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Covenant, *Justicies* Writs, and Reasonable Showings

by ROBERT C. PALMER*

In 1982, I presented a complex argument interrelating the history of debt, detinue, covenant, and trespass; it treated the provision of the *justicies* writs for county court cases, the development of the forty shilling rule in county debt/detinue, and the rule requiring specialty in covenant in the king's court.¹ The thesis was original along many lines and has met, expectedly, a certain amount of scepticism. Paul Brand, in a brief review, only noted that it was unconvincing.² Joseph Biancalana, in both a short review³ and in a lengthy review essay,⁴ completely dismissed the argument, arguing at length and in detail a different development, both for the origins of the *justicies* writs and for the covenant rule. More recently, David J. Ibbetson has asserted that the thesis could not bear close examination; he proposed an origin to the covenant rule in Roman law.⁵ The detailed alternatives presented by Biancalana and Ibbetson necessitate a similarly detailed response. Having considered these written and other informal comments, and with further data, my conclusion is that the criticisms are unfounded, and not simply a different, legitimate approach.

The specific legal changes at issue here, together with the wider implications about the nature of legal development in thirteenth-century England, likewise justify very careful consideration of the

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1. R. C. Palmer, *The County Courts of Medieval England, 1150-1350*, 174-262 (1982). In preparation of this article I am heavily indebted, as always, to Dr. Paul Brand, who examined several copies of the tract "Exceptiones contra brevia" in the British Library for me.

2. Brand, Book Review, 99 *Law Q. Rev.* 159 (1983).

3. Biancalana, Book Review, 1 *Law & Hist. Rev.* 313 (1983) (hereinafter Biancalana, Book Review).

4. Biancalana, *Medieval County Courts: A Review Essay* (Book Review), 52 *U. Cin. L. Rev.* 994 (1983) (hereinafter Biancalana, *Medieval County Courts*). I find the critical comments Biancalana makes about the first half of the book to be unfounded, based on a superficial reading, as are those that concern chapters 7 and 8. That material, less complicated and more open to historians, can stand more easily on its own and is outside the scope of the present subject.

5. Ibbetson, *Words and Deeds: The Action of Covenant in the Reign of Edward I* 4 *Law & Hist. Rev.* 71 (1986).

issues. The legal changes not only determined the nature of lesser jurisdictions in England, but also dictated that covenant would grow rapidly obsolete, so that the later history of contracts grew rather out of *assumpsit*. My analysis suggested that the *justicies* writs were provided to route simple cases out of the king's court into the county courts without litigants thereby losing particularly advantageous royal procedures. Biancalana sees their provision as aimed at controlling county courts and providing revenue. As will become apparent, this is in effect an attempt to revive the once useful but now outdated approach to English legal history associated with Maitland's work. At all points, the matter deserves attention.

The specialty rule in covenant raises similarly important problems. My explanation was that royal justices became accustomed to adjudicating covenant actions under *justicies* writs of covenant removed into the king's court; since those writs always had plaintiffs with specialty, the justices eventually elevated that happenstance into an evidentiary rule. Biancalana suggests that the specialty rule arose simultaneously in county and king's court because of the growing literacy of society. His alternative avoids facing the problem of *why* and *how* the rule appeared; it uses social history to avoid legal analysis. Ibbetson's alternative, deriving the rule as an outgrowth of a borrowing from Roman law, is far worse, however. Resorting to Roman law for the source of English common law rules should be greeted with great scepticism, not because it could not have happened, but because borrowing from Roman law has so often served as an easy all-purpose explanation. Once again, it is an approach that, unless all other avenues are first pursued, discourages close evaluation of the sources. However, any successful showing of such a relationship between the common law and Roman law at a point as major as the specialty rule in covenant would be important; Ibbetson's argument deserves close attention. As I shall show, the objections and alternatives proposed by Biancalana and Ibbetson are devoid of merit.

Not even the additional evidence I have obtained, however, will satisfy those who demand massive, direct, and irrefutable proof. Such clear evidence is unavailable for certain parts of the thesis: very little documentation has survived for medieval county courts.⁶ Nevertheless, there is still so much evidence to support the thesis that one cannot revert to traditional explanations. This thesis, not absolutely proved but far stronger than its critics have realized, should stand until a more explanatory argument replaces it.

6. Palmer, *supra* note 1, at 225-26; Palmer, *County Year Book Reports: The Professional Lawyer in the Medieval County Court*, 91 Eng. Hist. Rev. 776 (1976).

I. The Ibbetson Thesis on the Covenant Rule

David Ibbetson, having rejected the various current theories about the reason for the requirement of specialty in covenant, posits a borrowing from Roman law that was then progressively expanded to cover all cases in covenant. Not only is his criticism of my thesis unfounded, but his alternative is untenable. Still, his examination of the problem can lead to an interesting examination of covenant in the reign of Edward I that would, without explication, otherwise be lost in the rejection of his article as a whole.

