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0521356822 - The Birth of the English Common Law - R. C. Van Caenegem

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The Birth of the English Common Law

This book provides a challenging interpretation of the emergence of the common law in Anglo-Norman England, against the background of the general development of legal institutions in Europe. Beginning with a detailed discussion of the emergence and development of the central courts and the common law they administered, the author then traces the rise of the writ system and the growth of the jury system in twelfth-century England. Thereafter Professor van Caenegem attempts to explain why English law is so different from that on the Continent and why this divergence began in the twelfth century, arguing that chance and chronological accident played the major part and led to the paradox of a feudal law of continental origin becoming one of the most typical manifestations of English life and thought.

First published in 1973, *The Birth of The English Common Law* has come to enjoy classic status, and in a new preface Professor van Caenegem discusses some recent developments in the study of English law under the Norman and earliest Angevin kings.

From reviews of the first edition:

‘This *tour de force* is a piece of mature scholarship based on exceptional first-hand knowledge of archives and literature dealing with early Common Law.’
Social Science Quarterly

‘The study reflects a thorough command of the primary sources and the vast secondary literature, and it is written with rare lucidity and wit.’
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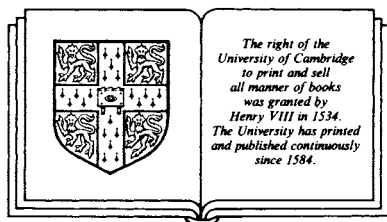
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The Birth of the English Common Law

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*Conjugi carissimae
laboris semper sociae*

Preface to the second edition

Some authors go on working on their books even after publication: they live with them, re-read, expand and improve them with a possible new edition in mind. Others leave their work completely behind them as soon as it is out; they cannot even bring themselves to re-read it because they have moved on to other concerns and are getting bored with the book they have written, re-read and proof-read up to saturation point. I belong to this latter category but I have kept in touch with publications dealing with the early history of the common law and gladly use this opportunity to draw attention to some topics that have been discussed in that connection during the past fifteen years. This preface has also given me another chance to read the correspondence to which it led, particularly the warm letters of appreciation I received from H. Coing, G. D. G. Hall and J. R. Strayer, and I have carefully re-read the reviews which the Press regularly passed on to me and to which I will occasionally refer.

Most of the topics I have in mind can be described as traditional. One such is the moot point whether in the twelfth century the exchequer and the *curia regis* were two distinct institutions. In 1973 I maintained my earlier position that they were,¹ but some scholars disagreed and either maintained that in the twelfth century the 'barons of the exchequer' and the 'king's justices' were interchangeable terms (Richardson and Sayles), or suggested that bench and exchequer were identical, but only until the justiciarship of Hubert Walter (West and Hall, supported by Harding and Kemp). The problem was thrashed out in great detail by B. Kemp in an extensive article where a comma in Glanvill's Treatise plays an important role.² This same comma turns up in a paper from 1977 by R. V. Turner, who quotes a witness list from 1182–5 which recognizes royal justices and barons at the exchequer as two distinct groups, even when they are jointly witnessing a document.³ The reader will understand that this present preface is not the place to discuss in depth this somewhat Byzantine *crux*, let alone solve it: the forthcoming publication by the Selden Society of the *English Law Cases from William I to Richard I* will hopefully contain fresh materials to clarify if not to settle the debate.

Nobody will be surprised that the old case of the Normans v. the Anglo-Saxons, comparable to the continental controversy between the Germanists and the Romanists, has also rumbled on.⁴ The central problem is, of course, the indebtedness of the Norman kings to their Anglo-Saxon predecessors. I have always felt that the Anglo-Saxon achievement was considerable and goes a long way towards explaining the remarkable and precocious realizations of the Norman and Angevin kings, and I was strengthened in my conviction, *inter alia*, by the solid and illuminating work of P. Wormald.⁵ Not everybody, however, is convinced. Thus attempts have been made to belittle the role of the royal writ, widely considered a major technical and administrative achievement of the Old English state.⁶

