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English courts from the Conqueror to Glanvill

'Ne inde clamorem audiam pro penuria recti'

It was with considerable trepidation that I undertook, as a continental scholar, to lecture on English legal history in an English university, and particularly in Cambridge, where Maitland once used to teach. Fortunately, I can plead extenuating circumstances for this temerity, to which the Faculty in inviting me agreed, showing a commendable lack of prejudice. I have had the good fortune to study in this country for a considerable time and to become familiar with its history, notably by working on unpublished material in depositories large and small, up and down the country; above all I have had the rare privilege of working on the early history of the Common Law under the supervision of the late Professor T. F. T. Plucknett, a very learned and patient master, who felt that a continental approach to English history might throw some new light on such questions as the possible Roman origin of certain Common Law notions and procedures. Also, England is near to my own country and their historical ties very close: the Flemish knights and their retainers who joined William of Normandy (married to the daughter of their own count) in the conquest of England were numerous. Though this sort of military adventure is now out of fashion, the intellectual adventure of conquering some difficult problem of another country's history is equally thrilling.

One reason why my subject may be considered difficult, is the state of the evidence, The contrast between the period from the Conquest to Glanvill, with which I shall deal here, and the following centuries is striking. Until Glanvill there were no comprehensive law-books but only rather helpless attempts to state some rules of law by authors who were clearly baffled by the diversity of English customs and did not hesitate to incorporate rather indiscriminately material from the Theodosian Code or the Salic and Ribuarian Law.[1] There are no plea rolls, either central or local, none of those *curia regis*, and assize rolls that begin to flow around 1200, so many of which are now available in admirable editions; nor do we

dispose of the feet of fines before the reign of Richard I.[2] One also looks in vain for a stately series of legislative texts like the 'statutes of the realm' of a later age. The historian has to work with the miscellaneous mass of charters, conserved in original or in cartularies, which Henry VIII's policy scattered all over the country and where documents of judicial importance are *rari nantes* in the vast sea of humdrum donations and agreements. There are chronicles and letters which occasionally touch on law and law courts and scattered texts of final concords, in common use from the 1170s onwards and liable to contain data on procedure and court personnel.[3] A few royal enactments, such as Henry II's assizes, very informal texts (conserved because a chronicler has taken the trouble to include them) of an era when English kings were just beginning to relearn their rôle as legislators, have come down to us. The admirably edited pipe rolls, a solitary one for 1130 and a continuous series from 1156 onwards, are full of information for our subject (since royal justice had to be paid for) and unique in twelfth-century Europe. Not as explicit as we would wish, they leave a good deal in the dark that was not less important because it did not happen to pass through the administrative channels of the Exchequer. Above all, we have large numbers of royal writs, easy to trace for the period from William I to Stephen thanks to the three volumes of the *Regesta Regum Anglo-Normannorum*, but still unedited and even uncalendared as far as the English administration of Henry II is concerned.

When Glanvill wrote – for the sake of facility we shall thus call the author of the 'Treatise on the laws and customs of the realm of England commonly called Glanvill' – people were getting uneasy about unwritten laws. Customs might go unrecorded, but ought not royal legislation to be embedded in formal written texts, like the *leges* of the Roman emperors, which Europe was studying with great zeal and fascination in the *Codex* of Justinian? The texts of the assizes of Henry II tucked away in some monastic chronicle were very pale reflections of those imperial *constitutiones*. Glanvill mentions the problem and takes up a definite position. 'Although the laws of England are not written,' he says, 'it does not seem absurd to call them laws – those, that is, which are known to have been promulgated about problems settled in council on the advice of the magnates and with the supporting authority of the prince.' And he proceeds cleverly to turn the tables on possible Roman-

inspired detractors of English laws by quoting from Roman Law to support his thesis: 'For,' he writes, 'this also is a law that "what pleases the prince has the force of law" and if merely for lack of writing, those unwritten laws were not deemed to be laws, then surely writing would seem to supply to written laws a force of greater authority than either the justice of him who decrees them or the reason of him who establishes them.' Glanvill, who must have been aware of the canonists' distrust of unwritten custom, then proceeds to prove *per absurdum* that it really is law, for, he writes: 'It is utterly impossible for the laws and legal rules of the realm to be wholly reduced to writing in our time, both because of the ignorance of the scribes and because of the confused multiplicity of those same laws and rules.'[a] He ends his Prologue by announcing his intention wisely to limit himself to expounding 'general rules frequently observed in the king's court'; thus he came to write the first, masterly exposition of the nascent Common Law of England – an enterprise that he rightly calls 'not presumptuous, but rather very useful for most people and highly necessary to aid the memory'.[b]