Ibbetson adduces two reasons why my thesis about the covenant rule "does not bear close examination."⁷ The first is that it is hard to believe that county courts in mid-thirteenth century England refused to hear covenant cases not supported by specialty.⁸ The statement is completely true. County courts almost certainly heard cases of covenant not supported by specialty, both in the mid-thirteenth century and throughout the fourteenth century. However, my argument was that there was a distinction between cases brought by plaintiff and cases brought by *justices* writ. Litigants without specialty would bring covenant cases in county by plaintiff; purchase of the *justices* writ of covenant presupposed written proof. The specialty rule in county court "relied on a specific writ form"⁹ and had no bearing whatsoever on cases brought by plaintiff. Ibbetson's first reason for rejecting my thesis is thus based on a misreading.

His second reason is related to the first and is equally unfounded. He considers it implausible that justices "would confuse the rule applying in the county with the rules to be applied in the royal courts."¹⁰ The rule, however, was not a county court rule. If anything, it originated in Chancery, which issued the *justices* writs. The rule attached to the writ, not to the jurisdiction; when such a writ was removed into Bench, the rule still applied. The effect on the justices, moreover, is quite believable. Many of the actions of covenant brought by *precipe* originally into the king's court were non-litigious: they began the process by which the parties recorded land settlements in final concords.¹¹ *Justices* writs removed into the

7. Ibbetson, *supra* note 5, at 80.

8. *Id.*

9. Palmer, *supra* note 1, at 209.

10. Ibbetson, *supra* note 5, at 80.

11. To make a final concord, one could bring either a writ of warranty of charters or a writ of covenant. One yearbook note stipulates that warranty of charters is brought for a gift ("doun"), whereas covenant is brought for a render ("rendre"). The original writ determined the binding quality of the fine. A final concord based on a writ of warranty of charters could be defeated in two ways: by denying that the deed on which the action was based was followed by seisin or by showing that the deed was different from the fine. Such a final concord only bound those privy to it. A final concord based on a writ of covenant, however, could be denied only by showing that the court had been deceived; moreover, it bound both those privy and also strangers. British Library Add. MS. 31826 fol. 226.

king's court, however, would usually be litigious; the court would have had trouble relating the possession of specialty to the form of the writ once the forty shilling rule in debt/detinue had destroyed the original meaning of the same phrase in those more common *justicies* writs.¹² It would seem completely plausible that the regular appearance of plaintiffs with specialty in covenant before royal justices should influence the way in which those justices thought about covenant. The question ought not relate to plausibility, but to whether that was the decisive influence. At any rate, Ibbetson's rejection of the thesis was not based on the merits, but on a superficial and incorrect reading.

The validity of Ibbetson's alternative, however, does not rest on the accuracy of his criticisms of other approaches. He suggests a three-stage development for the specialty rule in covenant. The first stage was the application of the rule to actions brought on leases, and this application was a borrowing from Roman law. The second stage was the expansive application of the rule to actions of covenant brought for non-performance of agreements. The third stage was the application of the rule to covenant in all situations. His alternative is severely flawed at every point.

Ibbetson bases his first stage solely on the tract *Exceptiones contra brevia*, and especially with three of the exceptions that could be taken to a writ of covenant, which he dates at around 1280.¹³ Each must be treated separately. He renders one of those exceptions "If a writing has been produced in an action of covenant, he cannot claim that he is not required to answer this writ or count."¹⁴ He infers that thus specialty was not always necessary, since the exception supposes a limited class of covenant actions in which specialty is produced, not all actions.¹⁵ However, his paraphrase of this exception is inaccurate. The exception is rendered accurately "Likewise, if anyone has view of the writing of the covenant, he cannot object that he is not held to answer such a writ or count."¹⁶ No inference about the specialty rule can be made from this exception. The point is completely procedural. Once the defendant has asked for and received view of the specialty (without indicating whether specialty will always be present or not), he cannot resort to pleading that he is

12. Palmer, *supra* note 1, at 258-61.

13. Ibbetson, *supra* note 5, at 81-82.

14. Ibbetson, *supra* note 5, at 82.

15. *Id.*

16. Ibbetson includes the Latin version: "Item si quis habet visum scripti de convencionem non potest dedicere ei quod non tenetur respondere tali brevi vel narracioni." *Id.* at 82 n. 61. An alternative version derives from British Library Add. MS. 18600, ff. 177-177fv; it is not significantly different: "Item cum quis habuit visum scripti in brevi de convencionem, non potest dedicere quin teneatur respondere tali brevi vel narracioni."

not held to answer: rather, he must challenge a variance between the writ and count and the specialty or else answer specifically to the specialty. That order of pleading is observable in several cases.¹⁷

The next exception Ibbetson renders "He can ask what he has of the covenant, and if he has nothing he can ask for judgment."¹⁸ The rendition is accurate, and he quite rightly notes that this is the same kind of exception used in debt which did not preclude claims supported only by suit. We both conclude that that exception is not sufficiently specific to indicate anything about whether or not there was a specialty rule.

