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WARRANTY AND GOOD LORDSHIP IN TWELFTH-CENTURY ENGLAND

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ABSTRACT

Already in the twelfth century, men canvassed different views on the ways in which they thought lordship ought to be exercised. They used their picture of how an idealised "Good Lord" -- a familiar label in later times -- comported himself to assess the treatment they actually received from their lords. This Good Lordship had both Positive and Negative aspects: the "good lord" maintained his vassals in their honours and renounced his right to revoke grants afterwards. One excellent way to study the pursuit of this double ideal is through the language of charters, more particularly through the warranty clauses by which Good Lordship was often implemented. The transformation of warranty into its familiar Common-Law shape reflects corresponding and complex changes in both lord-vassal relations and the role of the King and his justice.

Warranty actually began as a security device, designed to keep men to their word, and is found used in this sense over wide areas of sub-Carolingian Europe. It was probably imported to England by the French, and can be seen in twelfth-century charters progressively superseding other forms of words to become the classic "guarantee" of Good Lordship. In this manner it came by 1200 to be virtually equated with the lordship it had originally been used to enforce. Warranty was lordship seen from the vassal's point of view, that is, tenant-right.

Despite this origin in very personal relations, warranty probably always created between the parties' heirs some kind of obligation, which sharpened and was made infinitely more clear-cut with the emergence of full legal inheritance rights. Warranty swelled to full tenant-right, a full guarantee of the Right to Good Lordship.

As the heir's claim grew into an enforceable right of inheritance through increasing access to remedies by royal justice, and because such justice tended to strict construction, warranty became a contractual addition to which claimants had to prove their entitlement. The narrative of legal change from 1150 argues for gradual evolution but also suggests 1153-4 as the decisive turning-point in this development.

Detailed (sometimes technical) examination of evidence for some relevant cases, royal writs concerning warranty and the turning-point of 1153-4 is reserved for three appendixes.

WARRANTY AND GOOD LORDSHIP IN TWELFTH-CENTURY ENGLAND*

This paper starts from charters. It may even be regarded as an attempt to trace and explain the rise and development of express warranty clauses in English private documents, an exercise in diplomatic. The main stimulus behind the investigation is, however, something quite different: the challenge of understanding English law before the advent of a Common Law. I want my explanations to be consistent not merely with the social relations that produced the charters, but also with the mental terms in which they were thought out and interpreted, their legal context.

Charters have some particular merits for the legal historian of the twelfth century. The sheer volume of twelfth-century charters offers perhaps the best chance to explore the world from which the Common Law emerged. They also serve as a useful check to the official Common-Law records, because they offer a view of normality before the onset of conflict and litigation and from the perspective of the future litigant and his advisers. Additionally, the legal historian can attempt through charters to surmount one of his most acute difficulties -- habitual ignorance about his subjects' life before the case and outside the court-room. And starting from one of the well-edited collections immeasurably increases his chances of success.¹

For these reasons, I have chosen to work here in the first instance from the four thousand or so charters from twelfth- and early

thirteenth-century Yorkshire already in print.² There is, of course, at least one obvious objection to this procedure: that for all its apparent bulk the sample is still too small and localised. Most readers will take some convincing that even Yorkshire can represent all of England; this exiled Yorkshireman glories in his native shire's blessed atypicality. But legal historians have perhaps been too fearful of the supposed abysses between customary practices on the different twelfth-century lordships. The major principles on procedure, family and lordship appear to have been more widely shared than used to be thought, less variable by region and fief.³ In any event, the lordships represented in "Early Yorkshire Charters" extend a good distance beyond the county boundaries and into a fair range of conditions and terrain. From them, I hope to propose hypotheses of national pretensions for test against hard fact from other areas. A dialectic between local fact and national legal analysis is sorely needed.

1. Warranty's Dual Origin

Most accounts present warranty as a very technical legal institution, of interest mainly to historians of common-law doctrine and procedure. The textbooks tend to class it as an institution of public royal law, essentially a subsidiary, if important, function of lordship over land. Scholars often portray Common-law warranty as intrinsically bound up with the possession of charters and the courts' close interpretation of their formulas. Since the time of the great Maitland, work on the real actions based on premises such as these has

made a solid contribution to our understanding of the developed common law of land. More recent studies have, however, exposed the older view's difficulties in explaining a number of the features of the very early common law.⁴ It is now axiomatic that a proper understanding of early warranty -- and thus its development into the institution of the plea rolls and yearbooks -- can only come from focussing first on its function and appearance in the twelfth century.

In attempting something of this kind, the spotlight almost inevitably falls on Prof. S.F.C. Milsom's wonderfully creative book, The Legal Framework of English Feudalism,⁵ which blazed a trail largely followed here. The central role of warranty in that book's schema, not immediately obvious to the casual reader, is well worth further emphasis. Milsom sets out a very clear view of the essential character of that earlier world from which the common law was created: it was dominated by lordship. This liberating insight, which has much advanced our understanding of the common law's birth -- not to mention other aspects of Angevin society and politics -- naturally still needs critical consideration. There is much more than private lordship to the social relations of twelfth-century England. To appreciate the proper interaction between warranty and lordship, in particular, requires some clarification of concepts and origins.

Somewhere very close to warranty lies the age-old duty of "good lordship".⁶ A man owes a duty to support and protect in their material honour the vassals on whose support he depends. This Good Lordship is patently an ideal, a standard against which men measure actual

practice. In violent times, men exercised lordship in ways that seemed hardly to recognise vassals' rights at all, or indeed trod them consciously underfoot. Still, most men accepted that vassals did have some rights; by this date confusion of honourable vassals with servile dependants was unacceptable. Arguably, the historian wishing to attribute "ownership" of land in anything resembling the modern lawyer's sense needs to assess the rough balance of power between lord and man with care. As this shifted according to political circumstance, so too in a sense did "ownership". One might thus talk of vassal's "rights" as the reverse side of the lord's duty to his man, a kind of equivalent to the much better documented rights of lordship.⁷

One way to trace contemporary dealings with these theoretical rights of honourable dependants and tenants is through the language of warranty. Significantly, this appears over a broad area of northern Europe (not just England) as an import, not initially associated with lordship. Warranty was in origin a security device, semantically as well as etymologically akin to a modern guarantee. Yet, already before the end of the twelfth century warranty was almost universally used as the standard English method of portraying tenant-right (Latin ius, French droit). Effectively, it represented lordship, viewed from the perspective of the vassal as tenant. Sometimes, indeed, warranty is apparently equated with homage, the bond which tied the vassal to his lord and the ritual which made that bond visible.

A further point is helpful in clarifying the way land-lordship worked. The warranty of early land law has a dual nature. In his

warranty, the grantor made two rather different commitments. He made, first, a positive promise, that he (and his family) would maintain the grant against outside challenge. They would warrant their grantee's right against third parties and (probably) acquit him against anyone who tried to claim from him service other than that provided for in the original grant. If they were unable to do this, the grantee had to be compensated for his loss, as by an exchange ("escambium") of an equivalent holding. Developed warranty additionally had a negative aspect, by which the grantor was understood to have renounced his right to second thoughts. Once the grant was complete, neither he (nor his family) were to try to resume any part of the property conveyed.⁸

These negative and positive aspects of warranty are pretty obviously severable. It is not certain that the negative aspect was originally thought of as inherent in warranty. Charters with express warranty clauses sometimes contain separate renunciation clauses. A thirteenth-century defendant would not defend a claim by his own grantor or some descendant by direct reliance on the original warranty; he would plead that his opponent was bound to warrant him when he was impleaded by a third party and could therefore not succeed against him. Clearly, there is no intrinsic necessity to pursue the rather different ends of the positive and negative aspects of warranty by means of a single institution.⁹

Examination of the general relation between warranty and lordship is patently a first task. Initially, there seems much to be said for the formulation of warranty as the obligations of the land-

lord seen from the tenant's point of view. But although the hypothesis accords well with a good deal of twelfth-century customary practice, the identity with lordship is incomplete.¹⁰ Certain features of late twelfth-century law, incompatible with it, point towards a rather different view of warranty's origins and significance.

Take first the extant land charters. As we should expect, we find warranty reserved in at least some of the rare early lay charters of enfeoffment, grants where one layman became another's lord -- we might say, landlord -- for the holding conveyed, do include express warranty clauses.¹¹ Grants in substitution, where the grantee is to hold not of his grantor but of his overlord (grants that is, where the grantor relinquished any claims to lordship over the land or its new tenant) ought conversely to contain no warranty clauses. This is a good test. Twelfth-century grants of this kind are somewhat more common than once thought¹² and seldom made casually or without proper consideration. I have in fact noticed no such early grants with an express warranty clause.¹³ One does, however, occasionally find the inclusion of a warranty in confirmations by the grantor's lord (i.e. the new tenant's overlord). The new tenant, usually a religious house, obviously thought he was getting something worthwhile out of this, something that would otherwise not be his. No doubt the warranty of a powerful lord was preferable to that of his more obscure tenant.¹⁴

Grants in alms to the Church tell a subtly different tale, largely but not completely in accord with the logic of the lordship view. The documents recording these were usually composed on behalf of

the beneficiaries. One of their draftsmen's main aims was to combine security for the property rights conveyed to their house with the fullest possible Gregorian liberties against possible secular interference and obligations. Elemosina was to be free and pure, as well as perpetual. Twelfth-century charters omitted to mention a tenurial bond between the parties to grants in alms much more frequently than in grants in fee. The church holding in alms was not stated to hold of anyone. This cannot be mere chance. Clerical draftsmen were no doubt happy to minimise a grantor's continuing residual control over his former land, and perhaps to imply that no tenure existed between the parties. Logically, one would not expect a warranty clause in such charters; no tenure, no warranty. In practice there sometimes was one, to emphasize the grantor's continuing obligation.¹⁵ This was the Church having its cake and eating it too. The grantor was expected to fulfill his duties without enjoying the fruits of lordship. The monks expected warranty from one whom they would not acknowledge as lord.

This widespread pattern does not support the correlation between tenure and warranty to be expected if warranty were merely a function of lordship. Certain other aspects of early warranty law likewise ring warning bells about any simple theory of the connection between warranty and lordship. Even in the 1180s, the writs available for voucher to warranty in the course of an action of right do not appear to be limited to use against lords and the unique role of warranty within dower claims is quite impossible to square with a lordship view.¹⁶

Even in the later twelfth century, warranty and associated terms retained a range of meanings. They were still almost as much used of chattels as of land and in ways that have no reference at all to lordship. Twelfth-century Englishmen hearing the word "warranty" probably thought as readily of chattels lost or stolen as of land. Consider Glanvill's treatise of the late 1180s. Its author's treatment of chattel warranty in his Book X on debts cross-references his discussion of land warranty only because, in his view, the same procedure applied to both kinds of property.¹⁷ Warranty -- the plea that some third party sold or gave you the disputed property -- is clearly a normal defence to theft accusations. Someone found in possession of stolen goods can plead that he acquired them properly in open market and then summon (vouch) his source to come into court, confirm the story and take over the onus of explaining where the goods came from.

Slightly later cases help to flesh out Glanvill's account of the procedure.¹⁸ Chattel warranty was in no way derived from, or subsidiary to, the warranty of land grants. It is a very ancient procedure, illustrated in England by the tenth century enactments that had tried to confine legitimate trade to nominated places where they could be properly witnessed. Ideally these official witnesses rendered unnecessary the use of warranty in cases of, say, livestock rustling. In practice thieves who escaped immediate death must often have been allowed to put off the moment of judgement by vouching a warrantor who might, in his turn, vouch someone else. That the tenth-century system

continued, at least theoretically, into the twelfth century is shown by contemporary unofficial leges and latin translations of Old English laws.¹⁹ Similarly, perhaps by analogy, one finds reference to warranty as a defence to other criminal-type accusations.²⁰

The clear conclusion from all this is that the device of warranty was applicable to both goods and land. A little extra confirmation comes from a slightly unexpected source. Andrew of St. Victor was a distinguished expositor of the literal sense of the Bible. An Englishman by birth, he taught in the French schools before returning to end his days as abbot of Wigmore on the Welsh border. He was reminded of warranty when commenting on a verse of Isaiah, "Lord, I suffer violence, answer thou for me". This, he said, was the equivalent of the French: "Lord reclaim me, warrant (garantiza) me". "When our belongings [Andrew's word "res" would cover either land or chattels] have been taken from us by theft", he went on, "or lost in any way, and we find them in the possession of others, we vindicate them as our own and, so to speak, put in our claim. But if those against whom we claim have bought or in some other way received the goods from others, these latter must stand for the possessors and warrant what they sold or granted. Lord, vindicate and reclaim me, your servant, whom sickness and death have almost abducted, guard and protect me as your own possession".²¹

Since the word "warantus" and its equivalents are extensively used in these texts, the occasional charter promise to warrant a chattel grant is unsurprising.²² In truth, the range of situations in

which warranty language was used far beyond landed property almost deserves a separate study. The appropriate translation of warranty words vary according to context. The connotation can be "surety" or "witness",²³ though "guarantor" in something like the non-technical modern sense is usually defensible. Most usage seems, moreover, to share a tripartite conceptual core: The guarantor is required to take over responsibility for a disputed action or claim from a defendant who, in some sense, acted on his behalf or under his authority.²⁴ He becomes responsible for defence of the case, once his obligation to warrant is established. And finally, his competence or duty to warrant might be implied from the circumstances; the warranty did not have to be expressly made. A crooked horsedealer could not, for example, plead that he did not have to warrant an alleged thief, on the ground that he had never expressly promised that the horse was his at the time of the sale! Patently, lordship is in no way essential to chattel warranty; buying a horse did not make you the dealer's vassal!

The wide usage of warranty language thus presents a minor puzzle for solution. We have seen that warranty of land was very closely tied up with lordship in the later twelfth century and there will be more to say of warranty as tenant-right. Yet, the idea of warranty itself was pretty obviously used in many contexts where lordship had no place. The dating and nature of these non-seignorial uses rule out the possibility of mere analogy with land warranty.²⁵ Furthermore, the difficulty is not a purely English one, for it extends over much of western Europe and beyond, wherever the language of

warranty was spoken. The hypothesis to meet this international problem needs itself to be international.

In origin, warranty seems to have had nothing to do with either lordship or land as such. It was simply one of a number of forms of personal engagement by which the men of the West sought to keep each other honest through the difficult period of the decline and break-up of the Carolingian Empire.²⁶ Commitments in warranty language can be found from a broad area of Northern and Western France and beyond. They are not confined to landed property, and the usage may well have begun in livestock markets.

Certainly, these theft procedures involving warranty were widely known and practised in eleventh-century Europe and by no means new at that time. Anyone caught in possession of allegedly stolen goods could escape responsibility by showing that he came by them properly and in open market. Ideally, he named his source, who then had to answer the allegations in his place. This plea, if confirmed, was in principle a complete defence for the original accused. The seller now replaced him and might perhaps in turn have his source summoned as warrantor. Naturally, fear of the hangman's noose created some competition to pass on others the onus of facing the accusation. There was often argument (even battle) between the party saddled with possession and the person from whom he said it came (his vouchee to warranty). The need to resolve this before the principal charge could be tried could cause considerable delay.

The warranty here is the personal obligation of a donor to

confirm his donee's story and thus to guarantee his title. Its consequences closely resemble those familiar from later land law, except that absolutely no questions of lordship arose from it. The personal relationship behind chattel warranty could be very temporary and quite commercial in nature, lasting perhaps for no longer than it takes two horse-traders to agree the price of an animal at market.

From the eleventh century (and earlier), this pattern of warranty for the sale of goods coexisted over much of Europe with warranty of land.²⁷ If chattel warranty came first, as seems possible, it may have been laymen who first noticed the possible analogy with land. Early written references on the Continent sometimes contain disclaimers of such non-classical usage as "ut vulgo dicitur".²⁸ Perhaps some lay lord suggested its inclusion in a charter recording his grant of land. Or perhaps some enterprising monastic draftsman, concerned to secure for his house the continuing protection of their benefactor, included a warranty clause in a land charter on his own initiative. Then, personal submissions of the impotent to powerful protectors might have been a decisive factor in warranty's spread. Certainly, lords interposed into the chain of land title in this way became the characteristic warrantors of land title.

How far this kind of pattern holds for England is obscure. We cannot even be sure whether Anglo-Saxon England knew land as well as chattel warranty, and the cautious will probably consider land warranty another Norman innovation from France.²⁹ This can only be speculation. More important here is the undoubted fact that, since warranty of both

kinds of property continued into Angevin England, warranty of land must be interpreted within a lexicographic context that includes the chattel procedures inherited from the Anglo-saxon past. The undoubtedly seignorial nature of Angevin land warranty as tenant-right must be a function not of warranty's seignorial origins -- because it did not have any -- but of a temporary equation of lordship with protection over land.

The protective lordship of the early twelfth century is not easily documented, even where land was part of the transaction. At this stage, grants to laymen were rarely written down. Instead, those involved proclaimed the changed status and property relations to the community at large by public ritual acts. The Homage ceremony broadcast the status gulf between a new lord and his man, through a submission ritual (complete with kiss as well as oath) that should instantly strike a chord even among ethologists. And Livery of Seisin, as is well known, was intended to ensure that any accompanying land grant was completed in a physical act of transferring the right to the land or its enjoyment through some symbol so visible that future denial was out of the question.³⁰ Spectators who viewed these two ceremonies knew from their experience of similar acts in the past how to interpret what transpired. We can perhaps say they "knew" their custom. Their memory primed not only on possession but also about customary right and status relations, they stood ready to bear witness by oath or sword, should this be required.

It is little exaggeration to see the charters' main function at

this stage as assisting individual memories of an important occasion in the past. Most interestingly, the two rituals just mentioned carried for the vassal-tenant precisely the same meanings as the positive and negative functions of warranty. He performed his homage in the hope that it would commit his lord to behave towards him as a Good Lord should, to protect him and his honour. Similarly, in his eyes the point of Livery of Seisin was to dramatize his acquisition of seisin and thus prevent the grantor and his friends from denying the transfer later.

The temptation to regard this equation as confirmation of the separate origins of what I termed the positive and negative aspects of warranty is to be resisted. The rituals of homage and livery of seisin were almost certainly less distinct from each other than is usually supposed. Our accounts of each are of the kind that impose on messy real-life happenings a neatness and order they never actually possessed. Any close reading of the charters shows, for example, that these "occasions" frequently included other ritual acts such as the public enunciation of a warranty promise combined with an affidatio or oath on some holy object.³¹ In real life, homage and livery of seisin must once have shaded into each other in ways that depended on what was most central at the time. Perhaps only where a new lordship relation was being created without any land grant -- an infrequent event outside exceptional situations like that after the murder of the Count of Flanders in 1127 -- did the ceremonial approximate to textbook homage. In the much more likely event of a land grant to an already-established vassal, proceedings will have resembled "Livery of Seisin" more

closely, but seldom exactly. And where lordship was created alongside or through a land grant, the ceremonial was, no doubt, messier still and hard to analyse in the terms to which we have become used.

This is not the place to pursue such a suggestion. To the man hungry for the security of Good Lordship the precise theory that underlay his protective relationships was much less important than the fact of protection. Since Good Lordship itself is the object of our inquiry, we must confine ourselves to warranty and kindred formulas, such as the direct promises of Maintenance or Protection that were sometimes patently central to the documents that contain them. Most examples are found in lords' confirmations, naturally enough since the ability to protect vassals was basic to Good Lordship. This willingness to act on behalf of a threatened tenant is at the core of what I have called the positive aspect of warranty.

Historically, offers of protection, loaded or otherwise, were the roots from which such lordship sprang, its very justification.³² In the circumstances of early medieval Europe, no pauper could stand alone against pressure or threats of violence from a neighbouring potens.³³ Vulnerability rather than penury defined the so-called pauper. In time of trouble, men naturally turned to their lord for aid. Even in the twelfth century, the duty to protect one's vassals was still recognised as basic to good lordship. Nor was the expected assistance merely a matter of help with the expenses or organisation of presenting a case in court. Particularly during the difficult years of Stephen's reign outbreaks of good old-fashioned violence required from

a "good" lord equally old-fashioned physical aid. The awkward corollary, that petty freeholders and minor gentry were swept up in the feuds and social competition of the very great, can be documented from the plea rolls of the early thirteenth century as well as from more expected places.³⁴

Twelfth century charters, for all the special ecclesiastical interests of the draftsmen mostly responsible for them, permit us to put some flesh on the bare bones of lordship theory. We read of estate officials ordered to treat named lands exactly as they would the lord's own demesne³⁵ and vassals warned not to harass their lord's new tenants.³⁶ Rather more politely, charter grantors request their amici to do what they can on behalf of dependants in need.³⁷ Through the learned formulas waft echoes of earthier lay feelings about lordship. "He who makes trouble here is no friend of mine", Roger de Mowbray is made to say on one occasion; on another, he admonishes all his men to guard and maintain the possessions of St. Peter's Hospital in his fee, or his steward will compel them to do so, "as he loves me and the salvation of my soul".³⁸ It seems that the ancient ideal of the loyal vassal sworn to love those whom his lord loved and hate those whom he hated still retained some force,³⁹ despite the evidence that protection was sometimes forced down the unwilling gullets of the weak or peddled for profit.⁴⁰

The charters also document some of the mechanisms of seigniorial protection. Two in particular, maintenance and advowry, enrich our understanding of warranty. Twelfth century charters very frequently

make their grantors promise to maintain the beneficiaries, generally religious houses, on the lands granted.⁴¹ As the century wore on, the language of maintenance is increasingly incorporated into express warranty clauses.⁴² The original promise was again one of physical support in the kind of world where courts and royal interference were largely discounted. This assumption was riskier in England, where lords always had to reckon with kings and courts, than in France (which is, of course, where the trail once again leads). The English situation was most nearly comparable during the reign of Stephen.

