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NOTES ON COURTS OF RECORD IN ENGLAND*

S. E. Thorne**

Heinrich Brunner long ago found the origin of courts of record in an extension to the records of their courts of the privilege of incontestable documentation possessed by the Frankish kings.1 It had long been a commonplace that the documents of the Merovingian and Carolingian kings as contrasted with contemporary private documents dispense with witnesses, but Brunner first pointed out that the absence of witnesses was due to the incontestability of these documents which made the rogatio testium and hence the subscriptio testium superfluous.2 But, though it was therefore impossible to question the material content (sachliche Inhalt) of the document, it was always possible to dispute its
documentation.3

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1 Professor Plucknett has pointed out that curious modern definition of a court of record as one which can find and imprison (per. Lord Holt in Groenvelt v. Burwell (1997) 1 Ld. Raym. 454, 467) is itself evidence that the term 'court of record' has had a tortuous history. The purpose of these notes is not to trace that history in detail but rather to throw some light upon two of the many facets the problem presents. The enormous scope of the problem and the absence of any treatment of the subject must explain both the presence of what may seem two distinct papers under one title and the publication of two parts of a homogeneous work before the connecting framework has been fully completed.

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2 Zeugen- und Inquisitionsbeweis der karolingischen Zeit in 15 Sitzungs-berichte der phil-hist. Klasse der Wiener Akademie (1866) 343, 384-85; Forschungen zur Geschichte des deutschen und französischen Rechtes (1894) 88, 128; Wort und Form im altfranzösischen Prozess in 73 ibid. (1868) 655, 664-68; Forschungen (1894) 260, 268ff; Die Entstehung der Schwurgerichte (1872) 50, 139-95; Das Gerichtszeugnis und die französische Konigsurkunde in Festgaben für A. W. Heffer (1875) 123-1 Abhandlungen zur Rechtsgeschichte (1931) 417; Carta und Notitia in Commentationes in honorum Th. Mommseni (1877) 570-1 Abhandlungen zur Rechtsgeschichte (1931) 458; Die Zulassigkeit der Anwaltschaft im französischen, normannischen und englischen Rechts des Mittelalters (1878) 1 Zeitschrift für vergleichende Rechtswissenschaft 321, 356ff; Forschungen (1894) 389, 418ff; Zur Rechtsgeschichte der bömischen und germanischen Urkunde (1880) 570ff; 1 Deutsche Rechtsgeschichte (1906) 583f; 2 ibid. (1928) 560.

3 Das Gerichtszeugnis und die französische Konigsurkunde, 438-441; 1 Deutsche Rechtsgeschichte, 578-79; and his explanation has been adopted by diplomatists: Redlich, Allgemeine Einleitung zur Urkundenlehre in Eben-Schmitz-Kallenberg, Urkundenlehre (1907) 31; Heuberger, Allgemeine Urkundenlehre (1921) 30f; Giry, Manuel de Diplomatique (1925) 82f; Steinacker, Die antiken Grundlagen der fruhmittelalterlichen Privaturkunde (1927) 8. Bresslau (2 Handbuch der Urkundenlehre (1915) 204) expresses the distinction succinctly: 'Die Grunde fur diesen Unterschied (between private witnessed and royal unwitnessed documents) erheben aus dem, was friher über die Stellung und den Wert der Konigsurkunde im Beweisverfahren bemerkt worden ist (1 ibid. (1912) 640ff); die Anfechtung ihres sachlichen Inhalts war rechtl. unmöglich und eher formale Echtheit wurde nicht durch Zeugenbeweis, sondern durch die Aussagen des königlichen Kansleipersonals oder des Königs selbst erwiesen.'
authenticity, in other words, its formal genuineness (formale Echtheit) and this question was resolved at first by the chancellor or a chancery clerk, later by an examination of the king’s seal attached to the document. Brunner further remarked the fact that the unofficial court-documents (Gerichtsurkunde) of the Frankish period sometimes bore the subscription of witnesses, sometimes were unwitnessed, sometimes were sealed with the king’s seal, and in the sealed gerichtsurkunde of the royal court found an extension of the privilege of indisputability from the king’s charters to a more general class of royal documents which included the records of the royal court. He was of the opinion that this privilege was Frankish in origin, that with the breakdown of the Frankish empire and its law it passed to Normandy and persisted in the courts of the Norman dukes, that it was brought to England by the Conquest.

Although Seeliger (11 Mitteilungen des österreichischen Instituts für Geschichtsforschung (1890) 398) takes the opposite view, Brunner (2 Deutscbe Rechtsgeescbichte (1928) 426) and Bresslau (1 Handbuch der Rechtslenhre (1913) 643) hold that in the Germanic law the challenge to a document was a single act in which material and formal characteristics were undistinguished. But **ex hypothesi** the challenge to a royal document could go only to its formal validity. The question is settled by the referend, clerk, or chancellor who had written the document, perhaps by the king himself. BRESSAU, 644. This is of course only possible as long as the author of the document or the king is available. As a substitute the question of authenticity is made dependent upon the seal (1 BRESSAU, 698; REDLICH, DIE PRIVATUrkunde des Mittelalters (1911) 106) and it is only by a later extension that this means of identification includes proof of the credibility of the document’s content.

