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Book Reviews

Ex Nihilo Nihil

The Birth of the English Common Law. By R. C. Van Caenegem. Cambridge: Cambridge University Press, 1973. Pp. vii, 160. \$8.50.

Reviewed by Morris S. Arnold†

Royal justice was rarely invoked in England at the beginning of the twelfth century, but, as many medievalists have recently noted, during the course of the century it became generally available to litigants and was more or less commonly sought in lieu of feudal or seignorial justice.¹ This remarkable and indisputable development is apparent from even a cursory comparison of the *Leges Henrici Primi* (circa 1115)² with Glanvill's *Tractatus de Legibus* (circa 1188).³ Yet the exact steps in this process, and more important, the theories of government that made the change possible, have been the subject of much debate. The work of Professor Van Caenegem has been conspicuous in this debate, and his present book, as its author notes, is in the main an abridged recapitulation of the views expressed at much greater length in his *Royal Writs in England from the Conquest to Glanvill*.⁴ It is good to have those ideas in the more succinct and accessible form in which they are now presented.⁵

I

The gradual displacement of local courts by central royal justice was once seen in terms of a jurisdictional battle between a grasping and usurping central government and a local nobility less than willing to surrender judicial power. Magna Carta, clause 34—which prohibits

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1. The primary contributions are H. RICHARDSON & G. SAYLES, *THE GOVERNANCE OF MEDIEVAL ENGLAND FROM THE CONQUEST TO MAGNA CARTA* (1963); D. STENTON, *ENGLISH JUSTICE BETWEEN THE NORMAN CONQUEST AND THE GREAT CHARTER: 1055-1215* (1966); R. VAN CAENEGEM, *ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL* (1959).

2. The modern edition is L. DOWNER, *LEGES HENRICI PRIMI* (1972).

3. The best edition is G. HALL, *TRACTATUS DE LEGIBUS ET CONSUECUDINIBUS REGNI ANGLIE QUI GLANVILLA VOCATUR* (1965).

4. R. VAN CAENEGEM, *supra* note 1.

5. R. VAN CAENEGEM, *THE BIRTH OF THE ENGLISH COMMON LAW* (1973) [hereinafter cited to page number only].

“the writ *praecipe* by which a free man may lose his court”—was viewed as an attempt (although all realize it proved futile) to restore in some measure the original jurisdictional autonomy of the feudal lords; thus some modern commentators have arrayed imperial pretensions against local sovereignty.⁶ This was exciting stuff, providing historians of the cataclysmic school opportunities to speculate on the personal characters of the principal actors—of Henry II, Richard, and especially John—and to develop sweeping generalities based on the “national spirit” of the English. All this is now antique, however, because a more sober examination of the sources has uncovered complexities against which these modes of analysis are impotent.⁷ Modern historical thought tends to minimize drastically the competitive nature of the centralizing forces and underplay the confrontation between feudal and royal jurisdiction.⁸

It seems more accurate now to describe the disappearance of feudal jurisdictions as a gradual withering process and to see the concomitant triumph of royal justice as a development which the feudal magnates acquiesced in or even actively encouraged.⁹ Our understanding of the broad trends in the twelfth century accommodates this description. In a truly feudal world the lord’s right to decide in his own court cases involving land in his fee was obviously the crucial element of feudal jurisdiction: for to decide rights to land in the fee was to decide who could enter the lord’s land. This unremarkable power to exclude an interloper remains one of the ordinary indicia of ownership in present-day law; it flows less from public notions of jurisdiction than from private notions of property. The economic revival and expanding money economy of the twelfth century led in part to an increased use of paid troops,¹⁰ which in turn helped diminish the lord’s power over his land and tenants. So also did natural occasions for the applications

6. See, e.g., W. McKECHNIE, *MAGNA CARTA* 346 (2d ed. 1914): “In extorting from John a solemn promise to restrict the use of this particular writ, the barons gained something of infinitely greater value than a petty reform of court procedure; they committed their enemy to a reversal of a line of policy vigorously pursued for half a century. The process by which the jurisdiction of the King’s courts was undermining that of the feudal courts was now to be arrested.”