Three charters from this period, all concerned with the same grant in free alms to Nostell, make an excellent illustration. The benefactor, Osbert Salvein, sheriff of Nottingham and Derby in 1130 and the man of several great lords for fees elsewhere must be presumed to have known what he was doing. He took the trouble to notify and beg ("precor") for his grant the help of several of his most influential contacts, in terms appropriate to each. One charter addressed to his "dearest lord" Adam Tison reassured his immediate landlord that he stood to suffer no loss but would on the contrary benefit from the monks' special prayers, and asked him to confirm Osbert's gift. In a second charter, Osbert requested King Stephen himself, "his lord" Roger de Mowbray (the tenant-in-chief for the Tison fee) and "his lord" Adam again, along with all his amici and kinsmen, to confirm and maintain the donation in the event that anyone decided out of perversity to molest the monks. And a third document notifying the Dean and Chapter of York of the grant, recited Osbert's unchallenged tenure this time in

the canonical terms of a thirty- year period, then implored all sons of Holy Church as well as his own heirs and successors to maintain and keep these his alms for the love of God and the honour of Holy Church.⁴³ Osbert must in his time have received and dealt with many royal writs, including not a few initiating litigation. Yet he included no mention of legal action in his attempts to provide a comprehensive safeguard for his relatively minor gift. The absence of any straight charter of gift among the documents is perhaps itself more than chance. Osbert knew that in the event of future challenge, the maintenance of great men was all-important, since, in Maitland's dry words, "such an answer would often be final".⁴⁴

Maintenance as revealed by the charters makes in at least two respects an instructive contrast with warranty. It was in one sense wider ranging. A grantor could call upon whomever he liked. He was not restricted to his heirs or successors in title. Apart from his own officials, he might include virtually anyone whom he felt he could influence, even the king himself. For what it was worth, he could call on everyone aware of his grant, as in the standard charter address clauses. The effect of this remains obscure. Maintenance language retained much of the feeling of a voluntary gesture, lord to man, unenforceable except by pressure of honour and shame. The commitments recorded by the charters created no legal obligation. There is no hint that failure to perform carried with it any right of the beneficiary to claim compensation. Grantors merely expressed the hope that those they addressed would do what they could to help.⁴⁵ The author of the Leges

Henrici Primi warned in the second decade of the century that failure to perform could result in the lord's loss or dishonour.⁴⁶ He clearly believed that lords ought to support their men through their own courts if they had them, or wherever they could. But not even he mentions any right of the vassal to enforce maintenance by suing in some court. In contrast, warranty came to be all about such suits.

In the absence of legal enforcement, a promise of maintenance was only as persuasive as its promisor's physical and political clout could make it. It may have been most valuable in connection with the procedure of compurgation, still in active use well into the twelfth century, where the need for oath-helpers virtually forced litigants into the arms of the local powers-that-be. Maintenance was perhaps an attempt to secure those oaths in advance against some future emergency. It offered the impotent no more than a hope of binding the powerful. Neither a poor man nor a religious house could realistically hope to sue if the great chose not to honour their engagements. Who would they find to appear in their support? Maintenance had to be a matter of persuasion and social relationship.

It was also just one of the various ways of describing protective lordship. Another was advowry, whose effect on warranty language in cases from the earliest plea rolls was demonstrated some years ago by Prof. Bailey. He remarked upon the unusual terms used to record voucher to warranty in cases about churches. The clerical incumbent of a church sued by a would-be patron did not vouch ("vocavit") a warrantor, as a secular defendant would; he avocavit the

patron who had presented him to the benefice.⁴⁷ In other words he subordinated his own interest in the church to that of his patron, the advocatus who sometimes still in the later twelfth century thought of himself as its lord and owner.⁴⁸ The pattern of patronage and protection in these twilight days of the proprietary church may be expected to bear some resemblance to that formerly prevalent around secular property at a date when lords could be represented as owners of their tenants' holdings under the same label advocatio (advowry, avowry).⁴⁹

Some such conclusion seems likely to hold for Normandy towards 1100, despite the extreme rarity there of the classical sub-carolingian monastic advocate. In a situation where the dukes enjoyed a virtual monopoly of monastic advocacy, charter references to advocates implied an obligation on those so named to protect the whole estate of the beneficiary. Norman warranty can thus be seen as advowry made specific to a particular grant.⁵⁰ Perhaps the same was true in England. Outside the royal courts, men may have occasionally "avowed" to hold land of a lord, in rather the way the plea rolls show them avowing tenure of churches.⁵¹ In the twelfth-century Latin leges, "advocatio" denoted the kind of protection to be looked for first from one's kin or lord, but which the king was expected to provide for the defenceless pauperes.⁵² Legal translators on occasion used "advocatus" as the equivalent of French "warans"⁵³ and charters too seem to equate the "advocatus" with the warrantor.⁵⁴ It seems likely that the patterns of seignorial protection known as advowry in outlying areas had once been

more general. What prevented advowry rather than warranty from becoming the accepted term for the lord's obligation to maintain his tenants on what was once "his" land was probably its preemption by the church for its own.⁵⁵

2. Good Lordship defined in idea and actuality

We are some distance now towards an understanding of the way warranty came to represent the obligations of land-lordship in the early common law. The positive aspects of warranty must be seen within the context of the kind of competitive lordship whose respectability the Angevin reforms effectively removed. By that time, charter draftsmen had few doubts about the best way to make explicit on behalf of land grantees the good lordship to which their tenure entitled them. The language they employed had a long history stretching back across the Channel into the French homelands of England's conquerors. From the end of the twelfth century, although alternative formulas remained known, warranty clauses predominated, as the neatest way to combine positive protection with the ever essential renunciation of claims by the grantor and his heirs.⁵⁶

What did warranty guarantee to the tenant? Unless the grantor said otherwise, he gave his tenant whatever right he had in the land, less a lordship that customarily included the expectation of service. The tenant received full right against the world as far as his landlord could guarantee it.⁵⁷ This was as close to full right as a lay tenant could hope to approach before the Angevin reforms.⁵⁸ By Glanvill's

time, then, warranty did approximate to tenant-right ("ius").

The best way to see this is to consider briefly the early disputes over warranty (or homage) in the king's courts. Would-be tenants sought to persuade the king to enforce their claims to warranty (or homage) against an opponent who perhaps preferred to hold in demesne.⁵⁹ The real issue here was title to land. Hence pleading was in the right; when matters of seisin were adduced, it was to establish right. The suits by royal writ for warranty or homage were in effect an alternative to that upward claim of right which Prof. Milsom has identified as the "prime case covered by the writ patent".⁶⁰ They were used in some of the circumstances where that writ, the Breve de Recto patent, was ineffective or unavailable.⁶¹

In the classic situation, where the tenant was already being sued in a royal court for his holding, it was obviously too late for him to bring an original writ of right against his lord. He ought nevertheless to have some way to claim right against his lord, to persuade the king to enforce his claim to warranty or the receipt of his homage. The warranty issue only arose where right was at stake. Thus a lessee, lacking the special security which comes from doing homage, could expect no implied warranty from the early common law. His lessor retained full legal seisin during the lease. For connected reasons, in the highly possessory assize of novel disseisin with its summary procedure, voucher to warranty was restricted in a fashion unique among contemporary land actions. Yet it was available as normal in the related assize of mort d'ancestor which came much closer to the

right.⁶² The warranty promise summed up the tenant's legitimate expectations that his land-lord will guarantee and protect him in his title and tenure. It guaranteed his right.

The obligation to warrant one's grant in this way was certainly not new in the last years of the twelfth century. This is not to deny the transformations of tenant-right effected by the recent law reforms. Previously, warranty can only have secured to tenants such right in their holding as custom and their lords permitted them. It is not hard to believe in the previous existence of a sentiment that the trusted vassal with full military tenure, at least, ought to rest secure in the knowledge that his lord would warrant him against any outsider, whatever the terms of his tenure, and irrespective of any difficulties in establishing those terms.⁶³ This would carry the important corollary that such tenants already possessed a certain form of property right.⁶⁴ Can one go further to assert that the grantor of a permanent tenure was expected to warrant, unless he had for some reason specifically excluded warranty?⁶⁵ Can one perhaps infer a general duty to warrant all tenants in fee from the mere existence of a grant? And if so, how long had this existed?

An hypothesis of this kind is very hard to test. The practice of recording lay grants by charter only began to be routine at the end of the twelfth century; most previous lay land dispositions had been essentially oral. The commonplace formulas of thousands of charters from which one can deduce the routine of lay land dealings in the thirteenth century do not exist for the twelfth. Early charters about

lay grants are always likely to have been produced precisely to record the exceptional. Thus the ordinary case, where a general obligation to warrant might show up, is irrevocably lost to us, and charter testimony on this kind of point must always be a little suspect. Among the very rare charter statements of general custom,⁶⁶ none seems to deal with warranty.

We are reduced to searching the extant charters for data in conflict with our suggested picture of normality, a most unsatisfactory mode of proceeding. The most obvious fact about extant twelfth-century charters is the preponderance of grants to religion. The fact that the spread of express clauses of warranty thus begins in an ecclesiastical context inevitably raises the suspicion that the warranty obligation might have been an ecclesiastical innovation designed to protect benefactions. Suggestions that some drafting device was imported for lay transactions from the province of learned churchmen must always be taken seriously.⁶⁷ On this occasion, however, the origins are lay, not learned.

The best way to see this is to ask what happened when documents about a grant were either lacking or offered no explicit guidance. The developed common law included an often complex doctrine of implied warranty, to specify the occasions when it would intervene to enforce a claimant's rights. Some of the early common law's most obviously technical judgements⁶⁸ were devoted to this subject. This was only to be expected, as part of the all-important process of determining the limits of tenurial protection. Perhaps the most striking feature of

the doctrine of implied warranty in Glanvill and the earliest plea rolls is its breadth, the range of cases it covered.⁶⁹ Clearly, men already expected to have to warrant grants without their vouchers necessarily producing charters and binding warranty clauses, often without any written evidence at all. Moreover, the Church could not have exercised any substantial influence on the warranty obligation, without giving land warranty quite a different meaning from that which warranty carried in the context of chattel dealings, where written guarantees were superfluous.⁷⁰ The fact that the one institution of warranty could cover such a range of transactions much strengthens the case for its being a general obligation on all grantors.

More direct evidence in support of the proposition is not entirely lacking, though interpretable in more than way. There is no doubt that warranty obligations predated the rise of express clauses in England. Scattered evidence from the eleventh century exists for a wide area of Continental Europe; it was a common if not standard feature in Normandy by c.1100, and probably in Anjou, Maine and Touraine too.⁷¹ Express warranty clauses, though increasingly rare as one goes back in time, can certainly be found in England before the 1170s.⁷² Direct charter reference to the tenant's right to an exchange on failure of the warranty comes some decades earlier.⁷³ These dates depend on chance survival and the draftsman's whim. As if to emphasize this, the first clauses to exclude exchange, specifying that the grantor accepted no obligation in the event that he was unable to warrant his grant, begin earlier still. St. Mary's, York issued

charters with just such an exclusion clause as early as the latter part of Henry I's reign, almost as soon as grants recognisably akin to the later grants in fee begin to appear.⁷⁴ One can surely take it that when draftsmen take the trouble to exclude expressly a possible corollary, the existence of the primary obligation is so clear as not to require explicit mention.

Recent work on Normandy appears to establish that the same kind of customary expectations of good lordship already existed deep into the eleventh century.⁷⁵ Since a comparable examination of the eleventh-century English evidence is far beyond the scope of the present paper, we must be content to survey the Norman arguments and indicate how far their conclusions are likely to be applicable on the other side of the Channel. Normans patently counted on their lord's aid when it was necessary, in the courtroom just as much as on the field of battle. If it failed to materialize, they felt wronged.⁷⁶ Nor were their expectations restricted to themselves. They assumed too that the claims of vassals' sons to enjoy a similar lordship should be implemented in the absence of good reason.

What the son had was, of course, no more than a claim, which naturally lost its force when his family sided with the lord's enemies or acted in some other fashion that forfeited the right to grace. Someone else might possess a stronger claim, a possibility that will receive further consideration below.⁷⁷ When a man's legitimate claim was defeated by greater right, however, his peers generally agreed that he ought to receive compensation. The language is voluntary, the future

tense rather than imperatives, but the drift is clear. Gradually charter expressions of the aspiration for the protection of Good Lordship become more confident and swell into a virtual customary tenant-right. Though the process is neither in any sense inevitable nor even in its pace and strength, hereditary claims grew more powerful by degrees.

The sensible vassal took nothing for granted. He adopted what safeguards he could. Increasingly this meant an express commitment in writing, especially in cases where there had already been some dispute. (References to previous disputes are prominent among the earliest formulas. Once bitten twice shy!) Already by the first years of the twelfth century Normandy had reached the stage where the clear trend was towards more explicit statements of obligation. Between 1101 and 1106, for example, the Abbot of Préaux, propelled by his vassals into a grant against his better judgement, explicitly refused any commitment to his new tenant to make an exchange if the present grant failed for any reason.⁷⁸

The holders of "Cross-Channel Estates" might be expected to behave the same way in all their lands. From the middle years of Henry I's reign onwards, this was demonstrably so. In England as in Normandy, the good lord was routinely expected to warrant his man's tenure.⁷⁹ Henry I's Coronation Charter of 1100, that paean to Good Lordship, strongly suggests that the same expectation already existed before the turn of the century. Confirmation comes from the complex evidence of the Domesday Inquest.

In 1086, the primary test for disputed title was the testimony of local jurors, men of shire or hundred. They were supposed to indicate from their own knowledge the person through whom a tenant had entered.⁸⁰ Mostly this depended on royal acts; the jurors either had or had not seen someone seised by the king's writ and man (liberator). This has very much the air of a public guarantee of title.⁸¹ On occasion, though, this public livery of seisin was attributed to a private lord,⁸² which in effect shifted the test to something very close to private warranty.

When one turns to look at the ways in which challenged tenants justified their title or others put in their claim, private title comes much more to the fore. Rivals cited some donor⁸³ or protector⁸⁴ who would vouch for the legitimacy of their tenure. Lords relied on showing tenants to be their men to establish lordship over the land.⁸⁵ Domesday even confirms that men were familiar with the warranty terminology itself,⁸⁶ though the forms used varied a good deal.⁸⁷ The best defence of tenure was to cite one's grantor, who was usually also the same person who had seised you and ought to protect you. If the great man failed you, then, as in the classic warranty, you stood to lose your land.⁸⁸

The prominence of the king's name and word throughout these title disputes is in no way surprising. Twenty years after the Conquest, subenfeoffment was still rare in large areas of the country. The king, standing between the disputing parties and some Old English "antecessor", remained much the most common grantor, thus also a land

claimant's most useful guarantor. William's need to know whom to warrant and confirm could have been a major reason for the Domesday Inquest. The English situation was quite different from that in Normandy, where ducal writs and interventions were still uncommon.⁸⁹ Public memory of past action in the king's name was often the most appropriate and effective way of clarifying title in 1086. That said, there can be no doubting the familiarity of the landholding classes, in England as in Normandy, with the idea of seignorial responsibility for the validation and defence of their followers' tenure. The very fact that men applied this private language of seisor, protector, advocate and warrantor to the king proves that. The Domesday evidence clearly indicates that some kind of ideal general customary obligation of Good Lordship with regard to tenurial guarantees already existed in the late eleventh century.

The generality of this obligation to warrant places its origins firmly into the largely oral society before royal law became supreme. Naturally enough, these origins deeply marked the process by which the express clauses became standard practice and the common law came to take over warranty as its own. But before delving further into the narrative of change, two further preliminary tasks remain.

How had that older world dealt with warranty? To answer this question, we need to examine not merely lords' courts, whose important influence on the early Common Law has lately been given its proper due, but also the shire court of the early twelfth century and the writs by which the king could control it. However fragmentary the sources, any

understanding that emerges will assist the second task, which is to determine the nature and duration of the obligation and whether it was restricted to the lives of the original parties. We might well guess from warranty's remote origins as a very personal commitment that it was so limited in the twelfth century. A different conclusion emerges, however, from arguments similar to those of the last section. It appears that from well before the advent of the common law warranty was, in principle, a heritable obligation, which normally bound the heirs of both principal parties. What this means needs clarification, since the whole concept of heritability was in flux during the century and warranty changed along with it. These changes pose a further question for consideration in the final section of this paper. How did it come about that this sometime purely personal commitment became the "contractual addition which the tenant may or not have",⁹⁰ creating an obligation dependent on the closely interpreted terms of his grant? The answer demands an examination of the rise of the express warranty and some of its important consequences.

A start can be made by speculating on the treatment of warranty in lords' courts during the first half of the twelfth century.⁹¹ Initially I make two simplifying assumptions, first that we are dealing with a law-suit in a recognisable court,⁹² and second that the disputed holding was vacant without a sitting tenant, as for example after a tenant's death when the lord had to decide whom to recognise as his new tenant.⁹³ I shall also exclude questions about the identity of the nearest heir, though these must have taken up a good deal of court time

and obviously needed resolution before a lord could know where to confer his warranty.

The simplest cases presented no conceptual difficulty. A son or other close kinsman could often succeed a deceased tenant without opposition. He would simply plead the original grant by the lord (or some predecessor) to the deceased (or a predecessor). He would be calling upon the lord to warrant that grant and its associated seisin.⁹⁴ The challenge was conceptually clear, though practical action if the lord refused to perform was a different matter, to be dealt with outside the courtroom. Legal problems classically arose from competing claims to the land. It could easily happen, for example, that two or more vassal families could each plead their own apparently valid seignorial grant from the past as title to the same holding. This might put a new lord in a real quandary, uncertain whose claim was the better, who had "maius ius" in the land. His vassals, as suitors of his court, were expected to advise him of the most "reasonable" decision, that most consonant with "ratio" or custom. In other words, they had to help him find an answer which did not clash with what they remembered doing in similar cases and which would not cause trouble in a future already anticipated. Only in this way could the internal peace of the honorial community be assured.

Contemporary description of the inquiry process is rare. Charters very rarely admit to the arguments about warranty whose results they must so often have been recording.⁹⁵ There do exist, however, a few cases on the plea rolls of around 1200 which permit a

late glimpse of the kind of circumstances in which such inquiries had once been held. Tenants were summoned into a royal court to show "by what warrant" ("quo waranto") they were on the land. In some few cases also a private lord sought, in effect, the counsel of royal justices on his warranty obligations. By this time, cautious lords had come to terms with the danger that ousted tenants might later recover damages as well as the land by suing novel disseisin in the royal courts. It now made sense to pay the king⁹⁶ to put his royal authority behind inquiries which earlier lords had happily held off their own bat.⁹⁷ Thus what appears at first an embryonic common-law procedure of "quo waranto"⁹⁸ actually represents the old-style seignorial inquiries as hygienized by royal clerks. Similar royal "quo waranto" cases, where the king is himself acting as honorial lord, help to fill out the picture. The inquiries frequently mark the lord's own recent succession or recovery of control from some rival. They were not always simple fact-finding operations. Sometimes the lord hoped to justify the resumption of a holding into demesne, after escheat perhaps.⁹⁹ On other occasions, the idea was to discover and perhaps reverse the dispositions of some usurper or doubtful predecessor.¹⁰⁰

One crucial factor in these cases was the evidence and proof available to the claimant.¹⁰¹ The would-be tenant's strongest card was the production of the lord's own charter stating the obligation to warrant in unambiguous terms.¹⁰² He thus challenged the lord to fulfill his proven promise. Even if a charter possessed no more than evidentiary force,¹⁰³ as many scholars still believe, it must have been

very hard to renege directly on terms publicly read out in court. The lord's honte was too public to bear. So charters were probably conclusive for tenure and the terms of service.¹⁰⁴ But clear cases founded on documentary proof must have been rare indeed during the first half of the century.

Charters can never have been essential in lords' courts,¹⁰⁵ and without one the prudent claimant needed to approach his task with careful forethought in advance of any trial. There were doubtless plenty of experienced vassals around to consult on strategy. The atmosphere was much more political than most modern courts.¹⁰⁶ The well versed pleader had to take into account the kind of honorial democracy, which we can glimpse from the vernacular literature of the day.¹⁰⁷ He talked elegantly of men's higher qualities, while striving to persuade the audience that their interests coincided with his and his client's. In theory, of course, the community of peers favoured justice and fair play. Certainly, it feared to permit injustice, in a community where today's judge (suitor) was inevitably tomorrow's petitioner. It took real political savvy embodied in pleas of epic character to move a lord and his men.

It is a fair bet that accomplished pleaders often drew their listeners' minds back to dramatic scenes of past seisin and homages. Here lies the real importance of the lordship rituals discussed already.¹⁰⁸ Skillfully "remembered", they might perhaps persuade an assembly of vassals to take an unexpected view of the concomitant warranty. Judgements emerged organically from memories of what men had

"seen and heard" of the grant. Battle, that most typically chivalric form of settling scores by the "Judgement of God", sparingly used as much to promote compromise as for the ultimate proof, lent the process essential room for manoeuvre. The challenge was to persuade one's peers of your claim to right in terms as much political as legal. Able pleaders no doubt tried first to persuade their opponents to concede. Failing that, they sought to win over their peers. The court might then signal their approval so clearly by a favourable award as to bring further pressure on the other side to concede and thus avoid a risky duel. This could backfire. Some welcomed the duel, whether trusting in their strong right arms in disbelief of divine providence or because they piously expected God to intervene on their behalf. The pleader's power was limited, but persuasion was always worth a try and was in any event the required preliminary.¹⁰⁹

A process of this kind is little susceptible of legal analysis, least of all by the distant historian. Such knockdown legal arguments as existed mostly go undocumented.¹¹⁰ One must generally deduce them from later common-law sources. One good example is a formal proffer and receipt of service made publicly or in a lord's court. Glanvill holds that this was sufficient to establish warranty in the king's court. The lord's acceptance confirmed the tenure of the claimant, who was then seised beyond further denial.¹¹¹ There is no reason to link this logic with Angevin innovations; it clearly antedates the arrival of routine royal intervention and would have applied equally well in lords' courts.

The simple pattern of an "upward claim" to a vacant fee proceeding from a would-be tenant's offer of service is no doubt atypical. Two (or more) claimants can often be found seeking in effect the warranty of the same lord.¹¹² The existence of conflicting arrangements for the allocation of the same holding cannot have been a rare occurrence. Disseisins resulting from ira et malevolentia were no royal monopoly and remain pertinent to explanations for the invention of the assize of novel disseisin. Until well into the twelfth century, a great deal turned on the lord's changing whim. In an age when so much depended on memory, lords sometimes simply forgot past promises and were certainly much freer to change their mind than later. Twelfth century family and estate histories present many tenurial discontinuities best understood in this context.¹¹³ The resulting disputes could hardly all be confined to convenient vacancies. Not infrequently, one claimant arrived to find that the lord had already ratified someone else's seisin with all due ceremony. That put the lord and his advisers in a spot.

This situation is the very stuff of courtroom drama, as in the trial scenes of contemporary chansons de geste. Romantics might side perhaps with the young man they had thought gone for ever, now returned to claim his birthright. But the cold voice of precedent and conservative stability spoke powerfully in the other direction. However good the young man's claim in the custom of some ideal world, responsible peers would ask, how could the court now disseise a properly entitled tenant who had done no wrong to them or their lord?

