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DISCIPLINARY JURISDICTION

History is difficult because people never state their assumptions or describe the framework in which their lives are led. To the extent that you do not unthinkingly supply these from your own experience, you can only guess at them from what your actors said and did. There will be no more evidence for the most important lines in your picture than that they fit with the demonstrable detail. They are either obvious or wrong. Maitland's indestructible memorial is that the great outlines he drew of the history of the common law, for which so much material survives, have so long seemed obvious. New or unnoticed detail at last begins to obtrude: but you cannot usefully erase an outline, only propose what seems a better fit.

This book will be about a small part of his picture, but one in which our understanding of the law is peculiarly entwined with our understanding of contemporary life. It will try to reconstruct what may be called the feudal component in the framework of English society in the years around 1200, the earliest time at which we know enough of what people said and did to make out what did not need saying and what it was not thinkable to do.

The things said and done are nearly all taken from *Glanvill* and from the plea rolls surviving from the reigns of Richard and John; and the lawyer trespassing in historians' country knows that he compounds his offence by concentrating on the legal sources. But somebody must make a start. It is in these sources, if anywhere, that the formal structure of society at this time must be reflected; yet they have never been seriously examined with that in mind. And they are so intractable that a lifetime may be too little even for the single-minded lawyer.

Can this intractability be analysed? Why is it that we do not immediately see the daily life of a society which left such copious records of its litigation? Partly it is because we confront those records with anachronistic questions, and turn away when they do

not immediately answer. To us a law-suit should first ascertain the facts and then apply the law. Relevant facts are therefore stated; and although we cannot know whether any particular party is telling the truth, we can be fairly sure that it would be lawful to act as he did if the facts were as he says. This last of course is always so; and to the extent that facts are stated at all in the earliest records the legal and social order is faithfully reflected. But the reflections are fragmentary because early law-suits did not work by ascertaining and examining the facts. The plaintiff alleged the basic ingredients of his case in a set form of words – for example that his ancestor was seised of the land in dispute and that he was heir; the defendant normally made a general denial; and the business of the court was to decide which side should swear to the justice of his cause and how the oath should be tested – for example by battle. The only facts stated are those required of the plaintiff, and most of what actually happened is lost in that general denial.

It follows that direct and explicit answers to our questions will be rare indeed. But we may do better with our own questions if we first try to understand theirs; and their questions were mostly about proof. That this was the end to which the legal process was directed is obvious. That it was also the pivot upon which its logic turned is something that has been hidden behind a contrary assumption. The network of assumptions implicit in the phrase 'the forms of action' sees the first step in a law-suit as logically primary. Its identity lies in the writ or other mode of initiation, and proof is just one of the things that follow from that: there must be battle because it is a writ of right. The mischief is that this necessitates another assumption, that writs embody concepts: it is not the writ but 'the right' that demands the battle. In much this way mysticism eventually came into the law itself. But it was not there to begin with. Writs were practical pieces of machinery, as they are for Glanvill; and there was a direct and, in its own day, a rational relationship between the facts and the mode of proof. What a party sought to allege, sometimes even what writ he started with, were dictated by the proof he would have to offer. That was what law-suits were about.

It is naturally in the context of certain writs concerning land that this point will matter to the present inquiry. But an easier and more dramatic application in a different context illustrates a second theme: we have over-estimated the magnitude of legislative inno-

