An Armory of Writs
The Rewriting of the English Social Contract, 1066-1290

by

Zachary S. Blau
Class of 2009

A thesis submitted to the
faculty of Wesleyan University
in partial fulfillment of the requirements for the
Degree of Bachelor of Arts
with Departmental Honors from the College of Social Studies
and with Departmental Honors in Medieval Studies

Table of Contents

ACKNOWLEDGEMENTS II
PREFACE IV
NOTE ON SOURCES AND HISTORIOGRAPHY VI
NOTE ON USAGE X
ABBREVIATIONS XI
GLOSSARY XII
ROYAL FAMILY TREE XV

CHAPTER 1 - INTRODUCTION 1

1. PROPERTY NORMS AND RIGHTS IN POST-CONQUEST ENGLAND 1
2. A VERY LEGAL HISTORY OF ENGLISH KINGS 7
3. CONCLUSION 17

CHAPTER 2 – SECURITY OF TENURE AND HERITABILITY 19

1. SECURITY OF TENURE: DISSEISIN, DISINHERITANCE, AND DISCIPLINARY POWER 20
   1.A. Practices in Normandy 20
   1.B. Disciplinary actions in post-Conquest England 22
2. NOVEL DISSEISIN AND ENFORCING SECURITY OF TENURE 26
3. NORMS OF HERITABILITY 28
4. HISTORY OF THE RELIEF 36
5. ROYAL DEFENSE OF HERITABILITY 40
6. CONCLUSION: THE CLASH OF NORMS 46

CHAPTER 3 – QUO WARRANTO OR QUIS WARRATIZAT? WARRANTY, LEGAL PROCEDURE, AND THE DEFENSE OF PROPERTY 50

1. ORIGINS OF WARRANTY – THE NORMS OF THE LORD'S OBLIGATION 51
2. WARRANTY AND RULES OF LAW 56
   2.A. Proprietary actions before Henry II's reforms 57
   2.B. Novel disseisin and mort d'ancestor – the possessory assizes in the royal court 63
   2.C. The legal system after Henry II 77
3. THE LORDS LOSE REAL POWER 85

CHAPTER 4 - ALIENABILITY 88

1. LAND TRANSFERS, C. 1066-1200 89
   1.A. Substitution and Subinfeudation 89
   1.B. Glanvill on Alienation 94
   1.C. On the rarity of substitutions in the twelfth century 96
2. THE THIRTEENTH CENTURY: FROM SUBINFEUDATION TO *QUIA EMPTORES* 98
   2.A. The economic background 98
   2.B. The growth of free alienability 99
   2.C. Resistance to free alienability 101
   2.D. Statutory protections for the lords 107
   2.E. The Statute of Quia Emptores 109
3. HOMAGE AND THE POLITICS OF ALIENABILITY 112
4. CONCLUSION 114

CHAPTER 5 - CONCLUSION 118

APPENDIX: SELECTED LAWS 128

BIBLIOGRAPHY 135

ACKNOWLEDGEMENTS

It is truly astonishing to me how many debts of gratitude I have come to owe in the course of only four years at Wesleyan. I would never have been able to write this thesis without the help of my family, friends, and teachers over this time.

To Gary Shaw, who took me on as an advisee and made this as painless a process as possible by helping me narrow my topic down to a manageable scope, providing insightful comments and questions even up to the last minute, and making our meetings enjoyable (a joke about "anthropological peasants" comes to mind), even when I was struggling to grasp the subject.

To John Hudson, who has shown me every possible kindness from the moment I arrived in St Andrews as a JSA, allowing me to audit his "Law and Society" module which gave me the opportunity to begin studying medieval law, making sure I adjusted comfortably to the University, and even reading and commenting on several chapters of this thesis.

To Cecilia Miller, who, more than anyone, taught me how to read and write as a college student, forcing me, from my first college assignment on, to work hard, think critically, and write clearly; she has provided me invaluable guidance and assistance on everything from Dante to teaching to applying to grad school, and has commented on several chapters of this thesis.

To Don Moon, who has been my academic adviser since I was a freshman; I still cannot imagine what he must have thought of that seventeen-year-old who walked into his office during orientation, proudly declaring that he would double major in CSS and medieval studies, but I do know that his teaching and guidance have been a key reason why I was able to make good on that declaration.

To Clark Maines, who has been my medieval studies adviser and a great resource; the time I spent with him in class and during office hours has been informative, helpful, and often hilarious.

To Erik Grimmer-Solem, who helped me learn how to write history in the CSS history tutorial, and who has been accessible and encouraging ever since; I have taken to heart his advice to avoid missing the forest for the trees, and I hope that this thesis reflects that.

To Gil Skillman and Richie Adelstein, who discussed with me the relationship between norms and laws and helped me find material on the subject which has influenced deeply the theoretical framework for this thesis. It is especially appropriate that I should thank Professor Adelstein here, although I have not taken a class with him, as it was his permission to attend and participate in his sophomore economics tutorial in October 2004 that convinced me to apply early decision to Wesleyan and then to the CSS; I answered a question that afternoon about Locke's ideas on property, and now I finish my college career by writing a thesis on that same subject.

To Will Eggers, whose boyish enthusiasm for all things medieval has reassured me that I am not alone and who has worked tirelessly to bring me and his other students closer to the world of academia; anyone who drives his class to a conference for fun is a "true dude."

To the College of Social Studies, which has provided me the best education I could hope to have. This community has dominated my time at Wesleyan, and I could not be happier about that fact. I am especially grateful to the seventeen other seniors with whom I have studied, and from whom I have learned so much, and to the sophomore class, my students, who have humored my digressions on my thesis when I should have been teaching them about imperialism.

To Matt Podolin, Emily Gorham, Eli Allen, and Gaël Hagan, with whom I have witnessed many, many Friday sunrises and whose intelligence, kindness, and humor has made those absurd Thursday nights so worthwhile.

To Sarah Leonard and Nick Field, my closest non-CSS friends; Sarah, by making me laugh at ridiculous things on the internet, and Nick, by making me watch hockey and play squash, have helped me retain some semblance of sanity during this process.

To Michelle, whose support, encouragement, footnote checking, and love I have relied on so much, especially during these last few weeks, and whose patience I appreciate more than I can possibly express.

Finally, to my parents. Their help with this thesis and throughout my life leads me to the belief that, saving perhaps the Obama daughters, I have the world's best parents. Both my mom and dad have provided very useful edits to this thesis, and my dad in particular has been a tireless editor, even double-checking my cross-references at 1 am. I am so fortunate to have been raised by two brilliant, funny, and loving people, and their help and encouragement have made this thesis, and so much else, possible.

Despite all of the help I have received on this project, errors no doubt remain. Much as I would like to blame them on someone – say, my brother – these errors are my responsibility.

PREFACE

Medieval property law has been described as "the most technical and most difficult part of the common law."[1] One of the most important books on the subject in the last fifty years, S.F.C. Milsom's *The Legal Framework of English Feudalism*, was described by Robert Palmer as "almost impossible to understand," its author having "raised allusion, hint, and obscure suggestion to an art."[2] When I have told friends and fellow students that my thesis is on medieval property law, the reaction was invariably some combination of eye-rolling and "that sounds so incredibly boring." Why, then, would anyone write a thesis like this, on such a technical and seemingly obscure topic?

While I have always known that I wanted to write about medieval England, it was only after my semester abroad at the University of St Andrews, where I took two classes with John Hudson, that my focus turned to law. Property law was of particular interest, as it allowed me to draw connections to Locke and social contract theory. This is a connection that, it appears to me, has remained unexplored. Legal histories tend to focus on the development of the English Common Law, either in the medieval or long-term historical context; social histories tend to focus on rural or village life; political histories focus (sometimes anachronistically) on the rise of the institutions of the modern state. To the extent that Locke and Hobbes are ever placed into a historical context, these first "modern" social theorists' ideas are seen as responses to the political upheavals of their time. None of this is incorrect, but it is

---

[1] Daniel Klerman, "Review: The Fee Tail and the Common Recovery in Medieval England, 1176-1502," *Albion: A Quarterly Journal Concerned with British Studies* 35, no. 2 (2003): 271.
[2] Robert C. Palmer, "Review: The Feudal Framework of English Law," *Michigan Law Review* 79, no. 5 (1981): 1130-1. It would not be unfair to note that Palmer himself is not the clearest of writers.

insufficient. After all, the form of property assumed by Hobbes and Locke arose through the formation of the Common Law; and yet the history of the land law tends to examine only the early Common Law's effect on…modern property law. Though this thesis is in large part a work of legal history, and will inevitably in some respects reflect the limitations of this method, I use this analysis to develop conclusions that cut across the various types of history.

Drawing on the multidisciplinary background I have gained in the College of Social Studies, where I learned to bring history, social theory, government, and economics together, I have in this thesis made a connection that seems almost obvious: not only is the development of property law of great importance to legal history, but it had important social and political implications too. We owe to the English Middle Ages not only our Anglo-American Common Law and state institutions, but our fundamental understanding of the role of government. So, why write a thesis on such a "boring" and difficult subject? I hope that I have rebutted the former charge, and that my arguments answer the latter by demonstrating the value of such a study.

NOTE ON SOURCES AND HISTORIOGRAPHY

If all philosophy is but a footnote to Plato, then it is not unreasonable to say that all scholarship on the laws of medieval England is but a footnote to Frederic William Maitland. While his classic work *History of English Law Before the Time of Edward I* was coauthored with Frederick Pollock, Pollock acknowledged in the preface to the first edition (1895) and elsewhere that his own "contribution…was very limited." It has therefore become the convention among legal historians to refer to the text as having being written only by Maitland, crediting Pollock only in formal citations.

This two-volume book, through Maitland's fine research and lucid writing, remains, if not absolutely authoritative, one of the most important works in the field. It has been critiqued perhaps most strongly by S.F.C. Milsom who, like Maitland, taught law at Cambridge. Milsom's *The Legal Framework of English Feudalism* is a dense but deeply influential book, and he has contributed many other works on legal history. Other law professors whose work I have engaged include S.E. Thorne, whose "English Feudalism and Estates in Land," while flawed, remains important; Joseph Biancalana, whose "For Want of Justice" is a valuable examination of the impetus for Henry II's legal reforms; and Robert Palmer, whose work builds upon Milsom's and represents a distinctly positivist approach to property rights.

Several professors of history have also contributed to my views on the subject. J.C. Holt and Paul Hyams have both written very important works on Anglo-Norman and Angevin England, including Holt's "Politics and Property in Early Medieval England" and his classic *Magna Carta*, and Hyams's "Warranty and Good Lordship

in Twelfth Century England." Paul Brand has written extensively on thirteenth century England, and his book *Kings, Barons and Justices* provided a goldmine of information on the legal initiatives of Henry III and Edward I. One of the most significant recent books on Anglo-Norman England is John Hudson's *Land, Law and Lordship*. Hudson has also written several articles that I have found very helpful, and my understanding of, and views on, this subject owe more to him than to any other source (not least because I first studied medieval law in depth when I took two classes with him during my semester abroad).

There are several detailed studies that have illuminated various aspects of medieval property law, particularly through their use of data. RáGena DeAragon's article on "The Growth of Secure Inheritance in Anglo-Norman England" provides charts and specific numbers, which have been very useful. Donald Sutherland wrote an extraordinary study of the assize of novel disseisin, aptly titled *The Assize of Novel Disseisin*, which gives a much more detailed look at the procedure and its impact than a broader legal history could. E.Z. Tabuteau undertook a close analysis of 750 Norman charters that recorded grants of land, and so *Transfers of Property in Eleventh-Century Norman Law* has provided sound backing for claims that, prior to its publication, had been largely inductive.

Primary sources are of course essential to any historical work, and I have benefitted from the wealth of (translated) materials available. The second and third volumes of *English Historical Documents* contain statutes, chronicles, charters, and other illuminating material. For documents specifically on legal history, the Publications of the Selden Society, founded by Maitland, are an incredible resource.

R.C. van Caenegem's collections of early royal writs and early lawsuits elucidate elements of Anglo-Norman legal culture. Doris Stenton translated several volumes of thirteenth-century records of the justices in eyre, and I have found the rolls for Lincolnshire in 1218-9 and for Worcestershire in 1221 very helpful. Elsa De Haas and G.D.G. Hall compiled a collection of four thirteenth- and early fourteenth-century registers of writs, which record and give generic examples of all the writs readily available from chancery.

(On the subject of the written record, it will no doubt occur to the reader to wonder why most of the cited charters or early writs involve churches. The answer is that churches kept better records than their secular counterparts, and so, as Holt notes, the written record has "very strong ecclesiastical bias."[1] He suggests that as much as 88 percent of royal writs and other *acta* "in favor of the laity" from Henry II's reign has been lost to history.[2])

Finally, there are the two great legal tracts of the age: *Glanvill* and *Bracton*. *Glanvill* was written in the 1180s, most likely c. 1188, and its authorship was attributed to chief justiciar Ranulf de Glanvill. Though we do not know who actually wrote the tract, it is nonetheless conventional to refer to it as *Glanvill*, and to its author as Glanvill. The text describes the royal legal system as it existed then, and addressed key questions of the time. In the case of *Bracton*, Maitland confidently attributed its authorship to Henry de Bracton and dated the text to the 1250s, but we now know neither is correct. As with *Glanvill*, it is still referred to as *Bracton*, and its

---

[1] J. C. Holt, "The Writs of Henry II," in *The History of English Law: Centenary Essays On "Pollock and Maitland"*, ed. John Hudson, *Proceedings of the British Academy* (Oxford: Oxford University Press for The British Academy, 1996), pp. 60-1.
[2] Ibid.

author as Bracton. This text was compiled largely by William of Raleigh, for whom Bracton clerked, prior to 1236-40. While Bracton is known to have worked on the text through the 1250s, most of it describes English law in the early years of Henry III's reign (1216-72). I have not made as much use of *Bracton* as of *Glanvill*, and there are two reasons for this. First, the multiple authorship of *Bracton*, and the length of time over which it was written, have rendered the text far less coherent and far more confusing than the more concise *Glanvill*. Second, *Bracton* does not align, chronologically, with much of my argument. I have found *Glanvill*, the *Rolls of the Justices in Eyre*, the *Early Registers of Writs*, and the statutes collected in *English Historical Documents* to be far more useful in assessing the effects of Henry II's reforms and the causes of Edward I's reforms, and so have relied more heavily on them.

NOTE ON USAGE

As has been noted by Reynolds, among others, the terms "feudal," "feudalism," "vassal," and "fief" refer to, or are meant to evoke, an ideal type of how the medieval world worked. However, their use is often anachronistic or misleading. Like many of the authors I have read, I have therefore chosen to refer to a "seigniorial" or "tenurial" system, wherein "tenants" hold "tenements" (or simply land) of a lord.

Second, confusion can arise over the terms "lord" and "tenant," as many men were both. In such cases, the use of "tenant" will refer to that person in his capacity as a tenant, and the use of "lord" will likewise refer to that person in his capacity as a lord. Tenants-in-chief will always be referred to as such specifically, and so the term "tenant" does not refer to them.

ABBREVIATIONS

Bracton	*On the Laws and Customs of England*
EHD	*English Historical Documents, vols. II and III*
Glanvill	*The Treatise on the Laws and Customs of the Realm of England, Commonly Called Glanvill*
Lawsuits	*English Lawsuits from William I to Richard I*
Registers	*Early Registers of Writs*
Rolls of the Justices in Eyre	*Rolls of the Justices in Eyre: Being the Rolls of Pleas and Assizes for Lincolnshire 1218-9 and Worcestershire 1221*
Writs	*Royal Writs in England from the Conquest to Glanvill: Studies in the Early History of the Common Law*

GLOSSARY

Aid	Payment from a tenant to his lord, particularly payments owed on certain occasions such as the knighting of a lord's son.
Amercement	A monetary penalty, exacted from one who had fallen into the king's mercy because of an offense.
Assize	Legislation (capitalized); procedures arising from such legislation; the body carrying out such procedures; the trial itself.
County court	A court presided over by the sheriff, which was a civil, non-criminal court; it had an original jurisdiction in personal actions; real actions came to it when the seigniorial courts made default in justice; cases were sent down to it for trial by jury from the king's court.
Default	Failure to do justice.
Demesne	Land a lord kept for himself in his own direct power, as opposed to land granted away to others; often contrasted with fiefs or tenements.
Deraign	To maintain or prove one's right.
Disseisin	Dispossession; the taking away of seisin.
Distraint	Temporary seizure of moveable goods and/or land in order to enforce obedience to a decision or order.
Dower	Land apportioned for a widow to hold after her husband's death (her dowry).
Enfeoff	To grant land as a fief or tenement to be held of the grantor.
Entry, writ of	A writ setting in motion a recognition and focusing upon one alleged flaw in the tenant's title.
Escheat	The reversion of land to its lord; land that has thus reverted.
Essoin	An excuse for non-appearance at court.
Eyre	A visitation by the king or his justices; a visitation by groups of royal justices throughout the realm to address with all pleas, with each group covering an assigned circuit of several counties.
Fealty	Loyalty; the oath of loyalty.
Feudal	Referring to a "system" by which medieval Europe is supposed to have been governed. The term is unhelpful and generally avoided.
Feudal incidents	Rights to which a lord was entitled from his tenants, including relief, wardship, and escheat.
Fief/tenement	Land, generally heritable, held in return for service, usually military.
Fine	Payment for an agreement, or the ending of a lawsuit; a final concord.
Frankalmoin/ free alms	Lands granted to a church for spiritual services from which no secular service can be demanded.

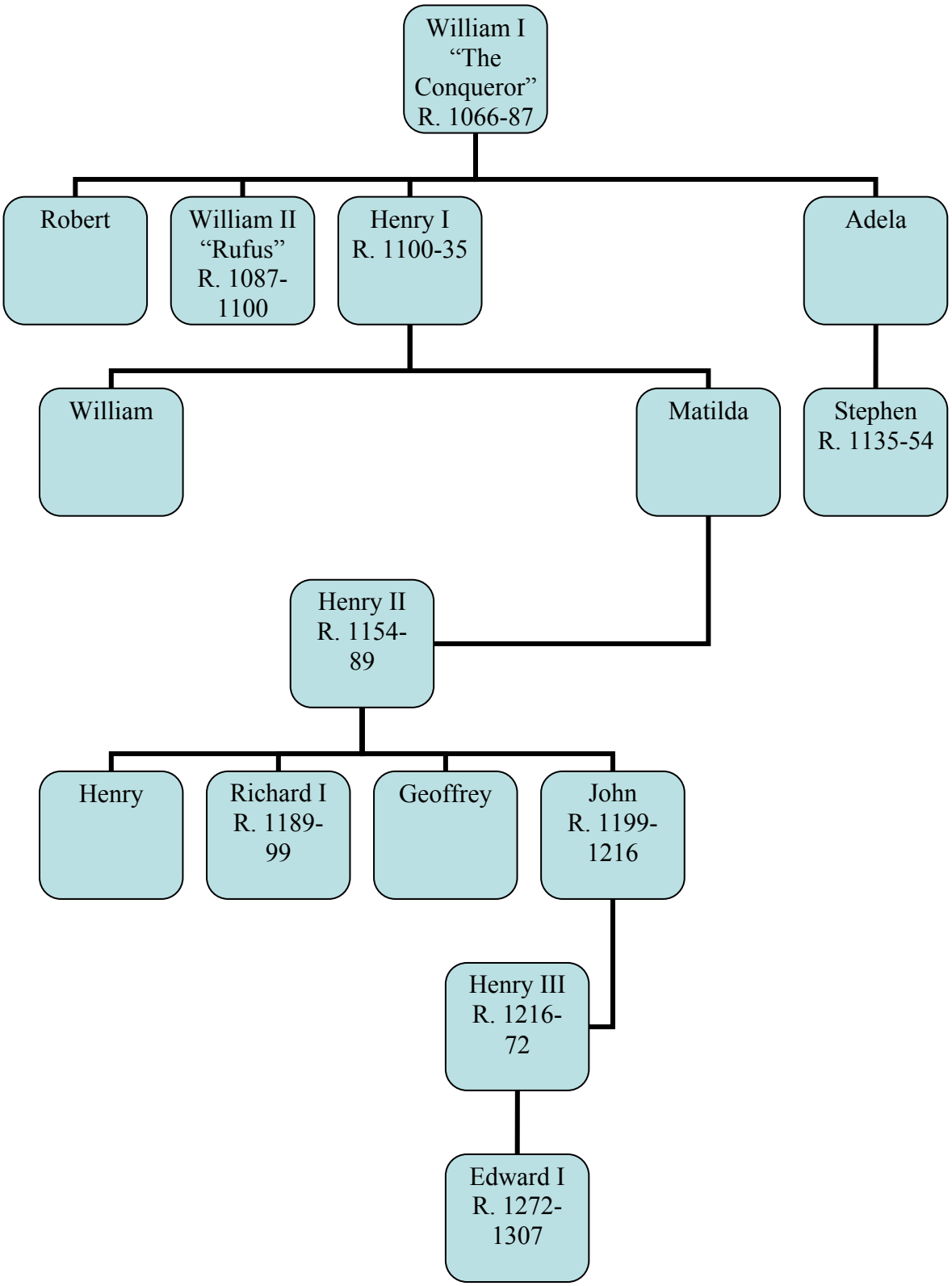
Homage	The ceremony of becoming a lord's man, generally connected to warranty.
Jury	Generally a body of local men summoned by justices to testify to the facts of a case and render a verdict.
Livery of seisin	The ceremony of transferring land or other rights.
Mort d'ancestor	An assize whereby an heir may claim his inheritance through a recognition.
Mortmain	Literally "dead hand," referring to alienations or grants in frankalmoin to the "dead hand" of the church.
Novel disseisin	A swift assize, making use of a recognition, to reverse recent, unjust disseisins.
Pone and tolt	The processes for transferring cases from the lord's court to the county (tolt), and from the county to the king's court (*pone*).
Praecipe	A writ conveying a command, disobedience of which will lead to the matter being heard before the king or his justices.
Praecipe quod reddat	A writ ordering restoration of land to a claimant; disobedience leads to the matter being heard in the king's court.
Recognition	A process whereby a body of neighbors (a jury) gave a true answer to a question put to them by the public official who had summoned them.
Relief	A payment made to a lord by an heir for his inheritance.
Royal court/*curia Regis*	A court presided over by the king or his official justices.
Scutage	Payment in lieu of knight service.
Seisin	Possession based on some justifiable claim; to be put in possession (to be seised)
Sub-infeudation	The grant of land by a lord other than the king to a man to hold from him as a tenement or fief.
Substitution	A grant of land whereby the current tenant alienates his land to a new tenant, who then holds of the lord on the same terms.
Suit of court	The obligation of a lord's men or certain men of the county to attend the lord's or the county court.
Tenant-in-chief	One who holds directly from the king; often refers to barons of the realm.
Tenement	A landholding.
Tenure	The holding of a land from a lord.
Tenurial	Referring to the system of dependent tenures by which English landholding was organized.
Wardship	Custody of an heir who is not yet of age and the heir's land; most wardships were not fiduciary.
Warrant	The authorization by which a tenant held land; *Quo warranto* proceedings asked by what/whose warrant a tenant held his land.

Warranty	Denoting a binding promise by a lord or grantor to defend the feoffee in the possession of the land, and to give him land of equal value if he lost it, especially if as a result of a recognition.
Writ	A written royal order which authorized a court to hear a case and instructed a sheriff to secure the attendance of the defendant.

The definitions given here are mostly from Hudson's *The Formation of the English Common Law*, though I have tailored some to this particular work.[1] The definition for county court is from Maitland,[2] and the definition for writ is from Milsom's *Historical Foundations of the Common Law*.[3] I have also consulted two legal dictionaries, those by Jowitt[4] and Stroud.[5] Some few of the definitions are my own.

[1] John Hudson, *The Formation of the English Common Law: Law and Society in England from the Norman Conquest to Magna Carta* (London: Longman, 1996).
[2] Sir Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I*, 2nd ed., 2 vols. (London: Cambridge University Press, 1968), I, p. 529.
[3] S. F. C. Milsom, *Historical Foundations of the Common Law* (London: Butterworths, 1969), p. 22.
[4] Clifford Walsh, ed., *The Dictionary of English Law*, 2 vols. (London: Sweet & Maxwell, 1959).
[5] Daniel Greenberg, ed., *Stroud's Judicial Dictionary of Words and Phrases*, 7th ed., 3 vols. (London: Sweet & Maxwell, 2006).

ROYAL FAMILY TREE



CHAPTER 1 - INTRODUCTION

The protection of real property rights was central to the development of the social contract paradigm upon which modern Anglo-American democracies are based. According to John Locke, whose *Second Treatise of Government* (1690) remains the classic exposition of the contractarian argument, "Government has no other end but the preservation of Property."[1] This understanding of government's role did not arise, *ex nihilo*, in the early modern period; historian Alan Harding notes that medieval kings, too, "had a particular obligation to protect the property rights of their subjects."[2] Indeed, the way in which we view government as upholding citizens' rights in property owes much to the means that the kings of medieval England developed to meet this obligation.

1. PROPERTY NORMS AND RIGHTS IN POST-CONQUEST ENGLAND

Property rights, broadly speaking, consist of the ability to use the property, to exclude others from it, and to transfer these rights.[3] In medieval England specifically, the concept of property rights encompassed security of tenure, heritability, and alienability.[4] Immediately after the Norman Conquest in 1066, landholding was tenurial, that is, title to land was acquired through contract with a lord, and this was

---

[1] John Locke, "Of Civil Government," in *Two Treatises of Government*, ed. Peter Laslett, *Cambridge Texts in the History of Political Thought* (Cambridge: Cambridge University Press, 1988), p. 329.
[2] Alan Harding, *Medieval Law and the Formation of the State* (Oxford: Oxford University Press, 2002), p. 201.
[3] Andrew Reeve, *Property*, ed. Peter Jones and Albert Weale, *Issues in Political Theory* (Atlantic Highlands, NJ: Humanities Press International, Inc., 1986), p. 11; Susan Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted* (Oxford: Oxford University Press, 1994), p. 55.
[4] See e.g. John Hudson, "Anglo-Norman Land Law and the Origins of Property," in *Law and Government in Medieval England and Normandy: Essays in Honour of Sir James Holt*, ed. George Garnett and John Hudson (Cambridge: Cambridge University Press, 1994), p. 200.

how William the Conqueror's barons gained their land, and how the tenants under them gained their holdings.[5] As described by the legal scholar S.F.C. Milsom, "From top to bottom one can imagine a series of bargains in which each superior allowed a measure of immediate control to his inferior, whose holding he undertook to protect in return for" services, usually military.[6] Some, thinking in terms of feudalism, have suggested this tenurial system precluded real or proper ownership, claiming that only in the seventeenth century do we find "absolute ownership."[7] Frederic William Maitland rightly noted the poverty of this view. Taken seriously, it implies either that no "land in England [was] owned" or that the only owner of land was the king and he owned the country. The former "leads to a barren paradox" and the latter is an "obvious falsehood."[8] Instead, it was understood that "an owner is none the less an owner because he and his land owe services to the king or to some other lord."[9]

---

[5] Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted*, p. 57.

[6] Milsom, *Historical Foundations of the Common Law*, pp. 8-9; Frederic William Maitland, *Domesday Book and Beyond: Three Essays in the Early History of England* (Cambridge: Cambridge University Press, 1987), pp. 151-8. Though military tenants were originally the men who would fight with their lord, or women or clerics who were allowed to send "able-bodied representatives," this obligation was soon (as early as 1127) converted to scutage, that is, the obligation to support the army with money instead of one's person. Tenants-in-chief, however, did not have the option of paying scutage – their service remained personal. *EHD*, II, no. 247; Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, pp. 252, 269, 271. Following convention, I refer to this in the text as having been written by Maitland, despite the coauthorship credit that Pollock receives. See above, Note on sources.

[7] Reeve, *Property*, p. 45.Reeve, p. 45. For criticism of this model, see Elizabeth A. R. Brown, "The Tyranny of a Construct: Feudalism and Historians of Medieval Europe," *The American Historical Review* 79, no. 4 (1974); Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted*.. As stated above, given the difficulties of defining precisely the terms "feudal" and, especially, "feudalism," I will avoid them as much as possible, using instead more accurate terms such as "tenurial" or "seigniorial."

[8] Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, p. 5.

[9] Ibid.

From the top down to the smallest freehold,[10] the tenurial system was an aggregation of social contracts between lords and tenants which Maitland describes as a "feudal ladder."[11] Each had obligations to the other. As Milsom noted, the basic elements of this contract were the lord's obligation to protect the tenant[12] and the tenant's obligation to provide services and homage – a solemn act carrying more significance than mere fealty.[13] The contracts were regulated by what the social scientist Edna Ullmann-Margalit termed "norms of obligation."[14] These social norms are defined thusly: first, they are "spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great"; second, they are "believed to be necessary to the maintenance of social life"; and third, the "conduct required" by norms "may, while benefitting others, conflict with what the person who owes the duty may wish to do."[15]

---

[10] This thesis will not address unfree tenure, or villeinage, which lies outside the scope of the social contract under consideration here. The legal remedies discussed below were available only to freeholders. The number affected, however, was not as small as we might suppose. Palmer suggests that perhaps even more than "30 percent of families" were reached by the bureaucracy that developed to enforce Henry II's legal reforms. Robert C. Palmer, *English Law in the Age of the Black Death*, ed. Thomas A. Green, *Studies in Legal History* (Chapel Hill: The University of North Carolina Press, 1993), p. 2.

[11] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 349. Kings consistently made assertions of direct relationships not only with their tenants-in-chief but with their under-tenants too. See below on the Salisbury Oath and the returns by tenants-in-chief to Henry II. *EHD*, II, no. 224, p. 971; Hudson, "Anglo-Norman Land Law and the Origins of Property," p. 216; J. C. Holt, "Politics and Property in Early Medieval England," *Past and Present*, no. 57 (1972): 32.

[12] See below, Ch. 3.1 on warranty.

[13] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, pp. 236, 98. Maitland notes that both parties also had rights in the tenement itself, but the lord's right was not understood to allow him actually to administer the land. Later reforms were to give the tenant greater rights in the land against his lord. See below, Ch. 3.2.B.

[14] Edna Ullmann-Margalit, *The Emergence of Norms* (Oxford: Oxford University Press, 1977), p. 12. Much of the following material on the relationship between norms and the law derives from a research paper I wrote for Professor Gil Skillman in CSS 391 – Political Economy. My thoughts also owe much to a valuable conversation with Matthew Podolin.

[15] Ibid., pp. 12-3.

The lord's court, however, was insufficient to ensure adherence to the norms of obligation expressed in the terms of tenurial contracts. In the 1170s, for example, the *Dialogue of the Exchequer* goes so far as to refer to lords as the "natural enemies" of their tenants.[16] While individuals asserting property rights in post-Conquest England did so on the understanding that the norms of landholding, that is, the lord's protection, "bound their lords," these normative claims were insufficient to guarantee what they believed to be their rights.[17] As Thomas Hobbes, another early proponent of social contract theory, observes, contracts require regular outside coercion to deter abrogation.[18] Normative social contracts, that is, require legal enforcement mechanisms and remedies. The threat of legal sanction supplements the normative "social pressure," and provides recourse in cases where the norm alone is insufficient.[19]

The centrality of real property, the "major economic resource,"[20] to the economy and society of medieval England imbued its landholding norms with great significance. When they were violated, as when a lord deprived his tenant of the tenant's land, or did not allow the tenant's heir to inherit, it was a blow not only to the tenant's normative claims with respect to the land,[21] but also to the stability of

---

[16] *EHD*, II, no. 70.
[17] Joseph Biancalana, "For Want of Justice: Legal Reforms of Henry II," *Columbia Law Review* 88, no. 3 (1988): 535.
[18] Thomas Hobbes, *Leviathan*, *Penguin Classics* (London: Penguin, 1985), pp. 191-2, 202.
[19] Amartya Sen, "Normative Evaluation and Legal Analogues," in *Norms and the Law*, ed. John N. Drobak (New York: Cambridge University Press, 2006), p. 247.
[20] Robert C. Palmer, "The Economic and Cultural Impact of the Origins of Property: 1180-1220," *Law and History Review* 3, no. 2 (1985): 381.
[21] Whether or not these can be referred to as property *rights* proper is a significant disagreement among scholars who study medieval English law. Lawyers tend toward a "skepticism…about rights existing without the corresponding legal remedies" rooted in legal positivism. Historians tend to give greater emphasis to the role of norms as a necessary condition for the legal remedies. Paul R. Hyams, "Review: The End of Feudalism?," *Journal of Interdisciplinary History* 27, no. 4 (1997): 661-2; Hudson, "Anglo-Norman Land Law and the Origins of Property," p. 200, n.7. The use of the word

society.[22] The land law that developed from 1066 to 1290, but particularly under Henry II (1154-89), regulated the "most vital area of men's interests."[23] Security of tenure, among other rights in property, was enforced under laws that protected both freeholders and social stability.[24] Norms alone, without regular legal means of enforcement, were insufficient to ensure that stability.

These legal enforcement mechanisms were developed in response to "specific defects perceived to exist in the system," that is, reforms were enacted through a "piecemeal approach."[25] Specific remedies were formulated to redress specific violations of norms, as the formalist writ system provided recourse first for gross violations of the broad norms of landholding, and later for more subtle actions that violated the spirit of landholding norms.[26] This is characteristic of the English Common Law, and contrasts with Roman law-type systems "of complete codes designed to remedy society's ills with a single stroke of the legislative brush."[27]

"right" also tends to obfuscate. While I do not agree with those such as Palmer and Milsom who argue for a late twelfth-century advent of rights, neither do I think that one can plausibly claim a right to, say, inherit unless there is regular enforcement of that right from above. The normative obligations from which these rights derive carry significant weight, and a dispossessed tenant could certainly claim that their contract with the lord, and the correlative norms, had been violated. I am not convinced that this constitutes an actual right – it seems meaningless to talk about a right that is unenforceable. While the normative claim to a certain property "right" was substantively the same in 1200 as before 1150, the advent of regularly enforced "Punishment rules, specifying what may happen to someone" who violated these norms of landholding "help[ed] to give meaning to ownership." Reeve, *Property*, p. 11; Biancalana, "For Want of Justice: Legal Reforms of Henry II," 535; John Hudson, *Land, Law, and Lordship in Anglo-Norman England*, *Oxford Historical Monographs* (New York: Oxford University Press, 1994), p. 10.

[22] Reeve, *Property*, p. 163.