The argument is powerful. Recently, it has seemed virtually conclusive to some. Once a sitting tenant claimed the lord's warranty, it was said, his court could not entertain the outside claim.¹¹⁴

Talk of an absolute bind on lords will seem very strange to ordinary historians of English society. Were it not for the acuteness and technical ingenuity with which Prof. Milsom argued the case, it would hardly demand an answer. Believers in a seignorial world, not just in England but all over medieval Europe, have taken it as normal to submit land disputes to resolution by a duel before the lord of whom the claimants wished to hold. The right to hold such duels was a mark of baronial status. Nowhere in the previous literature has there been any hint that duels might only be held where the disputed holding was vacant, by the tenant's death or otherwise. The supposed iron logic of warranty would surely have been recognised somewhere in Europe by a writer whose thoughts survive.

To believe that men felt themselves irrevocably bound by every grant once made is to believe in a world without sin. It makes warranty too mechanical an obligation for the tough society of the early twelfth century, with its largely oral memory. The hard politics of the seignorial world unquestionably accepted the ousting of once-accepted tenants for all kinds of reason, not excluding the making of fresh grants of lands previously given to men now out of favour.¹¹⁵ Though this kind of active lordship was, no doubt, especially rife during the anarchy of Stephen's reign, it broke out whenever lords were free to follow their inclinations, which must include most of the

Norman period. Certainly the rivalries and local politics of the honorial community were as often behind the ousters and regrants as any national allegiances.

Yet the lord's dilemma was genuine. The question of proof nicely encapsulates his difficulty. The court's ultimate recourse, when hopes of settlement faded, was to God's judgement through the duel. Awareness of this was itself a powerful inducement to come to terms. The question for the lord was whether he dare allow a question touching so closely on his own conscience and hence public reputation to reach God at all. Where the dispute narrowed down to an issue between the would-be tenant and his putative lord (the "upward claim"), battle would be between lord and vassal. This, though it did occasionally happen, was a patent embarrassment to all concerned,¹¹⁶ and a pressing invitation to seek outside aid.¹¹⁷

It was probably to meet this situation in particular that the right to escambium became an automatic corollary to warranty. This right of exchange, especially the notion that the new holding had to be of equal value to the old, deserves more emphasis than historians have given it. Compensation for loss is an ubiquitous feature of early medieval custom. Seldom, however, is the measure of customary compensation laid down in advance. With default of warranty, it was apparently so well known that express provision was unnecessary,¹¹⁸ a good indication that it proceeded from a particularly clear case. This was surely not that of the claimant defeated in his suit for a vacant fee. No doubt he too possessed a moral claim to compensation,

sometimes quite a weighty one. The peer-suitors might well, having found for the opponent with "*maius ius*" to the particular holding, advise their lord that past service entitled the loser to a land grant. But this was merely voluntary advice. The lord was under no obligation to accept it. One might reasonably expect compensation of considerably less value than the lost fee, no more than a compensatory *douceur* to demonstrate the lord's magnanimity.¹¹⁹ The case of a judgement ousting a vassal seised with his lord's warranty was of a different order. One can well imagine men saying that such a man must receive in exchange for his lost fee another of at least equivalent value. His right to replacement of what he had lost, to a full escambium, was as full a "right" as any could be in the customary world of the early twelfth century. It is somewhat remarkable that long before Henry II English practice apparently equated the two cases.

The Common Law's arrival changed things again. A new situation arose with that final "shift of control" which enforced the use of royal writs and thus inhibited the exercise of active lordship.¹²⁰ But challenges to sitting tenants had always encouraged one party or the other to appeal to outside aid. We know something about the king's assistance on such occasions from surviving writs and records of the cases introduced by them. Some of these may have been directed expressly at questions of warranty. More than once in the 1130 Pipe Roll, we seem to see the king intervening to enforce the right of other men's tenants to escambium.¹²¹ These together with references to royal assistance in land suits apparently by writ show that royal enforcement

of private warranty was known; for all we can tell, it may have been common. One route into royal justice was already well mapped in the early twelfth century. From the demandant's point of view, the lord's refusal to grant him his due constituted either defectus iustitie or, if the court had heard his pleas but reached the wrong conclusion, iniustum iudicium. Both of these had long been numbered among the king's special rights and there existed an ancient procedure (Tolt) to bring cases into the shire court on the broad grounds of "default of justice".¹²² Hearing arguments about warranty obligations in the shire court may already have been quite a familiar experience by 1135.¹²³

Private courts no doubt played their part too. The ethos of competitive lordship must have encouraged appeals by the disgruntled and pessimistic to their powerful neighbours. Men probably thought first of an overlord,¹²⁴ then of some other magnate prepared to claim the lordship. They might consider commending themselves to anyone powerful enough to aid their cause and maintain their gains. We can only guess. Twelfth century magnates left far fewer writs than the king. Traces of the lost jungle must be sought between the lines, in accounts of magnate competition and feud, or in details of apparently inexplicable property transfers from one honour to another. The jurisdictional picture was certainly more complex than many depictions of the seignorial world allow. And the violence of frustrated men provided ample justification for those who could to call in royal aid.

The second task promised above was to define warranty's limits. Who was bound by the promise and who stood to benefit from it? A legal

system may, if it wishes, restrict the force of a personal promise to the persons of the original principals, promisor and promisee. Equally, it can permit either principal to pass on his legal position to others by inheritance and/or assignment inter vivos. The Common Law did not easily extend from the original parties to others the burdens and benefits of their agreements and promises. Yet in the developed Common Law, warranty was as fully transmissible as the property right it represented. How long had this been so and how did it come about? Warranty can presumably outlast the joint life of the original principals only when the tenurial and vassalic relationships are perceived to be continuing or permanent, a point with obvious implications for the heritability of land tenure.

The early plea rolls leave no doubt that under the royal law of Richard I's reign warranties extended to the heirs of the parties.¹²⁵ S.E. Thorne contended that this position owed much to recent developments. In his opinion, the watershed came c. 1175 at about the time when the Assize of Mort Dancestor was introduced. Before that date, homage had, he felt, created no more than a personal link between the two principals who had performed and received it. Now it began to be seen as barring the lord's resumption of his land for the whole duration of the tenant's (direct) line. The grantee's performance of homage acquired for him "a permanent warrant", and estopped the lord-grantor from all legitimate re-entry other than by forfeiture or escheat. Charter draftsmen now less and less frequently recited the consent to alienation of the grantor's heirs and kinsmen (the so-called

laudatio parentum), now trusting for their clients' tenurial security in the permanent "homage bar" and warranty commitments. Previously, he held, a man's heirs had had to bind themselves personally to the ancestor's grant; simply being the grantor's heir created no obligation. Similarly, heirs of a grantee could not automatically benefit from the personal promises made to their ancestor. Some new commitment was needed to bind the ancestor's grantor (or his heir) afresh to them. The crucial change came when heirs began to enjoy royal assistance in their suits on a regular basis. From 1176 onwards the Assize of Mort Dancestor did more than just enforce a warranty; it enforced the "recovery" of seisin.¹²⁶

Prof. Thorne, perhaps less interested in heritability as such than the rise of ownership at Common Law, cited only enough charters to establish the absence before c. 1175 of a regular royal procedure to compel heirs to honour their ancestors' warranty promises.¹²⁷ Present needs require more than that, for the birth of the Common Law was in no way the start of our story. I have already pointed out some of the ways in which warranty was enforced without royal participation. Similarly, many sons confidently expected to succeed to their fathers' lands long before the king routinely guaranteed rights of inheritance.¹²⁸ To put it at its lowest, the father's long service and tenure persuaded the community that his heir, ceteris paribus, possessed a better claim to succeed than any stranger. And the same peers accepted the corollary, that an heir should, if he could, pay his deceased father's debts and fulfil other residual obligations. These

rights and duties existed in men's minds largely independent of the existence of formal legal remedies, which was one reason why lords sometimes agonised over questions about tenant-right in the manner already discussed. If this is so, the emergence of common-law warranty has to have been a more complex matter than Thorne's highly compressed account permits it to seem. I shall suggest that it was a gradual affair, best understood in terms of the gradual hardening of tenurial customs into a set of legal rules about ownership and inheritance rights.¹²⁹

The length of time it took for clauses reciting kinsmen's consent to grants to drop out of drafting practice indicates that the process was only loosely connected with the provision of new royal remedies. This cannot be proved in a straightforward manner. Disappearances are hard to document and the formulas are only after all indirect representations of conveyancing practice.¹³⁰ In any case the English clauses were never as forthright as those to be found in France.¹³¹ They have the air of reciting assents, rather than consents whose refusal could invalidate the transaction. Successful challenge by disgruntled kinsmen was also rarer than across the Channel. So there was less to disappear than might be thought. On the other hand, consent clauses can occasionally be found well into the next century. Consents probably only became genuinely superfluous -- drafting conservatism aside -- after kinsmen found their attempts to challenge grants in the royal courts barred one by one by ingenious royal justices.¹³² This takes us at least into John's reign, and thus brings us within the

chronological range found in Northern France.¹³³ The evidence of the consent clauses, then, favours a hypothesis of gradual change less dependent on particular legal innovations than Thorne implied.

Indications that warranty agreements bound the parties' heirs even before the Angevin legal reforms strengthen the argument. The donor's heir may be taken first. Was he bound in the mid-twelfth century to honour his ancestor's promise of warranty? This was not the open-and-shut question it became later under the Common Law. The important factors are the means and criteria by which an heir tried to make up his mind and the methods hopeful tenants used to persuade him. These varied according to the nature of the tenurial interest. The more precarious and impermanent this was, the less strongly could an ancestor's wish commit his successors. The moment of succession was then the one when the prudent heir most needed advice from his amici, extending perhaps to the kind of "Quo Warranto" inquiry already mentioned. By Glanvill's day, the inquiry should have been a formality unless the donee's seisin was in some way tainted. The king's court would now compel an heir to warrant any full grant (vera donatio) of his ancestor and predecessor-in-title. As Glanvill himself puts it, "The heirs of donors are bound to warrant to the donees and their heirs the gifts and the things given, in so far as they were given rationabiliter".¹³⁴

Glanvill's formulation prompts one to ask how commonly grants were left incomplete. Cases from the earliest royal plea rolls frequently turn on just this issue,¹³⁵ and were quite often pleaded in

the language of warranty.¹³⁶ The classic examples are family arrangements, especially deathbed grants to younger sons, and gages of land. Glanvill's round declaration, that a nuda promissio of this kind was insufficient to create a valid legal claim, "secundum consuetam regni interpretationem", surely implies a general custom beyond the bounds of the curia regis which was his main concern.¹³⁷ Many, perhaps most, gifts to laymen in the third quarter of the twelfth century and before were in fact incomplete in this Glanvillian sense. Prof. Thorne showed some forty years ago that Glanvill's requirement for livery of seisin, meaning the public delivery of possession to an incoming grantee, was another Angevin creation.¹³⁸ The symbolic investitures common earlier in the century, even had they been performed with enough publicity to attract through local jurors the notice of the royal courts, would not have swayed Angevin justices. Such grants would normally have remained among those private convenciones which the curia regis was not in the habit of dignifying with recognition.¹³⁹ Any warranties contained naturally shared the grant's fate. This had not greatly worried men a generation earlier. In the mid-twelfth century, charter draftsmen simply sought to express their grantors' wishes in the form that seemed to offer the best chance of lasting effect.¹⁴⁰ Their charters rarely contain warranty clauses specifically limited to the original grantor. Some kind of plausible explanation can often be attempted for first person warranties.¹⁴¹ Some, for example, are confirmations or similar personal supplements to an earlier grant by someone else.¹⁴² It certainly looks as if draftsmen felt from the

beginning that the onus was on them to explain why an express warranty clause should not commit the warrantor's heirs.¹⁴³ Certainly, the vast majority purport to bind the donor and his heirs to the donee and his heirs.¹⁴⁴ This more-or-less standard formula predates Henry II and his reforms by some years, a generation before comparable clauses appeared in France. I conclude that Englishmen already believed that in normal circumstances heirs ought to honour their ancestors' warranties.¹⁴⁵

A similar logic probably applies to the heirs of the grantees. Charters that expressed warranties as due to the grantee and his heirs -- which almost all did -- most probably meant what they said.¹⁴⁶ Historians doubting this in the past may have been swayed by what seems to be a contradiction between two passages in Glanvill. The one already quoted states clearly that in full grants warranty is owed by donors and their heirs to donees and theirs. This authoritative formulation in a book devoted to questions about inheritance and under the early rubric "De heredum warrantizatione" seems to leave no room for doubt in the matter. However, in Glanvill's later discussion of homage, he deduces from the mutual bond that:

"If anyone gives to another for his service and homage any tenement later proved against him by another, the lord is indeed bound to warrant the tenement to him (the donee) or render him an appropriate exchange. The case of someone who holds his fee from another as an inheritance is, however,

different, because the lord is not bound to an exchange even if he (the hereditary tenant) loses that land."¹⁴⁷

There is no denying the difficulty of reconciling these two dicta. The restriction to holdings "*sicut hereditatem*" may, however, point towards a solution. It suggests that Glanvill had in mind here a distinction, between acquisitions and inheritance which was obsolescent but still alive as he wrote.¹⁴⁸ It seems to harken back to a past when alienation was abnormal, so that a lord might perhaps feel that his obligation expired with his grantee, who ought to have made his own arrangements to secure the holding for his heir. This had not wholly passed out of current use in Glanvill's time. The sentence is likely to be better evidence for recent royal policy on the enforcement of warranty, than for the scope of the obligation more generally. If this is unacceptable, the difficulty will have to await another explanation, which may well turn out to be very specific.¹⁴⁹ But perhaps Glanvill simply erred. In any event, I prefer to follow the passage most consistent with the obvious interpretation of the charters themselves.

The clinching argument, to my mind, comes from grants to religion. Their draftsmen must always have intended to create a *permanent effect*; the *saintly grantees and most of those whose souls* were meant to benefit were already dead. The enduring relationship between land, church and the souls close to the grantor's heart was central to the whole act. The draftsman's priority was to discourage

grantors and their kinsmen from all further interference in grants once made. His language had already advanced far towards common form by the early twelfth century.¹⁵⁰ The feeling that grants in alms really ought to be permanent was old and widespread. Members of the grantor's family had an interest and some kind of obligation to uphold his grant from which they and their souls stood to benefit -- permanently.¹⁵¹ Their obligation had to be of equal duration to the grantees'. The grant in alms, if it were made in due form -- "*sicut rationabiliter facte*" -- was already the classic example of a gift with permanent warranty.

One might argue that church draftsmen were careful, precisely because alms were different and lay warranties normally unenforceable by the donee's heirs, a view that has some force for the early years of the century. More probably, the warranty clauses enjoyed by ecclesiastical beneficiaries showed everyone that warranty could be a continuing commitment. The lay recipient of a charter containing a similar warranty clause would wonder why the security of tenure granted him with such *éclat* should not extend also to his heir. Doubtless the grantor and his heirs frequently and perhaps legitimately took a different view. The original grant, especially if for little or no service, might be impugned as not made rationabiliter, for example, because it constituted a disproportionate alienation.¹⁵² It may have been almost as common here as in France for a newly succeeded heir to question his predecessor's grants in this way.¹⁵³ He and his advisers might feel that circumstances

abundantly justified them refusing particular tenants' homage. Such complaints did trouble the courts at the time of the early plea rolls. But these are the exceptions. The primary fact is the growing number of express clauses phrased to join in mutual obligation not only the parties but their heirs. Quite swiftly, these built up the atmosphere of permanent commitment to the point where the nascent common law could, perhaps had to, turn it into a rule.

This conclusion accords nicely with an emerging view of the rise of heritability in twelfth-century England. It points, indeed, towards a reconciliation of the commonsensical perceptions of general historians that men did in fact succeed their fathers throughout the century, with the lawyers' careful distinctions designed to show what was changed by the origin of common law inheritance rights.¹⁵⁴ Ex hypothesi men were enforcing warranties against the heirs of deceased grantors during the early twelfth century. We can rarely see them doing so, because the proceedings were largely unrecorded. When suits for inheritance (lawyers might prefer to say non-testamentary succession) are visible, most fail to mention warranty at all. Yet these hidden cases, routine perhaps in seignorial and local courts, are the essential context for the occasional royal enforcement of private warranties from Henry I's time.¹⁵⁵ The king was doing nothing too revolutionary. He simply granted to the favoured few an exceptional remedy for wrongs to widely recognised customary rights. Before Henry II there was perhaps no legal inheritance right in England, though there certainly were succession customs which the

king, among others, would sometimes help to enforce. Undeniably the provision of regular royal remedies constituted a key change, which soon made the succession of an undoubted heir to his inheritance all but automatic. As we shall see, the dating and character of this process are matters of judgement. But whatever position one takes on them, the advent of regular royal procedures can hardly have created "ownership". Rather was an existing tenuous, customary ownership brought under royal protection to be strengthened, defined and formalized.

3. The written record and its consequences.

Much of the argument up to this point stands or falls on evidence from express clauses of warranty. This may seem a trifle perverse, when as late as 1150, many laymen still possessed no charters at all, and warranty clauses remained the privilege of a tiny minority. The arrival of express clauses in force was still changing warranty in crucial respects as it emerged into the glare of the Common Law day. Clearly, one ought to conclude with some account of the process by which it became normal to express warranty obligations in writing.¹⁵⁶

The crux is not warranty's sporadic first appearances in writing,¹⁵⁷ but the time when express clauses began to appear the norm, more specifically the date when they become a routine part of enfeoffments. Precocious examples apart,¹⁵⁸ warranty clauses are hardly found before the middle of Henry II's reign¹⁵⁹ and are still

not completely normal at the end of the century.¹⁶⁰ Their diversity of formula, while confirming that warranty was no novelty in the late twelfth century, also rules out any simple timetable of change. Once draftsmen had decided that the obligation had to be inserted into their texts, they drew on a range of forms as wide as for any other formula. It seems certain that the changes under consideration were not due to any local factors but related to the emergence of the royal Common Law.

There is this time a strong case for attributing the new practice to Church initiative. All the earliest examples of express clauses come in grants to religion, at a time when ecclesiastical beneficiaries still had such an edge in drafting experience that the end result was likely to reflect their choices over those of their lay benefactors.¹⁶¹ Was there perhaps some special difficulty inherent in grants to the Church which spurred men to have their warranty undertakings put into writing? Did the key lie, for example, in grants reserving little or no service to the grantor, which are much more frequent than between laymen? In addition to the obvious consequence that a serviceless grantor was that much less capable of bearing the obligations due from his own lands, grants in free alms seldom produced any visible service to serve as evidence of the warranty obligation.¹⁶² Ecclesiastical draftsmen had good reason to be cautious here.¹⁶³

Of course beneficiary drafting was not ubiquitous. By the second half of the century, great lay lords were certainly producing

their own charters and thus controlling their form.¹⁶⁴ Yet the movement towards express warranty clauses probably owes a great deal to the fears of potential grantees. Religious houses, in particular, no doubt first made warranty express in cases where trouble was anticipated from the very making of the grant.¹⁶⁵ Actual warranty clauses occasionally make explicit the parties' fear of a doubtful title or a mighty neighbour, by adding to the usual general warranty a specific promise to help against some named person, "et nominatim contra X".¹⁶⁶ This form, which afforces the original obligation, and thus gives the grantee something extra, supports the hypothetical origin in beneficiary drafting.¹⁶⁷ From monasteries, then, the idea of express clauses as the kind of guarantee no tenant should be without filtered into the lay world.

Two other phenomena of the late twelfth century also influenced the rise of express clauses in important ways, the "strict construction" of the evidence for warranty and the advent of routine royal remedies against default. Since by this time warranty can be equated with tenant-right, the rise of the real actions must have been a major determinant. Warranty enforcement cannot have marched out of step with royal control of land litigation, without disturbing most reasonable assumptions about legal change in the period.¹⁶⁸ The warranty material thus serves incidentally as a coherence test of recent views on the Angevin reforms.

It is reasonable to seek a watershed in the tenurial settlement made at the close of the civil war between Stephen and the

future Henry II. One recent view goes beyond this to argue that besides the formal Treaty of Westminster, which ended the political hostilities there had stood a further settlement setting out a special new rule for deciding the property disputes inevitable after a long period of civil strife.¹⁶⁹ I am not yet convinced of the existence of such a new but undocumented rule, well though it would fit some features of legal development later in the reign.¹⁷⁰ As Professor Milsom says, "It is doubtful whether we should think of an essentially legislative act intended to govern the future".¹⁷¹

How far the stream of royal decisions and confirmations in Henry II's first years began while Stephen was still alive is relatively unimportant for our picture of the development of warranty and tenant-right. Much more to the point is the probability that the flow of acts was unusually large.¹⁷² The whole period from the Treaty of Westminster late in 1153 on into the first year or so of the new reign was characterised by a high degree of confusion about where men stood, the precise nature of their rights and liabilities under the emerging regime.¹⁷³ No wonder they flocked to seek confirmations from the new king. If a substantial number of these petitioners were under-tenants, as seems likely, their pleas must have been the major springboard for royal justice into the sphere of real property.¹⁷⁴ Presumably all claims against grantees of confirmations would automatically be within royal jurisdiction and thus entitled to a writ from the beginning.¹⁷⁵ This alone could explain why Henry was already legislating against disseisins from as early as 1156 or 1158.¹⁷⁶ The royal interest in

tenant-right which this implies would then date from the king's coronation or before.

Progress will have been very uneven.¹⁷⁷ The natural emphasis on Novel Disseisin and the great eyre visitation of 1165-6, does less than justice to other less easily discernible advances with equal impact at the time. The Assize of Novel Disseisin did not stand alone. A constitutio about Tolt from "the very early years of the reign", for example, perhaps in origin a royal gesture on behalf of disinherited Angevin supporters, also attests to the king's willingness already at this early date to intervene in land cases on a substantial scale.¹⁷⁸ It appears nevertheless that it was only from about 1170 that the king and his advisers began to take a direct interest in the identity of the sitting tenant (deforciant) when granting writs "de recto",¹⁷⁹ a change which must reflect a fresh or intensified royal will to deter lords from any inclination towards unthinking warranty of sitting tenants. A further burst of rationalisation after the guerra of 1173-4, partly embodied in the Assize of Northampton of 1176, may even have been pivotal.¹⁸⁰

Routine royal intervention was a function of the introduction of the real actions. The 1170s look to be the first decade when royal land actions reached a critical mass that compelled judicial reflection on the nature, proof and enforcement of private warranty, and property right in general. The first block of pipe rolls payments for warranty default etc. in 1169 could mark a step-up in royal interest.¹⁸¹ Other tests point to a second stage of development. By

about the start of the thirteenth century, for example, the maxim that no man need answer for his free tenement without a royal writ had completed its journey from statement of fact to Common-law rule,¹⁸² and the once valid novel disseisin defence of ouster on good grounds by legitimate judgement of one's own court was passing out of use.¹⁸³

Occasional warranty writs appear almost from the start of the reign. The first kind was a royal order in "Precipe" form that a named person should warrant the beneficiary. This is already recognisable, from the first extant example dated 1156/7, as a predecessor of the Common-Law writ *De Warantia Carte*, the only important difference being that it did not always refer to a charter.¹⁸⁴ What we do not know, even for the period from the 1180s when pipe roll payments appear, is how common it was. For a long time, it probably remained a favour to be purchased. The pipe rolls reveal the existence of two other new writs at about this time. One, in summons form (first evidenced 1179), was issued at the justices' discretion interlocutory in actions of right and dower. Though itself of little lasting legal importance, it usefully indicates the growing scale of royal intervention. The other new writ (first evidenced 1178), later called the *De Homagio Capiendo*, enjoyed a certain popularity into the early thirteenth century. Glanvill's account associates it with the single situation of an heir in possession but unable to secure his lord's blessing for his tenure.¹⁸⁵

The provision of new writs for situations connected to voucher suggests that men close to the seat of power were beginning to be

aware of some consequences of the new remedies. We have no way of knowing in detail how the royal courts dealt with warranty disputes in the earliest stages. Strict construction of express clauses is already evident on the first extant plea rolls in the mid-1190s, but was perhaps less stringent than it later became.¹⁸⁶ These facts slowly trickled into the general consciousness. Charter draftsmen gradually began to follow the lead of the royal courts, now increasingly the forum most relevant to their labours. More careful drafting and the inclusion of express clauses into all grants intended to carry warranty was no more than the prudent response and does not seem on present evidence to have been at all general before the very end of the twelfth century. The whole process must have taken about two generations, one for the king to take control and a second for men to perceive this.