vation. Henry II and his advisers did great things; but they did not reach out from their own world. The appeal of felony and the indictment are traditionally distinguished in terms of initiation and motive: the victim's desire for vengeance proved insufficient to protect public order and royal rights, and so a new procedure of public accusation was invented. Important work has suggested that after all the Assize of Clarendon did not create the indictment process, and has pointed to what it probably did do, which was to alter the mode of proof.[1] The change was not in giving any effect to the suspicion of the countryside, but in giving it greater effect. Now it would put a man not just to compurgation but to the more drastic 'law' of the ordeal. But still we have not thought through the implications of this. Glanvill does not see two separate entities, distinguished by their mode of initiation: he sees only two modes of proof.[2] Either there is a specific accuser or not. If there is, he can swear as one who saw or otherwise knew, and can prove his oath by the test of battle. If there is no specific accuser, but only the suspicion of the countryside, there can be no affirmative oath and therefore no battle. It must be the accused who swears to his denial, who must wage and make his law. Consider Glanvill's special worry about the taking of treasure trove,[3] an offence which leaves no corpse, no wound, not even anything known to have gone. Unless it was otherwise established at least that some metal had been found, the custom was that public suspicion could not put a man to the ordeal: he thinks the assize may have altered this, and seems to disapprove. That is the kind of question with which law courts dealt, and the kind of change which legislators could make.

Changes in what we should call substantive law could equally result from changes in the proof which courts themselves required; and important developments in warranty, for example, seem to have followed from an increasing insistence upon charters. But our immediate concern is with the records as evidence; and our chance of learning the facts is another of the things governed by considerations of proof. Charters provide a good example, so long as we remember that they were only proof and not the dispositive deeds of a later time. The party who has a charter may formally rely upon the fact which the charter proves, and the law-suit may

[1] Hurnard, 'The Jury of Presentment and the Assize of Clarendon', *English Historical Review*, LVI (1941), 374.

[2] *Glanvill*, XIV, 1ff.

[3] *Glanvill*, XIV, 2.

follow a different course in consequence: if he is plaintiff it may even begin with a different writ; if he is defendant there may be a special issue instead of the general denial. And yet what we should regard as the substantive dispute may be the same: it is not that we learn more of the facts than we otherwise would have.

What does it matter if we learn them for reasons turning upon proof rather than upon substance? If we assume that facts are stated whenever they are substantively relevant, we also assume that whenever they are not stated they are either not relevant or not present. The harm is to our understanding of the ordinary, of that great majority of early cases in which the defendant formally puts forward no facts of his own and makes the customary general denial. The scale of misunderstanding that may result is most simply seen in an example again outside the scope of the present study. Throughout the middle ages defendants sued for certain kinds of harm often plead specially that indeed they did it but because of some justification, never that it happened by accident. Modern minds have drawn both the modern inferences: that the early cases all concerned deliberate wrongs, or that liability was strict so that accident was no defence;[1] and the latter implies something important and unlikely about the intellectual climate. The truth seems to be that such a defendant said, as he would in a criminal trial to this day, that he was Not guilty. The accident was not substantively irrelevant, but it did not affect the proof. The defendant had no charter or the like, and if he relied formally on the accident it would still go to the same jury as if he said Not guilty. In such a situation, the rule for centuries is that the special matter may be pleaded only if the general question might somehow mislead the jury. The justification is an example: the defendant may formally rely upon it because he admittedly did and meant to do what the plaintiff says he did.

It has been suggested elsewhere that the possibility of a jury being misled was the sole reason for allowing defendants to advance special facts instead of making the general denial, and therefore that the whole fruitful process began as juries replaced the older and supposedly infallible modes of trial.[2] This may be an over-

[1] See, e.g., Holmes, *The Common Law* (ed. 1938), pp. 4, 101; Plucknett, *Concise History of the Common Law* (5th ed., 1956), p. 465; Holdsworth, *History of English Law*, vol. III (5th ed., 1942), p. 375.

