laid down by law on Helgi, Njal's son, when Flosi, Thord's son, wounded Helgi, Njal's son, with a brain or a body or a marrow wound, which proved a death wound, and from which Helgi got his death. I said that he ought to be made in this suit a guilty man, an outlaw, not to be fed, not to be forwarded, not to be helped or harboured in any need. I said that all his goods were forfeited, half to me and half to the men of the quarter who have the right by law to take the goods which he has forfeited. I gave notice of the suit in the Quarter Court into which the suit ought by law to come. I gave notice of that lawful notice; I gave notice in the hearing of all men at the Hill of Laws; I gave notice of this suit to be pleaded now, this summer, and of full outlawry against Flosi, Thord's son. I gave notice of a suit which Thorgeir, Thorir's son, had handed over to me; and I had all these words in my notice which I have now used in this declaration of my suit. I now declare this suit of outlawry in this shape before the court of the Eastfirthers over the head of John,[1] as I uttered it when I gave notice of it."

This is repeated with the single change of stating the wounds first. Then Mord calls upon the two persons named to bear witness of these steps, which they do twice in the same lengthy formula, speaking with one voice after severally stating their names. Next, the witnesses to the handing over the suit to Mord appear and testify in unison to the fact.

Again Mord speaks: "I take witness to this," said he, "that I bid those nine neighbours whom I summoned when I laid this suit against Flosi, Thord's son, to take their seats west on the river bank; and I call on the defendant to challenge the inquest. I call on him by a lawful bidding before the court, so that the judges may hear." And this demand upon Flosi is repeated by him. Then he takes witness to the fact that he has taken all necessary steps, repeating them shortly, and closing thus: "I take witness . . . . that I shall not be

[1] As to this term of fiction, see 1 Dasent, Burnt Njal, Introd. p. 171, n.; 2 Ib. p. 245, n.

thought to have left the suit though I go away from the court to look up proofs or on other business."

It is now Flosi's turn to make such objection as he can; and he proceeds to challenge successfully four of the nine neighbours sitting on the inquest; thinking that he had thereby quashed the suit. Mord, however, knows the law, and declares the challenge is of no effect, since an inquest might consist of five or nine. No other objection being raised at present, Mord now requires the five to give their verdict; which they do in lengthy formalism, after the manner of Mord's declaration, above given, pronouncing Flosi guilty. And this finding is also repeated. Mord thereupon takes witness of the finding, and then calls upon Flosi "to begin his defence," the time for which, according to modern ideas of practice, had passed.

Flosi now appears by his counsel, Eyjolf, and pleads successfully to the jurisdiction of the court;[1] which by the early English procedure, at least in the middle of the thirteenth century, he could not have done at any stage of the proceedings without first having pleaded to the merits.[2] Eyjolf takes witness to the facts concerning his allegation as to the jurisdiction, and the witness duly confirms it. Then in formal language he forbids the judges (not the inquest of neighbours) to utter in judgment;[3] and the suit in this form is at an end.

It happened, however, that word had reached the ears of Mord and his friends that Flosi had paid money to Eyjolf (a "retainer" fee) for undertaking his defence, which was contrary

[1] There had been some sharp practice in the dark on the part of Flosi, which made this possible.

[2] Bracton, 140; 1 Britton, 102 (Nichols).

[3] It seems that this did not necessarily prevent the judges from pronouncing judgment, for Eyjolf still appears before the court, endeavouring to divide the judges, from which it is to be inferred that they were inclined to decide for Mord notwithstanding his mistake. Mord, however, quietly hastens away and anticipates Eyjolf with a suit in the Fifth Court for bribery and contempt, greatly to the latter's confusion.

to law: such business was to be an *honorarium*, a thing which has been heard of in the history of modern English law. Mord at once proceeds to take advantage of this fact, and of the additional fact that a witness brought forward by Eyjolf was incompetent, and now sets a suit on foot in the Fifth Court for outlawry against both Flosi and his counsel, Eyjolf.

Mord goes to the Hill of Laws for this purpose, and makes summons: "I take witness to this," he says, "that I summon Flosi, Thord's son, for that he gave money for his help here at the Thing to Eyjolf, Bolverk's son. I say that he ought on this charge to be made a guilty outlaw, for this sake alone to be forwarded or to be allowed the right of frithstow ["peace-place," i.e. sanctuary], if his fine and bail are brought forward at the execution levied on his house and goods, but else to become a thorough outlaw. I say all his goods are forfeited, half to me and half to the men of the quarter who have the right by law to take the goods after he has been outlawed. I summon this cause before the Fifth Court, whither the cause ought to come by law: I summon it to be pleaded now and to full outlawry. I summon with a lawful summons. I summon in the hearing of all men at the Hill of Laws." And he summons Eyjolf in like manner, and then summons each again for bringing forward the incompetent witness. The court were already set, and thither the parties now went.

The case, it will be observed, went not as in the other case before the ancient Quarter Court of the island, but before the Fifth Court, a new tribunal, established at the suggestion of Njal, for hearing appeals from and contempts of the Quarter Courts, and regulated in its procedure by rules suggested by the same person. The interesting feature about the procedure of this court is that "vouchers" must follow the oaths of the parties. The idea is *akin* to that of the supporters to the oath of parties in the English and Norman practice; and it is probable that Njal was now but introducing a modified part of the Scandinavian procedure which had not theretofore been in

use in Iceland. Compurgation, however, in the general sense of the Germanic procedure, appears not to have prevailed in Iceland before the union with Norway in the thirteenth century: the oath of the vouchers was the nearest approach to it. In a broad sense this was compurgation; but it prevailed only in the Fifth Court.

Mord makes oath before the Fifth Court as follows: "I take witness," said he, "to this, that I take a Fifth Court oath. I pray God so to help me in this light and in the next, as I shall plead this suit as I know to be most truthful and just and lawful. I believe with all my heart that Flosi is truly guilty in this suit if I may bring forward my proofs; and I have not brought money into this court in this suit, and I will not bring it. I have not taken money, and I will not take it, neither for a lawful nor for an unlawful end."

Then two of the men who were Mord's "vouchers" went before the court and, somewhat after the manner of compurgators, took witness. "We take witness that we take an oath on the book, a lawful oath: we pray God so to help us two in this light and in the next, as we lay it on our honour that we believe with all our hearts that Mord will so plead this suit as he knows to be most truthful and most just and most lawful, and that he hath not brought money into this court in this suit to help himself and that he will not offer it, and that he hath not taken money, nor will he take it, either for a lawful or unlawful end."[1]

In continuation of the procedure Mord now summoned nine neighbours, who lived next to the Thingfield, on the inquest in the suit; and then Mord took witness and declared the suits which he had set on foot against Flosi and Eyjolf. "And Mord used all those words in his declaration that he had used in his summons." Mord "declared his suits for outlawry in the same shape before the Fifth Court as he had uttered them when he summoned the defendants."

[1] Njal-Saga, c. 143; 2 Dasent, 264.

He now takes witness and bids the nine neighbours on the inquest take their seats west on the river bank, and then with witness calls upon Flosi and Eyjolf to challenge the inquest. This they cannot do; and Mord now requires the nine to utter their finding, and they thereupon find the defendants guilty. Then Mord, as in the previous case, calls upon the defendants to begin their defence, repeating the steps which he had taken. The president or "lawman" sums up the case, and Mord thereupon forbids the defendants from pleading, and then calls upon the judges to give judgment. This would naturally be the end of the case, but there were more judges "in banco" than ought to be there in pronouncing judgment: Mord makes a slip on this point; and this case, too, falls to the ground.[1]

Of trial by charters, to return to the English-Norman procedure, little need be said. The effect and interpretation of documents were ordinarily matter for the judges; and trial by charters had in consequence more of the features of trials of the present day than any other form of litigation except that by inquisition and recognition. The event was not, as it was in trial by wager of law and by party-witness, largely and often wholly in the hands of the party who had delivered the last good pleading. Nor was it necessarily left to some external test, incapable in fact of discovering to the court the truth. But as in the case of trial by inquisition, the truth was, if possible, sought by a rational and satisfactory mode of inquiry; as by a comparison of the seal in question with other seals of the same party, admitted to be genuine.[2]

[1] With the procedure in these cases, the chapters in the Gragas, Thingskapathattr (*De judiciis ordinandis*), vol. i. pp. 13 *et seq.* (Schlegel) deserve to be compared. The Norse procedure is there minutely described, in all its phases, in sixty-two chapters. It would be wholly aside from the purposes of this book to enter into further details. It is enough, for the present purpose, to show its outlines as depicted in the sagas: these will serve the purposes of comparison with the English and Norman procedure. Further reference to the Gragas and sagas will be made later on.

[2] Glanvill, lib. 10, c. 12, § 4.

Whatever a defendant pleaded in answer to the plaintiff's claim of title or right by charter, or whatever the plaintiff may have replied to a defence of right or title by charter, the charter must be produced at the trial and become the main subject of contest. The defendant or plaintiff must allege either that the charter did not cover the subject-matter of the suit, or if it did, that it had been annulled, suspended, or defeated by some other competent charter, document, or act, or that the charter itself was incomplete or a forgery. Whichever of these positions was taken, the charter in question, with the counter-charter, if such were set up, must be produced, and the trial thus became a trial by charter.

It seems, too, that in such cases, when at least a charter brought into court at the first term was to be impeached, the contest did not necessarily require a second term, but could often be decided on the issue-day. The case of Abbot Walter v. Gilbert de Baillol,[1] already referred to several times, shows this, and also illustrates to some extent what has just been stated in the preceding paragraph. The only means of defence was that of impeaching the plaintiff's charters; but the objection made to these, based on the *want* of seals, was not attended by any claim on the part of the defendant of a right to establish their invalidity by the ordeal or by the duel, or in any other way than by decision of the judges then and there. In like manner when in Abbot of Battel v. Alan de Bellofago[2] the defendant set up title by a charter covering the subject of the dispute, and the plaintiff raised a question as to the genuineness of the document, there was no intimation that the question ought to be decided otherwise than by the court upon inspection and comparison; nor was there any adjournment of the case for decision at another day. The defendant produces his charter at the first term, the plaintiff disputes its genuineness, and the court, after examination of the instrument, diligently made, so far rule in favour of its

[1] Placita Ang.-Norm. 175. [2] Ib. 245.

validity as to suggest a compromise; all being done at the same sitting.[1]

When, however, there was no means of determining of the genuineness of the seal (for if that was genuine, the charter at the time when it was executed was valid) by inspection or comparison, then the party offering the impeached document might have recourse to the duel to establish the seal by any proper witness (champion), especially by one whose name had been inserted by authority in the charter in question.[2] This would of course require another term ; and the mode of proceeding would be the same as that of the duel in a writ of right or other case.

Trial by record was the mode of establishing or disproving a fact alleged to have transpired in court upon some stated occasion. As to the incidental features of the procedure in such cases, the English sources give no specific information. But it seems reasonable to suppose that the demand of a party for record of a fact could be objected to in various ways; as by a denial of the existence of any legal court at the time and place asserted by the other party with a sufficient offer of proof, or by an affirmation by the objecting party, in a proper case, that he had never been legally summoned to the former trial. Such a practice prevailed on the Continent.[3] By this practice abroad the declaration of the record could at once be had if enough court-witnesses (called "recordatores" on the Continent)[4] were present ; otherwise a day was to be set for the purpose.[5] According to the Somma, the party who demanded the record was required to name persons by whom the same was to be declared.[6] And, unlike the case of an inquisition, the men to be selected were (on the Continent) to be men of rank, "homines magnæ famæ," "quos vite meritum

[1] See also Glanvill, lib. 10, c. 12, §§ 3, 4. [2] Ibid.

[3] See a case referred to by Brunner, Schwurg. 193.

[4] There appears to have been no constituted body of *recordatores* in England as there was on the Continent.

[5] Brunner, 193. [6] Ibid.

et providencie honestas fecerit fide dignos."[1] An oath was taken by these persons before making their declaration that they would record the truth, neither adding nor omitting anything.[2] This or a similar oath might be taken as well before the king privately as in open court.[3] In the former case the persons were simply required to speak the truth when they came into court.

The distinction prevailed throughout the Norman period which prevails at the present day, between proceedings of the superior and those of the inferior courts. The former alone, with some exceptions made by special law, had record of their proceedings; the meaning of which was then as now that what was properly reported to have transpired therein was indisputable. But the term "record," as may be inferred from what has just been said, did not at this time mean or imply an enrolment: it was used in the literal sense of the original word "recordari," to recall to remembrance; and the oral recording had the same effect as the inspection of the written record at the present day.[4] The proceedings of the inferior courts, testified in the same manner, could be impeached.

The County Court was an inferior tribunal for this purpose in most particulars; but for some purposes not only the County but the Manorial Courts had record as fully as the King's Court. Thus, says Glanvill, if the duel has been waged in any inferior court, and the suit is afterwards transferred into the King's Court, then, as to the claim of the demandant, the defence of the tenant, and the words in which the duel was adjudged and waged, the former court shall have its record (i.e. its proceedings therein, duly reported, shall be

[1] Brunner, 193. [2] Ib. 194; Somma, part 2, c. 50, § 4.

[3] Brunner, 194. As to the number of witnesses required on the Continent, see ib.

[4] Enrolment of judicial proceedings, privately made by the interested parties, was not unknown either in the Norman or pre-Norman period. It was, it seems, a regular official practice from the early years of the reign of Henry the Second; but in the Rolls it was done in brief memoranda merely, seldom at length. See Appendix, No. 56.

conclusive) even in the King's Court. The same was true of a change of champion in the local court. If, after the suit had been transferred into the King's Court, a different champion should be produced than the one who had waged the duel, and a dispute arose upon this point, the "record" of the inferior court should "by a law of the realm" be conclusive upon the subject. Glanvill further says with respect to the record of an inferior court, that anyone might declare that he had said more than was contained in the record ; and the fact that he did so say in the court, he might prove, as in earlier times,[1] against the whole court by the oaths of two or more lawful men, according to the varying custom of the courts. No court, he said, was bound to prove or defend its record by the duel, though it was otherwise of its (medial) judgment,[2] the reason of which distinction is clear. The proceedings had in court were not the acts of the judges, nor was the record the act of all, in ordinary cases, while the judgment as to the bringing of the proofs *was* their act.

The most of the following cases from the Rotuli Curiæ Regis[3] will serve to illustrate the bringing of the record of a cause from an inferior to a superior court, for the purpose of transferring the cause to the latter court : It was commanded the sheriff to cause the record to come of the plaint between Richard de L. and Robert le M. of a plea of land in T. by certain knights who brought that record before the justiciars in Eyre from the court of the archbishop of York on Easter. And Robert M. then came and offered himself (for trial); and the said knights then came not nor essoined themselves, and Hugh B. and one of the justiciars in Eyre then came and said that that record came before them, and that it pertained

[1] Laws of Wm. I. i. c. 24.

[2] Glanvill, lib. 8, c. 9. That the record of the King's Courts was conclusive in earlier times after the Conquest, while that of the others was not, see Laws Wm. I. i. c. 24; Laws Hen. I. c. 31, § 4; c. 49, § 4. Before the Conquest, it is probable that the same was entirely true of the record of the County Court.

[3] 1 Rotuli, 376, 377, *anno* 1199.

to nothing (now material). Judgment that Robert go without day.

In the year 1194 the bishop of Chichester and Robert de V.[1] declared the record of a plea of land in T., of which there was a plea between them in the King's Court, to wit, that Robert gave the church of the Trinity to the bishop of Chichester for ever (to be held) freely and in peace, and five acres of land, together with the said vill of T., in frankalmoign, so that whatever was found by oath of twelve knights of the vicinage as pertaining to the church should remain to it. Day was given for taking the chirograph in the octaves of St. Hilary at Westminster.

Herbert de H.[2] essoined himself on the third day, during the day of a pleading de malo veniendi against Alice de F. of a plea of his judgment and record concerning a recognition summoned between himself and the said Alice of the advowson of the church of D. . . . Record by Simeon de Pateshull that the assise said that they never saw any parson presented to the church of D., but seven parsons held it in person from father to son down to the last parson who lately died; and they say that that church was founded in the fee which Alice holds of the said Herbert in the vill of D., and that he has nothing in demesne around that church. It was considered that Alice hold in peace and that the bishop receive the parson presented by her.

Hugh de V.[3] complains that Amanda of S. has wrongfully taken possession of sixty acres in the marsh of B., on account of a duel waged between them in the court of the archbishop of York, and he demands that view be had whether the duel related to that land. It was considered that the sheriff cause such view to be had of that land by the same knights by whom the first view was had whether the duel (related to it), and cause record of that view to come by four knights to

[1] 1 Rotuli, 12. [2] Ib. 37, *anno* 1194.
[3] Ib. 44, same year.

Westminster in the octaves of St. Hilary. Hugh de V. puts in his place Hugh de M.

Cecilia de F.[1] owes the king two marks for having record of the complaint as it was tried in the King's Court between her and Geoffrey R., who recovered . . . . for a villein, and that she might have the complaint in the King's Court at Westminster, which is between them in the County Court. Cecilia has a writ for summoning that complaint to Westminster on the day of St. Hilary in fifteen days.

The next mode of trial to be noticed was the ordeal, commonly called *judicium Dei*, sometimes simply *judicium*. It was, like the duel, the final test, from which there was no appeal. It was a solemn invocation to Heaven to decide the matter in dispute; and the result of the test was regarded by the credulous masses as effected by the direct interposition of the Almighty. But it was only when the party had no charters, and could furnish neither witnesses nor compurgators, that he resorted to the ordeal;[2] except in cases provided for by special legislation, as by the Assises of Clarendon and Northampton. It was applicable to women equally with men;[3] and it was the legal mode of exculpation of a man accused by a woman of the murder of her husband.[4]

The ordeal was more extensively employed in the procedure of the early Norman period than in the later. It was the typical mode of trial among the English, contrasting English procedure with the procedure of their Norman conquerors. With them it was, until the Conquest, the only *judicium Dei*, so far as existing monuments bear witness. It was used frequently in civil as well as in criminal cases before and for a considerable time after the Conquest. Even Normans, who affected to despise the peculiar institutions of the English, sometimes resorted to the ordeal. In the time of

[1] 1 Rotuli, 92, *anno* 1194.
[2] See e.g. Laws Hen. I. c. 65, §§ 2, 5.
[3] Laws Edw. Conf. c. 19.
[4] Glanvill, lib. 14, c. 3, § 4.

the Conqueror his Norman bishop Remigius purged himself of a charge of treason by the ordeal of fire, sustained by one of the household of the accused.[1]

Of the use of the ordeal in civil cases during the latter part of the eleventh century, Domesday bears ample evidence. It is offered in three cases of lands of earl Ralph;[2] in two cases of lands of earl Alan;[3] in a case relating to lands at Greston;[4] in a case of lands of William of Warenne;[5] in the case of a freeman;[6] and in other cases.

The ordeal may possibly have continued to be a legal mode of trial for civil cases in the twelfth century so far as anything directly to the contrary appears; but the encroachment of the duel, of compurgation, and of the inquisition was constantly narrowing its application to such cases, until probably long before the end of that century, probably, indeed, before the middle of it, it had become practically obsolete in civil litigation. Its use appears at the same time to have become somewhat narrowed in criminal procedure. In the latter half of the twelfth century, and probably earlier, the duel had come to be the recognised mode of trial in appeals of treason,[7] if not in appeals of crime generally; though in the case of presentments, where compurgation had probably been the common mode of trial, the Assises of Clarendon and Northampton had provided for trial by ordeal.[8]

This mode of trial finally received a fatal blow from the well-known decree of the Lateran Council of the year 1215, at which it was ordered that the ordeal should be discontinued throughout Christendom. The effect of this decree, however, was not an immediate abrogation of ordeals in England. The ancient procedure continues to be mentioned as prevailing for some time after the year 1215. The article of Magna Charta of John, "nullus ballivus ponat de cetero aliquem ad *legem*

[1] Placita Ang.-Norm. 30. [2] Ib. 40, 41. [3] Ib. 41, 42.
[4] Ib. 41. [5] Ib. 42. [6] Ib. 43.
[7] Glanvill, lib. 14, c. 1, § 5. [8] See also Glanvill, lib. 14, c. 1, § 2.

simplici loquela sua, sine testibus fidelibus ad hoc inductis" is carried into the charter of Henry the Third, *anno* 1224; where, however, the term "lex manifesta" has in the English translation been misunderstood as "wager of law," instead of the ordeal.[1]

It should be observed that the ordeal had answered the place of trial by a petit jury in modern times; being trial upon a traverse of the accusation of the public voice, or of the finding of the jury of presentment or grand jury of the assises of Clarendon and Northampton. By these statutes, and by the ancient law of England as well, accused persons, against whom a presumption of guilt had been raised by a presentment or by an accusation of the public voice, had the constitutional right of a further trial; a traverse of the presumption. But when at length the ordeal came to be considered as abolished (there was no authoritative legislation in England abolishing it, so far as is known), the judges were in straits to know what should be done with the prisoner. He had had the constitutional right to be tried by the ordeal; and could he now be compelled to submit to some other mode of trial? If he could not be directly compelled, as clearly he ought not to be, in the absence of authoritative legislation, must he on refusal be pronounced guilty, as would have been the result of his refusal of the ordeal?

The answer to these questions explains the introduction of the proceeding known as *peine forte et dure*,[2] which probably dates from the thirteenth century. The practice was occasionally observed, it seems, before the Lateran Council of 1215, of traversing the presentment by another jury in the general manner of modern times.[3] This was probably done at the request of the prisoner, perhaps under the king's writ.

[1] 1 Stat. at Large, 9 Hen. III. c. 28.

[2] The history of this measure of coercion was first adequately portrayed by the late Sir Francis Palgrave in his great work on the Rise and Progress of the English Commonwealth. See vol. i. pp. 268–270; vol. ii. pp. 189–191.

[3] See 1 Stubbs, Const. Hist. 619.

He clearly could not have been compelled, except by arbitrary power, to submit himself to a traverse jury: there was no law requiring it. The same mode of trial now suggested itself to the judges, after the disuse of the ordeal; but how should trial by jury be enforced, when the prisoner had a right of election? The answer was, he must be put to privation and suffering, if recusant, until willing to put himself upon the verdict of a trial jury.

There were four forms of ordeal, to wit, by cold water, by hot water, by hot iron, and by the morsel, or "corsnæd." The first two were in the time of Glanvill for the lower and partly unfree classes, the "rustics"; the third was for the lay freeman;[1] while the last, as we have seen, was for the clergy. The accused, however, appears to have had an election at one time between the modes by fire and by water.[2] Whether this was true in the twelfth century is doubtful.