Such, in crude outline is the change to be explained. One possible hypothesis to deal with the matter in much the same terms as it has been stated can be deduced from the pages of The Legal Framework of English Feudalism. A Milsomian view might start from the "shift of control" consequent upon the new royal law of the real actions and run something like this. Lords and other grantors had after 1166 to face the fact that royal law could force a new tenant upon them against their wishes, while at the same time forcing them to compensate by exchange their preferred old one. They suddenly had to treat promises of warranty even more seriously than before. Charters and express clauses rapidly came to seem desirable, even essential, to

limit grantors' liability by clarifying its bounds. As obligations were specified with greater care and precision, men took an ever more combative attitude towards them. The royal justices, because they lacked detailed knowledge of the local circumstances that spawned disputes before them, were driven back on charter texts. Stricter construction of the written evidence was the result, in a kind of trade-off by which the courts only enforced warranty against lords in the clearer cases, the more obvious situations where warranty had to be implied or where the charters were indisputable. This has all the appearance of agreed damage control by the courts in the interest of lords.¹⁸⁷

This account, for all its illuminating aspects, cannot be the whole answer. Our warranty material raises general questions about the Angevin legal reforms, on the balance between conscious innovation and unanticipated, consequential change, and the direction of any central policy behind royal interventions into land law. Strict construction of the charters by the royal courts is central to the answers, a natural judicial response, perhaps, to the challenge of providing outsider justice for situations previously dealt with primarily within the disputants' home community.¹⁸⁸ Royal warranty cases are essentially unrecorded before the mid-1190s. The first plea rolls do not in any case reveal the personal contacts and choices which influenced the justices' decisions.¹⁸⁹ But they do already show much the same tendency as later to construe charter formulas strictly according to technical rules of interpretation. Angevin justices,

buttressed by their education in the learned laws and their high opinion of royal supremacy,¹⁹⁰ were not afraid to declare from on high the proper interpretation of custom. With the arrival of the returnable writ in the 1170s, they had a "set text" around which to concentrate their minds. With this background, strict construction looks more like an inevitable part of common-law warranty than something which needed time to develop.

There is little attraction in positing some implicit policy decision initiated at levels above that of the justices. Significant legal change did not always proceed from conscious legislative choices in the middle ages and there was little reason for policy decisions about warranty once the real actions -- surely the product of more conscious political decision than the Milsomian view allowed -- were in existence. To reach common-law warranty from their starting-point, the justices could have merely followed the logic of the new remedies to the better protection of tenant-right.¹⁹¹

A conscious political decision might well have come down against the "lords" anyway. Charters and express clauses in the first instance benefit grantees not grantors, warrantees rather than warrantors. Some of the earliest royal cases about warranty show the lengths to which lords would go in court to wriggle out of promises, even when recorded on their own charters.¹⁹² A lords' lobby, out to design common-law warranty in its own interest might have argued against all implied warranty, insisting on the clearest possible written evidence. But no such lobby could have existed, when

all "lords" were also someone else's men. And any such argument ran directly contrary to the main thrust of the Angevin reforms in land law. A rather more plausible route from our earlier world to common-law warranty was via the justices' dutiful pursuit of the logic of the real actions in defence of tenant-right. This general policy would not exclude the occasional "political" verdict in particular cases. But to do justice was one of the first promises the king made at his coronation. Henry II's resolve in the matter no doubt derived as much from his awareness of the profit and prestige to be gained thereby -- witness the pipe rolls -- as by the distant example of his grandfather. There is no need to colour Angevin attitudes with exaggerated idealism. Until Magna Carta, kings took great care to ensure that the new concern for tenant-right did not infect the politics of relations with tenants-in-chief; the new procedures did not apply within the royal honor.¹⁹³ On the other hand, the king and his justices were quite sensitive to cries of "Foul!" from the politically influential. Most likely, conscious royal intervention, if any, was moderated by the conservative desire not to disturb unduly the status quo. Thus, in principle, it favoured enforcement of warranty at least for settled holdings. Richard FitzNeal knew what he was doing c. 1179, when he apprised his Exchequer pupil of a general royal policy of aiding tenants against their "domestic enemies", the lords.¹⁹⁴ Here lay the basic theme of the law reforms.

This picture, with its suggestions about the roles of beneficiary drafting and ecclesiastical inspiration in the rise of express

warranty clauses, cannot be merged into a Milsomian one. Nor can a primarily legal analysis take the matter much further. The torch is ready for the political historians. Law and legal change were never more obviously part of the political process than in Angevin England, a fact which the purest legal historian must respect. A combined approach seems promising. I have tried here to indicate some of the ways in which it might go. There is first the broader perspective. The knowledge that warranty patterns straddle the Channel could encourage comparative study of the different ways in which English and French courts treated tenant-right.¹⁹⁵ The splitting-up of a single customary world during the century following Henry of Anjou's acquisition of the English crown is a dazzling phenomenon. Grand comparisons between the fates of similar custom under different regimes offer a fresh perspective on the birth of the English Common Law, ready for testing against the details of English litigation. Here lies the other potential strength of a combined approach. Where possible in this paper, I have tried to supplement the legal historian's tried method of analysing the common law from its own records, with extra-legal evidence from private charters and royal records. Especially from John's reign on, when a variety of legal and financial records can be brought together, historians have on occasion used the pipe and fine rolls to considerable effect to bring out aspects of litigation omitted by the plea rolls.¹⁹⁶ Patently, royal financial records of the twelfth century, such as they are, have a good deal to add to our understanding of the Common Law at its pre- and peri-natal stages.¹⁹⁷

But just as the legal system and its doctrine as a whole should be related to national politics, so, ideally, must we approach each individual case as a piece of local history, a still greater challenge for the historian of English law, because of the very scattered nature of local sources.¹⁹⁸ Perhaps regional and estate specialists will deploy their expertise to criticize the legal arguments. By establishing at what date express clauses became de rigeur on their patch, for instance, they will adjust the global pattern proffered here, and, more important, the anomalies they expose may compel reconsideration of some of the causal arguments.

Warranty has proved a useful starting-point for investigation of the "Feudal Framework of English Law".¹⁹⁹ It nicely encapsulates one of the great paradoxes of the twelfth-century's discovery of the individual. One might expect such an age to place great weight on personal relationships such as the bond of homage between lord and vassal. To the contrary, in the course of the Century of the Individual, warranty was institutionalised and very largely extracted from the realm of personal relations into that of impersonal written contract. For all the twelfth century's talk about human values and individuation, movement from personal choice to institutionalisation -- from status to contract -- is seldom far from centre-stage.

Footnotes to WARRANTY AND GOOD-LORDSHIP IN TWELFTH-CENTURY

ENGLAND

* The rough draft from which this paper grew was composed at the Institute for Advanced Studies, Princeton in 1980 and tested at the First Caltech-Weingart Conference in the Humanities the next year. I completed it during my year as a Sherman Fairchild Distinguished Scholar at Caltech in 1985. The reactions of Donald Sutherland and Eleanor Searle at the 1981 conference and of Paul Brand, Jeffrey Hackney, John Hudson and Steven D. White to intermediate drafts have all left noticeable impressions on the present shape of the argument. I am grateful to them all and especially for those responsible for my fruitful stays in Princeton and Pasadena. My wife Elaine Marcotte Hyams, as always, has contributed in many diverse ways.

1. S.F.C. Milsom, The Legal Framework of English Feudalism (Cambridge 1976) is the prime illustration of what can be done by clever and imaginative speculation on the things Common-Law sources exclude. T.A. Green, "Societal Concepts of Criminal Liability for Homicide", Speculum xlvii (1972), 669-94 is another good example of the technique. On the other hand, A.W.B. Simpson has shown in his Cannibalism and the Common Law (Chicago 1984) and other recent studies what standard historians' research can contribute to the understanding of leading cases

from the modern period. Even for the medievalist there are other options, such as working from the records of one or more monastic houses. M.T. Clanchy, "A medieval realist: interpreting the rules at Barnwell, Priory, Cambridge", Perspectives in Jurisprudence, ed. E.A.G. Attwooll, Glasgow 1977, 176-94) makes good use of a register composed in the 1290s. I hope myself to examine The Chronicle of Battle Abbey, ed. E. Searle (Oxford Medieval Texts, Oxford 1980) against the background of the house's charters with something similar in mind.

2. Early Yorkshire Charters [hereafter EYC], ed. W. Farrer and C. T. Clay (12 vols., vols. i-iii Edinburgh 1914-6, vols. iv-xii and index vol. to vols. i-iii Yorks. Arch. Soc., extra series i-x 1935-65); I treat Charters of the Honour of Mowbray, 1107-1191, ed. D. E. Greenway (London 1972) as an extension of the series. The most surprising fact about EYC, with its wealth of material buttressed by the immense learning and good judgement of its editors, Farrer, Clay and now Greenway, is perhaps the remarkably little use legal historians have made of it. Even so, the number of cases that can be understood in the round remains small. Appendix II carries details of some of the more knowable ones.
3. See my article on "The Common Law and the French Connection" in R. Allen Brown (ed.), Proceedings of the Battle Conference on Anglo-Norman Studies IV, 1981 (Boydell Press, 1982), 77-92, esp. 83-4.

4. The text does not pretend to a nuanced survey of the previous literature on warranty. The main lines of inquiry can be traced from the following: Sir F. Pollock and F. W. Maitland, The History of English Law (2nd edn., Cambridge 1898), i. 301, 306-7; ii. 158, 162-4, 662-4 etc.; S.J. Bailey, "Warranties of land in the thirteenth century", Cambridge Law Journal [hereafter CLJ] viii (1942-4), 274-90 and ix (1945-7), 82-106; idem, "Warranties of land in the reign of Richard I", CLJ ix (1945-7), 192-209; S. E. Thorne, "English feudalism and estates in land", CLJ (1959), 193-209; A. W. B. Simpson, An Introduction to the History of Land Law (Oxford 1961), 15, 49-50, 109-10, 118 sq. For Milson, see the next note. Maitland seems, as usual, to have made some of the observations crucial to the argument here long ago; see below n. 30.
5. For warranty see esp. pp. 42-7, 58-9, 61-4, 75-7, 85-6, 108-9, 121, 126-32, 172-4, 183-4. Some of what follows is developed from my review in English Historical Review xciii (1978), 856-61.
6. The expression "good lordship" was probably a later medieval coinage. I follow the classic usage of K. B. McFarlane, The Nobility of Later Medieval England (Oxford 1973), 113-4.
7. Many lawyers and some legally minded historians deny the existence of rights in the period before there existed a Common Law to enforce them. The timely arrival on my desk of a draft paper by S.D. White on "Legal Argument and Claims to

Inheritances in Western French Courts, c. 1050 to c. 1150: their Implications for the Study of Earlier Anglo-French Law" did much to reassure me that the usage here is defensible. I accept, of course, that tenant-right is something broader than warranty, in any world other than one where being put in by the lord is the only acceptable form of title, a view of restricted twelfth-century tenant-right that I cannot share. Tenants' defences, such as a simple denial putting the demandant to proof of his right, imply something more. On the other hand, the warranty equation can only apply to those honourable tenures, which the Common Law will term tenure in, or as of, fee, where the tenant has full right (ius). Warranty of a lessee by his lessor does not convey right, nor conversely can a lessee expect warranty in the absence of express provision between them.

8. Any attempt to clarify what is meant by "family" here and later would involve a consideration of what French historians call Laudatio Parentum. This is the practice by which charters recite the consent of kinsmen (and lords) of the grantor in an apparent effort to restrain their later interference in the grant. I eagerly await elucidation of the practice in Stephen D. White, Custom, Kinship and Gifts to Saints (Studies in Legal History, U. of N. Carolina Press: Chapel Hill, N.C., forthcoming 1985). See also Emily Tabuteau, "Transfer of Property in Eleventh-Century Norman Law" (Harvard Ph. D. Thesis 1975), 803-27. I am grateful to Dr. Tabuteau for letting me see, in addition to her

dissertation, a draft for the warranty chapter in her forthcoming book.

9. I say something more below on the extent to which positive and negative warranty did constitute a single institution. There is room for further research on customary practices here.
10. The hypothesis is of course essentially a deduction from Common-Law sources; see Milsom, Legal Framework, index s.vv. Glanvill, Plea roll entries.
11. The earliest example noted, EYC i. 265 = EYC iv. 118 (c.1137/61) was in fact made by a religious house, St.Mary's, York, on whose perhaps precocious drafting care see below text at n. 74. See further EYC viii. 111 (1159/64), made in the court of Earl Warenne and EYC iii. 1405 (1160/c.70), a ministerial grant.
12. As pointed out by Milsom, Legal Framework, cap.4.
13. The two exceptions noted are both late and unusual. In EYC x. 114 (1194/8), the lay vendor promised to return the purchase price if he was unable to warrant his sale. EYC v. 321 (early 13th cent.) was a grant (without reservation of tenure) to the grantor's lord; its warranty clause no doubt reflects unequal bargaining power.
14. Three confirmations to Fountains, each repeating with added warranty a confirmation already provided, suggest a house policy: EYC xi. 21 (1156/75) after *ibid.* 20 (1156/62); EYC xi. 140 (c.1180/90), to be compared with nos. 139-40; EYC xi. 43 (c.1182/1204), to be compared with nos. 25, 38.

15. EYC ii. 710, 716 (c. 1160/70, 1178/81); cf. also EYC i. 50, 55 (1187/1207, 1170/86); iii. 1535, 1605 (1165/80, c. 1175/1200) etc. If this suggestion is correct, it would be interesting to know when the later presumption of tenure came in. Cf. Milsom, LF, 51, 91, 144-5. P.Landau, Jus Patronatus: Studien zur Entwicklung des Patronats im Dekretalenrecht und der Kanonistik des 12. und 13. Jahrhunderts (Forschungen zur Kirchlichen Rechtsgeschichte und zum Kirchenrecht xii, Cologne 1975) details the Church's view of what lay patronage ought to be like; its problem was to destroy the proprietary view of the lay interest without opening up too unrealistic a gulf from "consuetudo", ie such customs as the English law under consideration here. The patron retained the "honor" of defending the church from material deterioration, Landau, 129.
16. Glanvill, iii. 3. 1, 7 (ed. Hall, 38, 42). See below Appendix I for details of these writs. For dower, see Glanvill vi. 4-13 (ed. Hall, 60-65) and cf. Bailey, CLJ ix, 196-7, 202-3. The language of lordship was, it is true, used of husbands (the wife's dominus) and there is also the unusual case of the heir who must warrant in claims for dower from his deceased father. On the question of whether the heir was the dowress' lord before 1176, see R.C. Palmer, "The Origins of Property in England", Law and History Review iii (1985), 13 sq.
17. Glanvill x. 15; pace Hall, 130, n. 1, the reference back is surely to Glanvill vii. 2 on which see below text at n. 134.

18. Glanvill x. 15-7 (ed.Hall, 130-1). CRR viii. 271-2, 277-8 (1220) is a well-known case of horse theft that started in a court of the earl of Brittany.
19. II Atr., 8-8. 2; II Cn., 23, 24. 1-2 (In.); Wl.Art., 5; Leg.Wmi., 21-21. 3, 45; E.Cf., 22. 3, 28. 1a. All these are cited from vol. I of F.Liebermann Gesetze der Angelsachsen (3 vols. Halle 1903-16) by the sigla there adopted. Also Assize of Clarendon 1166, c.12.
20. Hn., 43. 1, 94. 3 envisage a lord warranting his man against royal accusations of wounding and the like; Ibid., 85. 2-2a makes it clear that this was not licit in cases of serious crime. Cf. also Hn. Mon., 2 (possession of false coins). This kind of warranty seems to have survived in an attenuated form in some personal actions, where a defendant could claim to have acted on behalf of a lord, whose aid in the case he then solicited but could not compel. This was assimilated with Aid-prayer, for which see generally Bailey, Cambridge Law Journal ix. 82-4 and S.F.C. Milsom, Novae Narrationes (Selden Society lxxx 1963), cxlv, cciii.
21. I have modified the translation of B.Smalley, The Study of the Bible in the Middle Ages (2nd ed. Oxford 1952), 118 in the interests of legal clarity; compare the Latin text *ibid.*, n. 2. The defendants' grantors are to "pro illis stare et ... garantizare", very likely a reference to the common phrase

- "stare ad rectum". This commentary was admittedly written (before 1161/3) in France, *ibid.*, 87-8.
22. EYC ii. 983 (1183/c. 1160).
 23. Pipe Roll Soc. xiv. 22-3 (1194). Cf. J. Prawer, Crusading Institutions (Oxford 1982), 415, 427.
 24. This need not be in court. References to the "warrant" of the king or others for some money payment are common in royal records, e.g. Pipe Roll 15 Henry II, 23, 110 (1169).
 25. Pollock and Maitland, i. 59 saw chattel warranty references as "interesting by their analogy to the doctrine of warranty in the law of real property".
 26. I discuss some of these as they effect land title in twelfth and thirteenth century England in my paper "The emergence of the flat-arsed conveyancer in medieval England".
 27. The evidence cited by Pollock and Maitland, ii. 71, n. 2, for the existence of the same rule limiting voucher to three warrantors is a good indication of this. Cf. also Ducange s. vv. Garantus, Garantire and Warantus, iv. 26-7, viii. 403-4; J.F. Niermeyer, Mediae Latinitatis Lexicon Minus (Leiden 1976), s.v. Warantus, pp. 1128-9; Lexicon Mediae et Infimae Latinitatis Polonorum, ed M. Plezi (Warsaw etc. 1975-7) s. vv. Guarandia, Guarantia etc., cols. 646-50; and Liebermann, Gesetze der Angelsachsen s. vv. Gewahrburge, Gewahrleisten, ii. 471-2. The French literature on warranty is almost non-existent. Not figuring among the set topics of feudalism or roman law,

warranty is little studied. Thirteenth-century coutumiers nevertheless attest to its existence over a wide area. Cf. Le conseil de Pierre de Fontaines, ed. M.A.J. Marnier (Paris 1846), XV. x, lxix; XXIX. xxiii; XXXII. iv (pp. 113, 148-9, 350, 366-7); Le livres de justice et de plet, ed. L. Rapetti (Paris 1850), IX. xv; XII. vi (pp. 177, 232-4); Philippe de Beaumanoir, Coutumes de Beauvaisis, ed. A. Salmon (Paris 1899-1900; reissued 1970), c. 34, esp. sections 998, 1011, 1015 etc.

28. The evidence noticed to date is northern French. See H. Platelle, "Crime et châtement à Marchiennes", Sacris Erudiri xxiv (1980), 195-8 for an attempt 1033/48 to produce "tutorem ..., legitimum quem vulgo appellant warandum qui hanc rem testificaretur" against a rent suit by a lay lord through a public court. The monastic landlord merely sent relics, which lost the case but induced the oppressor to repent. The account is very late eleventh century from near Charleroi, Belgium, *ibid.*, 161. In the early 1080s, Robert of Mortain insisted that the Norman priory he founded for Marmoutiers remain exclusively under his protection, so that he would be "advocatus et ut vulgo dicitur garantus eleemosinae meae, sicut laicus homo esse debet eleemosinae in sua manu retentae". Paris, B.N. Lat. 12878, fos. 281v-282v (1060/90, ? early 1080s) A charter of 1153, makes a vendor monastery promise Homblières (nr. St. Quentin) not to refuse "tuitionem et quod vulgo dicitur guarandisam" when required, Paris B.N. Lat. 13911, fo. 44r-v. I owe my knowledge

of the last two texts to Professors Emily Tabuteau and Giles Constable respectively, and must also thank Dr. David Bates for advice on dating etc.

29. Pre-Conquest England lacks documented private land grants of the kind that might have included warranty clauses. Normandy, which does possess such documentation, lacks evidence of chattel warranty. Clearly, extant documents are an unsafe basis for general statements here. However, see below text at ns. 75-89. for argument to justify the statement in the text.
30. S.E. Thorne, "Livery of Seisin", Law Quarterly Review [hereafter LQR] lii (1936), 345-64.
31. BYC iv. 91 (1173/4) illustrates the practice at Rielvaux.
32. Maitland already saw this, Pollock and Maitland, i. 306-7; ii. 663. See now the acute remarks of E. King, "The Anarchy of Stephen's Reign", TRHS 5th s. xxxiv (1984), esp. 138-9. English historians ought to consult the excellent recent studies on forms of protection in various regions of France by P. Duparc. See in particular his "Le tensement", Rev. hist. de droit français et étranger 4e s. xi (1962), 42-63, which reveals the context of the word tenserie in Anglo-Saxon Chronicle s.a. 1137. Also id., "La commendise ou commende personnelle", Bull. école des chartes cxix (1961), 50-112, "Le sauvement", Bull. philologique et hist. du comité des travaux historiques et scientifiques (1961), 389-433 and "Libres et hommes liges", Journal des savants (1973), 81-98. Little comparable has been

attempted in England since the classic controversy over commendation in Domesday Book cursorily summarised in my book King, Lords and Peasants in Medieval England (Oxford 1980), 237-

9. There is, however, suggestive material from one area in R. Stewart-Brown, "The avowries of Cheshire", EHR xxix (1914), 41-55 and G. Barraclough, "Some charters of the Earls of Chester", in Pipe roll society n.s. xxxvi for 1960 (1962), 25-43, esp. nos. 7-9, pp. 35-7.