The 'French connection' also continues to elicit commentaries. I pointed out in 1973 that the English common law started in fact as Anglo-Norman law, which was shared by one and the same feudal society on both sides of the Channel and became 'English' only after the 'loss of Normandy' and the gradual absorption of the duchy by the French monarchy, which was veering towards Roman law (pp. 96–8). In a well-informed survey of the Anglo-Norman period, Marjorie Chibnall agrees that the 'French' and the 'English' indeed lived under a common law, and in a chapter entitled 'Normans and English'⁷ surveys various quantitative and qualitative aspects of this symbiosis. So much so was this Anglo-Norman 'common law' part of the wider French feudal world that P. Hyams, who 'has only recently come to study some French law in earnest' has been able, following J. Yver, to see Glanvill as one of several French *coutumiers*.⁸ The author regrets that this 'French connection' has been somewhat neglected by scholars, 'relatively few' of whom 'have looked across the Channel'. Indeed, not many English scholars have done so (although quite a few continentals have): whether this was, even 'in part', 'Maitland's fault' (he is said to have been 'too expert' in the writings of German historians) is another matter. Nevertheless, every continental scholar will rejoice at the fact, noted by Hyams, that English historians have now 'discovered life beyond the Channel'. The author tends, however, with the true zeal of the neophyte, to overstate his case where he maintains apodeictically that 'France was the centre of medieval culture',⁹ which gives short shrift to the immense Italian contribution. He also speaks of a 'common body of Anglo-French custom' and

insists that 'the French connection' is a better term than the 'Norman connection',¹⁰ but he has not convinced me. The osmosis between English and Norman law in the days of Henry II is patent enough, but the law applied in the exchequer at Rouen was rather different from that of the Midi, for example, which is equally French. Another aspect of the 'Norman connection', the use of the writ in Normandy, has recently been the object of a detailed analysis by D. Bates, thus restoring the balance between the much studied English writs and their somewhat neglected counterparts across the Channel.¹¹

The action of novel disseisin, the linchpin of the early common law, continues to attract attention. It was so important because it concerned seisin, i.e. possession of free land and its fruits. Its protection was an early concern of the government. People who had been disseised, which often meant bereft of their livelihood, could, of course, go to court and work their way through the cumbersome and possibly dangerous stages of a complete traditional trial on the title of land. Alternatively, they could try the short cut of a royal order of reseiin, which would promptly restore the land to victims of unjust disseisins. Examples of such quick and imperious royal interventions are not difficult to find.¹² The trouble with this rough and ready justice was that not all disseisins were necessarily unjust. Somebody might be in possession of land without a good title: he might have obtained it by fraud or violence, or even if he had obtained it justly, he might have forfeited it for some good reason. The action of novel disseisin solved this problem by combining the advantage of an imperious royal intervention with that of a judicial safeguard: a man who had been deprived of his free land in the recent past could obtain quick redress through the sheriff and royal justices, if a local jury found that he had indeed been disseised 'unjustly and without judgment'. Two questions concerning this development have recently received particular attention: against whom was the assize directed and at what particular juncture was it devised? It used to be assumed that novel disseisin was created to protect any victim of a recent unlawful disseisin against any wrongdoer. Then S. F. C. Milsom expressed the opinion that the action was initially intended for specific use by tenants disseised by their own lords: in other words, it was designed to operate against lords as disseisers.¹³ One of Milsom's arguments was linguistic, i.e. that 'to disseise' was specifically used for lords who put their tenants

out of possession, since 'to seize' was employed originally to describe what a lord did when he put them in possession. This interesting thesis, coming from an eminent specialist, deserves a much fuller discussion than can be offered here.¹⁴ It is sufficient to say at this moment that I do not have the impression that the numerous writs of disseisin brought – and bought – in the day of Henry II (and known through charters and entries in the Pipe Rolls) were predominantly used by tenants against their own lords (here again the forthcoming *English Law Cases* may shed new light on the problem), nor am I convinced that 'to disseise' refers particularly to disseisin by a lord.¹⁵