[23] Donald W. Sutherland, *The Assize of Novel Disseisin* (Oxford: Clarendon Press, 1973), p. 5.

[24] Ibid.

[25] "The Common Law Origins of the Infield Fly Rule," *University of Pennsylvania Law Review* 123, no. 6 (1975): 1480; Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, p. 569.

[26] The former refers to the writ of novel disseisin (see Ch. 3.2.B), and the latter to the writs of entry (see Ch. 3.2.C).

[27] "The Common Law Origins of the Infield Fly Rule," 1480.

We must be careful, of course, not to attribute to the medieval Common Law our modern notion of the rule of law. The remedies of the writ system notwithstanding, the medieval world was a violent place, and royal justices and sheriffs were far from omnipotent or omnipresent (or even fair).[28] Levels of stability and peace varied widely during our period, for, as Maitland observes, "All depend[ed] upon the ruling man."[29] Expanded royal backing for property rights, which strengthened the relationship between king and under-tenant while concomitantly weakening the relationship between lord and tenant, and the shape of the formulary system itself were a result of "the exceptional vigor of the English kingship" and of geographic accident – England was comparatively easy to rule.[30] Further, the Norman kings took over a powerful administrative system, and were, in this sense, "happy not to treat their new land as *tabula rasa*."[31] Structural considerations aside, English law must be understood not simply as a result of a "mixture" of Anglo-Saxon and Norman law, but as having been shaped by kings', and royal officials', "personal characters" and relationships with their barons.[32] At this point, in order to contextualize the following chapters, we will examine these kings and the events from 1066 through 1290 in greater detail.

---

[28] See, for example, *EHD*, II, nos. 47-8.
[29] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 69.
[30] Ibid., II, p. 558; Harding, *Medieval Law and the Formation of the State*, p. 130.
[31] Hudson, "Anglo-Norman Land Law and the Origins of Property," p. 201; Harding, *Medieval Law and the Formation of the State*, p. 130.
[32] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, pp. 79-80.

2. A VERY LEGAL HISTORY OF ENGLISH KINGS

After the death of Harold II Godwinson (1066) at Hastings on 14 October 1066, William, duke of Normandy (1035-87), became king of England (1066-1087). As William ensured the loyalty of his new subjects, he and his men replaced, almost completely within twenty years, the Anglo-Saxon system of landholding with the tenurial system.[33] The elites, both secular and ecclesiastical, were supplanted by Normans (with the exception of the bishop of Worcester).[34] As historian J.C. Holt observes, the Normans "took hold like a parasite within a host," preserving and adopting certain Anglo-Saxon institutions, including shire courts, juries, and territorial jurisdictions, while turning them to their own use.[35]

Two of William's initiatives, both implemented in 1086, indicated royal interest in landholding and foreshadowed later developments: the Salisbury Oath and the famous Domesday Book. The Oath was taken not only by tenants-in-chief, but also by undertenants. Like his successors, William sought the active loyalty of all and, to that end, established direct relationships with undertenants, which strengthened the latter's security of tenure.[36] The Domesday survey likewise "implie[d] permanence" and security of tenure for smaller landholders,[37] and demonstrated the broad administrative reach of the English crown. William,

---

[33] J. C. Holt, "Colonial England, 1066-1215," in *Colonial England: 1066-1215* (London: The Habledon Press, 1997), p. 5.
[34] In reference to "the higher ranks of men," Maitland wrote that "The upper storeys of the old English edifice have been demolished and a new superstructure has been reared in their stead." Maitland, *Domesday Book and Beyond: Three Essays in the Early History of England*, p. 150.
[35] Holt, "Colonial England, 1066-1215," p. 5. See also Maitland, *Domesday Book and Beyond: Three Essays in the Early History of England*, pp. 80-107.
[36] Holt, "Politics and Property in Early Medieval England," 32.
[37] Ibid.: 37; John Hudson, "Life Grants of Land and the Development of Inheritance in Anglo-Norman England," *Anglo-Norman Studies* xii (1989): 74.

however, died the following year, precipitating what Holt termed a "tenurial crisis" that led to twenty years of instability.[38]

William the Conqueror was survived by three of his sons, Robert, William "Rufus," and Henry, and a daughter, Adela, who was married to the count of Blois. Following the common pattern of inheritance, the eldest son, Robert, received the duchy of Normandy (William's patrimony), and William Rufus received England (William I's land by conquest) and became William II (1087-1100).[39] Henry was likely trained for the priesthood (we know that he was literate) and received money. The splitting of the Conqueror's domains created a significant problem for many landholders, who had land on both sides of the Channel and now held them of not one but two rulers.[40] William II faced baronial and ecclesiastical opposition, engendered largely by his own actions, and spent the first seven years of his reign attempting to extend his control to Normandy.[41] In 1100, William was killed in a suspicious hunting accident. It has been believed for centuries that his brother Henry was behind the death, but there is no conclusive evidence. Nevertheless, Henry became king (1100-35), and, with Robert's return from Crusade, followed in William's footsteps and attempted to bring Normandy under his control.

In 1106, following his victory over Robert at Tinchebrai, Henry reunited England and Normandy.[42] From the first, as demonstrated in his Coronation Charter,

---

[38] Holt, "Politics and Property in Early Medieval England," 19-21.
[39] Consider for example the division of Henry II's land among his sons and the provision made by William of Anisy for his second son between 1120 and 1140. *EHD*, II, no. 249.
[40] Holt, "Politics and Property in Early Medieval England," 19-21.
[41] Robert joined the First Crusade in 1096 and placed Normandy in William's custody until his return in 1100.
[42] Robert was held prisoner for the rest of his life, dying at Cardiff Castle in 1134. Henry, however, continued to face challenges in Normandy, particularly from King Louis VI of France, but after 1113 Louis was unable to inspire plots against Henry involving English barons. However, Robert's son

Henry took a strong interest in justice and assisted those who had been disinherited by their lords.[43] However, the stability that England experienced under his reign ended with Henry's death in 1135. Henry had two children: a son, William and a daughter, Matilda (or Maud). Matilda was married to the Holy Roman Emperor. William, who was Henry's heir, died in 1120 when the White Ship sank shortly after leaving Normandy for England, leaving Matilda as Henry's only (legitimate) issue.[44] After the Holy Roman Emperor died in 1125, she returned to England and, in 1128, married Geoffrey Plantagenet, count of Anjou. Henry had his barons swear to support her as his heir, but the question of Matilda becoming queen in her own right remained controversial. Henry I died in Normandy in 1135, and while Matilda delayed crossing the Channel back to England, her opportunistic cousin, Stephen of Blois (who, through his mother, Adela, was the Conqueror's grandson) had himself crowned. This precipitated an eighteen-year civil war between Stephen and Matilda, known as the Anarchy.

Matilda's claim was supported primarily by her half-brother, Robert of Gloucester, but Stephen managed to retain control over most of England for all but a few months of 1141.[45] Even though the war's intensity decreased after 1141, Stephen never was able to assert the strength and authority over his barons that Henry I had, and he was plagued by secondary rebellions. In 1144 Stephen lost control of

---

William Clito, until his death in 1128, was able to challenge Henry for the duchy with Louis's sponsorship. RáGena DeAragon, "The Growth of Secure Inheritance in Anglo-Norman England," *Journal of Medieval History* 8, no. 4 (1982): 384-5.

[43] *EHD*, II, nos. 19, 43. For Henry's involvement in succession, see for example *Lawsuits*, no. 226; Holt, "Politics and Property in Early Medieval England," 41; Hudson, "Life Grants of Land and the Development of Inheritance in Anglo-Norman England," 77-8.

[44] Among Henry's many bastards, of particular prominence was Robert, Earl of Gloucester.

[45] Stephen was captured in battle, but Robert was captured by Stephen's army shortly thereafter, and the two were exchanged for each other.

Normandy to Matilda's forces, led by her husband Geoffrey. By the end of the 1140s Matilda and Geoffrey's eldest son, Henry, was leading that faction. Henry also became a powerful landholder in his own right – not only did he gain Normandy and inherit lands from his father, but he married Eleanor of Aquitaine in 1153 and added her extensive duchy to his territories.

Meanwhile, Stephen's eldest son and heir died in 1153 and Stephen then signed the Treaty of Westminster with Henry, who had invaded England once again to fight for his claim. The Treaty stipulated that Stephen would remain king for life, and Henry would be his heir. Stephen died a year later, and Henry was crowned in December 1154 and would remain king for 35 years. Although Henry II was a strong ruler and talented administrator, his reign was marked by various uprisings. From the first, he was confronted by the effects of instability and had the task of sorting out competing claims to land from the Anarchy, while avoiding private war. Henry skillfully adapted the residual Anglo-Saxon administrative structure of England, including sheriffs, juries, and shire courts, to settling land claims.[46] One of the earliest legal documents we have from Henry's reign is the Constitutions of Clarendon from 1164. This legislation regarding crimes committed by clergy was at the center of his dispute with his former chancellor, Archbishop Thomas Becket – a dispute which ended in 1170 with Becket's murder. Two years after the Constitutions, the Assize of Clarendon was issued, and it reflects the breadth and depth of Henry's administrative powers. It shows the role of itinerant justices and juries, and demonstrates Henry's efforts against crime.[47] By 1166 as well, we have a

[46] See below, Ch. 3.2.A.
[47] *EHD*, II, no. 24. Hudson, *Land, Law, and Lordship in Anglo-Norman England*, pp. 263-4.

(probable) record of the assize of novel disseisin, wherein royal justice provided a remedy for those dispossessed (usually by their lords) "unjustly and without judgment," that is, without due process.[48]

In 1166 Henry also demanded that his tenants-in-chief provide him with the number of knights who held of them. As with the Salisbury Oath in 1086, Henry was concerned that every landholder swear fealty to him, and not just to his lord. The Return of the archbishop of York notes the inclusion of all his military tenants' names, "because you [Henry] wish to know if there are any who have not yet done you allegiance and whose names are not written in your roll, so that they may do you allegiance before the first Sunday in Lent."[49] Henry's involvement in the details of landholding and justice in his realm continued in 1170 with the inquest of sheriffs. As a result of this investigation, "he removed from office almost all the sheriffs of England and their bailiffs because they had maltreated the men of his realm."[50] The office of sheriff became more professional, rather than hereditary, and from this time we see improved written records, which were essential to establishing coherent, common rules of law.[51]

In what became a pattern later in Henry's reign, his eldest sons rose up in rebellion in 1173. Though this was easily put down, Henry, in 1176, promulgated the Assize of Northampton, which again expanded royal involvement with justice and extended the king's control of the kingdom. Since his subjects' loyalty was clearly a concern, in Clause 6 Henry ordered his itinerant justices to:

---

[48] See below, Chs. 2.2, 3.2.B.
[49] *EHD*, II, nos. 224-34.
[50] Ibid., nos. 47-50.
[51] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 224.

> "…receive oaths of fealty to the lord king…from all who wish to remain in the kingdom, namely from the earls, barons, knights and freeholders, and even villeins. And whoever shall refuse to take an oath of fealty may be arrested as an enemy of the lord king. The justices shall also order that all who have not yet paid homage or allegiance to the lord king shall come at a time appointed for them and pay homage and allegiance to the king as their liege lord."[52]

Further, Clause 4 created the assize of mort d'ancestor, which ensured that heirs would be allowed to inherit their parents' lands, even against the wishes of the lord.[53]

Three years later, in 1179, there was another reorganization of the itinerant justices and their eyre courts, as the kingdom was divided into six regions, with three justices assigned to each.[54] Along with the inquest of sheriffs and the Assize of Northampton, this represents a significant step in the development of regular and professional royal justice. This bureaucratization is also reflected in the *Dialogue of the Exchequer*, written in c.1178 by Richard fitz Nigel, bishop of London and treasurer. The text takes the form of questions from a "disciple" and answers from a "master," an experienced royal official, and it describes in great detail the financial administration of England.[55] In the effusive words of Maitland, "That such a book should be written is one of the most wonderful things of Henry's wonderful reign."[56]

From the end of Henry's reign, in 1187-9, we have also the legal treatise *Glanvill*, which its translator hails as "the first textbook of the common law."[57] *Glanvill* contains a trove of information, including descriptions of legal procedure and examples of many Chancery writs. The text also states the famous tenet of property law, demonstrating the extension of royal control over the seigniorial courts, noting

---

[52] *EHD*, II, no. 25. See Appendix, no. 2.
[53] See below, Chs. 2.3, 3.2.B.
[54] *EHD*, II, no. 59a.
[55] Ibid., no. 70.
[56] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 162.
[57] *Glanvill*, p. xi.

that "no-one is bound to answer concerning any free tenement of his in the court of his lord, unless there is a writ from the lord king or his chief justice."[58]

At his death in 1189, Henry II was a broken man. His marriage had long since failed, his sons Henry (who had been the heir to England) and Geoffrey (who had been the heir to Brittany) were dead, and he faced rebellion from his two remaining sons, Richard and John. Henry had intended for Richard to inherit Aquitaine, but as the oldest living son, Richard inherited England too. From the perspective of England, and English law, Richard's ten-year reign (1189-99) was not particularly noteworthy, as he spent only six months in England, and spent the first five years of his reign on the Third Crusade or in captivity.[59] What is significant is that, although John stirred up trouble in Richard's absence, the administration of the kingdom was in the hands of Richard's mother, Eleanor of Aquitaine, and his justiciar, Hubert Walter, and remained fairly stable. This is perhaps not so surprising when we consider that Henry II was often away from England for years on end, tending to his concerns in France, and part of the impetus behind his legal reforms was to ensure stability in his absence. Indeed, from 1181-89, when *Glanvill* was written, Henry's "visits to England were neither frequent nor long."[60] Though we think of Richard as "the Lionheart," he met a somewhat ignominious death while besieging a small castle in France, and it was his younger brother, John, who was to have by far the greater impact on English law.

---

[58] Ibid., p. 148.
[59] The tales of Robin Hood and Ivanhoe notwithstanding, Richard does not seem to have been overly interested in England, though he was the first king since Henry I to have been born in the kingdom.
[60] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 155.

Although John was not (quite) the villain of popular history, his reign (1199-1216) was marked by controversy from the first, and he was perpetually unpopular with a significant number of his barons. John's claim to inherit the throne and his French territories from Richard was tenuous, as, according to the traditional customs of inheritance,[61] his nephew Arthur of Brittany, as the son of John's older brother Geoffrey, had the stronger right. In 1203, after four years of conflict, Arthur was captured and killed, possibly by John himself. John then proceeded to lose Normandy to King Philip II of France in 1204, and was excommunicated in 1209 due to a dispute over the election of a new archbishop of Canterbury. In addition to the excommunication, England was placed under papal Interdict until 1213, when John submitted to Pope Innocent III, acknowledging him as the overlord of whom John held the kingdom of England. In 1214, following "financial oppression" which funded "the final collapse of John's military and diplomatic schemes on the field of Bouvines,"[62] the barons rebelled, and John was forced to sign Magna Carta at Runnymede on 15 June 1215. Though the charter was soon annulled by John's lord, the pope, on the grounds that it had been signed under duress,[63] revised versions were issued in 1216, 1217, and 1225 and it became, in Maitland's words, "a sacred text."[64]

Though the abuses with which we associate Magna Carta connote an image of John as somehow dismissive of the law, this was not the case. John had always demonstrated "an interest in judicial matters" – even "in the hard-pressed years of the Interdict and his own excommunication" – and had been tutored by none other than

---

[61] See below, Ch. 2.3 on primogeniture.
[62] J. C. Holt, *Magna Carta*, 2nd ed. (Cambridge: Cambridge University Press, 1992), pp. 188-92, quotations at 192 and 188.
[63] *EHD*, III, no. 21.
[64] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 173.

Ranulf de Glanvill.[65] The problem, politically, was that, although he was "not radically more high-handed than his brother or father…he devoted more attention to English government after the loss of Normandy."[66] Indeed, the only legal "novelty" known to be John's work was the assertion of greater "supervisory" powers over local juries.[67] Magna Carta largely upheld the legacy of Henry II's reforms, such as the assizes of novel disseisin and mort d'ancestor.[68] Its key provisions were those that, drawing on the popular "distinction between law and will,"[69] stipulated that the king should make appropriate use of these legal innovations, "refrain from using them as a means of extortion,"[70] and not deny the due process rights that Henry's reforms had made the lord's court observe.[71] John died shortly after Magna Carta was signed, and was succeeded by his nine-year-old son, Henry III (1216-72), but these key principles of the 1215 version of the charter remained in its subsequent iterations.[72]

The early part of Henry III's reign – his minority – saw the restoration of stability in England, and his 56 years on the throne are noteworthy more for what occurred during that time than any specific action by Henry.[73] The return of itinerant justices and the eyre courts to the counties after Henry's accession helped to produce the excellent legal records upon which the articulation of England's laws in the legal

---

[65] Holt, *Magna Carta*, pp. 180-1.
[66] Palmer, "The Economic and Cultural Impact of the Origins of Property: 1180-1220," 390.
[67] Holt, *Magna Carta*, p. 181.
[68] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 172; Holt, *Magna Carta*, p. 117.
[69] Holt, *Magna Carta*, p. 90.
[70] Harding, *Medieval Law and the Formation of the State*, p. 139.
[71] See especially Magna Carta 1215, cl. 39: "No free man shall be arrested or imprisoned or disseised or outlawed or exiled or in any way victimized, neither will we attack him or send anyone to attack him, except by the lawful judgment of his peers or by the law of the land." *EHD*, III, no. 20. See Appendix, no. 3.
[72] Ibid., nos. 22, 23, 26. See Appendix, no. 4
[73] Henry is perhaps best remembered for rebuilding Westminster Abbey in the Gothic style, and for ordering the whitewashing of the Tower of London's keep, earning it the nickname "The White Tower."

treatise known as *Bracton* rests. While the authorship of this text was credited to the royal justice Henry of Bracton by Maitland, who dated it to the 1250s, Bracton appears to have played only a minor role in revising and updating the text, which was written mostly before 1236.[74] In that year the Provisions of Merton enacted one of Henry III's first legal reforms, which increased penalties for redisseisin;[75] historian Paul Brand observes that mention of this invention was "an addition" to the text of *Bracton*, indicating that much of the text had been written prior to 1236.[76] Later statutes of Henry's reign extend royal regulation of property, limiting alienations by tenants-in-chief, and to the church.[77]

Like his father, Henry was frequently in conflict with his barons, and from 1258 to 1265, under the leadership of Simon de Montfort, they rebelled and briefly took control of Henry's person and the kingdom before being defeated at Evesham in 1265, where de Montfort was killed. The rebel's complaints were not particularly cohesive, as they demanded limits on royal power and on alienations to the church,[78] but they also demanded "that the royal court should be endowed with yet new" powers and greater oversight of lordly actions.[79] Though the rebels were defeated,

---

[74] Paul Brand, ""The Age of Bracton"," in *The History of English Law: Centenary Essays On "Pollock and Maitland"*, ed. John Hudson, *Proceedings of the British Academy* (Oxford: Oxford University Press for The British Academy, 1996), pp. 72-9. Brand attributes "a major part" of the authorship to William of Raleigh, for whom Bracton was a clerk when William was the senior justice on the King's Bench.

[75] *EHD*, III, no. 30. See Appendix, no. 5.

[76] Brand, ""The Age of Bracton"," pp. 67, 70-1. There is, of course, further evidence that Brand cites for the earlier date, including references to writs and "forms of judicial commission" from the 1220s, and Brand argues that it is difficult to "see why someone writing in the 1250s should have wanted, or even been able, to include" this material.

[77] *EHD*, III, nos. 35, 40.

[78] See below, Ch. 4.2.C, D.

[79] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 203.

many of their demands were met through various statutes[80] enacted by Henry and, after his death, his son Edward I (1272-1307).

Edward I, along with Henry I and Henry II, was one of medieval England's most important monarchs. In the course of his energetic reign, he conquered Wales, invaded Scotland, and held the Model Parliament of 1295. In matters of law, he had a greater impact than any monarch since Henry II, and his legislation, especially *Quia Emptores*,[81] should be seen as the logical conclusion to the reforms of Henry II, bringing lords' control over their tenants more or less to an end. According to the historian Joseph R. Strayer, Edward, through this final blow at seigniorial jurisdiction, contributed to the advent of modern "sovereignty," as at this time "basic loyalty definitely shifted" from localized political entities, such as the lord or the community, "to the emerging state."[82]

3. CONCLUSION

Through the period of 1066 to 1290, we see the royal government expanding its role and undertaking more and more of what Hobbes and Locke understood to be the essential purpose of government, that is, the defense of property rights through the enforcement of contracts. The norms of the tenurial social contract, so necessary to the functioning of life in medieval England, had, through the failure of the lords and their courts, been proven insufficient for ensuring adherence to the contract, and were

---

[80] These include the Statutes of Marlborough (1267), Westminster I (1275), Gloucester, (1278), Mortmain (1279), Westminster II (1285), and *Quia Emptores* (1290). *EHD*, III, nos. 44, 47, 52, 53, 57, 64. See Appendix, nos. 8-13.

[81] See below, Ch. 4.2.E.

[82] Joseph R. Strayer, *On the Medieval Origins of the Modern State*, *Princeton Classic Edition* (Princeton: Princeton University Press, 2005), p. 36.

therefore given regular and central legal backing.[83] After Henry II's legal reforms, those seeking redress for their lord's abuses were no longer making complaints about the violation of normative expectations by their lord; they complained about the violation of their legal rights. We ought, then, to understand the developments in English property law during this time as a substantive rewriting of the social contract: the personal, tenurial contract between lord and tenant became a shadow of its former self,[84] and protection of property rights became an impersonal and institutional task of the central government and its professionalized and bureaucratized judiciary.

[83] See especially Ch. 3.2.
[84] S. F. C. Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, *Cambridge Studies in English Legal History* (New York: Cambridge University Press, 1976), p. 174; Paul R. Hyams, "Warranty and Good Lordship in Twelfth Century England," *Law and History Review* 5, no. 2 (1987): 483.

CHAPTER 2 – SECURITY OF TENURE AND HERITABILITY

"Heirs of full age may, immediately after the death of their ancestors, remain in their inheritance; for although lords may take in to their hands both fee and heir, it ought to be done so gently that they do no disseisin to the heirs. Heirs may even resist the violence of their lords if need be, provided that they are ready to pay them relief and to do the other lawful services."

- Ranulf de Glanvill[1]

In 1123 William of Roumare, an Anglo-Norman noble, rebelled against King Henry I (1100-1135). William had requested that the king return to him land belonging originally to his mother, which his stepfather had given to the king in return for other land, though "apparently with [his mother's] consent."[2] Henry refused. In perhaps an excessive fit of pique, William spent two years "assuage[ing] his anger by plundering and burning and taking men prisoner."[3] Henry ultimately relented and "restored a great part of the inheritance [William] had demanded."[4]

This episode raises questions about the norms of landholding and inheritance that will be addressed in this chapter, which focuses on the king's role in disputes over land. We will first examine the norms of landholding through the elements of security of tenure and heritability; then for each we will discuss the twelfth-century expansion of royal activity in defense of those norms, thereby demonstrating the shift from a lord-tenant social contract to a king-tenant social contract.

[1] *Glanvill*, p. 82.
[2] DeAragon, "The Growth of Secure Inheritance in Anglo-Norman England," 385.
[3] Orderic Vitalis, quoted in Ibid.
[4] Ibid.

1. SECURITY OF TENURE: DISSEISIN, DISINHERITANCE, AND DISCIPLINARY POWER

1.A. PRACTICES IN NORMANDY

Security of tenure or title is "the most fundamental and indispensable right of all" and is, logically, a prerequisite to heritability, for without security in one's own lifetime, there cannot be any security across generations.[5] When Duke William and his men landed at Pevensey in September 1066, they brought with them a tradition of hereditary rights[6] in land, though there was an "element of precariousness in their tenure," evidenced by not-infrequent ducal redistribution of fiefs.[7] Though land was generally heritable in Normandy, the means by which it was held had changed during the eleventh century. In the early part of the eleventh century, Norman land was generally held "from no lord…[or] independent of a superior," that is, there was little oversight from the central ducal authority, let alone from the French monarchy.[8] This form of landholding was denoted by the term *alodium*, which was a "commonly recurrent" term in eleventh-century Norman charters, and which signified "land held by hereditary right."[9]

In the twenty years prior to the Conquest, landholding became more tenurial, that is, dependent, and the term *feodum* came into wider use.[10] Though there was in practice "little difference" between *feodum* and *alodium*, tenure did nonetheless

---

[5] Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted*, p. 55.
[6] "Right" here, and in the following quotations, is used in a loose sense, and refers to the normative claims on land that the heir had by virtue of his father's having held the land, not to any legal right proper. See above, Ch. 1 n. 21.
[7] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, pp. 71, 315.
[8] E.Z. Tabuteau, *Transfers of Property in Eleventh-Century Norman Law*, *Studies in Legal History* (Chapel Hill: University of North Carolina Press, 1988), pp. 97, 107; Hudson, "Anglo-Norman Land Law and the Origins of Property," p. 202.
[9] Holt, "Politics and Property in Early Medieval England," 6.
[10] Hudson, "Anglo-Norman Land Law and the Origins of Property," p. 202.

introduce a "trait of precariousness," as it was forfeitable to the lord, who also had a right to reliefs and wardships.[11] The main differences between the two were that service for the *alodium* was generally less demanding than that for the *feodum*, and where the *alodium* was "de jure" inheritable (because there was no superior lord to reject an heir), the *feodum* less definitively heritable.[12] Heritability, though, remained strong, as it now referred to "possessions over which the successive generations of a family had rights – property whose destiny, barring permanent alienations, was to descend in the family."[13] Tenements were still thought of as "inheritances," and Maitland notes that the Norman and Anglo-Norman *feoda* were "indubitably hereditary," even by women.[14] Indeed, by the thirteenth century, "To say of a tenant that he holds in fee *(tenet infeodo)* means no more than that his rights are inheritable."[15]

E.Z. Tabuteau argues convincingly for a link between this new assertion of lordly rights over tenants and Duke William's consolidation of power in Normandy, noting that the "crystallization of Norman custom" dates to the middle of the eleventh century, the years of William's "greatest strength."[16] Even in the face of William's

---

[11] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, pp. 67-8. These rights (the feudal incidents) seem to have existed in Normandy, though the evidence is fragmentary; their existence in England is far more certain and well-established. Tabuteau, *Transfers of Property in Eleventh-Century Norman Law*, pp. 59-62.
[12] Tabuteau, *Transfers of Property in Eleventh-Century Norman Law*, p. 103.
[13] Ibid., p. 102.
[14] Ibid. Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, pp. 72, 316. See also Maitland, *Domesday Book and Beyond: Three Essays in the Early History of England*, pp. 152-3.
[15] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 235.
[16] Tabuteau, *Transfers of Property in Eleventh-Century Norman Law*, p. 224. Reynolds offers a different explanation, suggesting that dependent landholding, or the twelfth-century "law of fiefs," derived from the adoption of ecclesiastical practices, used "to protect the property of the church," rather than "norms of the lay nobility." Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted*, p. 64. In either case, we see during the eleventh century the assertion of greater power against the tenant by the person or entity of whom he held his land.

growing power, the "overwhelming" use of toponyms among the leading Normans indicates that, as the charters recording the grants by which they received their lands used language that implied heritability, these men saw their lands as a family holding, or birthright, and took their surnames accordingly.[17] Hereditary landholding was clearly a norm for the Normans. Security of tenure through generations was directly proportional to rank, and so the duchy's aristocracy, in particular, was "accustomed to inheritance."[18] Despite this new "precariousness," there is no question "that the Normans came to England used to sons succeeding" their fathers.[19]

1.B. DISCIPLINARY ACTIONS IN POST-CONQUEST ENGLAND

According to the norms of tenurial landholding that the Normans brought across the Channel, lord and tenant had "a *personal* relationship…marked by reciprocal duties of protection and service."[20] A tenant would perform homage to his lord, "swearing to bear him faith of the tenement for which he does his homage, and to preserve his earthly honor in all things, saving the faith owed to the lord king and his heirs."[21] Glanvill goes on to argue that "The bond of trust arising from lordship and homage should be mutual, so that the lord owes as much to the man on account of lordship as the man owes to the lord on account of homage, save only reverence,"[22] thus underscoring the reciprocal, contractual nature of dependent tenure. Assuming the tenant kept to the terms of this contract, his tenement ought to be secure.

---

[17] Holt, "Politics and Property in Early Medieval England," 8; Hudson, "Anglo-Norman Land Law and the Origins of Property," p. 207 n. 35.
[18] Holt, "Politics and Property in Early Medieval England," 5.
[19] Hudson, "Anglo-Norman Land Law and the Origins of Property," p. 207.
[20] A.W.B. Simpson, *A History of the Land Law*, 2nd ed. (New York: Oxford University Press, 1986), p. 2. Emphasis added.
[21] *Glanvill*, p. 104.
[22] Ibid., p. 107.

Precariousness in tenure and inheritance, then, was inconsistent with the norms of security of tenure and heritability, but it remained the main instrument of the lord's power over his tenants. Robert Palmer argues that "Choice of a tenant mattered less than the lord's power to evict the disloyal or incompetent tenant."[23] However, the former is implied by the latter; the lands of a disseised tenant most often went to a new tenant, rather than becoming part of the lord's demesne.[24] The ability, both legal and practical, to punish disloyalty or default on services through confiscation of land was critical to a lord's disciplinary power – without it, there was little disincentive to rebellion or other breaches of the tenurial contract. In the early Anglo-Norman period this right was exercised by kings directly to "combat disloyalty," but the violation of norms of security of tenure was not "a general policy."[25] Indeed, these were not even violations, but were appropriate punishment for tenants who had by their own acts severed the bond of homage. Of the 185 baronies (whose occupants were the king's tenants-in-chief) which survived from Domesday to 1154, roughly eighty percent remained within one family during that time.[26] Though RáGena DeAragon enumerates five means of discontinuity, by far the most common was forfeiture – "the common penalty for treasonous behavior of men bound to the king by homage."[27] Of course, the fact that these discontinuities required justification implies "a prima-facie right of inheritance."[28]

---

[23] Robert C. Palmer, "The Origins of Property in England," *Law and History Review* 3, no. 1 (1985): 6.
[24] Ibid.: 32.
[25] DeAragon, "The Growth of Secure Inheritance in Anglo-Norman England," 388.
[26] Ibid.: 383.
[27] Ibid.: 384, 386. The other means, which were much less frequent, were escheat, exchange of lands, breaks in continuity of family holding, and the denying of the inheritance to the heir.
[28] Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted*, p. 344.

The twenty-one incidences of forfeiture listed by DeAragon occurred during times of political instability in England: sixteen from 1086-1113/4, after William I's lands were divided among his sons – what Holt termed Anglo-Norman England's "tenurial crisis"[29] – until Henry I reunited England and Normandy in 1106; and five from 1136-54, during the Anarchy of Stephen's reign.[30] From 1114-35 the stability imposed by Henry I, the "lion of justice," and the absence of any real conflicting claims to the English throne,[31] prevented any significant rebellion.

Given the division of William I's lands between his two older sons, these conflicts were, if not inevitable, unsurprising. As Glanvill noted a century later, although "A man may do several homages to different lords…there must be a chief homage, accompanied by an oath of allegiance."[32] Given that the leading landholders in England were of course also Norman aristocrats who had supported their duke's venture, the rivalry between Robert and his brothers produced an inescapable dilemma.[33] The spike in forfeitures in the beginning of Stephen's reign (1135-54) was also due to the conflicting claims on baronial allegiance by Stephen and Matilda.[34]

Henry I's confiscations of rebels' estates were not, then, representative of a "general policy" of perpetuating precariousness of tenure; indeed, the "theory of the time…was that" tenurial claims "were supposed to be good even against the king."[35]

---

[29] Holt, "Politics and Property in Early Medieval England," 19-22.
[30] DeAragon, "The Growth of Secure Inheritance in Anglo-Norman England," 384.
[31] See above, Ch. 1 n. 41. The only implication William Clito's efforts had in England was the aforementioned case of William of Roumare. Ibid.: 384-5.
[32] *Glanvill*, p. 104.
[33] DeAragon, "The Growth of Secure Inheritance in Anglo-Norman England," 384. Cf. Holt, "Politics and Property in Early Medieval England," 19-22.
[34] DeAragon, "The Growth of Secure Inheritance in Anglo-Norman England," 384-6.
[35] Ibid.: 388. Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted*, p. 347.

Rather, these were exceptions, made out of political necessity, which proved the norm: "disseisin and disinheritance" were explicitly "penalties for political misbehaviour."[36] Indeed, as Section 3 and below will show, Henry often intervened to ensure heritability, that is, compliance with the norm.[37] The fact that six of the eighteen baronial estates forfeited[38] in the Anglo-Norman period were then granted to a different member of the same family[39] demonstrates further the strength of the norm of inheritance and familial security of tenure. As time went on, barons' attachment to their estates and the physical strength of their castles (as wood was replaced by stone) increased, and forfeiture became more difficult to carry out.[40] But if the king was less able to discipline his tenants-in-chief directly, the legal reforms of Henry II, which added the force of law to the norm of inheritance and provided greater security of tenure for undertenants, similarly restricted lords' disciplinary power against undertenants. As we will see below in this Chapter, and in Chapter 3, this "increased participation" in land disputes[41] provided the king far greater and far more regular, albeit indirect, control over his lords.

---

[36] Holt, "Politics and Property in Early Medieval England," 21.
[37] See also below, Ch. 3.2.A.
[38] Though DeAragon records twenty-one incidences of forfeiture, some estates were forfeited more than once, accounting for this discrepancy. See the chart in DeAragon, "The Growth of Secure Inheritance in Anglo-Norman England," 386.
[39] Ibid.: 389. Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 281.
[40] Hudson, "Life Grants of Land and the Development of Inheritance in Anglo-Norman England," p. 74. DeAragon, "The Growth of Secure Inheritance in Anglo-Norman England," 389.
[41] Hudson, *Land, Law, and Lordship in Anglo-Norman England*, p. 255.