The subject of this study will be the formative years of the Common Law under the Anglo-Norman kings and the great Henry II, who added England to a long series of Angevin family acquisitions. By Glanvill's time, in A.D. 1187–9, the outline of this common law of England, administered by a cohesive body of justices and

[a] Ever since Gregory VII had sharply remarked 'Christ has not said "I am Custom", but he has said "I am Truth" ', custom had been under a cloud of suspicion in leading ecclesiastical circles; thus Stephen of Tournai and Sicard of Cremona underlined Gratian's opinion that concessions to 'various customary laws, introduced because of the differences in time, temperament and place', should be restricted; they found local customs dangerous and preferred that the Church should be governed by laws, see G. Le Bras, Ch. Lefebvre and J. Rambaud, *L'âge classique, 1140–1378. Sources et théorie du droit*, Histoire du Droit et des Institutions de l'Eglise en Occident, vol. 7 (Paris, 1965), p. 215.

[b] G. D. G. Hall, *The treatise on the laws and customs of the realm of England commonly called Glanvill* (London, 1965), pp. 2–3. Glanvill's quotation of the maxim 'quod principi placuit, legis habet vigorem' (Inst. 1, 2, 6) is a whiff of romanism that has amazed F. Schulz, 'Bracton on Kingship', *English Historical Review*, 60 (1945), 171, to the extent that he declared it an interpolation – a most convenient way of dealing with texts that happen to stand in the way of one's particular vision of history – unfortunately, as Hall, p. 2, n. 1 remarks, 'the words are in all the manuscripts and Schulz's argument could be used to dispose of substantial parts of the treatise'.

following a distinct procedure, was clear and the basic elements established for many centuries. How the system described in the *Tractatus* originated, is what we have to examine. The importance of our subject needs little comment: the Common Law is one of the major legal systems of the world, and was also of great political importance. In the decisive seventeenth century the Common Law, that 'bulwark of individual liberties against what might well be called the irrepressible monarchic aspirations of kings',[4] was a potent weapon in the hands of Parliament, where the common lawyers were a formidable phalanx. But it is to the twelfth century that we must now turn our attention. In the first chapter I shall try to set the scene: we shall take a critical look at the state of the law and the courts and, above all, at the position of the monarchy. The second and third chapters will be devoted to writs as instruments for initiating procedure in the royal courts and to the jury, which became their ordinary mode of proof. Having seen how England acquired a comparatively modern common law, based on writs and recognitions, we shall ask in the fourth chapter why this modernization did not, as on the Continent, take the form of the 'infiltration' or the 'reception' of Roman law. In other words, having seen what did happen, we shall try to guess what might have occurred, and why it did not – a more profitable exercise than one might at first glance be inclined to believe.

The events of 1066 were a cataclysm of the first magnitude. They were much more than the mere accession of a new dynasty (not something new to the English) or even the massive dispossession and elimination of a native aristocracy: they created a split society, a country inhabited by two nations, the *Franci* and the *Anglici*, where a dominant minority introduced values, rules and a language different from those of the native masses. Led by the duke of Normandy, a band of knights accustomed to live in a feudal society, followed by clerics familiar with the latest papal ideas, came over from the Continent with a retinue of servants and traders and took over the kingdom of England, its churches and its landed wealth. They installed a military and quasi-colonial regime and covered the country with their proud, mighty castles and cathedrals. Eventually the country returned to a more normal state of affairs and the two nations and the two traditions amalgamated into one English country that was neither Anglo-Saxon nor Norman (nor Danish, nor

Flemish, to name two minority groups that left their marks in certain regions). It was ruled by an English king, lived under a common law, and spoke one language. The history of England between 1066 and Magna Carta can be written in terms of this conflict and the ensuing synthesis, of which the kings were the architects.