It is nevertheless true that lords could and did disseise tenants who had failed in their duties: nobody would expect a lord to sit idly by while his tenants held his land without keeping their side of the bargain. The question was, however, whether a lord could withhold the land or take it back into his demesne without any trial or judgment. This might have been acceptable in the past, but there are indications that here too Henry II took measures to extend judicial protection to seisin. Mary Cheney has recently drawn attention to the case of John the Marshal who, in 1164, went to court because his lord, Archbishop Thomas Becket, had taken back certain lands from him without litigation. This happened just before the winter of 1165–6, in which the action of novel disseisin was probably devised (witness the Pipe Roll entries of 1166), and since the chronicles say that 'as the law then stood', i.e. in 1164, the Marshal had no redress,¹⁶ the change in the law, after the Marshal's case, may well have coincided with the introduction of the assize of novel disseisin. Without suggesting that the case of John the Marshal was 'in any simple sense the cause of the appearance' of novel disseisin, Mary Cheney makes it plausible that it may have spurred on the king's lawyers 'to devise a standard, regular and impersonal procedure to replace the earlier unstandardized, occasional and arbitrary royal interventions to protect seisin'¹⁷ and thus adequately to protect free tenants from dispossession without judgment.

Another question that has occupied scholars is why the English common law has resisted the universal impact of Roman law. In 1973 I drew attention to the chronological factor and explained that the Roman model had no chance in England because that country started the modernization of its legal system before the learned law in general and the Roman–canonical procedure in particular were

available and ready to be introduced by the kingdoms and their courts. This interpretation has met with some approval,¹⁸ although other factors have quite rightly also been given prominence.¹⁹ Thus, in a stimulating paper, A. Watson has recently drawn attention, in a European context, to the powerful resistance that feudalism put up to 'the common written laws': the less feudalized a country – Friesland for example – the more open it was to the Roman and canonical impact and conversely, the more feudal, the more imperious it was to the 'reception'. The fact that England was the most thoroughly feudal of all European countries must therefore have been an important factor in her stubborn resistance to the appeal of the *leges* and the *canones*.²⁰

So far I have mentioned only technical questions inside the common law and its courts. That is, however, not the whole story of dispute settlement, as M. Clanchy rightly pointed out in a recent article on the role of arbitration and amicable composition in English medieval society.²¹ A few remarks on the relation between the adjudicative and the arbitral process at the early stages of the common law may therefore be called for. Clanchy does not share the enthusiasm of many historians for the achievement of Henry II and his justices, for he believes that the success of the royal courts and their writs and juries was won at the expense of traditional 'bonds of affection existing in feudal lordship and kindred loyalties', which were weakened and strained without anything 'as adequate' being put in their place. To historians such as myself who drew attention to the statistical proof of the success of the English royal courts, the author replies that 'a sufficient explanation for this growth is that plaintiffs had no choice'.²² I believe that Clanchy has opened an interesting debate that may well lead to lively discussions. Here I must, again, limit myself to a few provisional remarks about the most appropriate questions and the best possible answers. Arbitration and amicable settlement negotiated with the friendly help of neighbours and relatives are very old institutions, which have outlived the Middle Ages. 'Love' functioned alongside 'law' and the authoritative judgment-finding of the courts. As few studies exist on the relative numerical importance of both systems in European legal history, and the statistical study of litigiousness is only in its initial stages,²³ I shall limit myself to a few remarks on England in the twelfth century. The success of the royal courts is undeniable, but was it because the 'plaintiffs had no choice' or

because they preferred royal justice over village palavers? The fact that hundreds of people were prepared to pay substantial sums to have their cases heard in the royal courts points in the latter direction. Perhaps they 'had no choice', but then only in the sense that the other conceivable ways were too risky if not illusory. Nor is it difficult to see why 'ordinary freemen flocked to the royal courts'²⁴ to obtain judgments which were 'more or less commonly sought in lieu of feudal or seignorial justice'.²⁵ It was surely an advantage to appear in a court that was backed by royal authority to enforce its judgments. Public opinion understood that the king's concern with legal matters was no idle boast. Tenants who failed to obtain justice at the traditional local level complained to him, and it is known that Henry II, in the early years of his reign, did not hesitate to publish an edict making possible the transfer of cases to higher courts and finally, if need be, to his own, whenever his subjects suffered from a breakdown of the judicial machinery at the local level.²⁶ Village mediation may sound idyllic, but where was the victim of local potentates and bad will to turn? Wyclif for one took a not so rosy view of arbitration and conciliation.²⁷ People who preferred royal justice opted for professionals instead of amateurs: even though we hear of complaints about corruption, the sheer competence of the trained judges in the king's courts must have been a powerful magnet,²⁸ and 'corruption' is a notion with a variable content.²⁹ Nor was the royal justice of the early assizes completely cut off from its popular base, for the jury was the *vox populi*, and it conserved something of the spirit of village arbitration.³⁰ This jury had two powerful attractions. It pinned the verdict down to a precise and decisive issue, which certainly made for clarity, and it operated with a more rational and calculable system of proof than the archaic ordeals with their 'doubtful outcome' and the risk, in the case of battle, of 'the greatest of all punishments, unexpected and untimely death'.³¹ It is nevertheless true that 'love' has often been prized more than 'law', even after the great changes under King Henry II,³² and it is to be hoped that the exact relation between these two approaches to justice will be the object of further investigation.