**Das Gerichtszeugnis und die Frankische Königsurkunde, 441:** ‘Was von der Königsurkunde im allgemeinen, gilt auch von der über ein königliches Placitum ausgestellten Urkunde. Die Placita so werden die Urkunden über Placita gleichfalls genannt- sind ja im Namen des Königs und unter königlichem Siegel ausgestellt. Da aber die Urkunde nach den Grundsätzen des Zeugenbeweises behandelt wird, so muss der unschätzbar königsurkunde ein unschätzbar Zeugnis des Königsgereichtes, also ein Gerichtszeugnis entsprechen.’ 1 Deutsche Rechtsgeschichte 566 ff; 2 ibid., 560 ff. For gerichtsurkunde see: REDLICH, DIE PRIVATURKUNDE, 64ff; Bresslau, Urkundenbeweis und Urkundenschreiber im älteren deutschen Recht (1886) 26 ForscheungZen zur Deutschen Geschichtze 1ff; 1 BRESSAU, HANDBUCH DER URKUNDENlehRE, 59ff. (no repetition of authorities cited in earlier article); but compare: Henberger, Frankische Pfalzgrafenzegnis und Gerichtscheißertum (1920) 41 Mitteilungen des österreichischen Instituts für Geschichtsforschung 46, 50-62. Sohm (Die Frankische Rechts-Und Gerichtsverfassung (1871) 527 n. 5) gives an example of a witnessed gerichtsurkunde; for sealed gerichtsurkunde: SIQUEL, Acta Regum et Imperatorum Carolinorum (1807) 192, 364; MAYER-HOMBERG, Die frankischen Volksrechte (1912) 245 ff.

**Das Gerichtszeugnis und die Frankische Königsurkunde, 454, 440; Die Entstehung der Schwurgerichte (1872) 50; Forschungen (1894) 419, 424. LIEBERMANN (3 Gesetze der Angelsachsen (1816) 290) adopts his view: ‘Von der Curia des Frankischen Königs ging dies Vorrecht der Unanfechtbarkeit über auf die des Normann. Herzogs und des Anglonormann. Könige.’ Record is not the only English institution whose root Brunner found in the Frankish empire and which he traced through Normandy to England: both equity and the jury he regarded as having followed a similar path. The
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But before the Conquest there is in Normandy no evidence of the incontestable king’s charter: there is neither a chancery nor a seal to answer for the formal genuineness of the document, nor the absence of the subscriptio testium to indicate that proof by witnesses was unnecessary. Evidence of written judicial records, either private or public, is likewise lacking: the Frankish notarii, cancellarii (gerichtsschreiber) found no foothold in Normandy nor do official court rolls appear until long after the Conquest. 

former has been vigorously attacked by Kirn in Über die angebliche Billigkeitsjustiz des frankischen Königs (1927) 47 Zeitschrift für Rechtsgeschichte (Germanistische Abteilung) 115 and in Aequitatis judicium von Leo dem Großen bis zu Héloïse von Reims (1932) 52 ibid. 53. As to the latter, evidence of continuity between the Frankish inquisitio per testes and the Norman jury remain undiscovered (Haskins, Norman Institutions (1918) 226) and does evidence of the existence of the assise in Normandy before 1164, the date of its appearance in England. Thorne, The Assise Utrum and Canon Law in England (1933) 33 Col. L. Rev. 430 n. 11. With regard to courts of record Brunner (Entscheidung, 50 n. 2; Gerichtszeugnis, 426, 432) is forced to admit with Sohm (Die fränkische Reichs- und Gerichtsverfassung (1871) 436) that they were unknown to the Frankish law and for their existence in Normandy prior to the Conquest produces no evidence earlier than the Summa de Legibus Normanniae (c. 1250).

* But two Norman charters before 1066 make mention of a chancellor (Haskins, Norman Institutions (1918) 52 n. 248). These are charters of Richard II (c. 1066) but the chancellor early disappears (Haskins, 59-60). None of William’s charters bears the attestation of a chancellor, few the attestation of a chaplain, only one mentions its author (Lot, Études critiques sur l’abbaye de St. Wandrille (1913) no. 20) who seems to have been a monk at St. Wandrille (ibid. nos. 30, 31). In general the variation of style and form preclude the existence of an effective chancery and indicate that the charters were generally drawn up by the recipients. Stevenson, An Old-English Charter of William the Conqueror (1896) 11 Eng. Hist. Rev. 731, 733 n. 5; Haskins, 52-54, 274. Under the Conqueror’s son in Normandy the situation is similar. Haskins, 72-74. Anterior to 1066 there is no trace or mention of a dubal seal. Stevenson, Yorkshire Surveys and other Eleventh Century Documents (1913) 27 Eng. Hist. Rev. 1, 4; Haskins, 53 n. 255. In fact the seal in use in lower Italy disappeared under Norman domination. 1 Bresslau 942.

* The charters of William in the most important cartularies and collections are witnessed: Le Provolet, Mémores pour servir à l’histoire du département de l’Eure (1866-69) Lot, Études critiques sur l’abbaye de Saint-Wandrille (1913); Round, Calendar of Documents preserved in France (1899); Sauvage, L’abbaye de Saint-Martin de Troarn (1911); Vernier, Chartes de l’abbaye de Jumièges (1916); Antiquus cartularius ecclesiae baigensis (1902-03); Haskins, Norman Institutions (1918) appendices. The witnesses to William’s charters sign in attestation rather than assent. Haskins, 54-55; cf. Mainland, Domesday Book and Beyond (1897) 247-52.

* Halbedel, Frankische Studien (1915) 42f; Bresslau, Der Ambassatorenwernbure in der Urkunden der Karolinger (1908) 1 Archiv für Urkundenforschung 177; Mayer-Homburg, Frankischen Volksrecht im Mittelalter (1912) 245f; 1 Tout, Chapters in Mediaeval Administrative History (1920) 122f; Valin, Le duo de Normandie (1910) 103f. The decisions of Norman courts in the period anterior to the Fench conquest have reached us only in charters preserved by the interested parties: there are no plea rolls or feet of fines. Delisle, Recueil de jugements de l’Echiquier
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In England before the Conquest the situation is only slightly more propitious: the Anglo-Saxon kings have not established Brunner's necessary concomitant to record, the incontrovertible king's charter, and though there is a chancery, there is no private or official systematic written record of litigation.