Each was undergone after the most solemn religious ceremonial. In the case of the cold-water ordeal, a fast of three days' duration was first submitted to in the presence of a priest; then the accused was brought into the church, where mass was chanted, followed by the communion. Before communion, however, the accused was adjured by the Father, Son, and Holy Ghost, by the Christian religion which he professed, by the only-begotten Son, by the Holy Trinity, by the Holy Gospels, and by the holy relics, not to partake of the communion if he was guilty. Prayers, reading of the Scriptures, intercessions and benedictions follow. Communion having been partaken, *adjuratio aquæ* is made by the priest; in which the water is asked to cast forth the accused if guilty, and to receive him into its depths if innocent. After these ceremonies the accused is stripped, kisses the book and the cross, is sprinkled with holy water, and then cast into the depths. If he sank, he was adjudged not guilty; if he swam, he was pronounced guilty.

[1] Glanvill, lib. 14, c. 1.

[2] Schmid, Gesetze, Anhang, 13.

Similar religious ceremonies were performed in the other forms of ordeal. If the accuser elected for the accused the trial by hot water, the water was placed in a vessel and heated to the highest degree. Then, if the party were accused of an inferior crime, he plunged his arm into the water as far as the wrist, and brought forth a stone suspended by a cord; if he were accused of a great crime, the stone was suspended deeper, so as to require him to plunge his arm into the water as far as his elbow. The hand of the accused was then bandaged, and at the end of three days the bandage was removed. If it now appeared that the wound had healed, the accused was deemed innocent; but if it had festered, he was held guilty.

If trial by hot iron was elected, a piece of iron weighing either one or three pounds, according to the nature of the crime charged, was heated under the direction of men standing by, whose duty it was to see that a proper heat was obtained and kept until the time for the test had nearly arrived. During the final ceremonies the fire was left, and the iron allowed to remain in the embers. It was then raised, and, with an invocation to the Deity, given into the naked hand of the accused, who carried it the distance of nine feet, when it was dropped, and the hand bandaged as in the case of the hot-water ordeal, to abide the same test.[1]

The ordeal of the morsel, accompanied by similar ceremonials, was undergone by the accused undertaking to swallow a piece of barley bread, or a piece of cheese, of the weight of an ounce; in which, if he succeeded without serious difficulty, he was deemed innocent, but if he choked and grew black in the face, he was adjudged guilty.[2]

The duel became a feature of judicial procedure in England, if the absence of mention of it previously is con-

[1] Beames, Glanvill, pp. 351, 352.

[2] See Schmid, Gesetze, Anhang, 17, for the ceremonials in all of these forms of the ordeal.

clusive, only upon the advent of the Normans. This mode of trial, however, was as common in Normandy before the Conquest as was the ordeal in England; and as early as the taking of the Great Survey, about twenty years after the overthrow of the English at Senlac, the duel appears to have become almost as common in England as the ordeal. So early probably as the year 1077, the record of the case of Bishop Wulfstan v. Abbot Walter[1] informs us that the men of the Church of St. Mary and of the bishop were ready to prove by oath and by *battle* the case of the plaintiff; and this, it should be noticed, is at the instance of an Englishman, which tends somewhat to show that the Norman innovation was already coming into favour in the land of the Anglo-Saxons. From the time of Domesday Book forward the duel begins to encroach upon the domain of the ordeal, until at length it succeeds in crowding it out of civil procedure altogether. And while this was going on, the duel was also forcing its way between the ordeal and compurgation, drawing from each, and becoming established in criminal procedure, as we have seen.

All traversed appeals[2] either were, or in the election of the appellant made known in the formula of his appeal, might be followed by the duel, whether in criminal or in civil cases. When no election was made by the appellant, the court might, it seems, upon demand of the appellee, order wager of battle. The duel might also be ordered in other cases than appeals, upon the state of the pleadings. This was true whenever a question of right turned upon the disputed allegations of the parties; and it was also true when the genuineness of a seal was in question and the court had no adequate means of deciding.

Many examples of the use of the duel in England during the Norman period might be presented;[3] but there is no

[1] Placita Ang.-Norm. 16.

[2] We have already seen in what cases appeals were usual. *Ante*, pp. 295–297.

[3] Placita Ang.-Norm. 41, 42, 62, 69, 141, 142, 182, 210, 305.

complete record before the thirteenth century of the procedure. Bracton sets out the whole proceeding in several cases; and there is no reason to suppose that there had been any material change since the twelfth century.

The proceedings in the case of an approver (*probator*)—one who had turned State's evidence against an accomplice in crime, and appealed him thereof—may safely be quoted from Bracton. That appeals of this kind prevailed as early as the year 1167, the Rolls of the Pipe afford direct evidence; and the use of technical language indicates that they were even then nothing new. The roll for the fourteenth year of Henry the Second contains the following entry: "Reimundus de Baldac debet xx. marcas pro appellatione Walteri probatoris de falsonaria."[1]

The record given by Bracton (the whole of which, including the first-term pleadings, should be read together) is to the following effect: The king, he says, has the power to remit the punishment of crime to those who will discover their accomplices and agree to free the country of them; or he may grant the right to his justiciars to remit the punishment. In the latter case he issues a writ to them of this tenor: Know that we give you power to grant life and limb to such an one who has become an approver before us, and acknowledged a robbery (or some other felony), upon the condition, that he wage the duel and secure the conviction of five (or such another number), etc.

The sheriff then attaches the bodies of the parties to be appealed, and the king thereupon issues his writ commanding the sheriff without delay to take "A., whom B. (who confesses that he is a robber), in our court, before our justices, appeals of complicity in robbery, and bring him speedily before the said justices at such a place to answer the said B. of complicity in robbery, whereof B. appeals him."[2]

[1] Placita Ang.-Norm. 269.

[2] If the trial was to be *per patriam*, the writ required the sheriff to bring a *secta* of the vicinage for making an inquisition.—Bracton, 152 b.

The parties having been brought into court, the appeal is made in the following form: "A., of N., acknowledging himself to be a robber, appeals B. of complicity in theft and robbery, that they together stole such a thing at such a place, and so that the said B. had for his part so much, and this he offers to prove against him by his body, as the court may direct."

It was necessary, Bracton adds, for the approver to express a thing certain, and all the circumstances without variation or change of words, and that he should recognise the party appealed when brought into court before him.

The defendant's plea follows in the same language as that used in the time of Henry the Second. It was as follows: "And B. comes and defends the complicity and robbery and every felony, and whatever is imputed to him from word to word, and according as it is imputed to him from word to word."

Pledges are then given, by the appellor for the prosecution and by the defendant for defence. If the latter, however, cannot give security, he is sent to jail again. A day is named for the trial of arms; which having arrived, the parties appear in court armed, and the defendant, coming forward first, takes the following oath: "Hear this, you man whom I hold by the hand, who call you yourself A. by your baptismal name, that I am not a robber, nor your accomplice in robbery, nor did I with you steal such a thing, in such a place, nor did we do any such thing, as such robbery, nor did I have for my part so much; so help me God."

Then the appellor swore in words of affirmation as follows: "Hear this, you man whom I hold by the hand, who call yourself B. by your baptismal name, that you are perjured, and you are so perjured because you are a robber, and were accomplice with me in theft, because in such a place we together stole such a thing, of which you had for your part so much; so help me God."[1]

[1] Bracton, 152, 153. For the rest of the record, Bracton refers back to p. 142 b, which is given in the text *supra*.

The oaths having thus been taken, the defendant is immediately sent out with two knights or other legal men, according to his rank, and is by them conducted to the field in which the contest is to take place; whither the appellor is in the same manner conducted. Each is so guarded that no one after the oaths can speak with them before the duel is begun; but when they reach the field they must swear again before the justices in the following formula: "Hear this, ye justices, that I have not eaten or drunk, nor has anyone done anything by or for me, whereby the law of God might be abased or the law of the devil exalted; so help me God."

Then proclamation was made by the king's officer, and silence commanded in these words: "The king and his justices command that no one be so bold, whatever he may hear or see, as to move or cry aloud, and if anyone disobey, let him be taken and imprisoned for a year and a day, according to the king's pleasure."

They now proceed to the combat on foot, with staffs, and if the appellor is conquered, or if the defendant[1] can defend himself through the whole day, until the stars appear, then the defendant might go quit of the appeal; and with him all others appealed of complicity in the same crime. If, however, the defendant is conquered, the appellor must then wage the duel as before with the others, if any, similarly accused. If the appellor were overcome, the party appealed, with the others probably who had not waged battle, was dismissed on giving pledges, unless the judges thought there was ground for detaining him in prison. If he could not give pledges, he was to abjure the kingdom or be sent to jail for life.[2]

[1] The old text has "appellans"; but this is clearly a mistake for "appellatus."

[2] Compare the trial for treason of Ganelon, Chanson de Roland, cc. 295–318, for a vivid account of the duel, in the language, it seems, of the latter part of the twelfth century. The story is of the treason to Roland and Oliver in Spain, of which Ganelon is represented as appealed by the Emperor Charlemagne. See also, as to the procedure of the duel in detail, 1 Assises de Jérusalem, pp. 172, 173 (Beugnot). Both parties fought by champion on horseback, on the Continent.—Ib.

The great feature of procedure in the Norman period was the inquisition; the practice concerning which has been considered in the chapter on the issue term. Something similar to this may have prevailed before the Conquest and afterwards, possibly, in the Danelag, in the Norse "buakvidr" and the "tolftarkvidr," the verdict of neighbours and the verdict of twelve, of which mention has already been made. But each of these differed essentially from the inquisition; and neither has left any trace of its existence in England, unless the passage heretofore quoted from the Laws of the Confessor be thought to suggest the Norse inquest.[1]

The buakvidr has been noticed in the case of Mord v. Flosi. It was an inquest of either five or nine neighbours, summoned by the plaintiff, of those who lived nearest the place where the act in question was committed. In cases of manslaughter they proceeded to view the body of the slain; and as the act of slaying in such cases must have been publicly avowed (otherwise it was murder), they became witnesses to the fact in a proper sense.

This was the most common form of trial in Iceland. The references to it in the Gragas and in the sagas are frequent;[2] and its general resemblance to the inquisition by recognitors is noticeable. Still it differed from that mode of trial in several essential particulars. (1) It appears not to have been applicable to the trial of so wide a class of actions as was the inquisition; it was for the trial of questions of fact only, upon the testimony of neighbours nearest the affair in question.[3]

[1] *Ante*, p. 309. [2] Vigfusson, Cleasby, Dict. Kvidr.

[3] The Latin version of the Gragas says: "De quavis re effectum [verdict] proferre vicini evocati non obligantur. De causis peregre, vel extra medium oceani orientem versus, enatis, quamvis hic actis instituatur, discernere non tenentur. Quid juris hac in civitate valeat, vicinis evocatis definire non licitum est. . . . Si porro novem evocati sint vicini ubi quinque tantum adhiberentur, vel quinque, ubi novum adesse deberent; vel si causæ per dodecadis veridicos (sc. prætorianum effatum [priest verdict of twelve men, tolftarkvidr]) dirimendæ vicini admoventur, evocati judicium adeuntes testes antestentur, qui probent eos hoc suo effato proferendo obstare velle, quod vel novera pro quinque vel vice versa provocati, vel causæ per dodecadis veridicos dirimendæ admoti sint."—1 Gragas, 168.

(2) It was summoned by the plaintiff, and not by an officer of the law. (3) Its chief use was in criminal cases. (4) The number sitting upon the inquest was fixed to five or nine. (5) The verdict of the *bua* need not have been unanimous: a majority was sufficient.[1]

The tolftarkvidr or verdict of twelve, called also the gothakvidr or priest verdict, is said to have been applicable only to certain (unnamed) cases "defined in the law;"[2] but the references to it in the Gragas and sagas are numerous. The inquest, according to the Gragas, was summoned by the godi (priest), he himself being one of the number unless rendered incompetent by some special circumstance, such as consanguinity to one of the parties litigant.[3] The function of the inquest appears to have been to *hear* evidence, like that of the modern English jury; and hence it seems not to have been necessary to summon them from the nearest neighbourhood. The majority, in the time of the Gragas, governed; but when the inquest was equally divided, the side upon which the godi voted prevailed.[4]

The decision of a case under this mode of trial was therefore virtually in the hands of the godi;[5] of which fact an illustration is afforded by the case of Hallvard, as stated in the saga of Viga-Glum. One autumn, says the saga, Halli missed some ten or twelve wethers out of the hill pastures, and they could not be found, so when Bard (Halli's son) and his father met, Halli asked his son what he thought had become of the wethers. Bard replied: "I don't wonder if sheep disappear when a thief lives next door to you, ever since Hallvard came into the district." "Yes," says Halli, "I should like you to set on foot a suit against him, and

[1] 1 Gragas, 53. "Si de effato ferendo in unum non consenserint, consentientium numerosiorum effatum valeat."

[2] Vigf. Cleasby, Dict. Kvidr. [3] Head, Viga-Glum Saga, p. 118.

[4] "Si ce effato proferendo inter eos non convenerit, eorum prævaleat sententia qui plures simul in unum conspirant; si vero dissentientes numero *pares* sint, ferant effatum e voluntate prætoris."—1 Gragas, 57. [5] Head, p. 118.

summon him for theft. I don't think, if I make this charge against him, Glum [the priest of the district] *will go the length* of clearing him by the oath of twelve men." "No," answered Bard, "it will be a difficult matter for him to get the oath of twelve men out of Glum and Vigfuss [Glum's son, Hallvard being his foster-father] and their people."

This would be sufficient to indicate the main difference between the buakvidr and the tolftarkvidr; but the saga proceeds: Then Bard set his suit on foot, and when Vigfuss knew it he told his father that he should not like proceedings for theft to be commenced against his foster-father. Glum's answer was: "You know he is not to be trusted, and it will not be a popular thing to swear him guiltless." Vigfuss said: "Then I would rather that we had to deal with a matter of greater consequence." Glum replied: "It seems to me better to pay something on his account, and let him change his residence and come hither, than to risk my credit for a man of his character."

When men came up to the Thing the case was brought in court, and Glum had to swear one way or the other with his twelve men. Vigfuss became aware of the fact that his father intended to find Hallvard guilty, so he went to the court and said that he would take care that Glum should pay dearly for it if his foster-father was declared guilty. It ended in Glum quashing the suit by swearing that Hallvard was innocent.[1]

[1] Head, Viga-Glum Saga, pp. 66, 67. The sequel further shows the power of the godi, and is told not without wit. In the course of a winter or two, says the saga, it happened that Halli lost a pig, which was so fat that it could hardly get on its legs. Bard came in one day and asked if the pig had been killed, and Halli said it had disappeared. Bard replied: "He is gone, no doubt, to look for the sheep which were stolen last autumn." "I suppose," said Halli, "they are both gone the same way. Will you summon Hallvard?" "Well," replied Bard, "so it shall be, for I do not think Glum will this time swear Hallvard free; Vigfuss was the cause of the previous acquittal, and he is not now in the country." Bard took up the case, and proceeded to serve the summons; but when he met Hallvard he made short work of the suit by cutting off the man's head.

Whatever resemblance may be discovered between the Norse modes of trial and the modern English jury, it is perfectly clear that neither the tolftarkvidr, nor the buakvidr, nor any of the minor modes of trial of the same nature (of which there appear to have been two or three),[1] bore fruit in the modern jury.[2] That institution was purely Norman-English, having come by direct lineage from the inquisition procedure introduced from Normandy by William the Conqueror. The development of the writ of novel disseisin, heretofore examined, has shown the history of the procedure by inquisition and recognition in England from the time of the Conquest until the end of the reign of Henry the Second, when the jury as it prevailed until the separation of witness and juror, or rather until the juror ceased to be a witness, was fully established. No other institution was at work contesting with the inquisition the establishment of the jury. The recognition, when it first presents an appearance in England, is what it was to the end, a body of impartial men, summoned by an officer of the law, to speak the truth concerning the matter in dispute, of which body the officer was never a member. That body in the end was the modern jury.

The essential features of the modern jury were in fact nearly consummated in the recognitions. Compurgators were party-jurors (using the term juror in a broad sense), who merely attested the credibility of their principal. They were selected by the party himself, either out of the whole community or out of a portion named by the judge, or they were chosen by lot. Their competency as law-worthy men of the community was the only matter of fact they could be required to establish. Party-witnesses were jurors whose oath or verdict, when properly given upon the question before them, decided directly the question of fact in issue; but, as in the

[1] See Vigf. Cleasby, Dict. Kvidr.

[2] It may be added that the coroner's inquest, to which the Icelandic inquests bear some resemblance, is totally unconnected with them in origin.

case of compurgators, these were *party*-jurors, that is, men selected by the party upon whom devolved the proof required by the medial judgment. They were not men selected impartially to speak the truth.

The simple inquisition stands between this mode of trial by witnesses and that species of the inquisition known as a recognition; not in strict chronological order, for all three existed side by side throughout the Norman period; though it may be observed that trial by party-witness was older than trial by simple inquisition, and that the latter was perhaps older than trial by recognition. But the simple inquisition was a stage between the other two without being connected with party-witness. The "inquisitio per testes," as this mode of trial was sometimes called, was an inquiry into the truth of a disputed allegation, not an attempt to find a certain number of men who would swear in a particular way.[1] The inquiry was accordingly instituted by an impartial person, as by the presiding officer of the court.[2]

But there was no jury here: there was no *defined body* of triers between the court and the parties. There were more or less witnesses only, whose function commonly was to find some incidental fact.

The recognition consisted usually of a fixed number of men; a body of jurors from the outset standing between the parties and the judges, and sworn to report the truth to the court. The sheriff sought out the required number of men, making diligent inquiry concerning those who were sufficiently acquainted with the facts by personal knowledge or by reliable report ("de visu et auditu," in the language of the time). This jury could inform itself by making inquiry; that is, witnesses could testify before them upon their request, and help them to a conclusion, or bring them to a division. The body, probably either as a whole or individually, could take any means to ascertain the truth, whether it were to confirm

[1] See Brunner, Schwurg. 85. [2] Ib. 84.

or to overturn their own belief as to the facts, before making their report to the court. They reported upon what they had seen and *heard*. Glanvill says that with respect to the knowledge required of the recognitors, they should be acquainted with the merits of the cause, either from what they have personally seen and heard, or from the declarations of their fathers (as in the case of champions), and from other sources equally entitled to credit as if falling within their own immediate knowledge.[1] An example from an ecclesiastical cause at the beginning of the reign of Henry the First (the Case of Matilda[2]) has already been referred to, where persons standing in the same situation as recognitors in temporal causes proceed to inform themselves before giving answer to the court by making personal inquiry of people cognisant of the facts. A similar example in a lay court may be found in the case of Monks of St. Stephen v. The King's Tenants.[3] It seems also probable that the practice which is known to have prevailed in the thirteenth century of examining the recognitors themselves as to their knowledge of the facts (the judges propounding the questions) prevailed also in the twelfth century; the same motive existing then as afterwards, a desire to ascertain whether the finding was based on reliable grounds.

The difference between this and the jury of the present day is but as a step; though in fact several steps, differing from what might perhaps be expected, were taken before the modern jury was reached. All that was *necessary* was that the idea should become established that the jurors should be men wholly unacquainted with the facts (it came to be thought inconsistent that a man should at the same time be juror and witness); when of course they would need to be informed by the testimony of persons who did know the facts. This point finally reached brought to an end the ancient practice of the examination of the jurors by the court, except as to their

[1] Glanvill, lib. 2, c. 17, § 4. [2] Placita Ang.-Norm. 79; *ante*, p. 63.
[3] Ib. 119, 120.

competency. But the modern practice of bringing witnesses before the jury has another and different origin from the act of the recognitors in informing themselves, although it amounted in the end to much the same thing. That subject belongs to the later history of the jury.[1]

Forms of the community-*jurata*, so often mentioned in the law-books of the thirteenth century, had clearly been in use in England ever since the Conquest; such for instance as the simple judicial inquisition ordered for the trial of a cause by the king's writ.[2] But the more interesting form of the *jurata*, in respect of judicial procedure, was its use in the midst of a cause, generally in an assise, by which the court, through orders emanating from itself and without the king's writ, informed itself upon questions incidentally raised in the course of the particular trial.[3] The proceeding made known by Bracton and others, by which the recognitors of the assise—an assise of novel disseisin, for instance—were converted into a *jurata* ("assisa vertitur in juratam"),[4] was indeed unknown to the Norman period. That proceeding marks a distinct step in advance of the reforms of the reign of Henry the Second. It was a simplification of the machinery of the superior courts. It was also a step towards introducing a jury unacquainted with the facts and hence to be informed entirely by testimony brought before them; for as the recognitors had been summoned for a special purpose, such, for instance, as the determination of seisin at a previous time, they must sometimes, if not often, have been unacquainted with the facts

[1] See Forsyth, Hist. Jury, 150, where the subject is considered at length; Brunner, Schwurg. 436.

[2] See, for example, Ruaculus de A. v. Abbey of Abingdon, Placita Ang.-Norm. 73; Glanvill, lib. 9, c. 13, § 3; lib. 7, c. 9, § 7. And see also the language of the submission to arbitration of the differences between Henry II. of England and Louis of France in Roger de Hovenden, *anno* 1177; also the treaty between Philip and Henry, ib. *anno* 1180. Further, Placita Ang.-Norm. 121, 139, 203, 261.

[3] Leading Cas. on Torts, 346; 1 Reeves, Hist. Eng. Law, 352–354 (Finl.).

[4] Bracton, 216 b.

necessary to the determination of questions which they had not been summoned to answer, such, for instance, as the villenage or minority of one of the parties.

Whether the community-*jurata* was employed in the twelfth century in the course of a recognition or of the Magna Assisa cannot be certainly determined. The question could be readily answered were it not for the continued use of the Anglo-Saxon community-witness and similar party-proof.[1] This procedure so nearly resembled the *jurata* that unless the facts are particularly given, it becomes difficult, if not impossible, to determine to which class the transaction belonged. The essential difference between the two is sufficiently clear. The Anglo-Saxon proceeding was strictly party-proof; while the *jurata* was an inquisition, being summoned and conducted by the judge or sheriff, or by some other disinterested person.[2] If the mode of conducting a particular proceeding of the kind were always stated, there would be no difficulty in determining of the existence in the Norman period of the *jurata* as an incidental agency of litigation.