The amalgamation took place at the biological level, notably through intermarriage between Norman and English families. It was reflected in the disappearance at the end of the twelfth century of the traditional greeting 'to all lieges French and English' from the address of royal charters. In his treatise on the Exchequer (A.D. 1179) Richard fitz Neal, who was no dreamer, remarked expressly on this development. Talking of the murder-fine, he wrote: 'Nowadays, when English and Normans live close together and marry and give in marriage to each other, the nations are so mixed that it can scarcely be decided who is of English birth and who of Norman.'[5] He added, however, three little words of great weight: 'de liberis loquor' (I speak of free people). The qualification is important: the treasurer of England, who was also bishop of London, was only speaking, as he casually reminds his readers, of the people who count, and naturally left out the large anonymous majority of unfree villeins, who were born into their status and, as he remarks in the same breath, 'cannot alter their condition without the leave of their masters!' The qualification was superfluous for his contemporaries, but the official mind expressed it in so many words.

The amalgamation of the two nations can also, of course, be observed in the development of the English language, which after a massive absorption of French words emerged from the crucible of the Norman occupation as a very different tongue from that of Alfred the Great and Edward the Confessor. The same is true, and we shall dwell on this a little longer, in the field of military organization. In two solid books Professor Hollister has shown that Anglo-Saxon military institutions did not disappear because of the Norman introduction of a feudal defence system. Eventually a new army of mercenaries paid by the royal treasury, in which feudal became fiscal relations, was established; it was neither the *fyrd* of the Anglo-Saxons nor the feudal knight service of the Normans.[6] I have just used the word 'feudal' – quite naturally, as I was discussing military organization, because that is what feudalism was about. In so doing

I have unavoidably stepped into a hornets' nest. At least, though we must look at the issue and though much turns on a question of definition, I shall not offer 'my definition of feudalism'. I shall, instead, quote the biblical word 'by their fruits ye shall know them' and say this: when I see knights doing military service for the king, on expeditions or castle guard, because of the fiefs they hold – and there is little doubt that the *servitia debita* were introduced by the Conqueror – when I see barons, bishops and abbots do feudal homage for their lands and positions; when I see scutage paid on the knight's fee and statistics compiled of subinfeudation by royal vassals; when I see people holding their land 'in fee', and heirs paying reliefs for entering into their inheritances; when I see numerous quarrels and stipulations about reliefs and other 'feudal incidents', not least in the Great Charter itself; when I find the feudal rule of primogeniture and the equally feudal right of the wronged vassal to renounce his bond, the well known *diffidatio*; when I find the very feudal notion of 'felony' dominating the criminal law – when I see all those fruits of feudalism, then, I conclude that I am indeed faced with feudalism and the feudal state.

To deny English feudalism because it does not fit some pre-established restrictive definition will not help us. It is clear that 'English feudalism was a creation of the Norman Conquest'[7] and that Anglo-Norman England was a feudal state – 'the most perfectly feudal kingdom in the West'[8] – even if it does not pass the test of Mr Richardson and Professor Sayles. Those authors hold that 'for half a century or so from 1066 the English way of life was not sensibly altered' and that 'the structure of the state remained essentially as it was, modified perhaps, but not changed in any fundamental element, to accommodate any new ideas of the relationship between lord and vassal which the Normans brought with them'. After showing that English feudalism lost its original importance from the later twelfth century onwards, they conclude – not having forgotten to praise Freeman and to condemn Round, who 'had been a pupil of Stubbs' – as follows: 'The administration of medieval France can be termed feudal because sovereignty was divided between the king and his feudatories. If in this sense France was "feudal", England was not. If we call England "feudal", then we should find some other adjective to apply to France.'[9]