7. Hurnard, *Magna Carta Clause 34*, in *STUDIES IN MEDIEVAL HISTORY PRESENTED TO F.M. POWICKE* 157 (R. Hunt ed. 1948).

8. H. RICHARDSON & G. SAYLES, *supra* note 1, at 384, devote almost no time to the feudal courts and state that clause 34 was merely intended “to simplify the procedure under which a lord claimed an action for his own court.”

9. See, e.g., Hurnard, *supra* note 7. Magna Carta, clause 17, providing that the court of common pleas should be held at some fixed place, and clause 18, providing for regular visits of assize justices, indicate quite clearly that the feudal classes had no general objection to royal justice.

10. See C. HOLLISTER, *THE MILITARY ORGANIZATION OF NORMAN ENGLAND* 270 *passim* (1965).

of the lord's justice diminish; as he lost what would now be called the elements of ownership over property, his jurisdiction—based on control of property—disappeared.

A good story would be needlessly lost, however, by a refusal to see any competition at all between baronial and central courts. Magna Carta, clause 34, must stand for more than the symbolic assertion of seignorial rights long obsolete and abandoned.¹¹ First, although the twelfth century development of the tenant's powers of alienation and heir's right of inheritance severely restricted the lord's "ownership" rights in his fees,¹² nonetheless the incidents of feudal tenure remained quite lucrative. The lord's desire to maintain these incidents, such as wardships and marriages, would result in some continued interest in retaining jurisdiction over rights to land. Second, the mere existence of clause 34 indicates that lords desired to keep at least ultimate jurisdiction over the question of entitlement to lands within their respective fiefs. The only other explanation is that the barons, in a fit of pique, insisted on including in Magna Carta an undesired concession which they forced from the defeated king only to demonstrate their awful power over him. This rationale must surely be a distortion, a fit of fancy.

Richardson and Sayles, in their recent book, have gone a great distance toward dismantling the neat and inaccurate picture of English medieval government as a vertical hierarchy conforming to some rigid feudal organizing principle, with the king as suzerain only.¹³ Yet even if the king was always something more than the richest and most powerful landlord in England, and even if the English structure of government was far flatter than strict feudal theory would admit, antipathy and competition between seignorial and royal justice nevertheless must have existed at some level. The particular writ *praecipe quod reddat* at which clause 34 was evidently aimed robbed the lord's court of first-instance jurisdiction: It short-circuited the feudal framework and brought litigation directly to the *Curia Regis*. Apparently the writ annoyed the nobility enough to insist on clause 34, by which they indicated some intention to retain their lordly jurisdictions. It seems, then, that the assize of novel disseisin, the invention of Henry II's reign which extended to all freeholders disseised "unjustly and without judg-

11. Clanchy, *Magna Carta, Clause Thirty-Four*, 79 *ENG. HIST. REV.* 542 (1964), makes clear what was not clear before: the writ *praecipe quod reddat* disappeared altogether after Magna Carta and was replaced by the writs *praecipe in capite* and *praecipe quia dominus remisit curiam suam*.

12. See Thorne, *English Feudalism and Estates in Land*, 1959 *CAMB. L.J.* 193 (1959).

13. See generally H. RICHARDSON & G. SAYLES, *supra* note 1.

ment" the efficiencies of direct royal justice, was on its face an interference in feudal jurisdictions which would be met with resentment. Thus, instead of denying the likelihood of resentment, it seems necessary to devise a theory accounting for the lords' acceptance of this encroachment on their jurisdictional domains.