[2] Milsom, 'Law and Fact in Legal Development', *Toronto Law Journal*, XVII (1967), 1.

simplification. A defendant who had some other proof of his fact – for example, a charter or the record of a court – may always have had greater latitude. But juries generated most of the logic that kept defendants from stating and us from learning the facts. It seems, for example, that you could not make anything of the possibility that a jury might be misled if you yourself chose it instead of an alternative. The grand assize was always chosen, being in principle alternative to battle; and this may be why actions in the right so rarely disclose the facts underlying the dispute. The petty assizes, on the other hand, were imposed. The writ itself ordered the general question to be put, and the defendant had considerable freedom to advance his own facts by way of exception. But, and this is a difficulty which affects all forms of special plea at first, the question was whether he could take this course, not whether he must. If the proof involved was burdensome, for example, he might prefer to let the general question go to the jury; and a petty assize would be taken although he did not even come. If his fact was overlooked in consequence or not given proper weight, the loss was his. In any event it is also ours. Even in a case in which we might have expected to see them, the facts are hidden behind the usual general verdict.

The inscrutability of general issue and general verdict, all we know of most concluded cases on the plea rolls, is our central difficulty. Most work seems to have assumed that the dispute was just about the brute event: did it happen and is this the man? That has always been the normal question in criminal cases, but even today is not the only question raised by Not guilty. In civil cases, it was roughly the effect given to the general issue by nineteenth-century rules of court; and projected back into the early rolls it conjures up an agitated and arid world, fundamentally a criminal world. Malefactors hurry about attacking people, ejecting them from their lands, hoping to get away with obvious wrongs. It is a world we can unthinkingly assume, but cannot consciously believe in. The general issue contained all possible questions, and often hides a more or less honest dispute about the details of an event which is not itself disputed. Those details were what juries and assizes commonly discussed; but for centuries we hardly ever hear anything but their final decision, the blank verdict for the one side or the other. Occasionally on the early rolls we may learn something if the jurors disagree among themselves, or if the loser

seeks to attaint them as liars.[1] Occasionally they give a reason which evidently goes to the detail in dispute, but may still be cryptic without the context.[2] Very occasionally we find them doing what Glanvill says the grand assize can do, tell the story and leave it to the court to work out which side should win.[3] Reason suggests that this would not be infrequent, but would be treated as a request for direction. The court would declare for which side the verdict should go, and that verdict is what the clerk would enter.

The methods of the clerks form a further screen through which the facts must pass. Of course it was not their business to inform us; but frustration can almost imagine a censorship at work, so consistently do they leave out what we need just because they did not need it themselves. They did not need anything said in court which was not formally relied upon. A century after the period now under consideration, the year-books begin to show us what rich discussions might leave no trace on the rolls. A little earlier, statute had to provide for the possibility that a rejected exception might after all be needed in some review.[4] Earlier still, we forget even that such discussions may be going on; and only a rare rehearsal can show us what actually lay behind a short entry in

[1] A disagreement: *CRR*, VII, *340*; *CRR*, I, *37*; *PKJ*, II, *78*; *RCR*, I, *285*, *399*; *PKJ*, I, *2056*, *2885*; *RCR*, II, 100 (Walesham), 105–6, *148*. Revealing attaints: (*a*) *CRR*, III, 97–8; (*b*) *CRR*, III, *131*, 134–5, *138*; (*c*) *CRR*, III, *128*, 332–3; (*d*) case in n. 1, p. 15, below. But the entry of an attaint is often as blank as that of an assize: (*a*) *PKJ*, III, 909; (*b*) *Gloucs.*, 642.

[2] See, e.g., (*a*) *CRR*, IV, *33*, *73*, *165*, *199–200*, *247–8*; *CRR*, V, 4–5, where the dispute must have turned on a gift to a younger son which the reason does not even mention, and which may be compared with the case below, p. 142, n. 1; (*b*) the cases below, p. 23, n. 1. But reasons are occasionally informative: (*a*) *Lincs.*, 1419; (*b*) *PKJ*, I, *2774*; *CRR*, I, *205*, *244*, *473*; *CRR*, II, *27*, *199–200*; *PKJ*, III, *584*; *Northants.*, *532*; *CRR*, III, *13*, *67*, *179*, *229*, *254–5*, *307*, 341 (Alneto); (*c*) *CRR*, II, *260*, *296*; *Northants.*, *680*; *CRR*, III, *309–10*; *CRR*, IV, *17*, 58–9, *118*, *141*, *173*.