The absence of written court documents makes it impossible to find the origin of courts of record in England in Brunner's theory of the transmission of the king's privilege of incontestable documentation. The germ of record must lie either in the delegation to his court of the king's privilege of oral indisputability.

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De Normandie (1864) 247 ff.; Perrot, Arresta Communia Scaccarii (1910); Marnier, Establissements et Coutumes, Assises et Arrets de l'Echequier de Normandie au XIIIe siecle (1889).

* Brunner, Zur Rechtsgeschichte d. romanischen und germanischen Urukunde (1880) 158-59; Maitland, Domeday Book and Beyond, 250. This must follow solely from the subscriptio testum for both Maitland and Brunner's statements as to the non-existence of the Anglo-Saxon chancery must be recorded. The seal is in use under Edward the Confessor. 27 Eng. Hist. Rev. 67.

V. Aronus, Diplomatische Studien über die älteren angelsachsischen Urukunden (1889) 12. Earlier Brunner (Gerichtszugnis, 434) attributed the lack of record among the Anglo-Saxons to the presence of court-witnesses: "Das angelsächsische Recht kennt den Rekord nicht, es benutzt vielmehr besonders ernannte Urkundspersonen als Zeugen sowohl über Rechtsgeschäfte als auch über gerichtliche Achte," citing Edward II, 2; Athelstan V, 1 § 5; Edgar IV, 3-6. These are taken directly from Schmidt, Gesetze der Angelsachsen (1858) 649 s. v. recordatio, and are applicable only in so far as they describe transaction witnesses used to corroborate business transactions of sale, gift, and exchange. Bechert, Die Einleitung des Rechtsgang nach angelsächsischem Recht (1927) 47 Zeit. f. Rechtsgeschichte (Germanistische Abt.) 31ff. Liebermann, Die Eidshufen bei den Angelsachsen (1910) Historische Aufsatze fur Zeumer 557.

13 See the two articles of Stevenson cited supra n. 6. Davis, Regesta Regum Anglo-Normannorum (1913) xi ff. The diplomatique examination urged by Haskins to determine the extent to which the Anglo-Norman chancery was influenced by Anglo-Saxon precedents has been made by Galbraith for Winchester (Royal Charters to Winchester (1920) 35 Eng. Hist. Rev. 385-400) by Douglas for Bury St. Edmunds (Feudal Documents from the Abbey of Bury St. Edmunds [1923] 79-80) both indicate the dependence of the A-N writ charter on the A-S writ and the continuity between the A-S and A-N royal scripatoria. Cf. Galbraith, An Episcopal Land Grant of 1085 (1928) 44 Eng. Hist. Rev. 355-58; 1 Tout, Chapters in Mediaeval Administrative History (1920) 131.

14 Pollock & Maitland, History of English Law (1923) 669-70; quoted 5 Holdsworth, H. E. L. (1934) 157. Add to n. 2, p. 699 the remark of Willoughby, J.: 'Quant le Roi recorde assume chose de sa veue demescne cel record ne sorra jammes anienti.' Y. B. 12-13 Edw. III (Rolls Ser) 101 (1338). The incontestability of the king's oral word may have Anglo-Saxon roots: in Kent (c. 695) a bishop or a king's word though unsupported by oath is incontrovertible. Withered c. 16 (1 Liebermann, Gesetze, 13). Cf. Les Costumes d'Oleron, c. 40 in 2 Black Book of the Admiralty (1783) 311: 'Li mayor es creuges de tout eul que il dit comment gu il dient comme tuges ou comme clamés ou comme garenz . . . . quau le mareus est tengus par son saictement de tuger dret et de dire verite et de faire loyte.' Brunner claims oral indisputability in the Frankish law (2 Deutsche Rechtsgeschichte (1928) 16): 'Das frankische Recht hatte den Grundsatz: der König liegt nicht. Sein Wort besess erhorte Glaubwürdigkeit... Sein schriftliches und
or in the delegation of his privilege to have all that has transpired in his presence incontrovertible. It may seem gratuitous to distinguish between either or both of these and the king's written word, and to fail to regard all three as instances of the same fundamental claim, but nevertheless the distinction seems sound. The oral record in England is completely disconnected from the written tradition of the Frankish court. In Glanvill there is mention of record but none of rolls: the record lies in the memories of the justices, and after the introduction of rolls the situation remains

sein mundliches Zeugnis durfte im Rechtsgang bei Vorwirkung des Lebens nicht angefochten werden.' But he cites only the Kentish law supra.

12 Leis Willems, c. 24 (1 LIEBEMANN, GESETZE 510): 'De hume bi ploied on bi curt que eo seit, for la y te cors te roi seit, e hom luz met sure k'U ad dit chose qu'il ne volle convistre, s'il pot deredhier par un entendable hume del plai oant e veant qu'il ne laverad dit, recouvre ad sa parole.' DIALOGUS DE SCACCIARIO I, c. 4: 'For there sits the Chief Justice of the lord king . . . as well as the greatest men of the kingdom . . . so that whatever has been established in the presence of such great men subsists by an inviolable right.' GLANVILL (ed. Woodbine, 119) VIII, 5: 'Necess est enim quod id quod aquis in curia domini Regis coram domini regis vel eius instititus cognoverit, vel quod se facturum in manum ceperit, teneant is qui hoc in manu cepit vel cognovit.'