The barons, apparently, were content to permit the king his action of novel disseisin but kept for themselves the ultimate power to decide the question of the right to land.¹⁴ This compromise, ideally suited to a system of dual sovereignty, vindicated the central authority's right to enforce order through summary process—for the assize was "possessory"—and yet recognized that the lord, by the writ of right, had jurisdiction over the ultimate question of entitlement. Henry II himself may have claimed some personal jurisdiction over land. The Norman kings had been careful to claim from St. Edward by hereditary right and had reinforced their putative Englishness by confirming to the English their old laws. In succeeding to the Anglo-Saxon throne, Henry may have considered himself to be succeeding also to the jurisdiction over land exercised by early English kings. When forcefully and unpleasantly presented with the ecclesiastical theory of the state in his confrontation with the church, moreover, Henry may have adopted for his imperial purposes the church's description of the king as "the minister of the common interest . . . [who] bears the public person in the sense that he punishes the wrongs and injuries of all"¹⁵ The lords' claims, on the other hand, were sanctioned by long years of feudal custom and by the logic of private property as it was then understood.

The argument over ultimate jurisdiction of questions of entitlement to land was mooted, in a large number of cases, perhaps a majority, because the outcome of the assize would dictate a similar result in an action on the right. This would be most obviously true of the *praecipe* writs of entry which proliferated after Magna Carta;¹⁶ hardly ever would a writ of right, though always theoretically available, produce a result different from the judgment on a writ of entry. The later development of elaborate proprietary pleas in bar to the assize of novel disseisin¹⁷ also helped diminish the number of occasions when resort to a writ of right, and thus to feudal jurisdiction, would be a worthwhile enterprise. The marginal feudal jurisdiction, in effect, existed in the theoretical region between actions asserting absolute rights to land

14. Magna Carta provided for regular visits of the assize. See note 9 *supra*.

15. JOHN OF SALISBURY, *POLICRATICUS* 7 (J. Dickinson transl. 1963).

16. See generally 2 F. POLLOCK & F. MATTLAND, *THE HISTORY OF ENGLISH LAW* 62 *passim* (2d ed. reissued 1968).

17. See D. SUTHERLAND, *THE ASSIZE OF NOVEL DISSEISIN* 153 *passim* (1973).

and less *droiturel* actions such as the assize. In the twelfth and early thirteenth centuries, this region shrank nearly to nothingness. Therefore the lord who complained of the interferences of royal jurisdiction evidently would have to be satisfied with the reply that his jurisdiction remained intact: The writ of right was still available, and belonged to the feudal courts. The general feudal proposition that land cases belong to the lord of the land was exploded. Yet the odd structure of English real remedies—the vertical progression from purely possessory to absolutely *droiturel*—bears the imprint of the old vertical feudal world which it eventually brought down; in fact, the remedies may have assumed their odd structure as a result of efforts to circumvent the levels of authority in the vertical feudal world.

A somewhat different explanation of novel disseisin's role in the developing government structures of the twelfth century has been offered recently by Professor Milsom.¹⁸ He sees the assize as initially designed to buttress the feudal tenant-lord relationship by providing tenants royal remedies against lords acting contrary to feudal principles. The assize, he maintains, was originally designed to operate against lords as disseisers. He deduces this theory partly from the opinion that the verb "to seize" was employed originally to describe what a lord does when he puts his tenant in possession; to "disseise," therefore, is what a lord does when he puts his tenant out of possession "unjustly and without judgment." Milsom's idea is quite appealing, and it is not altogether unlikely that a desire to protect tenants against lords generated the assize. Professor Sutherland, in his new book on the action,¹⁹ sees it otherwise; but both Milsom and Sutherland agree that the assize, far from buttressing feudal jurisdictions, in the end contributed significantly to their collapse.²⁰ In any event, the lords perhaps were never comforted by the idea that the assize would preserve the feudal order and the effects of the assize would certainly justify lordly disquiet from its very inception.

Professor Sutherland's book appeared too late for Van Caenegem to deal with in *The Birth of the English Common Law*, but it seems singularly odd that he has ignored Professor Milsom's striking thesis of the assize's origin. At any rate, Professor Van Caenegem has a very different explanation of the growth of royal jurisdiction. He sees the growing royal jurisdiction as the natural solution to the confusion

18. S. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 118-19 (1969); Milsom, *Introduction* to I F. POLLOCK & F. MAITLAND, *supra* note 16, at xl-xliv.