NOTES

- 1 *Birth of the English Common Law*, p. 19, cf. my *Royal Writs in England*, London, 1959, p. 31.

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- 2 B. Kemp, 'Exchequer and Bench in the later twelfth century – separate or identical tribunals?' *English Historical Review*, 88, 1973, pp. 559–73 (with the references to Richardson and Sayles, West, Hall and Harding). Kemp's discussion of the relevant passage in Glanvill is an interesting example of a *petitio principii* since he argues that 'some commentators and editors' who have inserted commas after *regis* and *scaccarium* have done something unacceptable 'since it interferes with the natural sense of the statement', which happens to be the one that Kemp selected in the first place (p. 565).
- 3 R. V. Turner, 'The origins of Common Pleas and King's Bench', *American Journal of Legal History*, 21, 1977, p. 243. See also the comments offered by G. J. Hand in *The Irish Jurist*, 7, 1974, p. 388–9 (reviewing *The Birth of the English Common Law*).
- 4 See the recent survey by K. F. Drew, 'Another Look at the origins of the Middle Ages: A Reassessment of the Role of the Germanic Kingdom', *Speculum*, 62, 1987, pp. 803–812.
- 5 See, *inter alia*, 'Lex Scripta and Verbum Regis: legislation and Germanic kingship from Euric to Cnut', in P. H. Sawyer and I. N. Wood (eds.), *Early Medieval Kingship*, Leeds, 1977, p. 105–38; 'Aethelred the Lawmaker', in D. Hill (ed.), *Ethelred the Unready: Papers from the Millenary Conference*, London, 1978, pp. 47–80 (British Archaeological Reports, British Series, 59); 'Charters, law and the settlement of disputes in Anglo-Saxon England', in W. Davies and P. Fouracre (eds.), *The Settlement of Disputes in Early Medieval Europe*, Cambridge, 1986, pp. 149–68.
- 6 R. A. Brown, 'Some observations on Norman and Anglo-Norman charters', in D. Greenway, C. Holdsworth and J. Sayers (eds.), *Tradition and Change. Essays in honour of M. Chibnall*, Cambridge, 1985, pp. 145–64, particularly p. 161, where the sealed writ is called 'a very flimsy basis for the received doctrine of an Anglo-Saxon secretarial administration far in advance of the Norman'.
- 7 M. Chibnall, *Anglo-Norman England 1066–1166*, Oxford, 1986, pp. 208–18.
- 8 P. Hyams, 'The common law and the French Connection', in R. A. Brown (ed.), *Proceedings of the Battle Conference on Anglo-Norman Studies*, iv, Woodbridge, 1982, pp. 77–92.
- 9 All these quotations are taken from Hyams, *ibid.*, p. 77.
- 10 *Ibid.*, p. 81 and p. 197, n. 11.
- 11 D. Bates, 'The earliest Norman writs', *English Historical Review*, 100, 1985, pp. 266–82. The comparative neglect of the Norman writs can be partly explained by the dearth of the material: only 88 Norman writs or writ-charters have survived from Henry I's rule as duke of Normandy (1106–35), as compared to more than 1,000 for England (*ibid.*, p. 267).
- 12 To the examples given in the *Royal Writs* and the *Birth of the English Common Law*, I would like to add a very interesting executive writ of the future King Henry II, which can be dated 6 Nov. 1153 or (more probably) 8 Dec. 1154, in favour of Glastonbury Abbey. In it Earl William of Gloucester is ordered 'omni excusatione remota' and 'sine mora' to reaise Glastonbury of the manor of Siston (which clearly had been lost as a result of the civil war) as the abbot and monks held it on the day King Henry I died (R. B. Patterson, 'An un-edited charter of Henry Fitz Empress and Earl William of Gloucester's comital status', *English Historical Review*, 87, 1972, p. 755). Rulers were not the only ones to issue this sort of peremptory orders: the magnates followed their example. See a writ of 1124–36 by Richard Fitz Gilbert ordering a member of the Pecche family to reaise the monks of the priory of Stoke by Clare of the tithes of Gestingthorpe. This writ is of particular interest because it adds to the peremptory order in favour of the monks that if the addressee or anybody else 'should make