13 The presence or absence of a written record had no effect upon the status of the court as a court of record. The county court was not of record (n. 37 infra) yet it might have a written record. 6 C. R. R. 228 (1213); Y. B. 8 Edw. II 219 (1314); Y. B. 19 Edw. III 479-80 (1345); Manorial courts and hundred courts in private hands were in a similar position. Y. B. 80-81 Edw. I 500 (1302). This point is well made by Woodbine (County Court Rolls and County Court Records (1930) 43 HARVARD L. REV. 1096 n. 36; his edition of GLANVILL, DE LEGIBUS (1932) 238-45) but his statement that 'for such of the king's court as have a roll, that roll is the record' must be taken with caution.

14 GLANVILL, DE LEGIBUS (ed. Woodbine, 54, 88, 120-23) I, 31; V, 11; VIII, 5-11. The earliest plea-roll extant is that of 1194. Round, The Earliest Plea Rolls (1896) 11 ENG. HIST. REV. 102. Maitland (SELECT PLEAS OF THE CROWN (1888) xxvi-xxvii) brought forward evidence to show the existence of such rolls as early as 1181, but see Round, The First-Known Fine in FEUDAL ENGLAND (1909) 509. There is evidence of a roll for the first year of Richard I (1189). Woodbine, Proof of Existence of Plea Rolls before 1194 (1926) 35 YALE L. J. 345; 3 C. R. R. 45. The date of Glanvill is thus earlier than 1189, perhaps than 1181. The Dialogus de Scaccario mentions the roles of the justices: see n. 21 infra, but whether these were more than a record of amercements or the passage an interpolation in the Dialogus is unknown. Richardson, Richard Fitz Neal and the Dialogus de Scaccario (1928) 43 ENG. HIST. REV. 161, 321.

15 Before 1195 the justices might bear record of a fine levied before them, and if they did so their record was conclusive; but their record was based upon their memory. GLANVILL, DE LEGIBUS (ed. Woodbine, 121) VIII, 8; of. ibid. 236 s. v. finalum concordiam. In 1344 (Y. B. 18-19 Edw. III 299) an inquest had been taken at nisi prius 'et nota que le recorde ny ad pas mention fait que enquys fut des domages'. But Willoughby who had taken the inquest and was now one of the judges sitting 'recorda de bouche' that the jury assessed the damages. Y. B. 30-31 Edw. I 329 (1902); J ROYALTY PARLEMENTORDM (1292) 84. Record is regarded as something that had taken place before justices, and long after the introduction of rolls the emphasis of the serjeants in court is still so placed. Examples are numerous: 'encontre
unchanged, for though the rolls may serve to refresh the memories of the justices they do not completely substitute for them. The rolls vary among themselves, and may be altered and supplemented by the justices without further formality. It is true that where there are written records litigants often vouch the rolls and records of the justices, but rolls and records are used in no technical sense, and it seems to have been immaterial whether the litigant vouched the justices or their rolls.

It may be said without fear of contradiction that the recordum and the roll are not yet synonymous.

sa reconysauce demene en court he porte record' (Y. B. 20-21 Edw. I (1202) 309 bis); 'en curt he porte record' Y. B. 21-22 Edw. I (1293) 33, 85; 'dovant Justice ky portunt Record' (ibid. (1293) 145); 'conisance fot en court' (ibid. (1293) 146 bis); 'ne put dire ge nous by avoms acutue in court que porte record' (Y. B. 4 Edw. II (1310) 77); 'jugement si vous encontre vostre conisance demene in court que porte record pues dire . . .' (Y. B. 4 Edw. II (1311) 169); 'Record est de chose fet en court' (Y. B. 9 Edw. II (1315) 38); 'par as . . . conisance . . . en court ge porte record' (ibid. (1316) 103); 'en court ge porte recorde' (ibid. (1316) 128, 129); 'vous no posz dire ge nous en court ge porte recorde vous soins l'acquitance conu' (ibid. (1316) 132). For an instance in which it seems clear that the acknowledgment in court and not the entry on the roll was of the essence see: Y. B. 2-3 Edw. II (1308-09) 42 in which it was claimed that the Statute of Westminster II (13 Edw. I c. 18 limited an acknowledgment to matter in dispute and not to any acknowledgment made before justices. Cf. Y. B. 21-22 Edw. I (R. S.) 146.

3 C. R. R. 301 (1205): ' . . . et preceptum est justiciariorum quod tunc habeant recordum tocius loquele et quod possint tunc certificare quorum rotuli alius adversantur de recordo illo, ut dicitur.' 3 C. R. R. 334 (1205): 'Unde dominus rex precepet ut justiciariori soire facerent ci que diversitas in quibus rotuli invenitur.'

Fraunceys v. Latimer, Y. B. 4 Edw. II 114 (1310).

'vocat rotulos domini regis' (ibid. 131); 'ponit se super rotulos curie domini regis' (ibid. (1201) 403); 'vocat ad warantum rotulos' (ibid. 408); 'vocaverat recordum illorum justiciariorum' (ibid. 418); 'ponit se super rotulos domini regis. Et quoniam justiciariori recordantur . . .' (2 C. R. R. (1201) 19); 'ponit se super rotulos anni primi regni Riccardi et super recognitores' (3 C. R. R. (1205) 45); 'et unde vocat justiciarios et rotulos ad warantum' (ibid. (1204) 169); 'petit recordum curie et rotulorum' (ibid. 170); 'vocat ad warantum justiciariorum et rotulos domini regis' (4 C. R. R. (1205) 86); 'dies data . . . qui justiciariori voluius iustigare rotulos suos et certificari . . . .' (ibid. (1206) 210); 'petit recordum curie domini regis . . . curia ergo recordantur' (ibid. 264); 'vocat rotulos et recordum justiciariorum' (6 C. R. R. (1212) 280); 'ponit se super recordum justiciariorum' (ibid. 308). Similarly, to vouch the unrolled record of the county court: 'vocavit unde recordum comitatus' (1 C. R. R. 72); 'ponit se super recordum comitatus' (ibid. 100); 'vocat curiam ad warantum' (ibid. 400). This voucher to warranty is an appeal to the court's memory (2 Pollock & Maitland, H. E. L. (1923) 670 n. 7) and may be seen in the later plea rolls: 'vocavit curiam domini regis ad warantum' (Bracton's Note Book, pl. 88); 'vocat ad warantum rotulos ipsorum justiciariorum' (ibid. pl. 829).