33. For references to the literature on this, see my King, Lords and Peasants, 261, n. 158.
34. CRR v. 77-9 (1207) is a good example, for whose circumstances see EYC xi, pp. 187-90 etc. and C. T. Flower, Introduction to the Curia Regis Rolls, 1199-1230 A.D. (Selden Society lxii 1943), 133-4, 217. Quite a body of material reflects the situation when a tenant quarrels with his lord or finds he is saddled with an old enemy as his new lord, and so seeks the protection of an overlord by direct homage.
35. EYC iii. 31 (1138/47) Warenne to Nostell, a protection almost regal in its range of formulas; EYC viii. 1510 (1177/c. 1185). This is a familiar theme of royal protections, EYC iii. 1363 (1181), 1462 (1170/85) v. 240 (?1181).
36. EYC i. 164 (1160/5) to Rielvaux, a renunciation of false boundaries to which ix. 157 = Greenway, Charters of the Honor of Mowbray, no. 247 supplies the context; EYC v. 389 (c. 1155/77).
37. EYC viii. 34-5 (1147, after 1138) both Warenne to Lewes are good

examples. Also v. 222, 347 (c. 1155/84, 1115/33) to St. Mary's, York. Clauses of this kind are usually phrased in the first person. The drafting choice between such words as "oro", "volo", "rogo" or "precipio" is noteworthy.

38. Greenway no. 351 (c. 1147/57): "quia non est michi amicus qui inde contumeliam fecerit"; *ibid.* no. 313 (c. 1170/86).
39. See the borrowed Frankish form of hold-oath (fealty) in W. Stubbs, Select Charters (9th edn. H. W. C. Davis, Oxford 1913), 73-4, 78 and cf. Glanvill ix. 1 (ed. Hall, 104).
40. EYC iii. 1352 (1150/c. 1160) records a life grant graciously accepted by William, earl of Aumale "pro adjutorio meo et manutenemento meo".
41. EYC ii. 1012 (c. 1126/9): "volo... ut heredes mei manuteneant et defendant eam ubique et contra omnes homines"; cf. also iv. 10 (c. 1135), 86 (1205/?1212).
42. EYC ix. 125, 151 = Greenway nos. 243, 236 (1154/7, 1154) are the earliest ones noted. Also EYC iii. 1559 (1200/20); x. 111 (1210/20).
43. EYC xii. 74-6 (1143/54). I guess that the grantor may have had a hand in drafting these documents, which go well beyond the normal Nostell style. See *ibid.*, pp. 97-9 for information about his lands. The group of documents have interesting implications for those interested in the location of "ownership" at this date. Important questions of tenurial definition and the responsibility for forinsec service were not clarified in

writing until the confirmation by Osbert's son Ralph, *ibid.* 79 (1154/63).

44. Pollock and Maitland, i. 306-7.
45. Kirkstall Abbey was assured by EYC iii. 1655 (c.1160/75) that it would receive another two carucates in the event of inability to maintain the original grant. This has the air of an express provision necessitated by the terms of the agreement, not a standard formula, as in warranty. Cf. EYC viii. 45 (1138/47): "pro posse suo".
46. *Hn.*, 57. 8 (ed. Downer, 178).
47. Bailey, Cambridge Law Journal ix. 203 suggests that this is the origin of "advocatio" = advowson. This would take the argument back at least to Constitutions of Clarendon 1164, c.l. Landau, Jus Patronatus, 9-10, n. 32 also thought that the usage started in mid-twelfth century England.
48. Paul Brand suggests a different distinction. He points out that an incumbent clerk was calling upon, not his grantor and predecessor-in-title (or representative thereof) as in ordinary warranty, but a patron with a mere right of presentation. The patron and the clerk claimed two quite distinct interests in the "property". No patron could be expected to warrant the possession of a church. The best a clerk could do was to avow that this patron had presented him and let the patron establish his title or lose it.
49. Lords as "owners": S.E. Thorne, "English feudalism and estates

in land", Cambridge Law journal xvii (1959), S.F.C. Milsom, in his introduction to Pollock and Maitland, The history of English Law (Cambridge 1968 reissue), i. lxxxv. For Advowry, see above n. 32.

50. J. Yver, "Autour de l'absence d'avouerie en Normandie", 57 Bulletin de la société des antiquaires de Normandie (1963-4), 189-270; E. Tabuteau, "Transfer of Property in Eleventh-Century Norman Law", 803-4.
51. Both references noticed concern the king. REX v. MALKAEL (Appendix II) seems to stem from royal action to resume land from the supporter of a dispossessed rebel. By EYC iii. 1420 (1102/ c.1114) Henry I granted to Robert de Lacy lands "quas idem Rex de Willelmo de Say avoabat", according to W.C. Wightman, The Lacy Family in England and Normandy, 1066 - 1194, (Oxford, 1966), 36-7, a reference to a banishment. In the Welsh Marches and Ireland, "advocaria" denoted in the thirteenth century lordship over men without landholdings. Dr. Brand also points out that in a thirteenth-century action for Customs and Services the defendant could disavow holding of his plaintiff, and thus force him into an action of right.
52. Hn., 10. 3, 75. 7a; cf. *ibid.*, 43. 3, 85. 1 . See also J. Wuest, Die Leis Willelme (Romanica Helvetica lxxix, Berne 1969), 98.
53. See the translation of II Cn., 23, 24. 1 in Liebermann, Gesetze, i. 327 and the latin translation of II Atr., 8 sq. in Quadripartitus, Gesetze, i. 224 sq.

54. EYC xi. 123 (c. 1140/50) and x. 88 (1151/6) are the earliest noticed. Also ii. 1202 = xi. 10 (before 1160); xi. 274 (c. 1170/93); xii. 69 (before 1181); ii. 766, 1078 (1180/90).
55. References to monastic advocates are not unusual in England. Yorkshire examples are EYC viii. 17 (1118/30); iii. 1468 (1135/7); ii. 952 (1153/7); x. 105 (1180); xi. 50 (1189). The point seems to have been to single out founders and others with similar duties; see Clay, EYC x, p. xvii and n.1.
56. I discuss this "negative" aspect of warranty further in my paper on "The Emergence of the Flat-arsed Conveyancer". Legal historians refer to it as the "homage bar", on which see below, text at n. 126.
57. See below text at ns. 112 sq. for tenants previously seised, who naturally affected warranties of new grantees.
58. In practice this was mostly a matter of the probability of continued, untroubled tenure. One might wish to say that great churches armed with a string of royal and papal privileges had greater "right" than mere laymen.
59. The writs they used are discussed in Appendix I.
60. Milsom, Legal Framework, 80 sq.
61. CRR i. 283, 295, 341 (1200) is one good illustration; Appendix I has others.
62. Bailey, Cambridge Law Journal ix. 196, 201-2; D.W. Sutherland, The Assize of Novel Disseisin (Oxford 1973), 19-20, 37, 42, 131, 218-9. The fact that leases might contain express warranty is

another indication that the institution was not seignorial in origin.

63. One would expect the same to be true of tenants in free alms.
64. In contrast, R.C. Palmer, "The Feudal Framework of English Law", Michigan L.R. lxxix (1981), 1149, 1153 sees the settlement of 1153 as investing tenants with a "germ of ownership" for the first time. Further discussion in Appendix III below.
65. It is hard to formulate this without anachronistic invocation of the common-law tenures. I have in mind some hypothetically "normal" terms of lasting, honourable and non-servile tenure.
66. F.M. Stenton, The First Century of English Feudalism (2nd ed. Oxford 1961), 38-41, 260-1 gives one example.
67. See below text at ns. 161 sq. for the role of Church draftsmen in establishing the practice of express clauses.
68. See below at n. 186 for some comment on the strict construction involved.
69. Bailey, CLJ viii. 279-85 and ix. 193-7.
70. Canon lawyers could no doubt have chosen a very difficult kind of security device from roman law formulas.
71. Cf. above at n. 28.
72. ESC i. 265 = iv. 118 (c.1137/61), the earliest Yorkshire example comes from St. Mary's, York and contains the house's exchange exclusion. Cf. also viii. 111 (1159/64), which is patently anything but common form; iii. 1405 (1160/c.1170); vi. 156 (1166/82). Chronicon Abbatie Ramesseiensis, ed. W.D. Macray (R.S.

1886), 273, 274-6, both probably from the 1130s, suggest that Ramsey too assumed a normal obligation to warrant by this time. Tabuteau cites a Préaux charter of 1101/6 that similarly assumes exchange as the normal case by excluding it in this instance.

73. Early examples from EYC are i. 372 (1130/8); viii. 42, 113 (1138/47, before 1152). iv. 12 (1136/45) is a probable example; ii. 1223 (c.1130/9) a possible one. A. Saltman, Theobald, Archbishop of Canterbury (London 1956), 537-8, a narrative relating a warranty demand of 1146, has both parties using the language of voluntary requests; Regesta Regum Anglo-Normannorum iii, ed. H.A. Cronne and R.H.C. Davis (Oxford 1968) [hereafter Regesta iii], no. 150 is Stephen's confirmation of the eventual exchange. From the 1160s one finds exchanges which can be related to their original failed grant, e.g. vi. 140, 154 (1166/74, 1166/94) and iii. 1501, 1624 (1147/54, 1185/93). It is necessary to exclude references to exchange for such reasons as economic convenience (ii. 1257), or compensation to a dowress for a grant of her dower land (ii. 1250) or when evicting unwanted tenants (i. 250, 1049 of 1154/7 and 1155/63). The last case is not perhaps irrelevant to the matter in hand.
74. The earliest examples are from the abbacy of 1122/c.1137, EYC i. 310 (on which cf. J.L. Barton, "The rise of the fee simple", LQR xcii, 1976, 112); iii. 1303. EYC i. 264 suggests that the exclusion applied to all the abbey's "franci tenentes" in the area. Other examples in EYC are i. 369; ii. 1168 (Bridlington

- 1188/95, 1175/85) and iii. 1685 (Watton ?late twelfth century).
75. What follows constitutes a personal interpretation of the arguments and material collected in a draft chapter (Cap. IV: "Modes of assurance: warranty") of Emily Tabuteau's forthcoming book on Normandy. I have not seen her argument in its final form.
 76. Fauroux, no. 159 (1061/3) is an excellent case to point.
 77. Below at ns. 112 sq.
M78. Tabuteau quotes this charter in her book draft but unfortunately did not give the full reference.
 79. See above n. 74 for St. Mary's systematic exclusion of exchanges from the 1127/36 abbacy, the preceding text for the first smattering of express warranty clauses and below Appendix I for writs on the 1130 Pipe Roll that apparently offer royal assistance in the enforcement of a claim to exchange on default of warranty.
 80. DB, i. 204d.
 81. DB, i. 62b is typical.
 82. eg DB, i. 148d.
 83. DB, i. 135b is a good illustration; see F.E. Harmer, Anglo-Saxon Writs (Manchester 1952), 310-11, 356-7 (no. 91) for the way Westminster Abbey may have touched up their evidence (a writ confirming a pre-Conquest private grant) to persuade the king to back them up. Also DB, i. 141c.
 84. In DB, i. 137d a protector is vouched to justify tenure against

- the king himself; the plea succeeded, VCH, Herts., iii. 63. See also DB, i. 141d-142a.
85. Cf. DB, i. 220c, 225d.
 86. DB, iv. 480 = f. 516b (Liber Exon.): tenant "invocat eum (the lord) ad garant. Sed (the lord) inde omnino deficit ab illo die quo Rex W. nunc (the tenant) de ipsa terra resaisire fecit." Cf. also DB, i. 49d, 56b.
 87. DB, i. 1a: townsmen "revocant (Odo of Bayeux) ad protectorem et liberatorem vel datorem", last two words interlined; DB, i. 227c: claims the king as advocate; DB, i. 249b: "se defensorem facit" against the king; DB, i. 276c: avows the king as protector but Henry de Ferrars as liberator.
 88. See above for DB, iv. 480. Also DB, i. 238c, 244c (Flecknoe, Warwicks.).
 89. Fauroux, no. 113 (1043/8) is a nice illustration both of an early guarantee/confirmation by a great lord and of the further recourse to the ducal court as to a higher -- but still private -- power. See David Bates, "The Earliest Norman Writs", EHR c (1985), 266-84.
 90. Milsom, LF, 174.
 91. Milsom, LF, 8 was unduly pessimistic on prospects of knowing his seignorial world. Charters record something of both normality and the disputes on its breakdown.
 92. S.D. White's unpublished paper, "Legal Argument and Claims to Inheritances in Western French Courts" (above n. 7) shows how

complex the patterns of dispute resolution were in Western France. His argument must serve as a warning for English historians, even though English courts may have been precociously dominant because of the absence of private war etc.

93. Further consideration of this assumption, often unjustified, comes below.
94. Milsom, LF, 40 : "Seisin itself connotes ... that seignorial acceptance which is all the title there can be."
95. See above n. 73 for exchanges made after warranties had failed. Earl Richard de Clare's mandate of ?1173, printed by Stenton, The First Century of English Feudalism (2nd ed. Oxford 1961), 270, refers to a comparable inquiry (into rei veritas) made "ab antiquioribus hominibus meis" but characteristically fails to expand on the details.
96. The Prior of Spalding paid 5 m. in 1212 for his writ in SPALDING v BICKER (Appendix II).
97. Milsom, LF, 47-50; cf. *ibid.*, 47 for these cases.
98. Milsom, LF, 49, 52-4, 93.
99. PKJ iii. 2007; CRR iv. 101-2, 198 (1206) is one example, whose background is clarified by Pipe Roll 6 John, 113; Rot. de Ob. et Fin., 219 (1204). SPALDING v BICKER (Appendix II) is another.
100. SUDBURY v CLARE (Appendix II).
101. See above at n. 59 for the use of suits about warranty or homage as an alternative to upward claims by writ of right patent.
102. The text strictly holds only for disputes between the original

parties to a grant. Most disputes came when one or both were dead.

103. But see Thorne, "Livery of Seisin", IQR lii (1936), 352.
104. Milsom, LF, 125, n. 2, 128, n. 2 cites some relevant cases.
105. For attitudes towards charters in the royal courts at the time of the earliest plea rolls, see Milsom LF, 63, 89 and the cases there cited.
106. W.J.M. Mackenzie, Politics and Social Science (Harmondsworth 1967), Cap. 9 (b), esp. 126-7 intriguingly hints at an early Games-Theory approach to the politics of an almost contemporary society through saga literature.
107. See on this F.L. Cheyette, "Suum Cuique Tribuere", French Historical Studies vi (1970), 287-99 and, for some general thoughts on trial procedure, my own "Henry II and Ganelon", The Syracuse Scholar (1983), 23-35.
108. Cf. J. Le Goff, Pour un autre moyen age (Paris 1977), 349-420 on the associated ritual of Investiture. Of course, many grants were unaccompanied by homage. Livery of seisin, which must have been equally important, needs fresh study from this point of view.
109. For the model that justifies this very summary account of battle see my "Trial by Ordeal: the Key to Proof in the Early Common Law", Of the Laws and Customs of England: Essays in Honor of Samuel E. Thorne, ed. M.S. Arnold et al. (Chapel Hill, N.C. 1981), 90-126.

110. White, "Legal Argument and Claims to Inheritances", suggests lapse of time before making a claim (prescription or negligence) and estoppel by quit-claim as possibly decisive arguments.
111. Glanvill, iii. 7, cited Milsom, LF, 77. Pipe Roll 24 Henry II, 72 may well echo this procedure. The sheriff accounts for 8/- which Arnald f. Cliebern had offered to Robert f. Azo "pro servitio cujusdam terre quos (denarios) idem Azo noluit accipere". I conjecture that Arnald offered his service on Robert's accession to his father's lordship and on refusal deposited it with the sheriff against a future royal lawsuit.
112. I exclude from consideration here cases where two claimants seek to hold of two different lords, which could lead to a straight fight between the maintaining lords over the lordship. Cf. Glanvill iii. 6-8 (ed. Hall, 41-3) and Appendix I.
113. GODRIC OF SKEEBY'S CASE (Appendix II) is one example that happens to be relatively clear and almost certainly from the period before 1166 and novel disseisin.
114. Milsom, LF, 61, 75. R.C. Palmer, "Feudal Framework", Michigan Law review lxxix (1981), 1136, 1141-2, 1145 seemed to go beyond Milsom (e.g. LF, 42). Professor Palmer has since explained his views to me by letter. He distinguishes between elder sons returning, say, from crusade and those ("strangers") claiming through a title distinct from the sitting tenant's. His conclusion, that "before 1176 ... decisions were discretionary ... not by rules of law that would compel a lord at times to

make an inappropriate choice" but by "a complex calculus of factors ... astronomically higher" for a stranger than for a returning elder brother, seems quite close to the present argument. I am grateful to him for access to a typescript draft of his recent article "The Origins of Property in England", Law and History Review, iii (1985), 1-50, the first section of which is particularly relevant here.

115. Clear cases of this are very hard to find, especially for the period before private charters become common. One suspects that many charters were drawn up after suits where a lord's accepted tenant was genuinely at risk or had even lost his land. Draftsmen had no interest in recording that someone else had once claimed to have "maius ius" than his grantee, though express warranty clauses do sometimes specify the likely claimant; see below at n. 166. GODRIC OF SKEEBY'S CASE (Appendix II) despite its unusual documentation, is still not entirely clear. One can only point to likely examples. EYC ix. 124 (?1147/57) seems to result from a suit in Roger de Mowbray's court by Rielvaux abbey. EYC v. 245 (1155/68) resulted from a younger brother's suit by writ in the court of a lord who had recently released Easby abbey from the obligation to pay relief on this land "nisi alius eam acquirat qui majus ius in ea habeat" (ibid. 243 unhelpfully dated by the editor 1155/95). EYC iv. 3 (1156/8) is a confirmation by Earl Conan of Richmond which assumes that the grantee, Kirkstall abbey, will hear

actions by writ (including "breve de recto") against tenants in the vill. Quitclaim charters have a particularly powerful claim to consideration. EYC xi. 231 (c.1160/75) records one made in the court of William de Percy. I guess that Sallay had on the basis of ibid. 14 (c.1147/54) sued Robert Coc, who as the man in possession and perhaps a Percy servant had unsuccessfully sought his lord's warranty. Other readings are possible.

116. Pipe Roll 31 Henry I, 112: 105 m. "pro placito duelli inter eum et hominem suum"; Cf. Pipe Roll 13 Henry II, 102, 122 and perhaps Pipe Roll 26 Henry II, 29. Also Milsom, LE, 84-5.
117. See below at ns. 168 sq.
118. Earldom of Gloucester Charters, ed. R.B. Patterson (Oxford 1973), no. 186 records an interesting Norman case dated c. 1155/62.
119. My pupil John Hudson suggest that some of the charter quit-claims of tenants to their lords represent extracurial action by the lord to rearrange "his" lands without the need to make a full exchange.
120. I discuss the chronology of these changes below.
121. See Appendix I, n. 15.
122. LHP, 10. 1; Glanvill, xii. 1, 6-9, on which see N.D. Hurnard, "Magna Carta, clause 34" in Studies in Medieval History ... to F.M. Powicke, ed. R.W. Hunt et al. (Oxford 1948), esp. 161-2, 168, 178-9. See further on Tolt n. 161 below. J. Campbell, "The Significance of the Anglo-Norman State in the Administrative

History of Western Europe", Francia ix (1980), 117-34 makes a powerful case for raising previous estimates of royal writ production from Henry I's reign, and indeed back into the eleventh century.

123. The viscontiel writs in R.C. Van Caenegem, Royal Writs from the Conquest to Glanvill (Selden Soc. lxxx 1961), nos. 1-2, 5-7, 9-10, 14, 18 and Section IX (nos. 130-58) passim, have been curiously neglected. Such writs appear to peter out early in Henry II's reign, no doubt because of newer forms. Cf. Glanvill, vii. 7; ix. 9, 14; xii. 12-14, 16-17, 20.
124. Hurnard, "Magna Carta, clause 34", 160 is one of the few to pay attention to the overlord. Glanvill, xii. 8 suggests that one could get a writ of right addressed to an overlord. Cf. also above n. 31 for a late illustration of tenants bypassing their immediate lord. Advice from one's own lord to receive homage from a particular claimant, perhaps in the overlord's court as in EYC v. 309 (c. 1180/9), was not easily resisted. See also in this connection Chronicon Abbatie Rameseiensis, 274-7, 318-9.
125. Bailey, "Warranties of Land in the Reign of Richard I", CLJ ix (1945-7), 197-8.
126. S.E. Thorne, "English Feudalism and Estates in Land", CLJ (1959).
127. Thorne, "English Feudalism and Estates in Land", 193, n. Since his lectures remain unpublished, we are left with charter references from "easily accessible books" only.

128. Cf. J.C. Holt, "Politics and Property in Early Medieval England", Past and Present lvii (1972).
129. Palmer, "The Origins of Property" takes a position not dissimilar in principle to that argued here, though our different usage of words like "rules" may obscure this. My choice of a more gradualist line here was consciously reaffirmed against a recent reading of the impressive warnings of Stephen Jay Gould, The Panda's Thumb (1980), caps. 17-9.
130. See my "The Emergence of the Flat Arsed Conveyancer in Medieval England."
131. The rest of this paragraph depends heavily on S.D. White, whose forthcoming book Custom, Kinship and Gifts to Saints will clarify the Laudatio Parentum and much else. The argument in the text is thus rather provisional.
132. Milsom, LF, cap. IV cites many of the cases.
133. See P. Ourliac and J. de Malafosse, Histoire du droit prive ii (2nd ed. Paris 1971), 424-5.
134. Glanvill, vii. 2 (ed. Hall, 74). The fact that heirs still tried to challenge their ancestors' grants illustrates the popular feeling that the heir's interest predated the ancestor's death. I hope to discuss elsewhere the implications of "rationabiliter", with which Henry II qualified all free alms grants and confirmations from 1155 onwards. ECY i. 76 is an early example; see also Yver, art. cit., 793. In 1202, Geoffrey f. Peter required a special privilege, Rot. Chart., 79, to get

the rule waived in his favour. The innovation seems to have been a learned import to English law via the canonical prohibitions on the alienation of ecclesiastical lands.