There are, however, strong *a priori* grounds for believing that the *jurata* of the community was then in such use. It had been in use in Normandy before the Conquest (as a simple inquisition, "inquisitio ex jure")[3] and it was in use in England in the thirteenth century. It is not likely that it was introduced into England after the loss of Normandy by John, *anno* 1204; and we have seen the use of the term in England, apparently in a technical sense, so early as the year 1172.[4]

Glanvill's language is not decisive; but the natural inter-

[1] An example of party-proof to stay an assise *temp.* king John will be found in Abbreviatio Placitorum, p. 81, col. 2. "Et N. . . . dicit quod assisa non debet inde fieri quia ipse M. villanus est et inde producit sufficientem sectam, sc. A. R. patronum suum et R. filius R. et tres fratres suos cognatos ipsius M. qui se fatentur esse villanos ipsius N."

[2] On the Continent the *jurata* was called an "inquisitio ex jure," an inquisition of right, probably because it was had without the king's writ, whenever in the course of a trial it became necessary or proper.

[3] Brunner, Schwurg. 84, 381, 382. [4] *Ante*, p. 125.

pretation of it makes it point to the use of the *jurata*. In a writ of right the tenant might put himself upon the Grand Assise to avoid the duel. But to the rendering of any verdict by the assise the demandant was permitted to object that the parties were sprung from the same stock from whence the inheritance in question came. If this were admitted by the tenant, the assise was terminated, "because it shall then be lawfully *inquired* ["quia tunc legitime inquiretur"] which of the parties is the nearer to the original stock, and as such the heir more justly entitled."[1] If, however, the tenant denied the alleged relationship, then recourse was to be had to the kindred of the parties, who for this purpose were now to be summoned into court, that the question of relationship might be inquired of ("inquiratur") through them. If the relations disagreed, or if their unanimous answer was stoutly denied, the case was to stand upon the verdict of the vicinage ("veredicto vicineti"). Inquiry now being made ("facta autem *inquisitione*"), the result was to stand according to the answer.[2] The use, by a lawyer, of such technical terms would, in connection with the considerations already presented, be nearly if not quite conclusive; but in another place, where the subject treated of is the analogous one of proof as to villenage, Glanvill's language as to the *latter* question shows that party-proof (community-witness) was used. A writ having been obtained by a party claiming his freedom against one who was holding him to villenage, Glanvill says that the question of freedom should be determined in this manner: the *party* who claims his liberty *shall produce* a number of his nearest relatives; and if their freedom is recognised and proved in court, the plaintiff shall be declared free.[3] This, however, is followed by the statement that if the free condition of the *secta* were denied, then recourse was to be had to the vicinage, whose verdict ("veredictum") should decide the question, and if the *defendant should bring forward* persons

[1] Glanvill, lib. 2, c. 6, § 3. [2] Ib. §§ 4, 5. [3] Ib. lib. 5, c. 4, § 1.

to prove that the plaintiff's *secta* were his (the defendant's) villeins-born, and they were sprung from the same stock as the plaintiff, then, says Glanvill, if both were found ("recognoscantur") to be of common kindred, "let it be inquired by the vicinage ('disquiretur per visinetum') which of them are the nearest to him," with judgment accordingly.[1] And in the corresponding passage in the Regiam Majestatem, so far as that fact is entitled to consideration, this passage concerning the inquiry by the vicinage reads: "It shall be tried by an assise."[2] On the whole the conclusion fairly is that by the side of the tenacious Anglo-Saxon proceeding by party-witness of the community, the Norman impartial *jurata* of the community was in use, though certainly not in the fixed and familiar form of Bracton.[3] It may be added that the *secta* of a party was probably subjected to examination by the judges as to the facts in question.

[1] Glanvill, lib. 5, c. 4, § 2. [2] Regiam Majestatem, lib. 2, c. 11.

[3] This is also the view of Reeves, 1 Hist. Eng. Law, 352–354. See Leading Cas. on Torts, 346; Forsyth, Hist. Jury, 143; Brunner, Schwurg. 381 *et seq.* and 416 *et seq.*

CHAPTER X.

THE FINAL JUDGMENT.

JUDGMENT in favour of the defendant in a civil case declared that the party go without day and the plaintiff be in mercy *pro falso clamore*. In criminal appeals in the time of Bracton, as we have seen in the last chapter, the defendant, though successful, was required to find pledges, unless there was ground for detaining him; otherwise he was to abjure the kingdom or be sent to jail. A somewhat similar law had been made *anno* 1176 by the Assise of Northampton as to persons who had acquitted themselves on being sent to the water ordeal under the oath of the jurors of presentment. The judgment by this law required the parties to find pledges, permitting them to remain in the country; unless they had been accused of murder or some other enormous felony, when they were sentenced to depart the country, with their chattels, within forty days, and abjure the kingdom.

The nature of judgment in favour of a plaintiff varied according to the nature of the action. During the anarchy of Stephen and Matilda, and during the first years of the reign of Henry the Second, as we have elsewhere seen, the possessions and interests of the church were taken into the protection of the Ecclesiastical Court; and the records of the time disclose the practice of that court in the matter of final judgments in

favour of the church. Aside from the peculiar pains and penalties of the Spiritual Court, there was no material difference, as has been shown, between the procedure of that court and the procedure of the lay courts; and there is no reason to suppose the existence of any difference in matters of final judgment. Church causes relating to property about the middle of the twelfth century will show the general practice of the time, in substance, as well as the special practice of the Spiritual Court.

In the case of a recovery of lands, the judgment of the court, pronounced by the archdeacon or other presiding officer, was that investiture or seisin be given the plaintiff.[1] Thus in the case of Abbot Gilbert (of Gloucester) v. Earl Gilbert,[2] *anno* 1145, an action for the recovery of two churches unjustly seized by the defendant, the record tells us that the cause having come on for trial in open synod, after the defendant had often been summoned but to no purpose, and the plaintiff had made out his case by charters and by the testimony of the synod; "we adjudged investiture of the said churches to the abbot and church of Gloucester, and by the keys of the said churches we inducted him into possession thereof by judgment of the whole of our synod."

There is a similar case of the year 1156, between the successor (abbot Hamlin) of the same plaintiff and William, earl of Gloucester.[3] In a record of this case, an action in the Ecclesiastical Court to recover the church of St. Gundley, Theobald, archbishop of Canterbury, says that because the defendant wholly refused to appear before him at the peremptory day ("ad diem peremptorium, ante nostram præsentiam")

[1] Taking property into the king's hand must not be confounded with final process. That was done under mesne process. See *ante*, p. 221. The king held the property under the process of præcipe quod reddat, on failure of the tenant to answer the third summons, for fifteen days, subject to a right to replevy; after which time, if the tenant had not replevied, the land was adjudged to the demandant, subject to a writ of right by the tenant.—Glanvill, lib. 1, c. 7.

[2] Placita Ang.-Norm. 150.

[3] Ib. 182, 183.

and to answer Hamlin and the monks of Gloucester of the church of which he had unjustly disseised them, they restored, in canonical manner, by canonical judgment, to the abbot and his monks the church in question. And he adds, as if it were feared that the defendant would not respect the judgment, a direction for the exercise of the spiritual authority of the church over him if he should presume to harass the abbot and monks in their possession. He was to be coerced to justice by ecclesiastical vengeance enjoined throughout the dioceses. A similar cause and judgment follow against a certain clerk named Picot, whom the earl of Gloucester had inducted into the church.[1] It was ordered that if Picot refused to give up the key, the person addressed in the record (Nicholas, bishop of Llandaff) should make a new key, open the church, and give to the abbot investiture of the church, houses, and pertinents, without delay. And if Picot were refractory and molested the abbot, he was to be subjected to ecclesiastical discipline.

In the case of a recovery of lands from a person of high station in the church, the practice in the first instance probably was to direct him to give seisin to the demandant, or upon failure so to do to appear in court upon a day named and show cause therefor. There is a case of the year 1194 which supports this suggestion, and shows what followed upon non-appearance. It was commanded the abbot of B., according to the Rotuli Curiæ Regis,[2] that he deliver the advowson of the church of E., of which he was incumbent, to Richard de T., on account of a claim which Richard had successfully made to the said church, in the King's Court; and unless he should do so, he should be before the justiciars at Westminster on the feast of St. Michael in fifteen days to show why he had not done it. And the said Richard (the record proceeds to state) came and offered himself, and waited until the fourth day; and the abbot came not nor essoined himself

[1] Placita Ang.-Norm. 184, 185. [2] 1 Rotuli, 4.

and summons was proved. Judgment that the abbot be put by gage and pledge to be at Westminster in the octaves of St. Martin to show why he had not come on the day set for him in court, and (to answer) concerning a capital plea; that is, the full wite or mulct.

In the event of the success of the demandant in a writ of right as to land, whether in the duel or in the Grand Assise, the final judgment required the sheriff to disseise the tenant, without delay, of the land in question, with all the fruits and produce found upon it, and give the same to the demandant.[1] In case there was any doubt as to the boundaries of the fee in question, the king's special writ issued, directing, if we may judge generally from a single case, a survey by twelve legal men of the vicinage who knew the bounds of the tenement and were sworn to speak the truth thereof.[2]

In like manner if the suit was for default in performing services due by reason of tenure, the judgment was for the recovery of the land, unless the plaintiff had called for compensation only. He had the right, it seems, to sue for the land upon default of service, and was not compelled to demand performance or compensation. The several cases of suits by abbot Faritius[3] (*anno* 1101) in respect of knights' fees will serve as an illustration. In one of these cases he sues William, the king's chamberlain, for neglecting or refusing to furnish a knight on the occasion of the threatened conflict between Henry the First and his brother Robert, in the first year of Henry's reign. The defendant was compelled to admit the abbot's claim; and though, as the record states, it seemed that by the law of the land William justly deserved to be outlawed, still by the intercession of the good men present the plaintiff *gave the land* to William upon the agreement that he should

[1] Glanvill, lib. 2, c. 3, § 11.
[2] Placita Ang.-Norm. 175, early in the reign of Henry II.
[3] Ib. 75-78.

become the man of the abbot, and pay him ten pounds by way of penalty, etc.

Judgment in favour of the demandant in an assise of mort d'ancestor, or of the last presentation, or of novel disseisin was that seisin should be given him; and a writ for this purpose was issued commanding the sheriff to cause him to have it without delay.[1] In the case of the assise of mort d'ancestor, the demandant was entitled, together with the seisin, to the possession of all the chattels found in the fee at the time of delivering the seisin.[2] In the assise of novel disseisin, the tenant, if he failed, was amerced for the disseisin, and the demandant was entitled to have judgment for what in modern times would be included within the term "mesne profits." A special writ was obtainable for this purpose, requiring delivery of the "chattels and fruits," if the sheriff did not attend to the matter on giving seisin to the demandant. Glanvill, while not quite clear as to what the "chattels and fruits" thus to be delivered were, says that in no other recognition did the judgment usually speak of chattels or fruits, from which it is to be inferred that something different is meant from what he had said about judgment in the assise of mort d'ancestor, above mentioned. It is clear that the demandant was entitled to damages besides seisin. Many cases in the Rotuli of judgment in novel disseisin show this. "Judgment that William have seisin and Nigel be in mercy. Damage four shillings, fine half a mark."[3] "Judgment that Robert have seisin and Walter be in mercy for the disseisin. Damage for the disseisin half a mark."[4] "Damage half a mark."[5] "Damage one mark."[6] "Damage two shillings."[7] "Fine half a mark, damage twenty shillings."[8] "Damage five shillings, fine half a mark."[9] "Damage *done thereto* thirty pence, fine half a

[1] Glanvill, lib. 13, *passim*. The other recognitions were mostly for incidental purposes. [2] Ib. c. 9.

[3] 1 Rotuli, 177. [4] Ibid. [5] Ib. 329. [6] Ib. 330.

[7] Ib. 350. [8] Ib. 374. [9] Ib. 391.

mark."[1] "Damage one mark, fine one mark."[2] "Damage done thereto one mark, fine two marks."[3] "Damage twenty shillings, fine half a mark."[4] "Damage done thereto six shillings, fine half a mark."[5] "Damage done thereto ten shillings, fine upon Aristotle forty shillings, upon Ralph half a mark."[6] "Damage nine marks seven shillings and five pence, and William to be amerced."[7] These fines were the amercements for the disseisin; and they were inflicted as well when the tenant succeeded as when he failed, if the disseisin were violent.[8]

In the case of judgments upon simple money demands, the defendant, if he did not make present payment, was probably required to find sureties for the amount, when he lacked sufficient property, subject to levy, to pay the sum adjudged due. In the case of The King v. Thomas à Becket,[9] the defendant was persuaded to put himself upon the king's mercy, and was thereupon adjudged to pay five hundred pounds, for which he found sureties. Failure to do this when required probably entailed outlawry or loss of freedom, according to circumstances, in the case of a layman, unless the defendant were so fortunate as to secure the king's discharge.

If the defendant were prosecuted and found guilty of the commission of a considerable crime below the grade of treason or felony, such as theft of valuable property, the judgment, besides requiring restitution or compensation, or security therefor, commonly ordered the defendant to suffer mutilation, as in Ailward's Case,[10] or if the offence was petty, merely imprisonment or a simple amercement. But in prosecutions of treason or felony, the prisoner, if found guilty, was adjudged in the king's mercy of life and limb;[11] and added to this were

[1] 1 Rotuli, 396. [2] Ib. 422. [3] Ibid. [4] Ib. 424. [5] Ib. 430.
[6] Ib. 434. [7] Ib. 446. [8] Glanvill, lib. 13, c. 38, § 2.
[9] Placita Ang.-Norm. 211. [10] Ib. 260.
[11] Glanvill, lib. 14, c. 1, § 2. See the cases of Roger de Breteuil, ib. 11, and of earl Waltheof, ib. 12, *temp.* Wm. I.

confiscation of goods and the perpetual disherison of his heirs.[1] By the continental law, at least within the bounds of modern France, and by the Assises of Jerusalem, the pledges of the defendant were subject to the same punishment as that adjudged upon the principal; though not, it seems, in the same odious form sometimes inflicted upon the latter.[2] It is doubtful if such consequences followed upon conviction in England. In great negotiations it was common for each of the parties to pledge *obsides* to go "in captione" of the other party upon his default in the performance of his part of the engagement. Thus, in an engagement, *anno* 1103, between Henry the First and Robert, count of Flanders, for supplying the king with a thousand soldiers, twelve *obsides* of the count "ponent se in captione, in turri London, vel in alio loco, ubi rex eos libere possit retinere ad proficuum suum," in case of their principal's default.[3] But this is all that the known records justify us in asserting of the law in this particular as to pledges.

The judgment pronounced upon a person who had entered into pledge to produce for justice a person accused of theft or robbery, and had failed to perform his engagement, was, according to the Mercian law, as follows: He should restore the stolen chattels and pay twenty shillings (to the prosecutor as *infra*) for the head of the fugitive, and four pence to the keeper of the stocks, and a halfpenny "pro fossoris" ("pur la besche"), and to the king besides, forty shillings. According to the West-Saxon law, the pledge should give one hundred shillings for the head to him who prosecuted the claim, and to the king four pounds. By the Dane law he forfeited eight pounds, of which seven went to the king, and the eighth for the head, to the prosecutor. But if within a year and a day he should find the accused and bring him to justice, the pound

[1] Glanvill, lib. 14, c. 1, § 6.

[2] See Chanson de Roland, line 3958 (Gautier); Huon de Bordeaux, 44 (Guessard); 1 Assises de Jérusalem, c. 104, p. 175 (Beugnot).

[3] Rymer, Fœdera, 2, 3.

should be restored to the pledging party, and justice done upon the criminal.[1]

Outlawry was usually a last resort. It was seldom proclaimed except as punishment for contumacy; that is, for unyielding disobedience of the requirements of the law when once set in motion, or of the commands of the king or of the courts.[2] This might be by refusal to obey summons, as in the Case of Earl Ralph,[3] in the time of the Conqueror, and in the Case of Roger de Belesme,[4] in the time of Henry the First, or it might be by refusal to obey the medial or the final judgment of court. But such a consequence could not follow a refusal to obey the medial judgment of a tribunal, it seems, except when that judgment required the party to purge himself of an accusation of crime, or perhaps of a delict, and he had fled. Failure, or even refusal, to make the proof in a civil cause relating to property or to services was followed only by amercement, and judgment against the pledges, if pledge had been given. This was so, because, when the defaulting party was the plaintiff, no damage was done, and when he was the defendant, the means of satisfying the demand of the opposite party was at hand in the property in question, or in the person of the pledges. When this was not the case, *refusal* to perform the judgment of court requiring the defendant to give security probably subjected him, if a layman, to outlawry and its consequences.

The contumacy of an alleged criminal, or of a recusant defendant, if not already known to the king, was reported to him, on judgment of court, for the final sentence of the law. And now, unless the influence of others or the king's own

[1] Wm. I. i. c. 3.

[2] Laws Hen. I. c. 53, § 1; c. 66, §§ 1, 2. See, however, c. 52, § 1. And see Assise North. c. 13.

[3] Placita Ang.-Norm. 11.

[4] Ib. 83. See also Laws Wm. I. c. 52; Edw. Conf. cc. 6, 18, 37, 38. It seems by inference that in the eleventh century outlawry had extended to children born after the offence. The law expressly exempts those born before, and is silent as to those born after.

disposition towards him availed, the hopeful outlaw, who had preferred the uncertainty of concealment and flight to the doubtful event of the ordeal or the duel, or to the certainty of imprisonment, was turned over to the tender mercies of that disproportionate part of the population who, strangers to pity, knew no shrinking at the sight of blood.[1]

[1] It was declared of one who had broken the peace of the church: "Si infra xxx. et unum diem, per amicos suos seu per justiciam regis reperire non poterit, ore suo utlagabit eum rex. Et si postea repertus fuerit et teneri possit, vivus regi reddatur, vel caput ipsius si se defenderit; lupinum enim caput geret a die utlagacionis sue, quod ab Anglis *uulues heued* [wolfshead] nominatur. Et hec sentencia communis est de *omnibus* utlagis."—Laws Edw. Conf. c. 6.

Contumacy towards the Ecclesiastical Court was punished by excommunication; to which, if need were, the arm of the secular power was added. See Charter of William the Conqueror, Appendix, No. 1. See, however, the modification made by the Constitutions of Clarendon, c. 10, *ante*, p. 37.

APPENDIX.

APPENDIX.

CARTÆ ET PLACITA.

All of the following records, except the first three and the last one, are of litigations in Normandy, from the time of William the Conqueror until the reign of Henry the Second, inclusive. With the exception of Nos. 1–3, they have never before been printed in full, most of them not at all. No. 1 is the famous charter of the Conqueror concerning jurisdiction of spiritual causes; No. 2 is the record of an important cause at Antioch in the twelfth century; and No. 3 is the record of a temporal cause before a clerical court in the time of Henry the Second.

No. 1.] CARTA WILLELMI.[1]

W. gracia Dei rex Anglorum R. Bainardo et G. de Magnavilla, et P. de Valoines, ceterisque meis fidelibus de Essex et de Hertfordschire et de Middlesex, salutem. Sciatis vos omnes, et ceteri mei fideles qui in Anglia manent, quod episcopales leges, que non bene, nec secundum sanctorum canonum precepta, usque ad mea tempora in regno Anglorum fuerunt, communi concilio et consilio archiepiscoporum et episcoporum et abbatum, et omnium principum regni mei, emendandas judicavi. Propterea mando, et regia

[1] 1 Anc. Laws, 495 (8vo ed.).

auctoritate precipio, ut nullus episcopus vel archidiaconus de legibus episcopalibus amplius in hundret placita teneant, nec causam que ad regimen animarum pertinet ad judicium secularium hominum adducant; sed quicunque, secundum episcopales leges, de quacumque causa vel culpa interpellatus fuerit, ad locum quem ad hoc episcopus elegerit vel nominaverit veniat, ibique de causa vel culpa sua respondeat, et non secundum hundret, sed secundum canones et episcopales leges, rectum Deo et episcopo suo faciat. Si vero aliquis per superbiam elatus ad justiciam episcopalem venire contempserit vel noluerit, vocetur semel, secundo, et tercio; quod si nec sic ad emendacionem venerit, excommunicetur; et si opus fuerit ad hoc vindicandum, fortitudo et justicia regis vel vicecomitis adhibeatur. Ille autem qui vocatus ad justiciam episcopi venire noluerit, pro unaquaque vocacione legem episcopalem emendabit. Hoc eciam defendo et mea auctoritate interdico, ne ullus vicecomes aut prepositus seu minister regis, nec aliquis laicus homo, de legibus que ad episcopum pertinent se intromittat, nec aliquis laicus homo alium hominem sine justicia episcopi ad judicium adducat. Judicium vero in nullo loco portetur, nisi in episcopali sede, aut in illo loco quem ad hoc episcopus constituerit.

No. 2.]

Privilegium Raimundi, principis Antiochiæ, de justicio in ipsius curia facto, de injuria quam conventus ecclesiæ Sancti Pauli diutissime canonicis Sancti Sepulcri super injusta cujusdam gardini possessione intulerat. [Anno 1140.][1]

In nomine sanctæ et individuæ Trinitatis, Patris et Filii et Spiritus Sancti, amen. Antiqua patrum tradit auctoritas ut, quotiens digne rei celebris institutio æquitatis meretur efficaciam, manifestis profecto memorialis paginæ apicibus eo attentius præmuniri debeat, quo et circumspectius oblivionis calcare insolentiam, et totius incursum calumniæ perpetuo intendit præcanere. Præsentibus igitur et eorum posteris necessario innotescimus quoniam ego Raimundus,[2] præclaris siquidem Pictavorum ortus natalibus, cum ex superno munere Antiocheni regni solium obtinuissem, ad sacrosancta Hieru-

[1] 2 Assises de Jérusalem, Beugnot, 501.