2. NOVEL DISSEISIN AND ENFORCING SECURITY OF TENURE

Like the rest of Western Europe, England witnessed petty, private violence, and undertenants were particularly vulnerable to disseisin during interregna[42] or in times of rebellion or civil war. Though they were accustomed to violence, men nonetheless viewed these actions as illegitimate disseisins. As this message from the earl of Hertford to his men shows, violent disseisins violated norms of landholding, and did not give the disseisor good title:

> For I tell you all that while this Stephen had the stewardship and mastery of all the land of Earl Gilbert, he unjustly and wrongfully occupied the land of Pitley which belonged to William the reeve of Bardfield and his heirs, for he cruelly and unjustly caused one of William's sons to be killed, because he knew and perceived him to be the nearest to his father's inheritance in the regard to the possession of the land…I command you as my faithful men to swear nothing as to the fee and inheritance of this Stephen, for neither was his, neither fee nor inheritance, but only, as has been said, a wrongful and violent occupation.[43]

This is but one example of the many such disseisins that occurred during Stephen's troubled reign.[44] When Henry II reestablished a strong royal government, he devoted much energy to preventing this type of petty violence.

Given Max Weber's definition of the state as claiming "the *monopoly of the legitimate use of physical force* within a given territory,"[45] it is not surprising that

---

[42] Henry I's Coronation Charter contains a provision that "If since the death of my brother, King William, anyone shall have seized any of my property, or the property of any other man, let him speedily return the whole of it. If he does this no penalty will be exacted, but if he retains any part of it he shall, when discovered, pay a heavy penalty to me." *EHD*, II, no. 19. See Appendix, no. 1.

[43] F. M. Stenton, *The First Century of English Feudalism, 1066-1166*, 2nd ed. (Oxford: Clarendon Press, 1961), pp. 80-1.

[44] For the restoration of these stolen lands to those who had held them before Stephen's reign, see below, Ch. 3.2 on the writs of right.

[45] Max Weber, "Politics as a Vocation," in *From Max Weber: Essays in Sociology*, ed. H.H. Gerth and C. Wright Mills (New York: Oxford University Press, 1946), p. 78. Reynolds offers an interesting and useful reworking of this definition, suggesting that a medieval state "is an organization of human society within a fixed territory that more or less successfully claims the control (not the monopoly) of the legitimate use of physical force within that territory." Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted*, p. 27.

legalistic means of preventing violence were developed in response to the problems of Stephen's reign. Indeed, the use of the writs of right after the 1153 Compromise to prevent retaliatory disseisin can be viewed as the "pre-history" of the assize of novel disseisin,[46] though the assize can also be placed within the context of a "drive against crime" during the 1160s.[47] The regularized assize was likely created in 1166,[48] possibly in response to attempts by Thomas Becket to reclaim diocesan lands "granted out to the laity," but certainly in response to "specific political circumstances."[49] Henry's objective was to prevent violent disseisins, especially retaliatory actions, rather than simply to "protect…seisin as an abstract state of affairs," and so the assize aimed to "to get the land back into the hands of the rightful owner" quickly.[50] It is instructive, however, that this was done by enforcing norms of tenurial landholding, of security of tenure.

The importance attached to resolving violent disputes quickly through legal means is reflected in the rules of the assize of novel disseisin: in contrast to other recognitions, "No essoin[51] [was] allowed."[52] Glanvill goes into great detail elsewhere in the text about essoins, which could be for sickness, "being overseas," "being in the service of the king," or even "being on a pilgrimage."[53] In novel disseisin, the enormity of the action for which the complainant sought redress meant that no excuse

---

[46] Palmer, "The Origins of Property in England," 12.
[47] Hudson, *Land, Law, and Lordship in Anglo-Norman England*, pp. 263-4.
[48] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, pp. 145-6. Cf. Sutherland, *The Assize of Novel Disseisin*, pp. 5-8. Sutherland for the most part agrees with Maitland, but adds that "All we can say for certain is that King Henry made his assize against disseisin some time between the last months of 1155 and the first months of 1166."
[49] Hudson, *Land, Law, and Lordship in Anglo-Norman England*, p. 265.
[50] Simpson, *A History of the Land Law*, p. 31; Sutherland, *The Assize of Novel Disseisin*, p. 29.
[51] Excuses for not being present at court.
[52] *Glanvill*, p. 169. However, an assize of novel disseisin could be delayed on the request of the complainant. *Rolls of the Justices in Eyre*, nos. 439, 442
[53] *Glanvill*, pp. 7-22.

offered by the alleged disseisor would delay the trial. Further, he notes that the "losing party…shall always be liable to amercement…on *account of the violent disseisin*."[54] That Glanvill invokes the violent nature of disseisin as reason for penalizing the loser, and that the procedure was necessarily so expeditious that it could not be delayed for any excuse by the defendant, demonstrates that avoiding or containing violence and promoting stability was the king's overriding concern.[55]

According to Glanvill, use of the writ of novel disseisin was appropriate "When anyone has unjustly and without a judgment disseised another of his free tenement."[56] Despite this broad applicability, "The typical…disseisor was the lord," who took the land, not for himself, but usually as an exercise of his disciplinary power against a tenant who failed to perform the service he owed, and often redistributed it to a new tenant;[57] indeed, John Hudson suggests that this new oversight by such an "active royal government may have contributed to baronial support for the" 1173 rebellion of Henry's son.[58] In response, the lord's power was limited even further, through the assize of mort d'ancestor.

3. NORMS OF HERITABILITY

Just as novel disseisin curtailed the lord's arbitrary use of disciplinary power against his tenants by enforcing the terms of the tenurial social contract, the assize of mort d'ancestor provided the tenant legal rights against the lord through upholding

---

[54] Ibid., p. 170. Emphasis added.
[55] See also Sutherland, *The Assize of Novel Disseisin*, pp. 27-34.
[56] *Glanvill*, p. 167.
[57] Palmer, "The Origins of Property in England," 32. Note, however, that not all disseisins were unjust, only those that were not carried out as the result of the proper proceedings of the seigniorial court – the writ of novel disseisin was in this sense a defense, not only of property, but of due process rights. Milsom, *Historical Foundations of the Common Law*, p. 119.
[58] Hudson, *The Formation of the English Common Law: Law and Society in England from the Norman Conquest to Magna Carta*, p. 132.

norms of inheritance. The common law codification of heritability came in 1176 with the assize of mort d'ancestor.

As we can see from Glanvill's understanding of homage as being indicative of a personal relationship, and from examples of royal land distribution from Charlemagne to William I, a lord's control over who held his land was a significant part of his power.[59] Though this might seem to imply that lords always preferred to redistribute their land after a tenant's death, there were mitigating factors that allowed for the strengthening of the norm and practice of inheritance while preserving most lordly control. Palmer notes that in granting a fief, a lord was making provision for his man, which extended to "provision for survivors."[60] Absent the likelihood of inheritance, men had much less incentive to be loyal. The lord also benefited from his tenant's inheritance: the heir "had been raised in the lord's service…he was at hand, loyal, and familiar."[61]

Even after the Conquest, however, non-hereditary life tenures persisted, mainly with respect to church lands. The church restricted the term of its grants as a matter of canon law.[62] Pope Alexander III (1159-81) expressed this policy in a letter, stating: "it is not lawful for a bishop to cause loss to his church…Therefore, if…something has been granted away…it is proper that it should return to the control

---

[59] It is obviously far easier to distribute land to favorite knights when the territory is a freshly-conquered *tabula rasa*, as occurred after the Conquest. As Reynolds argues, "If ever there was a time when reality came near to the later myths of the origin of feudalism in royal grants, it was in post-conquest England, when a king really did give out estates wholesale to his nobles." Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted*, p. 345. After some period of time, when a family has become entrenched, it is much more difficult, though certainly not impossible, to install one's favorite in land that another tenant already holds, especially if that tenant can defend himself and his lands. After the first set of grants, any change in tenancy is a zero-sum game.

[60] Palmer, "The Origins of Property in England," 5.

[61] Ibid.: 6. See also Hudson, "Anglo-Norman Land Law and the Origins of Property," p. 207.

[62] Hudson, "Life Grants of Land and the Development of Inheritance in Anglo-Norman England," 75.

and ownership of the church."[63] The distinctions between secular and church landholding, and between life and heritable grants, owed much to new "developments in thought concerning landholding."[64] This canon law emphasis on retaining control over land can be "seen as a practical side of the broader movements referred to as Gregorian Reform and the Twelfth-Century Renaissance."[65] Further, within England itself, the 1086 survey that produced Domesday Book necessitated the repeated asking of how the land was held, which helped to solidify the categories of landholding and the distinctions among them.[66] In order that the church not be compromised, then, grants were explicitly limited to no "more than a fixed number of lives or a fixed number of years."[67]

In an example of a grant in life tenure from the reign of William I, in 1085, a grant from the bishop of Hereford stipulated that only Roger (the grantee), and no one in his family, "shall have rights in the aforesaid land" and that when Roger dies (or takes the cloth), "the land shall be returned without question to the bishop."[68] In a later case (from 1191), the abbot of Bury St. Edmunds expressed his concerns about losing control of abbey land thusly:

> If you, who claim to be the heir of that hundred [unit of land], should take to wife some free woman, who held at least one acre of land as tenant in chief of the king, the king after your death would seize your entire holding and the

---

[63] Quoted in Mary Cheney, "Inalienability in Mid-Twelfth-Century England: Enforcement and Consequences" (paper presented at the Sixth International Congress of Medieval Canon Law, Berkeley, California, 1980), p. 467.
[64] Hudson, "Life Grants of Land and the Development of Inheritance in Anglo-Norman England," 76.
[65] Ibid.
[66] Ibid.
[67] Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted*, p. 63.
[68] *EHD*, II, no. 221. In a further example of non-hereditary landholding, evidence in a lawsuit that occurred between 1109-1129 showed "that William Peche and Elfwen his wife ought not to hold the land of Over from the fief of the abbot of Ramsey except for their lives only…and that after their death that land ought to return to the demesne of the church and abbot without any claim." *Lawsuits*, no. 261. Cf. *EHD*, II, no. 220, a grant of land from an abbey which does not specify life tenure, but also does not suggest heritability.

> wardship of your son, if he were under age; and so the bailiffs of the king would enter into St. Edmund's hundred, to the prejudice of the abbot.[69]

The "strategy" of using life grants allowed churches "to indicate their residual control and satisfy their obligations under canon law."[70] However, the fact that ecclesiastical lords "took such care to prevent succession" as early as the reign of William the Conqueror indicates that the norm of heritability was already strong.[71]

While the church resisted hereditary tenure as best it could, customs of inheritance, such as primogeniture, were rapidly being standardized in the secular world. Even prior to the Conquest, the "premium on male warriors" and "the success of the church in preaching monogamy…[through which] the identification of heirs in the male line became more certain" was giving rise to primogeniture.[72] Primogeniture was also "convenient for the lord" since he then had "but one heir to deal with."[73] Inheritance came to mean that the eldest son received the family lands, and this idea "moved down the social ladder" and was implemented in post-Conquest England by kings who were "strong enough to impose a law that…[had] the great merit of simplicity.[74] Henry I, however, in the case of one of his tenants-in-chief's lands, "passed over the older son Robert because the younger son Ralph 'was a better knight,'"[75] though the fact that this warranted a justificatory comment indicates its

---

[69] *Lawsuits*, no. 627.
[70] Hudson, "Life Grants of Land and the Development of Inheritance in Anglo-Norman England," 75.
[71] Ibid.: 74.
[72] Biancalana, "For Want of Justice: Legal Reforms of Henry II," 487.
[73] Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, p. 265.
[74] Biancalana, "For Want of Justice: Legal Reforms of Henry II," 488. Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, p. 265. Because of scutage, and the ability to send replacements to fulfill knight service, women in England were able to inherit in the absence of a male heir. Unlike men, however, women could be co-heiresses, and inherited in parage (equal division of the land). Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 307; II, p. 264.
[75] DeAragon, "The Growth of Secure Inheritance in Anglo-Norman England," 388-9. Cf. Palmer, "The Origins of Property in England," 6. Ralph was the product of a second marriage, making the case, as

irregularity. On the whole, primogeniture was the rule for military tenures, which, by the time of Glanvill, were the vast majority of free tenures in England;[76] it was also becoming the "common law for all."[77]

The norm of primogenitary heritability extended down the social ladder, from the highest-level barons to undertenants (and even to free commoners). Indeed, shortly after taking the throne, William the Conqueror (1066-1087) issued a writ for London, declaring, "I will that every child shall be his father's heir after his father's day."[78] The above examples of Roger, the bishop of Hereford's tenant, and William of Roumare provide further evidence of the strength of this norm, as demonstrated by the clear expectation of inheritance and desire to hold an ancestor's land. Roger, prior to agreeing to the life-tenure contract, had offered to buy the land from the bishop, since his father had held it.[79] William of Roumare believed that the land held by his mother, even though it had been alienated to the king by his stepfather, by right belonged to him, or at least that he had a sufficiently strong claim to the lands that it justified a two-year-long rebellion. We can see from these examples where inheritance was disrupted that there was attachment to the land and a general sense that an heir should be able to hold his parent's land.

John Hudson has pointed out to me, "rather odd." Nonetheless, the case's unusualness clearly implies that this succession was contrary to an assumed norm.

[76] Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, p. 269.

[77] Ibid., I, pp. 307-8. The traditional form of landholding in Anglo-Saxon England was socage, which was phased out over the next hundred years. The "free sokeman's land [wa]s divided among all his sons." However, any land that owed military service was automatically held by military tenure, and this partible heritability was only permitted, according to Glanvill, if the land had already been held in partible socage, for by the time of Henry II, even new socage tenures fell under "the primogenitary rule." Almost all post-Conquest feoffments, however, were "creating military tenures" anyway. Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, pp. 268-9.

[78] *EHD*, II, no. 269.

[79] Ibid., no. 221. The contract they agreed upon was that Roger would hold the land on the same terms as his father had done.

Though William's course of action was not common, his situation was. According to St. Anselm, among the types of soldiers a prince has are the men who:

> …labour with unbroken fortitude to obey his will for the sake of receiving back again an inheritance[80] of which they bewail the loss through their parents' fault… [These soldiers] suffer insults of every description – yet bear everything with steadfast minds so long as they have a firm desire to recover their inheritance and are supported by a sure hope.[81]

As Anselm viewed the world, it was obvious that men (particularly military men) wanted to inherit their parents' lands. Even if his parents had somehow lost or alienated the land the soldier, like William of Roumare, still considered it to be *his* inheritance and believed he had greater right to the land than any other. Anselm strengthens the case for viewing inheritance as a norm by stating: "This is clearly the case among men," and by providing scriptural grounding for it. He imagines that, as the prince has men in his court working to reclaim their inheritance, God's court is likewise populated by men "who keep to their purpose day and night, and strive to reach the heavenly kingdom which, being theirs by inheritance, they lost through the fault of their father Adam."[82] Theologically sound or not, Anselm clearly understands the desire for inheritance as a universal norm.

As the theory and norm of heritability developed so, too, did the practice of inheritance. Though life-tenure persisted,[83] heritability, which had been assumed by the Normans, was given legal protection by several royal actions. In 1086 the Salisbury Oath, wherein William was acknowledged as each tenant's ultimate, or

---

[80] In the context of Anselm's time, and his description of another class of soldiers who fight for the prince "in return for the lands which they hold from him," we can safely assume that he refers here specifically to land, and not chattels.
[81] Eadmer, *The Life of St. Anselm*, trans. R. W. Southern (New York: Oxford University Press, 1972), pp. 94-5.
[82] Ibid.
[83] See above on grants by churches.

liege, lord, implied that "undertenants could expect [familial] security of tenure from the Crown in return for loyalty."[84] The same year saw the completion of the Domesday survey, whose methodology "implies permanence" and its "corollaries…secure tenure and settled succession."[85] As Hudson notes, "so much effort [would not] have been expended on recording tenants' names in Domesday Book if men had really regarded succession as so insecure as to render the description of land-holding rapidly obsolete."[86] This norm gradually came to be reflected in written records of grants of land during the reign of Henry I, as "the documentary expression of the idea…follow[ed] the fact."[87] We have documentary evidence of several hereditary grants by Henry, but most merely confirmed successions that had occurred in accordance with original private grants.[88] These confirmations were, in all likelihood, not necessary, but they indicate the desire for royal backing for one's title, "a sensible caution in a time of upheaval when written records were valued but record-keeping was poor."[89] This exercise of royal power "rendered the tenant quite secure during his lifetime and his heir in a strong position to succeed after his death."[90]

The strengthening of the heir's normative claim to his father's land, especially when given royal backing, became problematic for churches.[91] Because succession was the lay norm, the lay tenants of churches felt that they too ought to inherit,

---

[84] Holt, "Politics and Property in Early Medieval England," 32, 37.
[85] Ibid.: 37, 7.
[86] Hudson, "Life Grants of Land and the Development of Inheritance in Anglo-Norman England," 74.
[87] Holt, "Politics and Property in Early Medieval England," 40.
[88] Ibid.: 41. For an example see *EHD*, II, no. 248.
[89] Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted*, p. 345.
[90] Hudson, *Land, Law, and Lordship in Anglo-Norman England*, p. 229.
[91] Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted*, p. 344.

illustrating the "normative force of ancestral seisin."[92] It was therefore "common" for an heir to bring suit against a church for his father's land.[93] In these cases, "The tenant justified his claim by the fact of ancestral seisin and the abbot resisted on the grounds that the tenant's ancestor had not received the land inheritably. For the plaintiff, the terms of the grant to his ancestor were not important. The fact of ancestral seisin meant that he ought to be accepted to continue that seisin."[94]

It was this understanding of the norm of heritability that led to the case of Modbert of Stoke in 1120. Modbert was the son-in-law of a late tenant who held of Bath Cathedral and claimed that, as his father-in-law's heir, he ought to be seised of that land. Modbert was supported by the king's son, who issued a writ in his favor. The bishop's court ultimately rejected the claim, as the grant had been for life only. Nevertheless, royal involvement in this and similar cases suggests that the distinction between heritable lay landholding and ecclesiastical life tenures was already weakening as the norm of heritability was strengthening.[95] Indeed, by the end of Henry I's reign, these life grants were being re-granted hereditarily to the heirs of the original grantees. In a charter that dates from between 1121 and 1148, the abbey of Bury St. Edmunds made a grant "to Adam of Cockfield and to his heirs that he should now hold in heredity…the land which his father held," and in 1140 the abbey granted to the count of Guines "and to his heirs" all the land the count's uncle had held of the abbey.[96]

---

[92] Biancalana, "For Want of Justice: Legal Reforms of Henry II," 499.
[93] Ibid.: 498.
[94] Ibid.
[95] *Lawsuits*, no. 226. Hudson, "Life Grants of Land and the Development of Inheritance in Anglo-Norman England," 77-8.
[96] *EHD*, II, nos. 250, 254.

Though inheritance was a norm and was assumed during the Anglo-Norman period, it was not necessarily secure until the advent of these grants of "hereditary title."[97] A lord's ability to disseise or to disinherit remained critical to his disciplinary power and was his most significant leverage over his tenants.[98] There was a quite reasonable expectation of inheritance if the tenant and his heir were loyal, and so A.W.B. Simpson's claim that the heir had "at best, a strong claim to succeed" his father, though perhaps strictly true in that the heir "owns nothing," was in practice largely belied by the norms of inheritance as implied by Domesday and the like.[99] Although an element of "precariousness" in landholding and inheritance clearly persisted,[100] heirs had very strong normative claims to inherit, and the heir's succession to his father's tenement was the assumed norm.[101]

4. HISTORY OF THE RELIEF

While forfeiture was a fairly uncommon action, a far more ubiquitous source of uncertainty in inheritance, even for the loyal, was the relief. The relief was a "payment made to a lord by an heir for his inheritance."[102] Under William I and William II Rufus there was no real regulation of reliefs. As Maitland notes, there

---

[97] Holt, "Politics and Property in Early Medieval England," 41.
[98] Ibid.: 21. Palmer, "The Origins of Property in England," 6 and passim. Disinheritance was later carried out specifically by bills of attainder, which were drawn up mostly against traitors. These acts were discontinued in Britain after 1798 and were banned under the U.S. Constitution (I.9.3).
[99] Simpson, *A History of the Land Law*, p. 17. Milsom, *Historical Foundations of the Common Law*, p. 105.
[100] Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, p. 265. Note, however, as discussed above, that according to DeAragon almost eighty percent of baronies were held in 1154 by the same family as in 1086. DeAragon, "The Growth of Secure Inheritance in Anglo-Norman England," 383. See below, Section 2.
[101] I owe this point to John Hudson.
[102] Hudson, *The Formation of the English Common Law: Law and Society in England from the Norman Conquest to Magna Carta*, p. 246. This type of payment was common in the middle ages; the Anglo-Saxons, for example, owed a heriot on an ancestor's death. Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted*, p. 336.

cannot be "a strict right to inherit when there is no settled rule about reliefs, and the heir must make the best bargain that he can with the king."[103] This meant that, the disapprobation of chroniclers notwithstanding, the two Williams could "practically sell lands to the highest bidder among the various claimants."[104] Although it is unclear whether they did so often enough to lend weight to Simpson's claim that the heir had "at best, a strong claim to succeed" in all cases,[105] Henry I's Coronation Charter in 1100 implies that these kings, particularly the much-reviled William Rufus, did so frequently enough to incite significant noble opposition.[106] While the royal actions discussed above in Section 2 were in response to specific acts of disloyalty, the imposition of unreasonable reliefs was an extortionate abuse designed not to punish, but to raise revenue (though the two were not necessarily mutually exclusive).

Henry I, "compelled to purchase adherents" in order to secure baronial acquiescence to his hurried coronation, promised an end to the "unjust exactions" and "evil customs by which…England ha[d] been unjustly oppressed," specifically extortionate reliefs.[107] This was a clear recognition that royal practices vis-à-vis inheritance had been incongruous with prevailing norms: "The king's right to" a relief "was not supposed to amount to confiscation and resale."[108] To bring practice in line with norms, Henry's Coronation Charter provided that heirs would no longer have to

---

[103] Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, p. 266. Further, as Milsom argues, "the fixing of the lord's due was an important part of the process by which a tenant came to 'own' his tenement." Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, pp. 162-3.
[104] DeAragon, "The Growth of Secure Inheritance in Anglo-Norman England," 381.
[105] Simpson, *A History of the Land Law*, p. 17.
[106] *EHD*, II, no. 19. Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 318.
[107] Ibid., I, p. 95. *EHD*, II, no. 19.
[108] Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted*, p. 344.

"redeem" their land by extortionate payments; rather, heirs would pay only "a just and lawful 'relief.'"[109] Since Henry did not specify what such a relief would cost,[110] it is clear that "there already was an idea of a just and lawful relief."[111] Not only was there a norm of inheritance, but a further norm of the process by which an heir would come into his patrimony, and both were recognized, if not enforced regularly, as rights by Henry.[112] Henry "assume[d] the whole structure of inheritance as it is later revealed in the records of the twelfth century."[113]

This structure and practice is seen in the text of a grant of land by a Walter of Bolbec to the abbot of Ramsey that occurred sometime between 1133 and 1160. Walter granted the land of Walton to the abbot and the abbot's heirs, that is, his successors in that office, for "the service of two knights."[114] When the current abbot died or resigned the office, the monks, in order to hold the land until the new abbot took office, were to pay "10 marks of silver."[115] If they did not, Walter or his heir would "hold [the land] until the new abbot comes."[116] The new abbot, upon his

---

[109] *EHD*, II, no. 19.
[110] Almost a century later, Glanvill says that "a reasonable relief for a knight's fee is one hundred shillings," but that the amount of relief for larger holdings depends on the king's "mercy and pleasure." *Glanvill*, p. 108. The second clause of Magna Carta (in the 1215, 1217, and 1225 versions) reinforces Glanvill, and specifies further that relief for a barony should cost £100. Harry Rothwell, ed., *English Historical Documents*, XII vols., vol. III, *English Historical Documents* (London: Eyre & Spottiswoode, 1975), nos. 20, 23, 26. Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 308.
[111] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 312. Relief pricing, however, was not standardized until Magna Carta. *EHD*, III, no. 20; Hudson, *The Formation of the English Common Law: Law and Society in England from the Norman Conquest to Magna Carta*, p. 226.
[112] Simpson, *A History of the Land Law*, pp. 17, 49.
[113] Holt, "Politics and Property in Early Medieval England," 9. See also Hudson, "Anglo-Norman Land Law and the Origins of Property," p. 200. Hudson, "Life Grants of Land and the Development of Inheritance in Anglo-Norman England," p. 78.
[114] *EHD*, II, no. 253.
[115] Ibid.
[116] Ibid.

appointment or election, was to pay an additional ten marks for this "inheritance."[117] The grant itself is a fairly lengthy document, and the fact that the enumeration of the process of inheritance was prior to the descriptions of the abbot's other duties to Walter[118] suggests the paramountcy of inheritance and the relief and the need for clarity in a case where inheritance resulted from the assumption of an office, rather than by succeeding a parent.

Henry I's Coronation Charter not only regularized the relief owed to the king by the barons, but also the relief owed to the barons by their tenants: "Similarly the men of my barons shall redeem their lands from their lords by means of a just and lawful 'relief.'"[119] Thus, even in Henry's concession of royal power, he weakened the power of his barons. This stresses that what applies to the relationship between the king and his barons also applies to the relationship between barons and their tenants.[120] As noted above, the ability to make tenants' holdings less secure, and thereby ensure their good behavior, was critical to any lord's power.[121] By strengthening norms of inheritance, and concomitantly limiting lords' ability to violate those norms, Henry thereby constrained and regularized the powers of his lords, preventing[122] them from inflicting on their tenants the same arbitrary abuses that William II had imposed upon them, and contributing to the normalization of royal supervision and regulation of lords' actions.

---

[117] Ibid.
[118] Ibid.
[119] Ibid., no. 19.
[120] Holt, "Politics and Property in Early Medieval England," 9.
[121] The attempt to regulate reliefs did not mean that the lord had nothing to gain from death of a tenant. If the heir was underage, during his minority the lord still "got a wardship of the lands held of him, but not a fiduciary wardship: he kept the income for himself, although the law came to protect the infant against…capital depredations." Milsom, *Historical Foundations of the Common Law*, p. 94.
[122] Ostensibly at least. Henry II's reforms indicate that this Charter was not sufficient to end these practices.

5. ROYAL DEFENSE OF HERITABILITY

Although royal interest, and the ability to intervene, in baron-undertenant relationships was implied by Henry I's Coronation Charter in 1100, it was not until after the Compromise of 1153 that the king began to exercise this power "in a [more] regular instead of an *ad hoc* manner."[123] This political settlement between Stephen and the future Henry II picked up two of the threads from our discussion of the Coronation Charter: the reflection of royal actions in baronial actions, and expansive royal jurisdiction over baron-undertenant relationships. The Compromise ended the Anarchy that had consumed Stephen's reign by allowing Stephen to remain king for the rest of his life, with Henry, his cousin's son, as his heir.[124] Others who had been disseised of land they or their ancestor had held could use writs of right patent – the first standardized royal intervention in landholding – to bring suit against those who now held the land.[125] As Milsom notes, this royal intervention demonstrated "The willingness of the king's law to constrain the lord's in such cases," since the lord had seised this new tenant in the first place, and constituted the earliest stage of the transformation whereby normative claims to inherit became "a rule of the common law" and a legal right.[126] However, it was also limited in scope, prohibiting baronial

---

[123] Palmer, "The Origins of Property in England," 8. This was something of a transition stage, where the king's assistance was available through the writ of right, it fell short of the regular circuits of the justices in eyre that began in the 1170s. See below on the assize of mort d'ancestor.

[124] Palmer argues that just as Stephen remained king with Henry as his heir, so those who were in possession of land in 1153 were allowed to keep it for the rest of their lives, but their heir "would be denied in favor of an outside claimant whose ancestor had been tenant in fee in 1135." Ibid.: 9. Biancalana rebuts this claim, noting that there exists "no evidence that the structure of the settlement of 1153 was imposed on anyone as a matter of policy, nor that anyone suddenly found patience with his dispossessed plight. Indeed, instances of claimants recovering in seigniorial courts against tenants provide evidence that" the compromise of 1153 did not prevent the dispossessed from bringing a writ as soon as they could. Biancalana, "For Want of Justice: Legal Reforms of Henry II," 468-9.

[125] Palmer, "The Origins of Property in England," 11. See below, Ch. 3.2.A.

[126] Milsom, *Historical Foundations of the Common Law*, p. 105.

discipline only with respect to "matters relating to Stephen's reign."[127] The Compromise and the writs of right showed the strength of norms of landholding against the power of the sword, demonstrating that good title derived from heritability, and not violence, and thereby promoted stability.[128]

The next significant step in providing greater security for landholding across generations came in 1176 with the Assize of Northampton. Like the 1153 Compromise, the Assize was a response to a political crisis – the rebellion of Henry the Young King against Henry II.[129] The Assize of Northampton *inter alia* established the assize of mort d'ancestor,[130] which provided a means for the disinherited to challenge their lord for their inheritance in the king's court, instead of the lord's:[131]

> Item, if any freeholder has died, let his heirs remain possessed of such "seisin" as their father had of his fief on the day of his death…And afterwards let them seek out his lord and pay him a "relief" and the other things which they ought to pay him from the fief. And if the heir be under age, let the lord of the fief receive his homage and keep him in ward so long as he ought…And should the lord of the fief deny the heirs of the deceased "seisin" of the said deceased which they claim, let the justices of the lord king thereupon cause an inquisition to be made by twelve lawful men as to what "seisin" the deceased held there on the day of his death. And according to the result of the inquest

---

[127] Palmer, "The Origins of Property in England," 9.
[128] Stenton, *The First Century of English Feudalism, 1066-1166*, pp. 80-1.
[129] Palmer, "The Origins of Property in England," 13. Hudson, *The Formation of the English Common Law: Law and Society in England from the Norman Conquest to Magna Carta*, p. 132.
[130] See also below, Ch. 3.2.B.
[131] Palmer argues that the intention behind mort d'ancestor was exclusively political, that it was enacted "to inhibit the magnates' power to prepare for hostilities" by passing over weak claimants, such as women or minors, in favor of able fighters. Palmer, "The Origins of Property in England," 16-7. However, Biancalana criticizes this view, noting that "Royal enforcement of the norms of inheritance…was not a method of preventing a medieval lord from rising in revolt. A lord preparing for war did not set about denying his men's claims to inheritance…He built, took or fortified castles. He grabbed lands that he believed to be of strategic importance. Henry's peacekeeping measures after the civil war were, therefore, to take castles into his own hands and have all free tenants renew their oath of allegiance to him." Biancalana, "For Want of Justice: Legal Reforms of Henry II," 504-5, n. 394.

> let restitution be made to his heirs. And if anyone shall do anything contrary to this and shall be convicted of it, let him remain at the king's mercy.[132]

Underlying mort d'ancestor was the idea that, upon the death of one who held heritably, "his heir is of all the world the person best entitled to be put into seisin."[133] Even if a rival had a better claim than the ancestor, he had to assert it by bringing a suit against the heir – he could not simply take the land.[134] Palmer suggests that mort d'ancestor was especially useful for weaker heirs such as women or minors,[135] but these groups alone could not account for the widespread use of the writ, as it helped protect the rights of all heirs.

Along with Clause 6 of the Assize of Northampton, which stipulated that every freeholder must swear loyalty to the king,[136] mort d'ancestor helped to "secur[e] the loyalty" of undertenants to the king, by defending their claims to land. This was an efficacious means of "undermin[ing]" the lords and providing stability because it was fully consistent with norms of inheritance.[137] By giving legal backing and "regular enforcement" to norms of inheritance, these royal acts weakened barons' ability to act arbitrarily toward their tenants.[138] This in turn reduced the importance of the personal lord-tenant relationship, and concurrently strengthened normative expectations of inheritance, that, through Henry II's reforms, became legal rights, backed by the royal judiciary and administrative apparatus.[139] While parts of the Assize of Northampton were certainly "concern[ed]…with politics, [and] not

---

[132] *EHD*, II, 25.
[133] Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, p. 59.
[134] Ibid.
[135] Palmer, "The Origins of Property in England," 18.
[136] *EHD*, II, no. 25.
[137] Holt, "Politics and Property in Early Medieval England," 36.
[138] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, pp. 164-5.
[139] Ibid., p. 170.

property" in the abstract,[140] the fact that political power was exercised through control over property demonstrates the centrality of property, and its norms, to medieval England.

Only a decade after the advent of the assize of mort d'ancestor, Glanvill's extensive discussion of the procedure indicates that it took on immediate prominence. Indeed, only three years later, the widespread use of the assize led to the appointment of more justices to hold the assize of mort d'ancestor in order to address heirs' claims and to "provide for men's needs."[141] Glanvill's understanding of the implications of mort d'ancestor is far broader than the few specifics articulated in the Assize of Northampton. Heritability was strongly protected. Lords were no longer permitted to hold the land until the relief was paid, using it as a bargaining chip to extract more money from heirs, but had to be content with a "simple" seisin as recognition of their lordship.[142] The right of the heir to enter the tenement at once, without having paid relief, was given "regular enforcement."[143] Glanvill adds, somewhat surprisingly, that "Heirs may even resist the violence of their lords if need be, provided that they are ready to pay them relief."[144] The "will of the lord" carried no weight: "provided that [the heir] offers his homage and reasonable relief to his lord," he must be allowed to remain seised of his inheritance, and the king could, through writs for homage and

---

[140] Palmer, "The Origins of Property in England," 18.
[141] Ibid.: 18; *EHD*, II, no. 59.
[142] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 169. Milsom states this in the original Latin: "*pro recognicione dominii sui*." See also Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, pp. 310-1.
[143] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, pp. 164-5; Milsom, *Historical Foundations of the Common Law*, p. 115; Hudson, *Land, Law, and Lordship in Anglo-Norman England*, p. 69; Simpson, *A History of the Land Law*, p. 50; *Glanvill*, p. 108. See below, Ch. 3.2.C.
[144] *Glanvill*, p. 82.

relief, order lords to receive the homage and relief of heirs.[145] Homage, no longer voluntary so much as *de rigueur*, became less personal.

These developments can be seen in three sample writs related to inheritance: one to a sheriff to begin mort d'ancestor proceedings; one to install the heir in his land, that is, to seise him, following a recognition of mort d'ancestor; and one to command a lord to receive homage and relief (which would apply if the heir already had seisin), respectively. They read as follows:

> If G. son of O. gives you security for prosecuting his claim, then summon…twelve free and lawful men…ready to declare on oath whether O. the father of the aforesaid G. was seised in his demesne as of his fee of one virgate [approximately thirty acres] of land in that vill on the day he died, whether he died after my first coronation, and whether the said G. is his next heir.[146]

> Know that N. has proved in my court, by a recognition concerning the death of a certain ancestor of his, his right against R. to the seisin of so much land in such-and-such a vill. And therefore I command you to have him put in seisin without delay.[147]

> Command N. to receive, justly and without delay, the homage and reasonable relief of R. for the free tenement which he holds in such-and-such a vill, and which he claims to hold of him.[148]

Without discussing the specifics of the procedure itself,[149] suffice it to note that the small size of the holding in the first sample writ indicates that the king found it important to secure the "especially vulnerable" tenures of minor undertenants.[150]

---

[145] Ibid., pp. 108-10, especially 109. Biancalana notes, however, that "Glanvill was reluctant to suggest" this remedy actually be used, since there "was something odd about forcing a lord into the personal relation of homage." Biancalana, "For Want of Justice: Legal Reforms of Henry II," 485.
[146] *Glanvill*, p. 150.
[147] Ibid., p. 153.
[148] Ibid., p. 109.
[149] See below, Ch. 3.2.B.
[150] Holt, "Politics and Property in Early Medieval England," 36.