An exception not treated by Ibbetson here becomes relevant. The exception is "Likewise, he can ask judgment inasmuch as he alleges a special deed or contract and has only the countryside."¹⁹ It could mean that when one alleges a special deed, or contract, indeed, any simple transaction, one cannot simply aver by jury but must have either the specialty or suit, respectively. This exception would then indicate that not all covenants were enforceable only if there was specialty. *Special*, however, could be read distributively, as referring to special deeds or special contracts, so that the exception relates to special provisions beyond the basic agreement.²⁰ This exception would not be relevant to the general specialty rule in covenant, but it might well indicate a more limited rule.²¹ It is puz-

17. British Library Add. MS. 31826 fv. 139 (*Neumarch v. Thornton*: exception as to whether plaintiff should be answerable by such a writ, after which view of the deed was asked); British Library Add MS. 37657 fol. 30 (*Keyser v. Crescy*: defendant first challenged the count, then waived that exception and alleged variance between writ and specialty); British Library Add. MS. 31826 fv. 345 (*John v. Rokele*: challenge as to whether plaintiff should be answered with such writ and count, followed thereafter by asking what he had of the covenant); Y.B. Pas. 21 Edw. I, 2, *Year Books of the Reign of King Edward I*, 23 (Rolls Series, A.J. Horwood ed., 1863-79) (A v. B: defendant forced to answer to the deed after view instead of challenging the writ, although complicated by the issue that distraint was possible).

18. Ibbetson, *supra* note 5, at 82 (*Ad breve de convencione potest dicere quid habet de convencione et si nichil habet petere iudicium*." The version in British Library Add. MS. 18600, f. 177f-fv is not significantly different.)

19. British Library Add. MS. 18600, f. 177-177v.: *Item potest peti iudicium ex quo allegat speciale factum vel contractum et nichil habet nisi patriam*." The versions in British Library Harley 1208, f. 132v.; British Library Harley 1120, fv. 152; and British Library Lansdowne 467, fv. 176 have only minor differences. A different manuscript merges this exception with the previous one: "*Potest dici quid habet de convencione et si nichil habeat potest petere iudicium desicut allegat speciale factum vel contractum et nichil habet nisi patriam*." British Library Add. MS. 31826 fv. 303. That manuscript thus lists only five instead of the standard six exceptions for covenant.

20. See *supra* note 25 and accompanying text.

21. I think the idea that such a rule was simply applied more broadly, without further explanation, is inadequate. The difference between the fact of the agreement and further clauses added on to it is an important one, given the origins of the writ of covenant that I am explicating in another article. It would require a substantial change in approach. The existence of this limited rule, however, would have made it more easy for the influence of the *justicies* writ that I argue to operate.

zling that Ibbetson chose not to treat this exception, despite its obvious relevance.

The third exception Ibbetson treats refers to leases and is central to his thesis: "He can ask for judgment if he counts for a certain term and this certain term is not put in writing."²² Several meanings are possible; he has chosen the least likely. He reads *terminus* (term) to mean *lease*, not a specific word of the agreement or the length of the lease. Accepting that for the moment, *certus terminus non ponitur in scripto* could mean, as he says, that the lease was not written down at all and thus was not enforceable.²³ It could also mean that the particular term or duration of the lease, the *certain* term was not put in *the* writing: that the specialty proffered talked about a lease without mentioning the duration of the lease, whereas his count specified a certain term. A third meaning, which overlaps with the second, is that *certus terminus* actually does mean *specific word*.²⁴ There would thus be a difference between a specific part of the contract alleged and the wording of the specialty. Finally, it could mean that there is a difference between the existence of a lease and specific details of a lease; specific details had to be in writing.²⁵ Of these, Ibbetson's choice is the least likely, because it does not explain why the exception talks about *certus terminus* instead of merely *terminus*. Ibbetson's sole adduced proof for the existence of a specialty rule in covenant limited to leases around 1280 indicates nothing of the kind.