[2] Raymond, youngest son of William VII., count of Poitiers, became in the year 1136 prince of Antioch.

salem loca, tertio mei, principatus anno, Domino prosperante adoraturus, ascendi. Ubi vero inter cætera humanæ reparationis gaudia singulari potius gloriosissimi Sepulcri visitatione delectatus, a domno Willelmo, ejusdem sanctæ civitatis reverentissimo patriarcha, sed et a domno Petro venerabili Dominici Sepulcri priore, necnon ab omni ipsius loci sancto conventu, super quibusdam injuriis diu penes Antiochiam excellentissimæ. Dei et hominis Christi Jhesu sepulturæ irrogatis, devotum et humilem clamoris effectum suscepi, pari etiam omnium prece crebrius in Domino exoratus, ut memorato ineffabilis mysterii loco celeberrimo sua plenarie jura, quorum eatenus injusta privatione graviter multatus fuerat, ob meæ animæ remedium misericorditer restituerem. Verum ego, cum tantorum piæ petitioni intercessorum nec possem nec deberem adversari, quippe qui justam cujuslibet oppressi vocem, nedum communem tantæ reverentiæ clamorem ex debito clementer admittere exiget. Usque adeo eorum vota diligentius sum prosecutus, ut quicquid de justicia Dominici Sepulcri in mea manu consistebat, totum libentissime ex tunc in æternum Christo Domino, et ejus, ad perhennem suæ resurrectionis memoriam, servientibus gratis redderem. Sed et de aliis omnibus quotquot ad suum jus pertinent, quæ scilicet in alienos possidentium usus cesserant, me eis devotissime, in meæ curiæ audientia, justitiam executurum promisseram. Ea propter, ipso meæ a Hierosolymis regressionis anno, prædictus Dominici Sepulcri prior, et Vulgrinus præpositus, assumptis secum aliquot suis fratribus, prima die mensis Februarii Antiochiam venientes, non multo post de mei promissi executione me vivaciter requirendo convenerunt, ut et nominatim de quadam injuria, quam conventus ecclesiæ Sancti Pauli super injusta cujusdam gardini et aliquantæ terræ possessione ipsis diutissime intulerat (neque enim usque ad illud temporis, cum sæpius suam calumniam prætendissent, justitiam quandoque assequi potuerant); de illa, inquam, tam obstinata injuria æquitatis audientiam eis accomodarem. Ad hoc itaque exequendum dominum Robertum, cœnobii Sancti Pauli abbatem, et universum conventum diligenti opera studui præmoneri. Quorum omnium una vox et eadem fuit sententia: hujus videlicet rei discussionem nullatenus ad secularis curiæ examen, sed ad solum domni patriarchæ Antiocheni et ipsius ecclesiæ spectare arbitrium. De jure enim ecclesiastico tota illa possessio processerat, præsertim cum eam dominus sanctæ memoriæ Bernardus patriarcha olim pro commutatione domus Stephani, thesaurarii ecclesiæ Sancti Pauli, dedisset: data etiam

autentica sui privilegii sanctione, quod apud se habebant, cum domini augustæ recordationis Boamundi junioris convenientia confirmasset. Ceterum cum illud privilegium me exigente in medium fuisset prolatum, et in conspectu circumstantis curiæ ad finem usque aperte et distincte retractatum, tanta nimiorum universis coauditoribus ejus patuit digna confutatio, ut quibusdam aliis quibus seipsum impugnabat prætermissis, nec unius testis, sicut rerum bene gestarum veritas exigit, quantulacumque assertione fulciretur. Sic tandem voce privilegii omnino cassata, ex communi consequenter curiæ intuitu diffinitum est, quoniam quando quidem cœnobii sancti Pauli monachis nulla prorsus ad habendam ecclesiæ audientiam ratio suppetebat, sine omni subterfugio tam ipsi quam et Sancti Sepulcri canonici alterutras suæ causæ allegationes in publicum meæ curiæ conferre debebant, ibique eorum controversias et recto judicio dirimi et dictante justitia terminari opporteret. Quia vero præfatos canonicos diutius nollem detinere, proxima quippe Paschæ solemnitate imminente, certum xv. diebus terminum utrique parti præfigere statui, in quo monachi constanter mihi resistentes, nullum alium placitandi terminum se quoquomodo suscepturos affirmabant, nisi quem communis curia ex deliberatione justitiæ illis designando proferret. Cum ergo eorum voci benigne assensissem, unanimi totius curiæ consideratione quadragenarii muneri elongatio est utrisque accommodata. Cujus spatii finalis terminus iii. kalendas Aprilis, septima quoque feria quæ tunc temporis vigiliam Dominicæ diei Ramis Palmarum præcessit, accurrisse dinoscitur. Sane in die constituta, et monachis ecclesiæ Sancti Pauli et Sancti Sepulcri canonicis, in loco extra Antiochiam qui ad Pontem Ferri dicitur (ibi enim eo tempore in castris commorabar), mei coram præsentia ad suæ causæ negocium venientibus, mihi quippe commodius est visum, propter plenioris consilii habendam sufficientiam, usque dum Antiochiam intrassem illud opus debere differri, unde et usque in diem tertiam terminum consultius prolongavi. In ea iterum die monachis et canonicis in Antiocheno palatio coram me in suæ causæ disceptationem intentis, eandem itidem causam usque in Sabbatum Paschalis hebdomadæ protelavi: non enim in tam arto temporis spacio sufficiens morum optimatum consilium convocare potueram. Cum vivo post Domini Pascha dies præfixi termini advenisset, omnemque curiæ ordinem mecum ad eam audientiam congregassem, prima diei hora canonici Sancti Sepulcri ad suum negocium convenerunt, monachis quippe ecclesiæ Sancti Pauli nequaquam vel tunc, vel postea per totam

diem conspectui nostro apparentibus. Comperta itaque eorum mora, quid me deinceps super eo negocio agere deceret, barones astantes affectuose consului, qui nimirum, communicato consilio, responderunt ut, quoniam ecclesia Beati Pauli sub meæ defensionis ope consistebat, viva meorum nunciorum voce monachos ad constitutam causæ audientiam ex gratia debere invitare, meis quoque nunciis id insuper ex mei parte monachis intimandum præcipere. Quoniam nisi saltem ad ipsius diei nonam placitaturi venirent, tantumdem eis abesse sufficeret, quantum ei prolata judicii sententia eos omnino confutasset. Nec mora, assumptis de medio cæterorum baronum Guiterio de Moro et Ricardo de Belmont, abbatem et monachos, sicut mihi suggestum fuerat, diligenter appellavi, qui omnes, nulla legalis exonii[1] excusatione prætenta, se nec coram me venturos, nec meæ curiæ judicium subituros, una voce responderunt. Verum ego, tam pertinaci eorum responso accepto, ne quid forte quasi minus justo per præcipitationem fieret, canonicos usque in diem tertiam equanimiter expectare exoravi. Qui et ipsi satis pacifice concesserunt. Porro, die tertia expectata, soli canonici justitiam exigentes presto affuerunt; quorum profecto justæ petitioni benigne assentiens, totum differendæ justitiæ pondus, maxime ex ipsius rei conferendis circumstantiis, meæ curiæ imposui. Unanimi igitur et communi omnium baronum consultatione est approbatum, quoniam canonici, qui nunquam diem vel causam subterfugerant, plenaria sui juris possessione justo judicio debebant investiri. Hoc tamen modo designato, ut ipsi investituram tam monachis ecclesiæ Sancti Pauli, quam etiam cuilibet calumnianti, quicquid mea curia adjudicaret, exequerentur.[2] Eo itaque modo et conditione, præfatos Dominici Sepulcri canonicos memorato gardino et reliqua terra adjacenti, suo scilicet jure, xvii. kalendas Maii, libere et quiete investivi. Qua statim investitione recepta, dominus prior et cæteri canonici sese ecclesiæ Beati Pauli justitiam executuros gratis obtulerunt. Sed nec unus affuit qui eos in aliquo impeteret. Item, nolumus quasi neglectum sub silentio præteriri, quoniam sæpe dicti canonici Græcos testes, moribus et seno maturos, in medium produxerunt, qui omnes, non vulgari conjecturæ opinione, sed certa visus attestatione, se illam de qua loquimur Sancti Sepulcri justitiam

[1] Essoin.

[2] The judgment was subject to a writ of right by the monks of St. Paul. Comp. Glanvill, lib. 1, c. 16; and see as to novel disseisin, 1 Assises de Jérusalem, 103 (Beugnot); Brunner, Schwurg. 346, 347.

juxta curiæ decretum comprobaturos asserebant. Cum vero eorum testimonia non nisi suo loco esset necessarium audiri, præsertim parte altera absente, producti tamen testes suo fortassis celeri obitu justitiam gloriosi Sepulcri posse deprimi formidantes, quod ore vivaci et corde memori erant confirmaturi, totum ad plenum litteris annotatum reliquerunt, ut in posterum, si necessitas forte exigerit, pro viva voce scripti non desit auctoritas. Testium quoque nomina sunt hæc: Gregorius, ecclesiæ Sanctæ Mariæ cantor; Thomas, subcantor; Michael, filius Molkini; Abraham, filius Sucar. Omnibus tandem, non sine onerosa differendi prolixitate, Deo auctore, ad perfectum deductis, ego Raimundus, Dei nutu princeps Antiochenus, sed et domina Constantia principissa, mea uxor illustrissima, legitimum factæ investitionis donum sanctissimo Domini Sepulcro, pari assensu et donatione in æternum quiete possidendum, damus et concedimus; principali quoque hujus privilegii nostrique sigilli confirmatione decoratum perpetua stabilitate præmunimus. Factum est autem hoc privilegium anno Incarnati Dei Verbi MCXL°, mense Aprili, indictione III[a], quarto quoque anno principatus domini Raimundi, Antiocheni principis invictissimi. Testes subscripti: [Here follow the names of twenty-nine persons, of various ranks, from archbishop down to notary.] Datum Antiochiæ, xiii. kalendas Maii, per manus Odonis cancellarii.

No. 3.]

GODFREY DE LUCI v. ODO, ABBOT OF BATTEL.

Anno 1176.[1]

[An action before an Ecclesiastical Council concerning the right to the church at Wi; the plaintiff claiming under a gift of the king, the defendant denying the validity of the same. The abbey of Battel having become vacant in the year 1171, by the death of abbot Walter, Richard de Luci, the chief justiciar, obtains it from the king for his son Godfrey, the plaintiff; the king's presentation being received by Richard, archbishop elect of Canterbury, and Godfrey instituted by him. The defendant Odo succeeds to the abbacy in the year 1175, and refuses to acknowledge the validity of Godfrey's claim to the church.]

Tunc temporis accedit quendam Hugonem.[2] Romanæ ecclesiæ

[1] Chron. de Bello, 170 (Ang. Christ. Soc.). [2] Commonly called Hugezun.

diaconum cardinalem a latere domini papæ Alexandri missum, legationis gratia venire in Angliam, qui convocatis archiepiscopis, episcopis, abbatibus, et totius regni clero concilium generali apud Westmonasterium concitavit, tum de negotiis pro quibus venerat tractaturus, tum de statu Anglicanæ ecclesiæ, et causis ecclesiasticis cognaturus. Abbate de Bello, generali edicto inter cæteros ad concilium vocato, scripsit ei prædictus legatus auctoritate apostolica, speciale sibi dirigens mandatum,[1] ut omni excusatione remota in præsentia sua appareret, Godefrido de Luci, super ecclesia de Wi responsurus, et juri pariturus. Abbas suscepto hoc mandato, plurimum turbatus est animo, sciens dominum regem prædictam ecclesiam, de Wi præfato Godefrido de Luci, vacante ecclesia de Bello, absque omne exceptione dedisse et confirmasse, ipsum quoque Godefridum ad præsentationem domini regis a Ricardo Cantuariensi electo fuisse susceptum, et auctoritate, qua electus potuit, in ecclesia institutum, carta nihilominus sibi a præfato electo super ipsius institutione præstita, quam idem electus postmodum ab apostolica sede rediens, et a papa Alexandro consecratus, jam archiepiscopus, jam primas, jam apostolicæ sedis legatus, omni qua fungebatur auctoritate confirmaverat.

[The abbot, in perplexity and fear of offending the king, the archbishop, and Richard de Luci, still resolves to defend his cause, and, not being himself a lawyer, seeks the assistance of various persons, requesting them to undertake his defence, but in vain. They all fear the king and the archbishop. The chronicle proceeds :]

Celebratis in crastino divinis officiis, simpliciter cum suis ad locum decisioni causæ præfixum processit, parte adversa ex opposito veniente cum advocatorum multitudine. Procurator et advocatus principalis in causa partis adversæ erat quidam magister Ivo Cornubiensis, qui procedens in medium, litterasque patentis Godefridi de Luci tunc in transmarinis scolas frequentantis in publicum proferens, commissam sibi manifestavit causæ, procurationem, et Godefridi ratihabitionem.[2] Erat autem tunc ibi, utpote ad concilium vocati, cleri conventus maximus, non tamen præsidente legato, sed quibusdam suorum quibus causæ commiserat decisionem. Præfatus ergo magister Ivo sic exorsus ait. "Satis vobis domini judices ex patenti testimonio litterarum domini mei Godefridi de Luci credimus constare, ipsum utpote in

[1] The double summons is worthy of notice.

[2] That is, Godfrey put Ivo in his place "lucrandum vel perdendum." See *ante*, p. 245.

remotis extra hoc regnum partibus scholarum studia frequentantem huic causæ suæ interesse non posse, mihique causam eandem procurandam commisisse. Cujus ego advocatione suscepta, non minorem mihi quam si dominus meus præsens adesset postulo dari audientiam, sed tanto diligentiorem, quanto causam quam fovendam suscepi constat esse justiorem. Cum jam huic vitæ finem fecisset vir venerabilis Walterus abbas de Bello, domini mei Godefridi patruus, totius monasterii dispositis in regiæ sullimitatis devenit potestatem, adeo ut in domini regis fuerit arbitrio, monasterii ipsius regimen cui vellet committere cum tamen in voluntate non habuerit aliquem in eo nisi canonice electum substitui. Nondum penes se deliberaverat majestas regia, cui monastorialis prælationis conferret honorem, cum presbiterum quendam Willelmum personam ecclesiæ de Wi contigit huic vitæ renuntiare. Dominus rex ratione, qua potuit de totius monasterii corpore pro voluntate disponere, prædictam ecclesiam de Wi in fundo monasterii sitam domino meo Godefrido de Luci pietatis et caritatis concessit intuitu, et carta sua quam ad manum habemus, confirmavit, ut rex, ut fundi dominus, ut monasterii illius, præter cætera regni monasteria, specialis patronus. Nec quidem incongruum fuit domino regi de membris disponere, cui totum corpus erat in potestate." Et hæc dicens, cartam domini regis super donatione et confirmatione in medium protulit. Et adiciens: "Facta," inquit, "jure patronatus hujusmodi donatione, vir venerabilis dominus Ricardus tunc Cantuariensis electus, dominum meum Godefridum, auctoritate qua potuit, ad præsentationem domini regis suscipiens personam absque omni exceptione instituit, datis sibi in testimonii munimentum institutionis suæ litteris, sigillo quod tunc habere videbatur opposito, licet nondum in plena potestate videretur constitutus." Proferensque in publicum litteras, "En," inquit, "ipsius electi testimonium. Sedem apostolicam postmodum adiens, ibique a domino papa solenniter consecratus, ac inde cum plena potestate archiepiscopi, primatis et legati denuo rediens, quod electus minus antea facere poterat, jam confirmatus plena auctoritate instituendo et confirmando roboravit." Et hæc dicendo, cartam archiepiscopi ipso etiam archiepiscopo præsente in omnium oculis ostendit, ita subinferens. "Cum igitur," inquit, "hujus ecclesiæ de Wi non qualemcunque portionem sed ecclesiam totam cum omni juris sui integritate dominus meus Godefridus tam excellenti auctoritate obtinuerit, dominus abbas et monachi de Bello ipsius ecclesiæ medietatem contra regiam episcopalemque

dignitatem detinent occupatam. Ergo secundum plenam domini regis donationem et domini archiepiscopi plenam institutionem, plenam petimus possessionem, ad majorem parati probationem, si forte jam edita videatur minus sufficiens; abbati et monachis, plena possessione suscepta, si quid quæstionis adversum nos habuerint responsuri, et secundum juris ordinem satisfacturi."

Stupefactus ad hæc abbas plurimum, stabat expers humani consilii, confisus tamen de divino. Responsurus ad proposita, cum eos quos credebat amicos, ut ad consilium suum venirent benique rogaret, omnes se modo quo prædictum est excusaverunt, adeo ut nec unus omnium qui aderant præter suos qui secum illo venerant consilium sibi vel auxilium præstiturus procederet. Nemo enim omnium timore domini regis et archiepiscopi et Ricardi de Luci secum stare præsumpsit, cognito quod eos causa contingeret. Aderat illic inter cæteros magister Walerannus Baiocensus archidiaconus, postmodum Roffensis episcopus,[1] qui tunc temporis Cantuariensi archiepiscopo adhærens, illic collateralis magistri Gerardi Puellæ[2] residebat. Hic abbatem intuens in angustiis positum, et divino et creditur instinctu pietate motus, conversus ad magistrum Gerardum: "Magister," inquit, "Gerarde, sic omnes abbatem de Bello desolatum relinquemus? Dei odium incurrat, qui ei in hac necessitate deerit." Surgensque et magistrum Gerardum amica violentia manu injecta post se trahens, "Eamus," inquit, "et abbatis assistentes consilio, ei in causa sua subveniamus." Venientibus ex insperato ambobus ad abbatis consilium, abbas jam erat animæquior, et de causa sua securior. Non diu protracto, sed maturato expeditoque consilio, redeunt pariter ad judicum consessum, ubi magister Gerardus, agente magistro Waleranno, immo Deo disponente, procedens in spiritu fortitudinis, non regem veritus, non archiepiscopum dominum suum, non principes non quoslibet eorum fautores, libera voce cœpit in hunc modum pro abbate allegare. "Sicut ea," inquit, "quæ canonice sunt inchoata, ut perfectionem obtineant sunt promovenda, sic quæ contra juris ordinem perperam sunt attemptata, in irritum sunt revocanda, aut in statum meliorem transformanda. Allegatum est a parte adversa, quod monasterio Belli pastore orbato, totius monasterii dispositio in manus domini regis devenerit, vacantem interim ecclesiam de Wi in fundo mon-

[1] 1182–1184. He was at this time also domestic chaplain to Richard, archbishop of Canterbury. [2] "Vir eruditissimus et litteratissimus."

asterii sitam dominus rex domino Godefrido de Luci contulerit, quodque eum regia auctoritate præsentatum dominus noster Cantuariensis primum electus, postmodum archiepiscopus, ad eandem ecclesiam susceperit, et in personam instituerit. Ad hæc imprimis salva pace domini regis respondemus, quod in rebus ecclesiasticis nihil juris obtinet potestas secularis.[1] Licet ad tempus, in rebus monasterii pastore orbati, visa fuerit majestas regia pro potestate sibi juris aliquid vendicasse, nihil tamen ad detrimentum monasterii abbatisve futuri de jure potuit vel debuit immutare, alienare, seu aliquatenus disponere, sed abbati futuro, resignanda omnia in sua integritate, conservare.

"Domini igitur regis super ecclesia de Wi in fundo monasterii sita nulla debuit esse donatio, quia vacantis cœnobii non tam patronus quam custos, nullam in eo proprii juris obtinuit possessionem, nec de jure alieno facere debuit donationem. Cum ergo, palam sit quod sit irrita donatio, consequens omnino est ut etiam irrita debeat esse præsentatio, quia qui non potuit dare, nec debuit præsentare. Præsentatus domino Cantuariensi electo per cum dicitur fuisse admissus, sed licet ratione præcedentium minus canonica fuerit institutio, et ideo irrita, alia tamen consideratione nulla fuit, nec esse potuit, quoniam electione archiepiscopi per summum pontificem nondum confirmata, electus admittendi vel instituendi non habuit potestatem. Consecratus a domino papa archiepiscopus, et a sede apostolica in plenitudine potestatis reversus, quod minus antea fecerat dicitur solennius fecisse, et episcopali auctoritate confirmasse, sed nulla esse debuit vel potuit ipsius confirmatio, cum in ipsius consecratione sint omnia a summo pontifice cassata, quæ ante consecrationem ejus electionis tempore ab ipso fuerant instituta. Cum igitur electionis tempore facta fuerit præsentatio et præsentati institutio, dum omnia in consecratione revocantur in irritum, constat etiam quod quicquid circa præsens negotium est attemptatum sub universitate concluditur, unde et in irritum proculdubio revocatur. Quia enim respectu apostolicæ auctoritatis modica aut nulla esse dinoscitur potestas episcopalis, quæ ab excellentiori dissolvantur, per inferioris ordinis gradum nequivit accipere firmitatem. Totius itaque rei serie diligentius considerata, dum omnia in juris ecclesiastici præjudicium perpetrata videntur, firmitatis suæ non immerito robur amittunt, quoniam in ecclesiasticæ soliditatis radice non subsistunt. Plenæ

[1] The editor of Battle Abbey Chronicle (Camden Soc. ed. p. 177) has remarked that it was a foreigner who made this bold statement.

institutionis postulat pars adversa beneficium cum potius beneficio portionis privari meruerit, quod in præfata ecclesia de Wi nullo rationis titulo dinoscitur possidere. Spoliatum est jure suo vacans monasterium, nec tenentur injuste spoliati, in jure suo respondere nisi primum restituti, unde et dominus abbas de Bello pro monasterio suo agens juris sui petit restitutionem, postmodum paratus ad exhibendam justitiæ plenitudinem."[1] Cum in hunc modum magister Gerardus in omnium audientia perorasset, et allegationem suam legum ac decretorum quæ hic inserere longum erat auctoritatibus comprobasset, jamque pro allegatione partium ferenda esset sententia, delegati judices haud dubium quin adversæ parti respectu potestatis deferentes, sententiam sub dissimulatione reliquerunt, et partibus ut componerent præceperant.[2]

No. 4.]

LETTRE SANS DATE.[3]

Venerabilibus patribus ac dominis Thome Cantuariensi et Henrico Eboracensi archiepiscopis eorumque suffragantibus et ceteris omnibus sancte ecclesie prelatis per Angliam constitutis Hugo Rothomagensis ecclesie humilis presbiter, salutem et graciam. Sciant tam presentes quam futuri quod venerabiles fratres nostros Philippus Baiocensis et Jocelinus Salesberiensis,[4] episcopi, in nostra presentia et episcoporum et personarum plurium qui affuerunt de

[1] With this agrees Peter of Blois, *ante*, p. 222.

[2] The advice of the judges was accepted, and the terms of the compromise follow in the chronicle.

[3] 1 Cart. de la Basse-Normandie, p. 50. From MS. Cart. Eccl. Baiocensis, No. 46. The Cart. de la Basse-Norm. is a collection of ancient records made in 1825 by M. Léchaudé d'Anisy. It consists of three MS. volumes, and lies in the Public Record Office, London. The originals are indicated. The full title of the cartulary is as follows :—"Cartulaire de la Basse-Normandie ou copie des chartres @ autres actes, concernant les biens @ privileges concédés en Angleterre à diverses maisons religieuses. Accompagnée des sceaux et contre-sceaux Anglo-Normands qui étaient encore appendus a ces mêmes actes. Par Léchaudé d'Anisy, Membre de plusieurs Sociétés Savantes et Correspondnt. de la Commission des Archives d'Angleterre. Caen. M. dccc. xxv." (The charters have never before been printed.)