135. Milsom, LF, 86-7.
136. Ibid., 85 and n.4. A case of 1194, RCR i. 64-5 cited Bailey, CLJ ix, 199, comes close to rejecting the Glanvillian doctrine and enforcing a deathbed grant even though seisin did not pass.
137. See my "The Common Law and the French Connection", 81-4.
138. Thorne, "Livery of Seisin", 356-63 is Milsomian avant la lettre! He demonstrates, pp. 353-6, that mere symbolic delivery had prevailed earlier in the century.
139. I discuss Glanvill, x. 8, 18 in my paper "The Emergence of the Flat-arsed Conveyancer in Medieval England".
140. The fact, as I believe, of beneficiary drafting in most charters should restrain any simple attempts to deduce the grantor's intention from their wording. It is hard to distinguish between what (ecclesiastical) draftsmen persuaded lay donors to "want", what the customary formulas wanted them to want, and what they did want. The formulas remain an invaluable guide to donors' practice, but not to their original aspirations.
141. Some like EYC i. 619 (1161) were leases. In i. 511 (1171/2) the warranty may have been limited to non-heritable land. The grantor of v. 398 (1146/58) was an archdeacon who may have been unwilling to bind his heirs, though a canon of Drax, who omitted any reference to his own obligations (no doubt because as a monk

he was civilly dead) took care to commit his heirs expressly. Not all can be explained away. I have at present no explanation for EYC i. 11 (1171/2) to a single grantee or *ibid.* x. 43 (c.1194). See also GODRIC OF SKEEBY'S CASE (Appendix II). One should naturally exclude from consideration here charters recording actual performance of warranty. Examples may include viii. 80 (1164/86) and Greenway, no.179 (1173/84), probably to be connected with no.178 (1161/9) and cf. *ibid.*, p.182.

142. EYC viii. 42 (1138/47); xi. 21 (1156/75); iv. 38 (1156/?1162); v. 228-9 (1165/74,?1174); iii. 1868 (1185/1200). Royal acts may be different; see for example Delisle and Berger, Receuil des actes d'Henri II, i, no. 60 (1155/8).
143. A few charters appear to mix a personal promise with a later clause binding heirs. Cf. xi. 193 (c.1145/70); Greenway, no. 264 (1154/86) which may be forged; EYC i. 623 (c.1180/90).
144. Milsom, LF, 42 remarks dismissively that this "may mean no more than that the authority is to be renewed on each change of parties".
145. Cf. EYC i. 277 (1175/95) whose carefully drafted warranty clause specifies that "quicumque in hereditatem meam succederint" were to warrant these alms.
146. S.D. White and J.C. Holt take differing views of a small number of grants "to X and his (singular) heir" in Past and Present lxxv (1974), 119-20, 130-2.
147. Glanvill ix. 4 (ed. Hall, 107).

148. J.C.Holt, "Politics and Property in Early Medieval England", Past and Present lvii (1972), 12 sq. reminded students of the continuing importance within English custom into Glanvill's time of the "French" distinction between "acquets" and "heritage". Further references in my "French Connection", 87-8.
149. The missing element might be a reference to relief. The lord's acceptance of a tenant's heir was still far from automatic in Glanvill's day. There was no obligation to receive an heir's homage until arrangement had been made for the payment of relief. I take it that the use in the text here of dominus rather than donator etc. reflects the seignorial context.
150. England is unlikely to have lagged for behind Normandy, for which see J. Yver, "Une boutade de Guillaume le conquérant: note sur la genèse de la tenure en aumône", Etudes G. Le Bras (Paris 1965), ii. 783-96, a study that needs replicating from English evidence.
151. F.M. Stenton, The First Century of English Feudalism (2nd ed. Oxford 1961), 38-40, 260-1.
152. Lay grants for little or no consideration, such as the important grant in frankmariage, were as open to this objection as grants to religion.
153. Cf. Thorne, "English Feudalism and Estates in Land", 205-6 and above at ns. 95 sq.
154. J.C. Holt's evolving view from Past and Present lvii (1972) to his "Feudal Society and the Family in Early Medieval England:

Notions of Patrimony", TRHS 5th s. xxxiii (1983), 193-220 may fairly be juxtaposed with Thorne, "English Feudalism and Estates in Land", White, "Succession to Fiefs in Early Medieval England", Past and Present lxxv (1974), 118-27 or Milsom, LF. Cf. also R. DeAragon, "The Growth of Secure Inheritance in Anglo-Norman England", Journal of Medieval History viii (1982), 381-91.

155. Below Appendix I, n. 15.

156. What follows is of necessity impressionistic. There is no way to read or count lost documents, still less grants that never reached writing.

157. Above at ns. 72-88.

158. For St. Marys, York, see above n. 74. EYC i. 36 (1154/63) is from the archiepiscopal neighbour at St. Peter's.

159. EYC viii. 111 (1159/64); iii. 1405 (1160/c.1170); vi. 156 (1166/82); iii. 1569 (1170/7); iii. 1638 (1170/80). Express clauses also appear in leases at about this time, EYC ii. 754 (1160); i. 619 (1161). Both of these limit the obligation to the original lessor and lessee, where later forms are closer to the full heritable warranty of grants in fee; cf. *ibid.*, ii. 763, 789 (1188, 1205). Cf. also Registrum Antiquissimum vi, ed. K. Major (Lincs. Rec. Soc. xli, 1950), 1935-6 (c. 1160, c. 1160/70).

160. F.M.Stenton, Transcripts of Charters .. to Gilbertine Houses (Lincs. Record Society xviii, 1922), xxviii sq. the most quoted

authority, points to the end of the century, but notes that it was already unusual in his sample to find a grant to religion without such a clause after the early years of Henry II. Cf. also C.Holdsworth, Rufford Charters i (Thoroton Soc. xxix, 1972), lxii etc.

161. This is the most obvious reason why the argument that follows does not apply to lay grants in frankmarriage, also often made for no service. Frankmarriage charters are rarer than the importance of keeping a precise record of so anomalous a transaction would lead one to expect and contain express warranty clauses no more often than ordinary grants in fee. EYC v. 262 (c.1175); iii. 1654 (c.1190/1205) and xi. 213 (late 12th cent.) are early examples. EYC xi. 215 (1148/56) an heir's confirmation of such a grant that might have been expected to make the warranty express did not do so. See further Bailey, CLJ ix, 197.
162. See above at n. 111 for Glanvill on this, and note voucher on the basis of homage and services performed continued to be legitimate without charter into the thirteenth century, Bracton, f. 382 (iv. 195-6).
163. Similar caution is evident in the recital of consent by a grantor's vassals, according to Thorne, "English Feudalism and Estates in Land", 204-5.
164. But the writing capability of lay magnates was more recent. See, for example, Patterson, Earldom of Gloucester Charters, 9 sq.

Legal history stands to gain greatly from a proper diplomatic study of twelfth-century drafting practice.

165. E. Tabuteau, "Transfer of Property in ... Norman Law", 812-4 suggests that Normandy saw the same development.
166. See GODRIC OF SKEEBY'S CASE (Appendix II). Another very interesting example is Early Charters of St. Paul's Cathedral, ed. M. Gibbs (Camden Soc. 3rd s. lviii, 1939), 243 (1180/6), which should be read with *ibid.*, 166, 171.
167. Grantors given their head might have sought to fob off a worried grantee with a promise of warranty limited to the anticipated troublemaker. I have not yet seen any clauses of this kind. The clauses excluding the right to exchange, mentioned above, amount to something very similar by creating grants incomplete in the Glanvillian sense and not carrying full warranty. Those from St. Mary's York, at least, were emphatically not beneficiary-drafted.
168. The level of royal intervention may also have been quite high for a time in Henry I's reign.
169. Milsom, LF, 178 first pointed out the importance of the 1153 settlement to legal history. R.C. Palmer took his suggestions further in two clever papers, containing much else besides, Michigan Law Review, "Feudal Framework", lxxix (1981) 1135-6, 1142-5 and "The Origins of Property", esp. 8 sq. In what follows I lean heavily on Cap. I of G.J. White, "The Restoration of Order in England, 1153-1165" (Cambridge Ph. D. Thesis, 1974),

kindly lent me by the author.

170. I survey the evidence and arguments for this hypothesis in Appendix III.
171. Milsom, LF, 178.
172. Mary Cheney, in "A Decree of King Henry II on Defect of Justice", in Tradition and Change: Essays in Honour of Marjorie Chibnall ..., ed. D. Greenway, C. Holdsworth and J. Sayers (Cambridge 1985), esp. 184 and "The Litigation between John Marshall and Archbishop Thomas Becket in 1164: A Pointer to the Origin of Novel Disseisin?", in Law and Social Change in British History, ed. J.A. Guy and H.G. Beale (London 1984), 23-4
assembles a good case for a high level of royal activity in the first years. The estimate of T.A.M. Bishop Scriptores Regis (Oxford 1961), 30-1 that as many as 40% of Henry's whole output of known acta come from the first 7 years is probably on the low side for the English acta alone. Henry employed more scribes during these years than at any other time in the century. Of course, it was normal for kings to make a disproportionate number of grants at the start of a reign.
173. See King, "The Anarchy of Stephen's Reign", TRHS (1984), 145.
The Chronicle of Battle Abbey, ed. E. Searle (Oxford 1980), 152-6 affords a vivid glimpse of the time.
174. The fact that representatives of English families pursuing some very old claims (see Appendix III, n. 10 below) were among their number suggests that many lost grants went to many besides

tenants-in-chief.

175. Contemporaries may have considered a claim to lands covered by a confirmation as a plea of the crown. See the interesting suggestions of A. Harding, "The Medieval briefes of protection and the Development of the Common Law", Juridical Review (1966). Royal confirmations indisputably took the tenurial relations they covered out of the realm of the privata convencio; cf. Glanvill, x. 8, 18.
176. Prof. D.W. Sutherland has now relinquished the view expressed in his book The Assize of Novel Disseisin, 7 in the light of The Letters of John of Salisbury, i, eds. W.J. Millor, H.E. Butler and C.N.L. Brooke (London 1955), no.115.
177. All interested in the chronology of Angevin legal change must take careful account of Palmer, "Origins of Property", esp. 8-24.
178. Cheney, "A Decree of King Henry II on Defect of Justice". For Tolt's previous limitation to "uncomplicated situations", see Palmer, "Feudal Framework", Michigan Law Review, lxxix (1981), 1141-2. Appendix III has some further reference to legislation at about this time.
179. Palmer, "Feudal Framework", 1145, n. 22 citing Van Caenegem.
180. Palmer, "The Origins of Property", 13 sq. has recently offered some imaginative arguments for this proposition. Not all are convincing. For example, "heredes" in the Assize might connote all surviving offspring (including those who would only inherit

if their older sibs predecease them), rather than heiresses alone. And some pre-1176 charters do refer to dower in language strongly suggesting tenure from the heir. But these are matters of detail to be taken up elsewhere, and it is quite likely that other items, such as the invention of the returnable writ, might corroborate Palmer's emphasis on the importance of the Assize of 1176.

181. Documentation for this statement and much of the argument in the next paragraphs is deferred to Appendix I.
182. See now Palmer, "Origins of Property", 19-23 and, for Countess Amice's Case, *SUDBURY v. CLARE*, Appendix II. C.H. Haskins, Norman Institutions (New York 1918), 189 noted that the maxim was never so broadly recognised in Normandy.
183. Palmer, "Origins of Property", 22-3 perhaps makes this break a little too early and too sharp. The defence goes on into the early years of the new century; see the cases cited by Milsom, LF, 14-17, 52-4 and Sutherland, The Assize of Novel Disseisin, 19, 20, n. 1, 71, 214. However, the crucial facts were the accession in 1199 of a new king with no qualms about making the justices sensitive to his wishes and what appears to have been a politically inspired precedent (*SUDBURY v. CLARE*) in the required direction. Note that the cases where the justices sent an assize dispute back to the lord's court for settlement (e.g. PRS xiv. 134; RCR i. 366) are all from Richard's reign.
184. See Van Caenegem, no. 127 and Appendix I.

185. Glanvill, ix. 5 (ed. Hall, 109). The possibility that this writ was originally framed to meet the situation at the death of a tenant who had acquired his land in Stephen's reign and retained it under the compromise of 1153 is unfortunately totally unsupported by evidence.
186. Cf. Milsom, LF, 76-7, 174; Bailey, CLJ viii, 278 sq. and ix, 193-4.
187. Cf. Milsom, LF, 76-7, 101, 120, 130-1, 142, 174, 183. Note that this is an unauthorised synthesis.
188. I say more about this in my "The Emergence of the Flat-Arsed Coveyancer in Medieval England".
189. The wielding of personal influence can sometimes be documented from extra-legal sources, though I have noticed no illustrations directly referring to warranty. H.D.Hazeltine, "Judicial Discretion at the Time of Henry II", Festschrift Gierke (Weimar 1911), 1055-1068 usefully summarises Glanvill's testimony, but better still would be a study of judges' own litigation. For Henry of Whiston, J., see REX v. MALKAELE (Appendix II). The work of Dr. Brand and others on a later period shows that study of judicial practice is feasible.
190. Glanvill, prol. (ed. Hall, 2-3). With R.V. Turner, The English Judiciary in the Age of Glanvill and Bracton, c. 1176-1239 (Cambridge 1985) should be coupled the perceptive survey of P. Classen, "Die koniglichen Richter des Common Law: Rechtswissenschaft und Rechtsstudium ohne Universitat" in his

posthumous Studium und Gesellschaft im Mittelalter, ed. J. Fried (Stuttgart 1983), 197-237.

191. C. Donahue, "What causes fundamental legal ideas? Marital Property in England and France in the Thirteenth Century", Michigan Law Review lxxviii (1979), 59-88 examines another aspect of this transformation by the light of the comparative method. I should like, in view of the remarks of R.H. Helmholz, Harvard Law Review xcv (1982), 725-6, 733, to repeat here my previously stated opinion that the Henrician "shift of control" was not the work of an altruistic automaton but resulted from persistent conscious legislative experimentation by Henry and his advisers.
192. This is the context for the arguments about the need for "do" and "concedo", on which see Bailey, CLJ, viii, 281-2; ix, 195. A well-known case of 1194, HURTON v FITZ:EVERARD (Appendix II) is a particularly good illustration.
193. Law and custom at the highest social levels are better assessed from political studies such as J.E.A. Jolliffe, Angevin Kingship (1955) or J.C.Holt, The Northerners (1961) than any works of legal history.
194. For the lord as domestic enemy, see Dialogus de Scaccario, ed. C. Johnson (corrected ed., Oxford 1983), 101. In my King, Lords and Peasants in Medieval England (1980), cap. 13, I argued that common-law villeinage originated in a decision to backtrack from a too wide provision of remedies for (free) tenants against

their lords.

195. S.D. White, "Inheritance Cases" indicates some of the approach's benefits.
196. There is a wealth of material in the introductions to recent volumes of the Pipe Roll Society, especially those edited by the late Lady Stenton. G.D.G. Hall, "The Early History of Entry Sur Disseisin", Tulane Law Review xlii (1968), 584-602 is a model for the integration of the different sources in straight doctrinal history. Palmer, Michigan Law review lxxix also makes exemplary use of the evidence from financial records.
197. See particularly Appendix I. Van Caenegem, Royal Writs brings together a great deal of raw data from the pipe rolls of this period.
198. Most of my own efforts in this direction have so far been unproductive. See however Appendix II: Select Cases.
199. As Palmer's witty title to his review essay in Michigan Law Review lxxix implied, Milsom's book was more concerned with the feudal framework of English law than with the actual title of his book! This is intentionally my first mention of "feudalism" or its derivatives in this paper; all too often feudal terminology seems to confuse rather than clarify. One can usually translate "feudal" either as "French" (ie a borrowing of forms from abroad) or as "concerning lordship". Since the assessment of French borrowings and the input of lordship were at the core of the concerns of this paper, talk of feudalism would at best have begged important questions.

Appendix I: The pre-history of the action "De Warantia Carte"

In the developed law of the thirteenth century, the writ "De warantia carte" initiated special pleas to compel warranty in a wide variety of situations. In the earliest plea rolls, it already appears as a discrete action, one of the many weapons in the lawyer's real property armoury. At this stage in the 1190s, two forms of "warranty" writ existed, one original, the other interlocutory, and litigants had the further alternative of an action based on homage.¹ The pre-history of "Warantia carte" and its associates is quite complex. Glanvill's treatment (1187/9) of relevant matters may be supplemented by a small number of actual writs surviving in contemporary copies and pipe roll records of payments for royal assistance in the enforcement of warranty and homage.² It is thus possible to glimpse how the Common Law rationalised the sporadic solicitation of royal assistance by tenants under threat into procedures that conformed with the goals of the new real actions.

Glanvill, still the most helpful point of entry, at once throws up a difficulty. Only one of the two current forms of "warranty" writ appears in his text. The explanation requires some examination of his Book III, where he discusses a "Breve de Summonendo waranto".³ Book II had dealt with procedure in cases introduced by writ Precipe (i.6) (the nascent action of right) where the tenant could make his defence without outside help. Book III now groups together three very different situations that required the presence in court of a third party. Two he details at the onset, those (1) where the tenant claims that the

disputed land is not his but belongs to someone else, a lessor for example, and (2) where, having admitted that the holding is his, he claims right to it by the gift, exchange etc. of a third party.⁴ A third, treated later in the book, is in fact the classic reason for acquiring a writ Precipe (i.6), though it can also emerge in actions commenced by a Breve de Recto. It arises when the demandant claims to hold the disputed tenement from a lord other than the tenant's. This, although Glanvill treats it in warranty language, differs from most voucher to warranty in that both parties -- not just the tenant -- have to seek aid from their "warrantors".⁵ Neither this nor the first situation concerns us here, only voucher to warranty proper.⁶ One can see why one of Glanvill's earliest readers felt that "De diversis modis placitandi" was a better title for Book III than the rubric "De diversis warantis" as printed.⁷

Glanvill had to discuss the De Summonendo Waranto, a judicial writ (to use an anachronism) for voucher to warranty in the course of an action of right.⁸ It summoned a warrantor to the aid of a tenant himself already summoned by a Precipe (i.6). The warrantor was to come into court (after his due allowance of essoins) either to warrant his voucher and take over the defence, or to explain why he was not bound to do so. What was to be done if he did not come looks to have been until recently a matter for learned dispute. According to Glanvill, the writ's issue lay at the justices' discretion.⁹ The author's older contemporaries could no doubt remember a time when constraint of a warrantor had been regarded as unmannerly or impolitic, when men

anticipated that, ideally at least, all concerned parties would owe suit to the same lord's court. He justified the constraint "*secundum ius et consuetudinem regni*" on the ground that a warrantor is bound to give an exchange for any land lost by his default, an appeal to moral obligations predating royal royal intervention. The end result, not expressly stated by him probably because it was not yet in existence, was the thirteenth-century *Cape ad Valentiam*, by which lands of a recalcitrant warrantor to the value of the lands currently in dispute (in other words a potential "*escambium*") were taken into the king's hand.¹⁰ Such details confirm that we are dealing with a procedure subsidiary to real actions touching the right.

This is the only kind of warranty writ mentioned by Glanvill; he says nothing of the later *De Warantia Carte*, an original writ not tied to any other kind of action and using, not the mesne process of real actions (*Cape* etc.), but the quite different process of personal actions. Such a writ found no place within the arrangement of the treatise, and certainly none within the Books devoted to the writ *Precipe* (i. 6) and the nascent action of right. Glanvill's silence on original warranty writs is to be expected. Yet the demand for an original warranty writ had long existed. What was the point of an ousted tenant possessing some theoretical right to escambium unless he could actually extract this from his warrantor? Threatened tenants were not always content to wait and be sued; they might wish to reassure themselves about their warranty in advance of trouble. In the absence of any evidence that Glanvill's writ of summons was used other than as

an interlocutory remedy,¹¹ the obvious candidate to fill the gap is the De Warantia Carte itself, whose Precipe form is quite congruous with an origin early in Henry II's reign.¹²

In Bailey's view, "the available evidence raises an irresistible presumption ... that the writ and action...were well established before the end of Richard's reign". Known cases took its existence back to within a very few years of Glanvill's writing,¹³ and it certainly has the air of an established action well before 1200.¹⁴ In truth, the king had long been prepared to help draw into a royal court for examination, and if necessary constraint, those from whom warranty or exchange was claimed.

A scattering of entries on the 1130 Pipe Roll encourage the belief that Henry I could be persuaded for a price to lend his support in a claim for warranty or exchange.¹⁵ Of Stephen nothing can be said, but writs in much the same Precipe form as the later Warantia Carte go back to the beginning of Henry II's reign¹⁶ and are not uncommon thereafter,¹⁷ being joined by writs of summons (presumably similar to those treated by Glanvill and thus interlocutory only) no later than 1179.¹⁸ Express clauses of warranty, that could go back to the early part of the reign, already envisage the possible disturbance of their dispositions by the intervention of "vis regia".¹⁹ There is at present no way to tell from what date this kind of calculation became routine and the writ ceased to be an expensive favour.²⁰

The third option was a suit based on homage. Glanvill presents the original writ later called De Homagio Capiendo in such a way as to

limit its validity to a single specific situation. The writ was only available to an heir in possession of a recently deceased ancestor's holding but afraid that the lord was about to oust him. The lord, who ought normally to take the heir's homage "ab inicio" was for some reason baulking at the prospect,²¹ and perhaps considering an inquiry into the heir's claim.²² The proper thing for the heir to do was to make frequent offers of relief through respectable intermediaries; this constituted his proffer for the reception of his homage. It was necessary for the lord to refuse this several times before the heir could obtain from the king or a justice a "Precipe" writ to the sheriff.²³

The homage writ presented the defending lord with three options. He could acknowledge the justice of the heir's claim, by accepting his homage or making firm arrangements to do so;²⁴ he could deny the plaintiff's right to succeed as heir; or he could justify his hesitation on the ground that the identity of the rightful heir remained unclear.²⁵ Glanvill is not very forthcoming on these and other colourable defences.²⁶ The lord might think himself entitled, by a "downward claim", to hold in demesne. In the past, this had frequently led to inquiries in the lord's court. Now, however, he needed a writ that might lead ultimately to a grand assize.²⁷ The writ *De Homagio* ensured that royal justices supervised any such "Quo Warranto" inquiry in the tenant's interest.²⁸ It is perhaps not surprising that the writ was in Glanvill's day of recent origin,²⁹ and expensive.³⁰ Its certainty of issue ("habebit") and its apparent restriction to a single

situation³¹ distinguish it from the two warranty writs, to which it offered little real alternative.

