for the last two hundred years, have puzzled the student who has grappled with the *Habeas Corpus*. As thus:

1. *Q.* Why was there any doubt whether the writ issued 'as of right'?

A. Because the *Certiorari* never issued as of right on the demand of the defendant, and the *Privilege* only issued in certain special cases (xviii. L. Q. Rev. pp. 69, 70).

2. *Q.* Why was there any doubt as to the proper tribunal?

A. Because the *Certiorari* only issued by order of the King's Bench, while the *Privilege* (writ or bill) sometimes issued out of the Chancery and sometimes out of the Common Pleas (ibid. p. 71).

3. *Q.* Why could the writ only be claimed in term time?

A. Because no one could take proceedings during vacation in a superior Court, and to take proceedings was, *ex hypothesi*, the object of the *Corpus cum causa* (ibid. p. 71).

4. *Q.* Why could the gaoler demand an *alias* and a *pluries*?

A. Because, the original *Capias* being an order to *arrest* a person, the sheriff, to whom it was addressed, might reasonably have some difficulty in catching his man (ibid. pp. 67, 68).

All of which questions were finally set at rest by the Habeas Corpus Act of 1679.[1]

[1] 31 Car. II. c. 2.

36. THE HISTORY OF THE REGISTER OF ORIGINAL WRITS[1]

By Frederic William Maitland[2]

De Natura Brevium, Of the Nature of Writs, — such is the title of more than one well-known text-book of our mediæval law. Legal Remedies, Legal Procedure, these are the all-important topics for the student. These being mastered, a knowledge of substantive law will come of itself. Not the nature of rights, but the nature of writs, must be his theme. The scheme of "original writs" is the very skeleton of the Corpus Juris. So thought our forefathers, and in the universe of our law-books, perhaps in the universe of all books, a unique place may be claimed for the *Registrum Brevium*, — the register of writs current in the English Chancery. It is a book that grew for three centuries and more. We must say that it grew; no other word will describe the process whereby the little book became a big book. In its final form, when it gets into print, it is an organic book; three centuries before, it was an organic book. During these three centuries its size increased twenty-fold, thirty-fold, perhaps fifty-fold; but the new matter has not been just mechanically added to the old, it has been assimilated by the old; old and new became one.

It was first printed in Henry VIII.'s reign by William Rastell. Rastell's volume contained both the Register of Original Writs and the Register of Judicial Writs. The former is dated in 1531; at the end of the latter we find

[1] This essay was first published in the Harvard Law Review, vol. III, pp. 97-115, 167-179, 212-225 (1889).

[2] A biographical notice of this author is prefixed to Essay No. 1, in volume I of this Collection.

accurate tidings — " Thus endyth thys booke callyd the Register of the wryttes oryggynall and judiciall, pryntyd at London by William Rastell, and finished the xxviii day of September in the yere of our lorde 1531 and in the xxiii yere of the rayne of our soverayn lord kyng Henry the eyght." Whether this book was ever issued just as Rastell printed it I do not know; what I have seen is Rastell's book published with a title-page and tables of contents by R. Tottel, in 1553. In 1595 a new edition was published by Jane Yetsweist, and in 1687 another, which calls itself the fourth, was printed by the assigns of Richard and Edward Atkins, together with an Appendix of other writs in use in the Chancery and Theloall's Digest. In 1595 the publisher made a change in the first writ, substituting " Elizabetha Regina " for " Henricus Octavus Rex; " the publisher of 1687 was not at pains to change Elizabeth into James II. In other respects, so far as I can see from a cursory examination of Rastell's book (which I am not fortunate enough to possess), no changes were made; the editions of 1595 and 1687 are reproductions of the volume printed in 1531, and the correspondence between them is almost exactly, though not quite exactly, a correspondence of page for page.

Coke speaks of the Register as " the ancientist book of the law." [1] In no sense can we make this saying true. But to ask for its date would be like asking for the date of one of our great cathedrals. In age after age, bishop after bishop has left his mark upon the church; in age after age, chancellor after chancellor has left his mark upon the register. There is work of the twelfth century in it; there is work of the fifteenth century, perhaps of the sixteenth, in it. But even this comparison fails to put before us the full ineptitude of the question, What is the date of this book? No bishop, no architect, however ambitious, could transpose the various parts of the church when once they were built; he could not make the crypt into a triforium; but there was nothing to prevent a reforming chancellor from rearranging the existing writs on a new plan; from taking " Trespass " from the end of the book and thrusting it into the middle. No; to ask

[1] Preface to 9 Rep.

for the date of the Register is like asking for the date of English law.

When we take up the book for the first time we may, indeed, be inclined to say that it has no arrangement whatever, or that the principle of arrangement is the principle of pure caprice. But a little examination will convince us that there is more to be said. Every now and again we shall come across clear traces of methodic order, and probably in the end we shall be brought to some classification of the forces which have played upon the book. The following classification may be suggested: (1) Juristic logic; (2) practical convenience; (3) chronology; (4) mechanical chance. Let me explain what I mean. We might expect that the arrangement of such a work would be dictated by formal jurisprudence; we might expect that the main outlines would be those elementary contrasts of which every system of law must take notice, — real, personal — petitory, possessory — contract, tort. Again, knowing something of the English writs, we might expect to find those which begin with " Præcipe " falling into a class by themselves; or, again, to find that those which direct a summons are kept apart from those which direct an attachment; or, again, to find that writs of " Justicies," *i. e.*, writs directing the sheriff to do justice in the county court, are separated from writs destined to bring the defendant into the king's own courts. Well, in part we may be disappointed; but not altogether: formal jurisprudence has had something to do with the final result, though not so much as might be expected. The printed book begins, and every MS. that I have seen, whether it comes from Henry II.'s day or Henry VI.'s, begins with the writ of right. Now, there is logic in this; for whatever actions are " personal," whatever acts are " possessory," — and different ages hold different opinions about this matter, — there can be no doubt that the action begun by writ of right is " real " and " petitory " or " droiturel." Our Register then begins with the purest type of a real and droiturel action. And the logic of jurisprudence has left other marks, especially near the end of the book, where we find Novel Disseisin, Mort d'Ancestor, Cosinage and Writs of Entry, following each

other, in what we shall probably call their "natural order." Still, such logic will not, by any means, explain the whole book. It would be quite safe to defy the student of "general jurisprudence" to find Trespass, or Covenant, or *Quare Impedit*, by the light of first principles.

Then, again, practical convenience has had its influence. The first twenty-nine folios of the printed Register are taken up by the Writ of Right, and other writs which have generally collected around that writ. Then a new section of the book begins (f. 30-71); it is devoted to writs which the modern jurist would describe as being of the most divers natures; but they all have this in common, that in some way or another they deal with ecclesiastical affairs and the clerical organization. The link between this group and that which it immediately succeeds is (f. 29 b) the Writ of Right of Advowson. It is a Writ of Right; but having once come across the advowson it is convenient to dispose of this matter once and for all, to introduce the Assize of Darrein Presentment, which is thus torn away from the other possessory assizes, the *Quare Impedit*, the *Quare Incumbravit*, the *Juris Utrum*, and so forth. This brings us into contact, if not conflict, with the church courts; so let us treat of Prohibitions to Court Christian, whether these relate to advowsons, land, or chattels, and while we are about it we may as well introduce the *De excommunicato capiendo*, and so forth; then we shall have done with ecclesiastical affairs. Here, to use the terms that I have ventured to suggest, we see "practical convenience" getting the better of "juristic logic;" or, to put it in other words, matter triumphing over form. But form's turn comes again. We have done with the church; what topic should we turn to next? The answer is, "Waste." But why waste, of all topics in the world? Because, until the making of a certain statute, duly noticed in our Register, the action of waste was an action on a royal prohibition against waste.[1] "Prohibition" is the link which joins "waste" to "ecclesiastical affairs."

Yet another principle has been at work. A section in the middle of the book is devoted to *Brevia de Statuto*, writs that

[1] Stat. Westm. II., c. 14.

are founded on comparatively modern statutes. What keeps this group of writs together is neither "form" nor "matter," but chronology; they are recent writs, for which neither logic nor convenience has found a more appropriate place. In short, we have here an appendix. But it is an appendix in the middle of the book. We can hardly explain its appearance there without glancing at the MSS.; but even without going so far we can still make a guess. When these statutory writs have been disposed of, we almost immediately (f. 196 b) come upon what seems a well-marked chasm. Suddenly the Novel Disseisin is introduced, and then for a long while logic reigns, and we work our way through the possessory actions. If we find, as we may find, a MS. which has several blank leaves before the Novel Disseisin, which honors the Novel Disseisin with an unusual display of the illuminator's art, we have made some way towards a solution of the problem. At one time the book was in mechanically separate sections, and the end of one of these sections was a convenient place for a statutory appendix.

After all, however, it is improbable that we shall ever be able to explain in every case why a particular writ is found where it is found, and not elsewhere. The *vis inertiæ* must be taken into account. Writs collected in the Chancery; now and again an enterprising Chancellor or Master might overhaul the Register, have it recopied, and in some small degree rearranged; but the spirit of a great official establishment, with plenty of routine work, is the spirit of leaving alone; the clerks knew where to find the writs; that was enough.

The MS. materials for the history of the Register are abundant. The Cambridge University library possesses at least nineteen Registers, some complete, some fragmentary; the number at the British Museum is very large. Over the nineteen Cambridge Registers I have cast my eyes. They are of the most various dates. In speaking about their dates it is necessary to draw some distinctions. In the first place, of course, it is necessary to distinguish between the date of the MS. and the date of the Register that it contains, for sometimes it is plain that a comparatively modern hand has copied an ancient Register. In the second place, as already said, it

is useless to ask the date of a Register, or of a particular Register, if thereby we mean to inquire for the date when the several writs contained in it were first issued, or first became current; the various writs were invented in different reigns, in different centuries. The sense that we must give to our inquiry is this: at some time or another the official Register of the Chancery was represented by the MS. now before us; what was that time? It will be seen, however, that the question in this form implies an assumption which we may not be entitled to make, — the assumption that our MS. fairly represents what at some particular moment of time was the official Chancery Register. I have as yet seen no MS. which on its face purported to be an official MS., or a MS. which belonged to the Chancellor or any of his subordinates. In very many cases the copy of the Register is bound up in a collection of statutes and treatises, the property of some lawyer or of some religious house. Often an abbey or priory had one big volume of English law, and in such volumes it is common to find a *Registrum Brevium*. Such volumes were lent by lawyer to lawyer, by abbey to abbey, for the purpose of being copied, and it is clear that a copyist did not always conceive himself bound to reproduce with mechanical fidelity the work that lay upon his desk. Thus, many clerks are quite content that the names of imaginary plaintiffs and defendants should be represented by A and B, while another will make "John Beneyt" a party to every action, and suppose that all litigation relates to tenements at Knaresborough. We have not to deal with the dull uniformity of printed books; no two MSS. are exactly alike; every copyist puts something of himself into his work, even if it be only his own stupidity. Thus, settling dates is a difficult task. Sometimes, for example, a MS. which gives the Register in what, taken as a whole, seems a comparatively ancient form, will just at a few places betray a knowledge of comparatively modern statutes. Gradually, however, by comparing many MSS., we may be able to form some notion of the order in which, and the times at which, the various writs became recognized members of the *Corpus Brevium*.

It will be convenient to mention here that one of the most

obvious tests of the age of a Register is to be found in the wording of those writs which expressly mention a term of limitation. There are three such writs; namely, the Novel Disseisin, the Mort d'Ancestor, and the *De nativo habendo*. Now, at the beginning of Henry III.'s reign (1216), the limiting period for the Novel Disseisin seems to have been the last return of King John from Ireland, but in 1229, or thereabouts, there was a change, and Henry's first coronation at Westminster became the appointed date;[1] the Mort d'Ancestor was limited to the time which had elapsed since Richard's coronation. The Statute of Merton (1236), or rather, as I think, an ordinance of 5th Feb., 1237, fixed Henry's voyage into Brittany as the period for the Novel Disseisin, and John's last return from Ireland as the period for the Mort d'Ancestor and *De Nativo*.[2] Statute of Westminster the First (1275, cap. 39) named for the Novel Disseisin Henry's first voyage into Gascony, for the Mort d'Ancestor and for the *De Nativo* Henry's coronation.[3] As no further change was made until Henry VIII.'s day, this test is applicable only to the very earliest Registers. For Registers of the fourteenth century, however, we can use a somewhat similar criterion: when they mention Henry III., as they call him "pater noster," or "avus," or "proavus noster." But, good though such tests may be, they are by no means infallible. A man copying an already ancient Register might well be tempted to tamper with phrases that were obviously obsolete; and, again, we shall have cause to doubt whether even in the Chancery itself a new statute of limitations always set the clerks on promptly overhauling their ancient books and making the necessary corrections; great is the force of official laziness. Still, these writs which men-

[1] This change I infer from the cases in Bracton's Note Book. On 18 July, 1822, a writ was sent to Ireland, fixing Richard's death as the period for the Mort d'Ancestor, in order to assimilate Irish to English law. See Sweetman's Calendar of Irish Documents, p. 160.