Two remarks are called for. First, it is true that from the later twelfth century onwards England quickly became a semi-bureau-

cratic state where feudalism lost its political, judicial and military significance and became restricted to the rules of land-holding and fiscal arrangements.[10] In this sense the very real 'first century of English feudalism' was also the last. Secondly, nothing justifies the equation of feudalism with 'divided sovereignty' within the state, i.e. political dismemberment. It was originally developed on the Continent by the Carolingians in order to secure cohesion and unity, through personal bonds of vassalage, coupled with the holding of land and offices of the king. The system played this rôle for some time in the realm of the Franks, in Anglo-Norman England and in the Norman kingdom of Sicily. The trouble with feudalism was that it depended entirely on the personal relation of the vassals with the king–feudal suzerain. If he weakened and failed to hold his vassals together, and they seceded followed by their own vassals, whole regions became independent and the kingdom disintegrated. This other face of feudalism was shown in France after the breakdown of Carolingian rule and in Germany after the collapse of the Staufen. Both situations, the centripetal and the centrifugal, are rooted in feudalism and nothing warrants our restricting feudalism to one of its faces only.

The disaster of Hastings and the introduction of continental feudalism caused a great and, it would seem, lasting trauma. The law introduced by the Normans was greatly abused in the seventeenth century, when the 'theory of the Norman yoke' was powerfully launched: the English had 'been in part disinherited of their free customs and laws by the Conqueror and his successors by violence and perjury'.[11] It led in the nineteenth century to controversy between Round and Freeman which still resounds in history books today. Perhaps the best therapy for a trauma is to explain it away. One has indeed the impression that some historians have indulged in this sort of exorcism. They argue on the one hand that nothing really changed after 1066 and on the other that everything was already present *in nuce* in the Anglo-Saxon kingdom; in other words they feel that the feudalism which the Normans brought with them was not real feudalism and that they did not really bring it, since the Anglo-Saxons already had something very similar anyway. The basis for this feeling may ultimately be a deep belief in continuity, such as led High Anglicans to believe that there was no breach of continuity between the medieval and the modern Church of England and that there had been no revolution in the

sixteenth century – a belief that led them, as Maitland put it, to hold that the Church of England 'had been protestant before the Reformation and Catholic afterwards'.[12]

Asking herself what was the peculiar characteristic of English feudalism, Miss Cam found the answer in its 'ultimate association with royal government', fruit of 'the marriage of feudalism with the non-feudal monarchic system that William the Conqueror inherited from Edward the Confessor'.[13] The marriage of Norman feudal leadership with Anglo-Saxon kingship is indeed the most striking example of the amalgamation of Anglo-Saxon and Norman strands: it made English kingship a very distinct phenomenon on the European scene. When William the Bastard was preparing his campaign, there were in Europe two kinds of rulers. On the one hand were the anointed monarchs, national kings, revered and distant figures like King Edgar, 'father of the monks', and the saintly King Edward the Confessor in England or Saint Henry II in Germany, quasi-episcopal 'rois thaumaturges', surrounded by a religious halo, who tended to be venerated rather than obeyed, respected rather than feared, distant father-figures closer to God than to the people, guarantors of justice and keepers of the immutable good old laws, secure in their hereditary dignity and the knowledge that royal blood flowed in their veins. On the other hand, particularly in anarchic France, were the territorial princes whose power was ultimately based on usurpation, violence and success in war and who ruled over small countries. They were tyrannical upstarts who made up through incessant and brutal personal intervention for their weak legitimacy and dealt in a high-handed way with people and situations which the law courts could not, or were not supposed, to face. They were feudal gang-leaders, not crowned heads, and such order as there was in their duchies and counties depended on their personal and iron-fisted intervention.