[3] *Glanvill*, II, 18. Grand assize declaring facts: (*a*) *CRR*, I, *16*, 75 (Nuers); *PRS*(NS), XXXI, *80*?, *102*, *107*; *RCR*, I, *288*?; *CRR*, II, *184*, *307*; cf. consequential litigation, *RCR*, I, *281*, *376–7*, *254*; *PKJ*, I, *2151*; *RCR*, II, *147*; (*b*) *Gloucs.*, 390, leading to concord; (*c*) cases below, p. 179, n. 6, arising out of gifts to younger sons before death of Henry I. For a grand assize which did not know, see *CRR*, III, 313–14; *CRR*, IV, *86*. Assizes of novel disseisin declaring facts: (*a*) *PKJ*, III, 1002; (*b*) *CRR*, VI, 81–2; (*c*) *CRR*, VII, 81–2. A story might lead up to a general verdict, *CRR*, VI, 333–4; and it might or might not be included by the clerk, as twin enrolments show, *CRR*, II, 146, 149 (Ditton). On judicial direction in the thirteenth century see Sutherland, *The Assize of Novel Disseisin*, p. 73. Recognitors were eventually allowed to insist on returning a special verdict, Stat. Westminster II, c. 30.

[4] Stat. Westminster II, c. 31.

common form.[1] But other chances can show us the kind of thing we may be missing. Once it is a work of fiction. A writer describing how various lawcourts work chooses as an illustration something that may be happening out of our sight in countless real cases.[2] Once it is a clerk who has not mastered the drill. Some mishap must have brought him into service when king John was in the west country in 1204. He is less precise than usual, and feels obliged to note more of what was actually said; and his entries seem to show us a more vivid world.[3]

It is also a world in three dimensions; and one of the important things about which these various distortions have deceived us, or helped us to deceive ourselves, is the seignorial dimension. The adjective is here used, for want of a better, to mean the qualities flowing from the relationship of lord and tenant at every level of lordship. Consider actions in the right. We have been content to see disputes between equals about something like ownership, with the lord playing at most a jurisdictional part. But in a substantial proportion of early cases the question is itself seignorial: is one of the parties entitled to hold the land of the other? This is something we have simply failed to take into account: the rolls do nothing to disguise it.[4] In any particular case, however, they do not tell us until near the end, if at all. Of the claim itself, the clerk often gives us nothing beyond a bare recital: the demandant *petit* the land against the tenant *ut jus suum*. Even if he enrols the count, we shall learn only about the ancestor's seisin and the hereditary descent: the logic of the law-suit required no more. Hardly ever will there be any hint that the demandant's claim is to hold of the tenant, if that is the case; and yet, in a sense that we shall see, that was the normal case.[5] If the claim is the converse, that the tenant is not entitled to hold of the demandant, the logic of proof may

[1] *CRR*, VII, 190, *288*, *321*, 322–5 (n.b., prior of Rochester's exception as recited in last entry).

[2] *Consuetudines Diuersarum Curiarum*; below, p. 56.

[3] *CRR*, III, 121 ff., esp. 131–8.

[4] Instead of being asked which party has the greater right, a grand assize may be asked (*a*) whether the tenant has greater right to hold of the demandant or the demandant to hold in demesne, or conversely (*b*) whether the tenant has greater right to hold in demesne or the demandant to hold of him. This book refers to the two latter as 'special mises', as opposed to 'general mises'; and in the early rolls they are about as frequent. Claims in the vertical dimension are discussed below, pp. 80–102.