[2] Bracton's Note Book, vol. i., p. 106; vol. iii., p. 230. Compare the Irish writ given in Statutes of the Realm, i., p. 4. The Statute of Merton in its printed form mentions not Brittany, but Gascony.

[3] As regards the Novel Disseisin the change, if any, was but nominal; the "first voyage into Gascony" of the Statute of 1275 was "the voyage to Brittany" of the ordinance of 1237. In 1230 Henry went to Brittany, and thence to Gascony.

tion periods of limitation are the parts of the Register which first attract the critic's eye.

But there is yet another difficulty. Are we justified in assuming that there always, or ever, was in the Chancery some one document which bore the stamp of authority, and which was *the* Register for the time being? I doubt it. The absolutely accurate officialism to which we are accustomed in our own day is, to a large extent, the product of the printing-press. The cursitors and masters of the mediæval Chancery had no printed books of precedents. It is highly probable that each of them had his MS. book; that these books were transmitted from master to master, from cursitor to cursitor, and that they differed much from each other in details.[1] To have prevented them from differing would have been a laborious and a needless task. This thought will be brought home to us by several passages in the printed book. In the first place, it is full of notes and queries: the writer expresses his doubts as to the best way of formulating this or that writ; he tells us what some think, what others think, what some do, and what others do; occasionally he speaks to us in the first person, says "credo" and "je croye," and even points out that this Register differs from other Registers.[2] It is in this way that we may explain the somewhat

[1] The "Cursitores," or "Clerici de cursu," were the clerks who issued the writs of course. The name of Cursitor street still marks the site of their ancient home. As to their duties, see Fleta, p. 78.

[2] Thus, f. 3 b, "quaere comment le brief serra fait ou si le brief gyst;" f. 6 b, "quibusdam videtur quod debeat scribi in istis brevibus etc.;" f. 9, "sapientes et jurisperiti dicunt;" f. 10 b, "secundum quosdam . . . sed alii dicunt;" f. 16, "et est contra registrum;" f. 27 b, "secundum quosdam fiant duo brevia;" f. 29 b, "secundum quosdam;" f. 97 b, "Nota quod non debet dici in brevi predicto *specialem auctoritatem ad hoc habentium* prout in quibusdam registris invenitur;" f. 108 b, "Nota per Thomam de Newenham; tamen alii clerici de cursu contradicunt;" f. 120 b, "Tamen quaere . . . per plusors sages dit est;" f. 121 b, "Les Maistres de la Chancerie ne voudrient agreer a cest clause;" f. 133, "Nota quidam addunt in istis tribus brevibus, etc.;" f. 134 b, "Vide de breve Statutum W. 2. c. 14 pro ista materia quia hic male reportatur;" f. 183 b, "Nota secundum quosdam . . . et ideo quaere inde;" f. 172 b, "Je croyc que son brief nest pas le pire;" f. 184 b, "Credo quod istud breve vacat;" f. 200, "Ascuns gents dirent;" f. 208 b, "In breve de post disseisina non dicatur *tam de illis,* etc., secundum Escrick;" f. 243 b, "Mes le brief . . . est le meillour come cest register voet;" f. 269, "Ista clausula . . . non continetur in statuto sed additur per quosdam jurisperitos."

capricious selection of writs that the printed book presents. It naturally includes all the common forms that are in daily use; but it includes, also, many forms of a highly specialized kind, — forms which set forth the facts of cases which have happened once, but are by no means likely to happen again. The Chancery undoubtedly had some power in itself to devise such "writs upon the special case;" not unfrequently it was ordered to make a writ suited to the very peculiar circumstances of a case which had been brought before the Council, or before the Parliament, just because none of the common writs would meet it.[1] Of such "*brevia formata*" we get a selection, but only a selection. Some are preserved because they will be useful as precedents, others, as it seems to me, because they are curiosities, and not likely to form precedents.[2] In many quarters we see more signs of private enterprise than of official redaction. A considerable number of specially worded writs bear the name of Parning, — a number out of all proportion to the brief two years during which that famous common lawyer held the great seal. He had the good fortune, we may suppose, to have some industrious clerk for an admirer; his predecessors and successors were less lucky.[3]

[1] The necessity for specialized writs is often noticed in the endorsements on petitions to Parliament; *e. g.,* in those of 14 Edw. II., Ryley's Placita, p. 408, "Habeat breve novæ disseisinæ in suo casu;" p. 409, "Adeat Cancellarium et habeat ibi breve in suo casu;" p. 412, "Habeat breve de conspiratione formata [conformatum] in suo casu;" p. 423, "Habeat breve de conspiratione in Cancellaria in casu suo formandum;" p. 421, "Habeant brevia suis casibus conveniencia." So in the Register we find writs issued by order of the Council; *e. g.,* f. 64, "per consilium;" f. 114, a writ founded on a Parliamentary petition; f. 124, "per consilium;" f. 125, "per consilium."

[2] F. 64 b, "Istud attachiamentum est notabile valde;" f. 224, "Nota quod istud breve sigillatum fuit et quassabille ut dicebatur pro veritate."

[3] Parning appears on f. 13 b, 16 b, 35, 69, 99 b, 100 b, 132, 136; in some other cases, though he is not named, we can tell, from the date of the writ, that it belongs to his chancellorship. He is the only Chancellor that appears prominently. A certain Herleston appears in three places, f. 49, 80 b, 261; f. 261, "Hoc breve concessum fuit . . . per cancellarium Lescrop et W. de Herleston," — *i. e.* (as I understand it) this writ was granted by the Chancellor, G. le Scrope, the Chief Justice, and W. de Herleston; the date of this writ seems to be 19 Edward III. Herleston was a Master in Chancery under Edward III. So, again, one Thomas of Newenham gets mentioned as a maker of writs; he seems to have been a Master under Edward III. and Richard II.; apparently we owe to him a writ against a vendor of a blind horse, who warranted it sound; see f. 108, 108 b, 151 b.

I greatly doubt, then, whether we have in strictness a right to speak about *the* Register of a given period, as though there was some one document exclusively or preëminently entitled to that name; rather we should think of *the* Register as a type to which diverse registers belonging to diverse masters and clerks more or less accurately conformed. About common matters these manuscripts agreed; about rareties and curiosities there was difference, and room for difference. There was no great need for a perfectly stereotyped uniformity; the fact that a writ was penned, and that it passed the seal, was not a fact that altered rights or secured the plaintiff a remedy; it still had to run the gauntlet in court, and might ultimately be quashed as unprecedented and unlawful. It is clear, indeed, that the granting of specially worded writs was regarded as an important matter, which required grave counsel and consideration; the masters were consulted as a body; sometimes it would seem as though the opinion of the justices was taken before the writ issued.[1] A chancellor, a master, even a cursitor, cannot have liked to see his writs quashed; and, though writs were quashed very freely, as the Year Books witness, still, if I mistake not, it will be found that in most cases the fault lay rather with the plaintiff or his advisors than with the Chancery; he had got an inappropriate writ, but not one that was in any respect contrary to law. Any notion that the Chancery was a Romanizing institution, that the learning of the masters was the learning of civilians, is rudely repelled by the Register. Whatever academic training in Roman and canon law the masters may have had, they were English lawyers, daily engaged in watching the development of English law in the English courts, in reading the Year Books, and in "writing up" decisions in the margins of their Registers. Still, to return to my point,

[1] Reg. Brev. Orig. f. 78 b, "Et les maistres W. de Aym. [Ayremine, Master of the Rolls?] et autres" expressed an opinion about a writ which does not commend itself to the annotator; f. 121 b, "Les Maistres de la Chancerie ne voudrient agreer a cest clause;" f. 131 b, "Ceux brefs furent enseales per tants les sages de la chancerie, per assent des serjeants le Roy et autres sages asses" [Nota quod hoc verbum *asses* non est verbum Anglicum sed verbum Franciscum]; f. 200, "Istud breve fuit concessum de assensu W[illelmum] de T[horpe] capitalis justiciarii et aliorum justiciorum de banco et clericorum de cancellaria."

the granting of a newly worded writ was no judicial act; to grant one which could not be maintained was no act of justice; it might be a very proper experiment.

The Register of which I am speaking is the Register of Original Writs. The printed book contains also a Register of Judicial Writs. The difference between Original Writs and Judicial Writs is generally known. Roughly speaking, we may put it thus: An original writ is a writ whereby litigation is commenced; its type is a common writ of trespass or debt, whereby the sheriff is directed to compel the defendant to appear in court and answer the plaintiff; on the other hand, a judicial writ is a writ issued during the course of an action, either before or after judgment; thus, the re-summons of one already summoned, a *venire facias* for jurors, a *fieri facias*, an *elegit*, — these may be taken as types of judicial writs. But, in strictness, we are hardly entitled to bring into our definitions any particularization of the character of the writs. The technical distinction seems to have been a simpler one: the original writ issues out of the Chancery, the judicial issues out of a Court of Law; we can say no more. It sometimes happens that the same writ can be obtained in the Chancery or in the Common Pleas; in term time one gets it from the court, in vacation one goes to the Chancery; such a writ will, therefore, have its place in both Registers, the Original and the Judicial.[1] And very many of the documents which find a place in the former cannot be described as writs originating litigation; they relate to litigation that has been already begun. A tenant in an action begun by writ of right puts himself on the grand assize while yet the action is in the court baron or county court; the writ summoning the electors of the grand assize will issue out of the Chancery, and we must look for it in the Register of Original Writs. The same Register contains numerous writs evoking litigation from the local courts, — writs of *pone*, *certiorari*, *recordari facias*, and so forth. But, further, the fully developed *Registrum Brevium Originalium* contains great masses of documents which neither originate nor evoke litigation, — pardons, protections, safe-conducts, licenses to

[1] Reg. Brev. Orig. f. 32, 69 b.

elect bishops and abbots, orders for the election of coroners and verderers, letters whereby the king presents a clerk, fiscal writs addressed to the Barons of the Exchequer, writs to escheators, and so forth, in rich abundance; even letters to foreign princes, begging them to do justice to Englishmen, find a place in the collection.[1] Many of these formulas, it may be, were never known as *brevia originalia*, and some were not *brevia* at all; still, it would be very difficult to say where the original writs left off, for a great deal of what we might call fiscal and administrative work was done under quasi-judicial forms, and by the use of quasi-judicial machinery. The Exchequer, according to our ideas, was half law court and half financial bureau. The collection of the revenue, the management of the king's demesnes and feudal rights, were carried on by means of writs, inquests, verdicts, very similar to those which determined the rights of litigants. And happy it may be for us that no stricter separation was made between ordinary law and administrative law. Our present point, however, must be merely that all this great mass of miscellaneous matter is collected into the Register of Original Writs, and thus gets mixed up with the formulas of ordinary litigation. The later the MS. of the Register the larger is the proportion which the administrative documents bear to the writs which originate or evoke litigation, and, as we shall see hereafter, the general scheme of the book had become fixed at a time when it was still chiefly made up of writs subserving the process of litigation between subject and subject.

These things premised, it may be allowed me to make a few remarks about the early history of the Register.

It is highly probable that so soon as our kings began to interfere habitually with the ordinary course of justice in the communal and feudal courts, and by means of writs to draw matters into their own court, the clerks of the chancery began to collect precedents of such writs, and it well may be that some of the formulas that they used were already of high antiquity.[2] But the careful reader of Mr. Bigelow's

[1] Reg. Brev. Orig., f. 129.

[2] Brunner, Enstehung der Schwurgerichte, p. 78, compares the *breve de recto* with the Frankish *indiculus communitorius*.