His derivation of the rule from Roman law is also flawed. I have no pretensions to knowledge of Roman law, but his choice of the Roman *emphyteusis* over the *locatio rei*, on his own description, as the appropriate analogy for the English leasehold seems particularly inappropriate. The *emphyteusis* was "the holding of land on a hereditary basis either for a fixed term or in perpetuity in exchange for

22. Ibbetson, *supra* note 5, at 82.

23. *Id.*

24. Ibbetson dismisses this possibility by saying that the exception would no longer make sense, "especially as the courts might be willing to allow the pleading of parol terms in actions brought on written agreements." Ibbetson, *supra* note 5, at 82 n. 63. The two cases he cites are irrelevant. One is an assize of *mort d'ancestor*, in which deeds were treated very differently from in other actions. The other is an action of debt for money given by reason of a marriage; such agreements always caused unusual problems. Palmer, *Contexts of Marriage in Medieval England: Evidence from the King's Court circa 1300*, 59 *Speculum* 42 (1984).

An exception analogous to the one envisaged here is an action of debt that arose from a broken covenant. The exception was that the deed did not specify a certain day for the performance. *Mohaut v. Boys*, British Library Add. MS. 35116 fol. 240.

25. Ibbetson notes that actions of covenant of lessee against lessor to regain the term after lessee was ousted by lessor did not seem to require specialty. Ibbetson, *supra* note 5, at 92. This would be a case in which the mere fact of the lease was at issue, as distinct from specific terms.

the payment of rent."²⁶ The English leasehold, unlike the *emphyteusis*, was not hereditary: it was a chattel that went to executors. The seemingly proprietary aspects of leasehold in the treatises Ibbetson cites are always carefully circumscribed. If there is an English analogy to the *emphyteusis*, it would seem to be the fee farm, as Ibbetson's citations might well indicate.²⁷ That analogy is often made.²⁸ The appropriate analogue to the normal English lease would be the *locatio rei*, the bailing or letting of a thing in return for compensation. The analogy on which his argument rests is faulty. Moreover, even if the civil law *emphyteusis* influenced the English lease despite the lack of a close analogy, it leaves as an anomaly one of Ibbetson's findings: that a lessee's suit in covenant against his lessor to recover after the lessor ejected him seems not to have required the lessee to support his suit with specialty.²⁹ There is literally nothing that remains of Ibbetson's first stage of the development of the specialty rule in covenant.

The second stage (the first extension of the rule) requires similarly close attention. Ibbetson adduces three reports to indicate the specialty rule between 1292 and 1304. There is no apparent extension beyond what can be perceived in the *Exceptiones contra brevia*.

*Corbett v. Mercury*³⁰ is a well-known case from the eyre of Shropshire of 1292. It has been assumed that its two reports, one indicating a plaint of debt and the other a plaint of covenant, were widely divergent reports of the same case.³¹ It seems, rather, that there were two different cases between the same parties and based on the same factual situation: a plaint of debt reported twice³² and a plaint of covenant reported once.³³ The plaint of debt went to the jury. The report of the plaint of covenant ended on an exception that the plaintiff ought not be answered unless he could produce a writing. The report itself does not indicate that this exception was successful, except that it terminated at that point. It is unlikely that both

26. Ibbetson, *supra* note 5, at 83.

27. Ibbetson, *supra* note 5, at 83 n. 67.

28. *Black's Law Dictionary* 554 (5th ed. 1979).

29. Ibbetson, *supra* note 5, at 92.

30. 1 Y.B. 20 Edw. I, *supra* note 17, at 222, 487.

31. Ibbetson, *supra* note 5, at 87-88 (here only following the normal treatment of the case).

32. 1 Y.B. 20 Edw. I, *supra* note 17 at 222, 487. The former reference is on the same page as the plaint of covenant and is described as based on a writ of debt. The exception taken, however, concerns the lack of a writ: it is certainly a plaint of debt. Moreover, both reports of the debt plaint concern 20 shillings, retail the same inappropriate 40 shilling limitation exception, and have the same pleaders in the same relationship.

33. *Id.* at i, 223.

suits were allowed to continue, and it is at least possible that the plaintiff realized that his suit was weak without specialty. He appeared against another defendant claiming an obligatory writing; that suit failed.³⁴ He could have been suing to recover a deed that had been put into the hands of a trusted third party. The failure of that plea would reinforce the possibility that the exception as to lack of specialty was successful. If so, however, the exception can only be construed as that found in *Exceptiones contra brevia*: that if certain terms, and not the mere existence of an agreement, are alleged, they have to be put in writing. The issue in this case did involve a special agreement in addition to the lease of a horse.