Through mort d'ancestor, "Royal assistance was available potentially to anyone who claimed a free tenement."[151]

As we have seen, the practice of relief payment evolved greatly during the twelfth century, with significant impact on tenurial relationships. In 1100, Henry I's Coronation Charter promised that lords would be prevented from abusing their power by imposing unjust reliefs; this promise was fulfilled by the time of Glanvill, when lords could be compelled to receive reliefs, and, further, could be prevented from "demanding…customs or services which" they are not properly owed.[152] Royal regulation of inheritance, implied by Henry I's Coronation Charter and expanded by the Compromise of 1153 and the Assize of Northampton, created greater security of tenure for undertenants, and thereby provided greater security for the realm by reinforcing undertenants' loyalty to the crown instead of their lords. Each of these developments was predicated on a general understanding of norms of inheritance – that heirs should succeed their parents in their land. Indeed, "Henry II's reforms could not have functioned, could not have been conceived of in the form they took, had there not been norms by which they might work. Those working out the limits of mort d'ancestor, for example, knew the customary patterns of secure succession," which "favor[ed] continuity of seisin in a family."[153] Royal actions had a strong normative base upon which to build and thereby to make practice more consistent with norms.

---

[151] Palmer, "The Origins of Property in England," 18. See below, Ch. 3.2.C for specific discussion of how widely used mort d'ancestor was.
[152] *Glanvill*, p. 141. Glanvill describes this as "The writ forbidding a lord unjustly to vex his tenant," or *ne vexas*. See also *Writs*, no. 178.
[153] Hudson, *Land, Law, and Lordship in Anglo-Norman England*, pp. 277-8; Biancalana, "For Want of Justice: Legal Reforms of Henry II," 486. In the event that the tenant's line failed, however, the tenement escheated, and the lord "got his land back." Milsom, *Historical Foundations of the Common Law*, p. 93.

The Assize of Northampton can be seen as "stating good custom and providing a regular remedy [for violations of this norm] by royal justices."[154] Finally, these reforms, and their articulation by Glanvill, show that "the heir's [legal] right to succeed is firmly established."[155] Through mort d'ancestor, royal enforcement implied that, where before the heir had a strong normative claim "against the lord to be seised" deriving from "The customs of inheritance,"[156] now the "true heir [was] *entitled*."[157] Legally, then, the uncertainty and precariousness in inheritance for undertenants ceased to exist by c.1200, as inheritance became "automatic."[158]

6. Conclusion: The Clash of Norms

One of the defining characteristics of tenurial landholding was precariousness. Although there were norms of security of tenure and heritability that placed obligations on the lord, these conflicted with norms of the lord's control over his tenants, and of the church's control over its land. The tenant had a strong normative claim against a lord who disseised him without cause, or who would not allow him to succeed to his ancestor's land, but he had no effective means of redress, of enforcing

---

[154] Hudson, *Land, Law, and Lordship in Anglo-Norman England*, p. 69.
[155] Simpson, *A History of the Land Law*, p. 50.
[156] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 42.
[157] Simpson, *A History of the Land Law*, p. 50. According to Reynolds, "there is no doubt" that the emphasis on inheritance by the "true heir" also strengthened primogeniture; however I have not found any examples, either in *Glanvill* or *Writs*, *Lawsuits*, or *Rolls of the Justices in Eyre*, of mort d'ancestor being used against a younger sibling. Further, Brand notes that the "Assize of Northampton is couched in terms which suggest that the lord is the only possible defendant to the assize of mort d'ancestor." Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted*, p. 381; Paul Brand, *Kings, Barons and Justices: The Making and Enforcement of Legislation in Thirteenth-Century England*, ed. D.E. Luscombe, *Cambridge Studies in Medieval Life and Thought, Fourth Series* (Cambridge: Cambridge University Press, 2003), p. 55. Additionally, in an example of the divide between historians and legal scholars over the meaning of "right" (see above, Ch. 1 n. 21), Reynolds argues that "lay property carried real rights of inheritance before Henry II's legal reforms…The new procedures that Henry provided did not confer more rights than his subjects were considered to have before, but offered them more immediate and routine methods of protecting their existing rights." Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted*, pp. 374-5.
[158] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 154.

that claim. With the assizes of novel disseisin and mort d'ancestor, these norms became legally enforceable, which meant greater certainty in outcomes for tenants – that is, their landholding became much less precarious.

However, there were also losers in this clash of norms. Lords lost a significant part of their disciplinary power, and, even worse, the king did not lose his power over them; this imbalance and the need to apply the same rules to the king was at the heart of the barons' rebellions in 1214 and 1258. Indeed, as we will see in Chapter 4, while undertenants gained ever-greater legal rights in land, the rights of tenants-in-chief were simultaneously weakened, and they required the king's help to reestablish some measure of control over their tenants.

The church lost too. While mort d'ancestor "kept clear the difference between…[lay and clerical] law and practice" and "affirmed secular norms of hereditary succession," the use of a (lay) jury in the assize served to apply secular norms to ecclesiastical holding.[159] In the famous Cockfield case of 1201 the daughter of Adam of Cockfield, a tenant of Bury St. Edmunds (and descendant of the Adam mentioned above in Section 3), brought a writ of mort d'ancestor against the abbey for two manors held by her father. Only ten years prior it was acknowledged that these manors were to be held only "for his lifetime."[160] This evidence was presented to the jury, and was "ignored."[161] Though the abbey had been very careful to grant these manors to Adam and his ancestors only in life tenure for each, "some were

[159] Biancalana, "For Want of Justice: Legal Reforms of Henry II," 506, 12. Biancalana even argues, not wholly convincingly, that "developments in canon law" provided the "immediate impetus" for mort d'ancestor.
[160] *Lawsuits*, no. 627.
[161] Biancalana, "For Want of Justice: Legal Reforms of Henry II," 512.

[now] taking the fact of succession as sufficient proof of heritability."[162] This is a far cry from when Adam of Cockfield and Roger, the bishop of Hereford's tenant, had attempted to buy (some would say obtain by bribery) their ancestor's lands from the grantor.[163]

While the result of the Cockfield case demonstrates the power of norms of inheritance when backed by law, the effects of mort d'ancestor, and of novel disseisin, were felt most keenly by lords and their tenants. With these two assizes, lords' actions were subjected to regular juridical oversight, and their arbitrary[164] wielding of disciplinary power was curtailed by a concomitant expansion of royal power. The heir was no longer someone with merely a normative claim, albeit a strong one, to a freehold: he "begins to look like an owner…And his homage…becomes a formality consequent upon the automatic devolution of some abstract title."[165] Palmer's argument goes even further, asserting that "Land left the sphere of personal relationships and became property."[166] This, however, ignores the strength and social import of the norms of heritability and security of tenure to which Henry II's reforms gave legal backing, and thereby overstates the change. The change was not the *advent* of property rights, but the gradual "hardening"[167] of normative claims to property into legal rights. Of even greater significance was that,

---

[162] Hudson, "Life Grants of Land and the Development of Inheritance in Anglo-Norman England," 75.
[163] *Lawsuits*, no. 627; *EHD*, II, no. 221.
[164] The assize of novel disseisin protected the tenant against "improper" disseisin, and worked to "compel that due process" by which the lord's court should work. Milsom emphasizes that this is why the form of the writ described a disseisin that was "unjust and without judgment" – the assize was in a sense a defense of due process, rather than a blanket defense against the lord. Milsom, *Historical Foundations of the Common Law*, p. 119.
[165] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 171.
[166] Palmer, "The Origins of Property in England," 24.
[167] Milsom, *Historical Foundations of the Common Law*, p. 91; Hudson, "Anglo-Norman Land Law and the Origins of Property," p. 199, n. 6.

in giving legal backing to these claims, we see royal government upholding for the first time the property rights of its free subjects through a regular and bureaucratized process. In the following Chapter we will examine the exact workings of novel disseisin, mort d'ancestor, and other royal writs. For now, let us simply note that the legal reforms of Henry II had rewritten the standard form of the tenurial social contract: the tenant's claim derived not from a contract with the lord, but from his social contract with the king.

CHAPTER 3 – QUO WARRANTO OR QUIS WARRATIZAT? WARRANTY, LEGAL PROCEDURE, AND THE DEFENSE OF PROPERTY

"The metaphor which likens the chancery to a shop is trite; we will liken it to an armory. It contains every weapon of medieval warfare from the two-handed sword to the poniard. The man who has a quarrel with his neighbor comes thither to choose his weapon. The choice is large; but he must remember that he will not be able to change weapons in the middle of the combat and also that every weapon has its proper use and may be put to none other. If he selects a sword, he must observe the rules of sword-play; he must not try to use his cross-bow as a mace."

- Frederic William Maitland[1]

"In England, the period from Henry II's reign brought many developments which increased the number, variety, and role of decisive norms. Access to royal justice became more routine, making norms more rigidly enforceable. Royal justices played a greater role in controlling argument and deciding cases. The centralized system of courts, intent on enforcing a single set of norms, a common law, ensured a standardization of norms…"

- John Hudson[2]

In Chapter 2 we demonstrated how heritability and security of tenure were strengthened through royal actions, specifically the advent of the assizes of mort d'ancestor and novel disseisin, which thereby shifted the balance of power from the lord to the king. To develop a fuller understanding of this shift and the juristic mechanisms behind it, we will now examine more closely the legal and contractual relationship between lord and tenant implied by the tenant's homage, for which he received the lord's protection, or warranty. Following this, we will scrutinize the

---

[1] The chapter title refers to the *quo warranto* question, which required men to answer by whose warrant or what right they held their land. *Quis warratizat* means "who warrants?" as this Chapter suggests that, practically speaking, the answer changes from the lord to the king. I am indebted to Thomas van Denburgh for the translation. Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, p. 561.

[2] John Hudson, "Court Cases and Legal Arguments in England, C.1066-1166," *Transactions of the Royal Historical Society* 10 (2000): 114.

breakdowns in this system – particularly stemming from the Anarchy – and then the advances by which royal intervention, originally a response to this crisis, was regularized into remedies at law, culminating in the development of Maitland's thirteenth-century "armory" of writs.

1. ORIGINS OF WARRANTY – THE NORMS OF THE LORD'S OBLIGATION

The lord's obligation of warranty was integral and critical to the tenurial system. Though we often think of feudal relationships in terms of swearing loyalty to one's superior, Glanvill remarks that the "bond of trust arising from lordship and homage should be mutual, so that the lord owes as much to the man on account of lordship as the man owes to the lord on account of homage, save only reverence."[3] Lordship did not consist of simply receiving services; it included obligations of "defense and warranty."[4] Good lordship involved, or was even equivalent to, actively providing warranty for one's tenants.[5] In such a world as medieval Europe, "vulnerability…defined" the vassal's experience, making the lord's protection against violence essential.[6] This is what Paul Hyams terms the "positive" aspect of warranty: the obligation of defense "against outside challenge."[7] In England, the relative "absence of private war" (compared to the rest of Western Europe) allowed warranty to take on a specific meaning in the context of lawsuits, beyond military considerations; as Hudson notes, in Anglo-Norman England "warranty of land was

---

[3] *Glanvill*, p. 107.
[4] Hudson, *Land, Law, and Lordship in Anglo-Norman England*, p. 7.
[5] Hyams, "Warranty and Good Lordship in Twelfth Century England," 439, 440; Hudson, *Land, Law, and Lordship in Anglo-Norman England*, pp. 51, 52-3.
[6] Hyams, "Warranty and Good Lordship in Twelfth Century England," 448.
[7] Ibid.: 440.

primarily seen as a means of protecting grants against challenge by a third party."[8] Correlative to this was the right to *escambium*: if the lord failed to defend the grant, he was then obligated to provide the grantee "an exchange of an equivalent holding."[9] Even at this early stage, we see that the lord's warranty did not necessarily mean "an end of" a property dispute and definitive title,[10] for the right to escambium implies that "the greater right was seen to provide a better title than the personal relationship."[11]

Though the Norman charters analyzed by E.Z. Tabuteau had not used specific warranty language, they clearly invoked the concept of an enduring promise to protect the grantee.[12] Hyams argues that the norm of warranty was carried across the Channel by the Normans, noting "In England as in Normandy, the good lord was routinely expected to warrant his man's tenure."[13] Well before the development of the common law, warranty was a "general obligation" on grantors, "cover[ing]…a range of transactions," whether grants in service or in alms.[14] Over time, "express [warranty] clauses became standard practice," but this only solidified the well-established custom.[15] Even in the earliest years of the Anglo-Norman kingdom

---

[8] Ibid.: 460, n. 94; Hudson, *Land, Law, and Lordship in Anglo-Norman England*, p. 58.
[9] Hyams, "Warranty and Good Lordship in Twelfth Century England," 440. Cf. Hudson, *Land, Law, and Lordship in Anglo-Norman England*, p. 56.
[10] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 58; S. E. Thorne, "English Feudalism and Estates in Land," *The Cambridge Law Journal* 17, no. 2 (1959): 197.
[11] Hudson, "Anglo-Norman Land Law and the Origins of Property," p. 206.
[12] According to Tabuteau, in her chapter entitled "Modes of Assurance: Warranty," "the verb 'warrant' and the noun 'warrantor' appear only four times in the approximately one thousand extant Norman charters, yet the concept of warranty was clearly implied in about seventy of these charters. Tabuteau, *Transfers of Property in Eleventh-Century Norman Law*, p. 197. See also Hudson, *Land, Law, and Lordship in Anglo-Norman England*, p. 53 n. 178.
[13] Hyams, "Warranty and Good Lordship in Twelfth Century England," 457.
[14] Ibid.: 456.
[15] Ibid.: 459.

"warranty-style procedures for the establishment of land claims" existed, and Domesday Book shows evidence of warranty terminology.[16]

The evolution of warranty was tied inextricably to the heritability of land, which was a norm long before mort d'ancestor was established.[17] Warranty was "a continuing commitment" across generations.[18] Hyams argues that the practice of the heir honoring warranties for grantees in alms implied warranty's durability, and indeed that there was a widespread belief, or norm, that "in normal circumstances heirs ought to honor their ancestors' warranties."[19] We even have a writ issued by Henry I enforcing this norm, requiring a son to return to a monastery land that his father had donated.[20] This intergenerational guarantee is, for Milsom, the essence of the lord's promise to warrant. His conception of seisin is such that "The seisin itself would bind the lord to keep [the tenant] until he died or failed in his duty."[21] The warranty, the promise to uphold the grant against third parties, went with the "and his heirs" clause of a grant, since the life grant already necessarily implied defense against third parties.[22] If this was indeed a given, then warranty translated into something like a "certain form of property right," as at least military tenants and churches could "rest secure" knowing that they were defended against outsiders.[23]

---

[16] Hudson, *Land, Law, and Lordship in Anglo-Norman England*, p. 53.
[17] See above, Ch. 2.3.
[18] Hyams, "Warranty and Good Lordship in Twelfth Century England," 472.
[19] Ibid.: 471-2; Biancalana, "For Want of Justice: Legal Reforms of Henry II," 488-9. For example, a charter recording a donation to a priory occurring sometime between 1150 and 1160 states "And I and my heirs after me will warrant this alms against all men," and another from before 1187 states "I and my heirs will warrant and acquit them…in perpetuity." *EHD*, II, nos. 194, 196.
[20] *Writs*, no. 80.
[21] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 42.
[22] Ibid. Milsom goes on to argue that *escambium* developed out of this original promise. Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 44. Hudson also suggests that warranty and *escambium* were "two linked obligations only gradually coming to be combined." Hudson, *Land, Law, and Lordship in Anglo-Norman England*, p. 56.
[23] *Writs*, no. 80; Hyams, "Warranty and Good Lordship in Twelfth Century England," 454.

In addition to the defense against third parties, warranty developed in the mid- to late twelfth century a "negative" aspect as it came to include defense against the lord himself, who "was understood to have renounced his right to second thoughts."[24] Hudson suggests that the understanding was due to a strengthened link between warranty and homage, giving rise to a more binding "obligation to allow continuing tenure."[25] This went even further toward establishing normative, if not legal, property rights, which were later shored up by the assize of novel disseisin.[26]

The operation of positive and negative warranties in the context of a third-party claim is explained in the following illustration. If a demandant X brought a real action against a tenant B, the tenant would vouch his warrantor (his lord) A, who would then be summoned to the court and would declare whether or not he would warrant.[27] If he warranted, A "took over the defense" against this outside claimant,[28] and the "demandant…[pleaded] solely with the warrantor."[29] If, however, the lord "defaults in his warranty to the tenant who brought him there to warrant, then there shall be a plea between them."[30] This plea was called *warrantia cartae*, and B could prove that A ought to warrant him because the "tenant performed for him in respect of the land a specified service."[31] Once A took over there were two possible

---

[24] Ibid.: 440.
[25] Hudson, *Land, Law, and Lordship in Anglo-Norman England*, p. 58. Cf. Simpson, *A History of the Land Law*, p. 52. See above, Ch. 2.
[26] Thorne, "English Feudalism and Estates in Land," 197..
[27] *Glanvill*, p. 38. The tenant could, however, proceed without his warrantor (and everyone who held land justly necessarily had a warrantor) if he so wished. In this case, a loss, either in battle or the assize, was final. The demandant was installed, and the tenant had "no further rights" regarding the land or against his warrantor. *Glanvill*, p. 40.
[28] Milsom, *Historical Foundations of the Common Law*, p. 147.
[29] *Glanvill*, p. 38.
[30] Ibid.
[31] Ibid., p. 42. Note that Glanvill says that convincing evidence of an ancestor's service is sufficient to prove the obligation to warrant, thereby demonstrating the heritability of warranty. Cf. Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 42.

outcomes. If the warrantor won, nothing happened: B remained seised, and X was empty-handed. If the warrantor lost, then X got the tenement (from whom he held it depends on whether he had claimed to hold of A, or of a different lord).[32] It was not, however, a total loss for B, for by Glanvill's time the link between warranty and *escambium* was well-established, though tenants whose warrantor lost the case did sometimes have to bring an action to enforce the promise of exchange.[33] By virtue of A's warranty, A was "bound to give to him who vouched him [B] an equivalent in exchange."[34] This was the manifestation of the developed principle of positive warranty.

But if X was claiming to hold of A, why could A not simply decide for himself who his tenant was? Due to the developed principle of negative warranty, the lord's court had no competence to address this claim. If B was in seisin, holding of A, then – the grantor having "renounced his right to second thoughts" or to reclaim the land[35] - "so far as the lord's own court is concerned, there…was an end of it."[36] Thus, we arrive at one of the most important legal maxims of the era: no one could be

[32] In one case, however, the agreement between A and B stipulated that if an X "should prove his right to that land," X "should hold the same from…[B] without any exchange of land" – B would still hold of A. *EHD*, II, no. 253.
[33] *Lawsuits*, no. 654.
[34] *Glanvill*, p. 39. Provided, of course, that A had available property. Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 44; Milsom, *Historical Foundations of the Common Law*, pp. 147-8.
[35] Hyams, "Warranty and Good Lordship in Twelfth Century England," 440.
[36] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 58.

made to answer for his free tenement without a royal writ.[37] Only the king could ask *quo warranto*.[38]

2. WARRANTY AND RULES OF LAW

In light of negative warranty then, royal "participation,"[39] or intervention, in property disputes was *necessary*, and eventually resulted in the wholesale "transfer of jurisdiction" to royal courts that "destroy[ed] the seigniorial order."[40] Milsom argues that this was a process of four stages: 1) the lord had full "discretion," 2) the king would help a claimant enforce a right against a lord, 3) the lord could not even help a tenant without a royal writ, and 4) a lord was "simply entitled to the profits of a justice entirely outside his real control."[41] The problem with this model is that Stage 1 is an ideal type that never actually existed. Although there was certainly seigniorial jurisdiction linked to property, royal intervention was in no way neoteric. In reality, kings had always been involved in property disputes from 1066 on, making Stage 2 the logical starting point.[42] "The crucial change" came when this royal activity was routinized, largely during the twenty years following the Anarchy, through the writ of right and then the assizes of novel disseisin and mort d'ancestor.[43] The expansion of

---

[37] *Glanvill*, p. 148; Harding, *Medieval Law and the Formation of the State*, p. 133; Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, pp. 57-9; Paul R. Hyams, "Review: The Legal Framework of English Feudalism," *The English Historical Review* 93, no. 369 (1978): 858.

[38] By 1236, at the latest, there was a writ that a tenant could bring to the sheriff to ensure that his lord did not make him answer for his free tenement in the seigniorial court without a royal writ. Brand, *Kings, Barons and Justices: The Making and Enforcement of Legislation in Thirteenth-Century England*, p. 100.

[39] Hudson, *Land, Law, and Lordship in Anglo-Norman England*, p. 255.

[40] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, pp. 36-7.

[41] Milsom, *Historical Foundations of the Common Law*, p. 107.

[42] Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted*, pp. 343, 375; Biancalana, "For Want of Justice: Legal Reforms of Henry II," 495.

[43] Hyams, "Warranty and Good Lordship in Twelfth Century England," 468.

royal jurisdiction was largely successful, but it was not simply "imposed from above."[44] Rather, it was a necessary response to legal formulae and the inadequacies (both practical and theoretical) of the lord's court – for example the lord's inherent conflict of interest in landholding disputes.[45] Even before mort d'ancestor and novel disseisin, the "rights" implied by warranty, namely heritability and security of tenure, "existed in men's minds largely independent of the existence of formal legal remedies."[46] This section describes the evolution of these norms from mere good custom to rules enforceable through legal recourse.

2.A. PROPRIETARY ACTIONS BEFORE HENRY II'S REFORMS

Early royal intervention

While we have very little written evidence of what took place in the lord's, or seigniorial, court in the Anglo-Norman period, the consensus seems to be that its decisions were "governed by custom" which was articulated for the lord through the counsel of his men.[47] If "rights" existed in the lord's court, they derived from the individual's tenurial contract with the lord, they were upheld in that court, and they were good only in that court, not against the world; as Milsom notes, that court's

---

[44] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 203. Indeed, by 1215, according to Maitland, "The voice of the nation, or what made itself heard as such…asked that the royal court should be endowed with yet new and anti-feudal powers…[and believed that it was] the king's business to provide a competent remedy for every wrong."

[45] Hudson, "Anglo-Norman Land Law and the Origins of Property," p. 217. See also Biancalana, "For Want of Justice: Legal Reforms of Henry II." Despite, for example, the norm of warranting the grants of one's ancestor, not every lord, or his court, followed it as policy. In a case from the mid-1160s, Gilbert Foliot, the former bishop of Hereford, complained to Henry II that his successor had not warranted Gilbert's grants. He asked that Henry remedy this offense against "the first elements of divine and human law." *Lawsuits*, no. 443.

[46] Hyams, "Warranty and Good Lordship in Twelfth Century England," 468.

[47] Hyams, "Review: The Legal Framework of English Feudalism," 856. See also Hudson, "Court Cases and Legal Arguments in England, C.1066-1166." Attending the lord's court and giving good counsel were two of the duties of the lord's men. Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted*, pp. 36-7. See also Hudson, *Land, Law, and Lordship in Anglo-Norman England*, p. 151; Maitland, *Domesday Book and Beyond: Three Essays in the Early History of England*, pp. 80-107.

decision was (ostensibly) "final."[48] This "autonomous" court had both disciplinary and proprietary authority.[49] Disciplinary authority "determine[d] what a tenant ought to do, the obligations of an undoubted tenant."[50] Proprietary authority addressed "questions about who ought to hold of the lord and how much he rightly held, questions about the location and extent of title."[51] Although proprietary matters theoretically remained solely within the lord's jurisdiction (Milsom's idealized Stage 1), that was not the case in practice. As Hyams observed (with understatement), these "disputes [over landholding] were less likely to remain internal to the lordship," and from the time of Henry I, many did not.[52] As the Salisbury Oath[53] of 1086 indicates, the Anglo-Norman kings were intent on establishing "direct relationships not only with their tenants-in-chief but with sub-vassals" too.[54]

Indeed, we find early examples of royal intervention, through the writ of right, during the reign of William II. In one case, between the abbot of Ramsey and one William of Albini, the king ordered the sheriff of Norfolk to "Inquire by the county (court) who had more justly a forfeiture of this kind in the time of my father."[55] We should observe three facts about this writ. First, the writ itself was "simply a royal order which authorized a court to hear a case and instructed a sheriff to secure the

---

[48] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 183.
[49] Hyams, "Review: The Legal Framework of English Feudalism," 856.
[50] Ibid.: 857.
[51] Ibid.
[52] Ibid; Biancalana, "For Want of Justice: Legal Reforms of Henry II," 495. Henry even developed, between 1108 and 1111, a set of jurisdictional rules for land disputes. If the dispute was between two men who held of the same lord, it should be held in that lord's court. If the two men had different lords, it was to be held in the shire court. And if the two men were tenants-in-chief, the king's court had original jurisdiction. *EHD*, II, no. 43.
[53] See above, Ch. 1.2 on William the Conqueror.
[54] Hudson, "Anglo-Norman Land Law and the Origins of Property," p. 216.
[55] *Writs*, no. 2.

attendance of the defendant."[56] Second, the claim to be adjudicated was both relative and historical: William asked who between the abbot and the ancestor of William of Albini had the *greater* right at a given time in history (the previous reign).[57] Third, despite having opened the case, the king himself did not have a say in the proceedings or control the outcome.[58]

Prior to 1154, the king's intervention was usually aimed at upholding the customary, normative claims of the tenant against his lord.[59] If a lord or his court denied to a demandant the land he claimed, he could have recourse to the king's writ. Although Hyams suggests that this was an "exceptional remedy" for "the favored few"[60] – or perhaps for use against the disfavored few – this was not necessarily the case. As Hudson notes of one demandant, Modbert[61]: "There is no sign that he was a rich man, capable of buying royal support…He seems simply to have turned to the king when he had trouble in obtaining what he regarded as his inheritance."[62]

Modbert sought to recover from the cathedral church of Bath land in Stoke that had been held by his wife's father.[63] His claim was two-fold – that he was Grenta's heir (through his wife), and that Grenta had held heritably. Modbert had obtained a royal writ (from the king's son) ordering the bishop to seise him, but upon receipt of the writ the prior noted that "neither the king nor the king's son has ordered

---

[56] Milsom, *Historical Foundations of the Common Law*, p. 22.
[57] *Writs*, no. 2; Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, pp. 76, 80.
[58] Even in his own court, the *curia Regis*, William II recognized that "it was not for him to make the judgments of his court." Ibid., I, p. 109.
[59] Hyams, "Warranty and Good Lordship in Twelfth Century England," 473.
[60] Ibid.
[61] See above, Ch. 2.3.
[62] Hudson, "Life Grants of Land and the Development of Inheritance in Anglo-Norman England," 77.
[63] *Lawsuits*, no. 226.

anything here to be done except justly,"[64] since a royal writ could only open a case, not determine its outcome. The case also shows the role of proof, which "was the end to which the legal process was directed," but also of logical argument.[65] As Hudson notes, "the essential issue [was] presented as a choice between two arguments, each resting on a legally charged fact" – either the land was held for life, or was held heritably.[66] Ultimately Modbert's case was doomed by evidence from Grenta's deathbed, a charter from a Saxon king of Wessex, and Modbert's own lack of evidence for his claim that the land was held heritably; but that the case happened at all reveals the king's role in upholding norms of inheritance, that is, ensuring that "right" was done.[67] Henry I did this through both his own charters and through "repeated" use of writs to provide "assistance for claims to inheritance."[68]

It is surely significant that most of our evidence for royal involvement comes from cases of men seeking their inheritance, that is, cases in which royal redress was sought for violations of the norms discussed in Chapter 2. For example, sometime between 1122 and 1137 a charter of the church of St Mary's in York granted land formerly held by Richard Tortus to Ougrim de Frisemareis.[69] The charter states: "if any heir of Richard Tortus can acquire that messuage of land *from the king* or deraign it against us or Ougrim and his heirs, we will not give an exchange."[70] This type of clause, denying the grantee's right to *escambium*, was not unusual even in the reign of

---

[64] *Lawsuits*, no. 226.
[65] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 2.
[66] Hudson, "Court Cases and Legal Arguments in England, C.1066-1166," pp. 100-2.
[67] *Lawsuits*, no. 226. See also *Writs*, no. 16.
[68] Biancalana, "For Want of Justice: Legal Reforms of Henry II," 496-7.
[69] Hudson, "Life Grants of Land and the Development of Inheritance in Anglo-Norman England," 77.
[70] Quoted in Ibid. Emphasis in original.

Henry I.[71] We can see then that the expectation of *escambium* was part of the promise of warranty, given that denial of that right needed to be stated explicitly in the grant.[72] Further, the fear of royal involvement demonstrated in this clause indicates that such royal activity was not uncommon. Even so, this occasional involvement did not denote a "legal inheritance right."[73]

The writ of right after 1154

The "first [formalized] inroad of external law" into the lord's court was the "regular machinery of the writ of right." This action was established by Henry II to "facilitate reconstruction after the Civil War" and to preserve the peace.[74] It was necessary that those displaced during the Anarchy, those who held the land in 1135 or their heirs, have a legitimate means of reclaiming their land, rather than trying to retake it by force – as early as 1158 "royal ordinances sought to prevent self-help as a means of settling restoration claims."[75] Through the writ of right patent, the dispossessed could open a case in the lord's court and if he could establish greater right than the one currently seised, which entailed proving that his ancestor had been

---

[71] Hudson, *Land, Law, and Lordship in Anglo-Norman England*, pp. 53-4. There is evidence as well that the king undertook to "enforce the right…to escambium." Hyams, "Warranty and Good Lordship in Twelfth Century England," 466.
[72] Hudson, *Land, Law, and Lordship in Anglo-Norman England*, pp. 53-4, 56.
[73] Hyams, "Warranty and Good Lordship in Twelfth Century England," 473. It is of interest that the above cases come from royal intervention with lords spiritual, not secular. (Of the seventeen writs of right collected by Van Caenegem that predate Henry II, all deal with church lands. This is significant, even taking into account that churches kept better records than secular lords.) Since the church made more extensive use of life tenure than lords, whose subinfeudation was more often military and therefore heritable, these cases might speak more to church-state relations and the strength of norms of inheritance (see above, Ch. 2) than to a conscious expansion of royal jurisdiction. However, they established a precedent that would come into its first flowering after the Anarchy as writs of right became more widely used. Perhaps Henry II decided he could apply the same process to weakening the lords, that is, setting up the royal courts as having at first something akin to appellate jurisdiction so as to uphold norms of inheritance, as his predecessors did to establishing oversight of church actions.
[74] Hyams, "Review: The Legal Framework of English Feudalism," 858.
[75] Biancalana, "For Want of Justice: Legal Reforms of Henry II," 466, 475; Milsom, *Historical Foundations of the Common Law*, p. 140; Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, pp. 178-9. See above, Ch. 2.2.

seised the day Henry I died, he could recover the land.[76] The claim, according to Milsom, "rests on a relationship" between the ancestor and the lord, not simply that the ancestor had possessed the land.[77]

Since the writ of right was necessarily "brought against one who is seised," it gave rise to the doctrine that no one could be made to answer for his freehold without royal writ.[78] Because of the promise of warranty to the tenant, the lord could not, even if the demandant had manifestly greater right, disseise the tenant. Proceedings were often moved to the county court, since the lord's court necessarily defaulted.[79] If C attempted to claim a tenement held by B of A, for which A had seised B, he could not go to A's court – positive warranty demanded that A reject C's claim. When C brought a writ of right patent, the lord's court defaulted to the county court (the words "And unless you do [right], the sheriff…shall do it" were not pro forma, they had real meaning).[80] Indeed, it was logically incoherent, if at first procedurally necessary, to bring the question of right to the lord's court: "the lord cannot…question the right which he himself gave."[81]

It is at this point that *escambium* took on greater importance. As the charter of St Mary's hinted, the relevance of this right increased when the king's involvement

---

[76] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 178; Milsom, *Historical Foundations of the Common Law*, p. 107. Cf. Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, p. 80.
[77] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 177.
[78] Milsom, *Historical Foundations of the Common Law*, pp. 22, 103.
[79] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, pp. 58-9. If the lord's court defaulted, the case was brought to the county court by a procedure called tolt, where witnesses swore to the sheriff that the lord's court had failed to do justice. The complainant could then use a writ of *pone* from chancery to bring the case to the king's court. Biancalana, "For Want of Justice: Legal Reforms of Henry II," 443.
[80] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 58. For examples, see *Writs*, nos. 20-5 and *Lawsuits*, no. 337. Separate examples say that right will be done by "my itinerant justice" or by then-chancellor Thomas Becket, among others.
[81] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 58

made a judgment against the tenant more likely. Indeed, it could be argued that with homage, all that a tenant received from the lord, aside from help in a writ of right proceeding, was the right to *escambium*. The promise of positive warranty, that the lord will protect his tenant against any third party, was "no longer…conclusive title."[82] The further promise of warranty, that of heritability, was now being upheld not by the lord, but by the king, who, through the first regular writs of right, had undertaken essentially to warrant those who were in seisin at Henry I's death and ensure that their heirs could inherit. The king had taken the place of the lord in the social contract as the one who upheld claims to property.