19. D. SUTHERLAND, *supra* note 17, at 30-31, 214-15.

20. S. MILSOM, *supra* note 18, at 119; D. SUTHERLAND, *supra* note 17, at 80 *passim*.

engendered by the welter of local courts, ecclesiastical and secular, to which application for redress might properly be made in the days of the Norman kings. The old English courts (the county and the hundred) were left intact by the conquerors, and the feudal courts were instituted by their side. The question of proper venue for a particular action could be enormously complex and "the inevitable result of it all was a good deal of overlapping, uncertainty and confusion. . . . It is no wonder that many court records leave an impression of basic weakness, hesitation and slowness."²¹ So, he concludes, royal orders to do right "without delay" were necessary to cure the "evil of the age": *penuria recti or defectus justicie*.²²

Professor Van Caenegem's assessment of the impotence of feudal and other local courts may be exaggerated and is, in any event, almost entirely conjectural.²³ Moreover, the connection between the availability of a number of courts and the assertion that there was a resulting lack of justice is tenuous. Nevertheless, Van Caenegem is right to see the procedural difficulties inherent in such a fragmented system, especially when the parties lived in different fiefs. American lawyers may see central court jurisdiction in such instances as analogous to the federal diversity jurisdiction; but whereas the development of a federal common law in such cases was halted by *Erie Railroad v. Tompkins*,²⁴ the English central courts developed a law which applied in all cases regardless of the residence of the parties or site of the action. Van Caenegem refers quite frequently to this common law,²⁵ yet while its existence cannot be denied it should be remembered that the royal justices often ruled according to well-established local custom rather than the general common law. Bracton marks many local peculiarities, and he constantly had to qualify his generalities by references to possible local aberrations.

Van Caenegem's explanation of the growth of English royal justice includes his famous "judicialization" theory: that many common law writs began as mere executive orders and only later became means to initiate litigation—*i.e.*, writs of summons.²⁶ Royal intervention in feudal jurisdictions began in these executive orders: these were writs of command issued after an *ex parte* hearing of a claimant's story; the

21. Pp. 15-16.

22. P. 17.

23. For citations to the literature on this subject, see D. SUTHERLAND, *supra* note 17, at 214-15.

24. 304 U.S. 64 (1938).

25. See, *e.g.*, pp. 20, 22, 24, 29, 90, 91.

26. Pp. 33 *passim*.

king or his ministers would peremptorily command an unheard adversary, or a royal minister, to restore to the petitioner some right which was withheld. This could lead, the argument runs, to the adversary obtaining a rescinding command, thus producing what the author calls a "war of writs."²⁷ The solution was "to judicialize royal interventions, *i.e.*, to surround them with the necessary judicial guarantees, to ensure fair examination of the merits of the case"²⁸ In this fashion "judicialization turned these executive measures into original writs and judicial instruments initiating formal lawsuits"²⁹

The evidence for Professor Van Caenegem's theory is, first, the form which the *praecipe* writ exhibited for centuries: It commenced with a mere order to do or stop doing something and when it came to be employed to initiate litigation, the argument runs, a clause was tacked on the end commanding the offender to come and tell the king's court why he did not do as ordered. The writ *praecipe* was thus "not redrafted after it became a simple writ of summons, but nobody expected the opening command—a mere fossil—to be carried out."³⁰ Professor Van Caenegem's interpretation of the available evidence as supporting his judicialization pattern is not unreasonable, and indeed the theory has a certain amount of appeal. It may well be that some of the common law writs in some way have their beginnings in earlier executive prototypes.

Some caution, nonetheless, is appropriate before accepting Van Caenegem's "judicialization" theory. There is, first, no way of knowing what lay in the mind of the king or, more likely, the king's ministers, when certain *ex parte* orders were issued. It is not at all clear, for instance, that some of these peremptory writs might not have been employed in much the same way as temporary restraining orders are today. Thus, further litigation may have been contemplated after the issuing of certain *praecipe* writs, even without the "show cause order" added to the end of the writ. Moreover, some *praecipe* writs may have been used as writs of execution after a full hearing; because they fail to recite the existence of a hearing preceding the writ's issue, they may appear falsely as mere *ex parte* orders.