The second case concerned a lease for 10 years with the stipulation of free ingress and egress. The report mirrors the alternative version of one of the covenant exceptions in *Exceptiones contra brevia*: "Likewise, one can ask judgment inasmuch as he alleges a special deed or contract and has only the countryside."³⁵ In this case the defendant, asked what he had to show, responded that he was ready to verify *per sectam patrie* (by suit of the countryside).³⁶ The inclusion of *sectam* was probably a mistake; the context supports the interpretation that he wanted merely to rely on a jury verdict, as the tract would suppose. The defendant then, in accord with the tract, asked judgement if "without a special deed attesting the abovesaid covenant he ought to be answered."³⁷ The exception was successful. The need for the special deed probably relates to the ingress and egress stipulation. The close following of *Exceptiones contra brevium* would not indicate any broadening.

The third case is perplexing, but shows no alteration in the rules pertinent to covenant. The lessor had leased to the lessee for two years; lessee was supposed to have made a writing that he would not hold over. Lessee did not make the writing, but did hold over for a further eight years. Defendant first argued that, since the writing was not made, the covenant was not made. This line of thought presupposes that two covenants were involved: the lease itself and a different covenant not to hold over. Lessor's response confirmed this conceptualization, isolating the holding over as the cause of the

34. *Id.* at i, 284.

35. See *supra* text accompanying notes 19-21.

36. British Library Add. MS. 5925 fol. 162 (Mich. 31 Edw. I) ("Et unde idem Adam [de P. capellanus] dicit quod cum predictus W. [Pistor] dimisit ei predictum tenementum usque ad finem x. annorum etc. cum libero ingressu et egressu ad eundem. [W. Pistor:] si quid habeat de convencione. Et A dicit quod per sectam patrie paratus est predictam convencionem verificare. Et predictus W. petit iudicium asque facto speciali predictam convencionem atestante responderi debeat per quod factum predictum W. sibi faceret responsalem in hac parte. Consideratur quod predictus W. inde sine die.")

37. *Id.*

action. Indeed, such a covenant against holding over could be distinguished from ingress and egress clauses, dates of performance, or the number of years involved in the lease, because it took effect only after the term expired and was thus not strictly appurtenant to the lease. Lessee's initial response failed, whereupon lessor was asked to show what he had of the covenant, whereupon he offered to aver by a jury. Lessee responded with an exception that sounds directly on point: "Covenant falls naturally in specialty, and of this you show nothing; judgment."³⁸ The exception was unsuccessful. I take the exception at something less than face value, as a variant on the exception to a special deed or contract supported only by the tender of a jury. It did not work here, apparently, because the hold over covenant was a separate covenant from the lease. It turned out that lessee claimed a free tenement adjudged him by an assize of novel disseisin. For the second stage, then, nothing that Ibbetson adduces shows any need for specialty in covenant as such, except when special clauses were alleged.³⁹

Ibbetson's concluding section details those areas in which covenant at the end of the reign of Edward I continued to be brought without specialty. He groups them in the category of "covenant for wrongs."⁴⁰ For him the most prominent area involves lessees who commit waste, but this category also includes what might be considered the main area for covenant: remedy for the lessee against a lessor who deprived him of the lease during the term. By the 1330s, however, all covenant cases in the king's court required specialty.⁴¹ Since the only specialty rule thus far observed prior to 1320 relates to special clauses, this once again centers attention on what happened in the *Waltham Carrier Case*.⁴² Ibbetson forwards scholarship by bringing these cases into discussion, but he fails both to recognize the rule about special clauses and to explain the origins of the specialty rule in covenant generally.

38. 5 Y.B. Pasc. 32 Edw. I, *supra* note 17 at 200-201.

39. Those who like to see Roman law importations will refer to Ibbetson's footnote 64, to find that John Bassianus had a similar idea. The similarity should not be automatically taken to prove a borrowing. In passing it should be noted that Ibbetson's perception of a shift from the substance of the agreement to the fact of the agreement as perceived in venue rules is faulty, being anchored in a case concerning Scottish lands and having strong parallels in other personal actions.

40. Ibbetson does not show how he distinguishes between committing waste on the one hand and damaging a horse or holding over on the other. It would seem that all could be considered "covenant for wrongs."

41. Ibbetson, *supra* note 5, at 93.

42. *The Eyre of London, 14 Edward II, A.D. 1321, Part ii*, 86 Selden Soc. 286 (Helen M. Cam, ed., 1969).