For the contrast between roll and record see the interesting case Abbess of Barking v. Sutton, Y. B. 16 Edw. III (2) 120, 125, 132, 593-97 (1342) in which counsel draws the distinction: 'Sire, il vous sourmit bien comen la defaute vous fut mistre; par que, Sire, eeo quest ore entre en roille ne put neynt estre recorder; par que, Sire, nous priions ce vous voulez recorder la
The rolls of pleas did not early obtain a position similar to that of the formal Pipe Roll, but by the middle of the fourteenth century the court rolls begin to reflect a like formality and precision. This, however, is not at all dependent upon the indisputability of the king's documents, for though the concept is well recognized in Anglo-Norman England and probably took form soon after the Norman kings had adopted the Anglo-Saxon chancery to their new

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chose tziel com il fut.' Cf. Y. B. 16 Edw. III (2) 94; for fine and record: Y. B. 9 Edw. II 42 (1316).

DIALOGUS DE SCACCARIO I, 5; 'The roll is of such authority that in nothing may it be altered or changed except in the case of obvious error plan to all, and then only by the common counsel of all the barons. Moreover the roll of a past year, or a roll of the current year after the payment to the Exchequer, no one can alter except the King.' The rolls of the Pipe were the only continuous record kept by the king's court and even after the retention of fees of fines in the Treasury, fines are inscribed upon the Pipe roll (after due payment) for greater security. Richardson, An Early Fine (1932) 48 Law Q. Rev. 415, 416. That the rolls kept by the justices were not held in as high esteem as the Pipe Rolls either because they were not subject to as careful treatment or because they could be altered by the justices and did not in themselves necessarily comprise the complete recordum is indicated by the fact that litigants make payments to have cases entered on the Pipe Rolls even after the case has been entered on the plea-roll. P. R. 6 Rich. I (1194) 163; MATTLAND, THREE ROLLS OF THE KING'S COURT (1194). See the cases collected in Langbein, The Jury of Presentment and the Coroner (1933) 33 Col. L. Rev. 1361 n. 126.

No amendment of an enrolled plea. Y. B. 20 Edw. III (1) 108, 112 (1345/6); 329, 331 (1346); Cf. Y. B. 20 Edw. III (1) 192. The increasing emphasis upon the rolls is illustrated by Scrope, C. J. in a report of an Eyn at Northampton in 1329 Y. B. 8 Edw. II (Selden Soc, no. 37) xvi-xvii. When urged to reduce an amercement he refused the petition, saying that 'he could not do this, for the fine had been entered on the roll; and he told how the king was angry with Sir Ralph de Hengham and put him on his trial on many charges, and did all that he could do, but he could find no fault in him save that he had remitted half a mark of a fine and had made an alteration in his rolls to that effect, and for this trespass the King fined him eight thousand marks.' But this would have been permissible after 1290 when Hengham was tried (Y. B. 4 Edw. II (1310) 114) and earlier DIALOGUS DE SCACCARIO II, 2; 'Let the judges take care that they deliver the rolls to the treasurer correct and in order, for it is not allowed even to the judges to change one iota after the rolls have been given in, even though all the judges agree therein.' Nor does Scrope's account conform to the account of Hengham's trial in the official records. RADULPH DE HENGHAM SUMMAE (ed. Dunham) liii-livi. The change is reflected in the physical make-up of the rolls and in the discontinuance of separate rolls. Bracton (De Legibus, fo. 352b) in speaking of variance in the rolls says we are to be guided by the roll of the protonotary 'cuius irrotulacionem debeant omnes alii rotuli . . . . . .' Thus so many rolls were made that they may be referred to as 'all'. In Henry III there were five rolls available. Powicke in (1924) 39 Eng. Hist. Rev. 268. For the reign of Edward II and later there are but two rolls: the Rex roll and that of the Chief Justice kept by the custos rotulorum. Y. B. 6 Edw. II (1) xxiv; Y. B. 5 Edw. II xxvii. In Edward III's reign the Rex roll is about one-tenth as complete as the C. J. roll and is obviously not used to bear record (Y. B. 16 Edw. III (2) xxv-xxix) though it might on rare occasions contain matter supplementing the roll of the justice.
needs and increased powers, it seems to have had no influence upon the rolls. The formality seems to be due to the spread of the administrative practice of the Exchequer to the increased business of the court which made it impossible to rely further upon memory, and to the elaborate procedure which by about 1340 the court of Common Pleas had developed. The very real connection between the king and record persists though the transfer of the seal to administrative officers serves to blur the issue.  