II

In his new book, Professor Van Caenegem interests himself again in the extent to which the English legal system is indebted to foreign

27. Pp. 37, 56.

28. P. 39.

29. P. 34.

30. Pp. 50-51.

influences for its institutions and ideas of liability. To the debate over the origin of the jury not much can be added. The jury's central idea, that the best way to discover facts is to ask people who live in the vicinity where the facts presumably occurred, is simple enough that one need not impute it to any administrative genius—either of the Normans or anybody else.³¹ Professor Van Caenegem sees the jury as a *tertium quid*, an amalgam of Norman and indigenous Anglo-Saxon fact-finding institutions.³² That there was a Norman contribution at all, however, is difficult to maintain since there is not one example known of the use of a jury in Normandy prior to 1066.³³ Perhaps it is not irrelevant to note that the most assiduous supporters of Norman origins for the jury are continental writers,³⁴ English medievalists, on the other hand, have stoutly, and almost unanimously, argued for the jury's insular roots.³⁵

A more interesting question, however, is the debt, if any, which English law owes to the twelfth-century Roman law revival on the continent. Much literature has been devoted to this subject,³⁶ and happily it has recently attracted a number of new investigators.³⁷ Van Caenegem himself has made large and interesting contributions in this area;³⁸ and his book is perhaps most interesting when treating this question.³⁹ Most scholars agree that true substantive borrowings, such as rules resulting from raids on the *Corpus Juris Civilis* and its associated literature, are extremely rare. A body of law, after all, is not an isolated intellectual system which can be transferred at will to different societies without regard to the political and economic environment in which its rules must operate.⁴⁰ The Roman revival, however, may have made popular the perception that the law could be approached scientifically, organized according to principle, and, perhaps, manipulated for the sovereign's purposes. English lawyers took some time to learn these lessons, but the example of the Roman lawyers may have provided helpful impetus.

31. For the view that the jury was imported by the Normans, see H. BRUNNER, *DIE ENTSTEHUNG DER SCHWURGERICHTE* (1871).

32. Pp. 72-73.

33. Van Caenegem himself makes this point. P. 74.

34. See, e.g., H. BRUNNER, *supra* note 31.

35. See, e.g., H. RICHARDSON & G. SAYLES, *supra* note 1, at 205-08.

36. See generally Plucknett, *The Relations Between Roman Law and English Common Law down to the Sixteenth Century: A General Survey*, 3 *TORONTO L.J.* 24 (1939).

37. D. SUTHERLAND, *supra* note 17, at 20-24, makes the latest contribution to the question of the Romano-canonical influences on the assize of novel disseisin.

38. See R. VAN CAENEGEM, *supra* note 1, at 349-90.

39. Pp. 85-110.

40. See Thorne, *English Law and the Renaissance*, in *LA STORIA DEL DIRITTO NEL QUADRO DELLE SCIENZE STORICHE* 437 (1966).

There are, further, two principal reasons why English legal historians ought to devote attention to the medieval Roman law. The first, and more obvious, is that an insular immersion in English law may give a student the sense that its rules are the inevitable products of reason and observation—as medieval English lawyers themselves believed. Historians may dispel that illusion by revealing to students that other equally “reasonable” rules of law existed in the middle ages which were capable of solving legal problems. A second reason for familiarity with Roman law principles rests on the odd circumstance that continental legal systems were greatly affected by those principles while England’s law shows almost no substantive influence. Why did England alone remain relatively unaffected?

Professor Van Caenegem alludes to several possible explanations,⁴¹ but in the end he attributes the English aberration to the fact that “a centralized and modernized legal system took place exceptionally early in England (and Normandy) before Roman law was in a position to exert any profound influence.”⁴² This explanation, however, as Van Caenegem realizes,⁴³ only leads one to ask why the English were in this respect so precocious. The old Anglo-Saxon state was certainly remarkably centralized and modern for its day;⁴⁴ and no doubt the Norman conquest was facilitated by the pre-Hastings centralization of government in the country.⁴⁵ And so the common law for the most part eluded the influence of the universities which flourished later in the middle ages; it was born and continued “an anomaly, a freak in the history of western civilization, less modern because it was modernized earlier”⁴⁶ Yet still unelaborated are the reasons for the early coherence of English law.