[4] Jocelin de Bohun, archdeacon of Winchester, was consecrated bishop of Salisbury in 1142 (Annal. Margan.). He resigned his bishopric in 1184, and assumed the Cistercian habit; and he died 18th Nov. in that year (xiiii Kal. Decemb. Obituar. Cantuar.). Le Neve's *Fasti*, 1854, vol. ii. p. 595.

controversia que erat inter eos pro quibusdam absportatis de thesauro Salisberiensis ecclesie concordasse tali conditione quod prefatus Philippus Baiocensis episcopus per manum Nigelli monachi de Cadumo et per Albertum portarium de Harecuria in presentia nostra, Rothomago reddidit eodem Jocelino Salesberiensi episcopo bracium unum aureis laminis coopertum et lapidibus pretiosis adornatum. Et insuper dedit ei x. marcas argenti. Et sic, querela que erat inter eos omnino remansit. Huic autem compositioni interfuerunt de personis Salesberiensis ecclesie Henricus cantor, Rogerus et Henricus archidiaconi et magister Robertus de Cicestro qui vice totius capituli sui concessionem istam concesserunt et approbaverunt; ex parte autem Philippi Baiocensis episcopi affuerunt magister Humfridus Herbertus cantor Baiocensis, Willelmus thesaurarius, Willelmus de Leone, Robertus subdecanus, Sylvester succentor, Johannes Lexoviensis archidiaconus, Ricardus thesaurarius, Willelmus prior de Sancta Barbara, Guillebertus prior de Ardena, Nicholaus prior de Plausiciaco. Actum est hoc Remis presentibus pluribus episcopis, archidiaconis et multis aliis canonicis et clericis.

No. 5.]

ASSISES DE L'AN 1176.[1]

Ricardus Dei gratia Vintoniensis episcopus, Simon de Tournebu, Robertus Marmion et Willelmus de Glanvilla, universis sanctæ matris ecclesie, salutem. Noverit universitas vestra quod cum apud Cadomum essemus in assisia, Robertus presbiter de Surrehein, coram nobis recognovit in ipsa assisia quod Villelmus decanus Baiocensis donaverat ei etc., duas partes ecclesie de Surrehein etc. etc. La même déclaration fut faite par Philippe de Than. Hec autem assisa fuit anno ab incarnatione Domini M°. C°. L°. XXVI°. mense Januarii. Et in ea fuerunt Henricus Baiocensis, Arnulfus Lexoviensis et Ricardus Constansiensis, episcopi, Stephanus abbas Sancti Severi, Ricardus de Humeto, Iordanus Taisson, Fulcho Paganellus, Willelmus de Ferrariis, Willelmus de Solers, Rogerius de Arry, Hamo Pincerna, Ranulfus de Grandivalle, Jordanus de Landa, Symon de Tenchebraia, Robertus de Agnellis, etc., et multi alii.

[1] 1 Cart. de la Basse-Norm. p. 50. Cart. Eccl. Baiocensis, No. 47.

No. 6.]

PLAIDS ROYAUX VERS L'ANNÉE 1076.[1]

Quia memoria hominum sicut homines cito pertransit, quedam facta eorum que cum memoria fugiunt necesse est scribendo retineri. Unde nos huic ecclesie providentes quod volumus successores nostros nescire, carte huic decrevimus inserere. Contigit itaque cuidam festivitate Sancti Leonardi comitem Rogerium interesse et cum eo nonullos utriusque ordinis non mediocris fame quos ipse invitaverat ad sui honorem et huic ecclesie exaltationem. Ex quibus Sagiensis pontifex Robertus, ea die nostro et comitis hortatu missam cantavit. Cujus etiam misse offerturam sibi per cupiditatem retinere temptavit. Quod nos videntes et velut monstrum exhorrentes, a quodam ejus clerico, cui eam reservandam commiserat, vi et non sine contumelia offerturam illam recepimus. Iratus propter hoc episcopus ecclesiam et nos excommunicare se dixit. Quo facto, prius clamorem quam fecit comes Rogerus, de Sagiensi episcopo ad Johannem Rothomagensem archiepiscopum die constituta exinde placituri devenimus Rothomagum. Ibi in palatio et in presentia regis et regine Anglorum, comes Rogerus conquestus est super Sagiensi episcopo quod ecclesiam Sancti Leonardi sine causa excommunicare presumpsisset. At contra episcopus nos inculpabat, quod manum quam sanam et integram habuisset habendo offerturas per totum episcopatum suum, nos ei accidissemus auferendo ab eo nostram offerturam. Ad hec rex et regina scitati sunt a comite Rogero de statu ipsius ecclesie. Comes vero et nos qui aderamus dilucide enarravimus quomodo Guillelmo de Belissimo supradictam ecclesiam ob peccatorum suorum veniam edificasset et quomodo eam ex precepto beate memorie pape Leonis liberam et solutam fecisset et quod a die dedicationis ejusdem archiepiscopus sive episcopus nullam in ea consuetudinem habuisset, nec eam ullo modo excommunicare potuisset. Affuerunt etiam antiquissimi homines qui hec viderant et audierant, parati probare secundum judicium regis quod nos edisseramus. His auditis rex et regina jusserunt Johannem archiepiscopum et Rogerum de Bello-Monte et plures alios barones ut secundum quod audierunt facerent inde judicium. Et illi abito consilio, judicaverunt ecclesiam que tanta auctoritate et tot tantocunque procerum confirmatione liberata esset et tam longo tempore in liberalitate perseverasset, debere deinceps in perpetuum sic permanere. Episcopum injuriam fecisse non solum comiti Rogerio,

[1] 1 Cart. de la Basse-Norm. p. 80. Archives d'Alençon, No. 3.

verum etiam regi de quo ipse ecclesiam tenebat. Dixit etiam Johannes archiepiscopus quasdam ecclesias in diocesi sua esse in quibus ipse nullam omnino consuetudinem haberet. Hoc pacto Sagiensis episcopus Robertus emendavit rectum faciendo regi et comiti Rogerio injuriam quam eis fecerat predictam ecclesiam invadendo ; diffinitum est etiam ibi ut si archiepiscopus sive episcopus eam amplius inquietare presumeret, apostolica et regia auctoritate a consortio fidelium usque ad satisfactionem alienus existeret. Hoc viderunt Guillelmus rex et Mathildis regina, Johannes Rothomagensis archiepiscopus, Robertus Sagiensis episcopus, comes Rogerius, Robertus de Belissimo, Rogerius de Bello-Monte, Warinus Curvisus, Guillelmus et Hascuinus, canonici, Amellandus et multi alii.

No. 7.] PLAID ET TRANSACTION EN PRÉSENCE DE HENRY I^er^ EN 1126 ET 1127.[1]

Debats judiciaire au sujet d'un différend porté en la Cour du Roi, par les religieux de Marmoutier contre Jean évêque de Siez pour l'investiture de quelques églises situées dans le territoire de Belesme, qui n'est remarquable que par le nombre de témoins présens a cet acte. Il se termine ainsi : Actum in presentia domini Henrici regis Anglorum apud Sanctam Gaubergem prope Rothomagum et ab episcopo ipso Sagiensi domno Johanne concessum. Presentibus istis Gaufrido Rothomagensi archiepiscopo Eudo et Bernardo episcopis, Gaufrido regis cancellario, Galeranno archidiacono, Roberto de Sigillo, de laicis, Roberto de Haia, Grimaldo medico, Roberto de Dangu, Roberto de Chandos, Rogero fratre ejus, Hugone de Braitello, etc. De nostris (Douze témoins). De clericis (Sept témoins). De famulis (Quatre témoins) et pluribus aliis.

Quant à la transaction qui eut lieu entre les parties au sujet du procès ci-dessus, elle n'offre d'autre particularité qu'une note historique jointe à la signature du roi Henry, qui est elle-même renfermée dans un orbe ou un cercle dentelée. Cette transaction se termine ainsi : Data Sagii anno ab incarnatione Domini M°. C°. xxvii indictione vi. regnante Ludovico rege Francorum, duce autem Normannorum Henrico rege Anglorum, presidente Rothomagensis ecclesie Gaufrido archiepiscopo.

Signum Henrici Regis Anglorū.

Quando dedit filiam suam Gaufrido comiti Andegavensi Juniori.

[1] 1 Cart. de la Basse-Norm. p. 84. Arch. d'Alençon, Nos. 8, 9.

No. 8.] BREF DE HENRY II. (Sans date.)[1]

Henricus, etc., constabulario et ballivis suis de Cesarisburgo, salutem. Precipio vobis quod sine dilatione plenum rectum teneatis priori et canonicis Sancte Marie de Voto juxta Cesarisburgum de terra que fuit Preisie apud Cesarisburgum et de domo quam ipsa eis dedit quas Willelmus Pichardus et uxor Richeris, eis difforciant, nisi sit feodum Lorice vel burgagium quod valeat plusquam c. solidos per annum. Et nisi feceritis, justicia mea Normannie faciat. Teste Hugone Bardulf dapifero apud Bonam Villam.

No. 9.] BREF DE HENRY II. (Sans date.)[2]

Henricus, etc. Notum sit vobis quod in tempore meo et Algaro Constanciensis episcopo fuit juramento comprobatum per meum preceptum in assisia mea apud Valonias quod. . . . filius Nigelli et omnes successores sui, ab Algaro Constancinsi et ab aliis predecessoribus suis Constanciensi episcopis tenuerant quicquid in ecclesiis de cesarisburgo et de Torlavilla et in omnibus possessionibus ad illas ecclesias pertinentes habuerant. Hec vero juraverunt Ricardus de Wanvilla, Willelmus monachus, Willelmus de Sancto Germano, Willelmus de Briquevilla, Ricardus de Martinwast, Robertus de Valoniis. Quare ego concedo quod hoc secundum illorum juramentum ratum sit et in perpetuo teneatur. Testes vero hujus concessionis sunt Ricardus cancellarius, Willelmus de Vernon, Engelranus de Bohon, Alexander de Bohon, Jordanus Taisson, etc., apud Sanctum Laudum.

No. 10.] LETTRE DE HENRY II.[3]

Henricus, etc. Precipio vobis quod custodiatis et manuteneatis et protegatis omnes res et possessiones canonicorum Constanciensium et communiam ecclesie Constansiensis. Ita quod non permittatis eis injuriam unquam fieri vel contumeliam; sed faciatis eis habere con-

[1] 1 Cart. de la Basse-Norm. p. 104. Arch. de St. Lo, No. 10.

[2] Ib. p. 129. Cartulaire ou Livre Blanc de l'Evêche de Coutances, fol. 350, No. 14.

[3] Ib. Livre Blanc de l'Evêche de Cout. fol. 351, No. 15.

suetudines et rectitudines suas quas habere debent et habere solebant et precipue nundinas in dicto comite quas pater meus dedis eis et concessit cum omnibus pertinentus suis et rectitudinibus sicut eis dedit in bona pace, et integre habere faciatis, non permittentes illis inde in ullo foro forisfieri. Et si quis super hoc injuriam eis aut molestiam intulerit, sine dilatione idcirco eis faciatis emendari. Teste Johanne[1] decano Saresbery apud Valonias.

No. 11.]

CHARTE CONFIRMATIVE. (Sans date.)[2]

Henricus rex Anglie, dux Normannie et Aquitanie et comes Andegavensis, archiepiscopis, episcopis, abbatibus, comitibus, baronibus, justiciis, vicecomitibus, ministris, et omnibus fidelibus suis totius Anglie et Normannie, salutem. Sciatis me concessisse et confiamasse Deo et Sancto Stephano de Cadomo et monachis ibidem Deo servientibus pro salute anime mee, patris, ac matris, uxoris, filiorum ac parentum meorum et antecessorum quicquid rex Willelmus proavus meus vel rex Henricus avus meus ecclesie predicte dederunt et concesserunt sicut carte illorum testantur, etc. . . .

[3] Concedo etiam sicut concessit prefatus Odo, ut ex ipsis criminalibus peccatis quandocunque in prefatis ecclesiis domibus, terris, audiri contigerit ab archidiacono Baiocensi; abbas vel prior predicte cenobii non ipse super quo crimine auditum fuerit moneatur et ibidem ab utroque disposito termino congruo ac prefixo die conveniant monachi et archidiaconus et in ipsa parrochia in qua crimen auditum fuerit predictis presentibus inquiratur inquisitio discutiatur et discussio si inde judicium portandum prodierit vel cognitio peccati patuerit Baiocensis ecclesie ut decet requiratur vel causa examinationis vel gratia consequende reconciliationis, etc. . . .

[4] Homines de Siccavilla recepti in societate monasterii Sancti Stephani dederunt eidem sancto duas partes decimarum suarum. Hujus autem ville ecclesiam, quam Sanctus Stephanus antiquiter in magna pace tenerat Hebertus quidam clericus ei modis quibuscumque poterit auferre querens abbatem et monachos inde diu fortiter vexari. Quorum vexatione Henricus rex finem imponere

[1] John of Oxford was dean of Sarum in 1165: he was made bishop of Norwich in 1175.

[2] 1 Cart. de la Basse-Norm. p. 154. Arch. de Calvados, No. 9.

[3] P. 163. [4] P. 174.

decernens utrisque ante se in castello Cadomi diem constiterit placitandi. Die igitur quo constituto abbas et monachi cum omnibus qui eis necessaria erant ipsi regi et justicie suum placitum obtulerunt; Heberto autem ibi in audientia regis et totius justicie necnon et baronum deficiente de prefata ecclesia ipsius regis et justicie judicio Sanctus Stephanus saisitus remansit, nemini deinceps amplius inde responsurus, Rogerius filius Petri de Fontaneto in presentia totius justicie reddidit Sancto Stephano terram illam et omnes decimas quas ipse sanctus a Godefrido avo illius et a patre suo habuerat, easque eidem sancto deinceps firmiter imperpetuum tenendas concessit. Hubertus filius Serlo dedit Sancto Stephano capitalem domum suam et aliam juxta illam que erat duarum stationum in Calheola ea conditione habita quod uxor sua Gisla et heredes ejus haberent easdem domos a monachis pro x. solidis per annum. Et preter hoc dedit terram illam que erat inter predictas domos et murum usque ad quarrariam. Concedo concordiam abbatis et Ricardi filii Eddite factam apud Londonem. Concedo concordiam factam inter monachos Sancti Stephani et ministros regis de terra de Brideport et de Bridetona.[1]

Hec omnia prescripta precedente ecclesie Sancti Stephani et monachis ibidem Deo servientibus concedo et confirmo habenda et tenenda in perpetuam elemosinam libere quiete sicut carte regis Willelmi et regis Henrici avi mei eis confirmant et testantur. Et quecunque hic prescripta sunt que rationabiliter adquisiverunt et que eis rationabiliter data sunt temporibus antecessorum meorum et meo. Testibus Rothroco Ebroicensi episcopo justiciario Normannie, Philippo Baiocensi episcopo, Arnulfo Lexoviensi episcopo, Thome cancellario, Gaufrido Ridello, Gaufrido capellano, Willelmo filio Johanne, Godart de Vaus, Jordano Taixun, Ricardo de Haia apud Cadomum.

No. 12.]

BREF DE HENRY II. (Sans date.)[2]

Henricus, etc. Precipio quod monachi Sancti Stephani de Cadomo teneant bene et in pace et quiete quietancias suas et

[1] Comp. Placita Ang.-Norm. 120.

[2] 1 Cart. de la Basse-Norm. p. 177. Arch. de Calvados, No. 11.

domos et redditus de Rothomago et de Abracense et de Diva scuti carta Roberti de Novoburgo testatur quod disraciocinaverunt eas in curia mea coram eo et baronibus meis agud Cadomum, teneant easdem quietancias et domos et alias res sicut carta Ebroicensis episcopi testatur quod disraciocinant in curia mea. Et ulli eis nihil faciat injuriam aliquam et contumeliam. Testibus Philippo Baiocensi episcopo pro Rogero de Warenne. Apud Cadomum.

No. 13.]

ACTE CHIROGRAPHE PORTANT LES MOTS "LITIS DIVISIO" EN 1171.[1]

Sciant omnes, etc., quod anno ab incarnatione Domini M°. C° LXXI° Willelmus de Abovilla concedente Henrico filio primogenito suo pro Deo et salute anime sue et antecessorum suorum dedit in perpetuam elemosinam cenobio Sancti Stephani Cadomi et monachis ibidem Deo servientibus quicquid juris habebat in presentatione et elemosine ecclesie de Bretteville orgoillose et capelle de Putot et illam donationem super altare beati Stephani posuit; et fide corporaliter[2] prestita super sanctum evangelium juravit se nunquam ulterius super hac donatione facturum aliquam calumpniam abbati et monachis Cadomi sed ubique et contra omnes homines idem Willelmus absque sua expensa mittenda illam in proposse suo garantizabit et pro donatione predicta dedit Willelmus abbas et monachi predicto Willelmo xxx. libras Andegavensas. Hec autem facta sunt coram domino rege Henrico, presentibus episcopis Arnulfo Luxoviensi, Frogerio Sagiensi, Goscelino Saresberiensi, et presentibus justiciis regis Willelmo de Sancto Johanne et Willelmo de Corceio presente etiam Thoma archidiacono Baiocensi qui in loco domini Henrici Baiocensis episcopi interfuit et proprio sigillo supradicta confirmavit. Testibus etiam Herberto precentore, Galerano archidiacono, et Rogerio de Arrie et Johanne archidiacono Sagiensi, et Johanne archidiacono Luxoviensi et aliis Willelmo de Glainvilla Willelmo de Humeto, Ricardo filio comitis, Willelmo Crasso, Ranulfo de Grandval, Roberto de Vein et Willelmo fratre suo et Roberto de Aniscio.

[1] 1 Cart. de la Basse-Norm. p. 179. Arch. de Calvados, No. 15.

[2] Comp. *ante*, pp. 115, 121, 122.

No. 14.] LETTRE OU BREF. (Sans date.)[1]

Rotrodus Dei gratia Rothomagensis archiepiscopus karissimo amico Willelmo de Corceio salutem, graciam et benedictionem. Eaque a domino nostro rege concessa sunt et carta sua confirmata a ministris suis debent inviolabiliter observari unde plurimum miramus quod carissimos filios nostros a domino rege plurimum dilectos abbatem et monachos Sancti Stephani de Cadomo patimini trahi in causam a Willelmo de Abovilla super ecclesia eorum de Brettevilla orguillosa cujus advocationis et presentationis jus a domino nostro rege eis est concessum et carta sua confirmatum et pluribus aliis cartis unde nobis consulimus et ex parte domini regis et nostra percipiendo mandamus quatinus eos in libera et quieta possessione dimittatis nec patiamini trahi in placitum sive in quamlibet causam usque adventum domini regis. Valete.

No. 15.]
CHARTE CONFIRMATIVE DE RICHARD I. (Circa 1189.)[2]

Ricardus rex, etc. Sciatis nos concessisse et hac presenti carta nostra confirmasse ecclesie Sancti Stephani de Cadomo et monachis ibidem Deo servientibus, etc. . . . . [3] Concedimus preterea concordiam factam coram Henrico rege patre nostro inter abbatem Cadomensem et Ricardum filium Johannis apud Burum de ecclesia de Condeto scilicet quod idem Ricardus dimisit Sancto Stephano omnem calumniam quam facibeat contra abbatem de predicta ecclesia et quicquid juris in ea se habere dicebat, eidem sancto in elemosinam dedit et concessit ea conditione quod monachi reciperent fratrem ipsius Ricardum majorem ad religionis habitum. Confirmamus, etc. . . . . Concedimus etiam concordiam factam inter abbatem Cadomi et Gislebertum Botin et filios ejus qui dimiserunt calamniam quam faciebant contra Sanctum Stephanum de Vinea de Wiborel et eam abjuraverunt receptis ab abbate xxx. solid. Concedimus, etc. . . . . [4] Concedimus et confirmamus Sancto Stephano emptiones et recuperationes quas fecit abbas Willelmus in tempore Henrici regis patris nostri

[1] Placed before 1189 in the volume. 1 Cart. de la Basse-Norm. p. 180. "De ma collection" (i.e. Léchaudé's), No. 16. See preceding case.

[2] 1 Cart. de la Basse-Norm. p. 182. Arch. de Calvados, No. 20.

[3] P. 184. [4] P. 188.

necnon et commutationes et concordias. . . . .[1] Recuperavit idem super Johannem filium Warini unam in quarreria quam idem Johannes injuste occupaverat. . . . . Fecit idem abbas quod Ranulfus Bendengel forisjuravit calumniam quam mittebat in cultura Fameleia. . . . . Recuperavit idem super Hasculf de Solenmis et uxorem ejus unam salinam datis eis centum solidis Andegavensibus et super Gaufridum de Castello ecclesiam Sancti Nicholai de bosco Balduini, dato ei uno palefrido. Recuperavit idem unum pratum apud Agvillam super Willelmum Germanum et terram Eschelini super comitem Glocestrie. Et super Julianam de Vacceio terram super montem de Berolis et apud Bogium masuras super Johannem Sailulta et apud Brachevillam unum villenagium super Gaufridum comitem de Mandevilla datis ei decem libris. Recuperavit, etc. . . . . [2] Recuperavit idem super Robertum de Vein in curia Henrici regis patris nostri apud Cadomum, hereditagium quod idem Robertus clamabat in tenendo manerio de Vein de Sancto Leone. Et super Robertum de Brienc ecclesiam Sancti Audoeni de Vilers de qua monachos violenter dissaisierat; set judicio baronum qui erant ad scaccarium [3] apud Cadomum adjudicata est ecclesia predicta Sancto Stephano et restituta. . . . . [4] Recognitum etiam fuit in plena assisia apud Abrincas quod homines abbatis Cadomi de manerio de Vein quietanciam suam habent de omnibus rebus venditis, emptis, in Abrincis excepto die mercati. . . . . Recognitum etiam fuit coram Rothrod Ebroicensi episcopo dapifero Normannie quod Willelmus filius Gerowart et Rogerus filius Henrici et Robertus filius Gislemi debent reddere consuetudines de domibus quas habent in burgo Sancti Stephani. Et domos Hugonis Fabri esse consuetudinarias excepta una. Et domos Radulfi Vituli nisi carta regis Willelmi testaretur unam esse quietam. Et domos servientium de Vilers esse consuetudinarias nisi quod unusquisque habet unam quietam. Et domos pratarii excepta una. Et domos facientium Sotulares (*vel subtalares* [5]) monachorum esse consuetudinarias preter unam. Et est judicatum nullam quietarum domorum habere nisi unam familiam et unam fenestram. Et donationem quam fecit, etc. . . . . [6] Hec autem omnia prescripta predicte ecclesie Sancti Stephani et monachis ibidem Deo servientibus concedimus et confirmamus, etc. . .