"Placita" will, as I think, be led to doubt whether before the reign of Henry II. there was anything that could fairly be called a *Registrum Brevium*, and the student of Madox's Exchequer will be inclined to hold that there were no writs that could be obtained "as of course" (*de cursu*) by application to subordinate officials. Nothing was to be had for nothing; the price of writs was not fixed, and every writ was, in the terms of a later age, "a writ upon the special case." Before the end of Henry's reign there had been a great change, though the practice of selling royal aid (theoretically it was rather "aid" than "justice" that was sold) was by no means at an end. Already when Glanvill wrote there were many writs drawn up "in common form;" so drawn up, that is, as to cover whole classes of disputes. Let us follow him in his treatment of them. Not impossibly he took them up in the order in which they occurred in an already extant Chancery Register, and, as we shall see hereafter, the arrangement of the Register in much later times conforms, as regards some of its main outlines, to the arrangement of Glanvill's treatise.

In his first book he begins (cap. 6) with the *Præcipe quod reddat* for land, which he treats as the normal commencement of a petitory action. In the second book we have (cap. 8, 9) the writs of peace granted when a tenant has put himself on the grand assize; then (cap. 11) the writ summoning the electors of the grand assize, and (cap. 15) the writ summoning the recognitors. The third book, on warranty, does not give us any "original" writ. In the fourth book (cap. 2) occurs the Writ of Right of Advowson, the Writ (cap. 8) *Quo advocato se tenet in ecclesia;* a Prohibition (cap. 13) to ecclesiastical judges against meddling with a cause touching an advowson, and (cap. 14) a summons on breach of such a Prohibition. The fifth book, on serfage, gives us (cap. 2) the *De libertate probanda*. The sixth book turns to dower, and contains (cap. 5) the Writ of Right of Dower, a writ of *Pone* (cap. 7) for removing the case from the county court, the Writ (cap. 15) of Dower *unde nihil habet*, and the Writ (cap. 18) of Admeasurement of Dower. The seventh book, on inheritance or succession, has (cap. 7) the Writ *Quod*

stare facias rationalem divisam, and (cap. 14) the writ to the Bishop, directing an inquiry into bastardy. In the eighth book comes (cap. 4) the Writ *de fine tenendo*, and several writs (cap. 6, 7, 10), *Quod recordari facias*, "evocatory writs," we may call them. In the ninth we have (cap. 5) the Writ *De homagio capiendo*, the Writ of Customs and Services (cap. 9), a writ against a tenant who has encroached upon his lord (cap. 12), and the Writ *De rationabilibus divisis* (cap. 14). The tenth book gives us the Writ of Debt (cap. 2), the Writ *De plegio acquietando* (cap. 4), a writ for a mortgage creditor calling on the debtor to pay (cap. 7), a writ calling on the mortgagee to render up the land (cap. 9), a writ calling in the warrantor of a chattel (cap. 16). From the eleventh book we gather only a writ announcing the appointment of an attorney. In the twelfth book we come to the Writs of Right, strictly so called (*brevia de recto tenendo*), and a number of writs empowering the sheriff to do justice; namely, the *Ne injuste vexes* (cap. 10), the *De nativo habendo* (cap. 11), a Writ of Replevin (cap. 12, 15), a Writ of Admeasurement of Pasture (cap. 13), a *Quod permittat* for easements (cap. 14), a Writ *De rationabilibus divisis* (cap. 16), a Writ *Quod facias tenere divisam* (cap. 17), a Writ of *Justicies* for the return of chattels unlawfully taken by a disseisor, and a few other miscellaneous writs, including a Prohibition to Court Christian against meddling with lay fee. In the thirteenth book come the possessory assizes. The fifteenth gives a hasty sketch of criminal business.

Glanvill's scheme of the law, or rather his scheme of royal justice, might, as it seems to me, be displayed by some such string of catchwords as the following: "Right" (*i. e.*, proprietary right in land), "Church," "Liberty," "Dower," "Inheritance" or "Succession," "Actions on Fines," "Lord and Tenant," "Debt," "Attorney," "Justice to be done by feudal lords and sheriffs," "Possession," "Crime." Now, some of the main lines of this "*legalis ordo*," if I may use that term, keep constantly reappearing in the later history of the Register. At all events, two poles are fixed, — the *terminus a quo*, the *terminus ad quem;* we are to begin with "Right;" to end with "Possession." The reappearance of

this scheme in the Register of later days is the more remarkable, because Bracton did not adopt it; as is well known, he begins with "Possession," and ends with "Right." We may make a further remark, which will be of use to us hereafter. Glanvill's twelfth book is most miscellaneous, and at one point resolves itself into a string of writs, which are given without note or comment. The idea which keeps the book together is that of justice done, not by the King's court, but by lords and sheriffs, in pursuance of royal writs. Such a tie is likely to be broken in course of time. Thus, the "Writ of Right Patent," the writ commanding a lord to entertain a proprietary action, is likely to find its proper place by the side of the *Præcipe quod reddat*, especially when Magna Charta has sanctioned the rule that a *Præcipe* is only to be issued when the tenant holds immediately of the king.[1] And so, again, the writs commanding the sheriff to do justice, writs of "*Justicies*," or "*Justifices*," will hardly be kept together by this bond; but in course of time, as the king's own court extends, its sphere will fall into various subordinate places; thus, for example, "Debt by Justicies in the county court" will become an appendix or a preface to "Debt in the Bench."

The arrangement of Glanvill's book is, however, sufficiently well known, and therefore, without further reflection upon it, I will pass on to describe the earliest *Registrum Brevium* that I have seen. Happily it is one to which we can affix a precise date, namely, the 10th of November, 1227. It is found in a MS. at the British Museum (Cotton, folios D, 11, f. 143 b), — a book that once belonged to the monks of St. Augustine's, Canterbury. It forms a schedule annexed to a writ of Henry III., bearing the date just given, and directed to the people of Ireland. That writ recites that the king desires that justice be done in Ireland according to the custom of his realm of England, and states that for this purpose he is sending a formulary of the writs of course (*formam brevium de*

[1] Originally a Writ of Right is so called, because it orders the feudal lord to do full right to the demandant, *plenum rectum tenere;* and in this sense, the *Præcipe quod reddat* is no Writ of Right. But when possessory actions have been established in the King's court, "right" is contrasted with "seisin," and all writs originating proprietary actions for land, including the *Præcipe in capite*, come to be known as Writs of Right. This has been remarked by Brunner, Schwurgerichte, p. 411.

cursu), and wills that they be used in the cases to which they are applicable. The writ was issued at Canterbury, and to this fact we probably owe its lucky preservation in a Canterbury book. The Register that it gives is about forty years younger than Glanvill's treatise, and affords the means of measuring the growth of law during an important period, — the period of the Great Charter. I will briefly describe its contents.

It begins with three Writs of Right (1, 2, 3), and we learn that these writs can only be had "*sine dono;*" that is, without payment, when the land demanded is but half a knight's fee or less, or the service due from it does not exceed 100 shillings, or, being a burgage tenement, the rent or the value of the buildings does not exceed 40 shillings a year. Then follows (4) the *Præcipe in capite.* Then (5) the *Novel Disseisin,* the period of limitation being stated as "*post ultimam transfretacionem nostram de Hibernia in Angliam;*"[1] and as an appendix to this we have (6) the Novel Disseisin of Common, and (7) the Assize of Nuisance, with variations. Next comes (8) the Mort d'Ancestor; the period of limitation is said to be *postquam coronacionem H. patri nostris.*[2] Then come (9) the assize of Darrien Presentment, (10) Prohibition to the bishop against admitting a parson, (11) Writ ordering a bishop to disencumber the church when he has admitted a parson contrary to such Prohibition, (12) Mandamus to a bishop to admit a presentee, (13) Writ of Right of Advowson, (14) Prohibition to ecclesiastical judges, (15) Writ against ecclesiastical judges who have disobeyed the Prohibition. This ecclesiastical group being finished, we find next (16) the Writ of Peace for a tenant who has put himself on the grand assize, and (17) a writ for the election of the grand assize. And here we

[1] This must be a blunder; it should have been "post ultimam transfretacionem patris nostri de Hibernia in Angliam."

[2] Here again there must have been some carelessness. The date referred to is the coronation of Henry II., the present king's grandfather. The mistake would seem to be due not to the monastic copyist, but to the Chancery clerk who drew up the document sent to Ireland, and was not careful to change into "avi" the "patris" which stood in a formula of John's reign, from which he was copying. See Sweetman's Calendar of Irish Documents, pp. 37, 160.

have an interesting note: "*Et notandum quod in hac assisa non ponuntur nisi milites et debent jurare precise quod veritatem dicent non audito illo verbo quod in aliis recognitionibus dicitur scilicet a se nescienter.*" Unless I am traducing the copyist, something must have gone wrong with these last words. They were French, but he took them for Latin. In the grand assize the recognitor must swear, in an unqualified way, that he will tell the truth; while in all other recognitions he may add "a so. scient;" that is, "according to his knowledge." A small group of writs relating to dower (18, 19, 20) come next. Then follows (21) the *Juris Utrum,* which, it is remarked, lies either for the clerk or for the layman.[1] Next (22) comes the Attaint which can be brought against recognitors of Novel Disseisin, Mort d'Ancestor, Darrein Presentment, but not against the recognitors of the Grand Assize. Then (23) we have an action on a fine, "*Præcipe A. quod teneat finem,*" and (24) the action of *Warrantia Cartæ.* Writs of Entry are represented by but two specimens: the first is (25) Entry *ad terminum qui præteriit,* the second (26) is *Cui in vita.* Then we find (27) *quod capiat homagium,* (28) writs for sending knights to view an essoinee, and (29) to hear a sick man appoint an attorney. On these follow (30) the *De nativo habendo,* (31) the *De libertate probanda* (32) the *De rationabilibus divisis,* and (33) the *De superoneracione pasturæ.* We pass to criminal matters, and get (34) the writ to attach an appellee to answer for robbery, rape, or arson, with a note that in case of homicide the appellee is to be attached, not by gage and pledge, but by his body; as a sequel to this comes (35) the *De homine replegiando.* We return to civil matters, and find (36) the Writ of Services and Customs, and (37) the *Ne injuste vexes.* Then comes (38) Debt and Detinue. The only writ that falls under this head is a *Justicies,* and not, like Glanvill's Writ of Debt, a *Præcipe;* and there is this further difference, that the remarkable words, "*et unde queritur quod ipse ei injuste deforciat,*" which occur in Glanvill's writ, and make it look

[1] This was a moot point in Bracton's day. Pateshull allowed the layman the assize, but afterwards changed his mind. Bracton thinks this a change for the worse. Bract., f. 285 b.

so very like a Writ of Right, have disappeared. The supposed debt in the Irish Register is one of 20 shillings, and we have this important note: "In the same fashion a writ is made for a charter, '*quam ei commisit*,' or for a horse or for chattels to the value of 40 shillings, '*sine dono*' [*i. e.*, without any payment to the king], for if the debt or price exceeds 40 shillings the words must be added: '*accepta ab eo* [the plaintiff] *securitate de tercia parte de primis denariis ad opus Regis.*'" In Ireland, at all events, the king will only become a collector of debts for the modest commission of 33⅓ per cent.

To this succeeds (39) a Prohibition to ecclesiastical judges against dealing with lay fee, and (40) a writ to compel them to answer for breach of such a prohibition. Next occurs (41) a writ directing the sheriff not to suffer an infant to be impleaded, and (42) a *Recordari facias* applicable to a case in which a tenant has vouched an infant. Then we have (43) a *Justicies de plegio acquietando* for a debt of forty shillings or less; "*non habebit ultra xl. sol. sine dono.*" Then comes (44) a writ forbidding the sheriff to distrain R., or permit him to be distrained, to render ten marks to N., for which he is neither principal debtor, nor pledge; but "this writ does not run in privileged cities, or where the debtor is the king's debtor." Another writ (45) forbids the sheriff to distrain R. for money promised to the king "for right or record," *i. e.*, for money promised in consideration of the king's aid in litigation, if, without his own default, he has not got what he stipulated for. Another writ (46) forbids the sheriff to distrain a surety when the principal debtor can pay; but this writ is not to be issued when the debt is one that is due to the king. Then (47) comes a writ of Mesne by way of *Justicies*, and (48) the *De excommunicato capiendo*. Upon this follows (49) covenant "*si quis conventionem fecerit albi quam in curia domini Regis cum vicino suo qui eam infringere voluerit de aliqua terra vel tenemento ad terminum si exitus illius tenementi non excesserint per annum xl. solidos;*" the writ is a *Justicies* "*quod teneat conventionem.*" We have then (50) a Writ of Dower, and (51) a Writ of Waste against a dowager. Miscellaneous writs follow: (52) a *Venire facias* for an assize; (53) a *Pone ad peticionem petentis;* (54) a summons for a warrantor; (55) a writ to inquire of the bishop touching the marriage of a woman claiming dower; (56) a writ directing a view of the land demanded.