22 During Henry II’s reign the chancery had begun to break up royal acts into two chief categories: charters and writs. Charters retained the list of witnesses, writs were witnessed by the king himself. Delisle, Recueil des Actes de Henri II, Introduction (1909) 325-26. But Tout (1 Chapters in Mediaeval Administrative History (1920) 135 n. 3) seems to follow Poole (15 Scottish Hist. Rev. (1918) 265-68) in believing that the ‘testo me ipso’ appears first in the royal charters of Richard I, and with respect to royal charters Miss Prescott has shown this to be true. The Early Use of ‘Testo Me Ipso’ (1930) 35 Eng. Hist. Rev. 214. From the reign of Henry III letters patent and letters close are attested by the king alone, but charters strictly so called continue to be attested by a varying number of ministers and courtiers. Maxwell-Lyte, The Great Seal of England (1928) 234ff. It is clear that Brunner’s statement (Zue RECHTSGESCHICHTE D. ROMISCHEN U. GERMANISCHEN URKUNDE, 158) that the ‘testo me ipso’ comes in from Normandy is unfounded, and that perhaps his theory that the subscriptio testium denotes disputability may be inapplicable to England. Despite the witnesses the king’s charters are incontrovertible: ‘Nota quod contra protestationem Regum per cartas suas non procedit placentium nec duellum nec magna assisa.’ (Bracton’s Note Book pl. 226); cf. Bracton, De Legibus (ed. Woodbine, 109) fo. 34; Bracton’s Note Book pl. 226; cf. Bracton, De Legibus, fo. 24; Bracton’s Note Book pl. 1236; Y. B. 33-35 Edw. I 135; Y. B. 20 Edw III (2) 421 (1346).

23 Plucknett (Concise History (1929) 10) hints at Domesday Book as the origin of the technical concept of record, and traces the idea to the rolls of the Exchequer and thence to the rolls of the law courts. But his discussion must be confined to the growth of indisputability of the rolls.

24olland (Y. B. 6-7 Edw. II (Selden Soc.) xxv-xxvii) was amazed to find that the roll of a manorial court (not a roll of record) might be made into an uncontestable document by having a transcript made and sealed with the foot of the Great Seal. He quotes Thorpe, C. J. (1354) in a case in which the tenant is an assise of novel disseisin pleaded in bar of the assise on the ground that he himself had recovered by a writ of right patent brought in a manorial court the very same lands as were claimed in the assize. He offered no proof of this assertion and was instructed by the Chief Justice ‘s’il est su de faire venir le record en le Chancery et ore est mis avant le record sub pode sigilli il est este bon barre’. Liber Assisarum, 147 n. 14; Brooke’s Abridgement, Monstrans de factis, no. 97. But this is little more than an application of Glanvill’s (De Legibus (ed. Woodbine p. 129) VIII, c. 9) statement that the king may summon any court to make a record before his court so that that record may be indisputable: ‘Item recordum potest habere quaelibet curia ex beneficio principis, quomadmodum si rex aliqua rationabili cause motus fecerit aliquam curiam summonerit ad recordum factendum in curia sua, ita quod velit dominus rex non necat eius recordo contradict.’ For the transformation of a bishop’s certificate of legitimacy into a record by the half seal see Y. B. 17 Edw. III (1343) 398-95. In 1601 it was held that if what purported to be a record bore any seal except that of the king null record would be a good plea; ‘Devant les Justices del Comon Ban .. fuit dit per totam curiam pur ley et par Keble. On dira bien envoit tiel record certifie desous le seel d’Eschiquier ou del Comon Bano Nul tiel record
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is placed more and more on the roll as indisputable evidence of the record and as the distinguishing feature of the court of record.\(^\text{25}\) In line with this development the entire concept of record changes from that of incontestable evidence to that of public policy.\(^\text{26}\)

II

At least as early as Glanvill the county court, in which the suitors were judges, the sheriff the presiding officer, was not a court of record.\(^\text{27}\) But a distinction must be drawn between proceedings conducted by the county court and proceedings conducted by the sheriff in the county court. In the latter case the sheriff heard pleas not as sheriff but as 	extit{iustitiarius regis} by virtue of a delegation of authority from the king and as such had record.\(^\text{28}\) The Norman kings distrusted the ancient customary process of the county court but were not able completely to dispense with it until their own control over local justice was secure. Thus they gave county court judgments a provisional validity. But for local cases in which it would be impossible or impractical to send a royal

\textit{car ce nest for sque un transcript del record: mes incontro le Grand Seel del Roy in le Chancerie nemy.}' Y. B. 16 Hen. VII, 11, no. 5, cf. Y. B. 16 Edw. III (3) 354 (1342). Edward II claimed the power to convert into a legal record of conviction anything of the nature of treason which he held to be notorious. Y. B. 11-12 Edw. III xxiiii; Y. B. 12-13 Edw. III 97-101 (1338/9). 'The King is of record in whatever part of the world he may be.' Y. B. 12-13 Edw. III 183 (1389).

\textit{TERMS DE LA LEY} s. v. Record defines a court of record by reference to the formal characteristics of its records: see the quotation 5 Holdsworth, H. E. L. 159 n. 1.

\textit{Hynde's Case}, 4 Rep. 70b, 71a; Floyd v. Barker, 12 Rep. 23, 24: 'Records are of so high a nature, that for their sublimity they import verity in themselves; and none shall be received to aver anything against the record itself; and in this point the law is founded upon great reason; for if the judicial matters of record should be drawn in question, by partial or sinister supposals and averments of offenders, or any on their behalf, there will never be an end to causes; but controversies will be infinite.' Cf. Plowden, 491a; Salmond, The Superiority of Written Evidence (1890) 6 Law Q. Rev. 83. For a similar shift in emphasis in the doctrine of judicial immunity: Holdsworth, Immunity for Judicial Acts (1924) Journal of the Soc. of Public Teachers of Law, 17.