[1] P. 189. [2] P. 192.

[3] The use of the Norman Exchequer for the trial of common pleas (*temp.* Hen. II.) will be noticed.

[4] P. 193. [5] *Sic.* [6] P. 194.

. . . Testibus Waltero Rothomagensi archiepiscopo, W. Eliensi episcopo, cancellario nostro, Henrico Baiocensi, Radulfo Lexovensi, Willelmo Constanciensi, Johanne Ebroicensi, episcopis, Willelmo de Humeto constabulario, Willelmo filio Radulfi senescallo Normannie. Datum per manum Johannis de Alençone Lexoviensis archidiaconi, vicecancellarii nostri, apud Rothomagum xx. die Martii regni nostri anno primo.

No. 16.]

ACCORD FAIT PAR L'EVÊQUE DE WORCESTRE EN 1174.[1]

R. Dei gratia Wigornensis episcopus universis sancti matris ecclesie filiis, salutem. Omnium cognitioni notum esse volumus quod controversia per Walterum clericum de Haseltona adversus monachos Sancti Ebrulfi mota super ecclesiam de Rawella et nobis a domino papa Alexandro delegata quam idem Walterus in subjectione ecclesie sue de Hallinghis sibi petebat, hanc finem coram nobis sortita est. Ecclesia de Rawella, ecclesie de Hallinghis vigilia Pasche unam libram incensi persolveret *in persolveret*[2] in perpetuum. Ita quod ecclesia de Hallinghis ab ecclesia de Rawella nichil amplius poterit exigere; et monachi predicti Waltero clerico in recompensationem laboris et expensis sex solidos de redditu suo de Rawella per manum procuratoris sui quamdiu Walterius vixerit duobus terminis in Pascha videlicet et in festo Sancti Michaelis annuatim persolverent. Abbas autem et conventus Sancti Ebrulfi litteris suis nobis transmissis, se ratum habituros insinuaverunt quicquid Ricardus monachus eorum in Anglia generalis procurator existens in presentia nostra judicio vel compositione[3] susciperet. Hanc conventionem se servaturos confirmaverunt hinc inde, Ricardus scilicet monachus in verbo veritatis et Walterius clericus fide data in manu nostra. Facta est autem hec conventio anno ab incarnatione Domini M°. C°. LXIIII°. His testibus Adam abbate Evesham, Roberto priore de Kenilleworda, Symone archidiacono Wigornensi magistro Moyse, magistro Waltero, magistro Silvestro, Gilberto capellano, Samsone clerico.

[1] 1 Cart. de la Basse-Norm. p. 243. Arch. d'Alençon, No. 48.
[2] *Sic.* [3] Compo*t*etione in the transcript.

No. 17.]

ACTE CHIROGRAPHE ENTRE L'ABBÉ DE MONTEBOURG ET CELUI DE ST. SAUVEUR LE VICOMTE EN 1147.[1]

Notum sit omnibus presentibus et futuris quod queremonia que inter abbatiam Sancti Salvatoris et abbatiam Sancte Marie Montisburgi. . . . . erat de ecclesia Sancti Petri de Fontaneto juxta vada, terminata atque diffinita est anno ab incarnatione Domini M°. C°. quadragesimo VII°. hoc modo. In presentia venerandi Algari Dei gratia Constantiensis episcopi et Gisleberti archidiaconi et Radulfi archidiaconi constitutum atque sancitum est concessu Ricardi de Walvilla et Leonis fratris ejus, ut compositio quedam ex supradicta ecclesia Sancti Petri cum omnibus decimis et elemosinis eidem pertinentibus sit talis inter duas abbatias. Scilicet ut domnus abbas Sancte Marie Montisburgi omnisque conventus ejusdem loci amodo perpetualiter et pacifice medietatem totius predicte ecclesie et medietatem cymiterii omniumque decimarum et terre elemosine et decime pomerii Leonis possideant. Alteram vero medietatem ipsius ecclesie, cymiterii, omnium decimarum terre, elemosine decime pomerii Leonis similiter domnus abbas Sancti Salvatoris et conventus ejusdem loci perpetualiter et pacifice possideant. Hujus conventionis extitit auctor ex parte abbatie Sancte Marie Montisburgi domnus abbas Galterus, cum priore suo Ricardo de Gaurey et Guarino sub-priore, Roberto cellario, Roberto de Jugarvilla, Hervio monachis. Ex parte abbatie Sancti Salvatoris fuit auctor domnus abbas Hugo cum priore suo Gaufrido, Petro sub-priore, Roberto de Flotemanvilla, Roberto de Alna, Roberto de Landa. Testes laici sunt hii Ricardus de Walvilla, Leo frater ejus domini hujus elemosine Jordanus de Barneville, Ricardus de Haga, Petrus sacerdos de Sancto Salvatore, Radulfus frater ejus, Pasturellus et multi alii.

No. 18.]

LETTRE DE HENRY II. (Sans date.)[2]

Henricus rex Anglie dux Normannie et Aquitanie et comes Andegavensis, Ricardo de Reviers, salutem: Precipio tibi firmiter quod in pace et juste et libere facias monachos de Monteburgo habere decimam de Haya Danneville et omnia alia que carta patris

[1] 2 Cart. de la Basse-Norm. p. 178. Arch. de St. Lo, No. 96.
[2] Ib. p. 180. Ib. No. 99.

tui eis confirmavit et nominatim medietatem ecclesie de Neahou sicut carta Ricardi primi de Redvers eis illam confirmavit et sicut Saplo monachus eorum illam habuit et tenuit de patre tuo et de te ipso. Quod nisi feceris Willelmus de Vernone vel ministri sui faciant et in ea justicia mea faciat facere et non remaneat pro passagio meo. Teste Manessies Biset dapifero apud Barbefluctum in transfretatione regis.

No. 19.]

CHARTE DE HENRY II. (Sans date.)[1]

Henricus, etc. Precipio vobis quod custodiatis et manuteneatis et protegatis abbatiam Montisburgi et abbatem et monachos ejusdem loci et terras et homines et omnes res et possessiones eorum sicut res meas et quod nullam eis injuriam vel contumeliam aut quietiam faciatis, nec ab aliquo fieri permittatis. Si quis autem eis in aliqua forisfacere presumpserit plenariam sine dilatione eis justiciam fieri faciatis quia ipsa abbatia et omnia que ad eam pertinent sunt in manu mea et protectione. Prohibeo etiam ne ipsa abbatia vel abbas aut monachi de ullo dominio tenemento suo ponantur in placito nisi per preceptum meum quamdiu in Anglia moram fuero, etc. Apud Valonias.

No. 20.]

CHARTE DU DUC GUILLAUME EN 1061.[2]

In nomine Sancte et Individue Trinitatis, Patris et Filii et Spiritus Sancti, amen. Ego Guillelmus gratia Dei totius Normannie dux, rogatus multimodis ab abbate Ranulfo monasterii beati archangeli Michaelis quod est in monte qui tumba antiquitus nuncupatur. Concedo eidem loco molendinum ville, que Veim vocatur perpetuo possidendum quod etiam pie memorie genitor meus Rotbertus eidem, beato archangelo dederat. Sed Suppo ipsius loci abbas, Ranulfo monetario, monachis contradicentibus illud injuste vendiderat. Postea vero quam Ranulfus abbas ipsum locum regendum suscepit, molendinum suscepit. Et justo examine in curia mea

[1] 2 Cart. de la Basse-Norm. p. 181. Arch. de St. Lo, No. 103.
[2] Ib. p. 236. Ib. No. 21.

definitum est, molendinum debere Sancto Michaeli suisque monachis manere in perpetuum. Concedo igitur ut, ipsum molendinum, quod etiam molendinum comitis dicitur perpetuo sit juris Sancti Michaelis ad victum suorum monachorum, nec habeat potestatem quisquam meorum successorum seu ejusdem loci abbatum vel monachorum hoc a me meisque sancitum immutare qualibet occasione vel quantalibet pretii numerositate. Ut autem hec mea donatio inconcussa permaneat signum vivifice crucis manu propria subtus imprimere curavi. Signum gloriosissimi ducis Guillelmi ✠; Sig. Mathildis comitisse ✠; Sig. Maurilii archiepiscopi Rothomagensis ✠; Sig. Johannis presulis Abrincensis ✠; S. Hugonis presulis Luxovicensis ✠; S. Rotberti Bertranni ✠; S. Stigandi dapiferi ✠; S. Radulfi cubiculari ✠; S. Richardi viceconitis ✠. Hæc carta facta est apud Rothomagum anno Dominice incarnationis millesimo sexagesimo primo indictione xiii.[a]

No. 21.]

ROLE CONTENANT UN JUGEMENT DU DUC [ET ROI] GUILLAUME. (Sans date).[1]

In nomine Sancte et Individue Trinitatis Patris et Filii et Spiritus Sancti, amen. Antecessorum sollers providentia approbabili more instituit super quasque possessiones ecclesiarum cartarum adhiberi testimonia, quibus viriliter opprimatur quotiens emerserit calumpniatorum pervicax insolentia. Ea ego intentione commodum duximus noticie posterorum tradere, qualiter devenerit in dominio monachorum Sancti Michaelis molendinum de quo Johannes filius Richardi conatus est eidem sancto archangelo calumpniam struere et qualiter eadem columpnatio oppressa sit justo judicio optimatum patrie breviter annectare.

Igitur gloriose recordationis Rotbertus dux Normannorum qui abbatiam Montis Sancti Michaelis amplis fundorum redditibus nobilissime dilatavit prefatum molendinum quod in proprio jure tenebat, aliaque quam plurima eidem loco solenni largitione condonavit, et ne quisquam sequentium auderet adimere quicquam ex iis juri Sancti Michaelis cum terribili anathemathe cyrographum fieri imperavit, digestumque manu sua roboravit. Qui postquam in reditu Jerusolimitano apud Niceam hominem exiens eterne vite ut credimus

[1] 2 Cart. de la Basse-Norm. p. 237. Arch. de St. Lo, No. 22.

sullimatus est solio. Suppo abbas ipsius loci contra jus suasque idem molendinum dedit Ranulfo monetario monachis id contradicentibus unanimi consilio. Postmodum autem jam domini Ranulfi abbatis temporibus idem molendinum Gualeranus filius Ranulfi optinuit ceteris sue parentele multipliciter deficientibus, a quo prefatus domnus abbas Ranulfus non minimo pretio illud redemit pluribus adhibitis testibus etiam gloriosissimo seniore nostro Willehelmo tunc quidem Normannorum principe id annuente scriptoque confirmante coram suis fidelibus ut liquet ipsius verbis insequentibus que ex alia membranule annexa sunt propriis caracteribus.[1]

Hinc jam post quindecim plus minusve annorum intersticia prefato serenissimo rege Guillelmo indepto de nobiliter gubernante Anglici regni fastigia, supradictus Johannes ad calumpniandum idem molendinum inspirate prosiliit sui consimilium animatus insania et quasi precepto ejusdem incliti regis ipso penitus ignorante saisivit illud non premissa juste probationis audientia ; sepefato vero domno Ranulfo abbate haud enerviter obsistente et tale prejudicium Sancto Michaeli ac sibi illatum esse ; regi suggerente, tandem in regali curia locus datus est disceptandi utrinque numerositate optimatum patrie assidente, ex quibus dominus Gausfridus Constantiarum presul est delegatus regali autoritate discussor et judex hujus disceptationis, pariterque, Ranulfus vicecomes, Niellus (vel Nigellus) filius Nielli, Rotbertus de Vezpunt aliique quam plures judices ample opinionis, qui diligenter et ad unguem[2] disquirentes originem contentionis ; legali judicio diffinierunt idem molendinum debere Sancto Michaeli suisque monachis manere in perpetuitate omnis successionis. Hanc diffinitionem victoriosissimus rex Guillelmus approbans et confirmans regali suffragio jussit hec mandari scripture testimonio, idque ad perenne monimentum per verba sequentia roboravit affixo signo proprio. Ego Guillelmus gracia Dei rex Anglorum ac princeps Normannorum per hoc ✠ signum Sancte Crucis confirmo decretum meorum optimatum supra scriptorum ut molendinum comitis quod abbas Ranulfus, me favente, a Gualeranno redemit perpetuo sit juris Sancti Michaelis ad victum suorum monachorum, nec habeat potestatem quicquam meorum successorum seu ejusdem montis abbatum, vel monachorum, hoc a me meisque sanecitum immutare qualibet occasione aut quantalibet numerositate pretiorum.

Signum victoriosissimi regis Guillelmi ✠. Sig. nobilissime Mathildis regine ✠ etc.

[1] See No. 20. [2] *Sic.*

No. 22.]

JUGEMENT RENDU AUX ASSISES DE CAEN EN 1157.[1]

Anno M°·C°·L°·VII°· in assisia apud Cadomum cum Robertus abbas de Monte Sancti Michaelis conquereretur de Jordano de Sacchevilla quod quasdam consuetudines et exactiones per vim capiebat in hominibus de Eventoth et volebat manutenere eos et quasi tueri contra abbatem, eo quod antecessores ejus dederant Sancto Michaeli predictam villam de Eventhoth. Diffinitum est in plenaria curia regis, ut pote in assisia ubi erant barones quatuor comitatum, Bajocassini, Constantini, Oximini, Abrincatini, quod ex quo aliquis in Normannia dat aliquam elemosynam alicui abbatie, nihil omnino ibi poterit retinere vel clamare preter orationes, nisi specialem habeat cartam de hoc quod vult retinere ducis Normannie, in cujus manu sunt omnes elemosyne ex quo donaverant abbatiis, vel locis religiosis. Hoc judicium approbaverunt et confirmaverunt Robertus de Novoburgo dapifer et justitia totius Normannie, Philippus episcopus Bajocensis, Arnulfus Lexoviensis, Ricardus Constanciensis, Willelmus Tallevat comes Pontivi, Ingergerius de Boura,[2] Philippus filius Erneisi, Guillelmus, Johannes, Godardus de Walz, Achard Potin et alii.

No. 23.]

CHARTE DE RICHARD EVEQ. DE COUTANCES EN 1158.[3]

Omnibus sancte matris ecclesie catholicis tam presentibus quam futuris Ricardus Dei gracia Constanciensis in Domino salutem. Que coram rectoribus sancte ecclesie finem capiunt ne iterum in controversiam veniant equum est scripto et sigilli munimine diligenter confirmare. Ea propter universitati vestre notum fieri volumus quod Willelmus sacerdos de Ivetot causam quam adversus venerabilem abbatem Robertum et monachos Sancti Michaelis de monte super decima de Perella in Gerneroio ingressus fuerat coram nobis refutavit et prefato abbati decimam illam cum omnibus ejus pertinentiis in terra et Melagio quietam adclamavit, ipse et frater ejus Alanus et filius suus Ricardus et super sanctum evangelium unusquisque

[1] 2 Cart. de la Basse-Norm. p. 279. "De ma collection" i.e. (Léchaudé's), No. 61.

[2] Engelgerus de Bohone? See *post*, p. 396.

[3] 2 Cart. de la Basse-Norm. p. 281. Arch. de St. Lo, No. 64.

eorum juravit quod nichil in ea deinceps clamarent et si quis super hac emergerent impetitores abbatiam prefatam et monachos inde pro posse suo juvarent. Receperunt etiam proinde ex dono et gratia abbatis et monachorum xiii. libras Andegavensium et alteri fratrum religionis suscepture concessum eo retento ut secum deferat quod tunc dinoscetur habere. Facta est hec compositio coram nobis et assistentibus his fratribus nostris et amicis Ansgoto abbate de Lucerna et ejusdem loci priore; O. cantore nostro; Philippo, Willelmo, Johanne archidiaconis nostris Alveredo, Willelmo, Roberto de Sancto Laudo, Roberto de Milli, canonicis, Ausgoto decano, Roberto capellano, et aliis multis. Anno ab incarnatione Domini M°C°LVIII quarto idus Junii, in ecclesia Sancte Marie Constanciensis ante altare apostolorum beatri Petri et Pauli. Hoc autem ut inconcussum maneat auctoritate nostra et sigilli nostri munimine confirmamus et ne quis contrarire cotietur anathematis censura prohibemus.

No. 24.]

ACCORD FAIT EN PRÉSENCE DE HENRY II. AU SUJET DE PONTORSON EN 1160.[1]

Universis matris ecclesie filiis Hugo Dei gratia Rothomagensis archiepiscopus, salutem, gratiam et benedictionem. Noverint cuncti presentes apices vel lecturi, vel audituri controversiam inter ecclesiam Abrincensem et monasterium Sancti Michaelis de monte super ecclesiis Pontis Ursonis exortam in presentia regis Anglorum secundi Henrici, nostraque et episcoporum Philippi Baiocensis, Rotrodi Ebroicensis, Herberti Abrincensis, Hugonis Dunelmensis, Thome cancellarii, Ricardi constabularii aliorumque plurimorum procerum Rothomagi hoc modo esse sopitam; quod donum primi et secundi Henrici regum Anglorum de predictis ecclesiis predicto monasterio factum de cetero ratum haberetur et inconcussum atque presbitero de Boce-Alano in cujus parrochia predictum castrum ut ferebat edificatum erat pro tota querela sua decidenda et compescenda optio daretur vel tunc xx. libr. Andegavensium finaliter accipiendarum vel tunc etiam x. et annuatim dum adjuveret x. solidorum predicte monete habendorum. Testes autem supradicte trancactionis sive concordie sunt dominus noster Henricus rex Anglorum, Philippus Baiocensis, Rotrodus Ebroicensis, Herebertus

[1] 2 Cart. de la Basse-Norm. p. 287. Arch. de St. Lo, No. 73.

Abrincensis, Hugo Dunelmensis, episcopis, Thomas cancellarius regis, Richardus de Humetis, Guillelmus filius Hamonis, et alii multi qui huic negotio interfuerunt. Quod sigilli nostri munimine confirmamus ne aliqua occasione vel fraude iterum in controversia veniant quæ finem legitimum sit sortita. Actum Rothomagi anno ab incarnatione Domini M°C°LX°.

No. 25.]

ACCORD ENTRE L'ABBAYE ET WALTER BLUNDEL. (Sans date.)[1]

Hec est conventio facta super querela que vertebatur inter abbatem et monachos Sancti Michaelis et Walterum Blundel super terram de la Herdeland quam prenominatus abbas et monachi concesserunt, terram de la Prestelanda et Pilemore cum bosco qui circumcingitur duobus rivulis scilicet de Grindecumbe et de Mieucumbe prefato Walterio et heredibus suis annuatim solvendos v. solidos et vi. denarios concesserunt et predicto Waltero habere sex porcos in majori bosco sive[2] pannagio et non plures; et si ballivus illius manerii vel monachi habuerint porcos, commune[3] habebunt in bosco Walterii. Preterea sepedictus Walterius habebit contra ad natalem sex quadrigatas de mortuo bosco ad focum et totidem ad clausum ejus et meremmium ad carrucas per visum et manum ballivi illius manerii. Hanc conventionem affidavit predictus Walterus tenendam et juravit super altare Sancti Michaelis apud Ottritoniam ipse et Yvo ejus heres quod ab hac conventione de cetero non resilirent.

No. 26.]

BREF DE HENRY II. (Sans date, extrait.)[4]

Henricus rex, etc., Willelmo et Radulfo Bigot, salutem. Precipio quod Nicholaus prior de Plaisiez teneat in pace et juste et quiete elemosinam de Malestrea quam Alveredus Bigot dedit ei, et nullus ei inde super hoc injuriam faciat et nisi feceritis, justicia mea fecerit. Teste Philippo episcopo Baiocensi, apud Argentonium.

[1] 2 Cart. de la Basse-Norm. p. 228. Arch. de St. Lo, No. 75.
[2] Sine? written indistinctly. [3] *Sic.*
[4] 3 Cart. de la Basse-Norm. p. 24. Arch. de Calvados, Cart. vol. i. ch. 568.

No. 27.]

BREF DE HENRY II. (Sans date.)[1]

Henricus Dei gratia rex, etc. Sciatis, abbatiam Sancti Salvatoris fecisse compositionem et pacem cum Thome de Grovilla de controversia que erat inter abbatiam et ipsum, tali modo quod abbatia fratrem Petrum ejusdem Thome recepit vicarium in ecclesia sua de Direte (hodie Flamanville) quamdiu viveret et Thoma vero dedit terram apud Grovillam. Quare volo et firmiter precipio ut hec compositio me concedente facta, firma sit et stabilis ne abbatia post mortem Petri ejusdem ecclesie presentationem perdat, nec Thomas terram sibi assignatam amittat. Testibus Gaufrido episcopo Eliensi, Henrico episcopo Baiocensi. Apud Cadomum.

No. 28.]

ACCORD FAIT PAR GUILLAUME ÉVÊQUE DE COUTANCES EN 1120.[2]

Universis, etc. Willelmus Dei gratia Constanciensis episcopus salutem. Noverit universitas vestra quod cum inter monachos Sancti Salvatoris ex una parte et Ricardum de Sancto Helerio et Ricardum Wace ex alia super prediis Sancti Helerii questio aliquandiu ventillata fuisset in hunc modum pacis in nostra presentia convenerunt predicti presbiteri prefatis monachis de prediis illis x. boisellos frumenti annuatim exolverent. Et hoc juraverunt firmiter observandum. Actum anno Domini M°C°. XX°. apud Sanctum Laudum.

No. 29.]

ACCORD FAIT ENTRE L'ABBÉ DE SAVIGNY ET LES ENFANS DE ROBERT DE MOSCON. (Extrait.)[3]

Noverint universi quod contentio inter monachos Savinienses et filios Roberti de Moscon, scilicet Johannem, Radulfum et Guillelmum de Moscon, post multas altercationes in presentia domini

[1] 3 Cart. de la Basse-Norm. p. 35. Arch. de St. Lo, No. 4.
[2] Ib. p. 56. Ib. No. 51.
[3] Ib. p. 78. Arch. de Mortain, No. 35.

Radulfi Filgeriensis et domini Alani de Dinanno et Radulfi de Albinncio in hunc modum terminata fuit. Filii vero Roberti de Moscon in perpetuam elemosinam concesserunt monachis Savigniensibus quicquid juris habebant in Brolio de Moscon in masura de Vaux et in terra de Verneia et in haillis Costardi et in prato Igerii Tuelon et in omnibus aliis rebus, etc. Et ob hanc demissionem et concessionem sepissime nominatis fratribus xx.ti libras Andegavensium et unum equum monachi dederunt et etiam concesserunt eis ut habitum religionis cum voluerunt eis dabunt. Et ut hoc memoriter inposterum conservetur tam fideli roboratum testimonio presens scriptum dominus Radulfus Filgeriis et dominus Alanus de Dinanno et Radulfus de Albinneio suorum astipulatione sigillorum munierunt.