So ends the Irish Register, an important document. It brings out very forcibly the king's position as a vendor of justice, or rather, as we have said, of "aid." We must, as it seems to me, believe, until the contrary be shown, that we have here a fairly correct representation of the writs that were current in England in 1227; the writs that were "of course" and to be had at fixed prices; but some may have been omitted as inapplicable to Ireland.

Before making further comments, let us turn to an English *Registrum*, which, so far as I can judge, must be of very nearly the same date as this Irish *Registrum*. It is found in a Cambridge MS. (Ti. vi. 13), and may, I think, be safely ascribed to the early years of Henry III.'s long reign; for I can see no trace in it of the Statute of Merton. The book contains a copy of Glanvill's treatise, which is followed by a *Registrum*, and of this we will note the contents. I add references to Glanvill's treatise, and to the Irish Register; the latter of these I will designate by the symbol "Hib." while the Cambridge MS., now under consideration, I shall hereafter refer to as CA.

1. Writ of right addressed "Roberto de Nevill;" with several variations. (Glanv. xii, 2; Hib. 1.)
2. Writ of right "*de rationabili parte.*" (Glanv. xii, 5.)
3. *Praecipe in capite.* (Glanv. i, 6; Hib. 4.)
4. *Pone;* this will only be granted to a tenant "*aliqua ratione precisa vel de majori gratia.*" (Hib. 53.)
5. Writs of peace when tenant has put himself on grand assize. (Glanv. ii, 8, 9; Hib. 16.)
6. Writ summoning electors of grand assize, "*et nota quod in hac assisa non ponuntur nisi milites et precise jurare debent.*" (Glanv. ii, 11; Hib. 17.)
7. *De recordo et judicio habendo.*
8. *Procedendo* in writ of right.
9. Respite of writ of right so long as tenant is "*in servicio nostro in Pictavia vel in Wallia cum equis et armis per preceptum*

nostrum." Respites (Hib. 41) where a tenant or vouchee is an infant.

10. *Warrantia cartae.* (Hib. 24.)

11. Entry "*ad terminum que preteriit.*" (Cf. Glanv. x, 9; Hib. 25.)

12. Entry "*cui in vita.*" (Hib. 26.)

13. *De homagio capiendo.* (Glanv. ix, 5; Hib. 27.)

14. Novel disseisin;[1] limitation "*post ultimum reditum domini J. patris nostri de Hybernia in Angliam.*" (Glanv. xiii, 33; Hib. 5.)

15. Novel disseisin of pasture; same limitation. (Glanv. xiii, 37; Hib. 6.)

16. Mort d'Ancestor;[2] limitation "*post primam coronacionem R. Regis avunculi nostri.*" (Glanv. xiii, 3, 4; Hib. 8.)

17. *De nativo habendo;*[2] same limitation. (Glanv. xii, 2; Hib. 30.)

18. *De libertate probanda.* (Glanv. v, 2; Hib. 31.)

19. *De rationabilibus divisis.* (Glanv. ix, 14; Hib. 32.)

20. *De superoneratione pasturae.* (Hib. 33.)

21. Replevin. (Glanv. xii, 12, 15.)

22. *De pace regis infracta;* writ to attach appellee by gage and pledge in case of robbery or rape. (Hib. 34.)

23. *De morte hominis;* writ to attach appellee by his body. (Hib. 34.)

24. *De homine replegiando.* (Hib. 35.)

25. Services and customs; a "*justicies.*" (Glanv. ix, 9; Hib. 36.)

26. *Ne injuste vexes.* (Glanv. xii, 10; Hib. 27.)

27. Debt; a "*justicies;*" "*reddat B. x. sol. quos ei debet ut dicit,* vel *cartam quam ei commisit custodiendam.*" (Glanv. x, 2; cf. xii, 18; Hib. 38.)

28. Prohibition to ecclesiastical judges against entertaining a suit touching a lay fee. (Glanv. xii, 21; Hib. 39.)

29. Similar prohibition to the litigant. (Glanv. xii, 22.)

30. Prohibition in case of debt or chattels, "*nisi sint de testamenti vel matrimonio.*"

31. Attachment for breach of prohibition. (Hib. 40.)

32. *De plegiis acquietandis.* (Glanv. x, 4; Hib. 43.) Also (32*a*) a writ forbidding the sheriff to distrain the surety while the principal debtor can pay. (Hib. 46.)

33. Mesne. (Hib. 47.)

34. Aid to knight lord's son or marry his daughter.

35. *De excommunicato capiendo.* (Hib. 48.)

36. Covenant; *justicies;* "*de x. acres terre.*" (Hib. 49.)

[1] I believe that this writ would have been antiquated after 1229.

[2] These writs seem older than 1237.

37. Writ announcing appointment of attorney.

38. Writ to send knights to hear sick man appoint attorney. (Hib. 29.)

39. Writ sending knights to view essoinee. (Hib. 28.)

40. Darrein presentment. (Glanv. xiii, 19; Hib. 9.)

41. Prohibition in case touching advowson. (Glanv. iv, 13; Hib. 14.)

42. Writ of right of advowson. (Glanv. iv, 2; Hib. 13.)

43. Writ to bishop for admission of presentee. (Hib. 12.)

44. *Quare incumbravit.* (Hib. 11.)

45. Attachment for breach of prohibition. (Glanv. iv, 14; Hib. 11.)

46. Dower "*unde nihil habet.*" (Glanv. vi, 15; Hib. 18.)

47. Dower "*de assensu patris.*" (Hib. 19.)

48. Dower in London.

49. *Juris utrum.* (Glanv. xiii, 24; Hib. 20.)

50. Attaint; the assize was taken "*apud Norwicum coram H. de Bargo, justiciario nostro.*"[1] (Hib. 22.)

51. *De fine tenendo;* the fine made "*tempore domini J. patris nostri.*" (Glanv. viii, 6; Hib. 23.)

52. *Quare impedit.*

53. Writ of right of ward in socage.

54. Writ of right of ward in chivalry.

55. Assize of nuisance; vicontiel or "little" writ of nuisance; limitation "*post ultimum reditum domini J. Regis patris nostri de Hybernia in Angliam.*" (Cf. Glanv. xiii, 35, 36; Hib. 7.)

56. *Ne vexes abbatem contra libertates.*

57. *Quod permittat* for estovers; a *justicies.*

58. *Quod faciat sectam ad hundridum vel molen dinum.*

Comment on these two Registers I must for a while postpone; I hope to be allowed to return to the subject on some future occasion.

When we compare these two Registers together, the first remark that occurs to us is, that in substance they are very similar, while in arrangement they are dissimilar. From this we may draw the inference that the official Register in the Chancery had not yet crystallized; or, to put the matter in another way, that very possibly different officers in the Chancery had copies which differed from each other. Indeed, the official Register of the time may not have taken the shape of a book, but may have consisted of a number of small strips

[1] This seems a reference to an eyre of 1222.

of parchment filed together and easily transposed. There is a certain agreement between them even in arrangement. Both have "Right" in the forefront, and occasionally give us the same writs in the same order. One instance of such correspondence is worthy of note, for it will become of interest to us hereafter. The following seems to be, for some reason or another, an established sequence: *De nativo habendo, De libertate probanda, De rationabilibus divisis, De superoneratione pasturæ,* Replevin, *De pace regis infracta* (writs for the arrest or attachment of appellees), *De homine replegiando,* Services and Customs. Traces of this sequence will be found even when the Register, having increased in bulk fifty times over, gets printed in the Tudor days. The writs are arranging themselves in groups: a Writ of Right cluster, an Ecclesiastical cluster, a Liberty and Replevin cluster. But many questions are very open. Shall the Writs of Entry precede or follow the Assizes? Shall they be deemed proprietary or possessory?

Taking our two Registers together, we can form an idea of the writs which were "of course" in the early years of Henry III.; and these we may contrast with the writs which Glanvill gives us from the last years of Henry II. On the whole, we can record a distinct advance of royal justice; but there have been checks and retrogressions. The Writ of Right, properly so called, the *Breve de recto tenendo,* which commands the feudal lord to do justice, has taken the place of the simple *Precipe quod reddat* as the normal commencement of a proprietary action for land. This is a victory of feudalism consecrated by the Great Charter. Again, in Glanvill's day the jurisdiction over testamentary causes had not yet finally lapsed into the hands of the church; twice (vii., 7, xii., 17) he gives us a writ (*quod stare facias rationabilem divisam*) whereby the sheriff is directed to uphold the will of a testator. This writ we miss in the Registers; the state has had to retreat before the church. We are so apt to believe that in the history of the law all has been for the best, that it is well for us to notice this unfortunate defeat, — for unfortunate it assuredly was, and to this day we suffer the evil consequences which followed from the abandonment by the

king's courts of all claim to interfere with the distribution of a dead man's chattels. On the other hand, we see that the triumph of feudalism is more apparent than real; it has barred the high road, but royal justice is making a flank march. Glanvill (x., 9) has a writ which lies for a mortgagor against a mortgagee; or, rather, we ought to say for a gagor against a gagee, when the term for which the land was gaged has expired. The alteration of a few words in this will turn it into a writ of entry *ad terminum qui præteriit.*[1] Such a writ of entry is given by our two Registers, and they also give the writ *cui in vita* applicable for the recovery of land alienated by a married woman. Curiously enough they do not give the writ of entry *sur disseisin;* though we happen to know that already in 1205 this writ, lying for a disseisee against the heir of the disseisor, had been made a writ of course.[2] This is by no means the only sign that the copies of the Register which got into circulation did not always contain the newest improvements. Still, here we see that a foundation has been laid for that intricate structure of writs of entry which will soon be reared. It is very doubtful whether Glanvill knew the procedure by way of attaint for reversing the false verdict of a petty assize; but we find this securely established in our Registers.

Another noteworthy advance is to be seen in the actions which we may call contractual. The *Warrantia Cartæ* is in use, and so is the Writ of Covenant. We may doubt whether there is as yet any writ as of course which will enforce a covenant not touching land. The typical covenant of the time is what we should call a lease; but Glanvill (x., 8) told us that the king's court was not in the habit of enforcing "*privatas conventiones*" agreements, that is, not made in its presence and unaccompanied by delivery of possession. Debt and

[1] The development can be seen in Palgrave's Rot. Cur. Reg., i., 341, "in quam non habuit ingressum nisi quia predicta B. ei commisit ad terminum qui preteriit;" ii., 37, "quam pater A. invadiavit B. ad terminum qui preteriit;" ii., 211, "quam ipse invadiavit C. patri predicti B. ad terminum qui preteriit," etc.

[2] Rot. Pat. i., 32, contains a writ of this kind, with the note: "Hoc breve de cetero erit de cursu." Even from Richard's reign we have "in quam ecclesiam nullam habet ingressum nisi per ablatorem suum." Rot. Cur. Reg., i., 391.

Detinue are still provided for chiefly by writs of *Justicies*, directing trial in the county court. "Debt in the Bench" seems, as yet, no writ of course, and the Irish Register shows us that, at least across St. George's Channel, one had to pay heavily even for a *Justicies*. The excuse for such exaction, of course, was that no writ was necessary for the recovery of a debt in a local court; royal interference was a luxury. Lastly, we will notice that, as yet, we hear nothing of Account and nothing of Trespass.

The next Register that I shall put in is found in a Cambridge MS. I shall hereafter refer to it as CB. (kk., v. 33). Like the last, it is bound up with a Glanvill, and this, I may remark, is in favor of its antiquity. Edwardian Registers are generally accompanied, not by Glanvill, but by Hengham, or Fet Assavoir or Statutes. On the whole, we may, as I believe, safely attribute this specimen to the middle part of Henry III.'s reign, to the period between the Statute of Merton (1236) and the Statute of Marlborough (1267), and I am inclined to think it older than the Provisions of Westminster (1259). In the following notes of its contents I will give references to the "Pre-Mertonian" Register CA., which I described on a former occasion: —

"*Incipiunt Brevia de Causa Regali.*"

1. Writ of right with many variations. (CA. 1.)
2. Writ of right *de rationabili parte*. (CA. 2.)
3. *Ne injuste vexes*. (CA. 26.)
4. *Praecipe in capite*. (CA. 3.)
5. Little writ of right *secundum consuetudinem manerii*.
6. Writs of peace when tenant has put himself on grand assize. (CA. 5.)
7. Writ summoning electors of grand assize, with variations. (CA. 6.)
8. [1] Writ of peace when tenant of gavelkind has put himself on a jury in lieu of grand assize, and writ for the election of such a jury.
9. *Pone* in an action begun by a writ of right. (CA. 4.)
10. [2] *Mort d'ancestor*, with limitation "*post primam coronacionem Ricardi avunculi nostri.*" (CA. 16.)