2.B. NOVEL DISSEISIN AND MORT D'ANCESTOR – THE POSSESSORY ASSIZES IN THE ROYAL COURT

While the regularization of the writ of right after the Anarchy was the first formal step in royal intervention in the lord's court, it was certainly not the last. Disseisin was not, of course, unique to the Anarchy; it was a fairly common occurrence throughout the Middle Ages. As discussed above in Chapter 2.2, land taken back by lords was usually then granted to another person. Though there could be just disseisins – those done "for cause," through the due process and judgment of the lord's court – the lord's court could not provide a remedy for one who had been unjustly disseised.[83] If A disseised B and put in C, then A's court could not and would not hear B's plea. First, C had been warranted, so only the king's writ could

[82] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 181.
[83] Milsom, *Historical Foundations of the Common Law*, p. 104. The cause, Milsom notes, was usually "a failure to perform services." The lord, however, could not summarily disseise a tenant for this cause, but could do so only through the due process of his court. While claimants to land had access to royal writs of right to put them back in, after the Anarchy lords too could make use of royal writs, either to reclaim land or to recover services. This in turn strengthened the rule that no one could be challenged in his tenement, whether by an outside claimant or his lord, without a royal writ. Biancalana, "For Want of Justice: Legal Reforms of Henry II," 472.

open the question; second, A had just disseised B, and so to say that he and his court would not be the fairest judges of B's complaint is an understatement. The assize of novel dissesin, then, "strengthened, defined and formalized" the "existing…customary ownership" by providing B a legal recourse.[84] It limited the lord's disciplinary power, his ability to disseise a tenant summarily.[85] Finally, it aimed at stability by protecting not the "lord's accepted tenant" who was warranted, but "seisin in the wider sense," that is, by protecting property rights.[86]

Form of Novel Disseisin

The writ of novel disseisin opened a case to be decided by jury in royal court.[87] The twelve-man jury was to "answer a set formula which reduced to two questions": had there been an unjust disseisin, and was it novel?[88] The latter question is relatively straightforward. At the time when the assize was established, no later than 1166, it was clear that it would not reach disseisins that had occurred before the start of Henry II's reign in 1154 at the earliest.[89] Where the writ of right addressed "claims based on ancestral seisin," the writ of novel disseisin addressed "a plaintiff's

---

[84] Hyams, "Warranty and Good Lordship in Twelfth Century England," 474.
[85] Palmer, "The Origins of Property in England," 24.
[86] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 61.
[87] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 529. Due to changes wrought by Magna Carta, "cases of novel disseisin almost always received their initial hearings in the county" court, or in the royal eyre courts. Sutherland, *The Assize of Novel Disseisin*, pp. 61-2. For a detailed summary of novel disseisin proceedings in the thirteenth century, see Sutherland, *The Assize of Novel Disseisin*, pp. 64-73.
[88] Milsom, *Historical Foundations of the Common Law*, p. 116. Although Milsom is correct that the jury's fact-finding duty "reduced" to these questions, Sutherland notes that "In whatever ways the case seemed to require, the justices coached the jurors through the details to the general verdict and accepted the general verdict only when they were satisfied about the facts and reasonings on which it was based." Sutherland, *The Assize of Novel Disseisin*, p. 73.
[89] Stephen's reign was something of a legal dead zone, and claims dating to 1135 were addressed by the writ of right that came out of the 1153 Compromise. For novel disseisin, "When Glanvill wrote, a plaintiff could still go back to 1154. In 1236 or 1237 he was allowed to go back to 1210. In 1275 he was allowed to go back to 1216, and this he might do until 1540." Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, p. 51. The longer limitation period was due to the popularity of novel disseisin. Sutherland, *The Assize of Novel Disseisin*, p. 55.

own prior seisin."[90] Novel disseisin was intended as a rapid response to prevent retaliatory violence. It thus contrasted with the writ of right, where defendants could delay the proceedings by demanding that the jury view the land in question, by sending an essoiner with an excuse for their absence, or by vouching a warrantor.[91] In novel disseisin, no essoin was allowed,[92] judgments were "summary,"[93] and the writ was very specific, as it was only for use by the disseisee against the disseisor.[94] If the disseisor had enfeoffed another, the writ would be brought against both, but only the perpetrator(s) of the disseisin would be held liable.[95]

The first question of the assize, whether the disseisin had been unjust, could also be framed through the lord's warranty. An unjust disseisin broke the promise of negative warranty, the renunciation of "second thoughts."[96] The lord was thus being called to "answer for an abuse of his power."[97] Verdicts on the question of disseisin stated "whether an undisputed event was an exercise or an abuse of rights."[98] This meant that the assize was an "expeditious and certain remedy."[99] In part because no essoin was allowed, the procedure was "efficient" and summary; two clear questions

---

[90] Biancalana, "For Want of Justice: Legal Reforms of Henry II," 501.
[91] *Rolls of the Justices in Eyre*, no. 680. In this case, which was heard between 18 February and 11 March 1219, the vouching of a warrantor delayed the case until "the next coming of the justices" which was to be sometime after Easter.
[92] *Glanvill*, p. 169. See above, Ch. 2.2. In two cases from Nottingham in 1219, which proceeded despite the defendants' absence, the jury found that the defendants had unjustly disseised the plaintiff. The judges awarded seisin to the plaintiff and amerced the disseisors. *Rolls of the Justices in Eyre*, nos. 440, 441.
[93] Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, p. 48.
[94] Ibid., II, pp. 54-5.
[95] In later law, as the definition of "novelty" expanded, a writ of entry *sur disseisin* could be brought against the enfeoffee of a dead disseisor (the "second hand"). Ibid., II, pp. 55-6. See below, Ch. 3.2C for writs of entry.
[96] Hyams, "Warranty and Good Lordship in Twelfth Century England," 440.
[97] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 11.
[98] Ibid., p. 17.
[99] Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, pp. 45-6.

were asked, and a verdict was rendered based on the answers.[100] Again, the contrast with the writ of right is clear, as the question of possession is easier to adjudicate than that of right. As Donald Sutherland notes, the question of possession referred "to recent and notorious facts" while the proprietary question of "'right' [referred] to older and more obscure facts."[101]

In the assize of novel disseisin, it fell to the jury, composed of men "summoned by a public officer" who took an oath to speak the truth, to inform the justices of the "recent and notorious" facts of the case: thus we see the justices in eyre summoning, in addition to witnesses, "8 other lawful men through whom the truth of the matter can best be known."[102] The jury was "to declare the truth," to give a verdict, rather than a judgment, based on their knowledge of the case: "The jurors say that they have disseised him."[103] As with the royal inquests from whose verdicts "Domesday Book was compiled," the jury was used by royal officials generally "for the purpose of obtaining any information that they want[ed]" and this extended to determining whether an unlawful disseisin had occurred.[104] In other words, the growing use of juries was "intimately connected with [the expansion of] royal power."[105]

---

[100] Hudson, *The Formation of the English Common Law: Law and Society in England from the Norman Conquest to Magna Carta*, p. 142.
[101] Sutherland, *The Assize of Novel Disseisin*, p. 40. This distinction became blurred in some cases, as Bracton refers to mort d'ancestor addressing claims of proprietary right. *Bracton*, II, p. 188; Joseph Biancalana, "The Origin and Early History of the Writs of Entry," *Law and History Review* 25, no. 3 (2007): 544.
[102] *Rolls of the Justices in Eyre*, no. 657; Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 140.
[103] *Rolls of the Justices in Eyre*, no. 440.
[104] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, pp. 140-3. See also S. F. C. Milsom, "Law and Fact in Legal Development," in *Studies in the History of the Common Law* (London: The Hambledon Press, 1985); Hudson, "Court Cases and Legal Arguments in England, C.1066-1166."
[105] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 140.

Moreover, a jury recognition in a possessory assize was a safer course for the plaintiff himself, since a tenant in a proprietary proceeding could always "could always refuse the foreknowable verdict of men and put himself upon the unforeknowable judgment of God" in battle.[106] Even if the disseised had greater right, he would most likely prefer the assize of novel disseisin.[107] Unsurprisingly, the assize "soon became an exceedingly popular action" for claimants to tenements both large and small who had been put out unjustly – often by their lord – regardless of the relative standing of the tenant and lord.[108]

Purpose of Novel Disseisin

Milsom conceives of novel disseisin as "providing a kind of judicial review" of the lord's court, through which "customs were enforced" and the lord's court was "made to work according to its own rules."[109] It certainly seems correct that the role of the assize was to uphold norms of landholding and protect tenures, but it is difficult to accept Milsom's suggestion that a response to abuses within the lord's court did not therefore imply that court's failure.[110] Novel disseisin was not aimed at protecting seigniorial justice, but at following the logic of warranty, and "introduced a new clarity and rigidity" into the rules of landholding through the royal enforcement of norms.[111] As Maitland observed, Henry II's key contribution to the genesis of

---

[106] Ibid., II, pp. 45-6.
[107] Ibid.
[108] Ibid., II, p. 48; Sutherland, *The Assize of Novel Disseisin*, pp. 43, 48.
[109] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 36. Cf. Tabuteau, *Transfers of Property in Eleventh-Century Norman Law*, p. 2.
[110] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 36; Biancalana, "For Want of Justice: Legal Reforms of Henry II," 482.
[111] Hyams, "Warranty and Good Lordship in Twelfth Century England," 481; Biancalana, "For Want of Justice: Legal Reforms of Henry II," 483.

common law was "devices for enforcing"[112] norms of landholding to promote stability. Indeed, the debate sparked by Milsom's *Legal Framework of English Feudalism*[113] as to whether Henry's reforms were aimed merely at ending the occasional abuse of tenants, or at "defeudaliz[ing] the law,"[114] is a false dichotomy. The assize of novel disseisin was pragmatic: many of Henry's writs express the wish that "I hear no further complaint" regarding the issue.[115]

As Paul Brand observes, Henry's kingdom "was still recovering from the Civil War," and Henry himself was often across the Channel, and so "in order to help keep the peace [he] legislated against disseisin."[116] In his absence, it was not just the lord who might disseise his tenant unjustly, but potentially "neighbors, those with rival claims to the same land, other lords."[117] Indeed, according to Glanvill the writ applied "When *anyone* has unjustly and without a judgment disseised another."[118] When the promise of warranty from his lord has been broken, then, a claimant could seek redress and enforcement of that contract from "the ultimate lord of all lords," through novel disseisin.[119] The norm of secure tenure that was implied by the lord's

---

[112] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 136.
[113] See for example reviews by Hyams, Lyon, Palmer, and White. Hyams, "Review: The Legal Framework of English Feudalism."; Bryce Lyon, "Review: The Emancipation of Land Law from Feudal Custom," *The Yale Law Journal* 86, no. 4 (1977); Palmer, "Review: The Feudal Framework of English Law."; Stephen D. White, "Review: The Legal Framework of English Feudalism," *The American Journal of Legal History* 21, no. 4 (1977).
[114] Lyon, "Review: The Emancipation of Land Law from Feudal Custom," 783.
[115] *Writs*, nos. 90-100.
[116] Paul Brand, "Henry II and the Creation of the English Common Law," in *Henry II: New Interpretations*, ed. Christopher Harper-Bill and Nicholas Vincent (Rochester, NY: Boydell Press, 2007), p. 236; Sutherland, *The Assize of Novel Disseisin*, p. 27. In addition, the example Glanvill gives suggests that the assize was brought upon the king's return from France, that is, that the disseisin was "novel" because it had occurred during his recent absence, though we know that redress was possible for claims dating to 1154. *Glanvill*, p. 167.
[117] Brand, "Henry II and the Creation of the English Common Law," p. 236.
[118] *Glanvill*, p. 167. Emphasis added.
[119] Brand, "Henry II and the Creation of the English Common Law," p. 236.

acceptance of homage and was "necessary for the maintenance of social life"[120] was violated by these disseisins. Novel disseisin's aim - to keep the peace – was "a reflection of a more fundamental goal" – to protect security of tenure.[121] This interpretation is bolstered by its applicability not just to heritable tenements, but also to land held by life tenure.[122] The assize was in this respect, as Hyams states, conservative, and attempted to uphold the status quo and "public order."[123] It is, however, instructive that the *Dialogue of the Exchequer*, in 1177-9, refers to a "general royal policy" of protecting tenants from "their domestic enemies, that is…their lords."[124] It concludes, "The law of the king alone, made at the voice of necessity for the good of the peace, is the principal solution."[125]

Two additional pieces of evidence suggest the paramountcy of stability and peacefulness to Henry II and his successors as the rationale for ensuring continued seisin by the rightful tenants, to Henry II and his successors. First, as the doctrine concerning novel disseisin developed, it was theorized that "Every disseisin is a

---

[120] Ullmann-Margalit, *The Emergence of Norms*, p. 12; Sutherland, *The Assize of Novel Disseisin*, p. 29.

[121] Sutherland, *The Assize of Novel Disseisin*, pp. 33-4. Sutherland argues that the king and his advisers asked themselves "How can the law give better protection to the rights of freeholders?" John Hudson has suggested to me that the question was more likely: How can we ensure that "the lands of honorable men are not usurped?"

[122] Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, p. 9. Maitland cites Bracton here, so it is unclear whether this was so from 1166. But Glanvill does not make a distinction, referring only to "free tenement[s]," so the point stands that novel disseisin upheld the security of tenure (to say nothing of stability) implicit in the warranty received by those who held for life, regardless of what would happen to the land afterward. See also *EHD*, III, no. 236. Unfree tenements, however, were not protected by the assize, and an accused disseisor could excuse his actions if the land in question was "recognized as servile." *Lawsuits*, no. 650.

[123] Hyams, "Warranty and Good Lordship in Twelfth Century England," 481; Brand, "Henry II and the Creation of the English Common Law," p. 237. Cf. Lyon, "Review: The Emancipation of Land Law from Feudal Custom," 784.

[124] *EHD*, II, no. 70; Hyams, "Warranty and Good Lordship in Twelfth Century England," 481.

[125] *EHD*, II, no. 70.

breach of the peace; a disseisin perpetrated with violence is a serious breach."[126] In the thirteenth century the disseisor was amerced for at least the amount of the damages (damages were awarded from 1198).[127] As a matter of course, "the justices will inquire whether he came with force and arms, and, if he did so, he will be sent to prison and fined."[128] From 1236, under the Provisions of Merton, repeat disseisors garnered even more severe treatment, demonstrating the "danger to the state [from] the practice of 'land-grabbing'"; and from 1267, under the Statute of Marlborough they were not to be freed from prison "without the king's special command."[129] Second, the other possessory actions created during Henry's reign were also concerned with issues of continuity and stability, not which court had which jurisdiction. For example, the assize of darrein presentment rested on the principle that the person who had appointed the previous man to the benefice should do so again, but "without prejudice to any question of right."[130] Here again the king did not necessarily have an interest in a particular outcome, especially in the many cases that

---

[126] Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, p. 44. Even disseisin carried out during war was not excused by reason of the war. As with the writs of right after the Anarchy, disseisins done during the Baron's War against John were remedied once there was peace. Again, the principle behind the restoration of the *status quo ante bellum* was that the rightful tenant should not be displaced for any reason. *Rolls of the Justices in Eyre*, no. 56.

[127] Sutherland, *The Assize of Novel Disseisin*, p. 52. For examples of amercement and damages, see *Rolls of the Justices in Eyre*, nos. 440-2.

[128] Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, p. 44. Sutherland notes that, regardless of whether or not the disseisin was lawful, the disseisor often brought "a large and threatening band of supporters to help." As suggested by Maitland, there was an accepted protocol for lawful disseisin: the justices would inquire of the jury not only if the men came unarmed, but whether or not they assaulted the disseisee himself, and whether they took the disseisee's chattels too. An affirmative answer from the jury would result in greater penalty, even for a lawful disseisin. Sutherland, *The Assize of Novel Disseisin*, pp. 118, 20.

[129] *EHD*, III, nos. 30, 44; Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, p. 44. See also Brand, ""The Age of Bracton"," p. 67; Sutherland, *The Assize of Novel Disseisin*, pp. 63-4 n. 2.

[130] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 148.

dealt with very small tracts of land; his interest was that there *be* a settled outcome, and the consequent promotion of peace.

Effect of Novel Disseisin

The consequences of the assize of novel disseisin are clear. It was the first step of a comprehensive shift of jurisdiction from the lords' to the king's court,[131] and the "superiority" of the "new jurisdiction" and of royal power meant that lords could not stop the steps that followed logically from novel disseisin and the writ of right: they were to become "invisible" in real actions.[132] Even in the short term, the changes were monumental, as illustrated by the Countess Amice case which was recorded in 1200. The case is an example of norms (of security of tenure and lordly control) coming into conflict; it should not be surprising that the norm that strengthened tenants against lords won out in royal court.[133]

Following the end of her marriage, Amice called a Richard to her court to "answer *quo warranto* he held his tenement."[134] He vouched her former husband as his warrantor, and, since the marriage was over and the land was Amice's, "he was put out by judgment of [her] court."[135] Richard brought a writ of novel disseisin against her, as he had been made to answer *quo warranto* without a royal writ, and

---

[131] Where the writ of right opened a case in the lord's court, from where it was often removed to the county or royal court, the writ of novel disseisin opened a case in the king's court, bypassing altogether the seigniorial jurisdiction.
[132] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 36; S. F. C. Milsom, "What Was a Right of Entry?," *The Cambridge Law Journal* 61, no. 3 (2002): 571.
[133] Hudson, *Land, Law, and Lordship in Anglo-Norman England*, p. 107. Hyams observes that at this time "the once valid novel disseisin defense of ouster on good grounds by legitimate judgment of one's own court was passing out of use." This defense could not work unless the *quo warranto* question had been opened by royal writ. Hyams, "Warranty and Good Lordship in Twelfth Century England," 478; Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 147. As Palmer notes, this case shows how the royal courts' application of "rules separated law from social [norms]," that is, norms were reified through the professionalization and bureaucratization of enforcement. Palmer, "The Origins of Property in England," 46-7.
[134] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 45.
[135] Ibid.

had therefore been unjustly disseised. He won. Though Amice could have challenged Richard's tenancy by other means, the success of his novel disseisin suit reflects the changes wrought by the assize, and the lord's consequent loss of disciplinary authority. Had she done the same to Richard prior to 1166, he could have tried to regain the land through a writ of right, but it was risky (he probably would have lost) and the case could have dragged on for years. Even though his right to the land was, after the marriage's end, suspect, he was nonetheless able to regain it through the assize of novel disseisin. The lord's preference, previously the primary source of right, ceased to matter.[136]

The fact of the tenant's seisin was sufficient for him to be "protected by an unusually rapid remedy," and seisin generally was "protected by the king."[137] While previously the tenant had to rely on his lord's warranty, or the benevolence of the king, now his "ownership," or property right, had automatic royal backing.[138] The duties of warranty were to be fulfilled by the king, and would be "made good even against kings," as "enshrine[d]" in Magna Carta: "No freemen shall be…disseised…except by the lawful judgment of his peers or by the law of the land."[139]

---

[136] Ibid., pp. 46-7. See the above example of Gilbert Foliot and his successor as bishop of Hereford. Even though his successor preferred tenants other than those enfeoffed by Gilbert, royal enforcement of the norms of warranty meant that his preference was, or at least ought to have been, irrelevant. *Lawsuits*, no. 443.
[137] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 146. See for example *Lawsuits*, no. 591.
[138] Ibid; Hyams, "Warranty and Good Lordship in Twelfth Century England," 473.
[139] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 146. For the text of Magna Carta (1215 and 1217), see *EHD*, III, nos. 20, 23.

Mort d'ancestor

Where the assize of novel disseisin gave royal backing to the norm of security of tenure, the assize of mort d'ancestor upheld the norm of heritability by compelling adherence to the promise to "warrant the grantee and his heirs."[140] As established at the 1176 Assize of Northampton, the assize of mort d'ancestor asked three questions of the jury: was the ancestor seised in his demesne as of fee (*feodo*) at his death, did he die "within a limitation period," and "was the demandant his nearest heir?"[141] An affirmative answer to all three meant "the demandant was put in seisin" of his inheritance.[142] As with novel disseisin, the question of greater right was almost immaterial to mort d'ancestor, except insofar as seisin and norms of heritability implied right. If one who was not the heir had a better claim than the dead man and decided to take the land, or if the lord enfeoffed another, the heir simply had to bring a writ of mort d'ancestor against them.[143] The outside claimant, one who claimed greater right than the ancestor, needed to bring a real action against the heir; he could not simply take the land.[144]

By creating a judicial recourse for displaced heirs, Henry provided greater stability through upholding norms of inheritance. However, this assize never applied to heirs of tenants-in-chief, and so it is not difficult to accept the conclusions of historians who view it as "a blow aimed at feudalism" that "enhance[ed] the king's

---

[140] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 42. See above, Ch. 2.5.
[141] Milsom, *Historical Foundations of the Common Law*, p. 114.
[142] Ibid. For an example, see *Rolls of the Justices in Eyre*, no. 448.
[143] *Lawsuits*, no. 633.
[144] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 148.

role as provider of justice."[145] It was certainly convenient for the king to expand his role through a popular measure, while simultaneously weakening the lord's power and "draw[ing] away business from the seigniorial courts" (which allowed the king to profit from the amercements made by the assize).[146]

The "hardening of tenurial customs," or norms, into rules of law brought inheritance from being in an important, practical sense dependent upon the lord to being more certain, a matter of course.[147] Regardless of the lord's preference for an outside claimant, the king had ensured that lords and their heirs were "bound to warrant to the donees and their heirs" grants that were reasonable.[148] The enfeoffee's homage now implied a warranty for his heirs from the grantor's heirs *ad infinitum*, eliminating any "legitimate re-entry other than by forfeiture or escheat"; and the lord's necessary abnegation of "second thoughts" was enforced by the royal courts.[149]

The curia Regis *and the rise of the Common Law*

The legal developments of Henry II's reign – the writs of right, novel disseisin, and mort d'ancestor – were responses to the "failure of seigniorial justice," and they "centralized and unified" English law through "a permanent court of professional judges."[150] It is remarkable that a work such as *Glanvill* could have been

---

[145] Ibid., II, p. 57; Brand, "Henry II and the Creation of the English Common Law," p. 237. While the king retained *libera saisina* over his tenant's lands and could withhold them until the heir had made satisfaction for the relief, the lord merely had *custodia*, or simple seisin. He was still entitled to the relief, but the seisin, the actual possession of the land was regarded as having been transmitted to the heir, who was entitled. The lord who was found guilty of disinheriting the heir was eventually held liable for damages in addition to the amercement. Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, pp. 160, 70.
[146] Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, p. 57; Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 170.
[147] Hyams, "Warranty and Good Lordship in Twelfth Century England," 468.
[148] *Glanvill*, p. 74; Hyams, "Warranty and Good Lordship in Twelfth Century England," 469.
[149] Hyams, "Warranty and Good Lordship in Twelfth Century England," 440, 67.
[150] Biancalana, "For Want of Justice: Legal Reforms of Henry II," 441; Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 138.

written; that it was written with a focus on the royal courts elucidates the fact that the legal system created to process these complaints and enforce rules of law was creating literally a *common* law.[151] Prior to 1154, the king did not take a regular role in addressing land claims; and when he did, it was usually to open the case in the lord's court and order that right be done there. Henry's involvement was so regular and frequent that many chancery writs were "writs 'of course,' available virtually on demand."[152] The sample writs of novel disseisin and mort d'ancestor that we find in *Glanvill* were issued in a "relatively large volume…by utilizing the services of junior clerks, who had only to follow the forms and fill in the necessary blanks," and did not require further authorization.[153]

There was a proliferation of royal courts to address the multitude of complaints, whether they were opened through a writ or were brought to justices on circuit, or in eyre. In addition, the king's court no longer required his presence: the *capitalis curia Regis* became a "permanent central tribunal" of "persons expert in the administration of justice," such as chief justiciar Ranulf de Glanvill, that sat regardless of whether Henry was in England or away in his French holdings.[154] The groups of itinerant justices who presided over the eyre courts (which were also *curiae Regis*) usually "include[d] some few members of the permanent tribunal."[155] The courts' permanence aimed to ensure stability while the king was overseas, and their "precocious dominance" and "maturity" was due to Henry's powerful kingship and

---

[151] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 166.
[152] Brand, "Henry II and the Creation of the English Common Law," p. 235. These are contrasted with writs of grace, which were issued only by "the king's grace."
[153] Ibid.
[154] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 154.
[155] Ibid., I, p. 156.

the courts' own success.[156] As Brand observes, the courts increased the supply of royal justice, the high demand for which was stimulated by the promise of royal protection for "possession of…free tenements."[157] Brand also notes an additional reason for the popularity of the possessory assizes – being jury trials, they had "more rational methods of proof" than the trial by combat to which one who brought a writ of right was subject.[158] Indeed, Holt suggests that "The whole system…was demand-led."[159] Even in cases that were not decided by justices, access to the king's court allowed binding settlements, and good records of them to be made.[160] Henry II's legal reforms established the "absolute existence" of the property rights implied by the norms of warranty and possession – that were now good against even the lord – which were now enforced through swift royal justice to which people had access "virtually on demand."[161] Through this shift, positive warranty, the defense against third parties, was now upheld for enfeoffees by novel disseisin and for heirs by mort d'ancestor; and negative warranty, the right against the lord's "second thoughts," was now upheld by novel disseisin.

---

[156] Ibid., I, p. 344; II, p. 558. See also *EHD*, II, no. 59. Cf. Hyams, "Warranty and Good Lordship in Twelfth Century England," 460 n. 94. As noted above in Chapter 1, it cannot be coincidence that *Glanvill* was written between 1181 and 1189, a time when "the king's visits to England were neither frequent nor long." Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 155. This seems analogous to the genesis of the post of prime minister under George I (1714-27), who was also absent from England for prolonged periods of time.

[157] Brand, "Henry II and the Creation of the English Common Law," p. 241. Cf. Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, p. 559.

[158] Brand, "Henry II and the Creation of the English Common Law," p. 241. Additionally, Maitland suggests that the 1179 provision for the option to use the grand assize (jury) instead of trial by combat in cases started by a writ of right "was a one-sided measure, a protection of possessors." Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 147; Hudson, *The Formation of the English Common Law: Law and Society in England from the Norman Conquest to Magna Carta*, p. 134.

[159] Holt, "The Writs of Henry II," p. 59. See also Sutherland, *The Assize of Novel Disseisin*, p. 43.

[160] See, for example, *Lawsuits*, no. 600.

[161] Lyon, "Review: The Emancipation of Land Law from Feudal Custom," 784; Brand, "Henry II and the Creation of the English Common Law," p. 235. Novel disseisin in particular was a rapid remedy – Sutherland gives examples of it working within nine, seven, and six months, and even within six days! Sutherland, *The Assize of Novel Disseisin*, p. 126.

2.C. THE LEGAL SYSTEM AFTER HENRY II

The expansion of the possessory assizes

By the close of the twelfth century the "substructure" of the common law was in place.[162] The "bureaucratic approach" of Henry II had used "external enforcement" to incorporate[163] local, seigniorial customs into conformity with the "uniform rules of [the common] law," a development that "transform[ed] the legal world."[164] The lord's court no longer had the final word on who could hold his land or inherit – there was instead "an abstract title in some sky."[165] It was at this time, according to Milsom, that the verb "to seise," which had "one person as its object and another as its subject," gave rise to the abstract noun "seisin," which "denot[ed] a relationship between person and land which can exist without the lord's concurrence, and even against his will."[166] This linguistic change was wrought by novel disseisin.[167] It, among the other changes during Henry II's reign, was "accepted" and reified by Magna Carta in 1215.[168] Magna Carta did not resist the principles behind royal enforcement of norms; rather, it applied them to the king himself, as the barons

---

[162] Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, p. 569.
[163] This term is used in its specific, legal sense, which refers to the judicial process by which parts of the American Bill of Rights were applied to state governments as well through the Fourteenth Amendment. Cf. Hyams, "Review: The Legal Framework of English Feudalism," 858.
[164] Palmer, "The Origins of Property in England," 19; Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, pp. 38, 175, 180. Cf. Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 177.
[165] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 182.
[166] Ibid., pp. 184-5.
[167] Ibid., p. 185.
[168] *EHD*, III, nos. 20, 23. Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 172. See also Hyams, "Review: The Legal Framework of English Feudalism," p. 859. In an example of the importance men attached to the legal developments of Henry II's reign, one of the complaints of the rebels during the Barons Rebellion of the 1250s was lordly disregard for the *quo warranto* rule that had been established under Henry II, that "no free tenant need answer for his freehold without a royal writ." This was remedied under the 1267 Statute of Marlborough. Scott L. Waugh, "Non-Alienation Clauses in Thirteenth-Century English Charters," *Albion: A Quarterly Journal Concerned with British Studies* 17, no. 1 (1985): 13 n. 44.

attempted "to bring themselves under the protective umbrella of the legal privileges which the freeman already enjoyed."[169] The possessory assizes were successful, and therefore much in demand by tenants, and even "generally welcomed" by the barons.[170]

The first possessory assizes, however, dealt only with "[t]he commonest cases."[171] Since the question facing the jury was "formulated before there ha[d] been any pleading," it became necessary to provide writs for "the less common cases," and so new remedies were developed throughout the thirteenth century, and even novel disseisin and mort d'ancestor underwent reform.[172] Novel disseisin was made more punitive, especially toward repeat offenders.[173] In the case of mort d'ancestor, the heir's title had strengthened, but, "tenants who stand low in the feudal scale" remained vulnerable to a lord who, not content with his simple seisin, "enters the tenement and wastes it" after the ancestor's death.[174] In 1259, the Provisions of Westminster allowed those who so "disseised" the heir, even if the heir had not yet entered the tenement, to be held liable for any damages "sustained on account of the detention," further strengthening heritability.[175] This was reinforced by the Statute of Marlborough in 1267, which noted the lord's simple seisin: the "lord shall not eject

---

[169] J. C. Holt, "Magna Carta, 1215-1217: The Legal and Social Context," in *Colonial England: 1066-1215* (London: The Hambledon Press, 1997), pp. 297-8; Harding, *Medieval Law and the Formation of the State*, p. 139.
[170] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 172; Harding, *Medieval Law and the Formation of the State*, p. 139; Holt, "Magna Carta, 1215-1217: The Legal and Social Context," pp. 297-8. The 1215 version of Magna Carta required the justices in eyre to visit each county four times per year, though the 1217 version reduced this to once per year. *EHD*, III, nos. 20, 23.
[171] Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, p. 569.
[172] Ibid.
[173] *EHD*, III, no. 30.
[174] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 311.
[175] *EHD*, III, no. 40; Brand, *Kings, Barons and Justices: The Making and Enforcement of Legislation in Thirteenth-Century England*, p. 57; Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 311; II, p. 60.

him [the heir] nor take or remove anything there, but shall take only simple seisin thereof as recognition of his lordship."[176] This was contrasted with the king's primer seisin, which gave him "special rights over the heirs of tenants-in-chief."[177] Unlike the case of novel disseisin, not all of the rules applied to the king: "As regards inheritances which are held in chief of the lord king, however…[the heir cannot] enter forcibly into the inheritance before receiving it from the hands of the lord king."[178]

Let us now examine one of the aforementioned "less common cases" for which the thirteenth century "superstructure" was erected. The assizes instituted by Henry II would be able to assist B, who was disseised by A. But suppose that A, who held the land that he had taken from B, died, leaving his heir C, who did not partake in the disseisin, in seisin of B's tenement. Novel disseisin could not apply, because it could only be used against the perpetrator of the disseisin. B could not simply take the land for himself, for "self-help is an enemy of law, a contempt of the king."[179] As Maitland observes, "The man who is not enjoying what he ought to enjoy should bring an action," but B did not seem to have any recourse.[180]

---

[176] *EHD*, III, no. 44. See also the Statute of Gloucester (1278), *EHD*, III, no. 52.
[177] Milsom, "What Was a Right of Entry?," 568; Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted*, p. 368.
[178] *EHD*, III, no. 44.
[179] Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, p. 574. However, a court could accept that "violence was justified if…[the disseisor] could prove that his right to the property was good." This type of *post hoc* justification reinforced the idea that the king was above all concerned that the rightful owner remain in seisin. Sutherland, *The Assize of Novel Disseisin*, p. 119.
[180] Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, p. 574.

The Writs of Entry

A great strength of a common law system is its ability to fix gaps in the law as they are revealed, and beginning in 1204, B would be able to bring an action through a newly minted "writ of course": the writ of entry *sur disseisin*.[181] Unlike the other early writs of entry, it developed from one of the possessory actions – the assize of novel disseisin. In a writ of entry, "The tenant, it is alleged, had no entry into the land except in a certain mode…one [which is] incapable of giving him a good title."[182] *Sur disseisin* claimed that the tenant had no entry save through B having been disseised. C, the disseisor's heir, had a clearly flawed title, and the writ of entry *sur disseisin* allowed B to challenge him:

> The king to the sheriff, greeting. Command [C] that justly etc. he render to [B] three messuages with appurtenances in N. into which the said [C] has no entry save by [A] who unjustly and without a judgment disseised the said [B]…[183]

After 1275, even if B brought a writ of novel disseisin against A, and A died before the assize leaving C in possession of the tenement, he did not have to return to chancery and purchase a new writ – he was "to have his writ of entry founded *sur disseisin* against the heir…of the disseisor."[184] Three years later B was also able to recover damages against the disseisor's successor.[185]

---

[181] Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, p. 64; Brand, *Kings, Barons and Justices: The Making and Enforcement of Legislation in Thirteenth-Century England*, p. 153. There were two other common cases where this writ was applicable: 1) if A disseised B, whether he enfeoffed a D or held the land himself, B's heir could bring the writ against either A or D; and 2) if disseisor A enfeoffed D, B or his heir could bring the writ against D's heir. See Palmer, "The Origins of Property in England," 32.
[182] Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, p. 64.
[183] *Registers*, CC. 197.
[184] *EHD*, III, no. 47.
[185] Ibid., no. 52.

Originally, the writs of entry (other than *sur disseisin*) were used by lords who, unable to ask *quo warranto* of a tenant, instead used the king's court to, for example, "recover against tenants holding over after an expired lease," or the tenant's heir or alienee, through the writ of entry *ad terminum qui preteriit*, or "for a term that has expired."[186] Later, in the thirteenth century, the majority of writs of entry claim that the tenant had "come to the land by virtue of an alienation made by someone who, though he was occupying and rightfully occupying, had no power to alienate it."[187] There were, for example, writs of entry for recovering land alienated by a guardian while the claimant had been a ward,[188] or land alienated "while of unsound mind."[189] Common among the early writs of entry against tortious feoffment was the writ of entry *cui in vita*, for a widow whose husband had, without her consent, alienated her dower lands.[190] Thus, in the case discussed at the beginning of Chapter 2, if William of Roumare had lived in the thirteenth century, he would have been able

---

[186] Palmer, "The Origins of Property in England," 25-6; Brand, *Kings, Barons and Justices: The Making and Enforcement of Legislation in Thirteenth-Century England*, p. 153. For examples, see *Registers*, R. 767, 768, Hib. 25.