II. The Biancalana Thesis on *Justicies* Writs

Biancalana tried to dismantle the *justicies* writ thesis as thoroughly as I have tried to do this to Ibbetson's thesis on covenant. I argued that most of the *justicies* writs (most prominently, viscontiel writs of debt/detinue and covenant) presupposed a plaintiff that had a showing of a higher nature than suit, normally specialty. Those writs were provided to relegate routine cases to the county courts, and for that purpose the writs provided plaintiffs with the advantageous force given specialty in the king's court, but now to be applied in county courts when the suit was brought by writ. "Palmer," he says, "is almost certainly wrong in his argument about the *justicies* writ of debt."⁴³ He much prefers to read the evidence as showing the *justicies* writs as a mechanism that "extended royal control over county courts and facilitated the collection of royal revenue."⁴⁴

Biancalana's suggestion shows the remarkable vitality of Maitland's approach to twelfth and thirteenth century English legal history. That tradition views the maxim "no man need answer for his free tenement without a royal writ" precisely as a mechanism for licensing and thus controlling pleas of land in feudal courts and as a source of revenue. That approach to Angevin legal development has proven bankrupt.⁴⁵ From a completely a priori perspective then, Biancalana's approach would seem improbable, as based on a faulty perception of Angevin legal change. Having put Biancalana in an historiographical context, however, does not show that he is wrong; it only shows that evaluating his analysis is important for determining the overall nature of the origins of English common law.

On a crucially important point Biancalana and I worked on different assumptions, assumptions that seemed so obvious as not to need proof and really not to need explication. I worked on the assumption that county courts had jurisdiction in debt/detinue and covenant by plaint, so that the introduction of *justicies* writs after around 1200 was in addition to that continuing jurisdiction by plaint. Litigants thus had a choice as to whether or not to buy a writ until the 1290s, at which time writs became available that prohibited debt/detinue plaintiffs for forty shillings or more in the lower courts. Biancalana started from the opposite assumption: that the plaint jurisdiction in debt/detinue and covenant in county courts ended with the provision of the *justicies* writs. Litigants thus would have

43. Biancalana, Book Review, *supra* note 3, at 315.

44. *Id.*

45. S.F.C. Milsom, *The Legal Framework of English Feudalism* (1976); Palmer, *The Economic and Cultural Impact of the Origins of Property*, 3 *Law & Hist. Rev.* 375 (1985); Palmer, *The Feudal Framework of English Law*, 79 *Mich. L. Rev.* 1130 (1981); Palmer, *The Origins of Property in England*, 3 *Law & Hist. Rev.* 1 (1985).

had no choice at all. It was from this perspective that he read the book, and only toward the end of his discussion of the *justicies* writ of debt does he consider my working assumption: "Palmer's argument would be more convincing if we knew that a plaintiff in, for example, a case of debt was required to begin his suit with a *justicies* writ. For if he were not so required, he could begin by plaint and thereby avoid the requirement of a charter."⁴⁶ My assumption can at least be established as probable, and Biancalana's caveats and suggestions as mistaken.

Little doubt can exist that litigants did not need to purchase a *justicies* writ to bring cases in county courts throughout most of the thirteenth century. The best quantitative evidence we have would indicate that in 1330, only 10% of the cases in county court were brought by writ.⁴⁷ Working backwards, the requirement of a writ in county court for debt/detinue cases claiming forty shillings or more originated in the 1290s. Biancalana thought that the date was uncertain⁴⁸ and cited John Beckerman's article, without reference to the additional information contained in *County Courts*.⁴⁹ It is difficult to see how the date can be uncertain when the first writ of prohibition of forty shilling plaints in debt/detinue was issued in 1295⁵⁰, lower court plaint cases in debt/detinue for thirty-nine shillings 11 pence (the typical way to avoid the forty shilling requirement) appeared only in 1292⁵¹, and the first formulation of a rule (although a rule not yet enforceable by prohibition or, as far as I can find, by false judgment) was in 1286.⁵² Moreover, I documented plaints of debt/detinue in county courts from early in the reign of Edward I, none of which were challenged on jurisdictional grounds.⁵³ The use of the writ *recordari* for the removal of such plaints in 1275 would have sufficiently indicated the existence of such plaints.⁵⁴ There is no basis at all for thinking that county jurisdiction over plaints in debt/detinue was limited prior to the 1280s; there is much documentation showing that the rule arose and became enforceable in the years 1281 to 1295. Biancalana completely compartmentalized my treatment of the forty shilling rule when he wrote on the *justicies* writs,

46. Biancalana, *Medieval County Courts*, *supra* note 4, at 1012.

47. Palmer, *supra* note 1, at 226.

48. Biancalana, *Medieval County Courts*, *supra* note 4, at 1012.

49. J. Beckerman, *The Forty-Shilling Jurisdictional Limit in Medieval English Personal Actions*, in *Leg. Hist. Stud.* 1972 110 (D. Jenkins ed. 1975).

50. Palmer, *supra* note 1, at 257.

51. *Id.* at 254.

52. *Id.* at 255.

53. *Id.* at 253.