For all the differences between the origins and early functions of the three writs, they provided remedies for overlapping situations and some litigants at least could choose which to purchase. In the twelfth century, this choice cannot have been determined merely by the available proof.³² Yet possession of a charter of enfeoffment constituted an undeniable advantage. Twelfth-century kings never represented themselves as in the business of selling naked power; they expected men to show some kind of prima facie case before receiving a writ. Many vouchees were of exalted enough status to inspire political caution at a time when men still idealized the autonomous "seignorial world". The king and his advisers needed some justification before they would flout convention by constraining vouchees to warrant. Best was a clear charter of the vouchee or an ancestor, which offered a causa for the granting of a "Precipe" of a kind expressly required by the formulas of some writs.³³ In the 1150s charters were too rare to be made an absolute requirement. Even Glanvill's writs recite only that the voucher claimed title "de dono" his vouchee or ancestor.³⁴ All the same, writs issued to the charterless probably needed some other justification.³⁵ For the first twenty years of Henry's reign, others may not have been able to obtain royal assistance.³⁶ Pleas of title through an unwilling lord must have rung out in many an early Angevin courtroom. These were hard cases of the kind that makes bad law. With the expansion of real property business in the 1170s, royal advisers

could hardly ignore them. There would be nothing surprising in their turning first to such strong cases as the seised but charterless heir and the tenant abandoned far from his lord in a royal action of right. Conscious royal decision might thus explain the almost contemporaneous arrival of the *De Homagio Capiendo* (first reference 1178), with its highly restricted application and high price, and the discretionary, interlocutory "*Breve de Summonendo Waranto*" (first reference 1179). They might even have originated at the same time.

The thirteenth-century history of warranty writs, including the detailed working of *Warantia Carte*, is beyond the scope of an appendix. In the very long run, the *De Homagio Capiendo* and the judicial writ of summons survived far into the thirteenth century, despite the apparent loss of some business to *Warantia Carte*.³⁷ Only their twelfth-century pre-history is to the present point. It has revealed that royal intervention in warranty disputes ran along rather familiar lines. The flow that became *Warantia Carte* began as favours for the privileged few, branched out with experimental remedies for hard cases, and passed on into the developed Common Law somewhat swollen with business from beyond its original scope. The process of experiment and partial rationalisation has parallels elsewhere. Even so, the best guarantee of the essentially unprovable picture sketched here is its congruity with the larger one of warranty in general to which it is attached.

FOOTNOTES to Appendix I

1. Milsom, LF, pp. 128-30, 172-3 and cf. the cases cited 41, n.2, 89, n.2. Milsom's suggestion that suing on warranty or homage was at the litigant's choice is considered below. Cf. also Milsom, Novae Narrationes (Selden Soc. lxxx), clviii sq.
2. Both these supplementary sources suffer from fragmentary survival. One must always ask of twelfth-century writs what interest men had in their preservation. As for the pipe rolls, the proportion of royal debts and, more specifically, judicial payments on them, remains obscure; I have merely collected here references to "warantia", "homagium" and similar terms. Many are irrelevant to the present purpose. The common payments of royal moneys to individuals "pro escambio terre sue" or the like in the "Terris datis" section (e.g. Pipe Roll 4 Henry II, 151, 161) mostly reflect the king's acts as lord. Sometimes, though, the king is compensating a tenant whose land he has granted away to someone else, in a way no doubt common among private lords before royal enforcement of warranty became normal. The endowment of the Witham Charterhouse in 1182 (Pipe Roll 28 Henry II, 109; cf. *ibid.*, 115) is a clear example.
3. Glanvill, iii. 3 (ed. Hall, 39). I am grateful in equal measure to Professor Donald Sutherland for directing my attention to the intricacies of Glanvill's text here and to Jeffrey Hackney and Paul Brand for laying bare the inadequacy of my first efforts to

understand them.

4. Glanvill, iii. 1 (ed. Hall, 37-8). In situation (1), the demandant should simply acquire a new writ and recommence proceedings against the genuine tenant. See also Bailey, CLJ ix. 83-4 for the lessee's aid-prayer.
5. The discussion is Glanvill, iii. 6-8 (ed. Hall, 41-3). It can only be resolved in the shire or a royal court; Glanvill, xii. 8 (ed. Hall, 140).
6. Glanvill, iii. 1-5
7. See Glanvill, ed. Hall, lxvi-lxviii and 37 n. c.
8. Glanvill, vi. 9 (ed. Hall, 63) gives a parallel writ in very similar words for use in dower actions, to summon the heir of the deceased husband as warrantor.
9. Glanvill, iii. 2 (ed. Hall, 39). Cf. H.D. Hazeltine, "Judicial Discretion in English Procedure of Henry the Second's Time", Festschrift ... Gierke (Weimar 1911), 1057-8, 1065. For the thirteenth century, cf. G.D.G. Hall in Early Registers of Writs, ed. Hall and E. De Haas (Selden Soc. 87, 1963), lxxxv, n.13.
10. Glanvill, iii. 4 (ed. Hall, 39-40). PKJ i. 3490 (1199) is a writ of attachment. Chattel warrantors in theft cases were not unnaturally subject to immediate attachment, Glanvill x. 16 (ed. Hall, 131). For the Cape ad valentiam, see Early Registers of Writs, J. 20-23, 27-29. Similar doubts on the constraint of a warrantor (this time the deceased's heir in the widow's action of dower) surface in Glanvill, vi. 9 (ed. Hall, 63-4).

11. Bailey, CLJ ix, 206 raises this unlikely possibility. Glanvill does not discuss all the procedures of his day. See my King, Lords and Peasants in Medieval England, 166 for another likely omission.
12. Cf. Van Caenegem, Royal Writs, 239-48.
13. Bailey, CLJ ix (1945-7), 207-9, citing WUDECOT v. LANGFORD and HURTON v. FITZEVERARD, which refers to the production of an original writ at a shire court in 1193. Cf. also Sutherland, Assize of Novel Disseisin, 219 and Hall, Early Registers of Writs, xxxviii, n. 1.
14. A proof in the shire court at York "per breve de warantia carte" mentioned in EYC xi. 232 could conceivably take the story back to 1182.
15. Pipe Roll 31 Henry I, 20: father and son proffer 10 m. to have their holding from Wilton Abbey "aut escambium ad valens in comitatu"; *ibid.*, 32: 20 m. "ut habeat escambium terre sue de E. ad valens"; *ibid.*, 71: 20 m. "pro concessione escambii inter eum et R. de S."; *ibid.*, 74: 2 m. "pro placito hominis sui pro quodam escambio". Some at least of these proffers were surely made to secure royal assistance against a warranty voucher. Cf. also *ibid.*, 145: two men made proffers of a mark of gold and 100 /- respectively "ne escambium duraret quod fecit cum G.B."
16. The fact that Van Caenegem, no.127 (1156/7) was issued by Queen Eleanor need not distinguish it from ordinary royal writs. Dr. Brian Kemp informs me that it should read "monachis" (not "monachos" as transcribed by H.G. Richardson), the dative case

agreeing with the formulas of later writs. His inability to find a charter from the putative warrantor in the Reading cartularies suggests that none existed in the abbey's archives and probably explains the absence of any charter reference in the writ.

17. Registrum Antiquissimum, i. 189, p.118 (1156/66) refers to a charter. EYC iii. 1458 (1164/75) refers to a charter in free alms; the royal confirmations EYC iii. 1428 (1121/7) and Monasticon Anglicanum vi, 93 (1154/8, ?1155) may also be relevant. Van Caenegem, no.128 (1170/83) refers to a charter and warns the vouchee not to harass his tenant. Pipe Roll 26 Henry II, 121 (1180), for which 40/- was due, concerned the dowry of the voucher's mother. The absence of reference to a charter in Pipe Roll 31 Henry II, 75 (1185), for which 5 m. was due, can be explained by the circumstances; see SOMERVILLE v LACY, Appendix II. Some of the many pipe roll payments "pro (or "de") escambio" may also be relevant, but many, such as those in the "Terris datis" sections, are not.
18. Pipe roll 25 Henry II, 78 records a proffer of 10 m., which was paid off by 1182, Pipe Roll 28 Henry II, 118.
19. EYC v. 198 (1162/81), for which see GODRIC OF SKEEBY'S CASE (Appendix II). Stoke-by-Clare Cartulary, ii, ed. C. Harper-Bill and R. Mortimer (Sussex Charters v, Suffolk Rec. Soc. 1983), 319 (1173/93) envisages ecclesiastical suits as well as "coram rege". Even earlier is Chronicon Abbatie Rameseiensis, 273 (1134/60).
20. The existence of a temporarily separate action Quod Faciat

Rati/nabile Escambium in the late 1190s might cast some slight doubt on the action's autonomy. Cf. Bailey, CLJ ix, 205, n. 199, 206, n. 108 and PKJ i. 3503 (1199) on which, however, see Hall, Early Registers of Writs, lxviii.

21. Glanvill ix. 1 (ed. Hall, 103); cf. *ibid.* 2 (ed. Hall, 106) for the kind of technical hindrances to this speedy homage. The form changed little. Cf. PKJ i. 3528 (1199), a justiciar's writ relating to RCR ii. 11; PKJ i. 2427.
22. As in the so-called "Quo Warranto" inquiries already considered.
23. Glanvill ix. 4 (esp. ed. Hall, 108-9), 5.
24. The point of the lord's denial that he had previously refused the heir's homage, Glanvill, ix. 6 (ed. Hall, 109) was perhaps to escape amercement.
25. A third-party claim naturally ruled out a swift decision "pendente lite". Cf. the 1206 case cited below n.31.
26. Glanvill, ix. 6 drifts off to discuss other situations. One can imagine defences based on allegations that the deceased had forfeited his holding before his death or on a preferred claim from some third party allegedly with better right than the deceased.
27. *Ibid* (ed. Hall, 110).
28. Cf. Glanvill, ix. 9, 17 (ed. Hall, 82, 90).
29. The first relevant pipe-roll entry seems to be Pipe Roll 25 Henry II, 49 (1178): 60 m., hawk and horse "ut electus L. accipiat homagium suum de tenemento patris sui". This concerned a

hereditary sergeantry, and thus differs from the situation covered by Glanvill, ix. 5. It never came to court; the debt continued to be enrolled as due until Pipe Roll 10 John, 79 (1210), perhaps because of the promisor's poverty; cf. Clay, Lincs. Archit. & Archaeol. Soc. iii.2 (1945-7), 119-21. The only other examples noted before Glanvill are Pipe Roll 26 Henry II, 53 (60 m. "quia non cepit homagium J. de L."), 104 (10 m. "ut Comes Cestrie recipiat homagium suum et reddat ei terram S", paid 1183, 29 Henry II, 36). Cf. also Pipe Roll 25 Henry II, 122 (1177): 10 m. "ut rex accipiat homagium suum", followed by 20 m. for seisin, presumably of the same holding. Entries relating to homages claimed of or due from royal tenants are not uncommon. It is hard to believe that Pipe Roll Society xiv. 135-6 (1195), concerning a single virgate, was worth an expensive writ. Yet the case went to a grand assize, as did a parallel action of right, *ibid.* 120, between the same parties concerning half a virgate in a different village. Of course, one expected to pay for a curia regis hearing; cf. Glanvill, i. 2-3. PKJ i. 2427, 3528; RCR ii. 11 (1199) unhelpfully records an extant justiciar's writ.

30. The earliest payments that seem to relate to this writ are Pipe Roll 25 Henry II, 49 (1179), 60 m. from the son of a sergeantry tenant of the bishop-elect of Lincoln, and Pipe Roll 26 Henry II, 104 (1180), 10 m. that the earl of Chester receive homage for Serlo the huntsman's land. The 60 m. fine "quia non cepit homagium", *Ibid.*, 53 (1180), might come from another case.

31. It is certainly not beyond a lawyer's wit to think up other situations in which the writ of Glanvill, ix. 5 would be appropriate. See *ibid.* 1-2 for situations where a tenant was alleged in his lord's court to incur forfeiture for committing an atrox injuria against his lord or otherwise acting to his disherison. Use in such situations would offer another example of a "Precipe" writ serving to bring into the royal courts domestic disputes from within a lordship. However, no such cases are known to me. One cannot often deduce the situation behind cases on the early plea rolls. CRR i. 139 (1200) is, however, one case that clearly does fit the Glanvill pattern; the plaintiff had recently recovered by mort d'ancestor. Another is ICKWORTH v. COLCHESTER ABBEY (Appendix II).
32. As Milsom, LF, 129-30. The plaintiff in ICKWORTH v. COLCHESTER ABBEY did possess a charter, while some "Precipe" warranty plaintiffs (for whom see below) did not.
33. Cf. the Prohibition to Court Christian.
34. Glanvill, iii. 3; vi. 9 (ed. Hall, 39, 63).
35. See above n.16 for Van Caenegem, no. 127 (1156/7) and below Appendix II for SOMERVILLE v. LACY (1185). The writ of summons needed less justifying ; but cf. Pipe Roll 31 Henry II, 75 (1185), reciting a previous warranty or acquittal in Tickhill honorial court.
36. Not till 1169 does a pipe roll contain more than the odd reference to warranty or warrants. Cf. Pipe Roll 15 Henry II, 17, 23, 26

(bis), 89, 110, which illustrate a range of possible meanings.

37. Milsom, Novae Narrationes (Selden Soc. 80, 1963), clviii-clxiii should be read along with Hall, Early Registers of Writs, xxviii, lxxvi, n.13, Hib. 54, CC. 133, J. 35-40 and R. 457.

Appendix II: Select Cases

GODRIC OF SKEEBY'S CASE. EYC v. 196-8 (after 1155).

Richard II de Rollos (honorial baron of Richmond) granted 46 acres in Brompton to Godric of Skeebby (the next Swaledale village) for a nominal rent (no. 196 of 1155/65). Later (?), 1162/5, Richard gave to his nepos Harold f. Aldred of Richmond 1 carucate in Skeebby, which Godric had previously held of a mesne lord, from whose son Harold was now to hold (264). Pace the editor (p.158), Godric seems to have been alive at the time. When Harold gave Easby Abbey 32 acres of Brompton moor (? part of Godric's grant in no. 196), at around this time, Richard's confirmation (no. 198, as lord as well as benefactor) was expressed as "ita quod warantizabo pro posse meo contra omnes et nominatim contra Godricum. Et si vis regia vel justiciarius capitalis compulerit me ...", he would stand with the abbey as best he could.

HURTON (rectius UPTON) v FITZ EVERARD. FRS xiv. 124 (Bedford eyre 1194). Comment Bailey, CLJ ix, 195; Milsom, LF, 132, n.1.

Plaintiff's lord was probably also his (?elder) brother, William, who held a fractional fee (a half or one twentieth) of the honor of Wallingford. [I owe the identification of "Hurton" with

Upton, Beds. to Dr. Paul Brand. See VCH Bucks. ii. 226-7, Book of Fees, 461, 463, 466 and cf. ibid., 555, 875.] This may be identical with the 6 virgates that owed castle-guard at Wallingford in 1197, Hunter, Fines i, 160-1. The disputants both belonged to the group of prominent freeholders who served the shire as recognitors etc. Cf. PRS xiv. 142, 143; RCR i. 384, 432; 2 ibid. 87, 160 etc.

A possible reading of the successive proceedings dating back to 1192-3 (and patently impossible to reconstruct with confidence from our single plea-roll entry) might run as follows. Geoffrey of Upton sued Robert f. Everard in his brother's court for 3 virgates by writ of right patent. Robert, though the sitting tenant, was unable to persuade William de Upton to warrant him. After William's court had found for Geoffrey, Robert had the dispute removed to the shire court on the ground of false judgement. The shire apparently accepted the allegation of falsity, but Robert prevented it from proceeding to a final judgement until he could bring before the shire a writ De Warantia Carte (brève justicé) addressed to William de Upton. On that day, when all three parties were present together, William's charter to Robert was read out in court. William acknowledged it as his, but pleaded that it did not bind him to warrant, "cum in carta nulla fiat mencio de dono suo nec de warentia". The shire's failure to reach a decision suggests that courts were already implying warranty in the absence of an express commitment. After successive adjournments and a civil war, Geoffrey had the whole case transferred before royal justices by a Recordari Facias, presumably in order to obtain royal

help to oust Robert finally from the disputed land.

It is hard not to believe that the two brothers were not acting in collusion, which may explain why Robert impugned the whole record upon which this reconstruction is based! [Pipe roll 6 Richard I, 208 probably refers to PRS xiv. 137 and is thus not germane to this case.]

ICKWORTH v COLCHESTER ABBEY. CRR iv. 61, 141, 144, 281 (Suffolk 1206).

The parties to this De Homagio Capiendo had agreed to concord, when the abbot changed his mind; noting that the plaintiff was himself being sued for the land in question (one carucate), he was unwilling "to take homage therein before he knows which of the two ought to remain". He had become aware of a pending action of right (MANNESTON v ICKWORTH CRR iv. 96, 104, 177) against Richard and his wife Sybil, brought by one Richard f. John de Manneston', who had paid 2 m. to bring coram rege a mise that Richard and Sybil had put themselves into land of which his father, John de Manneston', had been seised at his death, Rot. de Ob. et Fin., 343-4; Pipe Roll 8 John, 237. Not until the issues in the second case were clarified did the abbot take Richard of Ickworth's homage.

John's grant in frankmarriage, made during his lifetime so that neither he nor his widow Margaret was seised thereafter, except under a lease-back for 20/- p.a. rent payable by John's brother Thomas from the other family property at Stradbrook, 20 odd miles away on the Norfolk border. Although this plea can be fully confirmed by the text of the grant as recorded -- significantly -- in the Colchester cartulary (Cart. Monast. S.J. Bapt. Colecestria ii, ed. S.A. Moore, Roxburghe Club 124, 1897, 523-4), the parties proffered 1 m. each for a jury. The verdict, though unrecorded on extant rolls, must have gone to Richard of Ickworth, whose homage was received by the abbot of Colchester on the Morrow of St. Martins. No wonder the abbot would not act sooner!

[Richard of Ickworth also held 2 fees of Bury, whose acts he witnessed at around the time of the case; cf. Cal. I.P.M. i. 848, R.H.C. Davis (ed.), Kalendar of Abbot Samson (Camden soc. 3rd series, lxxxiv, 1954), pp. 24 sq. and nos. 1, 26, 48, 60 and W.A. Copinger, Manors of Suffolk vii. 69, 102-1.

LANWALAY v. BEAUCHAMP (re EATON SOCON AND SANDY) 1198-1203.

RCR ii. 279; CRR i. 68, 70, 106, 108-9, 227, 340, 401; ii. 4-5, 187; iii. 14.

In this action of right, demandant correctly based his claim on seisin (by his maternal grandfather, Hamo de St. Clair) in Henry I's reign, "die et anno quo obiit". Behind Hamo's seisin, by royal

grant of c. 1120, lurks the fall of the Mandevills after the 1101 revolt. Many of their lands then passed "temporarily" to Eudo Dapifer until a debt of more than two thousand pounds was paid. Hamo, a vassal of Eudo's, seems to have acquired the disputed honor after Eudo's death.

The Beauchamp claim through the dispossessed Mandevills was temporarily successful at a time when Stephen aided the Mandevills to recover lost lands. Under Henry II, Hamo's son Hubert, Hugh I de Beauchamp, then Hubert's daughter and her husband (our demandant's father, William I de Lanvalay) were successively in seisin. Politics and the control of the relevant heiress seem to have been decisive. Our demandant was left a minor at his father's death in 1180/2, which probably let in Hugh de Beauchamp again (ob. 1187), his son Oliver (ob. c. 1190) and finally his grandson, the tenant in our case. His minority over, our demandant made a substantial proffer in 1194 for the king's goodwill and his property. Neither the money nor the property appear to have changed hands. Certainly, John at his accession showed no initial favour to William de Lanvalay. Hugh de Beauchamp's hopes of securing royal support for his tenure however apparently came to nothing. On the other hand, no verdict has been found; the action no doubt foundered at the demandant's death in 1204. Sources for the claims cited in I.J. Sanders, English Baronies (Oxford 1960), 40, 92; S. Painter, The Reign of King John (Baltimore 1949), 59, 332; G.H. Fowler, BHRS ii (1914), 64-5; C. W. Hollister, History lviii (1973), 19-21, 25; Farrer, Honors and Knights Fees iii. 249-50.

Both claims in this case genuinely go back behind 1153, and indeed 1135.

REX v. MALKAEI Pipe Rolls 26 Henry II, 74; 27 Henry II, 43.

In 1178-9 Unfrid Malkael owed the exchequer 15 m. "quia advocavit tenere terram de (Crosby Ravensworth, Westmoreland) de alio quam de rege". The lord of whom he claimed to hold is later revealed to have been one Robert f. Peter. A possible meaning of this emerges from a later lawsuit, known only from the enrollment of its outcome on the pipe roll of 1194-5. In this a royal justice Henry of Whiston successfully extracted from Unfrid's heir, Geoffrey Malkael, a quitclaim of both Crosby and the nearby manor of Lowther. [Pipe Roll I Richard I, 148. Henry's efforts to establish his rights over the two villis are also illustrated by the fine, Pipe Roll Soc. xx. 128 (1197).] Geoffrey's claims were recognised by a grant back in fee of 3 bovates in Crosby. For this, he had to hand over a charter of Hugh de Morevill to Unfrid. I guess that in 1178 Unfrid was being punished for failing to attorn his service to the king, after his grantor Hugh had suffered forfeiture for his complicity in the 1173 revolt, Sanders, English Baronies, 59 and n. 6, and that Henry of Whiston's aunt, by whose right he sued later, was in some way involved. In effect Unfrid had been looking to the wrong lord for his warranty.

SOMERVILLE v LACY. Pipe Roll 31 Henry II, 75 (1185).

Plaintiff was head of a family substantial enough to hold fees of several other lordships apart from Lacy. His cousin, from a cadet branch which had retained Yorkshire interests despite moving to Scotland in Henry I's reign, seems to have solicited from Robert (?) de Lacy the grant of part of the family lands. See W.E. Wightman, The Lacy Family in England and Normandy, 1066-1194 (Oxford 1966), 39, 93 n.4, 100 and G.W.S. Barrow, The Anglo-Norman Era in Scottish History (Oxford 1980), 107-9, 193-5 on EYC iii. 1650-3. The present writ was thus intended to compel the lord to stick to his existing warranty of the sitting tenant rather than to be swayed by the moral claim of the other branch of the family; any allocation should no doubt come out of the lord's demesne.

SPALDING ABBEY v. BICKER. PKJ iv. 4477; CRR vi. 283, 342, 351-2;

Pipe Roll 14 John, 110, 111 (Lincs. 1212).

Cited Milsom LF, 47, n.1.

This "Quo Waranto" summons (5 m. for the writ) alleged intrusion after a tenant's death into land that should have escheated "pro defectu heredum". The defendant claimed that the deceased, while still in full possession of his faculties had made him a legitimate grant with livery of seisin. Both sides proffered for a jury, whose verdict appears lost.

If the deceased was the Robert clerk of Bicker, who appears a few years earlier (Lincoln Rec. Soc. xxii, nos. 921, 945, 1065), the

basis for the dispute becomes clear. Spalding had been acting through the courts to enforce services against its tenants here in Moulton and in nearby Pinchbeck, and William f. Rannulph, who put in his claim to this holding, was one of those sued (Rot. de Ob. et Fin., 512, 525-6). The present case was no doubt part of this drive to enforce rights of lordship.