[187] Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, p. 68; Brand, *Kings, Barons and Justices: The Making and Enforcement of Legislation in Thirteenth-Century England*, p. 151. As we will see below in Chapter 4, the expanded freedom to alienate without the lord's consent meant that land transfers were two-handed (donor – donee) rather than three-handed (donor – lord – donee), and so two-handed writs of entry came about that meant lords were no longer "parties to the assize" and so they were rendered "invisible." Palmer, "The Origins of Property in England," 33; Milsom, "What Was a Right of Entry?," 571.

[188] *Registers*, CC. 198.

[189] The writ of entry *dum non compos* could be used by the heir of the "idiot," or by the "idiot" himself after he regained his wits. *Registers*, CC. 195, 196; Palmer, "The Origins of Property in England," 27-8, 36.

[190] *Registers*, CA. 12. One of the more interesting proceedings in a *cui in vita* case comes from Lincoln in 1219. A widow tried to recover land in which the tenant "has no entry save through…her late husband who sold them to him and whom in his life [cui in vita] she could not gainsay." The tenant, however, "says that it does not seem to him that he ought to reply to [the widow]…because…[her husband] is in the parts of Jerusalem safe and sound." The judges instructed the widow to bring witnesses to swear to her husband's death when next they came to Lincoln. *Rolls of the Justices in Eyre*, nos. 655, 521, 669, 649; Sutherland, *The Assize of Novel Disseisin*, p. 110.

to bring a writ of entry *sur cui in vita* against his stepfather's alienee, but since his mother apparently consented, his case would have failed.

The "number of writs which were issued as of course" to allow those claimants not covered by the earlier assizes to have their cases heard, particularly through writs of entry, "increased rapidly" during the long reign of Henry III.[191] Instead of the writ of right, the claimant could bring a specific writ of entry which "alleged a single flaw in the tenant's title."[192] Furthermore, there was a greater demand for royal remedies in land disputes due to the growth of a land market, which meant that "the writs of entry had to deal with the world of conveyancing."[193] This led to the elimination of the degree requirements for the writs of entry, allowing lawsuits to be brought for flawed titles that had been acquired long ago. In our *sur disseisin* case above, B could bring the writ against C, who was in the second hand, that is, the land had gone from B to A to C. C's feoffee or heir would be the third hand, or the tenant who gained the land after the third change in possession. Until the 1263/4 reissue of the Provisions of Westminster, the fourth hand and beyond were safe from litigation under the writ of entry.[194] It was "provided that, [if] alienations for which the writ of entry is customarily given have passed through so many degrees that this writ is unavailable in the form previously in use, the complainant is to have a writ to recover his seisin without mention of degrees to whomsoever's hands that

---

[191] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 195. The different proceedings started by each writ had their own specific rules, inspiring Maitland's comparison of the chancery to an armory, quoted at the beginning of this chapter. Ibid., II, pp. 561-2.
[192] Palmer, "The Origins of Property in England," 24; Milsom, *Historical Foundations of the Common Law*, p. 106.
[193] Biancalana, "The Origin and Early History of the Writs of Entry," 548-9.
[194] Brand, *Kings, Barons and Justices: The Making and Enforcement of Legislation in Thirteenth-Century England*, p. 160.

property has come."[195] This provision was repeated in the 1267 Statute of Marlborough.[196] The writs of entry in the *post* (not limited by degree) contributed to the success of the royal court by "attracting new business" that would not otherwise have necessarily "reached the king's court in actions of right."[197] Where in 1250 the division of cases between actions of entry and of right was seventy percent to thirty percent, in 1290 writs of entry made up 64 percent of these cases, writs of entry in the *post* were thirty percent, and writs of right only six percent.[198]

Along the same lines as the expansion of the writs of entry, the principles behind mort d'ancestor, the norm of security of tenure within a family, gave rise to the expanded enforcement of heritability. The writ of mort d'ancestor itself could be brought only on the death of an immediate family member, usually a parent. The writ of aiel could be brought "for claims based on the seisin of a grandfather or grandmother," and the writ of cosinage could be brought for the seisin of any other relative not covered by aiel or mort d'ancestor.[199] Here we see that once the basic norms of landholding had been enshrined in royal law, that law evolved in the thirteenth century to "mold existing remedies to new situations."[200] As Maitland observes, the royal defense of norms engendered the belief, or even a new norm, that the king's court should be "omnicompetent," as free tenants expected remedies for

---

[195] Ibid., p. 449.
[196] *EHD*, III, no. 44.
[197] Brand, *Kings, Barons and Justices: The Making and Enforcement of Legislation in Thirteenth-Century England*, pp. 338-9.
[198] Ibid. Biancalana notes that the writs of cosinage and aiel had helped to blur the line between "claims to seisin and claims of right." Biancalana, "The Origin and Early History of the Writs of Entry," 544-48.
[199] Brand, *Kings, Barons and Justices: The Making and Enforcement of Legislation in Thirteenth-Century England*, pp. 54-5. Like the original writ of mort d'ancestor, these writs were "primarily intended for use against the lord." For examples of writs of aiel and of cosinage, see *Registers*, CC. 184, 185.
[200] "The Common Law Origins of the Infield Fly Rule," 1480.

"every wrong."[201] The building of precedent upon precedent was in some sense inexorable.

By the mid-thirteenth century, if not earlier, there had evolved a "graduated hierarchy of actions" based upon the degree of "possessoriness" involved.[202] The more possessory an action was, the more "recent and notorious" the facts were, the fewer questions were asked, and the more summary the judgment. Maitland ordered them as follows: novel disseisin (which asked two questions), mort d'ancestor (which asked three), the writs of entry, and ultimately the writ of right.[203] All of these proceedings were, of course, in the king's courts, which were "fast becoming the only judicial tribunals of any great importance" and were, according to Maitland, "well trusted by the nation at large."[204] Since, as Milsom suggests, the result of Henry II's reforms was that title now "reside[d] in the king's court" rather than the lord's, it follows that cases alleging a flawed title – as the writs of entry did – could be heard only in the royal court.[205] This "triumph"[206] of royal justice demonstrates that, in the approximately 100 years after the Anarchy, owners of free tenements had come to rely exclusively on the king rather than their lords to uphold their rights in land. This victory was so complete that in the 1285 Statute of Westminster II, Edward I

---

[201] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 203.
[202] Ibid., II, p. 74.
[203] Sutherland, *The Assize of Novel Disseisin*, p. 40; Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, p. 74. Note that, because of its "strong affinities with" the writ of right, proceedings "begun by writ of entry may by the pleadings be turned into a final, proprietary action." Cf. *Bracton*, II, pp. 320-1.
[204] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 202.
[205] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 174; Sutherland, *The Assize of Novel Disseisin*, p. 82.
[206] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 202.

"grant[ed] that novel disseisin shall henceforth apply in more cases."[207] While Henry II "could not ride roughshod over the valued rights of feudal courts by making [novel disseisin] available for all kinds of suits," his reforms, especially novel disseisin, had so effectively brought the defense of property rights under the sole jurisdiction of the royal courts that the judgments of the lord's court had little value, and so seigniorial jurisdiction rights were "no longer…worth caring for."[208]

3. THE LORDS LOSE REAL POWER

Even in the 1120s, grantors had attempted to avoid providing *escambium* in cases where royal intervention had displaced the grantee.[209] With the shift from the tenant's title coming from the lord, to his title "resid[ing] in the king's court," warranty from the lord became "a contractual addition" and was in reference almost exclusively to *escambium*.[210] The other duties of warranty, particularly protection of the tenant's title, had been "institutionalized and very largely removed from the realm of personal relations" and were performed by the royal courts.[211] Hyams argues that the impersonal warranty of the late twelfth and thirteenth centuries "followed [from] the logic of the new remedies to the better protection of tenant-right."[212] While the ability of the royal courts to uphold the tenant's title certainly derived from novel disseisin and mort d'ancestor, the logic itself stretched back at least to the Salisbury

---

[207] *EHD*, III, no. 57. Ten years earlier he had provided for more frequent taking of the possessory assizes. Ibid., no. 47.
[208] Sutherland, *The Assize of Novel Disseisin*, pp. 82, 130-1.
[209] Hudson, "Life Grants of Land and the Development of Inheritance in Anglo-Norman England," 77.
[210] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 174.
[211] Hyams, "Warranty and Good Lordship in Twelfth Century England," 483. Consent for transactions was also often sought in the king's court rather than the lord's, which, although indicative of the lord's loss of power, also protected him from the risk of having to provide *escambium* for a tenant he let in who was then displaced by a royal action. Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 106.
[212] Hyams, "Warranty and Good Lordship in Twelfth Century England," 480.

Oath in 1086:[213] if the king was the ultimate lord, then he was also the ultimate warrantor.

The English kings, through the "exceptional vigor" of their courts and monarchy,[214] had brought about a jurisdictional shift that struck a great blow at the lords' power.[215] The royally-enforced title, or ownership, that Henry II's reforms created was "incompatible with a system of truly dependent tenures," and so the rights that had been tenurial – "The tenant's right to his tenement and the lord's right to his dues" – became "independent properties, each passing from hand to hand without reference to the other."[216] Along with the advent of scutage,[217] there was also a general "commercial[ization]" of feudalism and a "growing money economy," and so the lord's interest "shifted from services to incidents."[218] In the thirteenth century, there developed a "considerable apparatus of royal actions…for the protection of

---

[213] See above, Ch. 2.3. Hudson, "Anglo-Norman Land Law and the Origins of Property," p. 216.
[214] Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, p. 558.
[215] Lyon, "Review: The Emancipation of Land Law from Feudal Custom," 786. This shift, as Lyon notes, also brought the kings additional revenue, which was, in this zero-sum game, therefore denied the lords. Given what we know of the English kings, particularly Henry II, any explanation of Henry's reforms must take into account the desire to "diminish…vassals' power." In this sense, Milsom, by emphasizing the feudal context of the reforms, naïvely ignores the political context. As Hyams argues, "Milsom cannot refute the case for an Angevin policy on seisin simply by ignoring it." Hyams, "Review: The Legal Framework of English Feudalism," 859; Sutherland, *The Assize of Novel Disseisin*, pp. 33-4. Cf. White, "Review: The Legal Framework of English Feudalism," 362. Further, according to Maitland, even in the time of Henry I the law for tenants-in-chief "was perhaps the severest in Europe." Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 96.
[216] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, pp. 121, 38. Additionally, the lord came to be regarded as having seisin of the incorporeal service, rather than seisin of the corporeal entity (land) itself. Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, pp. 38-9.
[217] See above, Ch. 1.1.
[218] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, pp. 328-9; Lyon, "Review: The Emancipation of Land Law from Feudal Custom," 785; Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 155. See below, Ch. 4 for discussion of the incidents.

wardship, marriage, and escheat" in defense of the lord's financial interest.[219] Registers of writs from the thirteenth and early fourteenth centuries contain writs for the lord's use against his tenant to recover services.[220] While it would have been unthinkable in the early twelfth century that the lord's disciplinary power would be so deeply weakened as to be wholly dependent on royal authorization, the Statute of Westminster II in 1285 provided lords with a writ, called *cessavit per biennium*, for forfeiture of land on which the tenant's services had been in arrears for two years.[221] Nevertheless, the days of the lord's proprietary interest in who held of him were well in the past, and this was made official in 1290 by the statute *Quia Emptores*, which granted tenants the ability to alienate freely, without the lord's consent.[222] The depersonalization of homage, warranty, and landholding in general that ultimately resulted from novel disseisin and mort d'ancestor had eviscerated the lord's ability to control who held of him.[223] This should be understood as a direct consequence of Henry II's rewriting of the feudal social contract, which meant that only the central government, and not the lords, had jurisdiction over property rights.

---

[219] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 155.
[220] *Registers*, Hib. 36, CC. 149, R. 519-22.
[221] *EHD*, III, no. 57; Milsom, *Historical Foundations of the Common Law*, p. 95. See also the Statute of Gloucester, *EHD*, III, no. 52.
[222] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 155. See below, Ch. 4.2.E for discussion of *Quia Emptores*.
[223] Waugh, "Non-Alienation Clauses in Thirteenth-Century English Charters," 2; Sutherland, *The Assize of Novel Disseisin*, p. 82.

CHAPTER 4 - ALIENABILITY

"The sound conclusion seems to be that…we must start not from the absolute inalienability of 'the fief,' nor from the absolute alienability of 'the fee simple,' but from something much less satisfactory, an indeterminate right of the lord to prevent alienations which would seriously impair his interests, a right which might remain in abeyance so long as there was plenty of scope for subinfeudation and the liberty of endowing churches was not abused."

Frederic William Maitland[1]

As discussed in Chapters 2 and 3, the strengthening of heritability and security of tenure through the assizes of novel disseisin and mort d'ancestor gave legal backing to tenants' normative claims to their land. Here we consider the third component of medieval property rights – alienability.[2] Where one's rights in property are uncertain or precarious, as was the case in Anglo-Norman England, alienation is problematic: how can one grant something for which they lack secure title? With Henry II's reforms, tenants could alienate their land without restraint by heirs or the fear of lordly retribution. As this ability was exercised more and more, there then developed legal means of limiting transfers that hurt the lord's economic standing, especially gifts to the church. Ultimately, the statute *Quia Emptores* of 1290 settled the problems of alienation; it provided for free alienability, while preserving the lord's financial interest.

[1] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 346.
[2] See above, Ch. 1. Hudson, "Anglo-Norman Land Law and the Origins of Property," p. 200.

1. LAND TRANSFERS, C. 1066-1200

As with our discussions of heritability and security of tenure, it will be instructive to examine first the norms and customs of alienability that the Normans brought to England. The eleventh century saw a settling of political conditions in Normandy, and the concomitant "origin" of an aristocracy.[3] The increased stability in landholding meant that land "transfers would have become increasingly noteworthy as interruptions of continuity."[4] The introduction of tenurial landholding[5] meant that the old distinction between "inheritance" (*alodium* held by successive generations) and "benefice" (land granted in dependent tenure) gave way to a distinction between "inheritance" (any land held in a family, regardless of whether it was a dependently held *feodum*) and "acquisition" (without reference to whether it was held of another).[6] This in turn led to principle that acquisitions, or conquests, were more freely alienable than inheritances, since one should not alienate his patrimony.[7] By the late eleventh century, the distinction was "well on its way" to being "incorporated" into Norman law.[8] This framework would remain in place for Glanvill,[9] but its importance had diminished by the turn of the thirteenth century.

1.A. SUBSTITUTION AND SUBINFEUDATION

The first Norman tenants in England acquired their property in return for military service. They had fairly broad power to dispose of their acquired lands, provided their own tenants were amenable, technically – if not practically –

---

[3] Tabuteau, *Transfers of Property in Eleventh-Century Norman Law*, p. 42.
[4] Ibid.
[5] See above, Ch. 2.1.
[6] Tabuteau, *Transfers of Property in Eleventh-Century Norman Law*, p. 102.
[7] Ibid.
[8] Ibid.
[9] *Glanvill*, pp. 70-1.

irrespective of the wishes of their lord or heir.[10] The earliest alienations in post-Conquest England were accomplished by subinfeudation of this newly-acquired land. The tenants-in-chief who fought at Hastings and earned baronies had the obligation to "produce a contingent of men" for the king's army.[11] Their tenurial contracts, described in Chapter 1, were a means of "pass[ing] on the obligation to military service imposed by the king," whereby these men "distributed smaller parcels to their followers."[12] The workings of subinfeudation and its inherent problems are highlighted by the following example. Suppose that tenant-in-chief B owed the king the service of twenty knights; he could then give parcels of land to twenty of his followers for the service of one knight each, and thereby meet his service to the king at no further cost to himself. Tenant C, then, held of B for the service of one knight, but did not have a direct tenurial relationship with the king.

This underscores the main problem of subinfeudation: the difficulty the king and other lords had in controlling it. Undertenants could donate to churches, and tenants-in-chief could enfeoff a much larger number of fighting men than they owed the king, giving them a potential power base from which to challenge the king's authority. The desire to mitigate this threat provided the impetus for royal initiatives such as the Salisbury Oath in 1086, which were designed to ensure that men such as C in the foregoing example swore loyalty to the king, and not just to B.[13] Similarly,

---

[10] Tenants' consent appears to have been necessary for alienations in Normandy, and Tabuteau cites charters which suggest that the donor's gift to the church would have been larger but for a recalcitrant tenant limiting the amount of land that would change hands. Tabuteau, *Transfers of Property in Eleventh-Century Norman Law*, p. 173.

[11] Milsom, *Historical Foundations of the Common Law*, p. 91.

[12] Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted*, pp. 356, 345.

[13] Holt, "Politics and Property in Early Medieval England," 32. Holt notes that undertenants had significant incentives for this, not only security of tenure: loyal tenants of rebels had their tenancies

when in 1166 Henry II inquired of his tenants-in-chief who held of them, it was discovered that many were owed more knight service than they themselves owed, and Henry endeavored to ensure that each undertenant swear loyalty to him.[14] In Henry's case, these concerns were well-founded, and after his sons' rebellion in 1173-4 he required that any who had not yet done so "pay homage and allegiance to the king as their liege lord."[15] These oaths strengthened the bond between king and undertenant, thereby helping to prevent instability and to improve the position of undertenants against their immediate lords.[16]

The alternative to subinfeudation was substitution, where C gave or sold his tenement to G, who then held of B on the same terms as C had done. In contrast to subinfeudation, substitution required, *eo ipso*, the lord's approval, since he would not want a tenant who was unable or unwilling to provide the services owed for the tenement. Accordingly, substitution was easier for lords to control, and so was far less common during the twelfth century.

Through the twelfth century, inherited lands generally passed to the eldest son through primogeniture,[17] and acquired lands, including those obtained through marriage, "were often used to endow younger sons" who would otherwise not have inherited.[18] The younger sons of Henry II were beneficiaries of this custom: Richard was given Aquitaine, and Geoffrey was given Brittany.[19] Further, the ability to

---

"converted…into tenancies-in-chief" or were "excepted…from the grant of a rebel's estates to a new tenant-in-chief."

[14] *EHD*, II, nos. 224-34. The archbishop of York in 1166, for instance, owed the service of 20 knights, but was himself owed the service of 43.88 knights by his tenants.

[15] Ibid., no. 25.

[16] Holt, "Politics and Property in Early Medieval England," 32.

[17] See above, Ch. 2.3.

[18] Holt, "Politics and Property in Early Medieval England," 12.

[19] Ibid.

control the fate of the alienated lands, such as through grants *in feodo et hereditate*, allowed a father to "make a permanent provision both for the younger son and his descendants."[20] This was done through substitution, rather than subinfeudation, and it was the only case in which substitution "was invulnerable and remained frequent" until the thirteenth century.[21] Such alienation was predominant given the "broad rule…that no one can give rights in land by…[a] will," and because a father could not "easily ensure that his heir will honor the gift" if it was done by subinfeudation, whereby the younger son would hold of the heir.[22]

The political conflicts of the twelfth century illustrate both the problems of wills and the rationale for alienation *inter vivos*. Although Henry I had demanded that his barons swear allegiance to Matilda, Stephen was nevertheless able to seize the throne. As noted in Chapter 1, Henry II enfeoffed, at least nominally, his sons Richard and Geoffrey as duke of Aquitaine and Brittany, respectively, and had his eldest son, Henry, crowned king of England during his lifetime. He did this in the hope of forestalling any wars among his sons after his death over his empire, knowing that a will would not be sufficient for the peaceful partition of his lands.[23] *Inter vivos* alienation, though "a poor substitute for a will, was the safest technique available."[24]

This form of alienation by substitution is seen in the case of William of Anisy, who, sometime between 1120 and 1140, gave land at Sherfield to his younger son, Richard.[25] William took care to note that the land "is of my acquisition."[26] The grant

---

[20] Ibid.: 42.
[21] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 110.
[22] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 307; Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 137.
[23] The premature deaths of Henry "the Young King" and Geoffrey rendered these actions largely moot.
[24] Simpson, *A History of the Land Law*, p. 62.
[25] *EHD*, II, no. 249.

follows the form that Holt describes, as the charter states explicitly that William gave the land to his "son, Richard of Anisy, *and to his heirs* freely."[27] The only reference to permission for, or approval of, the alienation was that William had made the grant with "the counsel and will…and with the assent of William of Anisy, my heir."[28]

That there are three statements of the heir's acquiescence in this record of the transaction, and none of the lord's, is telling. Nevertheless, because this was a substitution, the role of the lord in the transaction was critical. William formally "returned that fee to my lord" who then "put my son, Richard…into possession of the same fee, and has received his homage."[29] Given that the land could not transfer directly to Richard, but must instead go through the lord, the lord's consent was necessary. This was true of substitutions and marriages, since in each case the land that had been held of B by C would be held of a new tenant. Glanvill notes that the lord's consent was critical here, "lest he be forced to receive homage for his fee from an enemy or some otherwise unsuitable person."[30] Maitland argues that while Glanvill, later that century, "speaks at some length of the restraints on alienation that are set by the rights of expectant heirs," he "nowhere says that the tenant can not alienate his land without his lord's consent," despite the obvious "opportunity for saying that the rights of the lord also must be considered."[31] This, however, refers only to subinfeudations, where C remains B's tenant, and so C's enfeoffee did not do homage to B; the lord's consent was still necessary for substitution.

---

[26] Ibid.
[27] Ibid. Emphasis added.
[28] Ibid.
[29] Ibid.
[30] *Glanvill*, p.85; Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, pp. 104-5.
[31] *Glanvill*, pp. 69-74; Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 332, n. 1.

1.B. GLANVILL ON ALIENATION

Though not a part of the "common law position on alienation," which was "settled not long after"[32] the text was written in c. 1188, Glanvill offers an illuminating articulation of the rules that guided William of Anisy's alienation. Glanvill argues that, given the possibility of memory loss, "turmoil [and] suffering" at the end of one's life, it was proper that men generally not be allowed to alienate via wills or deathbed wishes.[33] Wills could, however, be deemed valid if "confirmed with the heir's consent."[34] Indeed, the import of the heir's consent is as emphasized by Glanvill in the 1180s as by William of Anisy between 1120 and 1140.

While Glanvill states that there was a distinction between the alienability of inherited land and of acquired land, the difference was one of degree rather than of kind. If a man "has only inherited land, he can…give a certain part of that inheritance to any stranger he chooses."[35] Similarly, one who had only acquired land could alienate only part of his possessions.[36] If one had land of both types, then "it is beyond question that he can give…part or all of his acquired land to whom he pleases."[37] In each case, the limiting factor was the same, the presence of an heir: "*non potest filium suum exheredare*."[38] Glanvill also gives examples of alienations where, although the heir's consent was not recorded, the charter notes that the land was an acquisition and not the grantor's patrimony, and so the heir was not being

---

[32] *Glanvill*, Hall's notes, pp. 184-5.
[33] Ibid., p. 70.
[34] Ibid.
[35] Ibid.
[36] Ibid., p. 71.
[37] Ibid.
[38] Ibid. "…he must not disinherit his son."

disinherited.[39] Ensuring that heirs were properly endowed seemed to be almost the only consideration for the would-be alienator, as though the land was held in trust for the next generation.[40] This view is supported by a comparable proscription on alienating land held in wardship.[41] Again, to restate Maitland's observation, though Glanvill provides an extensive discussion of limits on alienability by subinfeudation, the discourse focuses solely on the heir, who would be obligated to warrant his father's grants,[42] and we are left to assume that the lord, his disciplinary power eroded by Henry II's reforms, had no legal control over his tenants' subinfeudations.

Glanvill's view reflects the restriction of the lord's role implicit in the assize of novel disseisin. Scott Waugh argues that "The right to consent to a tenant's alienation of his holding had been an essential prop of lordship prior to" the reforms made by Henry II.[43] It is, however, an exaggeration to refer to this custom as a legal right, since there is no evidence to suggest that it was formally upheld by law. Indeed, the custom itself was relatively neoteric, as Tabuteau emphasizes that despite the frequency with which Norman charters claim a lord's consent as a precaution, the lord's consent was "not legally necessary."[44] In practical terms though, Waugh is probably correct that the specter of disseisin by the lord made it more likely that tenants would be careful about to whom they would alienate their land, particularly

---

[39] Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, p. 309.
[40] This does not mean to imply the specific problem of entail, which was based on a specific reading of the Statute of Westminster II and became "accepted doctrine" only in the 1420s. Klerman, "Review: The Fee Tail and the Common Recovery in Medieval England, 1176-1502," 272. See Appendix, no. 12.
[41] *Glanvill*, p. 82.
[42] For example, see *EHD*, II, no. 196: a Ralph donated one toft of land to a church in "perpetual alms" and pledged that "I and my heirs will warrant" the gift.
[43] Waugh, "Non-Alienation Clauses in Thirteenth-Century English Charters," 1.
[44] Tabuteau, *Transfers of Property in Eleventh-Century Norman Law*, pp. 173, 87.

for substitutions, which remained very rare except in the case of younger sons.[45] Even so, the charter recording Walter of Bolbec's grant by subinfeudation to the abbey of Ramsey[46] does not mention a lord's consent; and this was prior to the advent of novel disseisin. Thus, we can conceive of reasonably free alienability, saving the heir's (and, technically, the affected undertenants') consent, as a norm that, violated by lordly practice, was reified by the assize novel disseisin.[47]

1.C. ON THE RARITY OF SUBSTITUTIONS IN THE TWELFTH CENTURY

However, in some cases, such as that of William of Anisy, we should not simply assume that the lord would necessarily want to block alienations *inter vivos* to a younger son. As noted above,[48] there were clear advantages for a lord to have tenants who had "been raised in [his] service.[49] William's lord, Henry of Port-en-Bessin, lost nothing by having William's younger son as his new tenant – Richard of Anisy held the land for the same service as his father had.[50] On the whole, however, substitutions remained rare in the twelfth century, though they became more common during John's reign (1199-1216).[51] While Bracton claimed that lords could be forced

---

[45] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 110.
[46] *EHD*, II, no. 253. See also above, Ch. 2.4. As this alienation was via subinfeudation, we can reasonably posit that, since Walter would still hold immediately from his lord, the lord's consent was not necessary, and that his consent was only "necessary" for substitutions. Since subinfeudation was "much commoner" than substitution, it would seem that, even if we accept that lords had some practical veto power over substitutions, they did not have power over the majority of alienations. Further, by this time subinfeudations in Normandy did not require the lord's consent. Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, pp. 345, 342.
[47] Though this seems to be the result (and Waugh certainly thinks so), the assize was not created to allow for freer alienation of land. Instead, this result seems to have been what Milsom would term a "juristic accident." Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 37. See above, Ch. 3.2.B.
[48] Ch. 2.3.
[49] Palmer, "The Origins of Property in England," 6.
[50] *EHD*, II, no. 249.
[51] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 110.

to accept a new tenant and his homage,[52] Brand observes that there is no evidence to support this claim.[53] There is also no evidence that a lord was ever forced to accept a substitution, and, unlike cases of inheritance where there existed a writ of course to compel acceptance of homage,[54] no such writ existed to compel acceptance of a "substitute tenant."[55] Brand's argument is consistent with Waugh's, as he suggests that substitutions "always required the active cooperation of that lord in order to become effective, and were therefore always under their full and effective control," though this was eroded by novel disseisin.[56]

Less straightforward were gifts to churches, which often then held the lands in free alms, or frankalmoin; a lord would then lose the ability to "exact…any service" from the land.[57] Not all gifts to churches "excused the performance of service," but those "in free, pure and perpetual alms" did.[58] Gifts in frankalmoin were said to pass into the "dead hand" (mortmain) of the church, because the church did no service for the land, and never alienated it permanently.[59] In the example of Walter of Bolbec, the church held for knight service, and Walter's lord still received the same service from the same tenant, but even so the division of fees created other problems, as, if Walter's line expired, the land would escheat, but the lord would have a tenant he had not accepted.

---

[52] *Bracton*, II, pp. 140-3, 234-7; Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted*, p. 382, n. 268.
[53] Paul Brand, "The Control of Mortmain Alienation in England, 1200-1300," in *Legal Records and the Historian: Papers Presented to the Cambridge Legal History Conference, 7-10 July 1975, and in Lincoln's Inn Old Hall on 3 July 1974*, ed. J.H. Baker (London: Royal Historical Society, 1978), p. 29, n. 4.
[54] See above, Ch. 2.5
[55] Brand, "The Control of Mortmain Alienation in England, 1200-1300," p. 29, n. 4.
[56] Ibid., p. 29.
[57] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 342.
[58] *Bracton*, II, p. 93. For examples, see *EHD*, II, nos. 195, 235-7; *Lawsuits*, no. 638.
[59] See above, Ch. 2.3 for canon law strictures against alienations by churches

2. THE THIRTEENTH CENTURY: FROM SUBINFEUDATION TO *QUIA EMPTORES*

2.A. THE ECONOMIC BACKGROUND

The development of the common law and shifts in rules regarding alienability in the late twelfth and early thirteenth centuries occurred during a period of unusually high inflation, with prices rising by approximately 300 percent between 1180 and 1220.[60] Palmer suggests that this "great inflation" resulted from the changes in the land law that facilitated the alienability of land, positing that those changes made land more liquid and "increased the ability of tenants to use land as security for loans," which in turn led to an increase in the "velocity of money circulation."[61] However, the obverse of Palmer's hypothesis appears more plausible: that economic pressure in the form of the depreciation of the value of money increased the attractiveness of land as "an income-yielding store of value," which, combined with new limits on lordly control, led to a greater "transactions velocity."[62] Of course, given this increased

---

[60] Palmer, "The Economic and Cultural Impact of the Origins of Property: 1180-1220," 382; P. D. A. Harvey, "The English Inflation of 1180-1220," *Past and Present*, no. 61 (1973). Latimer locates a "substantial price surge" of approximately 200 percent specifically between 1198 and 1206. Paul Latimer, "The English Inflation of 1180-1220 Reconsidered," *Past and Present*, no. 171 (2001): 4.

[61] Palmer, "The Economic and Cultural Impact of the Origins of Property: 1180-1220," 381-2, 89; Latimer, "The English Inflation of 1180-1220 Reconsidered," 12-3. Other proposed explanations include changes in agricultural management, the shift from labor services to money rents, rapid growth in exports (especially wool), strengthened government after the Anarchy, and mismanagement by King John. See Harvey, "The English Inflation of 1180-1220," 18-25; Latimer, "The English Inflation of 1180-1220 Reconsidered," 9-12.

[62] Latimer, "The English Inflation of 1180-1220 Reconsidered," 27. Other factors that contributed to the increased transactions velocity with respect to land include population growth and a warmer climate – summers were almost 1°C warmer than the modern average – which led to more land becoming arable (and even to wine production in England). Latimer, "The English Inflation of 1180-1220 Reconsidered," 9; Brian Fagan, *The Little Ice Age: How Climate Made History 1300-1850* (New York: Basic Books, 2000), p. 17; Norman F. Cantor, *In the Wake of the Plague: The Black Death and the World It Made* (New York: The Free Press, 2001), pp. 68-9. Of course, none of these explanations can be proven definitively. As Harvey notes, positing the causes of economic developments in England during the late twelfth and early thirteenth centuries is necessarily speculative. Harvey, "The English Inflation of 1180-1220," 25.

demand for land, its price then "rose very rapidly and steeply."[63] If, as Paul Latimer suggests, the inflation was due in large part to "people's desire to hold less of a suddenly suspect coinage," then the recoinage in 1205, with its "generous limits for allowing underweight coins to continue" circulating at their original value, was insufficient to stem a long-term decrease in the "demand for money as a store of value" that lasted well into the reign of Henry III, if not longer.[64]

2.B. THE GROWTH OF FREE ALIENABILITY

Through various developments, then, including the assize of novel disseisin, the turn of the thirteenth century saw an increase in the "power of alienation."[65] The growth of free alienability affected both heirs and lords. The heir lost the ability to control his father's alienations by withholding his consent, and the lord lost the disciplinary power that had allowed him to regulate his tenant's actions with regard to land.