[1] The privilege of having a jury instead of a grand assize was granted to the Kentish gavelkinders in 1232. Statutes of the Realm, i., 225.
[2] The form seems older than 1237.

11. *Quod permittat* for pasture in the nature of Mort d'ancestor, with a variation for a partible inheritance.
12. *Nuper obiit*.
13. [1] Novel Disseisin, with limitations "*post ultimum reditum J. Regis patris nostri de Hibernia in Angliam.*" (CA. 14.) Novel Disseisin of pasture. (CA. 15.)
14. [2] Assizes of Nuisance: some being vicontiel, with limitation "*post primam transfretacionem nostram in Britanniam.*" (CA. 55.)
15. Surcharge of pasture. (CA. 20.)
16. *Quo jure* for pasture.
17. Attaint in *Mort d'ancestor* and Novel Disseisin. (CA. 50.)
18. Perambulation of boundaries.
19. [3] Writ of Escheat: claimant being entitled under a fine which limited land to husband and wife and the heirs of their bodies, the husband and wife having died without issue.
20. Darrein presentment. (CA. 40.)
21. Writ of right of advowson. (CA. 42.) A curious variation ordering a lord to do right touching an advowson; the writ is marked "*alio modo sed raro.*"
22. *Quare impedit*. (CA. 52.)
23. Prohibition to Court Christian touching advowson. (CA. 41.)
24. Attachment against judges for breach of such prohibition. (B. 45.)
25. *Ne admittas personam*.
26. Mandamus to admit parson. (CA. 43.)
27. Dower *unde nihil habet*. (CA. 46.)
28. Dower *ad ostium ecclesiae*.
29. Dower in London. (CA. 48.)
30. Dower against deforceor.
31. Writ of right of dower.
32. *Warrantia cartae*. (CA. 10.)
33. *De fine tenendo:* a fine has been made "*tempore J. Regis patris nostri.*" (CA. 51.)
34. *Juris utrum* for the parson. (CA. 49.)
35. *Juris utrum* for the layman. (CA. 49.)
36. Entry, the tenant having come to the land *per* a villan of the demandant.
37. Entry *ad terminum qui preteriit:* the tenant having come to the land *per* the original lessee. (CA. 11.)

[1] This form seems older than 1237.
[2] This form seems newer than 1237.
[3] This is called a Writ of Escheat; but it closely resembles the Formedon in the Reverter of later times.

38. Entry, the tenant having come to the land *per* one who was guardian.

39. Entry *cui in vita.* (CA. 12.)

40. Entry, the land having been alienated by dowager's second husband.

41. Entry sur intrusion.

42. Entry *ad terminum qui preteriit* for an abbot, the demise having been made by his predecessor.

43. Entry *sine assensu capituli.*

44. Escheat on death of bastard.

45. Entry sur disseisin for heir of disseisee, the defendant being the disseisor's heir.

46. Entry when the land has been given *in maritagium.*

47. Entry for lord against guardians of tenant in socage who are holding over after their ward's death without heir.

48. Entry for reversioner under a fine.

49. Writ of intrusion.

50. *Quod capiat homagium.* (CA. 13.)

51. False imprisonment: "*ostensurus quare predictum A. imprisonavit contra pacem nostram.*"

52. Robbery and rape: "*ostensurus de robberia et pace nostra fracta,* vel *de raptu unde eum appellat.*" (CA. 22.)

53. Homicide: "*attachiari facias B. per corpus suum responsurus A. de morte fratris sui unde eum appellat.*" (CA. 23.)

54. *De homine replegiando.* (CA. 24.)

55. *De plegiis acquietandis:* "*justifices talem quod . . . acquietet talem.*" (B. 32.)

56. *De plegio non stringendo pro debito:* do not distrain pledge while principal debtor can pay. (CA. 32a.)

57. *Quod permittat* for estovers: "*justifices A. quod . . . permittat B. rationabilem estoverium suum in bosco suo quod in eo habere debet et solet.*" Variation for right to fish: "*justifices A. quod permittat B. piscariam in aqua tali quam in eadem habere debet et solet.*" (CA. 57.)

58. Debt: "*justifices A. quod . . . reddat B. xij. marcas quas ei debet,*" vel "*catallum ad valenciam xii. marcarum quas* (sic) *ei injuste detinet sicut racionabiliter monstrare poterit quod ei debeat, ne amplios,*" etc. (CA. 27.)

59. Debt and Detinue before the king's justices. "*Precipe A. quod . . . reddat B. xij. marcas quas ei debet et injuste detinet* vel *catallum ad valenciam x. marcarum quod ei detinet, et nisi fecerit . . . summone . . . quod sit coram justiciariis nostris . . . ostensurus quare non fecerit.*"

60. Replevin. (CA. 21.)

61. Suit to mill: "*justifices A. quod faciat B. sectam ad molendinum . . . quam facere debet et solet.*" (CA. 58.)

62. Customs and services: "*non permittas quod A. distringat B. ad faciendum sectam . . . vel alias consuetudines et servicia que de jure non debet nec solet.*"

63. Customs and services: sheriff is not to distrain B. for undue suit to county or hundred court, etc.

64. Customs and services: "*justifices A. quod . . . faciat B. consuetudines et recta servicia, que ei facere debet,*" etc. (CA. 25.)

65. Customs and services, by *precipe:* "*precipe A. quod faciat B. consuetudines et recta servicia.*"

66. Waste: "*non permittas quod A. faciat vastum . . . de domibus . . . quas habet in custodia,* vel *quas tenet indotem,*" etc.

67. Waste: attach A. to answer at Westminster why he or she has wasted tenements held in guardianship or in dower, "*contra prohibicionem nostram.*" (Hib. 51.)

68. [1] *De nativo habendo:* let A. have B. and C. his "natives" and fugitives who fled since the last return of our father King John from Ireland. (CA. 17.)

69. *De libertate probanda.* (CA. 18.)

70. *De racionabilibus divisis.* (CA. 19.)

71. *De recordo et racionabili judicio.* Let A. have record and reasonable judgment in your county court in a writ of right. (CA. 7.)

72. Annuity: "*justifices A. quod . . . reddat B. x. sol. quos ei retro sunt de annuo redditu,*" etc.

73. *Ne vexes.* Do not vex, or permit to be vexed, A. or his men contrary to the liberties that he has by our or our ancestor's charter, which liberties he has used until now. (CA. 56.)

74. Wardship in socage: "*justifices A. quod . . . reddat B. custodiam terre et heredis C.,*" etc. (CA. 53.)

75. Wardship in chivalry, the guardian claiming the land: "*justifices,*" etc. Variation when the guardian is claiming the heir's person. (CA. 54.)

76. Aid to knight son or marry daughter: "*facias habere A. racionabile auxilium.*" (CA. 34.)

77. Covenant: "*justifices A. quod . . . convencionem . . . de tanto terre.*" (CA. 36.)

78. Sheriff to aid in distraining villans to do their services.

79. Prohibition against impleading A. without the king's writ. "*R. vic. sal. Precipimus tibi quod non implacites nec implacitari permittas A. de libero tenemento suo in tali villa sine precepto nostro vel capitalis nostri justiciarii.*"

80. *Ne qui simplacitetur qui vocat warrantum qui infra aetatem est.* (CA. 9.)

[1] This form seems newer than 1237.

81. *Ne quis implacitetur qui infra aetatem est.* (CA. 9.)

82. *Quod permittat: " justifices A. quod . . . permittat B. habere quendam cheminum,"* etc., vel *" habere porcos suos ad liberam pessonam,"* etc.

83. Account: *" justifices talem quod . . . reddat tali racionbilem compotum suum de tempore quo fuit ballivus suus,"* etc.

84. Mesne: *" justifices A. quod . . . acquietet B. de servicio quod C. exigit ab eo . . . unde B. qui medius est," etc.* (CA. 33.)

85. *De excommunicatis capiendis.* (CA. 35.)

86. Prohibition to ecclesiastical judges against holding plea of chattels or debt *" nisi sint de testamento vel matrimonio."* (CA. 30.)

87. Prohibition to the party in like case.

88. Attachment on breach of prohibition. (CA. 31.)

89. Prohibition in cases touching lay fee. (CA. 28.)

90. *Recordari facias,* a plea by writ of right in your county court.

91. [1] *Quare ejecit infra terminum. Breve de termino qui non preteriit factum per W. de Ralee: " Si A. fecerit te securum,* etc. *. . . summone,* etc., *B.* etc., *ostensurus quare deforciat A. tantum terre . . . quam D. ei demisit ad terminum qui nondum preteriit infra quem terminum predictus (D) terram illam predicto B. vendidit occasione cujus vendicionis predictus B. ipsum A. de terra illa ejecit ut dicit,"* etc.

92. [2] *" Breve novum factum de communi assensu regni ubi de morte antecessorum deficit."* This is the writ of cosinage.

93. *De ventre inspiciendo.*

94. [3] *" Novum breve factum per W. de Ralee de redisseisina super disseisinam et est de cursu."* Sheriff and coroners are to go to the land and hold an inquest, and if they find a redisseisor to imprison him.

95. [4] *" Novum breve factum per eundem W. de averiis captis et est de cursu."* After a replevin and pending the plea, the distrainor has distrained again for the same cause . . . *" predictum A. ita per misericordiam castiges quod castigacio illa in casu consimili timorem prebeat aliis delinquendi."*

96. *" De attornato faciendo in comitatibus, hundredis, wapentachiis de loquelis motis sine breve Regis."* A writ founded on cap. 10 of the Statute of Merton. Variation when the suit was due to a court baron.

[1] Bracton, f. 220, notices this writ as a newly invented thing. He recommends, however, another form, which is a Precipe quod reddat; but the above is the form which ultimately prevailed. Reg. Brev. Orig., f. 227.

Another of Raleigh's inventions, which we may ascribe to the year 1237. Bracton's Note Book, pl. 92.

[3] Given by Stat. Mert., cap. 3.

[4] This is given by Bracton, f. 159.

97. Prohibition to ecclesiastical judges in a suit touching tithes.

98. Writ directing the reception of an attorney in an action. (CA. 37.)

99. *Precipe in capite.* (CA. 3.)

100. Writs directing sheriff to send knights to view an essoinee and hear appointment of attorney. (CA. 38, 39.)

101. Writ to the bishop directing an inquest of bastardy, the plea being one of " general bastardy."

102. Writ of entry sur disseisin, the defendant having come to the land *per* the disseisor.

103. *Quod permittat* for common by heir of one who died seized.

104. *Quare duxit uxorem sine licencia. Quare permisit se maritari sine licencia.*

105. [1] *Monstraverunt,* for men of ancient demesne.

106. Removal of plea from court baron into county court on default of justice.

107. Surcharge of pasture; *" summone . . . B. quod sit . . . ostensurus quare superhonerat pasturam."* (CA. 20.)

108. Patent appointing justices to take an assise.

109. Prohibition to ecclesiastical judges against entertaining a cause in which B. (who has been convicted of disseising A.) complains that A. has " defamed his person and estate."

110. *De odio et hatia.*

111. Writ of extent. Inquire how much land A. held of us *in capite.*

112. Mainprise, where inquest *de odio et hatia* has found for the prisoner.

113. Writ of seisin for an heir whose homage the king has taken.

114. Writ of inquiry as to whether the king has had his year and a day of a felon's land.

115. *Warrancia diei,* sent to the justices.