[5] See generally below, chapters 2 and 3, and especially pp. 41–2, 71–4.

give us early warning in some phrase about the tenant's *ingressum*. But, almost as though regretting this, the clerk refuses to tell us whether the phrase was part of the writ or only said in court.[1] It is indeed over writs that his needs differ most disastrously from ours. He hardly ever tells us even whether a case was begun by *precipe* in the king's court or by writ patent in the lord's, let alone who the lord was. Could it have been the tenant to the action himself? Often, as we shall see, it probably was: but only once does the clerk tell us so, and then by mistake. Absent-mindedly he copied the writ (though turning it into indirect speech) on his roll.[2] Perhaps he was in trouble for wasting parchment.

The writ patent to the lord introduces the last and largest difficulty in interpreting our evidence, the easiest to overlook and the hardest to reckon with when seen. We have no records from lords' courts at this time. Something of their life a little earlier has been reconstructed by Sir Frank Stenton.[3] Substantially later a good deal can be seen in records. To the extent that we have consciously attended to the matter at all, we have read back the later picture, so supposing that Stenton's vigorous world disappeared without trace in decades or even years. We have assumed that at the time of Glanvill and the earliest rolls lords' courts were doing the same kind of thing as the king's court but less important, and doing it less effectively. Inferior jurisdictions administering the same law are in decay, their work just being taken over by national courts. The innumerable petty assizes, for example, reflect mere disorder: the thief of land and the prospector for tenements vacant by death are working in a society in which lords and their order might as well not exist. This book will suggest that the law was not like that: nor was the world.

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Thomas is one of Ralph's tenants, and he fails to do the services due from his tenement. What happens? This was an everyday question, and its answer must have been familiar to every man alive. As a matter of words, the answer is familiar to us: Ralph

[1] Below, pp. 96–102.

[2] *PRS*(NS), XXXI, 105, 100–1; *CRR*, I, *41*; *CRR*, VII, *346*. Entries apparently concerning the warranty are: *PRS*(NS), XXXI, *105*; *RCR*, I, *342*, *348*; *PKJ*, I, *2147*, *2579*, *2816*; *CRR*, I, *364*.

[3] *The First Century of English Feudalism* (2nd ed.), esp. lecture II.

distrains. But that may not mean in the twelfth century what it had come to mean by the fourteenth. A number of accounts survive from the years around 1200, surprisingly similar in different parts of England; and since they are given in law-suits by persons concerned to show that they have acted rightly, they tell us at least what ought to happen when Thomas fails to do his services.[1] He is summoned to Ralph's court: summoned by equal tenants, once, again, and a third time. If by the fourth court day he has not come, the court orders that he be distrained by chattels taken on the land; and this also is ordered three times. If that fails, the tenement itself is taken into Ralph's hand, and held if necessary until a third set of three court days has passed. After that, the theory seems to be that the court can order the forfeiture of all Thomas's rights in the tenement to Ralph, who can allocate it to another; but in practice Ralph probably continues to hold it only as a means of coercing Thomas.[2]

This looks like the common source of two things which became distinct. The first is mesne process, the steps by which courts in general compel persons to come and answer. Ralph's court would proceed similarly upon a claim by Ralph other than for services, or upon a claim by somebody other than Ralph.[3] If a third party claimed the tenement, for example, there would be the same three summonses, the same three orders for distress by chattels, and the same taking of the tenement into Ralph's hand; but if Thomas still

[1] Below, pp. 13–14, and references there given.

[2] *Glanvill*, IX, 1: *de iure de toto feodo quod de illo domino suo tenet exheredabitur* (below, p. 11, n. 1). But the power seems to have fallen into disuse by the time of even the earliest plea rolls. The only clear reference to a loss of all right *per judicium pro defectu servicii* is in an urban context, *CRR*, VI, 290–2. Cf. *Borough Customs*, I, Selden Society, vol. 18, pp. 297 ff. In *CRR*, V, 266–7 one who claims to have taken in hand for failure of service and held for eight years relies upon an eventual waiver by the tenant in his court. Cf. *Gloucs.*, 249. But as late as 1221 loss by judgment is referred to as alternative to waiver in such a case for the purpose of barring a mort d'ancestor by the defaulting tenant's heir, *Lincs.-Worcs.*, 981. Cf. *BNB*, 370; Bracton, f. 262.