Impact on heirs

Although little more than a decade earlier Glanvill had emphasized the need for the heir's consent for alienation, at the beginning of the 1200s "this restraint silently disappeared," and a tenant could "alienate the land away from his heir."[66] The heir joined the lord in being legally powerless to void an alienation by subinfeudation. As Sutherland notes, "free tenants had gained…a very full right to give or sell their holdings as they pleased."[67] By the thirteenth century, then, the

---

[63] Cantor, *In the Wake of the Plague: The Black Death and the World It Made*, pp. 68-9.
[64] Latimer, "The English Inflation of 1180-1220 Reconsidered," 19, 26-7. See also Paul R. Hyams, "The Origins of a Peasant Land Market in England," *The Economic History Review* 23, no. 1 (1970).
[65] Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, p. 13.
[66] Ibid.
[67] Sutherland, *The Assize of Novel Disseisin*, p. 86.

existing "lofty feudal ladders" of complex tenurial relations had not been "manufactured only by the process of adding new rungs at their nether ends; new rungs were often inserted in their middles."[68]

Furthermore, later in the thirteenth century, according to Bracton an heir did not have any claim whatever on land alienated by his ancestor – indeed, he was obligated to warrant it.[69] This "warranty bar," enforced by mort d'ancestor, prevented the heir from acting on "second thoughts" about his father's alienation, and he could not take the land in demesne, so his consent was superfluous and meaningless.[70] While in earlier times it might have appeared that William of Roumare's claims[71] were bolstered by norms of heritability, the "strong bias in favor of free alienation" typified by Bracton[72] indicates that the prevailing norm was no longer simply one of heritability, but rather of a tenant's ability to decide independently the fate of his land. Mort d'ancestor ensured that his heir could inherit, and novel disseisin and ultimately *Quia Emptores* ensured that he could alienate freely – the tenant's decisions were protected and there was a concomitant shift in the

---

[68] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 349.
[69] Ibid., II, p. 19; *Bracton*, II, p. 66. This contrasts with eleventh-century Norman custom, where heirs retained an interest in the alienated land. Tabuteau, *Transfers of Property in Eleventh-Century Norman Law*, p. 23.
[70] Milsom, *Historical Foundations of the Common Law*, p. 92; Hyams, "Warranty and Good Lordship in Twelfth Century England," 440; Biancalana, "The Origin and Early History of the Writs of Entry," 550. The import of mort d'ancestor was that if an heir wanted to reclaim his father's land, the father had to have died seised of the land. If it had been alienated, the father would not have been seised at his death, and so the heir, being unable to regain the land through mort d'ancestor, was *de facto* forced to warrant his father's alienation. See above, Ch. 3.1. Maitland notes a case from 1225 where "a son vainly tries to get back a tenement which his father has alienated," complaining that his father should not have alienated all his land, "but it is unavailing." Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, p. 311.
[71] DeAragon, "The Growth of Secure Inheritance in Anglo-Norman England," 385. See above, Ch. 2.
[72] Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, p. 19. This "bias" explains why, in the case of tortious feoffments, "The law could not treat these feoffments as void…Instead, it had to provide ways for the injured parties to undo them," namely, the writs of entry. Sutherland, *The Assize of Novel Disseisin*, p. 110. See above, Ch. 3.2.C.

tenant's ethos: "What ha[d] changed [was] the thinkable."[73] This was the logical result of jurists who worked to restrict the lord's disciplinary powers and who "were disposed to concede to every tenant the fullest possible power of dealing with his land."[74] It follows that "if the English law knows no *retrait feodal* [restraint by the lord]," then neither does it know any "*retrait lignager* [restraint by the heir]."[75]

Impact on lords

Even if the lords' control over their tenants had been reduced, they still had a strong interest in the land itself. Milsom notes that their interests had shifted to the feudal incidents, such as wardships and escheats, and so they were more concerned in the thirteenth century with their ability to extract wealth from lands that could come into their control.[76] Especially in the case of alienations in mortmain, lords found themselves in need of "legal devices that would enable them to alleviate the economic liabilities caused by free alienation" of land that was becoming ever more valuable.[77]

2.C. RESISTANCE TO FREE ALIENABILITY

The barons pushed back against freer alienability, though ultimately, like Canute, they were unable to withstand the tides of history.[78] For them, the problem of subinfeudation was that the enfeoffment of new tenants by their tenants, or the

---

[73] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, pp. 120-1.
[74] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 344.
[75] Ibid. Maitland links this development with the hardening of the primogenitary rule and mort d'ancestor's assurance that the heir will inherit: "if the heir's inheritance is guaranteed, then the object of the restraint in time past had not been solely, perhaps not mainly, the retention of land ' in a family'; it had secured an equal division of land among sons, or as equal a division as the impartibility of the knight's fee would permit. It became useless, inappropriate, unbearable, when the eldest son was to have the whole inheritance." Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, pp. 312. See generally Ibid., II, pp. 309-12.
[76] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 155. See also Milsom, *Historical Foundations of the Common Law*, pp. 94-5.
[77] Waugh, "Non-Alienation Clauses in Thirteenth-Century English Charters," 11.
[78] Canute (1016-35) was a Danish king of England. According to legend, he attempted to demonstrate his power by commanding the incoming tide to stop. Unsurprisingly, it did not.

partibility of fees, led to a "depreciation of escheats, wardships and marriages."[79] For example, if a tenant subinfeudated through a sale and retained only a "nominal service," and then died leaving a young heir, the wardship was now worth far less than it had been prior to the alienation.[80] Even in a case where the subinfeudated land owed substantial rent, this did not guarantee a valuable escheat or wardship. The rent paid for the land of Over, held by the same family for 150 years, rose only from £6 to £7, and the Great Inflation must have reinforced for lords the risks posed by subinfeudation.[81] However, Bracton observes that subinfeudation "does no wrong, though it may do damage, to the lords."[82] It did not deprive him of the service he was owed, nor did it deprive him of his rights to wardships and reliefs – it simply rendered them less remunerative.

It is in this context that we note a marked increase in the powers of the alienator through the thirteenth century. He was able to make the "land descend in this way or in that, make it 'remain,' that is, stay out for this person or for that, make it 'revert' or come back to himself or his heirs upon the happening of this or that event."[83] Unlike one who alienated via substitution, the subinfeudator did not merely "transfer…rights;" rather, he could "creat[e]…new rights," since he had full control over the terms of the alienation.[84] Indeed, "Donors could apply almost any condition

---

[79] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 337. See also pp. 330-1.
[80] Simpson, *A History of the Land Law*, p. 53.
[81] Edward Miller, "England in the Twelfth and Thirteenth Centuries: An Economic Contrast?," *The Economic History Review* 24, no. 1 (1971): 9.
[82] *Bracton*, II, p. 140; Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 332.
[83] Ibid., II, p. 11.
[84] Ibid.

to a grant."[85] Lords made extensive use of this ability to restrict alienations by their tenants.[86]

Non-alienation clauses had long been used by the church but not by secular lords. As noted in Chapter 2, the church often went to great lengths to retain control over its lands, and so it is unsurprising that an early example of a non-alienation clause (which goes further than a clause indicating that this was only a life grant, and not heritable) in England should come from a grant by the abbot of Westminster in c. 1083. William, the enfeoffee, "has pledged us that he will neither sell this land nor place it in pawn nor alienate it to anyone to the loss of our church."[87] Secular lords, confident of their disciplinary authority, do not seem to have employed such clauses, and turned to them only after "the consequences of novel disseisin became more widely known," as the power of the *forma doni* (form of the gift) was used to "restrain alienation."[88] Further, the inclusion of clauses that allowed the lord to

---

[85] Waugh, "Non-Alienation Clauses in Thirteenth-Century English Charters," 3. Though the implications of the statute fall outside chronology of this Thesis, *De Donis Conditionalibus* was enacted in 1285 to ensure that "the wish of the donor, according to the form manifestly expressed in his deed of gift, is henceforth to be observed." This was ultimately interpreted "to bar alienations," irrespective of circumstance, creating the problem of entail. However, this reading of *De Donis* – the idea of a "perpetual restraint on alienation" – was not "accepted doctrine until the 1420s." *EHD*, III, no. 57; Klerman, "Review: The Fee Tail and the Common Recovery in Medieval England, 1176-1502," 272. For more on the problem of entail, see Reeve, *Property*, p.158.

[86] Waugh, "Non-Alienation Clauses in Thirteenth-Century English Charters," 3.

[87] *EHD*, II, no. 219.

[88] Waugh, "Non-Alienation Clauses in Thirteenth-Century English Charters," 3; Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, p. 26. Though these conditional clauses began to appear *en masse* during John's reign, Waugh, writing before Tabuteau's study of Norman charters was published, is incorrect to state that they "first appear" in the late twelfth century, as though they were a new invention. As Tabuteau shows, along with the charter quoted above at n. 84, such grants had been common in eleventh century Normandy. What is of interest here is that while Norman grants assume inalienability unless otherwise stated, the reintroduction of conditional clauses in England implies alienability unless otherwise stated. This demonstrates that, after novel disseisin, the reduction of lordly control implied free alienability in England. Tabuteau, *Transfers of Property in Eleventh-Century Norman Law*, p. 23.

"distrain the tenement if it was alienated contrary to his interests" served to skirt the limits imposed by the assize of novel disseisin.[89]

Though Bracton's arguments downplayed the damage to lords from subinfeudations in general, one type of grant in particular – the grant in frankalmoin – posed the greatest risk for lords. Though there was no standard non-alienation language adopted in the thirteenth century, Waugh observes that "lords were above all interested in preventing grants to religious institutions."[90] Grants in frankalmoin greatly reduced the value of the feudal incidents of escheat and wardship, which were two key elements of the lord's residual financial interest in the lands held of him.[91] If the tenant's line ended, the land usually returned, or escheated, to the lord; if the tenant died leaving an underage heir, the lord then held the land in a non-fiduciary wardship, meaning he was free to extract as much wealth as he could from the tenement. And if this tenant had subinfeudated in alms to a church, then the "lord would get an escheat or a wardship not of the land but of an empty seigniory, bringing in no income but prayers," thereby depreciating the economic value of his lordship.[92] Worse, tenants could subinfeudate, not only without their lord's consent, but even without his knowledge.[93] Needless to say, lords sought to replace their disciplinary authority, lost to novel disseisin, by any means possible to avoid such a loss, and non-alienation clauses were very convenient means of doing so.[94]

---

[89] Waugh, "Non-Alienation Clauses in Thirteenth-Century English Charters," 3.
[90] Ibid.: 6, 4. Waugh does note that many non-alienation clauses prohibit *all* alienations, but here we will focus on alienations to religious bodies.
[91] Milsom, *Historical Foundations of the Common Law*, p. 95.
[92] Ibid., p. 97; Sutherland, *The Assize of Novel Disseisin*, pp. 86-8.
[93] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 116.
[94] Waugh, "Non-Alienation Clauses in Thirteenth-Century English Charters," 5.

We must not assume, however, that lords were entirely powerless to void a transaction physically, and that a new enfeoffee's novel disseisin suit would always be successful. While the courts, as Maitland notes, were well-disposed toward tenants, they often displayed a commonsense approach to novel disseisin.[95] Further, in order to have been disseised, a complainant must first have had seisin of the relevant tenement. Transfers of land in medieval England always involved a physical ceremony or investment. When William the Conqueror made a grant in 1069, for example, the "gift was made by the presentation of a dagger" to an abbot.[96] More developed custom required physical "livery of seisin," the enfeoffee needed to "enter" the tenement in order to take actual possession of it.[97] Without this physical investment in the land, "there was no gift; there was nothing but an imperfect attempt to give."[98]

Lords, tenants, and judges alike in medieval England were very wily when it came to circumventing the law, and in this case, the need for the physical establishment of seisin presented lords with a perfect loophole: they could prevent alienations of which they did not approve, not by disseising the enfeoffee, but by

---

[95] Sutherland, *The Assize of Novel Disseisin*, p. 98. An example of this approach can be seen in case no. 991 from the *Rolls of the Justices in Eyre*. Doris Stenton's translation note on the case calls attention to "the way in which the royal judges used their wide discretionary powers in the interests of justice. The complainant was the serjeant of Oswaldslow hundred and it would have been difficult for a poor widow to recover against such a man a small rent due from a tenement he had purchased from a third party. She and her son therefore took the drastic step of seizing the tenement. She had undoubtedly committed an offence and William's seisin ought certainly to be protected by the assize. But the judges, after hearing what she had to say, and William's admission that the facts were as she stated, ordered that he should recover his seisin and satisfy her in regard to her rent and the arrears. She was not amerced for disseisin for she was poor."

[96] *EHD*, II, no. 239. The charter goes on to note that "and when the king gave it to the abbot, he pretended to stab the abbot's hand. 'Thus,' he jestingly exclaimed, 'ought land to be bestowed.'"

[97] Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, pp. 83-4, 103.

[98] Ibid., II, pp. 83-4.

preventing the new tenant from establishing good seisin.[99] As with the rise of non-alienation clauses in the thirteenth century, this power is described by Sutherland as a "new lordly authority," which was encouraged by "the law's general permissiveness."[100] Disseisin was generally permitted within a certain time limit, which was never clearly articulated, but the lord could not allow "long and peaceable seisin…by virtue of the passage of time, which suffices to give title…on account of the negligence or compliance or powerlessness of the owners."[101] Sutherland notes that while the lord could not disseise the usurper if he was in possession "for a considerable time," court records would "assure us that the true owner was within his rights in disseising a usurper" by noting that this accused disseisor "acted 'quickly', 'freshly', 'straight-way', or (by far the favorite phrase) 'as soon as he learned of it.'"[102] Lords were given some leeway in protecting themselves from tortious feoffments and usurpations, but to do so required "eternal vigilance" and quick action.[103] And, beginning in 1217, they also gained legal protection in the form of statutory restraints on alienations.

---

[99] Sutherland, *The Assize of Novel Disseisin*, pp. 91-106.
[100] Ibid., pp. 94, 8.
[101] *Bracton*, III, pp. 248, 124.
[102] Sutherland, *The Assize of Novel Disseisin*, pp. 100-1. Legislation from the county court of Chester in 1260 granted the lord up to forty days after learning of the alienation to block it without facing a writ of novel disseisin. *EHD*, III, no. 211. Sutherland observes that forty days "may have been relatively generous." The vigilant lord would likely not wait so long. Sutherland, *The Assize of Novel Disseisin*, p. 94. Cf. Milsom, *Historical Foundations of the Common Law*, p. 98.
[103] Sutherland, *The Assize of Novel Disseisin*, p. 94. Some lords took more creative approaches: "sometime before 1290, Richard Stubbes sold some of the land that he held of the earl of Warenne to a Robert Curcon as a subenfeoffment [subinfeudation]. The earl found out about the sale and somehow forced Richard to grant him Robert's homage, service, and escheats and to renounce any claims in the land or lordship. This action represented a rough-and-ready solution to the problem of the loss of feudal incidents through subinfeudation." Waugh, "Non-Alienation Clauses in Thirteenth-Century English Charters," 7.

2.D. STATUTORY PROTECTIONS FOR THE LORDS

The 1217 version of Magna Carta offered the first official, legal "restraint [on alienation] in favor of the lord," barring alienations that would leave the donor unable to meet his obligations to his lord: "No free man shall henceforth give or sell to anyone more of his land than will leave enough for the full service due from the fief to be rendered to the lord of the fief."[104] As Maitland notes, this seems "directed chiefly, if not solely, against gifts in frankalmoin," since it is otherwise difficult to imagine a tenant giving away part of his land for nothing, but it "produced little effect" as it lacked any enforcement mechanisms.[105] But this was just the beginning of a trend toward greater restriction on alienations in mortmain. Henry III, in 1228, banned alienations in mortmain by his tenants-in-chief, and in 1256 he outlawed all unauthorized alienations by tenants-in-chief on the grounds that "we lose wardships and escheats and our barons and others who hold those baronies and fees of us are so weakened that they are unable to perform sufficiently the services due to us therefrom, whence our crown is seriously damaged."[106]

In 1259,[107] and again in 1279,[108] legislation against mortmain stipulated that tenants could not, without lordly consent, alienate to religious corporations by substitution (even if it was not a gift in frankalmoin, meaning that there would still be rent paid on it), as this would render the lord unable to demand the service intrinsic to

---

[104] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 332; *EHD*, III, no. 23; Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted*, p. 381.
[105] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, pp. 332-3.
[106] *EHD*, III, no. 35; Waugh, "Non-Alienation Clauses in Thirteenth-Century English Charters," 11-2. See Appendix, no. 6.
[107] The Provisions of Westminster, which state: "It is likewise provided that no man of religion can buy any land without the agreement of the lord." *EHD*, III, no. 40. See above, Ch. 1.2 on Simon de Montfort and the Barons' Rebellion, and Appendix, no. 7.
[108] The Statute of Mortmain. *EHD*, III, no. 53.

the tenement.[109] While these could be considered successors to Magna Carta in protecting lords against their tenants' alienations, we must not forget that the king had a similar compelling interest in limiting alienations to religious bodies, since he needed to be able to extract taxation from his tenants-in-chief and their tenants.[110] Under the Statute of Mortmain, the penalty for such an alienation was forfeiture, but if the immediate lord failed to disseise the donee, "the lord next above him on the feudal scale had a similar opportunity," all the way up to the king.[111] As Brand notes, the impetus behind the Statute was straightforward: "Lay lords were worried about the damaging effects of such alienations on their income from feudal incidents…[and the] king was worried about the effect of the transfer of landed wealth from laymen to the Church."[112] The seriousness of the king's worries was reflected in the provision for the lords' ability to take the forfeiture, rather than rely on the sheriffs – this appeal to the lords' self-interest all but guaranteed that one lord would disseise the donee.[113]

Since the justificatory clauses for the Statute of Mortmain focused on preventing financial harm to the king, it should not come as a surprise that the king, Edward I, was not opposed to those alienations in mortmain for which people were willing to pay through the purchases of licenses. These "licenses to acquire land in

---

[109] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, pp. 333-4; Thorne, "English Feudalism and Estates in Land," 208; Waugh, "Non-Alienation Clauses in Thirteenth-Century English Charters," 13.
[110] The 1267 Statute of Marlborough also contained a clause "protect[ing] rights of wardship, marriage, and escheat by forbidding leases and enfeoffments designed to circumvent lordship." Waugh, "Non-Alienation Clauses in Thirteenth-Century English Charters," 13; *EHD*, III, no. 44.
[111] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 334; *EHD*, III, no. 53.
[112] Brand, "The Control of Mortmain Alienation in England, 1200-1300," p. 40.
[113] *EHD*, III, no. 53.

mortmain were somewhat easily obtained."[114] Indeed, just six months after the Statute was enacted, Edward issued licenses for such alienations, "notwithstanding the recent statute in mortmain."[115] This statute, then, should not be seen as a defense, on behalf of the barons, of the principle of the necessity of lordly consent; rather, it was a defense of the king's financial interest. It was not until 1292 that the licensing of mortmain by the king gave the lord some measure of control as well, when Edward "agreed not to give licenses unless the consent of the immediate superior lord had been obtained."[116] So long as the king either stood to gain, through the selling of licenses, or not to lose, the alienations did not present a problem that necessitated royal intervention. Thus, we see that free alienability for free tenants, saving the lord's ability to extract service intrinsic to the land, continued to be the norm.[117]

2.E. THE STATUTE OF *QUIA EMPTORES*

The lord's involvement in land transfers – even substitutions – became increasingly superfluous during the thirteenth century, and this was reflected in the writs regarding such transactions, namely the writs of entry. Consider the example of a woman who has given her dowry to her future husband, who "then declined to

---

[114] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 334. Throughout the thirteenth century we see the effects of the "great inflation" in that kings were forced to seek out "less politically acceptable means of raising revenue" – Latimer specifically notes Henry III's personal "poverty." Latimer, "The English Inflation of 1180-1220 Reconsidered," 6, 26. This furthers the point that by licensing, rather than actually prohibiting, these alienations, kings worked in their own financial interest.

[115] *EHD*, III, no. 119.

[116] Sutherland, *The Assize of Novel Disseisin*, pp. 94-5.

[117] A further reform by Edward I, enacted through the Statute of Westminster II in 1285, also suggests that though his actions favored the lords, they did so only for the reasons given above, not to roll back the tenants' rights. Through *cessavit per biennium*, lords were given "an ampler remedy" for dealing with tenants who had been in default for two years: the lord could then "claim the land in demesne" and bring a royal writ to disseise the tenant justly. See above, Ch. 3.2.C. This did not so much impinge on the tenant's right to use his tenement as he desired as it expanded royal authority to enforce contracts. So long as the lord was still receiving his services, he had no legal means of controlling his tenants. Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 353; II, p. 5; *EHD*, III, no. 57.

marry her, but retained the land."[118] In order to regain her land, the woman could use the writ of entry *causa matrimonii prelocuti*, which commanded the former prospective husband, or his heir, to return it.[119] Significantly, the lord is entirely cut out of the writ or "becomes invisible" in the transaction,[120] which presumes that the woman had alienated the land by substitution – a substitution wherein she gave the land directly to the man. When, in the twelfth century, William of Anisy alienated to his son by substitution, he "returned that fee to [his] lord" who then "put my son…into possession of the same fee."[121] *Causa matrimonii prelocuti* and other thirteenth century writs indicate that such a process was by that time anachronistic: when giving land to her future husband, the woman simply did just that; she did not give the land back to her lord so that he could put the man in seisin. The lord was no longer, if indeed he had ever been fully, a "necessary participant," and was simply "omitted from the writ."[122]

This trend culminated in 1290 with *Quia Emptores*, which was a "compromise" that allowed for free alienability and an unfettered "rural capitalism," while ensuring that services and revenue would not be lost to the lords.[123] As with the Statute of Mortmain, while the barons pushed for the reform, Edward I recognized that it was also in his interest to avoid the depreciation of feudal dues through subinfeudation:

---

[118] Palmer, "The Origins of Property in England," 33.
[119] Ibid. For an example, see *Registers*, CC. 212.
[120] Milsom, "What Was a Right of Entry?," 571.
[121] *EHD*, II, no. 249. See above, Ch. 4.2.
[122] Palmer, "The Origins of Property in England," 34.
[123] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 337; Cantor, *In the Wake of the Plague: The Black Death and the World It Made*, pp. 68-9; M. M. Postan, *The Medieval Economy and Society: An Economic History of Britain in the Middle Ages* (London: Weidenfeld and Nicolson, 1972), p. 165.

> "Because purchasers of lands and tenements belonging to the fees of magnates and others have often in times past entered into their fees to the prejudice of those magnates and others, in that their free tenants have sold their lands and tenements to the purchasers to be held in fee by them and their heirs of their feoffor and not of the chief lords of the fees, whereby the same chief lords have very often *lost escheats, marriages and wardships* of land and tenements belonging to their fees…tantamount to manifest disinheritance, THE LORD KING…granted, provided and enacted that henceforth *it is to be lawful for each free man to sell at will his land or tenement or part thereof, so, however, that the feoffee shall hold that land or tenement of the same chief lord* and by the same services and customs his feoffor previously held them by."[124]

The aim of the statute was not to restrict the tenant's right to free alienability, but to prevent financial loss to the lords; the statute upheld a positive right to alienate, which was then hedged or mitigated by the stipulation that it could occur only through substitution, not subinfeudation. Simultaneously, the "king's claim to restrain any and every alienation by his tenants-in-chief attains its full amplitude."[125] One common thread between this and *Quia Emptores* was profit.[126] While *Quia Emptores* helped counteract the depreciation of lords' and the king's revenue, the king was also able to gain "considerable revenue out of licenses to alienate and fines for alienations effected without license" by tenants-in-chief.[127] Despite the statutory authorization for undertenant's alienations, other lords continued to assert the ability to take fines on and consent to these alienations until in 1315 they "finally…agreed 'that henceforth [lords] would neither demand nor take any fine from free men to enter lands and tenements which are of their fees, provided always that by such feoffments

---

[124] *EHD*, III, no. 64. Emphases added.
[125] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 337.
[126] Another commonality between the two developments is the expansion of the king's power, and the concomitant decline of the lords'. See below, Section 4.
[127] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 336.

they were not deprived of their services nor their services lost.'"[128] Kings did not conceive of inalienability as a principle to be upheld.[129] Royal policies seem simply to have favored the approach that would be most profitable for the king while upholding the norm of the tenant's control over his land; conveniently, they also worked to the advantage of the increasingly centralized and bureaucratized royal government.[130]

3. HOMAGE AND THE POLITICS OF ALIENABILITY

The trend for rules on alienation from the Conquest to *Quia Emptores* was one of progressively fewer restrictions for undertenants, that is, tenants who were not tenants-in-chief, which weakened the link between undertenant and lord while strengthening the bond between undertenant and king. As with heritability, allowing tenants greater freedom (or powers) to dispose of their lands as they wished implied a correlative trend: that of a smaller role and less discretion, and therefore less power, for lords. As noted in Chapter 2, the strengthening of the norms of a tenant's right to have his heir inherit freely or to alienate his land deemphasized the personal lord-tenant relationship, greatly limiting the lord's control over who held land from him.

Any alienation could be deleterious to the lord. A subinfeudation meant that the value of escheats, reliefs, and wardships could be significantly lessened. Even *Quia Emptores*, which banned subinfeudation in favor of substitution, did not mean

---

[128] Sutherland, *The Assize of Novel Disseisin*, p. 96. Sutherland's citation (n. 4) indicates that this agreement was recorded in Parliament's records, but did not appear in a separately promulgated statute.

[129] This was also true of lords. Waugh notes that after *Quia Emptores*, the number of grants from lords "restricting alienations seems to have declined," given that statute's protection of the lord's financial interest in escheats and wardships. Waugh, "Non-Alienation Clauses in Thirteenth-Century English Charters," 13-4.

[130] Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted*, p. 382.

that lords could prevent loss by alienation. More than the loss of money, free alienation implied that the lord had lost control over who held his non-demesne land. As Maitland notes, "If a new is substituted for an old tenant, a poor may take the place of a rich, a dishonest that of an honest man, a foe that of a friend, and the solemn bond of homage will be feeble if the vassal has a free power of putting another man in his room."[131] While the first military tenants had mostly been men who fought with their lord at Hastings, by the reign of Henry II they were no longer the lord's men who fought at his side, but merely men who were obligated to pay scutage.[132] Even if a tenant had done homage, he was nonetheless able to alienate the land, and the lord had no choice but to accept his new tenant.[133]

Thus, the act of homage lost significance, and by the thirteenth century was "but a pale reflection of moral sentiments which still are strong but have been stronger,"[134] for when the lord can be forced to receive homage, it cannot still be seen as indicative of a personal relationship. This went beyond forcing the lord to accept the homage of the heir, which he was already obligated to do by virtue of having warranted the ancestor. Through a substitution, the new tenant had seisin of the land, and, so long as he was able to provide the services due, the lord had no choice but to accept the alienation as *fait accompli*.[135] Through the twelfth and thirteenth centuries,

---

[131] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 330.
[132] Ibid., I, p. 266.
[133] Ibid., I, p. 345.
[134] Ibid., I, p. 297.
[135] Conversely, and reflecting the increased power of the tenant, the tenant's homage to a new lord could "not always be attorned." In addition to arguing that "the tenant can always waive or resign his tenement and so free himself from the duties of service and homage," Bracton claims that a tenant can block an alienation "if any attempt be made to substitute an insolvent for a solvent warrantor." However, this is too extreme a position: Maitland notes that "we have little reason to suppose that the rights of the tenants had ever in this country been a serious obstacle to alienations by the lords." Nonetheless, the fact that Bracton would even suggest that tenants held this power is itself significant.

the lord progressively lost control over who could become his tenant, whether via inheritance or sale of the land. Not only had novel disseisin given tenants recourse against the lord's abuses, but even if the tenant was manifestly objectionable – if, for instance, he did not do the services owed for the tenement – the lord's ability to address the problem on his own, through his disciplinary authority, had evaporated. He could not even go to his court to proceed against the tenant. If the lord wanted to extract an aid or services from a recalcitrant tenant, he needed a royal writ.[136] And if the lord wanted to reclaim his land from a tenant who had defaulted on services for at least two years, he needed a royal writ to evict him.[137] If he simply disliked the tenant, he had no legal recourse.

4. CONCLUSION

As with heritability, the lord's loss of power was the king's gain. The devaluing of homage and the deemphasizing of the personal relationship between a lord and his tenant allowed the king to "insist…with ever greater success that there is a direct bond between him and every one of his subjects."[138] After all, it was the king whose courts upheld the rules of law that defended the norms of inheritance, and whose laws (for the most part) protected the tenant's ability to dispose of his land however he desired. By defending the rights of undertenants and "securing the[ir] loyalty," the king weakened the lords.[139] The king's position in this was strengthened by the fact that he was acting in accord with the norm that the tenant should have

---

Ibid., I, p. 348; *Bracton*, II, pp. 232-42. See also Tabuteau, *Transfers of Property in Eleventh-Century Norman Law*, pp. 173, 87.
[136] See *Registers*, CC. 149, R. 520-22.
[137] See *Registers*, R. 825-32.
[138] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 299.
[139] Holt, "Politics and Property in Early Medieval England," 36; Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 300.

control over his property, limited only by the obligation to provide the lord service. The tenant could be confident that his heir would inherit, he could provide for younger sons, and he could sell his land too. *Quia Emptores* thus represented the capstone to a process that, beginning with Henry I's promise to impose only a "just and lawful 'relief,'"[140] saw successive kings limiting their barons' power, and protecting and upholding norms of individual property rights at the expense of feudal norms of the lord's dominance in the lord-tenant relationship.

Furthermore, although Magna Carta applied limits on disseisin to the king as well, the relationship between the king and his tenants-in-chief became very distinct from the relationship between lord and tenant. While tenants-in-chief were not "identified from the first as a distinct legal category," the expanded royal controls of Edward I, building upon the expansions of royal power under his predecessors, led to a much more restrictive set of rules for tenants-in-chief, particularly in the case of alienations.[141] As Maitland notes, "Before the end of Edward's reign both theory and practice draw a marked distinction between the king and other lords," as royal power continued to expand through the continuation of over a century of ever-tightening restrictions on lords' power.[142] Milsom observed that with the ban on subinfeudation, "tenures which disappeared by escheat could not be replaced" – barons lost the ability to enfeoff with the intent of building up a power base, as in the time of Henry II[143] –

---

[140] *EHD*, II, no. 19.
[141] Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted*, p. 350.
[142] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 336.
[143] See above, Ch. 4.1.A.

and so Maitland's metaphorical "feudal ladder" could only lose rungs.[144] Lordship and power, therefore, were increasingly "concentrated in the king."[145]

Noting that *Quia Emptores* was "a striking illustration of the lack of importance which by this time was attached to the personal relationship of lord and tenant," A.W.B. Simpson suggests that this implied that "lords were more interested in protecting their incidents than in selecting their tenants."[146] This interpretation is misleading, insofar as it implies that this was the lords' preference between two equally plausible alternatives; already, "lords [had] found they had no real control left over who entered their fee."[147] With *Quia Emptores*, we see that lords acceded, more or less, to the norm of free alienability, to the limits on their power, and attempted merely to preserve their right to services and revenue. It was not that they had no wish to "select…their tenants"[148]; rather, it seems they recognized that that ship had sailed, and that the compromise to allow free alienability while banning subinfeudation and preserving the value of escheats and wardships was the best they could hope for. As Milsom observes of *Quia Emptores*, "The feudal realities [were] recognized as dead, and the economic realities [were] saved."[149] However, what is most striking about *Quia Emptores*, the other thirteenth-century legislation against tortious alienations, and the new actions for lords against tenants, is that the lords could no longer rely on their own power to protect their interests. While in the twelfth century what Joseph Biancalana termed the "want of justice" for tenants

---

[144] Milsom, *Historical Foundations of the Common Law*, p. 101.
[145] Ibid.
[146] Simpson, *A History of the Land Law*, pp. 54-5.
[147] Palmer, "The Origins of Property in England," 34.
[148] Simpson, *A History of the Land Law*, pp. 54-5.
[149] Milsom, *Historical Foundations of the Common Law*, p. 99.

helped spur Henry II's reforms, in the thirteenth century it was lords' complaints about economic losses that prompted statutes such as Mortmain and *Quia Emptores*.[150] We see clearly that by the reign of Edward I, it was the king and his government that had claimed, quite successfully, the exclusive competence to address land disputes and to uphold rights in property for both tenants and their lords.

[150] Biancalana, "For Want of Justice: Legal Reforms of Henry II."; Thorne, "English Feudalism and Estates in Land," 208; Brand, "The Control of Mortmain Alienation in England, 1200-1300," p. 40.

CHAPTER 5 - CONCLUSION

"Therefore before the names of Just, and Unjust can have place, there must be some coercive Power, to compel men equally to the performance of their Covenants, by the terrour of some punishment, greater than the benefit they expect by the breach of their Covenant…and such power there is none before the erection of a Commonwealth."
- Thomas Hobbes (1651)[1]

"*Political Power* then I take to be a *Right* of making Law with Penalties of Death, and consequently all less Penalties, for the Regulating and Preserving of Property…Government has no other end but the preservation of Property."
- John Locke (1690)[2]

"[Henry II] issued no code; we may even doubt whether he published any one new rule which we should call a rule of substantive law; but he was for ever busy with new devices for enforcing the law."
- Frederic William Maitland (1898)[3]

We have thus far traced the transformation of tenants' normative claims on land into legal rights in England from 1066 to 1290: this formed the basis for the individual's relationship with government that remains the foundation for the modern social contract. Chapter 1 presented the theoretical framework and chronological context for this process. Chapter 2 described how norms of security of tenure and heritability were given royal backing that at first was intermittent and *ad hoc*, but later became regularized under Henry II. Chapter 3 examined both the specific role of the lord in landholding, and the way in which he was crowded out and rendered "invisible" by royal writs, and the exact workings of the legal mechanisms – the writs of right, novel disseisin, mort d'ancestor, and entry – by which successive kings

[1] Hobbes, *Leviathan*, p. 202.
[2] Locke, "Of Civil Government," pp. 268, 329.
[3] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 136.

asserted control over real property and established closer, direct legal relationships with undertenants. And in Chapter 4 we showed how the developments described and analyzed in Chapters 2 and 3 led to free alienability of land, and how even lords sought royal protection for *their* rights, mostly economic, in property, where before it had been their tenants seeking the king's justice. Norms of the tenant's control over his land, backed by the royal courts and the legal rule that no one need answer for his freehold without a royal writ, gave rise to reliance on the king and his justices, rather than the lord, to uphold the tenant's rights in property.

We thus arrive at a conception of the king's government as an entity whose main civil law interactions with its subjects were through justices and the royal courts which upheld rights in property by enforcing tenurial contracts (homage and services in return for protection and warranty). This is very similar to the models of the social contract advanced by Thomas Hobbes and, especially, John Locke. The legal reforms of Henry II, and the further development of the formulary system, had established "the land law as the most vital area of men's interests."[4] The assize of novel disseisin, the "most important" of these royal innovations, came about as an answer to the question of how to protect the land of freeholders from usurpation.[5]

Milsom has rightly emphasized the words "unjustly and without judgment" in the writs of novel disseisin, but for the wrong reason: it was not that Henry II desired to make an abstract seigniorial system "work according to its own assumptions,"[6] but rather that unjust disseisin was more than a lordly abuse – it was a breach of the

---

[4] Sutherland, *The Assize of Novel Disseisin*, p. 5.
[5] Ibid., pp. 82, 33-4. I owe the latter point to John Hudson as well as to the cited pages from Sutherland.
[6] Milsom, Legal Framework, pp. 11, 36-7.

tenurial contract that jeopardized the king's peace. The same is true of the violations alleged by the writ of mort d'ancestor. In both cases, the tenurial contract made by the lord's original acceptance of the tenant, where the lord, in return for the tenant's homage and service, put the tenant in seisin and promised to warrant him and his heirs,[7] had been broken by the lord. Later restrictions against mortmain and subinfeudation were adopted in response to the tenant's violations of this contract, for by alienating his land to his lord's economic loss or by making himself unable to perform adequately the service he owed for the tenement, the tenant had violated his side of the contract. Some, such as Scott Waugh, have posited a distinction between tenure in the twelfth century and contract in the thirteenth. This distinction elevates form over substance; the only difference was that what Waugh terms contracts were written down.[8] The terms of the agreement between enfeoffor and enfeoffee, between lord and tenant, were, in no uncertain terms, a contract.

As Hobbes notes, however, a contract requires external enforcement to ensure that both sides uphold it, and this is what was provided by the king's law –the common law.[9] The series of tenurial contracts that constituted what might be called the "feudal" social contract were, as seen during the Anarchy, clearly not sufficient to protect the tenant's claims to land that the lord had given him. This "want of justice"[10] was remedied by the activities of the royal courts, which compelled lords to uphold the terms of their contract with their tenants: to allow them to remain on the

---

[7] See above, Ch. 3.1.
[8] Scott L. Waugh, "Tenure to Contract: Lordship and Clientage in Thirteenth-Century England," *The English Historical Review* 101, no. 401 (1986): 818 and passim.
[9] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 38; Milsom, *Historical Foundations of the Common Law*, p. 140.
[10] Biancalana, "For Want of Justice: Legal Reforms of Henry II."

land, and to accept their heirs.[11] Where before these tenurial contracts imposed normative obligations on the parties, the reforms of Henry II (and legislation of Edward I) converted the parties' normative claims against each other into enforceable legal rights. Under Magna Carta, some were made enforceable even against the king.[12] The transformation of normative expectations to enforceable contractual rights underscores Hobbes's view that such enforcement is a key power of government. And the fact that it was not any contract that the king took an interest in enforcing, but specifically tenurial contracts, that is, contracts regarding property, pointedly evokes Locke. The development of royal government was centered upon what Locke saw as the proper role of government – protecting the property of individuals – through what Hobbes saw as one of government's most important functions – the enforcement of contracts.