116. Extent of land of one who owes money to the Jews.

117. Prohibition against prosecuting a suit touching advowson in Court Christian.

118. Writ to bishop directing an inquiry when bastardy has been specially pleaded: *" inquiras utrum A. natus fuit ante matrimonium vel post."*

119. Writ announcing pardon of flight and outlawry.

120. Writ permitting essoinee to leave his bed. Dated A. R. 33.

121. Abbot of N. has been enfeoffed in N. by several lords

[1] This will hereafter be attracted into the " Writ of Right group " by the Little Writ of Right for men of the Ancient Demesne.

who did several suits to the hundred court. You, the sheriff, are not to distrain the abbot for more suits than one "*quia non est moris vel juri consonum quod cum plures hereditates in unicum heredem descenderint vel per acquisicionem aliquis possideat diversa tenementa quod pro illis hereditatibus aut tenementis diversis, ad unicam curiam fiant secta diversa.*" Dated A. R. 43.[1]

Our first observation would be, that the Register has quite doubled in bulk since we last saw it; and our second should, as I think, be, that chronology has had something to do with the arrangement of the specimen that is now before us. The last two formulas are dated, and probably constituted no part of the Register that was copied, but were added to it, having been transcribed from writs lately issued. But leaving these two last formulas out of sight, I think that the last thirty writs or thereabouts are, for the most part, new writs tacked on by way of appendix to the older Register. The line might be drawn between No. 90 and No. 91. The latter of these, the very important *Quare ejecit infra terminum*, is expressly ascribed to William Raleigh, Bracton's master, whose judicial activity came to an end in 1239. Then No. 92, the Writ of Cosinage, is "*breve novum*," and we know that this was conceded by a council of magnates in 1237, and was penned by Raleigh.[2] Then again, No. 94 is attributed to Raleigh. It is the Writ of Redisseisin, given by the Statute of Merton. The last of this group of "Actiones Raleighanæ" (if I may use that term) deals with the recaption of a distress pending the action of replevin; in spirit it is allied to the Redisseisin.[3] The next writ, No. 96, is given by the Statute of Merton. The prohibition in tithe suits, No. 97, is the centre of a burning question; and so is No. 118, the writ directing the bishop to say whether a child was born before or

[1] In 1258-9 suit of court was a burning question. The Provisions of Westminster (cap. 2) laid down the rule, that when a tenement which owes a single suit comes to the hands of several persons, either by descent or feoffment, one suit and no more is to be due from it. This writ deals with the converse case in which several parcels of land, each owing a suit to the same court, come into one hand, and it lays down the rule that in this case also one suit is to be due.

[2] Bracton's Note Book, pl. 1215.

[3] The printed Registrum, f. 86, says, "istud breve fuit inventum secundum provisiones de Merton." But the Provisions of Merton, as we have them, contain nothing about distress.

after the marriage of its parents. One may be surprised to find this writ at all, after the flat refusal of the bishops given at the Merton Parliament. Of the other writs in this part of the *Registrum*, we may, I think, say that they form an appendix, and are not too carefully made, since some of them appeared in the earlier part of the formulary. Others may be writs newly invented, or old writs that have only of late become "writs of course." The *Monstraverunt* for men of ancient demesne, a writ of critical importance in the history of the English peasantry, is no new thing; but very possibly, until lately, it could not be obtained until the matter had been brought under the king's own eye, or at least his chancellor's eye. The same may, perhaps, be said of the equally important *De odio et hatia*.

In the next place, we see one of the causes at work, which, in the course of time, swells the Register of Original Writs to its great bulk. A group of what we may call fiscal or administrative writs have obtained admission among the writs by which litigation is begun. At present it is small: it includes two writs for "extending" land, and a writ directing livery to an heir whose homage the king has taken; in course of time it will become large.

But turning to the formulas of litigation, we see already a large variety of writs of entry; though as yet the tale is not complete, for writs "in the *post*" have not yet been devised, and would, perhaps, be resented by the feudal lords. The Assize of Mort d'Ancestor is now supplemented by *Nuper obiit* and Cosinage. We see signs of growth in the department of Waste. We have something very like a Formedon. Annuity and Account have been added to the list of personal actions, but Trespass is yet lacking.

A few words about Trespass: The MS. registers that I have seen, fully bear out the opinion that has been formed on other evidence as to the comparatively recent origin of this action.[1] Glanvill has nothing that can fairly be called

[1] I am happy in being able to refer to what is said on this point by "J. B. A." in HARVARD LAW REVIEW, ii., 292. [See also HARVARD LAW REVIEW, iii., 29. — ED.] Of course Trespass (transgressio) was well enough known in the local courts. "Trespass" and "Debt" were the two great heads of their civil jurisdiction.

a writ of Trespass. His nearest approach to such a writ is "*Justicies*," ordering the sheriff to compel the return of chattels taken "unjustly and without judgment;" but the chattels have been taken in the course of a disseisin, and the plaintiff has already succeeded in an Assize.[1] In later days we do not find this writ; its object seems to have been obtained by the practice of giving damages in the Assize.[2] But already, in John's reign, we find a few actions which we may call actions of trespass. In some of these, where there has been asportation or imprisonment, the true cause of action in the royal court seems to be that which our forefathers knew as the "ve de naam;" "vetitum naami;" the refusal to deliver chattels or imprisoned persons upon the offer of a gage and pledge, — a cause of action which had definitely become a plea of the crown.[3] Also, it is in some instances a little difficult to distinguish an action of Trespass from an appeal of felony. Just the dropping out of a single word might make all the difference. Thus, on a roll of Richard's reign A. is said to appeal B., C., and D., for that they came to his land with force and arms, and in robbery ("felony" is not mentioned) and wickedly, and in the king's peace carried off his chattels, to wit turves; whereupon B. defends the felony and robbery, and says that he carried off the turves in question from his own freehold.[4] Attempts were made to use the appeal of felony as an action for trying the title to land, — a very summary action it would have been. But

[1] Glanv., xii., 18; xiii., 39.

[2] Bracton, f. 179 b. "Item ad officium (vicecomitis) pertinet quod faciat tenementum reseisiri de catallis, etc., quod hodie aliter observatur, quia quaerens omnia damna post captionem assisae recuperabit."

[3] Rot. Cur. Reg., ii., 34, "A. optulit se versus B. de placito transgressionis." Ibid., 51, "A. queritur quod B. vi sua asportavit bladum de sex acris terre quas disracionavit in curia Dom. Regis (but here the recovery of the land in the king's court is a special reason for its interference). Ibid., 120, "A. queritur quod B. dominus suus cum vi et armis prostravit boscum et cum forcia frequenter asportat ad domum suam, et quadrigas suas cum forcia in bosco suo de W. capit et adhuc unam illorum habet et detinet injuste." Ibid., 169, "A. queritur quod B. et C. intraverunt in terram suam de X. vi et armis et in pace Regis et averia sua ceperunt et ten" (*corr.* contra.) "vadium et plegium tenuerunt." Ibid., 260, "A. queritur quod Episcopus Donelmensis cepit eum et imprisonavit et eum retinuit injuste quousque ipsum redemit et eum contra vadium et plegium retinuit."

[4] Rot. Cur. Reg., i., 38.

the court of John's reign would not suffer this.[1] On the rolls of the first half of Henry III.'s reign actions of Trespass appear, but they are still quite rare. The advantages of an action in which one can proceed to outlawry are apparent,[2] but something seems to be restraining plaintiffs from bringing it. The novelty of the procedure is shown by the uncertainty of the courts as to its scope, particularly when the action relates to land, and title is pleaded by the defendant. We actually find an action of trespass leading to a grand assize. If title is to be determined at all in such an action, it must be determined with all the solemnity appropriate to a Writ of Right.[3] Bracton, however, who unfortunately has left us no account of this action, shows a reluctance to allow this writ "*quare vi et armis*" to be used for the purpose of recovering land,[4] and a little later we find it repeatedly said that a question of title cannot be determined by such a writ.[5] So late as Edward II.'s reign it was necessary to assert against a decision to the contrary that in an action *de bonis asportatis* the judgment must be merely for damages and not for a return of the goods.[6]

But meanwhile, Trespass had become a common action. This, on the evidence now in print, seems to have taken place suddenly at the end of the "Baron's war." In the *Placitorum*

[1] Selden Society, vol. 1, pl. 35, "appellum de pratis pastis non pertinet ad coronam regis."

[2] Bracton's Note Book, pl. 85.

[3] Rot. Cur. Reg., ii., 120, "A. queritur quod B. dominus suus cum vi et armis prostravit boscum et cum forcia frequenter asportat ad domum suam . . . B. dicit quod A. non tenet vel tenere debet boscum illum de eo . . . A. ponit se in magnam assisam utrum ipse jus majus habeat tenendi de eo boscum vel ipse in dominico. Et B. similiter." Bracton's Note Book, pl. 835, "A. queritur quod B., C., et D. vi et armis et contra pacem Dom. Regis fuerunt in piscaria ipsius A. . . . et E. (vocatus ad warrantiam) venit . . . et dicit . . . quod ipse debet piscari in eadem piscaria cum ipso A., et dicit quod antecessores sui ibi piscari solent et debent et piscati sunt scil. tempore Henrici Regis avi. . . . A. dicit quod predecessor suus fuit seisitus de piscaria illa que fuit separabile suum . . . E. ponit se in magnam assisam."

[4] Bracton, f. 413.

[5] Placit. Abbrev. 142 (38 Hen. III.), "Et quia uterque dicit se esse in seisina de uno et eodem tenemento et non potest per hoc breve de jure tenementi inquiri." Ibid., 162 (1 Ed. I.), "Et quia liberum tenementum non potest per hoc breve de transgressione terminari."

[6] Placit. Abbrev. 346 (17 Ed. II.), "In hujusmodi brevi de transgressione secundum legem," etc., "dampna tantum adjudicari et recuperari debeant."

Abbreviatio we suddenly come upon a large crop of such actions for forcibly entering lands and carrying off goods, and in very many of these the writ charges that the violence was done "*occasione turbacionis nuper habitæ in regno.*" This may suggest to us that in order to suppress and punish the recent disorder, a writ which had formerly been a writ of grace, to be obtained only by petition supported by golden or other reasons, was made a writ of course, — an affair of every-day justice. Such MS. registers as I have seen seem to favor this suggestion. I have seen no register of Henry III.'s reign which contains a writ of Trespass, and it is not to be found even in all registers of his son's reign.

Let us pass on to a new reign. Registers of Edward I.'s time are by no means uncommon. I believe that we have at Cambridge no less than seven which, in the sense defined above, may be ascribed to that age, and there are many at the British Museum. The most meagre of them is far fuller than those Registers of Henry III.'s reign of which we have spoken. To give an idea of their size I may mention a MS. at the Museum (Egerton 656), in which the writs are distributed into groups of sixty; there are seven perfect groups followed by a group which contains but fifty-one members; thus in all there are four hundred and seventy-one writs. This increase in size is of course largely due to the legislative activity of the reign, and this of course makes the various specimens differ very widely from each other in detail. Still I think that I have seen enough to allow of my saying that very early in the reign the general arrangement of the Register had become the arrangement that we see in the printed book. A Register of Edward's day is distinctly recognizable as being the same book that Rastall published under the rule of Henry VIII. Not to lose myself in details about statutory writs, I will draw attention to one principle which may help towards a classification of these Edwardian Registers. That principle is expressed in the question — Does Trespass appear at all, and if so where? There are specimens which have no Trespass; there are others which have Trespass at the end, in what we may regard as an appendix; there are

others again which have Trespass in its final place, namely, in the very middle of the book.

Next I will give a short description of a specimen which I am disposed to give to the earliest years of Edward I. It is contained in a Cambridge MS. (Ee. i. 1) which I will call CC, and the following notes of its contents may be enough. For the purpose of making its scheme intelligible I have supposed it to consist of various groups of writs and have given titles to those groups, but it will be understood that the MS. gives the writs in an unbroken series, a series unbroken by any headings or marks of division.

1. *The Writ of Right Group.* This includes the Writ of Right *de rationabile parte;* Writ of Right of Dower; *Praecipe in capite;* Little Writ of Right; Writs of Peace, and writs summoning the Grand Assize or Jury in lieu of Grand Assize; writ for viewing an essoinee; writs announcing appointment of attorney; *Warrantia diei; Licencia surgendi; Pone; Monstraverunt.*

2. *The Ecclesiastical Group.* Writ of Right of Advowson; Darrein Presentment; *Quare impedit; Juris utrum;* Prohibition to Court Christian in case of an advowson; Prohibition to Court Christian in case of chattels or debts; Prohibition against Waste;[1] Prohibition in case of lay fee. Then follow seven specially worded prohibitions introduced by the note "*Ostensis formis prohibicionum que sont de cursu patebit inferius de eis que sunt in suis casibus formate et sunt de precepto.*" After these come the *De Excommunicato capiendo* and other writs relating to excommunicates.