54. *Id.* at 250.

and did not go back to revise those views when he later analyzed my treatment of the rule.⁵⁵

One can confidently assert that significant complaints in debt/detinue appeared in county courts in the 1270s; we can be equally confident about the earlier thirteenth century. Prior to the *justicies* writs, in the twelfth century, there was debt litigation in the county courts.⁵⁶ The provision of the *justicies* writs did not result in the massive issuance of such writs, as would have occurred had the writs been required for all debt litigation.⁵⁷ Moreover, if there was some point early in the thirteenth century when *justicies* writs were made mandatory for all debt/detinue litigation in county courts, that decision has left no trace. Finally, that decision would have had to have been reversed at some point prior to the reign of Edward I to account for the jurisdiction documentable at that time; the undocumented reversal of an undocumented royal position in such an important matter is extremely implausible. Any assertion that *justicies* writs were forced on all county litigants in debt/detinue in the early thirteenth century must be met with extreme scepticism. Biancalana's assumption about the requirement for the *justicies* and the consequent proposed motivation for licensing and control must therefore be dismissed; all of the documentation and almost all of the argument necessary for this dismissal appear in the book he was reviewing.

This mistaken assumption undermines the rest of Biancalana's analysis of the *justicies* writ of debt. He thought it improbable in the early thirteenth century, under men such as Hubert Walter, to allow enforcement of debts only if they were evidenced with specialty and that such a requirement was more reasonable late in the thirteenth century when literacy was higher.⁵⁸ However, such a requirement was improbable anytime in medieval England. The *justicies* writs did not force people to change their practices, because there was no necessity to purchase the writ to enforce the debt. Prior to the 1280s they could always resort to the plaintiff jurisdiction of the counties; thereafter, they could get a *justicies* writ even if they did not have specialty. Litigants without specialty always had some option.

The financial motivation Biancalana adduces is groundless. He thought that the writ "facilitated collection of the third part of a debt owed to the king when a debt was collected with the king's process."⁵⁹ There was no facilitation: the third part was *only* due if the

55. Biancalana, *Medieval County Courts*, *supra* note 4, at 1014-15.

56. Palmer, *supra* note 1, at 184.

57. *Id.* at 186-87.

58. Biancalana, Book Review, *supra* note 3, at 315; Biancalana, *Medieval County Courts*, *supra* note 4, at 1009-10.

59. Biancalana, *Medieval County Courts*, *supra* note 4, at 1008.

debt enforcement began with a royal writ. Biancalana thought that the *Rotuli de Oblatis* highlighted the financial importance of the writs.⁶⁰ On the contrary, they merely noted the few payments promised. Whether these payments are viewed as motive or welcome result depends on the reader's judgment. Those who imagine that the writs were provided merely as a very clever gimmick to increase revenue underestimate Angevin government and fail to put the records in proper perspective.

The question comes into better perspective when one realizes that litigants did not have to purchase the writs. The pressing question then becomes *why* they were willing to surrender a third (or a half, quarter, sixth or tenth) of the debt to the king to have a writ. Litigants would not part with their money simply to gain the experience of going into Chancery or to impress the sheriff with their diligence; there had to be some benefit that made the origination of the suit by writ particularly desirable. Isolating that reason was the purpose behind sorting through the possibilities that the *justicies* writs were *manu-militari* collection devices or constituted the sheriff as a justice.⁶¹ Biancalana viewed that exercise as wrong-headed,⁶² but both those theories, had they been possible, would have provided the motivation for litigants to purchase the writs. Once those were excluded, it remained possible that the writs provided jury procedure, a desirable matter for plaintiffs as compared to defendant's compurgation; but that seems to have been a matter that grew up later in the century.⁶³ Finally, the possibility of removal to the king's court could have been a motivation for litigants, except that that motivation is not believable until later in the century.⁶⁴

It is the exclusion of all other possible motivations for the writs, including Biancalana's suggestion of control and revenue, that raises the possibility that the *justicies* writs were provided to keep certain kinds of cases from clogging the king's court by making the writ demand the better procedure of the king's court for the individual case in county court. If the procedure was not trial by jury, nor access to removal by *pone*, nor the constitution of a friendly sheriff as justice, nor mere executive collection of the debt the remaining possibilities are not numerous. Those possibilities excluded, and obscurantism being undesirable, it remains to find that possibility that the evidence does tend to support. That the form of the writ was related to its effect and motivation is not improbable. The word

60. *Id.* at 1009.

61. Palmer, *supra* note 1, at 187-98.

62. Biancalana, *Medieval County Courts*, *supra* note 4, at 1006-08.

63. Palmer, *supra* note 1, at 215-16.

64. *Id.* at 217-18.

justicies having been eliminated as the decisive element, there only remain the words 'as he shall reasonably have been able to show': *sicut rationabiliter monstrare poterit*.