The progression toward the Lockean common law of property from 1066 to 1290 resulted from a concatenation of discrete measures intended to remedy basic flaws in the tenurial system. A tenant's reliance on his lord in the tenurial system was inherently unworkable and its displacement by the common law was essential to uphold the norms of obligation that were considered essential to the maintenance of social order. In *The Legal Framework of English Feudalism*, Milsom argues that Henry II's legal reforms were "safeguards of the unquestioned order of things" by which "customs were enforced upon lords and their courts."[13] He contends that Henry wished to maintain the hierarchical tenurial relationships represented in

---

[11] Hyams, "Warranty and Good Lordship in Twelfth Century England," 440, 68.
[12] *EHD*, III, nos. 20, 23. This refers specifically to the right against disseisin that was unjust and without judgment. Although Edward I would assert greater control over tenants-in-chief than lords had over tenants, the point remains that tenants-in-chief had legal rights against the king.
[13] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 36.

Maitland's metaphor of the "lofty feudal ladder."[14] Though he certainly acknowledges that these reforms ultimately worked to "destroy the seigniorial order," Milsom claims that this was mere "juristic accident."[15] If so, Henry cured the disease (lordly abuses) by killing the patient (lordly disciplinary power) – which is not a wholly convincing argument.

More plausible, in the context of successive royal efforts to establish direct relationships with undertenants, was that the formulary system was used to bring the king closer to these subjects, circumventing the barons – turning Maitland's feudal ladder into a more complex latticework embodying Locke's social contract theory. As Glanvill says of the Grand Assize, for example, it was "a royal benefit granted to the people by the goodness of the king"[16] – not simply a device to make feudal justice work "according to its own rules."[17] Henry was, according to a contemporary chronicle, "seeking to benefit those least able to help themselves," and his justices swore "to preserve the king's justice" – not merely to ensure the proper working of the seigniorial courts.[18] Even taking into account the possible bias of the source, it is clear that Henry saw himself as expanding the supply and reach of royal justice to undertenants, and not simply as "providing a kind of judicial review."[19]

Although this system of royal justice was "created by the naked will of the king," it effectively "relate[d] his powers to his people's rights."[20] Though an

---

[14] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 349.
[15] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, pp. 36-7.
[16] *Glanvill*, p. 28.
[17] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, pp. 36, 186.
[18] *EHD*, II, no. 59.
[19] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 36.
[20] Harding, *Medieval Law and the Formation of the State*, p. 140.

expression of royal authority against the lords, novel disseisin and mort d'ancestor were for tenants a means by which their normative claims in property were given judicial backing and became legal rights, the violation of which could be punished by the king's officials. As Hudson notes, Henry's reforms "constituted a shift in jurisdiction rather than a fundamental change in the nature of rights in land."[21] More than that, royal justices were now the bureaucratic instruments through which political power, the right of "the Regulating and Preserving of Property" as defined by Locke, was exercised.[22]

This power was effective not merely because it was exercised by the royal government, but because it served to uphold norms of landholding. Although there were some regional variations in customs, especially prior to the Conquest,[23] the "criteria of inheritance" for land held by military tenure[24] were "sufficiently clear" that the claims upheld by mort d'ancestor were, if the ancestor had been seised, and the claimant was the true heir, manifestly just.[25] By enforcing norms of landholding, the Angevin reforms served to create a common law of property, fulfilling what Locke understood to be the task of a government that separated civil society from the state of nature.[26] Although England certainly did not exist in a state of nature before

---

[21] Hudson, *Land, Law, and Lordship in Anglo-Norman England*, p. 8.
[22] Locke, "Of Civil Government," p. 268.
[23] Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, pp. 271-4; Maitland, *Domesday Book and Beyond: Three Essays in the Early History of England*.
[24] Land held by military tenure became more and more common, and it was this land that was under the jurisdiction of the Common Law.
[25] Biancalana, "For Want of Justice: Legal Reforms of Henry II," 441; Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 182.
[26] Locke, "Of Civil Government," pp. 282, 324-5.

Henry II's reign, the Anarchy was, at times, not far from a Hobbesian *bellum omnium contra omnes* – life was certainly "brutish and short" for a good many men.[27]

The key here, however, is that by regularizing and bureaucratizing justice, Henry II provided what Locke described as a "Judge on Earth…[a] decisive power to appeal to."[28] While the "precariousness" in landholding and inheritance that Maitland discusses stemmed largely from lordly actions,[29] there was uncertainty for lords too: they were certainly aware of how, according to custom, they should act, but royal involvement in land disputes was irregular, so they were wary of, but did not always expect, it.[30] The development of the land law from 1154 to 1290 demonstrates a progressively dominant royal jurisdiction and a concomitant weakening of seigniorial jurisdiction. Access to writs of course from chancery, and the regular visits of justices in eyre implied the application of the common law to all freeholders, and their access to the "relief [which] can be had by appeal" to a common authority – the king's court.[31] As Maitland observes, the *curia Regis* rapidly became the "only judicial tribunals of any great importance," as the judgments of seigniorial courts lost their value and were superseded by those of the king's court.[32]

Through the royal monopoly on justice, beginning with the maxim – critical to the Countess Amice case[33] – that no freeholder could be made to answer for his tenement without a royal writ, we see that "all private judgment" from the seigniorial

---

[27] Hobbes, *Leviathan*, pp. 185-6.
[28] Locke, "Of Civil Government," p. 325.
[29] See above, Ch. 2.1.
[30] See above, Ch. 3.2.A; Hudson, "Life Grants of Land and the Development of Inheritance in Anglo-Norman England."
[31] Locke, "Of Civil Government," p. 282.
[32] Pollock and Maitland, *The History of English Law before the Time of Edward I*, I, p. 202; Sutherland, *The Assize of Novel Disseisin*, p. 82.
[33] See above, Ch 3.2.B.

courts had been "excluded."[34] Milsom's argument that a lord necessarily defaulted in a writ of right proceeding because he was not competent to judge the case against a tenant he himself had warranted aligns with Locke's emphasis on "a known and indifferent judge."[35] As Locke notes, "*Want of a common Judge with Authority, puts all Men in a State of Nature*."[36] Further, Locke's requirement, shared with Hobbes, that there exist the "power to back and support the" tenurial contracts and the judgments of the central court was met by the sheriffs, and the royal administration generally.[37]

In reality Locke's theory of property was essentially justificatory. As several commentators have noted, "Locke did not try to invent an entirely new form of property, but rather to provide a philosophical justification of the already existing one."[38] The form of property that was the subject of Locke's apologia came into existence in England between 1066 and 1290. Thus, Maitland correctly describes this period as "the critical moment in English legal history and therefore in the innermost history of our land," a moment when the idea "of sovereignty appeared" and "the realm became the important community."[39] Through the reforms of Henry II, which gave tenants recourse against lordly abuses, and those of Henry III and Edward I, which provided lords with recourse against recalcitrant tenants, all property disputes

---

[34] Locke, "Of Civil Government," p. 324.
[35] See above, Ch. 3.2.B. Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, pp. 58-9; Locke, "Of Civil Government," p. 351.
[36] Locke, "Of Civil Government," p. 281.
[37] Ibid; Hobbes, *Leviathan*, pp. 191-202. See above, Ch. 3.2.B on the threat "and if you do not, the sheriff will."
[38] Andrzej Rapaczynski, "Locke's Conception of Property and the Principle of Sufficient Reason," *Journal of the History of Ideas* 42, no. 2 (1981): 312; Reeve, *Property*, p. 63.
[39] Pollock and Maitland, *The History of English Law before the Time of Edward I*, II, p. 673; Strayer, *On the Medieval Origins of the Modern State*, p. 36; Milsom, *Historical Foundations of the Common Law*, p. 15.

came to be opened and arbitrated – and their settlements enforced – under the aegis of the royal government. This was the locus of the relationship between the individual and the government. That title came to "reside in the king's court"[40] reflected the critical role of the royal authority in upholding rights (formerly normative claims) in property.

As the economic historian David Landes notes in his classic work *The Unbound Prometheus*, the centralized protection of property was "an indispensible condition of productive investment and the accumulation of wealth."[41] Yet at the time Landes describes this condition being met in continental Europe – the seventeenth through nineteenth centuries – the legal framework for this security in England was already several centuries old as the result of the reforms undertaken between 1066 and 1290. Richard fitz Neal, in his *Dialogue of the Exchequer*, was quite prescient when he wrote that "the king's ordinance alone," that is, the common law, "is the chief answer";[42] in questions of property, it was to be the only answer.

This shift in jurisdiction over property, along with royal insistence that all freeholders swear fealty to the king, represents a rewriting of the social contract. The specific tenurial social contract between man and lord, whereby title to land resided in the lord's court, had given way to a general social contract between each freeholder and the king, and this was reflected in the fact that "the personal element in homage

---

[40] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 174.
[41] Landes argues that "the growing assurance of security in one's property" in continental Europe was a critical precondition for the Industrial Revolution. He observes that "This security had two dimensions: the relationship of the individual owner of property to the ruler; and the relationship of the members of the society to one another." David S. Landes, *The Unbound Prometheus: Technological Change and Industrial Development in Western Europe from 1750 to the Present*, 2nd ed. (Cambridge: Cambridge University Press, 2003), p. 16.
[42] *EHD*, II, no. 70.

was waning rapidly."[43] The freeholder's fundamental expectation of the royal government was protection for his property, and this was accomplished, not through military defense, but through a juristic process that enforced tenurial contracts.[44] To carry further Maitland's armory metaphor, the king and his ministers served as legal blacksmiths, developing and providing the remedies for the protection of rights in property. Through novel disseisin and mort d'ancestor for tenants, and the early writs of entry and *cessavit per biennium*[45] for lords, the smithy that was chancery established a monopoly on property disputes, putting the lords out of business, as it were, and ushering in the notions of the proper role of government that, through Locke, remain a crucial element of the theory that underpins the modern paradigm of individual-government relationships in Anglo-American democracies.

---

[43] Milsom, *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, p. 28. Significantly, this model of the social contract, of a series of individual contracts with a sovereign figure, differs greatly from that posited by Rousseau, whose *On the Social Contract* supposed a much more *social* element to the social contract, and gave far less emphasis to property. See especially Jean-Jacques Rousseau, "Of the Social Contract," in *The Social Contract and Other Later Political Writings*, ed. Victor Gourevitch, *Cambridge Texts in the History of Political Thought* (Cambridge: Cambridge University Press, 1997), pp. 54-6.

[44] See above, Ch. 3.1, on warranty. Harding, *Medieval Law and the Formation of the State*, p. 130; Hudson, *Land, Law, and Lordship in Anglo-Norman England*, p. 158.

[45] See above, Ch. 3.3.

APPENDIX: SELECTED LAWS

1. The Coronation Charter of Henry I (5 August 1100)

"I abolish all the evil customs by which the kingdom of England has been unjustly oppressed… If any of my barons or of my earls or of any other of my tenants shall die, his heir shall not redeem his land as he was wont to do in the time of my brother, but he shall henceforth redeem it by means of just and lawful 'relief.' Similarly the men of my barons shall redeem their lands from their lords by means of a just and lawful 'relief'… If since the death of my brother, King William, anyone shall have seized any of my property, or the property of any other man, let him speedily return the whole of it. If he does this no penalty will be exacted, but if he retains any part of it he shall, when discovered, pay a heavy penalty to me." (*EHD*, II, no. 19)

2. The Assize of Northampton (1176)

"…if any freeholder has died, let his heirs remain possessed of such 'seisin' as their father had of his fief on the day of his death…And afterwards let them seek out his lord and pay him a 'relief' and the other things which they ought to pay him from the fief…And should the lord of the fief deny the heirs of the deceased 'seisin' of the said deceased which they claim, let the justices of the lord king thereupon cause an inquisition to be made by twelve lawful men as to what 'seisin' the deceased held there on the day of his death. And according to the result of the inquest let restitution be made to his heirs. And if anyone shall do anything contrary to this and shall be convicted of it, let him remain at the king's mercy… let the justices receive oaths of fealty to the lord king… The justices shall also order that all who have not yet paid homage or allegiance to the lord king shall come at a time appointed for them and pay homage and allegiance to the king as their liege lord." (*EHD*, II, no. 25)

3. Magna Carta (1215)

"If any of our earls or barons of others holding of us in chief by knight service dies, and at his death his heir be of full age and owe relief he shall have his inheritance n payment of the old relief, namely the heir or heirs of an earl £100 for a whole earl's barony, the heir or heirs of a baron £100 for a whole barony, the heir or heirs of a knight 100s, at most; and he who owes less shall give less according to the ancient usage of fiefs…Recognitions of *novel disseisin*, of *mort d'ancestor*, and of *darrein presentment*, shall not be held elsewhere than in the counties to which they relate, and in this manner – we, or, if we should be out of the realm, our chief justiciar, will send two justices through each county four times a year, who, with four knights of each county chosen by the county, shall hold the said assizes in the county and on the day and in the place of meeting of the county court…No free man shall be arrested or imprisoned or disseised or outlawed or exiled or in any way victimized, neither will we attack him or send anyone to attack him, except by the lawful judgment of his peers or by the law of the land." (*EHD*, III, no. 20)

4. Magna Carta (1217)

"Recognitions of *novel disseisin*, of *mort d'ancestor*, and of *darrein presentment*, shall not be held elsewhere than in the counties to which they relate, and in this manner – we, or, if we should be out of the realm, our chief justiciar, will send justices through each county once a year, who with knights of the counties shall hold the said assizes in the counties…No free man shall henceforth give or sell to anyone more of his land than will leave enough for the full service due from the fief to be rendered to the lord of the fief." (*EHD*, III, no. 23)

5. Provisions of Merton (1236)

"Also if any is disseised of his freehold and recovers his seisin by assize of novel disseisin before the justices in eyre…and is put in possession by the sheriff, if those same disseisors subsequently after the eyre of the justices again disseise him and are convicted of it they are to be at once arrested and detained in the king's prison until on payment of fine or in some other way they are discharged by the lord king…The same is to be done in the case of those who recover seisin by assize of mort d'ancestor, and in the case of all lands and tenements recovered by juries in the king's court, if they are subsequently disseised by the original disseisors from whom they have recovered in any way by jury." (*EHD*, III, no. 30)

6. Royal ordinance on alienations by tenants-in-chief (15 July 1256)

"Because it is manifestly to our most grievous loss and unendurable damage to our crown and royal dignity that any one enters the baronies and fees which are held of us in chief in our kingdom and power and the will of those who hold those baronies and fees through which we lose wardships and escheats and our barons and others who hold those baronies and fees of us are so weakened that they are unable to perform sufficiently the services due to us therefrom, whence our crown is seriously damaged; which matter we are unwilling to suffer any longer…no one henceforth may enter a barony or any fee which may be held of us in chief by purchase or by any other means without our assent and special licence." (*EHD*, III, no. 35)

7. Provisions of Westminster (October 1259)

"…if it happens that the lord after his tenant's death takes his lands into his hand because the heir is under age and then when the heir comes of age will not surrender his land without being sued, that the heir get back his land into his hand by writ of mort d'ancestor together with the damages he has sustained on account of the detention after his full age. And likewise if the heir is of age when his ancestor dies and is in [seisin?] as the heir apparent who is regarded and accepted [as such], that the chief lord may not evict him, or take anything or remove anything, except take a simple seisin only. And if the chief lord keeps him out, so that he is allowed to obtain a writ of mort d'ancestor or of cosinage, he may recover his land and his damages as by writ of novel disseisin…It is likewise provided that no man of religion can buy any land without the agreement of the lord." (*EHD*, III, no. 40)

8. Statute of Marlborough (18 November 1267)

"Concerning those who are accustomed to enfeoff their eldest sons and heirs with their inheritance when they are under age in order that by this the lords of the fees shall lose their wardships, it is unanimously provided and granted that by reason of such a feoffment no chief lord shall lose his wardship…They who are taken and imprisoned for repeated disseisin shall not be delivered without the king's special command and this by making fine with the lord king for their trespass of this kind…If any heir after the death of his ancestor is under age and his lord has the wardship of his lands and will not give them back to the said heir when he comes of age without being sued, the heir shall recover his land by reason of the death of his ancestor together with the damages he has sustained by the detention from the time when he came of age. Now if an heir is of full age on the death of his ancestor, is the heir apparent, and is acknowledged as heir and is found in the inheritance, his chief lord shall not eject him nor take or remove anything there, but shall take only simple seisin thereof as recognition of his lordship. And if the chief lord maliciously withholds seisin so that it is necessary for the heir to sue by an action of mort d'ancestor or cosinage, then he shall recover his damages as in the action of novel disseisin. As regards inheritances which are held in chief of the lord king, however, the observance shall be this: that the lord king shall have the first [primer] seisin thereof as he previously used to; nor shall the heir or anyone else enter forcibly into the inheritance before receiving it from the hands of the lord king…It is provided also that if the alienations for which a writ of entry used to be given are made through so many degrees that that writ cannot be had in the form previously used, the plaintiff shall have a writ for recovering seisin without mention of the degrees, into whosesoever hands the thing shall have come through such alienations…" (*EHD*, III, no. 44)

9. Statute of Westminster I (1275)

"…if any one from now on purchases a writ of novel disseisin and if he whom the writ proceeds against dies before the assize is passed, the plaintiff is to have his writ of entry founded sur disseisin against the heir or against the heirs of the disseisor…in the same way let the heir or the heirs of the disseised have their writ of entry against the disseisors…to do right to all and at all times, it would be useful for assizes of *novel disseisin*, *mort d'ancestor* and *darrein presentment*…to be taken in Advent, on Septuagesima and in Lent as indeed is done with the inquests; and the king asks this of the bishops." (*EHD*, III, no. 47)

10. Statute of Gloucester (7 August 1278)

"As up to now damages have not been awarded in assizes of novel disseisin except against the disseisors only, it is provided that if the disseisors alienate the tenements and have nothing from which damages can be levied, those into whose hands the tenements come shall be charged with the damages in such a way that each shall be responsible for his time. It is likewise provided that the disseised shall recover damages in a writ of entry upon novel disseisin [sur disseisin] against him who is found to be tenant after the disseisor. It is likewise provided that where up to now damages have not been awarded in a plea of mort d'ancestor, except in a case where the tenement was recovered against the chief lord, from now on damages shall be awarded in all cases where a man recovers by an assize of mort d'ancestor, as said before in the assize of novel disseisin…the demandant from now on shall recover against the tenant the costs of purchasing his writ as well as the aforesaid damages…if a man lets [subinfeudates] his land at fee-farm…amounting to a quarter of the true value of the land and he who holds the land thus charged lets it lie unused, so that no distress can be found there, for two or three year without having the farm for it rendered or without doing what is contained in the deed of the lease, it is established that after two years have passed the lessor shall have an action to demand the land in demesne by a writ which he shall have out of the chancery…" (*EHD*, III, no. 52)

11. Statute of Mortmain (November 1279)

"As it was once provided that men of religion should not enter anyone's fees without the licence and will of the chief lords from whom those fees are immediately held, and men of religion have, notwithstanding, from then until now entered both their own fees and those of others…whereby the services which are due from such fees and which were provided from the beginning for the defense of the realm are unjustifiably withdrawn and chief lords in respect of them lose their escheats,
We…have…provided, established and ordained that no religious or any other person whatever shall presume on pain of forfeiting them to buy, sell, receive from anyone under color of gift or term of years or any other title whatsoever, or by any other means…whereby such land and tenements come in any way into mortmain. We have also provided that if any religious or any other presumes by any means, art or artifice to contravene the present statute it shall be lawful for us and the other immediate chief lords of the fee so alienated to enter it within a year from the time of such alienation and hold it in fee and heritably. And if the immediate chief lord is negligent and does not wish to enter such fee within the year, then it shall be lawful for the lord immediately above to enter the fee within the following half year and hold it as aforesaid [and so on]…" (*EHD*, III, no. 53)

12. *De Donis Conditionalibus*, or Statute of Westminster II (Easter 1285)

"First, concerning tenements which are often given upon condition, that is, when someone gives his land to some man and his wife and the heirs begotten of the same man and woman with the added condition expressed that, if the man and woman should die without heir begotten of them, the land so given should revert to the donor or his heir…also in the case when someone gives a tenement to somebody and to the heirs issuing of his body: it seemed, and still seems, hard to such donors and heirs of donors that their wish expressed in their gifts has not heretofore been observed and still is not observed. For in all these cases, after offspring begotten and issuing from those to whom the tenement was thus conditionally given, these feoffees have hitherto had power to alienate the tenement so given and to disinherit their own issue contrary to the wish of the donors and the form expressed in the gift. And further, when on the failure of the issue of such feoffees the tenement so given ought to have reverted to the donor or his heirs by the form expressed in the deed of such a gift, notwithstanding the issue, if any there were, had died, they [the donors] have heretofore been barred from the reversion of the tenements by the deed and feoffment of those to whom the tenements were thus given upon condition, which was manifestly against the form of their gift. WHEREFORE the lord king…has enacted that the wish of the donor, according to the form manifestly expressed in his deed of gift, is henceforth to be observed, in such wise that those to whom the tenement was thus given upon condition shall not have the power of alienating the tenement so given and thereby preventing it from remaining after their death to their issue, or to the donor or his heir if issue fail either because there was no issue at all or because if there was issue it has failed by death, the heir of such issue failing…The writ whereby the donor has his recovery when issue fails is in common use in the chancery. And it is to be understood that this statute applies to the alienation of a tenement contrary to the form of a gift made after this, and does not extend to gifts made before it…As in a statute made at Gloucester it is contained that if any demise to another a tenement at a rent or a quarter or more of the value of the tenement, he who demised it, or his heir, shall after cesser of payment for two years have an action for claiming in demesne the tenement so demised, in like manner it is agreed that if anyone withholds from his lord the due or customary service over a period of two years the lord shall have an action for claiming the tenement in demesne by the following writ: 'Order A. that lawfully etc. he render to B. such and such a tenement, which C. has held of him by such and such service and which ought to revert to the aforesaid B. because the aforesaid A. has for two years stopped doing that service, as he says'…" (*EHD*, III, no. 57)

13. *Quia Emptores*, or Statute of Westminster III (8 July 1290)

"Because purchasers of lands and tenements belonging to the fees of magnates and others have often in times past entered into their fees to the prejudice of those magnates and others, in that their free tenants have sold their lands and tenements to the purchasers to be held in fee by them and their heirs of their feoffor and not of the chief lords of the fees, whereby the same chief lords have very often lost escheats, marriages and wardships of land and tenements belonging to their fees…tantamount to manifest disinheritance, THE LORD KING…granted, provided and enacted that henceforth it is to be lawful for each free man to sell at will his land or tenement or part thereof, so, however, that the feoffee shall hold that land or tenement of the same chief lord and by the same services and customs his feoffor previously held them by." (*EHD*, III, no. 64)

BIBLIOGRAPHY

Biancalana, Joseph. "For Want of Justice: Legal Reforms of Henry II." *Columbia Law Review* 88, no. 3 (1988): 433-536.

———. "The Origin and Early History of the Writs of Entry." *Law and History Review* 25, no. 3 (2007): 513-56.

Brand, Paul. ""The Age of Bracton"." In *The History of English Law: Centenary Essays On "Pollock and Maitland"*, edited by John Hudson. Oxford: Oxford University Press for The British Academy, 1996.

———. "The Control of Mortmain Alienation in England, 1200-1300." In *Legal Records and the Historian: Papers Presented to the Cambridge Legal History Conference, 7-10 July 1975, and in Lincoln's Inn Old Hall on 3 July 1974*, edited by J.H. Baker, 29-40. London: Royal Historical Society, 1978.

———. "Henry II and the Creation of the English Common Law." In *Henry II: New Interpretations*, edited by Christopher Harper-Bill and Nicholas Vincent, 215-41. Rochester, NY: Boydell Press, 2007.

———. *Kings, Barons and Justices: The Making and Enforcement of Legislation in Thirteenth-Century England*. Edited by D.E. Luscombe, *Cambridge Studies in Medieval Life and Thought, Fourth Series*. Cambridge: Cambridge University Press, 2003.

Brown, Elizabeth A. R. "The Tyranny of a Construct: Feudalism and Historians of Medieval Europe." *The American Historical Review* 79, no. 4 (1974): 1063-1088.

Caenegem, R.C. van, ed. *Royal Writs in England from the Conquest to Glanvill: Studies in the Early History of the Common Law*, *The Publications of the Selden Society; V. 77*. London: B. Quaritch, 1959.

Cantor, Norman F. *In the Wake of the Plague: The Black Death and the World It Made*. New York: The Free Press, 2001.

Cheney, Mary. "Inalienability in Mid-Twelfth-Century England: Enforcement and Consequences." Paper presented at the Sixth International Congress of Medieval Canon Law, Berkeley, California 1980.

"The Common Law Origins of the Infield Fly Rule." *University of Pennsylvania Law Review* 123, no. 6 (1975): 1474-1481.

Davis, H. W. C., ed. *Regesta Regum Anglo-Normannorum*. 4 vols. Vol. 1. Oxford: The Clarendon Press, 1913.

DeAragon, RáGena. "The Growth of Secure Inheritance in Anglo-Norman England." *Journal of Medieval History* 8, no. 4 (1982): 381-391.

Eadmer. *The Life of St. Anselm*. Translated by R. W. Southern. New York: Oxford University Press, 1972.

Fagan, Brian. *The Little Ice Age: How Climate Made History 1300-1850*. New York: Basic Books, 2000.

Greenberg, Daniel, ed. *Stroud's Judicial Dictionary of Words and Phrases*. 7th ed. 3 vols. London: Sweet & Maxwell, 2006.

Harding, Alan. *Medieval Law and the Formation of the State*. Oxford: Oxford University Press, 2002.

Harvey, P. D. A. "The English Inflation of 1180-1220." *Past and Present*, no. 61 (1973): 3-30.

Hobbes, Thomas. *Leviathan*, *Penguin Classics*. London: Penguin, 1985.

Holt, J. C. "Colonial England, 1066-1215." In *Colonial England: 1066-1215*, 1-24. London: The Habledon Press, 1997.

———. *Magna Carta*. 2nd ed. Cambridge: Cambridge University Press, 1992.

———. "Magna Carta, 1215-1217: The Legal and Social Context." In *Colonial England: 1066-1215*, 291-306. London: The Hambledon Press, 1997.

———. "Politics and Property in Early Medieval England." *Past and Present*, no. 57 (1972): 3-52.

———. "The Writs of Henry II." In *The History of English Law: Centenary Essays On "Pollock and Maitland"*, edited by John Hudson. Oxford: Oxford University Press for The British Academy, 1996.

Hudson, John. "Anglo-Norman Land Law and the Origins of Property." In *Law and Government in Medieval England and Normandy: Essays in Honour of Sir James Holt*, edited by George Garnett and John Hudson, 198-222. Cambridge: Cambridge University Press, 1994.

———. "Court Cases and Legal Arguments in England, C.1066-1166." *Transactions of the Royal Historical Society* 10 (2000): 91-115.

———. *The Formation of the English Common Law: Law and Society in England from the Norman Conquest to Magna Carta*. London: Longman, 1996.

———. *Land, Law, and Lordship in Anglo-Norman England*, *Oxford Historical Monographs*. New York: Oxford University Press, 1994.

———. "Life Grants of Land and the Development of Inheritance in Anglo-Norman England." *Anglo-Norman Studies* xii (1989): 67-80.

Hyams, Paul R. "The Origins of a Peasant Land Market in England." *The Economic History Review* 23, no. 1 (1970): 18-31.

———. "Review: The End of Feudalism?" *Journal of Interdisciplinary History* 27, no. 4 (1997): 655-662.

———. "Review: The Legal Framework of English Feudalism." *The English Historical Review* 93, no. 369 (1978): 856-861.

———. "Warranty and Good Lordship in Twelfth Century England." *Law and History Review* 5, no. 2 (1987): 437-503.

Klerman, Daniel. "Review: The Fee Tail and the Common Recovery in Medieval England, 1176-1502." *Albion: A Quarterly Journal Concerned with British Studies* 35, no. 2 (2003): 271-272.

Landes, David S. *The Unbound Prometheus: Technological Change and Industrial Development in Western Europe from 1750 to the Present*. 2nd ed. Cambridge: Cambridge University Press, 2003.

Latimer, Paul. "The English Inflation of 1180-1220 Reconsidered." *Past and Present*, no. 171 (2001): 3-29.

Locke, John. "Of Civil Government." In *Two Treatises of Government*, edited by Peter Laslett. Cambridge: Cambridge University Press, 1988.

Lyon, Bryce. "Review: The Emancipation of Land Law from Feudal Custom." *The Yale Law Journal* 86, no. 4 (1977): 782-787.

Maitland, Frederic William. *Domesday Book and Beyond: Three Essays in the Early History of England*. Cambridge: Cambridge University Press, 1987.

Miller, Edward. "England in the Twelfth and Thirteenth Centuries: An Economic Contrast?" *The Economic History Review* 24, no. 1 (1971): 1-14.

Milsom, S. F. C. "Formedon before *De Donis*." In *Studies in the History of the Common Law*, 223-30. London: The Hambledon Press, 1985.

———. *Historical Foundations of the Common Law*. London: Butterworths, 1969.

———. "Law and Fact in Legal Development." In *Studies in the History of the Common Law*, 171-90. London: The Hambledon Press, 1985.

———. *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972*, *Cambridge Studies in English Legal History*. New York: Cambridge University Press, 1976.

———. "Review: [Untitled]." *Harvard Law Review* 84, no. 7 (1971): 1756-1762.

———. "What Was a Right of Entry?" *The Cambridge Law Journal* 61, no. 3 (2002): 561-574.

North, Douglass C., and Barry R. Weingast. "Constitutions and Commitment: The Evolution of Institutional Governing Public Choice in Seventeenth-Century England." *The Journal of Economic History* 49, no. 4 (1989): 803-832.

Palmer, Robert C. "The Economic and Cultural Impact of the Origins of Property: 1180-1220." *Law and History Review* 3, no. 2 (1985): 375-396.

———. *English Law in the Age of the Black Death*. Edited by Thomas A. Green, *Studies in Legal History*. Chapel Hill: The University of North Carolina Press, 1993.

———. "The Origins of Property in England." *Law and History Review* 3, no. 1 (1985): 1-50.

———. "Review: The Feudal Framework of English Law." *Michigan Law Review* 79, no. 5 (1981): 1130-1164.

Pollock, Sir Frederick, and Frederic William Maitland. *The History of English Law before the Time of Edward I*. 2nd ed. 2 vols. London: Cambridge University Press, 1968.

Postan, M. M. *The Medieval Economy and Society: An Economic History of Britain in the Middle Ages*. London: Weidenfeld and Nicolson, 1972.

Rapaczynski, Andrzej. "Locke's Conception of Property and the Principle of Sufficient Reason." *Journal of the History of Ideas* 42, no. 2 (1981): 305-315.

Reeve, Andrew. *Property*. Edited by Peter Jones and Albert Weale, *Issues in Political Theory*. Atlantic Highlands, NJ: Humanities Press International, Inc., 1986.

Reynolds, Susan. *Fiefs and Vassals: The Medieval Evidence Reinterpreted*. Oxford: Oxford University Press, 1994.

Rothwell, Harry, ed. *English Historical Documents*. Edited by David C. Douglas. XII vols. Vol. III, *English Historical Documents*. London: Eyre & Spottiswoode, 1975.

Rousseau, Jean-Jacques. "Of the Social Contract." In *The Social Contract and Other Later Political Writings*, edited by Victor Gourevitch, 39-152. Cambridge: Cambridge University Press, 1997.

Sen, Amartya. "Normative Evaluation and Legal Analogues." In *Norms and the Law*, edited by John N. Drobak, 247-265. New York: Cambridge University Press, 2006.

Simpson, A.W.B. *A History of the Land Law*. 2nd ed. New York: Oxford University Press, 1986.

Stenton, Doris Mary, ed. *Rolls of the Justices in Eyre: Being the Rolls of Pleas and Assizes for Lincolnshire 1218-9 and Worcestershire 1221*. Vol. 53, *The Publications of the Selden Society*. London: Bernard Quaritch, 1934.

Stenton, F. M. *The First Century of English Feudalism, 1066-1166*. 2nd ed. Oxford: Clarendon Press, 1961.

Strayer, Joseph R. *On the Medieval Origins of the Modern State*, *Princeton Classic Edition*. Princeton: Princeton University Press, 2005.

Sutherland, Donald W. *The Assize of Novel Disseisin*. Oxford: Clarendon Press, 1973.

Tabuteau, E.Z. *Transfers of Property in Eleventh-Century Norman Law*, *Studies in Legal History*. Chapel Hill: University of North Carolina Press, 1988.

Thorne, S. E. "English Feudalism and Estates in Land." *The Cambridge Law Journal* 17, no. 2 (1959): 193-209.

Tierney, Brian. "Bracton on Government." *Speculum* 38, no. 2 (1963): 295-317.

Ullmann-Margalit, Edna. *The Emergence of Norms*. Oxford: Oxford University Press, 1977.

Walsh, Clifford, ed. *The Dictionary of English Law*. Edited by Earl Jowitt. 2 vols. London: Sweet & Maxwell, 1959.

Waugh, Scott L. "Non-Alienation Clauses in Thirteenth-Century English Charters." *Albion: A Quarterly Journal Concerned with British Studies* 17, no. 1 (1985): 1-14.

———. "Tenure to Contract: Lordship and Clientage in Thirteenth-Century England." *The English Historical Review* 101, no. 401 (1986): 811-839.

Weber, Max. "Politics as a Vocation." In *From Max Weber: Essays in Sociology*, edited by H.H. Gerth and C. Wright Mills. New York: Oxford University Press, 1946.

White, Stephen D. "Review: The Legal Framework of English Feudalism." *The American Journal of Legal History* 21, no. 4 (1977): 359-364.

———. "Succession to Fiefs in Early Medieval England." *Past and Present*, no. 65 (1974): 118-127.