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- any claim against them, right should be done where it was just' (sint ad rectum ubi iustum fuerit) (C. Harper-Bill and R. Mortimer, *Stoke by Clare Cartulary, Part Two*, Woodbridge, 1983, no. 345, p. 236) (Suffolk Record Soc.).
- 13 S. F. C. Milsom, *Historical Foundations of the Common Law*, London, 1969, pp. 117–19; *idem*, *The Legal Framework of English Feudalism*, Cambridge, 1976, pp. 11ff.
 - 14 One of the first reactions to Milsom's suggestion was formulated in D. W. Sutherland, *The Assize of Novel Disseisin*, Oxford, 1973, pp. 30–1. While there is no doubt, Sutherland wrote, that the assize was directed against lords who disseised their tenants, and was constantly resorted to in this way, 'whether the protection of tenant against lord was the specific governing purpose is, in my judgment, more than we can know'. In 1974 M. S. Arnold found Milsom's idea 'quite appealing' and wrote that it was 'not altogether unlikely that a desire to protect tenants against lords generated the assize' (*Yale Law Journal*, 1974, p. 859). In 1981, however, R. C. Palmer found Milsom's suggestion 'not convincing' and maintained that the assize was directed against both the lord and the outside claimant (*Michigan Law Review*, 79, 1981, p. 1146).
 - 15 I would like to quote two examples of complaints of unlawful disseisin which are most unlikely to have been directed against the feudal lord. One concerns Peter de Bessacar, who said he had been disseised by the monks of Kirkstall Abbey (the question clearly being who could use which part of a common); the case ended on 4–22 July 1187 in an agreement before royal justices at York (W. Farrer, *Early Yorkshire Charters*, II, Edinburgh, 1915, no. 820, pp. 163–4). The other concerns the canons of Osney Abbey, who were disseised without judgment by the parson of the church of Ewelme; this case also ended in a final concord, on 5 October 1187 (H. E. Salter, *The Cartulary of Osney Abbey*, IV, Oxford, 1929, nos. 412b and 413, pp. 444–5) (Oxford Histor. Soc., vol. 97): it is unlikely that the parson was the canons' lord.
 - 16 M. Cheney, 'Inalienability in mid-twelfth-century England: enforcement and consequences', *Proceedings of the Sixth International Congress of Medieval Canon Law 1980*, Vatican, 1985, p. 474 (Monumenta Iuris Canonici, Series C: Subsidia, vol. 7). The author had first expressed her views at the British Legal History Conference in Bristol in 1981; see M. Cheney, 'The litigation between John Marshal and Archbishop Thomas Becket in 1164, a pointer to the origin of Novel Disseisin?' in J. A. Guy and H. G. Beale (eds.), *Law and Social Change in British History*, London, 1984, pp. 9–26 (Royal Histor. Soc. Studies, 40).
 - 17 Cheney, 'Inalienability', p. 475.
 - 18 R. V. Turner, 'Roman law in England before the time of Bracton', *Journal of British Studies*, 1975, p. 21.
 - 19 Turner, *ibid.*, pp. 22–3 lists several factors.
 - 20 A. Watson, 'The evolution of law: continued', *Law and History Review*, 5, 1987, pp. 562–5.
 - 21 M. Clanchy, 'Law and love in the Middle Ages', in J. Bossy (ed.), *Disputes and Settlements. Law and Human Relations in the West*, Cambridge, 1983, pp. 47–67.
 - 22 *Ibid.*, p. 62.
 - 23 See R. C. van Caenegem, *Judges, Legislators and Professors. Chapters in European Legal History*, Cambridge, 1987, pp. 162–3 and the literature cited there, to which can be added R. L. Kagan, 'A golden age of litigation: Castile, 1500–1700', in Bossy (ed.), *Disputes and Settlements*, pp. 145–66, a study devoted to an age 'in which the formal adjudication of disputes was sharply and dramatically on the rise'.
 - 24 R. V. Turner, 'The reputation of royal judges under the Angevin kings', *Albion*, 11, 1979, p. 316.