No. 30.]

CHARTE DU ROI HENRY II. (Sans date.)[1]

Henricus, etc., omnibus justiciis et baronibus Normannie et Passeis, salutem. Sciatis me recepisce et retinuisse in protectione et manu mea propria abbatiam de Savigneio cum hominibus et possessionibus et omnibus pertinentiis suis; me etiam Deo fideliter promississe et vovisse quod eandem abbatiam et omnia sua ubicunque in mea potestate sint defendam, et in pace et quiete et libere custodiam. Mando itaque vobis et firmiter precipio quatinus ipsam abbatiam et monachos et homines et omnes res ad eam pertinentes sicut res meas dominias ab omni molestia et inquietudine et injuria tueamini et defendatis. Precipio et prohibeo ne aliquo modo patiamini predicte abbatie monachos vel homines suos in placitum vel querelam nuti de re aliqua unde fuerint saisiti die illo quo in Angliam transfretavi. Quod si aliquis super hoc meum preceptum inquietare vel quolibet modo molestare presumpserit, tunc vobis mando et sicut me, et mandatum meum diligis precipio ut tam prope et tam plenarie de eo justiciam faciatis sicut in me aut res mei domanii ipsam contumeliam faceret. Teste Guillelmo filio Hamonis. Apud Barbefluctum.

[1] 3 Cart. de la Basse-Norm. p. 80. Cart. de M. de Gerville, No. 37.

No. 31.]

CHARTE DU ROI HENRY II. (Sans date.)[1]

Henricus, etc. Sciatis, abbatem et monachos de Savigneio disrationavisse in curia mea apud Domnifrontem, me presente, terram et decimam de quibus inter eos et Robertum filium Radulfi erat dissensio. Ideoque mando et firmiter precipio quod habeant illam et teneant in bene et in pace quiete sicut illa in curia mea disrationaverit. Testibus Willelmo filio Hamonis, et Petro de Sancto Ilario.

No. 32.]

CHARTE DE CONSTANCE DUCHESSE DE BRETAGNE. (Sans date.)[2]

Omnibus, etc. Constancia ducissa Britannie et comitissa Richemondie, salutem. Sciatis quod filii Gaufridi Gifart, videlicet Gaufridus Bufelin et Willelmus et Emma soror eorum, omnem calumpniam quam adversus monachos Savigneii faciebant super vi. quarteriis frumenti annui redditus quos eisdem monachis Willelmus filius Pagani in terra de Vernea vendiderat, penitus dimiserunt. Ipsampue venditionem ita libere et quiete concesserunt quod nichil in ea decetero reclamabitur. Hujus rei testes sunt. Andreas de Vitreio, Brientius de Coisn., Eudo de Bellomonte, Guido Brito, Petrus Brito, Rotbertus Brito, Gaufridus de Gasto, Petrus de Sancto Melan., Petrus Herant, et alii plures. Quod ut firmum et inviolabile possit haberi presenti scripto et sigilli nostri munimine roboravi.

No. 33.]

CHARTE CONFIRMATIVE DU ROI HENRY II. (Sans date.)[3]

Henricus rex, etc. Sciatis me ad petitionem conventus Savigneii et abbatis ejusdem loci et Gaufridi de Monfort salvo jure Constanciensis ecclesie, concessisse et presenti carta mea confirmasse conventionem que facta est inter ipsum abbatem et monachos

[1] 3 Cart. de la Basse-Norm. p. 81. Arch. de Mortain, No. 38

[2] Ib. p. 84. Ib. No. 42.

[3] Ib. p. 89. Ib. (?), role particulier, No. 51.

Savigneii et predictum Gaufridum de ecclesiis de Ketevilla et de Gœvilla de quibus controversia erat inter eos coram justiciis meis. Scilicet quod abbas et conventus presentationem ecclesie de Gœvilla in perpetuum possidebunt Gaufridus vero et heredes sui presentationem ecclesie de Ketevilla in perpetuum habebunt. In utraque parrochia predictarum ecclesiarum percipient ipsi monachi unam medietatem omnium decimarum frugum scilicet leguminum, lini, cannabi, animalium, fructuum, et lanarum. In parte si quidem predicti Gaufridi et heredum suorum cedet altera medietas salvis tamen in decima de Gœvilla xx^ti^ quartariis ordei, etc. Quare volo et firmiter precipio quod prescripta compositis stabilis et rata permaneat sicut inter prenominatos abbatem et monachos et Gaufridum facta est, et firmiter et inconcusse teneatur, sicut carte illorum testatur. Testibus Hunfrido de Bohun conestabulario Hugone de Creissy, Roberto de Stuttevilla, Gilberto Pipard.

No. 34.]

CONFIRMATION DE L'ACCORD FAIT CI-DESSUS PAR GEOFFROI DE MONFORT. (Sans date.)[1]

Ego Gaufridus de Monteforti presentibus et futuris notum fieri volo quam controversia que fuit inter me et monachos Savignienses super ecclesiis de Ketevilla et Gœvilla consilio bonorum et sapientium virorum apud Redoñ in presentia domini Philippi Redonnensis episcopi tali compositione concordata est. (Vide ut supra.[2]) Ego quoque et mei milites Robertus filius Hugonis Willelmus de Gebrescio, Willelmus prepositus, Rualendus de Monte Orfin, Botterel de Bosco-Iagu predictam compositionem nos fideliter servaturos et a nostris firmiter servari facturos in manu Petri Redonensis archidiaconi fide corporali[3] firmaverunt. Uxor etiam mea Gervasia et nostri liberi Radulfus, Willelmus, Rolandus, Eudo, Matildis et Amicia huic concordie benignum prebuerunt assensum et consensum. Ut autem concordia ista firma in perpetuum maneat et inconcussa presenti carta mea eam muniri et sigillo meo roborari feci. Hujus compositionis testes fuerunt Robertus filius Hugonis, Johannes filius ejus,

[1] 3 Cart. de la Basse-Norm. p. 89. Arch. de Mortain (?), role particulier, No. 52.
[2] No. 33. [3] Comp. *ante*, p. 115.

Gaufridus Boterel, Rualendus de Monte Orfin, Johannes filius Helie de Albineio, Robertus presbyter de Sacio, Willelmus de Vera cum aliis pluribus.[1]

No. 35.]

ACCORD ENTRE L'ABBESSE DE CAEN ET L'ABBÉ DE THEOKESBERY.[2]

Universis ecclesie Dei filiis Fromundus abbas Theokesbery totiusque conventus ejusdem loci salutem. Noverit universitas vestra controversiam que inter nos et ecclesiam Sancte Trinitatis de Cadomo versabatur super ecclesiam de Aveling. amicabili pactione hoc modo finitam esse; videlicet, quod sancti moniales predicti monasterii Sancte Trinitatis nomine transactionē xx. marcas argenti ecclesie nostre dederunt ut a lite omnino discederemus. Quare nos propter pacis caritatisque concordiam ad comparandos legitimos redditus, has predictas xx. marcas in capitulo nostro suscepimus et quicquid juris in ecclesia de Aveling. vel in pertinentiis suis habuimus ecclesie Sancte Trinitatis de Cadomo remisimus atque modis omnibus quietum clamavimus. Huic autem transactioni ex mandato domini Rogerii[3] Wigornensis episcopi interfuerunt Radulfus prior Wigornensis qui tunc temporis in negociorum ecclesiasticorum executione vicem gerebat episcopi et Matheus archidiaconus Glocestrie quod ex sigillorum dependentorum testimonio comprobatur. Testibus Baldrico decano de Sapton., Rogero de Wich., Rainald de Aveling., Salomo presbitero, Willelmo capellano Theokesbery, magistro Silvestro Ricardo et Thoma de Bisleg., Ricardo de Hanton, Hugone de Teltbery, Waltero de Stanley, Philippo de Grenhamstud., Willelmo et Abraham clericis, Willelmo de Felsted, Harduino de Bisleg., Henrico de Hanton., Ricardo monacho, Willelmo de Nortun, Warino de Salesbery.

[1] Nos. 53, 54, 55 are subsequent confirmations of this agreement, dated 1212, 1223, 1224.

[2] 3 Cart. de la Basse-Norm. p. 257. Arch. de Calvados, No. 86.

[3] Roger, son of Robert, earl of Gloucester, 1164–1179.

No. 36.]
LETTRE D'AMAURY COMTE D'EVREUX. (Sans date.)[1]

Amalricus comes Ebroicensis, vicecomiti suo de Waravilla et omnibus baronibus suis et prepositis eorum de honore de Batvent, salutem. Precipio vobis ut terram et homines Sancti Martini et abbatis et monachum de Troarno immunes sint ab omni querela et omnia que habent in honore de Bavent quieta sint, quia sic volo et concedo pro mea et antecessorum meorum salute. Valete.

No. 37.] LETTRE DE HENRY II. (Sans date.)[2]

Henricus rex, etc., justiciis, vicecomitibus et omnibus ministris suis de Reiesmo, salutem. Sciatis quod ecclesia de Briwetonia et canonici ibidem Deo servientibus et omnis eorum res et possessiones sunt in mea manu et custodia et protectione. Et ideo volo et firmiter precipio quo predicti canonici habeant et teneant omnes tenuras et possessiones et libertates et liberas consuetudines suas et nominatim ecclesiam de Lion cum decimis et omnibus aliis ad eam pertinentibus bene et in pace, juste libere et quiete et honorifice. Et si quis super hoc aliquam eis fecerit injuriam, plenariam eis sine dilatione faciatis justiciam; et nisi feceritis justicia mea Normannie faciat. Teste Ricardo de Lucy apud Pictaviam.

No. 38.] LETTRE DE HENRY II. (Sans date.)[3]

Henricus rex, etc., archiepiscopo Rothomagensi, episcopis, archidiaconis, decanis, comitibus, baronibus, justiciis, vicecomitibus, et omnibus ballivis et fidelibus suis Normannie salutem. Sciatis quod prior Sancte Marie de Briweton et canonici regulares in eadem ecclesia Sancte Marie Deo servientes et omnes res et possessiones sue sunt in manu et custodia et protectione mea. Et ideo precipio quod priorem illum et canonicos et omnes res et possessiones suas et quecunque ad eos spectant in Normannia custodiatis et in manu teneatis et protegatis sicut mea propria. Ita quod nullam molestiam vel injuriam aut gravamen eis de aliquo faciatis, nec fieri permittatis. Et si quis

[1] 3 Cart. de la Basse-Norm. p. 332. Cart. de Troarn, fol. 82, No. 21.
[2] Ib. p. 344. Ib. fol. 22, No. 33. [3] Ib. p. 345. Ib. fol. 23, No. 34.

eis in aliquo forisfacere presumpserit plenariam eis inde sine dilatione justiciam fieri faciatis. Et de nullo tenemento suo quod habent in Normannia ponantur in placitum nisi coram me. Teste Willelmo clerico de Cañia,[1] apud Merlebergam.

No. 39.]

ACCORD FAIT PAR HENRY II. (Sans date.)[2]

Henricus rex, etc., archiepiscopo (ut supra, No. 38). Sciatis controversiam que versabatur inter abbatiam Troarni et comitem Johannem hoc modo terminatum fuit: scilicet, quod abbas Gislebertus et conventus abbatie Troarni clamaverunt quieta[3] comiti Johanni et heredibus suis totum manerium de Remberthomme et decimam foreste Gufferni de Vinaz. Et comes Johannes concessit predicte abbatie decimam thelonei de Montegomerici et tenementum filiorum Roise apud Troarnum, et insuper omnia tenementa que continentur in cartis ipsius abbatie quas habet de comite Rogero antecessore comitis Johannis in bosco et plano, in pratis et pascuis, in aquis et molendinis et in omnibus aliis rebus. Et idem comes posuit prefatam abbatiam in manu mea et custodia et protectione liberam et quietam ab omni servicio et ab omni exactione immunem ab ipso et heredibus suis. Et ideo volo et firmiter precipio quod hec compositio stabilis inter eos maneat et inconcusse teneatur sicut superius determinata est et in presentia mea facta. Testibus R. archiepiscopo Rothom., R. archiepiscopo Eboracensi, Henrico episcopo Baiocensi, A. episcopo Lexoviensi, R. episcopo Constanciensi, R. episcopo Abrincensi, H. abbate Fiscanni, R. abbate de Monteburgo, R. abbate Valacie, V. abbate Sancti Georgi de Bauchervilla, Ricardo de Humel. constabulario, Willelmo de Curci dapifero, Fulcon. Pænello, Willelmo filio Hamon., Ricardo de Canvilla, Seihero de Quincy. Apud Valoniam.

No. 40.]

WRIT OF HENRY II. AS TO AN ASSISE.[4]

Henricus rex Angliæ et dux Normannorum, et Aquitaniæ, et comes Andegavorum, Willelmo Patricii, salutem. Precipio tibi quod

[1] Camera?

[2] 3 Cart. de la Basse-Norm. p. 345. Cart. de Troarn, fol. 7, No. 35. [3] *Sic.*

[4] Cart. de Baieux, or Liber Niger de Baieux, fol. 4, No. 10. The following writs and charters from this cartulary are of the time of Philip d'Harcourt, bishop

sis ad primam assisam quæ erit citra Lexovium, et habeas ibi quarantes tuos qui quarantizent tibi feoda illa que tenes de feodo episcopi Bajocensis, de quibus conqueritur, scilicet de feodo Walchelin de Corcella de Renigore, et de Walchel Maminot de Noers, et Helionis conestabuli, de Gisetot, et Radulphi de Rovencestra de Mondrevilla, et Rogeri Malfilastre de Monte Secreto, et de Frenesia. Et nisi feceris, precipio quod justitia mea faciat ei habere considerationem meæ curiæ secundum quod audierit warantes tuos, quod idem episcopus habere debet in prædictis feodis, et pacem hic faciat hominibus de feodis illis, et terre predicte de auxiliis, et omnibus querelis, ita quod tu nichil de illa capias donec diffinitum sit, quid episcopus in illis feodis habere debet, et faciat ei habere considerationem in cujus manu feoda illa remanere debent. Interim et sine dilatione reddas plenarie omnia catalla [?] quæ de his feodis cepisti, quando fui Bajocas ad assisiam meam. Teste Thoma[1] episcopo Lexoviensi, apud Baiocas.

No. 41.]

CHARTER OF HENRY II. CONFIRMING A FINE AND CONCORD.[2]

Henricus Dei gratia rex Angliæ et dux Normannie et Aquitanie et comes Andegavorum archiepiscopis, episcopis, abbatibus, comitibus, baronibus, justiciariis, vicecomitibus, et omnibus ministris et fidelibus suis, salutem. Sciatis me presente Henrico Bajocensi episcopo et favente ad petitionem Roberti de Isingni, concessisse et præsente mea carta confirmasse finem et concordiam quæ facta est coram me inter capitulum ecclesiæ Bajocensis, et præfatum Robertum de Isingni, scilicet quod idem Robertus dimisit capitulo Bajocensi omnino quietum mesagium sacerdotis cum virgulto in quo mansit Mabo presbiter, et cum terra arabili que est in capite virgulti, et omne jus quod quoquo modo dicebat se habere in ecclesia de Isingny, universum quoque jus percipiendi decimas de toto illius ecclesie territorio : si quod pertinebat ad eum sive de grangia capituli, sive de terris ipsius Roberti aut alienis, sive decime consistant in

of Bayeux, A.D. 1144–1166, who had been chancellor to King Stephen. Many being of the time also of Henry II., the dates of such are thus fixed between the years 1154 and 1166; while the rest are of course of the ten years preceding. The MS. itself is of the thirteenth century. Extracts from a few of these records have been printed, but none have ever before been printed in full.

[1] Quære.

[2] Cart. de Baieux, fol. 4, No. 11.

duabus garbis, sive in tertia. Terrarum vero facta divisione super quibus vertebatur contentio, juxta formam pacis habet capitulum terram que est versus forestam. Et contra istam habet Robertus culturam quæ est sub gardeno Ade, et culturam que est de feodo Croste. Item habet capitulum totum pratum de Felger. Et Robertus habet totam landam versus Goleth. Item habet capitulum Milonem de Gonessa et Arnulfum Besuch et Hogam. Et Robertus habet contra hæc: Pilosum et Herveum de Goleth. Item prefatus Robertus dimisit ipsi capitulo dimidium acre terre quam tenet Chipheth. Et Willelmus nepos ejus et dimidiam acram quam tenet filia Riculfi. Et tres virgatas quas tenet Rogerius Tanchere. Et dimidiam acram quam tenet filius Gocie, et Grosvassat, et mansuram Bersech de Aumanvill. Hanc autem concordiam juraverunt in perpetuum observaturos Robertus et Simon et Rogerus Suhart fratres ipsius Roberti super sancta evangelia publice in processione ecclesie Bajocensis. Et capitulum dedit eidem Roberto xxvi. marcas Andegavenses, et fratribus illius lx. solidos Andegavenses pro bono pacis,[1] et ut jus quod capitulum habebat in prædictis, et præfati diutius perturbaverant, sibi quietum dimitterent, et inconcussam, et ipsi quicquid juris in eis se habere dicebant sicque super majus altare ecclesie Bajocensis posuerunt ei omnino renunciantes. Quare volo et firmiter precipio, quod prescripta concordia, sicut coram me facta fuit, firmiter et inconcusse teneatur. Testibus M. abbate de Curzay, P. abbate de Cadomo, magistro Waltero de Constantiis, magistro I. Cicestrensi archidiacono, magistro Petro Blesensi, Willelmo filio Radulfi, Sch. Normasi, Folqueto Painel, Ricardo de Aufay, Roberto de Bricurt, Hamon Pincerna, apud Burum.

No. 42.]

CHARTER OF HENRY II. AS TO AN ASSISE.[2]

Henricus dux Normanniæ et comes Andegavorum H. Dei gratia Rothomagensi archiepiscopo, et omnibus episcopis comitibus et baronibus suis de Normannia, salutem. Quoniam ecclesia Bajocensis post mortem Odonis episcopi per subsequentium episcoporum impotentiam, tum per eorumdem negligentiam, et perditiones et donationes et commutationes ab ipsis factas fere ad nichilum redacta erat, ne funditus ecclesia predicta destrueretur, proinde

[1] *Sic.* [2] Cart. de Baieux, fol. 5, No. 14.

Henricus rex avus meus instituit ut juramento antiquorum hominum qui rem norunt, recognoscerentur tenedura jamdicte ecclesie sicut fuerant in tempore predicti Odonis tam in dominicis quam in feodis militum, vavassorum et rusticorum, ipsius equidem tempore hec omnia jurata sunt et recognita et sepedicte ecclesie precepto ejus resignata et munimine carte sue quocunque modo a possessione ecclesie alienata essent, reddita sunt et confirmata. Subinde Gaufridus comes Audegavensis pater meus commonitione et precepto apostolicorum virorum Lucii et Eugenii qui omnium episcoporum Bajocensium ab Odone usque ad Philippum succedentium donationes et venditiones et commutationes et omnes alienationes quas de predicte ecclesie beneficiis facerant, irritas esse preceperunt. Item dominica et feoda et omnes Bajocensis ecclesie teneduras sicut fuerant in tempore Henrici regis jurata juramento fecit recognosci, et sicut Bajocensis ecclesia in tempore Odonis episcopi tenuerat, ea ex integro eidem ecclesie resignavit et cartha sua confirmavit. Vestigiis igitur antecessorum nostrorum avi scilicet et patris inherere concupiscentes et patrum nostrorum apostolicorum Lucii et Eugenii commonitioni et precepto obtemperare volentes: mandamus et precipimus ut dominica et feoda et possessiones libertates et consuetudines Bajocensis ecclesie et omnes tenedure quas habuit in tempore Odonis episcopi, sicut unquam ea melius et liberius in tempore ejus habuit juramento legitimorum et antiquorum hominum qui rem norunt, recognoscantur, sicut fuerunt jurata et recognita in tempore avi mei et patris. Ea itaque omnia sepememorate ecclesie reddimus concedimus et confirmamus. Teste Garino filio Girardi, Willelmo filio Hamonis, Manessero Biset. Apud Falesiam.

No. 43.]

WRIT OF THE DUKE OF NORMANDY, PROVIDING FOR A RECOGNITION IN A CASE OF DISPUTE AS TO LANDS OF THE CHURCH AT BAYEUX.[1]

Dux Normannie et comes Andegavorum omnibus baronibus suis justitiis baillivis et omnibus fidelibus suis hominibus, salutem. Volo et precipio quod Philippus Bajocensis episcopus teneat omnes terras suas tam in dominicis quam in feodis et omnes teneduras suas ita

[1] Cart. de Baieux, fol. 5, No. 16.

plenarie et honorifice sicut Odo episcopus unquam melius et liberius tenuit. Et quia, sicut bene novimus res Bajocensis ecclesie per negligentiam aut impotentiam antecessorum morum male disperse sunt et a pluribus occupate: volo et precipio quod, si de aliqua tenedura orta fuerit contentio inter episcopum et aliquem de suis hominibus: per juramentum legitimorum vicinie in qua hoc fuerit, sit recognitum quis saisitus inerat tempore Odonis episcopi, vel ipse episcopus vel ille cum quo erit contentio, et quod inde recognitum fuerit, firmiter teneatur, nisi ille qui tenet potuerit ostendere quod tenedura illa in manus suas postea venerit jure hereditario aut tali donatione que juste debeat stare, et hoc in curia episcopi vel in mea. Volo etiam et precipio et prohibeo ne aliquis pro facienda justitia nec pro alio intrent in terram episcopi Bajocensis nisi illi servientes qui ab antiquo ad hoc constituti sunt, et qui hoc faciebant tempore Henrici regis, nec isti et hoc faciant nisi sicut justum fuerit. Teste comite Mellenti [?]. Apud Rothom.

No. 44.]

WRIT OF THE DUKE OF NORMANDY, REQUIRING A RECOGNITION.[1]

Dux Normannie et comes Andegavorum Reginaldo de Sancto Vallerico, Roberto de Novo Burgo, et omnibus justiciariis suis de Normannia, salutem. Volo et concedo quod ecclesia beate Marie Baiocensis et Philippus episcopus, et successores ejus habeant et teneant leugatam de Cambremario ita bene et integre et honorifice sicut Odo episcopus eam tenuit cum omnibus consuetudinibus quas in ea tenuit in tempore Willelmi regis senioris, et sicut Ricardus filius Samsonis eam melius habuit in tempore Henrici regis. Propterea mando vobis et precipio quod faciatis recognosci per sacramentum proborum hominum de vicinio terminos leugate et consuetudines et forisfacturas et verendam.[2] Et faciatis hæc omnia habere et tenere in pace Philippo episcopo sicut predicti antecessores ejus ea melius habuerant in temporibus predictorum regum. Si quis vero ei inde resistere voluerit precipio vobis quod firmam justiciam inde faciatis. Testibus Hugone archiepiscopo Rothomagensi Ricardo cancellario, Reginaldo de Sancto Wallerico, Roberto de Novo Burgo. Apud Rothomagum.