SUDBURY v CLARE ("COUNTESS AMICIA'S CASE"). PKJ, i. 3199 = RCR, ii. 180; CRR, i. 186, 225, 249 (Suffolk 1200).

Legal comment Milsom, LF, 45-6, 56, 92-3 etc.; Palmer Michigan L. R. lxxix (1981), 1137-8; and Palmer, Law and History Review iii (1985), 22-3.

The assize was heard at Westminster because of a 2 m. proffer by the plaintiff, Pipe roll 2 John, 148 (paid by 1204, Pipe roll 6 John, 237); no counter-proffer is known. Countess Amicia was one of three daughters of Earl William of Gloucester and was married to Richard de Clare at around the time when Richard's fence-sitting posture in the 1173-4 revolt made him suspect to Henry II, S.Painter, Feudalism and Liberty (Baltimore, Md. 1961), 222-3. In 1176, the king promised Amicia and the third sister #100 worth of land each as part of a deal by which he acquired for his youngest son, John, the oldest sister, Isabella, and the expectation of the earldom of Gloucester (R.B. Patterson, Earldom of Gloucester Charters, 5); she may not have received her full share, though she did hold 15 fees about the time of the case (Pipe roll 4 John, 283). The political circumstances of this

marriage, and thus the subsequent divorce, remain obscure.

As to the divortium, we have only Amice's statement that it was by papal grant "per lineam consanguinitatis", possibly on the ground that both spouses were descended from Henry I. Earl Richard's life grant of a #10 annuity to a lady who may have been his mistress, though perhaps from this time, [Cf. CRR viii. 62 = BNB 52 (1219). Painter's supposition adopted by M. Altschul, A Baronial Family in Medieval England: the Clares 1217-1314 (Baltimore 1965), 30 receives some slight support from the fact that Earl Gilbert personally defended the 1219 suit ; cf. CRR viii. 62, 267, 287, 370.] is less likely to be relevant than the fact that the two families had been enemies in Stephen's reign or the marriage's failure to produce the expected material rewards.

The disputed land, to be distinguished from the other Sudbury long in Clare hands [W.A.Copinger, The Manors of Suffolk: The Hundreds of Babergh and Blackbourn (1905), 231-2; Red Book of the Exchequer, i, ed. H.Hall (1896), 37, 406-7], as Prof. R.B. Patterson very kindly pointed out to me, belonged to Amicia. It had been, so she asserts elsewhere, part of her dowry (her father, earl William, had dealt as lord with the church there in 1176; cf. CRR iv. 139-40.), Stoke-by-Clare Cartulary, i, ed. C. Harper-Bill and R. Mortimer (= Suffolk Charters iv, 1982), nos. 60, 63.

A few legal comments may be added. Amicia's inability to dissuade the court from permitting Richard to wage his law on the issue of his free submission to her court judgement was pivotal. The

non-appearance of the plaintiff and his oath-helpers on Amicia's Sudbury charters (where some of her co-disseisors do appear) marks him off as an outsider and points to the value to him of securing wayer of law. Had he not done so, or had the case gone to assize in the normal way, the issues would not only have been hidden from us but might well have been decided differently. There is no hint, for example, that Richard possessed a charter of Earl Richard to establish Amicia's consent to the grant or any obligation to warrant. One must also wonder why she did not go on to bring a writ of right after losing the assize.

These facts added to the recent change of regime encourage one to seek a political explanation, stemming from the relations between the new king and Earl Richard de Clare. The years 1199-1200 seem almost the only time in the reign before the Magna Carta revolt itself, when the earl was of political consequence. He was disgruntled because he had received only a tiny share of the Gloucester honor (through Amice, the third sister) while John had managed to take the lion's share. Thus, on Richard I's death, the new king's advisers listed him among those magnates whose uncertain loyalties claimed special attention. They extracted fealty from Richard and others at Northampton in 1199 in return for a promise that the new king would render to each his iug, that is, favour his property claims. Earl Richard had more reason than most to feel sensitive. In the first months of the new reign, John was planning to exchange the Gloucester earldom for the county of Evreux, as part of his planned marriage alliance with Phillip of France. At the same time, he was seeking to dissolve the marriage to

Isabella by whose right he held Gloucester. [S. Painter, The Reign of King John (Baltimore 1949), 13, 21; Altschul, 24-6; G.E.C., Complete Peerage, v. 502; vi. 692-3. Cf. Howden, Chronicon, iv. 88 for the 1199 oath.]

Amice must have known that the odds were against her once the case came before a royal court. Direct royal intervention may not even have been necessary, once the plaintiff's proffer brought the case to Westminster. Amice's failure to attempt recovery by an action of right suggests that she understood what she was up against. At least three details of the record accord particularly well with the idea that this was a "political" decision. The first two are: (1.) the plaintiff's proffer and (2.) the relative inactivity of the Countess, without counter-proffer or later writ of right. The third is the unusual decision (cf. Milsom, LF, 45-6) to let the plaintiff wage his law that he had not been summoned, let alone willingly pleaded in Amice's court. A precedent that permitted royal justices to over-rule seignorial court decisions in assizes of novel disseisin had in any event rather obvious attractions for John. Amice's case has indeed a quite particular interest for our understanding of the workings of royal control of justice at the time.

UPTON v FITZ:EVERARD. See HURTON v FITZ:EVERARD above.

WUDECOT v LANGFORD. PRS xiv. 14; RCR i. 126 (1193-5)

Cited Bailey, CLJ ix, 202, n. 79, 206, n. 108, 208, n. 118.

Robert of Woodcote, a substantial landholder [R.W. Eyton, Antiquities of Shropshire, vii (1858) 335; ix (1859), 11 sq., 17.]

seems to have been successfully sued in novel disseisin at the Shropshire eyre of ?1191 by one Robert de Huntele or Huntiland. Both of them may have sought to hold of Eva de Langford, an heiress in her own right. Some years later, seven of the recognitors could not remember whom she had warranted.

Robert of Woodcote sought his exchange from Eva, apparently by Warantia Carte, at the Shropshire eyre of 1193. Eva, no doubt advised by her new second husband Walter of Wheatfield, brother to a royal justice, had the case put to a jury, for which she paid a mark. [Pipe Roll 5 Richard I, 112; cf. Pipe Roll 3 Richard I, 152, 254.] The case was adjourned to Westminster, where Walter, on his wife's behalf "petit breve per quod implacitatur". If this means that he sought a sight of the original writ, it suggests that Warantia Carte was not yet a routine action. In the absence of a verdict, Eyton conjectured that Woodcote won his case, Eyton, viii (1859), 101-8 etc. Certainly, the Woodcotes were holding of Eva by 1208, CRR v. 270, 281.

By 1199 fresh proceedings were under way at Westminster, a Recordari Facias obtained to question the original assize decision. I have so far been unable to disentangle the subsequent course of this third case and its connection with the earlier dispute. The main references noted, and used above, are as follows:- William Salt Society iii. 50 (Stafford eyre); RCR ii. 239; CRR i. 197, 238, 461; PKJ i. 197, 513 (1199-1201)

Appendix III: The Treaty of Westminster 1153 and Legal Change

Milsom phrased his original insight very briefly, almost as an aside. He had noticed parallel to the peace treaty of 1153 "a general provision that those disinherited during the anarchy should be restored to the rights they had under Henry I". This he proposed, on the basis of action of right counts citing seisin from Henry I's reign on the early plea rolls, as the origin of "the writ of right as a regular action".¹

Robert Palmer transformed this modest suggestion into a model of the process by which a rule might have been generated to cover disputes in the exceptional situation after the ending of the civil war. He argued by analogy that once the Treaty of Westminster had restored peace at the highest political level, there was a need for a rule to govern land disputes stemming from the events of the Anarchy. Then he surveyed some of the central legal developments of the reign to show how well these fitted the hypothesis.

Palmer described his "rule" as follows. "An accepted tenant currently possessed of lands would remain tenant for life. At his death, however, his heir would be denied in favor of an outside claimant, whose ancestor had been tenant in fee in 1135 such that, in the normal course of things,² he would have been regarded as heir." Lords were not supposed to discipline tenants "for matters relating to Stephen's reign". In practice, of course, everyone concerned had an interest in compromise. This interest was not absolute; thus tension

over its consequences favoured royal intervention and explains the standardization of the *Breve de Recto*.³

The dearth of direct evidence for the second settlement of 1153 and the tenurial rule it produced is not in itself too serious for Palmer's hypothesis. True, the scattered records of litigation from the next decade or so do nothing to document it. Indeed, we possess more examples of compromise exceptions than of the rule itself.⁴ But this silence is quite explicable. It is always hard to illustrate current law from actual cases in this period, but disputes ending in compromise might be expected to be more carefully recorded than those decided by a regular rule.

In any event, the hypothesis' real strength is its substantial congruity with detailed aspects of the legal reforms. Judgements on its validity must concentrate on this aspect of the case, and also consider what appears to be an important premise behind, the notion that the Anarchy had created a situation demanding a new custom, one which established rules could not handle. "Warfare had occasioned many disinheritances", Palmer pointed out, "either by conquest and regrant or by disciplinary action."⁵ Perhaps men felt that only innovation could find a way out.

* * *

Medieval litigants had notoriously long memories for the rights they claimed as their own. Actions of right on the early plea rolls

from around 1200 are frequently founded on seisin more than half a century old. It is therefore striking to find that a fair number of their parties plead seisin from Henry I's reign, none from Stephen's. This looks very much like a policy decision of Henry II, enforced by his courts. As late as 1169-70, one litigant was punished for attempting to plead "de factis tempore werre", while in 1175-6 another paid 20 m. "pro recognitione de feodo ... a tempore regis Stephani", apparently an exceptional privilege.⁶ Apparently, this rule became permanent.

Another rule, setting Henry I's death as the last moment of official peace was equally long-lasting. By it, claims to have possessed right at or before Henry's accession had to rest on seisin from 1135 or earlier.⁷ This could have originated as a minimum requirement, coexisting with the protection of sitting tenants who had acquired seisin during Stephen's reign, i.e. since 1135.⁸ There is, however, no obvious reason to attribute this pleading limitation to a second settlement in 1153. It could quite as easily have resulted from decisions made during the months after the Treaty of Westminster or after the start of Henry II's reign proper. That the plea rolls say nothing of an 1153 origin means nothing; it could have been forgotten in the intervening generation. But more nearly contemporary evidence is no more forthcoming. Royal and ducal acts from the months before Stephen's death do not suggest that the peace had established any new policy on the establishment of right.⁹ No reference to the peace has yet emerged from any of Henry II's early writs. Before 1170, indeed,

the writs do not even mention the existence of sitting tenants.¹⁰ The new rule could therefore be unconnected with legislative concessions to sitting tenants who had entered their holdings during Stephen's reign. It might simply have emerged over time.

Another innovation early on in the new reign confirms that Henry and his advisers were certainly not afraid to fine-tune the pleading rules. This was a statutum enacting that, to succeed in land claims, Englishmen must plead seisin posterior to 1135. Apparently the English are to be the exceptions to the general prohibition against pleading seisin from Stephen's reign and the otherwise general right to plead seisin from Henry I's reign. They alone had to plead on facts from the reign of the despised Stephen! Curiously, an early writ of Stephen's constituted a precedent. This rule, which can be glimpsed in effect during the years up to about 1170, seems unconnected with 1153 and more probably resulted from over-exuberant attempts by optimistic descendants of English landholders to put in their claims at the start of Henry II's reign.¹¹ It certainly helps to confirm the early establishment of Henry I's death as a legal landmark, but does little to assist in pinning down the precise date at which this happened.

The more one looks at the indirect evidence for the second settlement, the more unsettling the scarcity of direct evidence becomes. Patently, there was more to the peace settlement than appears in the Westminster charter; the question is how much more, beyond a bare order that disseisin and plunder should cease. What was to be done to remedy existing inequities? Even the most directly helpful chronicle

passages fall far short of compelling one to believe in the generation of any novel rule. Robert de Torigni's point may be that intruders (invasores) in a period of undoubted werra had never acquired lasting, legitimate seisin. In similar vein the Gesta Stephani recorded a consensus that "the disinherited be recalled to their own, and (property?) rights and laws commanded to all according to pristine custom". This appears to go beyond Robert, to hold that disseisins during the Anarchy were subject to the good old custom, meaning presumably the rules administered under Henry I. Neither author emphasized the day of Henry I's death, or expressly mentioned legislative innovation of any kind, nor did they feel any apparent need to advocate compromise. They may be doing little more than restating the need for a return to law along the old lines, where only peaceful seisin counted.¹² Both talk in terms of immediate action, which is also the general impression given by the Treaty of Westminster and other sources. An arrangement that might take many years to come to fruition would leave problems in the interim with worse difficulties to follow. How, twenty odd years after the peace, was one going to determine whether a claimant really was entitled as one of the disinherited? In the circumstances, what was wanted was surely immediate settlements even at a cost.

When all is said and done, the Treaty of Westminster was a precarious compromise made against the wishes of both principals.¹³ Subsequent events might easily have nullified its effect. The king's son, William, never made any express renunciation of his claims.

Stephen himself was no "lame duck" in early 1154; some observers thought he was actually coming into his own. Nobody expected him to die so soon. This was a stroke of luck for Henry, who had scarcely been in a position to create controversial new rules while Stephen lived, nor indeed for some time after his own accession. Study of the political narrative of Stephen's last year as it unfolded week by week gives good reason not to place undue weight on the paper terms of a peace settlement, documented or not. Like men at the time, we should expect the lasting shape of future custom to emerge slowly and painfully out of the political turmoil.

There must, therefore, be some doubt how far contemporaries really felt the need for a new rule to implement the treaty settlement among their followers. In the first place, conscious law reform was still exceptional.¹⁴ In the second, the talk in 1153 was dominated by hopes for a return to the better practices of the past after recent horrors. Men are likely to have submitted their disputes either to established custom (ie on the basis of proving better right by legitimate seisin in time of peace) or (political) negotiation, as in most of the documented cases.

The particular hypothesis under consideration seems for these reasons best regarded as unproven for the present. Yet the notion of focussing the spotlight of research on the end of the Anarchy and the Angevin take-over is surely correct. Much of what remains to be done is germane to the present study. One example is the problem of the sitting tenant in the years before 1153. Some of the twelfth-century occasions

when lords' feelings towards their vassals shifted to the point of ousting one family in favour of another were demonstrably for normal political reasons quite unconnected with the Civil War. Study of the tenurial shifts within the major lay baronies of the mid-twelfth century is an urgent, if challenging, need. A good deal hangs on shifts in magnate allegiances and their consequences to lesser men in the period between, say, 1140 and 1176. Much the same is true of changes in the landlord families themselves. The dynastic changes of 1135 and 1153-4 could well be studied in this light. Their effect on noble land-holding needs scrutiny along the same kind of lines as major transitions in other periods, such as the Dissolution of the Monasteries or the English Civil War. This could become a standard assignment in studies of twelfth-century honors.¹⁵ We need first to identify the tenurial discontinuities, before we can know how profoundly they were affected by the events of 1153-4.

Another line of attack is to compare the hypothesis with known legislation of the day. One early example known entirely from royal acta, the statutum on English land claims, was discussed above. Another, rather differently evidenced, concerned disputes over the possession of churches, a form of real property still valuable albeit increasingly controversial in the lay world of Angevin England. The rules governing church possession appear to have changed at least once in the course of Henry II's reign. Very soon after Henry's accession, he apparently issued an edictum or constitutio against unjust occupations. As allegedly enforced in a royal writ of *reseisin* no

longer extant, this simply declared unjust seisin null and put the ousted claimant back in. The case which brings it to our attention involves a large-scale disseisin from Stephen's reign of the kind that might well have come under an 1153 settlement.¹⁶ Glanvill offers a different rule, which has been connected with a papal decretal of 1173/6. It has been decided ("statutum est ... in regno domini Regis"), he says, that clerks who entered churches by violence but "tempore werre" are to keep them during their lifetime.¹⁷ The late date suggests that the werra in question was the rebellion of 1173-4. Otherwise it would be tempting to associate the rule with the circumstances of 1153. Ironically, this comes as close as anything to direct evidence for the hypothesis.

The measures chosen to implement the peace settlement could easily have been much less exceptional than the settlement itself. The evidence for an undocumented agreement between Stephen and Henry of Anjou late in 1153 to submit their followers' disputes to a novel compromise rule remains too fragmentary to compel acceptance. The supposed rule fails most of the possible tests. Yet the treaty undeniably did trigger a process of tenurial sorting, by claim, counterclaim, compromise and confirmation, that continued into the new Angevin regime. The rule, that seisin, to be valid, had to pre-date Henry I's death in 1135, may not result from any formal enactment. The known litigation could have generated such a customary practice without any formal decision. Perhaps royal justices and advisers simply began to implement a known custom that valid seisin had to begin in time of

peace. To have made this a question of fact in each case was impractical, beyond contemporary judicial machinery. The death of Henry I was the natural, almost the inevitable choice for a rule-of-thumb date. After the civil war of John's reign, the courts similarly ignored seisins acquired in time of war.¹⁸ Nevertheless, the decision, however reached, was a portentous and exemplary one; right from the start of the reign, the king's men were interpreting custom and declaring how it ought to work.

Footnotes to Appendix III

1. Milsom, LF, 178-9 and see below.
2. ie without the need for warranty.
3. Palmer, "Origin of Property", 9-12. The writ of right's "operational peculiarity" to which he refers is due to its date; the form of writ close (with its character of a one-off purchase, in contrast to the writ patent's form as a lasting privilege) was not yet in the 1150s standard for litigation writs.
4. One settlement, the Berkeley double marriage pact was made in Duke Henry's presence and almost certainly according to his wishes at very much the same time as the political settlement. See for its terms, decidedly asymmetrical and hard to square with the alleged rule, I.H. Jeayes, Descriptive Catalogue of the Charters ... at Berkeley Castle (Bristol 1892), no. 4 and cf. Barkly, Trans. Bristol and Gloucs. Arch. Soc. viii (1883-4), 205-6, Regesta iii. 272, 309-11.
5. "Origin of Property", 9.
6. Pipe Rolls 16 Henry II, 51; 22 Henry II, 184. References to werra from later in the reign probably refer to 1173-4, as Pipe Roll 25 Henry II, 119. The inference that Henry considered Stephen a usurper is not required; in Normandy, he tended to ignore his own father's acts as if Geoffrey's time as duke were

- equally a mere interregnum, Haskins, Norman Institutions, 135.
7. Milsom, LF, 178-9. inferred that this formula, making 1135 "the last moment of peace and legitimate title ... set hard under Henry II", during those early years when the writ of right's "regular machinery" was born, "to implement the single decision that those put out during the ... anarchy should be put back again". LANVALAY v. BEAUCHAMP (App. II) is one relevant case.
 8. It is not clear that anyone had the automatic right to plead such long seisin. Even in John's reign, litigants can be found making substantial proffers to make tenure before 1135 of the issue. (I have only surveyed the 21 cases from the overlap between Richard I and John in CRR i and vii.) The demandant in CRR i. 38, 61 (1198) paid 15 m. for his writ, Pipe Roll 8 Richard I, 40. Cf. Rot. de Ob. et Fin., 13, 414-5 for clearer cases; in the first 10 m. made the issue seisin in Henry I's time; in the second a tenant paid 40 ozs. of gold for the king to stay a writ of right concerning land which his ancestors had held in peace since Henry I's reign. For Englishmen, see further below.
 9. See Regesta iii, xliii-xliv, xlvii-xlviii for list of acta. The formulation of grants and confirmations by either king or duke, separately or in each other's company, is outright and unconditional. Stephen twice in 1154 made general confirmations to religious of their property as held at or shortly after the Treaty of Westminster, nos. 696, 866. But Henry confirmed

Savigny's property as at the date when he had crossed to England, L. Delisle and E. Berger, Receuil des actes de Henri II i (Paris 1916), no. 82 (1154), and his confirmation of the chamberlain's office (Regesta iii. 582), made before the peace treaty, conveys it as the grantee held it "in anno et die quo Rex Henricus fuit vivus et mortuus". I cannot see that these confirmations differ much from earlier royal ones, other than in their number.

10. See, for example, Van Caenegem, Royal Writs, nos. 18-22, 86-94. Ibid., no. 87 = Regesta iii. 286 (1136/41, ?1138) is irrelevant here because of its corrected early date. Van Caenegem, 277-8 attributes to the flood of confirmations during the reconstruction period the "legal presumption" that seisin under Henry I put a claimant in the right. Royal writs do sometimes mention the legislation or occasion that gave them birth; see below.
11. As I suggested in King, Lords and Peasants in Medieval England, 252; cf. Van Caenegem, no. 169. Van Caenegem, no. 165 = Regesta iii. 134 (1135/9) is the possible precedent.
12. Cf. Milsom, LF, 178-9, and especially his remarks about seisin in time of peace and "tempore guerre". As he notes, counts in the action of right expressly contended that the seisin pleaded had been pacific. Though this feature might have become standard in the 1150s, it would certainly not have been out of place in the (admittedly different) land suits earlier in the century.

Further research is needed. The dictum of Glanvill, xiii. 11 (ed. Hall, 155) that assizes of mort dancestor were unavailable to anyone who had ever been "in guerra" against the king may be making a similar point. Alternatively, it might be read as commentary on the 1173-4 revolt.

13. This paragraph essentially follows White, "The Restoration of Order in England, 1153-1165", 32-57.
14. Cf. my "Henry II and Ganelon". But there was legislation at least for problem cases, especially early in the reign; see Cheney, "The Litigation Between John Marshall and Archbishop Thomas Becket", 23-4 and below.
15. Enlightenment in this as in other areas can be expected from David Crouch's project on "The Social Structure of the Medieval English Aristocracy, 1066-1272". Meanwhile, J. Le Patourel, "The Norman Conquest, 1066, 1106, 1154", Procs. Battle Conference on Anglo-Norman Studies, i, ed. R. Allen Brown (Ipswich 1979), 114 sq. offers some suggestive ideas on what he saw as the Angevin Conquest.
16. The Letters of John of Salisbury i, ed. C.N.L. Brooke et al. (London 1955), no. 102. Van Caenegem, Royal Writs, 284, n. 2, 331-2 associates the edict with the king's channel crossing in either 1156 or 1158.
17. Glanvill, iv. 10 (ed. Hall 50). Commentary has concentrated on the relationship with Alexander III's decretal X, 3. 38. 19. M. Cheney, EHR lvi (1941), 193-4 and J.W. Gray, *ibid.* lxxvii (1952),

488, n. 4 differ on the degree of seisin required to qualify for life protection.

18. See D.M. Stenton in Selden Soc. liii (1934), lix-lxiii and Selden Soc. lvi (1937), li-liii.