\textit{Glanvill, De Legibus} (ed. Woodbine, 121) VIII, 9; Bracton, De Legibus (ed. Woodbine, 441-42) fo. 158b; Hengham, Summa Magna (ed. Dunham, 8-10, 12-13) c. 4; Modus Compendi Eius in Woodbine, Four Thirteenth Century Law Tracts (1910) 134; Stat. Westminster II (13 Edw. I) c. 2. If in accordance with Bracton (II, 42) and Hengham (Summa Magna c. 4) the fact that the suitors are judges indicates the absence of a writ to the sheriff and therefore of record, the court was not of record as early as 1180; Pipe Rolls 20 Hen. II 57; 34 Hen. II 43.

justice, they pressed into service the newly-reconstituted sheriff, invested him with the requisite authority, his court with the attribute of record. The list of causes, then, which could be heard in the county court has its roots in at least two separate jurisdictions, but it was not long before all proceedings in the same court were mingled and their different histories forgotten. The history of the decline of the county court has never been written, and an insight into the shrinking jurisdiction of the sheriff with emphasis upon his loss of record may not be without value.

In 1370 it was already a moot question whether the sheriff was judge when commissioned by writ, and though it was held he was, in 1461 when the question came before the Common Bench the opposite result was reached. The plaintiff had recovered a judgment for damages in a court of ancient demesne but had been unable to have execution due to the fact that the defendant had neither goods nor chattels within the jurisdiction. He had then sued a certiorari out of the Chancery directed to the bailiff of the lord demanding that the record be certified into the Chancery, and from there it had come into the Common Bench by mittimus. With the record now before the justices the plaintiff prayed execution:

"Littleton: It appears that this recovery was in ancient demesne; in that case no execution can be awarded here, for no execution will be awarded except on matter of record, and the record of ancient demesne is not such, for on it one can only have false judgment, which proves that it is not matter of record. Moyle: We do not have jurisdiction to hold pleas of land in ancient demesne, but we can award execution of damages, for that is matter of record, since the plea was held by the king's writ, and just as in a writ of right in court baron, if the record comes before us we can award execution because it is matter of record since the plea was held by writ. In such case a writ of error lies as it does in justicies. Quod Prisot negavit and said: in neither case would a writ of error lie but only false judgment, for the suitors and not the bailiff.
are judges. Moyle: If the plea is held in the county by plaint then the suitors are judges, but if it is held by writ, as justicies, the sheriff is judge. *Quod fuit negatum. Prisot: The judgment is not of record until we affirm or disaffirm it; then it is of record and execution may be awarded or a writ of error had.*

Some few years later the question was again raised. A writ of admeasurement of pasture had been brought, the admeasurement made, and then removed to the Common Bench by certiorari. A writ *de secunda superoneratione* was then granted by the court. The defendant claimed that the admeasurement could not be removed by *certiorari* but only by *pone, recordari,* or false judgment since the admeasurement was not made before justicies but before the sheriff:

"*Tenney* (counsel for the defendant): The admeasurement was made by the sheriff who is not a justice, for the suitors are judges in the county court, just as in a writ of justicies. *Danby*: In *justicies* the sheriff is judge, nor the suitors, for the writ reads *quod justicies T etc.*, and thus is a commission and command to the sheriff who holds the plea as a justice, and well he may, for the plea is not *in pleno comitatu.*

... *Littleton*: On the contrary, neither in *justicies* not in any viscontiel action is the sheriff judge, but only the suitors, for he has no court except the county court and can hold no pleas except there — if he does it is *coram non judice.* And thus in replevin the command is *replegiari facias* yet is it held in the county and the suitors are judges, in a writ of right to the lord *quod plenum rectum teneas etc.* the suitors, are judges, and so here for the *justicies* has no other effect than to allow him to hold pleas involving more than forty shillings. And if they (the suitors) were not judges then one could not have false judgment, for this writ lies only against suitors, but on a judgment given under *justicies* false judgment lies, proving that the suitors are judges. *Quod Choke and Needham affirmavit.*

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*Notes:

1 Y. B. 39 HEN. VI, Mich. 5; Brooke's Abridgement (1573) Justicies 6: 'Nota que in Court Baron, Hundred, et county, les suitors sont judges, et hoc cibiens in brief de droit patent direct al court Baron, in justicies, come sur auters suites, que sont la per plaint sans brief.' See Y. B. 3 HEN. VI,Pasch. 2 (1403); Y. B. 7 HEN. VI,Mich. 17 (1429); Y. B. 34 HEN. VI,Pasch. 2 (1457); Y. B. 21 Edw. IV, Mich. 46 (1432); Y. B. 16 HEN. VII,Mich. 6 (1501).

2 Y. B. 7 Edw. IV, Hil. 27 (1468). Cf. Y. B. 34 HEN. VI, Trin. 13 (1456): 'Littleton: If a *justicies* is sent to the sheriff; even though it is an original writ, the party will never be allowed a writ of error on it, but only false judgment. But if judgment is given in a franchise, there error will lie. *Moyle*: On a judgment given in the county under *justicies,* as you say, false judgment and not error lies. But if the writ of *justicies* is removed here by *pone,* as
Similarly, the sheriff’s court in the county was not considered a court of record within the meaning of the doctrine of merger, nor was the litigant unable to go behind the records of this court in order to find the sheriff civilly or criminally liable for an abuse of jurisdiction. By the middle of the fifteenth century, then, the suitors and not the sheriff were the judges in the county court even in proceedings under writ. The distinction between proceedings by the county court and proceedings in the county court had been lost, or in other words, the king’s county court and the sheriff’s county court had become one and the same institution. With this merger went the loss of the sheriff’s privilege of record. As evidence that the change must have taken place long before this period it may be pointed out that the learned Littleton knows nothing of any extraordinary jurisdiction of the sheriff and that he explains the writ of justicies as a means of granting jurisdiction to an amount greater than forty shillings, though the writ long antedated

can well be done pending the plea, Sir, in that case after the plea and judgment given in this court, the party will doubtless have a writ of error and not false judgment. Thus the nature of the court changes the nature of the writ. Semble: Y. B. 6 Edw. IV, Mich. 9 (1467). If the plaintiff in the writ of false judgment be nonsuited, the other party can sue execution immediately. Fitzherbert’s Natura Brevium (ed. Hale, (1730) 40) 18g.