William of Normandy belonged very much to the latter type, which made the traditional ruler look very old-fashioned. He clearly was a son of the Norman race, who had, in the words of Professor Knowles, 'a drastic, hard directness, a metallic lustre of mind, highly coloured and without delicacy of shading, together with a fiery efficiency that easily became brutality'.[14] Having worked his way up from infancy through incessant battle, he established his rule and some form of feudal order upon the turbulence of Nor-

mandy, not least through his merciless cruelty. If he was respected, it was not because he was God's anointed, but because people who laughed at him were quickly taught a cruel lesson, like the unfortunate defenders of Alençon who waved hides and skins from their walls to taunt the duke with the fact that his mother's relatives were tanners – and suffered dreadful horrors after the capture of their town.[15] This man, who felt that the death penalty was too lenient and ordered blinding and emasculation instead,[16] conquered England through victory on the battlefield, as was his habit, and was crowned king, the ultimate achievement of a man of his rank. This violent ruler of a turbulent minor principality became the anointed of the Lord, the wealthy ruler of the best organized monarchy in all Europe. What he and his sons made of this unique chance shows the mettle of the dynasty. They rose to the occasion, realizing that the preservation of the old English tradition of kingship was all-important, as was the preservation of numerous other Anglo-Saxon institutions, not least the fiscal ones. The Conqueror did not, however, throw away the advantages of his position of feudal warlord in the Norman tradition: he stuck to what he knew, and continued to rule with an iron hand. What he looked like we do not know, for the famous description by the 'Anonymous of Caen' is largely a verbatim copy of Einhard's description of Charlemagne,[17] but that he was a master of statecraft we should not doubt: the exceptional strength of the English monarchy in his time stems largely from the combination, unique in Europe, of the immense prestige of Alfred the Great's and Edward the Confessor's sacred kingship with the iron strength and ruthless command of the Norman dukes.

No European country had a political organization comparable with England, least of all the illiterate duchy of Normandy. That region had undergone the disintegration of Frankish rule, and its Viking dukes laboriously built some order – using the feudalism that was then dominant in France – and restored some measure of monastic life by importing foreigners. There was no ducal chancery and no law books. The political form was personal rule and feudal allegiance – with all its consequent instability and arbitrariness. Fiscal organization was very primitive. Nor was Normandy a real fatherland for its knightly firebrands, but rather a stepping stone for further vast conquests. In England things were different. The country could be proud of a rich and ancient national culture, in which the vernacular – West Saxon having achieved a substantial

degree of uniformity – occupied a unique place. The royal chancery was, if modest in our eyes, a reality and was soon to become a model for the Continent.[18] The steady issue of royal writs was remarkable in quantity and for the regularity of the formulas; the use of the vernacular strengthened their national character and made for close contact with the population, their texts could be directly read out in the local courts to the assembled community – a unique feature at the time. No other monarchy disposed of the same means of direct, national taxation, nor were the interesting possibilities of frequent danegelds neglected by William and his successors. English coinage was technically superior and under complete royal control. Numerous boroughs had grown up as part of a deliberate royal policy for development and defence. Nowhere was the territorial organization so effective and the network of royal officers headed by royal sheriffs so uniformly established as in the English shires: there were no immunities or franchises after the continental fashion,[19] nor *a fortiori* any regional state-building. Nowhere was national unity so real or royal authority, that 'great tree with roots pushed into every pocket of soil that would nourish it',[20] so well established. Not in France, of course, where the Capetian king was little more than one territorial ruler among many others. He happened to hold sway over the Isle de France, the old duchy of France, as dynasties of counts held sway over Flanders, or Blois or – probably the worst brood of all – over Anjou. The old Frankish administrative divisions, the *pagi*, had disintegrated by the year 1000 and were replaced by fortuitous feudal *châtellenies*, clustered around some baronial castle. The kings of France disposed of no means of direct taxation even in their *domaine direct*, and certainly not in the whole of their kingdom. They had no chancery and, until about 1100,[21] issued no writs or *mandamenta*, as *brevia* were called on the Continent. So unusual was the request to King Philip I, on a visit to Poitiers in 1076, that he should seal a charter there, that he had to confess he had left his seal behind, not expecting to meet this sort of demand so far from home in a part of his kingdom where no king had been seen for ages.[22] Even if the German King/Roman Emperor had preserved much more from the wreckage of Frankish kingship, his fiscal position was weak and he had to put up with the large autonomy of the *Stammesherzogtümer* and the danger of divided loyalties, if the pope ever claimed his rights over the bishops and abbots of the German Imperial Church. The