3. *The Replevin and Liberty Group.* Replevin; a writ directed to the coroners where the sheriff has failed in his duty is preceded by the remark "*primo inventum fuit pro Roberto de Veteri Ponte;*" *De averiis fugatis ab uno comitate in alium; De averiis rescussis; De recaptione averiorum; Moderata misericordia; De nativo habendo,* the limitation is "*post ultimum reditum Domini J. Regis avi nostri de Hibernia in Angliam;*" *De libertate probanda;* Aid to distrain

[1] The reason why Waste gets enclosed in this ecclesiastical group is obvious; the action of Waste is, or has lately been, an action on a prohibition.

villans; *De tallagio habendo; De homine replegiando; De minis,* i. e. a writ conferring a special peace on a threatened person.[1] *De odio et atia* (with the remark that the clause beginning with *nisi* was introduced by John Lexington, Chancellor of Henry III.).

4. *The Criminal Group.* Appeal of felony evoked from county court by *venire facias;* writ to attach one appealed of homicide by his body; writs to attach other appellees by gage and pledge.

5. *A Miscellaneous Group. De corrodio substracto; De balliva forrestarii de bosco recuperanda; Quod attachiet ipsum qui se subtraxit a custodia; Quod nullus implacitetur sine precepto Regis.* Various forms of the *Quod non permittat* and *Quod permittat* for suit of mill, etc.

6. *Account.* Account against a bailiff (" *Et sciendum est quod filius et heres non habebit hoc breve super ballivum domini* [corr. *antecessoris*] *sin, set ut dicitur executores possunt habere hoc breve super ballivum tempore quo fuit in obsequio defuncti;* " it proceeds to give a form of writ for executors in the king's court and then adds, " *Et hoc breve potest fieri ad placitandum in comitatu. Verumptamen casus istorum duorum brevium mere pertinet ad curiam cristanitatis racione testamenti* ").

7. *Group relating chiefly to Easements and the duties of neighbors.* Aid to knight eldest son; *De pontibus reparandis — muris — fossatis; De curia claudenda; De aqua hauri-enda; De libero tauro habendo; De racionabile estoverio; De chimino habendo; De communa,* with variations; Admeasurement of pasture; *Quo jure; De racionalibus divisis; De perambulacione; De ventre inspiciendo.*

8. *Mesne, Annuity, Debt, Detinue, etc. De medio; De annuo reditu; De debito* (only two writs of debt, one a *precipe,* the other a *justicies;* the former has " *debet et detinet,*" the latter " *detinet* "); *Ne plegii distringantur quamdiu principalis est solvendus; De plegiis acquietandis; De catallis reddendis;* (Detinue by *precipe* and by *justicies*); *Warrantia cartae.*

9. *Writs of Customs and Services.*

10. *Covenant and Fine.* The covenant in every case is " *de uno messuagio.*"

11. *Wardship. De custodia terre et heredis; De corpore heredis habendo; De custodia terre sine corpore; Aliter de soccagio.* " *Optima brevia de corpore heredis racione concessionis reddende* [sic] *executoribus alicui defuncti.*"

12. *Dower.* Dower *unde nihil; De dote assensu patris; De dote in denariis; De dote in Londonia; De amensuracione dotis.*

13. *Novel Disseisin.* Novel *disseisin,* the limitation is " *post primam transfretacionem domini H. Regis anni*[1] [sic] *nostri in Brittanniam* "; *De redisseisina;* Assize of nuisance; Attaint.

14. *Mort d'Ancestor,* and similar actions. Mort d'Ancestor, (no period of limitation named); Aiel; Besaiel (*Multi asserunt quod hoc breve precipe de avio et avia tempore domini H. Regis filii Regis Johannis per discretum virum dominum Walterium de Mertone*[2] *tunc secretorium clericum et prothonotorium* [sic] *cancellarie domini Regis et postmodum cancellarium primo fuit adinventum quia propter recentem seisinam et possessionem et discrimina brevis de recto vitandum ab omnibus consilariis et justiciariis domini Regis est approbatum et justiciariis demandatum quod illud secundum sui naturam placitent* "); Cosinage; *Nuper obiit* (" *Et hoc breve semper est de cursu ad bancum in favorem petentis seisinam quod antecessor petentium habuit de hereditate sua et similiter ut vitentur dilaciones periclose que sunt in breve de recto.*")

15. *Quare ejecit infra terminum,* ascribed to Walter of Merton;[3] Writs of Escheat.

[1] A. has complained that he is threatened by B. therefore " prefato A. de prefato B. firmam pacem nostram secundum consuetudinem Anglie habere facias, ita quod securus sis quod prefato A. de corpore suo per prefatum B." etc. It is a writ directing the sheriff to take security of the peace.

[1] The occurrence of this word which may be a corruption of " avi " is not sufficient to make us doubt that in substance this Register belongs to Edward I.'s reign; though possibly a feeble attempt to " bring it up to date " may have been made at a later time.

[2] Walter of Merton seems here to get the credit which on older evidence belongs to William of Raleigh.

[3] Here again Merton seems to be obtaining undue fame at the expense of Raleigh.

16. *Entry and Formedon.* Numerous Writs of Entry, the degrees being mentioned (no writ "in the *post*"); Formedon in the Reverter; and a very general Formedon in the Descender.[1]

17. *Miscellaneous Group.* License to elect an abbot; petition for such license; form of presenting an abbot elect to the King; pardons; grants of franchises; a very special writ for R. de N. impleaded in the court of W. de B.; *De languido in anno bissextili* (concerning an essoin for a year and a day in leap year); *Breve de recapcione averiorum post le Pone; Quod non fiat districtio per oves vel averiis* [sic] *carucarum; Ne aliquis faciat sectam ad comitatum ubi non tenetur; Ne faciat sectam curie ubi non tenetur;* some specially worded Prohibitions.

In substance this MS. seems to represent the Register as it stood in the very first years of Edward I. I do not think that any of the statutes of his reign have been taken into account and doubt whether even the Statute of Marlborough (1267) has yet had its full effect. There is no Writ of Entry "in the *post*" and some writs about distress and suit of court founded on statutes of Henry III. still remain unassimilated in a miscellaneous appendix. The character of that appendix provokes the remark that the copyists of the Register may often have picked and chosen from among the miscellaneous forms of the Chancery those which would best suit the special wants of themselves or their employers. The *congé d'élire*, for example, looks out of place, and the petition for such a license still more out of place; but this is a monastic manuscript and these formulas were useful in the abbey.

I said above that Glanvill's scheme of the law, or rather his scheme of royal justice, might be displayed by some such string of catch words as the following: "Right" (that is proprietary right in land), "Church," "Liberty," "Dower,"

[1] "Praecipe R. quod juste," etc., "reddat H. unam virgatam terre . . . quam W. dedit M. et que post mortem ipsius M. ad prefatum H. descendere debet per formam donacionis quam prefatus W. inde fecit predicto M. ut dicit, et nisi fecerint," etc. What I have seen in this and other Registers favors the belief that there was a Formedon in the Descender before the Statute de Donis. See Co. Lit. 19a; Challis, Real Property, 69.

"Inheritance or succession," "Actions on Fines," "Lord and Tenant," "Debt," "Attorney," "Justice to be done by feudal lords and sheriffs," "Possession," "Crime." Now I will venture the suggestion that the influence of his book is apparent on the face of the Register (CC) and all the later Registers. It begins with "Right" while it puts "Possession," a title which now includes the Writs of Entry as well as the Assizes, at the very end. After "Right" comes "Church," and after "Church" comes "Replevin and Liberty," a title the unity of which is secured by the fact that when a man is wrongfully deprived of his liberty he ought to be replevied. The middle part of the Register is somewhat chaotic, and so it always remains; but it is really less chaotic than it may seem to some of us, whose heads are full of modern notions. We seem indeed to be carried backwards and forwards across the line which divides "personal" and "real" actions; Account, Annuity, Debt, Detinue, and Covenant are intermixed with actions founded on feudal dues and actions founded on easements, writs for suit of mill, suit of court, repair of bridges, actions of Mesne, actions of Customs and Services. The truth, as it seems to me, is that the line between "real" and "personal" actions as drawn in later books is, at least when applied to our medieval law, a very arbitrary line. For example, there is an important connection between an action in which a surety sues the principal debtor (*de plegio acquietando*) and an action of Mesne, in which the tenant in demesne sues the intermediate lord to acquit or indemnify him from the exaction of the superior lord; this connection we miss if we stigmatize "Mesne" as a "real action" just because it has something to do with land. The action of Debt, again, is founded on a *debet;* but so is the action for Customs and Services, at least in some of its forms. However I am not concerned to defend the Register.

In Edward I.'s day, partly it may be under the influence of Glanvill's book, it has become an articulate body. It will never hereafter undergo any great change of form, but it will gradually work new matter into itself. Such new matter will for a while lie undigested in miscellaneous appen-

dixes, but in course of time it will become an organic part of the system. I will mention the most striking illustration of this process.

Hitherto we have never come across that action of Trespass which is to be all important in later days and it seems to me a very noteworthy fact that there are Registers of Edward I.'s day that omit this topic. It gradually intrudes itself. First we find it occupying a humble place at the end of the collection among a number of new writs due to Edward's legislative zeal. Thus, to choose a good example, there is in the Cambridge Library a MS. (Ll. iv. 18) containing a Register which is very like that (Ee. i. 1.) which we have last described. But when it has done with the Writs of Entry, it turns to Formedon, gives writs in the Reverter, Descender, and Remainder, and a number of specially worded writs of Formedon which bear the names of the persons for whom they were drawn: — we have Bereford's formedon, Mulcoster's, and Mulgrave's; clearly the Statute of Westminster II. is in full operation. Then upon the heels of Formedon treads Trespass. It is a simple matter as yet, can be represented by one writ capable of a few variations — *insultum fecit et verberavit, catalla cepit et asportavit, arbores crescentes succidit et asportavit, blada messuit et asportavit, separalem pasturam pastus fuit, uxorem rapuit et cum catallis abduxit.* Trespass disposed of, we have Ravishment of Ward; *Contra formam feffamenti; Ne quis destringatur per averia carucae;* Contribution to suit of court; Pardons; Protections; *De coronatore eligendo; De gaola deliberanda; De deceptione curiæ; cessavit per biennium; carta per quam patria de Ridal disafforestatur; Breve de compoto super Statutum de Acton Burnell,* and so forth and so forth, in copious disorder. The whole *Registrum* fills fifty-two folios, of which no less than the last fourteen are taken up by the unsystematized appendix. Another MS. (Ll. iv. 17) gives a Register of nearly the same date, perhaps of somewhat earlier date, for it does not contain the new Formedons. This again has an unsystematized appendix, and in that appendix Trespass is found. The place at which it occurs may be thus described: — the part of the

Register that has already become crystallized, the part which ends with the Writs of Entry, having been given, we have the following matters: Pardon; License to hunt; Grants of warren, fair, market; *De non ponendo in assisam,* Writ on the Statute of Winchester; Leap year; Inquests touching the King's year and day; Contribution; Beau pleader; Trespass; Gaol Delivery; Intrusion; *congé d'élire; Quo Warranto;* Trespass again; Writ on the Statute of Gloucester; Mortmain; Trespass again (*pro cane interfecto*); *ne clerici Regis compellantur ad ordines suscipiendos,* — as variegated a mass as one could wish to see. Other MSS. of the same period have other appendixes with Trespass in them. They forcibly suggest that the Register was falling into disorder, the yet inorganic part threatening to outweigh the organic.

There came a Chancellor, a Master, a Cursitor with organizing power; Trespass could no longer be treated as a new action; a place had to be found for it, and a place was found. It may be that this was done under Edward I.; certainly in his son's reign it seems an accomplished fact. What was the place for Trespass? If the reader will look back at our account of the Register which we have called CC, he will find that we have labelled the third group of writs as "Replevin and Liberty," the fourth group as "Criminal." The connection between Replevin and Liberty is obvious, it is seen in the writ *De homine replegiando,* the writ for replevying a prisoner. The transition from Liberty to Crime is mediated by the writ *De odio et atia,* a writ for one who says that he is imprisoned on a false accusation of crime. Now when the time had come for taking up Trespass into the organic part of the Register, this was the quarter in which its logical home might be found. It was naturally brought into close connection with "crime." Throughout the Middle Ages, Trespass is regarded as a crime; throughout the Year Books the trespasser is "punished;" and it is a very plausible opinion that the earliest actions of trespass grew out of appeals of felony; they were, so to speak, mitigated appeals, appeals with the "*in felonia*" omitted, but with the "*vi et armis,*" and the "*con-*

tra pacem" carefully retained. Already in the Register that I have called CB, a writ of false imprisonment has come in immediately before the writ for attaching an appellee. Then, in CC, a writ *De minis* has forced its way into the "Replevin and Liberty Group" so as to precede the writs against an appellee. This writ *De minis*, commanding the sheriff to confer the king's peace, the king's "grith" or "mund" we may say, on a threatened person, and to make the threatener find security for the peace is the herald of Trespass: *De minis — De transgressione*, this becomes a part of our "*legalis ordo*."