[3] Instead of claiming services, the lord may be questioning the tenant's right to the tenement in the manner considered in chapter 2, below. Examples reciting the process are: (*a*) *Northants.*, 782 (below, pp. 53–4); (*b*) *CRR*, III, 161–2 (arrears and *quo waranto*, below, p. 53); (*c*) *RCR*, I, 62–3, *134–5* (guardian of newly succeeded lord taking homage of tenants); (*d*) *Gloucs.*, 406 (similar). Examples of claims to the tenement by a third party in which the process of the lord's court is recited are: (*a*) *Northants.*, 809; (*b*) *Lincs.*, 1384; *CRR*, IV, *233?*; (*c*) *PRS*(NS), XXXI, 87–8; cf. *PKJ*, II, *79*; *CRR*, I, *72*, *93*; *RCR*, I, *240*, *269*, *451*; (*d*) *CRR*, I, 59 (court of Arnold de Bosco), *61?*.

did not come to answer the claim and replevy the tenement, it would be adjudged to the claimant.[1] Nor is the routine fundamentally different in the king's court; and when first it ordered a tenant's lands to be taken into the king's hand, perhaps it was not the court or the hand of an abstract ruler, but specifically of a lord king.

But that threefold process in Ralph's court looks like the starting-point of something more central to our present study, namely distress. Later developments have led us to see distress as a distinct entity, an extra-judicial remedy which happened to be used in judicial process. With unwitting prodigality, we have even argued whether in the earliest days some judgment was necessary to make a distress lawful.[2] But there is little trace of this separate entity in the earliest rolls, and no apparent place for it in the scheme of coercion we are now considering.[3] We have been led to antedate it, perhaps seriously, by an ellipsis of language. Glanvill may speak of distraining for rightful aids;[4] but in connection with the failure to do services, as with other feudal wrongs, he inserts the understood words: the lord distrains his man *ueniendi in curiam suam ad respondendum de seruicio*.[5] So completely have we been taken in, that the insertion in a statute eighty years later of similar words about coming to court has caused us to understand a general prohibition of distraint out of fee as being limited to the obligation of suit of court.[6] When Ralph speaks of distraining for services,

[1] e.g., (*a*) *RCR*, I, 174–5; (*b*) *CRR*, I, 58–9; (*c*) cases at the end of last note.

[2] *Select Cases of Procedure without Writ under Henry III*, ed. Richardson and Sayles, Selden Society, vol. 60, p. xciii, n. 1.

[3] The only early case noted in which it may be suggested that a taking into hand for failure of service might be proper without as well as with judgment is *RCR*, II, *58–9*, 117 (Tichesie). A defendant seems to plead first that he took by judgment, then that he took without judgment. But it is possible that the judgment is assumed in his second statement, and that he is really modifying a plea of disseisin by judgment to one of taking in *namium* (also by judgment). Cf. below, p. 11, n. 1.

[4] *Glanvill*, IX, 8: *ad huiusmodi auxilia reddenda possit aliquis dominus tenentes suos ita distringere*. But this summarises the preceding sentence: *Possunt autem domini tenentes suos ad huiusmodi rationabilia auxilia reddenda eciam suo iure sine precepto domini regis uel capitalis iusticie per iudicium curie sue distringere, per catalla que in ipsis feodis suis inuenerint uel per ipsa feoda si opus fuerit; ita tamen quod ipsi tenentes inde iuste deducantur iuxta consideracionem curie sue et consuetudinem rationabilem.*

[5] *Glanvill*, IX, 1.

[6] Stat. Marlborough, c. 2. Cf. the justification offered in Stat. Westminster II, c. 2, for the provision that lord as well as tenant can procure the removal of a replevin action to justices: though nominally defendant, the lord *distringit & sequitur* for his customs and services.