III

Professor Van Caenegem’s patient and exhaustive work in the scattered records of this period has greatly increased our knowledge of the details and causes of the significant legal changes occurring in twelfth-century England. Some caveats, however, perhaps may be usefully advanced here. Van Caenegem’s concentration on writs—necessary since other sources, though not entirely wanting, are meager⁴⁷—almost

41. Pp. 86 *passim*.

42. P. 90.

43. P. 92.

44. P. 107.

45. Cf. J. DAWSON, *THE ORACLES OF THE LAW* 295 (1960).

46. P. 105.

47. Professor Van Caenegem is presently at work on a replacement for M. BIGELOW, *PLACITA ANGLO-NORMANICA* (1879), which is a compilation of reports of cases gleaned from chronicles and other descriptions of actual litigation.

inevitably turns the reader's thoughts to those supposedly ineradicable categories known as the "Forms of Action."⁴⁸ The association of the growth of the common law's substantive ideas with the growth of writs has in the past resulted in the false view that the substantive idea represented in a later form of action, or writ, somehow grew out of a simpler substantive idea present in an earlier, simpler writ. This seductive idea may be irresistible to a generation whose minds are polluted in the social sciences by the Idea of Progress and in the physical sciences by Darwinism. But Professor Milsom demonstrated convincingly in his work on the "action" of trespass, for instance, that there is no such simple relationship between earlier and later writs employed to redress wrongs.⁴⁹ It seems likely that other examples can be exposed after a systematic, comprehensive examination of available plea roll evidence.

An association of the change in the *Registra Brevium* with the growth of the law, then, may promote the mistaken impression that legal thought about remediable wrongs developed in the same ways as did the *Register*. The truth more often is that the appearance of new royal remedies represents a jurisdictional shift from the local or even ecclesiastical courts into the royal courts. Inventions of novel substantive liabilities in medieval England are extremely rare, perhaps virtually nonexistent. No doubt some statuses changed; for instance, a guardian in socage did become liable to account.⁵⁰ And the notion of strict liability for damages in a particular set of circumstances occasionally might relax sufficiently to admit some concept of culpable negligence. Generally, however, the subtler rules of liability are not to be perceived in the wording of writs. It is more likely that "rules" of this sort are to be discerned not by investigating the mysteries of chancery pleading or even the erudite verbal fencing of serjeants-at-law, but instead are to be discovered by reconstructing the attitudes of the community whose representatives, the jury, had in many instances unbridled authority to decide cases.⁵¹

There is indeed much to be learned still from an examination of the *Register*. The legal historian of medieval England who wants to answer the important questions, however, must develop research tech-

48. Professor Van Caenegem himself invites the reader's attention in this direction. Pp. 33, 41.

49. Milsom, *Trespass from Henry III to Edward III* (pts. 1-3), 74 L.Q.R. 195, 407, 561 (1958).

50. Statute of Marlborough, c. 17 (1267). It is possible that the obligation to account previously existed and only the royal remedy was new.

51. For an example of such a reconstruction, see Green, *Societal Concepts of Criminal Law Liability for Homicide in Medieval England*, 47 SPECULUM 669 (1972).

niques and methods of analysis which face the reality that the life of the medieval common law did not lie principally in the stereotyped writs that initiated litigation. The law did come to be so regarded, or at least the nineteenth-century reformers said it did; but this development occurred long after the medieval period. The essential story of the law's later dependence on writs can be fairly well documented in the history of attempts to control the jury's authority, although this story remains to be told. The tendency to see the beginning of this development in medieval centuries, however, must be resisted assiduously, and medieval legal history must be seen as something more than a branch of archival study.