The result in the fully developed Register is curious, showing us that the arrangement of the book is the resultant of many forces. Let us see what follows Waste. We have the *De homine replegiando*, then the Replevin of chattels, then, returning to men deprived of liberty, the *De nativo habendo* and the *De libertate probanda;* these naturally lead to the writ ordering the sheriff to aid a lord in distraining his villans. There follows the *De scutagio habendo*. Why should this come here? Because in older times villanage had suggested tallage; this had been the place for a *De tallagio habendo* and then tallage had suggested scutage. Then in the printed Register we have the *De minis;* and then an action against one who has given security for the peace and has broken it by an assault, brings upon us the whole subject of Trespass, which with its satellites now fills some forty folios, some eighty pages. And then what comes next? Why *De odio et atia;* we are back again at that topic of "Liberty and Replevin" whence we made this long digression. Meanwhile these criminal writs, these writs for attaching appellees which originally attracted Trespass to their quarter of the Register, have disappeared as antiquated, since persons accused of felony now get arrested without the need of original writs.

Similar measures were taken for writing into appropriate places the result of the legislation of Edward I.; but the formation of new writs was constantly providing fresh materials. Some of these found a final resting-place at the very end of the Register, but for most of the statutory writs, a

home was found in the middle. The occurrence of the Assize of Novel Disseisin marked the beginning of a new and logically arranged section of the work, a section devoted to Possession. It is between Dower and Novel Disseisin that the newer statutory writs are stored.

As already said, the printed Register is full of notes and queries. Many of these are ancient, some as old as the reign of Edward I. Speaking broadly one may say that the Latin notes are ancient, the French notes comparatively modern. Some of them must have been quite obsolete in the reign of Henry VIII.; but the "*vis inertiae*" preserved them. When once they had got into MSS. they were mechanically copied.

During the whole of the fourteenth century the Register went on growing and by the aid of MSS., we can still catch it in several stages of its growth. Some of these MSS. show a Register divided into chapters, and thus make it possible for us to perceive the articulation of the book. As the printed volume gives us no similar aid, I will here set out the scheme of a Register which I attribute to the reign of Richard II. It is contained in a Cambridge MS. (Ff. v. 5). In the right-hand column I give the catch-words of its various chapters; in the left-hand column I refer to what I take to be the scheme of CC, the Register from the beginning of Edward I.'s reign, of which mention has already been made.

1.	The Writ of Right Group.	i. *De recto.*
		ii. *De recto secundum consuetudinem manerii.*
		iii. *De falso judicio.*
		iv. *De attornato generali; Protectiones.*
		v. *De attornatis faciendis.*
2.	The Ecclesiastical Group, including Waste.	vi. *De advocatione; De ultima presentacione; Quare impedit; juris utrum.*
		vii. *De prohibitione.*
		viii. *Consultationes.*
		ix. *De non residentia; De vi laica ammovenda,* etc.

		x.	[1] *Ad jura regia.*
		xi.	*De excommunicato capiendo,* etc.
		xii.	*De vasto.*
3.	Replevin and Liberty Group.	xiii.	Replevin generally and *De homine replegiando.*
		xiv.	Trespass and Deceit *(transgressio in deceptione).*
		xv.	[2] Error.
[4.	Criminal Group dissolved.]	xvi.	*Conspiratio; De odio et atia.*
5.	[Miscellaneous Group. See cap. xix].		
6.	Account.	xvii.	Account.
		xviii.	Debt and Detinue.
7.	Easements, Neighborly Duties, etc.	xix.	*Secta ad molendinum; curia claudenda; Quod permittat,* etc.; *Quo jure;* Admeasurement of pasture; Perambulation; *Warrantia cartae; De plegiis acquietandis.*
8.	Mesne, Annuity, Debt, Detinue.	xx.	Annuity; Customs and Services; Detinue of Charters; Mesne.
9.	Customs and Services.		
10.	Covenant and Fine.[3]	xxi.	Covenant.
11.	Wardship.	xxii.	Wardship.
12.	Dower.	xxiii.	Dower.
		xxiv.	[4] *Brevia de Statuto* (Modern Statutory Actions).
		xxv.	*De ordinatione contra servientes* (Actions on the Statute of Laborers.

[1] A group of especially stringent prohibitions called out by papal and ecclesiastical aggression.

[2] The topic of Error is suggested by Trespass, just as the topic of False Judgment is suggested by "Right."

[3] The action on a fine by original writ has disappeared, because fines are now enforced by *Scire Facias.* This is noted in the printed Register, f. 169.

[4] Here come two chapters of statutory appendix.

13.	Novel Disseisin.	xxvi.	Novel Disseisin.
		xxvii.	*De recordo et processu mittendo* (Writs ancillary to the Assizes).
14.	Mort d'Ancestor, and similar writs.	xxviii.	Mort d'Ancestor.
		xxix.	Aiel, Besaiel, *Nuper Obiit,* etc.
15.	*Quare ejecit.*	xxx.	*Quare ejecit; De ejectione firmae.*
16.	Entry.	xxxi.	Entry *ad terminum qui preteriit.*
		xxxii.	Entry, *Cui in vita.*
		xxxiii.	Intrusion.
		xxxiv.	Entry for tenant in dower.
		xxxv.	Cessavit.
		xxxvi.	Formedon.
		xxxvii.	*De tenementis legatis.*
17.	Miscellaneous group.	xxxviii.	[1] *Ad quod damnum.*
		xxxix.	*De essendo quieto de theolonio.*
		xl.	*De libertatibus allocandis.*
		xli.	*De corrodio habendo.*
		xlii.	*De inquirendo de idiota; De leproso amovendo,* etc.
		xliii.	Presentations by the king, etc.
		xliv.	*De manucaptione et supersedendo.*
		xlv.	*De profero faciendo; De mensuris et ponderibus.*
		xlvi.	*De carta perdonacionis se defendendo.*
		Appendix.	*De indemptitate nominis.* Statutory writs; *Decies tantum,* etc.

A Register from the end of the fourteenth century is in point of form the Register that was printed in Henry VIII.'s

[1] Here begins a long appendix consisting mainly of documents that may be called administrative.

day. If I might revert to my architectural simile, I should say that the cathedral as it stood at the end of Richard II.'s reign was the cathedral in its final form; some excrescent chantry chapels were yet to be built but the church was a finished church and was the church that we now see. In the printed book we can detect but very few signs of work done under Tudor or even under Yorkist kings, and though the Lancastrian Henries have left their mark upon it, still that mark is not conspicuous. I should guess that the last occasion on which any one went through the book with the object of adding new writs and new notes occurred late in the reign of Henry VI.[1] On the other hand we constantly find references to decisions of Richard II.'s time, and there are many signs that the book was revised and considerably enlarged in the middle of Edward III.'s reign; allusions to decisions given between the tenth and twentieth years of the last-named king are particularly frequent, and we read more of Parning than of any other chancellor. This is a curious point. Robert Parning, as is well known, was one of the very few laymen, one of the very few common lawyers, who during the whole course of medieval history held the great seal. He held it for less than two years; he became chancellor in October, 1341 and died in August, 1343; yet during this short period, he stamped his mark upon the Register. The policy of having a layman (a "layman," that is, when regarded from the ecclesiastical not the legal point of view) as chancellor was very soon abandoned; few if any laymen were endowed with the statecraft and miscellaneous accomplishments required of one who was to act as "principal secretary of state for all departments." But within the purely legal sphere, as manager of the "*officina brevium*," a great lawyer who had already been chief justice may have found congenial work. After all, however, it may be chance that has preserved his name in the pages of the Register; just in his day some clerk may have been renovating and recasting the old materials and thus have done for

[1] Reg. Brev. Orig. f. 12, 31, 58, 288, 289 b, 291, 308, show work of Henry VI.'s reign.

him what some other clerk a century earlier did for William Raleigh.

During the fifteenth century the Register increased in bulk but except in one department there seem to have been but few additions made to the formulas of litigation; the matter that was added consisted, if I mistake not, very largely of documents of an administrative kind, — pardons, licenses to elect and other licenses, letters presenting a clerk for admission, writs relating to the management of the king's estates, writs for putting the king's wards in seisin, and so forth, lengthy formulas which conceal what I take to be the real structure of the Register. As a final result we get some seven hundred large pages, whereas we started in Henry III.'s day with some fifty or sixty writs capable of filling some ten or twelve pages. The department just mentioned as exceptional is of course the department of Trespass. Here there has been rapid growth; but I do not think that the printed book can be taken as fairly representing the law of the time when it was printed, namely 1531. It draws no line at all between "Trespass" and "Case." The writs that we call writs of "Trespass upon the special Case" are mixed up with the writs which charge assault, asportation, and breach of close, and are very few. Writs making any mention of assumpsit are fewer still, and I think that there is but one which makes the non-feasance of an assumpsit a ground of action.[1] I should suppose that the practice of bringing actions by bill without original writ checked the accumulation of new precedents in the Chancery, and it seems an indubitable fact that the invention of printing had some evil as well as many good results; men no longer preserved and copied and glossed and recast the old manuscripts. But when all is said it is a remarkable thing that a Register which certainly did not contain the latest devices should have been printed in 1531, reprinted in 1595, and again reprinted in 1687. The consequence is that Trespass to the last appears as an intruder. No endeavor has been made to reduce the writs that come under that head to log-

[1] Reg. Brev. Orig. f. 109 b, a writ against one who has "assumed" to erect a stone cross and has not done it.

ical order. The forces which have determined the sequence of these writs seem chiefly those which I have called "chronology" and "mechanical chance;" as new writs, as they were made, were copied on convenient margins and inviting blank pages. There has been no generalization; the imaginary defendant is charged in different precedents with every kind of unlawful force, with the breach of every imaginable boundary, with the asportation of all that is asportable, while the now well-known writs against the shoeing smith who lames the horse, the hirer who rides the horse to death, the unskilful surgeon, the careless innkeeper creep in slowly amid the writs which describe wilful and malicious mischief, how a cat was put into a dove-cote, how a rural dean was made to ride face to tail, and other ingenious sports. It would be interesting could we bring these Registers to our aid in studying the process whereby Trespass threw out the great branch of Case, and Case the great branch of Assumpsit; but the task would be long and very difficult, because the Registers are so many, and unless we compare all of them our means of fixing their dates are few and fallible. Of course, if the task concerned the history of Roman Law it would be performed; but we are all fully persuaded, at least on this side of the Atlantic, that our own forefathers were not scientific.

37. AN ACTION AT LAW IN THE REIGN OF EDWARD III.[1]

By Luke Owen Pike[2]

IT has been suggested that a paper on the relation of the reports of cases in the Year Books to the records of the same cases found among the Public Records might be of some interest to those readers who are giving attention to the history of law and of legal procedure. In the following pages an attempt is made to show, not in very great detail (for the details would be endless), but in a general way, in what manner the two sources of information differ, and why.

The report and the record were drawn up for two wholly different purposes. The report was intended for the use of the legal profession, including the judges. It was designed to show general principles of law, pleading, or practice. It was, of course, always a report of a particular case, but of one reported solely because it contained, or was supposed to contain, matter of general use. For this reason, the names of the parties and of places were frequently omitted, or represented by letters chosen at hazard, or, if given at all, given most inaccurately. They were not the facts which the lawyer wished to know, and would not help to guide him in his pleading, except in cases in which an argument turned upon a description or a misdescription.

[1] This essay was first printed in the Harvard Law Review, vol. VII, pp. 266-280 (1894), under the title "An Action at Law in the Time of Edward III."

[2] Barrister at Law, and Editor of the Year-Books of the Reign of Edward III (Rolls Series). Oxford University, M. A., 1861.

Other Publications: A History of Crime in England, 1873-76; A Constitutional History of the House of Lords, 1894; The Public Records and the Constitution (Oxford Lecture, 1907); article "Crime" in the Encyclopedia Britannia, 9th ed., etc.