30 Y. B. 9 Edw. IV, Hil. 10 (1470): ‘Moyle: In debt it cannot be pleaded that the plaintiff had recovered before on the same bill or contract in the county under a justicies, or in any other court not of record, unless he had sued execution. But the matter is otherwise in a court of record.’ Whether the plaintiff had recovered below was matter in pais: Y. B. 34 Hen. VI, Trin. 15 (1566): ‘If one recovers on a writ of right in ancient demesne by assize or otherwise, so that damages are recovered, and if a writ of debt is sued on this record, the defendant can plead null tiel record and it will be tried by the court.’ However in Y. B. 9 Edw. IV, Mich. 27 (1470) Choke, J. said: ‘There is diversity between recovery in a court of record and in those courts which are not of record, as ancient demesne or court baron, for against a recovery there one cannot plead null tiel record, for there is no record, but one can plead null tiel recovery, and it will be tried by pais, quod futi concessum.’ See also Y. B. 10 Hen. VII, Mich. 20 (1495).

34 Y. B. 9 Hen. VI, Hil. 9 (1413): ‘Martyn: If a sheriff returns three or four exactions on an exigent when in truth there are five, will not the party have an action against the sheriff because of this? (Quasi dicret, sic) yet he is sheriff of record and the exigent is of record, but he is not a justice of record. And all the justices were of the opinion that the action would well lie.’ 2 Hen. IV, Mich. 14 (1401); Y. B. 22 Edw. IV, Mich. 11 (1483). In the case of courts of record it had been held as early as the reign of Edward III that a litigant could not go behind the record in order to show the judge liable for an abuse of jurisdiction. 27 Assisaturm 18. Cf. Y. B. 10 Hen. VI, Mich. 22 (1414); Y. B. 7 Hen. VI, Pasch. 25 (1429). Holdsworth, Immunity for Judicial Acts (1924) Journ. of the Society of Public Teachers of Law 17; 6 H. E. L. (1924) 235 ff.
the statutory limitation.\textsuperscript{25} By the time of Crompton and Coke the view advanced by Littleton was well established,\textsuperscript{26} though it may be noted that Coke’s explanation of the rule is little more than a repetition of Littleton’s argument supra.\textsuperscript{27} The loss of the sheriff’s record must be contemporaneous with the appearance of the suitors as judges in cases instigated by writ as contrasted with plaint, and with that of the writ of false judgment from the sheriff’s court.\textsuperscript{28} The lack of cases points toward the solution. The growth of local royal jurisdiction made it unnecessary for the litigant longer to invoke the procedure of special writ to the sheriff.

\textsuperscript{25} The interpretation put upon the Statute of Gloucester (6 Edw. I) c. 8 deprived the county court of jurisdiction if the amount in question was more than 40s. Britton (ed. Nichols) 155; Pollock \& Maitland, H. E. L. (1923) 554. The writ of justicies occurs in Glanvill (De Legibus (ed. Woodbine, 174) XIII, 39) and in John’s reign: Maitland, The History of the Register of Original Writs (1389) 3 Harw. L. Rev. 112.

\textsuperscript{26} Coke Litt. 117b; 2 Coke Inst. (1669) 312; 4 Coke Inst. c. 55; Crompton, L’Authentique et Jurisprudence des Courts (1594) 230-32.

\textsuperscript{27} Gentleman’s Case 6 Rep. 11b (1532). The question as there raised was whether in a writ of right patent directed to the lord of the manor, or in a writ of right close directed to the lord of ancient demesne, or in a writ of justicies directed to the sheriff, the court held by virtue of the writ was or was not a court of record. It was argued that the lord, the bailiff, or the sheriff was constituted judge by the writ since it was sent to him and not to the suitors, and that as the writ is of record and constitutes a new judge, then the authority of the judge being by the king’s writ, the court must also be of record. This Coke vigorously denied: the reason why the writ is sent to the lord or sheriff is because the court baron is the lord’s court, the county court the sheriff’s, and the writ is sent to him to whom the court belongs. Further (1) the suitors are judges (implying that if the writ to the sheriff made him judge the court would have record, but since the suitors who hold no king’s writ are judges, they hold no king’s court) and (2) a writ of false judgment and not error lies whether the plea is held by king’s writ or not, and as false judgment lies only from a court which is not of record, these courts are not of record.

\textsuperscript{28} Y. B. 15 Edw. III 58 (1341); Y. B. 13 Rich. II 123 (1390). Vinogradoff’s citation (Y. B. 6 Edw. III 1) xxxvii) is incorrect: the case referred to is 7 Edw. II (Vulgate) 244 (droit). It is interesting to note that the reverse of the process that had taken place in the county court was occurring in the merchant courts. The suitors are judges in 1344 (1 Little Red Book of Bristol (1900) 70, 71) but in 1467 the steward or chief officer of the court was considered judge and the party might have a writ of error but not of false judgment. Y. B. 6 Edw. IV, Mich. 9.