(See *post*, Nos. 51–53.)

[1] Cart. de Baieux, fol. 5, No. 17. [2] A warren.

No. 45.]

CONFIRMATION OF THE DUKE OF NORMANDY OF THE RETURN OF A RECOGNITION.[1]

Dux Normanniæ et comes Andegavorum Raginaldus de Sancto Walerico, Willelmo de Vernone, Roberto de Novoburgo, et omnibus et proceribus suis Normanniæ, salutem. Sciatis quod ego concedo et confirmo ecclesie Sancte Marie Bajocensis et Philippo episcopo, et omnibus successoribus ejus omnes terras et consuetudines quas Odo episcopus habuit in episcopatu Bajocensi, et nominatim terram de Carchenneio[2] et terram de Wolleia,[3] sicut recognitum fuit et juratum, in choro Bajocensis ecclesie quod predictus Odo eas habuerat in dominio. Astantibus ibidem per preceptum nostrum ad hoc audiendum Roberto de Curceio dapifero nostro, Ricardo de Haia et aliis quampluribus. Testibus Hugone Rothomagensi archiepiscopo Ricardo cancellario nostro, Raginaldo de Sancto Walerico, Roberto de Novoburgo, apud Rothomagum.

No. 46.]

ANOTHER WRIT BY THE SAME, REQUIRING A RECOGNITION.[4]

Dux Normannorum et comes Andegavensium Thomæ de Bohun, salutem. Mando tibi et precipio quod dimittas episcopo Bajocensi in pace feudum militis quod Robertus Marin de ipso tenebat Witenill. Et feudum suum quod Willelmus de Bohun de ipso apud Monimartin tenere debet, quod hucusque injuste occupasti. Quod nisi feceris, precipio quod justitia mea R. de Haia secundum assisiam meam recognosci faciat predictum feodum episcopi quomodo antecessores sui tenuerunt tempore regis Henrici, et sicut recognitum fuerit ita episcopum in pace tenere faciat. Quia ego non paterer quod de jure suo injuste perderet tibi etiam Ricarde la Haia precipio quod per totam bailiam tuam secundum assisiam meam recognosci facias feudum episcopi Bajocensis et ipsum in pace tenere sicut recognitum fuerit secundum assisiam meam. Test. Pagan . . . Apud Cenomanum.

[1] Cart. de Baieux, fol. 6, No. 19. [2] Carcagni. [3] Vouilly.
[4] Cart. de Baieux, fol. 7, No. 24.

No. 47.]

WRIT OF THE DUKE OF NORMANDY AND EARL OF ANJOU REQUIRING A RECOGNITION.[1]

Dux Normannorum et comes Andegavorum G. de Sableio et R. de Curceio justiciis suis. Mando vobis quod sine mora recognosci faciatis secundum assisiam meam de feodo Guilelmi Bersic et de servitio ejusdem, quis inde saisitus erat tempore regis Henrici et si recognitum fuerit quod episcopus Baiocensis inde saisitus esset vivente rege Henrico, ei habere et tenere in pace faciatis. Preterea vobis mando quod recognosci faciatis secundum assisiam meam de terra Crasmesnil et de Rochencort quis inde saisitus erat tempore regis Henrici et si recognitum fuerit quod Guaquelinus de Corceliis inde saisitus esset eo tempore, ei in pace tenere faciatis. Et prohibete Roberto filio Erneis ne aliquid ei forifaciat necque sui homines. Et si Robertus filius Erneis sive sui homines aliquid inde ceperint postquam precepi in Epiphania Domini quod terra esset in pace donec juraretur, cujus deberet esse reddi faciatis. Teste T. P. de Clarvall, apud Cenomanum.

No. 48.]

WRIT OF HENRY II. REQUIRING A RECOGNITION.[2]

Henricus rex Angliæ et dux Normannorum et Aquitanorum et comes Andegavorum Willelmo filio Johannis, salutem. Præcipio tibi quod facias recognosci per antiquos homines Cadomi quot et quarum domorum in Cadomo episcopi Baiocensis solebant habere censum et redditus tempore Henrici regis avi mei, et que servitia et quales consuetudines inde tunc habebant, et sicut fuerat recognitum, ita in pace et juste et integre eas facias habere Philippo episcopo Bajocensi et plenum rectum ei faciat de terra ubi grangiæ . . . .[3] episcopi esse solebant, secundum assisiam meam, et plenum ei facias rectum de terra arabili que est juxta aquam secundum assisam meam, et plenum rectum ei facias de decimis . . . .[3] et lane feciorum de Cadomo secundum assisam meam. Et nisi fecerit, Robertus de Novoburgo faciat. Teste Toma cancellario apud Lemoviam.

[1] Cart. de Baieux, fol. 7, No. 25. [2] Ib. fol. 8, No. 27. [3] Indistinct.

No. 49.]

CONFIRMATION BY HENRY II. OF THE RETURN OF A RECOGNITION.[1]

Henricus rex Angliæ et dux Normannorum et Aquitaniæ et comes Andegavorum R. de Novoburgo et omnibus ballivis suis Normanniæ, salutem. Precipio quod faciatis Philippum episcopum Baiocensem tenere banlewan suam de Cambremario, et omnes consuetudines suas ita bene et in pace et libere et juste et plenarie, sicut recognitum fuit coram nobis et coram Roberto de Curceio, ex precepto patris mei per sacramentum legalium hominum, et sicut carte regis Henrici avi mei et comitis Gaufridi patris mei et nostra, in quorum præsentia hoc factum est, testantur, et sicut postea per litteras meas precepi. Et si quis ejus consuetudines in aliquo diminuere voluerit, firmam ei justitiam sine dilatione faciatis. Teste G. de Lond. apud Wudestocam.

No. 50.]

CONFIRMATION BY HENRY II. OF A CONCORD.[2]

Henricus rex Angliæ et dux Normannorum et Aquitaniæ et comes Andegavorum, archiepiscopo et episcopis et justiciariis et baronibus et ministris suis totius Normanniæ, salutem. Sciatis quod ego concedo et carta mea presenti confirmo compositionem illam que facta fuerit coram me inter Philippum Bajocensem episcopum et Philippum de Columbariis de morte Beatricis neptis predicti episcopi quam Robertus nepos Philippi de Columbariis interfecerat. Hanc videlicet quod Philippus de Columbariis predictum Robertum abjuravit, et pacem firmam episcopo Bajocensi et Willelmo Britoni et toti cognationi eorum juravit. Præterea ecclesiam de Columbariis cum duabus garbis et tercia et aliis pertinentiis ejus cuidam prebende Bajocensis ecclesie pro anima Beatricis predicte et pro restauratione dapni quam eidem prebende fecerat, in perpetuam eleemosinam dedit et concessit. . . .[3] Quare volo et firmiter precipio quod hec compositio firmiter et discusse teneatur. Testibus Thoma cancellario, Rogerio archidiacono, Richardo de Husneto Constantiense. Apud Leones.

[1] Cart. de Baieux, fol. 8, No. 32. [2] Ib. No. 33. [3] Indistinct.

No. 51.]

CHARTER OF THE DUKE OF NORMANDY AS TO A RECOGNITION.[1]

Dux Normannorum et comes Andegavorum Hugoni Dei gratia Rothomagensi archiepiscopo et omnibus episcopis Normannie et omnibus baronibus, salutem. Christianorum principum est sua ecclesiis jura inconcussa illibataque conservare. Et si aliquatenus fuerunt improborum hominum vexatione turbata vel imminuta, ad pristinum sue rectitudinis statum quantocius revocare. Eapropter quod Baiocensis ecclesia post tempora Odonis episcopi multa de jure suo perdiderat per subsequentium episcoporum incuriam qui minus in conservando vigiles extiterunt, nos predicte ecclesie in oppressionibus suis compatientes, juramento antiquorum et legitimorum hominum qui rem noverant, fecimus recognosci jura, possessiones, consuetudines, libertates supradicte ecclesie quascumque habuerat in tempore Odonis episcopi. Vestigiis regis Henrici inherentes, qui hoc idem juramento antiquorum hominum fecerat recognosci post mortem Ricardi episcopi filii Samsonis, cujus factum bone memorie Lucius et Eugenius papæ approbantes, donationes, venditiones, commutationes ab omnibus episcopis factas post Odonem episcopum usque ad Philippum cassaverunt, et irritas esse preceperunt, nos igitur predictorum patrum nostrorum Lucii pape et Eugenii litteris commoniti et precibus Philippi Baiocensis episcopi compulsi juramentum quod rex Henricus fieri fecerat ratum esse volentes: juramento eorumdem qui tempore regis Henrici juraverunt, et aliorum recognosci fecimus jura, possessiones, consuetudines, libertates quas ecclesia Baiocensis tempore Odonis episcopi habuerat et habere debebat. Recognita est igitur inter cetera leugata de Cambremerio apud Falesiam coram Roberto de Novoburgo et coram Roberto de Curceio justiciariis meis, juramento antiquorum et legitimorum hominum qui subscripti sunt. Juramento itaque hominum de terra Roberti de Monteforte, scilicet Ricardi de Warlammont et Ricardi de Altaribus, et de terra abbatis de Sancto Petro supra Divam, Ricardi filii Milonis, Rogeri filii Odonis, Hugo Taissun. . . .[2] Recognita est leugata et consuetudines et emende et termini quibus leuga continetur. Juraverunt itaque predicti homines quod episcopus Baiocensis habet et habere debet et quod Ricardus episcopus filius Samsonis habuerat in tempore regis Henrici de hominibus omnibus

[1] Cart. de Baieux, fol. 10, No. 39. In connection with the following three records, see No. 44, *ante*.

[2] Et al.

infra terminos manentibus statum theloneum de omni emptione et venditione infra terminos facta ex consuetudine, nec non et telonii non redditi et sanguinis ibidem facti constitutam emendam. Juraverunt etiam quod licebat preposito episcopi per omnes terras infra terminos leugate justitiam suam libere exercere. Termini autem leugate hii sunt : incipit autem a petra de Houtemaine et distenditur usque in Algot fluvium.[1] . . . Cæterorum maneriorum occupationes jurate sunt Bajocis coram Ricardo de Haia et Roberto de Novo Burgo et Roberto de Curceio et coram Engelgero de Bohone a nobis ad hoc faciendum transmissis, congregatis ad hoc jurandum de singulis maneriis plurimis antiquis et legitimis hominibus quorum juramento ita omnino recognitum est sicut continebatur in scripto quod factum fuerat secundum juramentum quod rex Henricus antea fieri preceperat. . . . Omnia itaque hec et cetera quecumque de jure Bajocensis ecclesie ablata sunt precipimus ad jus ecclesie predicte et in potestate episcoporum de cetero firmiter inconcusse permanere. Testibus Ricardo cancellario, Roberto de Novo Burgo, Roberto de Curceio, comite Ebroicense, Amauricio de Maistenone, Gaufrido de Cleis, Gufero de Brueria.

No. 52.]

RETURN OF THE FOREGOING RECOGNITION.

The following is the return of Robert de Curceio (*semble*), one of the parties who took the recognition :[2]

Duci Normannorum et comiti Andegavensium karissimo domino suo Robertus de Curceio et Robertus de Novoburgo, salutem. Notum facimus vobis, quod sicut precepistis ; leugatem de Cambremerio fecimus recognosci per juramentum antiquorum et legitimorum hominum in confinio manentium, sicut melius fuerat tempore regis Willelmi prioris. Et sicut postea melius fuerat tempore regis Henrici et episcopi Baiocensis Ricardi filii Sansonis. Et ut cercius res ad notitiam veniret plures quam in ceteris rebus soleamus juratores et de terris diversorum baronum apud Falesiam in ecclesia beati Gervasii in presentia mea convenire et jurare fecimus. Juramento igitur eorum qui se hoc vidisse et audisse et novisse testabantur, quorum etiam quidam servientes ejustem leugatæ tempore regis Henrici exercuerunt ; recognitum fuit predictam leugatam subscriptis

[1] Here follow the boundaries. See pp. 397, 398.

[2] Cart. de Baieux, fol. 11, No. 43.

terminis extendi et contineri, et omnes infra terminos manentes episcopo Baiocensi tempore regis Henrici ex consuetudine reddidisse de omni emptione et venditione infra terminos facta teloneum statutum, et telonei non redditi emendam. Similiter et sanguinis ibidem facti emendam. Licebat etiam preposito episcopi per omnes terras infra terminos justitiam suam libere facere. Termini autem infra quos leuga continetur, isti sunt. Incipit enim a petra de Howemainne, et extenditur usque in Allegot fluvium, et deinde sicut Alegot descendit donec cadat in Viam fluvium. Abhinc vero sicut Via flumen discurrit; usque dum Oreta aqua[1] in eam labitur. Subinde Oreta leugatum claudit sicut descendit a vado Sancti Germani de Livet.[2] Et inde distentur[3] leuga per domum Ricardi Garet usque ad Cutam[4] de Manerba, abhinc autem per medium Grattepanche pretenditur ad petram de Howmainne unde incipit. Juratores autem isti fuerunt. De terra abbatis de Sancto Petro-supra-Divam, Ricardus filius Milonis, Rogerus filius Odonis, Hugo Taissun ——; de terra Rogeri de Gowiz, Robertus de Howmainne; de terra Roberti Marmium que est de feodo comitis de Mellent, Gocelinus Warin; de terra Roberti de Monteforti, Ricardus de Warlaimont, et Ricardus de Altaribus;[5] de terra Simonis de Bosvilla,[6] Gauterus Britto, Robertus filius Milonis, Willelmus de Brueria, Radulfus de Luto, Ricardus Parvus; de terra Rogeri de Grattepanche, Ricardus Durum Scutum[7] cognomento, Hugo filius Ricardi; de terra Gauteri de Pinu, Ricardus Verroil; de terra Hugonis de Crevecor, Ricardus de Fraisneto.[8] Retulerunt etiam isti coram nobis nominatas ibidem quas viderant justitias et emendas. Testibus Willelmo de Montpichun, Radulfo de Corlibove, Aitardo Ponti, Willelmo de Olvilla, Willelmo B., Gilleberto de Bigart.

No. 53.]

SAME CONTINUED.

Return (*semble*) of Robert of Newburg.[9]

Duci Normannorum et comiti Andegavensium Robertus de Novoburgo et Robertus de Curceio, salutem. Nos fecimus jurari secundum preceptum vestrum leugatam de Cambremerio apud

[1] The little river Dorette. [2] ? [3] Distenditur. [4] La Cutte.
[5] Des Authieux. [6] Benvilliers? [7] Durécu. [8] Fresne-en-auge.
[9] Cart. de Baieux, fol. 11 b, No. 44.

Falesiam quam juraverunt decem et octo homines magne etatis. Ricardus de Altaribus de feodo Manerbe, de feodo abbatis de Sancto Petro-supra-Divam —— Rogerus filius Odonis, Hugo Taissun, Ricardus filius Milonis; de terra Simonis de Bosvilla, Gauterus Brito, Radulfus de Luto, Ricardus Parvus, Robertus filius Milonis, Willelmus de Brueria; de feodo Rogeri de Grattepanche, Ricardus Durum Scutum, Hugo Planius, de feodo Rogeri de Gowiz, Robertus Howtemainne, Gosselinus Varin; de feodo Hugonis de Crevecor, Ricardus de Fraisneto; de feodo Gauteri de Pinu, Ricardus Veroil; de feodo Roberti de Monteforti, Ricardus de Warlemont; de feodo Roberti Marmium, Gosselinus Varin. Qui post juramentum suum confessi sunt quod viderunt eam habere Ricardo filio Samsonis Bajocensi episcopo in tempore Henrici regis in justitiam de teloneo et sanguine per omnes terras qui sunt infra terminos leuge. Termini autem leuge hii sunt: a lapide de Houtemainna usque ad Allegot fluvium, et inde eo usque idem fluvius cadit in Viam fluvium. Et inde usque ad pontem de Corbun, et ab hoc ponte quidquid Oreta fluvius ambit, usque ad eum locum in quo rivulus de domo Ricardi de Alneto cadit in eamdem Oretam. Inde ad domum Ricardi Garet, et inde ad Cutam Pinoldi, et inde ad petram de Howmainna, aqua incipit. Juraverunt etiam warandam infra istos terminos esse intra epi. tm.[1]

No. 54.]

RETURN OF A RECOGNITION, REPORTED TO THE DUKE OF NORMANDY.[2]

Duci Normanniæ et comiti Andegavorum G. comes Mellent uti karo domino. Sciatis quod precepto vestro fecimus recognosci per sacramentum legitimorum vicinorum quid et qualiter episcopus Lexoviensis et episcopus Bajocensis tenebant tenuras suas in Espivilla tempore regis Henrici, et recognitum esse quod unusquisque habet dimidiam villam in feodo, et ecclesia tota et atrium est in feodo episcopi Baiocensis, et ejus esse ecclesiam predictam dare et sacerdotem ponere sicut illam de qua ipse est episcopus et sacerdos, et qui de dono ejus ecclesiam habebit, plenariam decimam de utroque feodo habere debet. Et idem sacerdos nullam obedientiam episcopo

[1] Episcopatum?

[2] Cart. de Baieux, fol. 25, No. 88.

Lexoviensi facere debet. Tamen crisma de ipso accipiet sine nummorum datione, ad sinodum suam ibit precepta tantum auditurus non aliquid redditurus, vel de aliquo placito responsurus. Et in eadem villa homines Baiocensis episcopi soli Baiocensi episcopo respondebunt de placitis episcopalibus. Homines vero Lexoviæ quamvis ibi sint parochiani episcopi Baiocensis tamen de placitis episcopalibus respondebunt: soli Lexovienses denarium Pentecostes reddent homines Baiocensis episcopi apud Lexoviam. Sola prece non emenda coacta.

No. 55.] A SIMILAR RECORD.[1]

Dei gratia duci Normanniæ et comiti Andegavensi. R. de Sancto Walerico uti karo domino, salutem. Sciatis quod precepto vestro fecimus recognosci per sacramentum legitimorum vicinorum quid et quomodo et qualiter et episcopus Lexoviensis et episcopus Baiocensis tenebant tenuras suas in Esprevall. Et in episcopali et in terrena potestate tempore regis Henrici et recognitum est quod unusquisque illorum habet dimidietatem villæ illius in feodo, et quod ecclesia tota et atrium est in feodo episcopi Baiocensis, et est ejus predictam ecclesiam dare, et sacerdotem in ea ponere, sicut illam de qua ipse est et episcopus et terrenus advocatus, et sacerdos qui de dono ejus ecclesiam illam habebit, plenariam decimam de utriusque feodo habere debet. Et idem sacerdos nullam obedientiam episcopo Lexoviensi facere debet. Scilicet tamen chrisma de ipso accipiet sine datione nummorum, et ad sinodum suam ibit, precepta tamen auditurus vel[2] de aliquo placito responsurus. Sicut sacerdos Lexoviensis episcopi de Nunant accipit chrisma de episcopo Bajocensi et ad sinodum suam vadit, nichil tamen dabit vel de aliquo placito episcopo Baiocensi respondebit. Et in eadem villa homines Baiocensis episcopi soli Baiocensi episcopo respondebunt de placitis episcopalibus. Homines vero Lexoviensis episcopi quamvis sint ibi parochiani episcopi Bajocensis, tamen de placitis episcopalibus respondebunt soli episcopo Lexoviensi. Denarium Penticostes reddent homines Baiocensis episcopi apud Lexoviam. Sola prece non emenda coacta.

[1] Cart. de Baieux, fol. 25, No. 89.

[2] Nec?

No. 56.]

DE TERMINO SANCTI HILLARII ANNO VII.° REGNI REGIS HENRICI PRIS. ["patris." Regularly, "domini regis" should follow].[1]

Huntingdonscira ss. Philippus monachus habeat breve ad vicecomitem quod prohibeat Reginaldo monacho ne teneat placitum de terra unde idem Philippus questus est in curia domini regis quod Reginaldus monachus non vult recipere homagium suum.

SS. Philippus monachus essoniavit se primo [die] de infirmitate veniendi versus Reginaldum monachum de placito et de homagio ejusdem terre et de quodam vidia terre de Torp per Willelmum filium Nicholai de Grafham in xv. dies post festum apostolorum Philippi et Jacobi pleg˜ essoñ fides.

[1] Coram Rege Roll, Michaelmas, 9 John, No. 33 (A1. 40), membrane 8. The record, now printed for the first time, which follows this title, is found in the Rolls of the King's Court, precisely as here given (except that it is written with contractions), without explanation. It shows that the practice of enrolment, as seen in the Rotuli Curiæ Regis and in the Placitorum Abbreviatio, or rather in the original rolls from which those books are printed, was in use long before the printed rolls began, and at least as early as 7 Hen. II. We are safe in inferring that enrolment of placita was one of the reforms instituted upon the accession of Henry the Second, in accordance with the promise of the peace of Wallingford. Nor is this all. The record itself exhibits the King's Court, as early as the year 1160, issuing an "injunction" to a suitor in a Manorial Court from proceeding with a cause begun therein; a perfect example of the equitable power of the King's Court. See *ante*, pp. 192, 196. The record affords still another suggestion. The proceeding corresponds, so far as it goes, with the process of the Magna Assisa. The demandant sues for the land in question in the local court, and the record shows the tenant, as would be done after putting himself upon the Magna Assisa, obtaining a writ to prevent further proceedings there; the case being now drawn into the King's Court. If this suggestion should prove well founded, the record would go to confirm the intimation of the text, *ante*, p. 175, n., that the Magna Assisa was also one of the reforms effected by virtue of the terms of the peace of Wallingford. The record, however, is equally capable of the explanation that the tenant had merely obtained, for a price, a change of forum of the litigation.

The roll above quoted by the scribe of 9 John is followed by others of later date; and it would not be strange if a thorough examination of the unpublished rolls should reveal still earlier transcripts than the one above given, and aid in the answer of important questions. Enrolment in the Exchequer, it may be added, was another thing; relating to fiscal matters. That was perfect as early as 31 Hen. I. *Ante*, pp. 94, 123.

INDEX.

INDEX.

THE END.

CHARLES DICKENS AND EVANS, CRYSTAL PALACE PRESS.