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- 25 M. S. Arnold, *Yale Law Journal*, 1974, p. 855 (reviewing *The Birth of the English Common Law*).
- 26 M. Cheney, 'A decree of King Henry II on defect of justice', in Greenway *et al.* (eds.) *Tradition and Change*, pp. 183–94.
- 27 J. Bossy, 'Postscript', in Bossy (ed.), *Disputes and Settlements*, p. 289: 'We can bear in mind that in a feudal regime love may be compulsory, and do justice to Wycliffe's comment that the settlement of disputes by love rather than law may favour the strong at the expense of the weak.'
- 28 See Turner, 'Reputation of royal judges', p. 316: 'Far less frequent, even among writings of their severest critics, were complaints of the judges' incompetence or ignorance of the law, even though such was sometimes the case, at least among the itinerant justices.' For a thorough survey of the royal justices as a group one can now consult R. V. Turner, *The English Judiciary in the Age of Glanvill and Bracton*, Cambridge, 1985. About the comparable rise of royal justice in Castile, Kagan, 'A golden age', p. 150, writes that although it was not perfect 'for many it was far better justice than that offered by local and seigneurial courts'.
- 29 Henry II's justices were praised as well as vituperated, as the king himself was extolled for his care for justice and chastized for his greed (see among recent studies Turner, *English Judiciary*, and Clanchy, 'Law and love', p. 63). One should never forget that the 'gifts' expected by those in authority were conditioned by specific circumstances and cannot simply be labelled corruption (see the pertinent comments in Turner, *English Judiciary*, pp. 285–7).
- 30 I refer to a remark made by J. R. Strayer in a letter to me of 26 November [1973]: 'I find it difficult to draw a sharp line between arbitrators drawn for their knowledge of the facts, and the informed neighborhood juries of early 12 c. England.'
- 31 Glanvill, *Tractatus de legibus et consuetudinibus Angliae*, II, 7 (ed. G. D. G. Hall, London, 1965, p. 28).
- 32 For a recent study of 'law' and 'love' in late medieval England, see E. Powell, 'Arbitration and the law in England in the late Middle Ages', *Transactions of the Royal Historical Society*, 5th Series, 33, 1983, pp. 49–68.

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Preface to the first edition

While I was staying in Cambridge as a Visiting Fellow of University College, whose warm hospitality I would like to acknowledge, the Faculty of History invited me to give a series of four lectures. I accepted the invitation with pleasure and the Faculty agreed that I should talk of the formative years of the Common Law of England. I felt that the students might find it useful to hear, in the succinct and – I hope – accessible form of lectures, some views I had expounded in a more elaborate and detailed way in my *Royal Writs in England from the Conquest to Glanvill* (London, 1959). I also welcomed the opportunity to air some new views which I was working on at the time in the quiet of Cambridge's fine libraries. When eventually the University Press invited me to publish the lectures, I gladly welcomed the occasion to place them at the disposal of the wider reading public.

Certain themes of my Cambridge lectures I treated subsequently in Newcastle, Oxford, Paris and Tübingen, where I profited greatly from discussions with learned historians and lawyers, as I had done in Cambridge: for this I offer them my warmest thanks. My text has been expanded, brought up to date and annotated, but follows closely the original pattern of the four lectures as they were given in the spring of 1968.

R. C. van Caenegem
Ghent, July 1972