Biancalana raises several objections to my construction of the reasonable showing clause; none are well conceived. Biancalana notes, as did I,⁶⁵ that there were two *justicies* writs in *Glanvill*,⁶⁶ although he does not note that the book already handles his objections. Start with the *facias* writ for enforcing testamentary bequests. Biancalana objects that such writs would not demand the plaintiff to have written proof, because a donor's death-bed gift did not have to be written.⁶⁷ That criticism assumes that the writ would apply to all potential litigants under a bequest; that it was a general remedy for testamentary bequests. The commentary in *Glanvill* indicates that it was not appropriate when the will was not rightly made (*testamentum non fuerit recte factum*) or when it was disputed whether the thing claimed was thus devised.⁶⁸ The writ was thus appropriate only for the very clear cases, as when, one might suppose, the *testamentum* was written; otherwise it went to the ecclesiastical courts.⁶⁹ Nevertheless, this was a *facias*, not a *justicies* writ and looked to more executive action, as simply to make the division of the chattels in a judicial setting. Then, as to the writ for delivering chattels after an assize of novel disseisin, contrary to Biancalana,⁷⁰ *Glanvill* does not indicate that it is a writ of execution. Only after the sheriff has failed to obey the writ of execution would the plaintiff purchase the writ for restoring chattels;⁷¹ the fact that the sheriff had declined to restore the chattels indicates that there remained further problems. However, when the plaintiff in the *justicies* writ arrived in county court, he could well have been expected to have evidence of the court record of the assize of novel disseisin or at least of the writ of execution on which his *justicies* writ was based. Neither of these writs provides any basis for doubt about the thesis; only the writ of customs and services is a problem.

Biancalana considers that *Glanvill*'s commentary on the writ of customs and services decisively undercuts my thesis, because of the reference to the suit proceeding by the custom of the county. The problem is serious, but analysis of *Glanvill* offers only two alternatives. The first is that the reasonable showing phrase only refers to

65. *Id.* at 182, 210-11.

66. Biancalana, *Medieval County Courts*, *supra* note 4, at 1010-11.

67. *Id.* at 1011.

68. vii *Tractatus de legibus et consuetudinibus regni Anglie qui Glanvilla vocatur*, 8 (81) (Hall ed. 1965) (hereinafter *Glanvill*).

69. *Id.*

70. Biancalana, *Medieval County Courts*, *supra* note 4, at 1010.

71. *Glanvill*, *supra* note 68, at 170.

local custom. This was Biancalana's conclusion even though I had handled that possibility in the book. Chancery, however, could be very precise in referring to local custom as the relevant law.⁷² Moreover, if the writ was not conferring special procedure but only mandating the application of local custom, there was no reason for plaintiffs to surrender so large a portion of their claim to purchase the writ. The other alternative in approaching *Glanvill* is to examine other possibilities of what he meant. In the book I mentioned four possibilities, the most likely of which is that handling the case according to the custom of the county would apply to all matters except the preclusive power of the deed: the form of the count, the mesne process, the accustomed nature of the court and its judges, and the method of execution after judgment.⁷³ None of these writs presents any serious problems for the thesis; the writs concerning testamentary divisions and restoration of chattels after an assize of novel disseisin certainly support it.

Biancalana takes me to task for overlooking the possibility that the early *justicies* writs involving the *archae cyrographorum* were a possible influence on the origins of the viscontiel *justicies* writs.⁷⁴ The *archae* was a collection of the written bonds that proved debts owed to Jews. That origin would help establish the relationship of the viscontiel *justicies* writs to specialty. I would agree, but I did not overlook the possibility. I examined the earliest *justicies* writs in the pipe rolls and concluded that they were special procedures for Jewish plaintiffs in debt, not viscontiel debt writs.⁷⁵ Most of those were prior to the creation of the *archae* in 1194, but the presumption is

72. Palmer, *supra* note 1, at 210.

73. Palmer, *supra* note 1, at 210, n. 87.

74. Biancalana also asserts that I did not pay much attention to the greed and oppression of sheriffs or the reason for the decline of the county courts. Biancalana, *Medieval County Courts*, *supra* note 4, at 995, 1002-03. In this he followed the lead, seemingly, of Stephen White, who commented "Palmer therefore concludes that while the viscontiel bureaucracy was hardly 'a faultless servant of the public interest,' it was probably not 'as corrupt as the occasional virulent protest might indicates' (p. 55). One need not share Palmer's sunny view of medieval county bureaucracy. . . ." White, *The Medieval English County Court* (Book Review), 81 Mich. L. Rev. 963, 965 (1983). Unlike Helen Cam, Stephen White, and Biancalana, I do not believe that every allegation of misconduct is true; had the Hundred Rolls resulted in indictments, it must be expected that the majority of those accused, like the majority of those indicted for homicide, would legitimately have been acquitted. Few allegations of misconduct appear in the plea rolls; for many of them, the sheriff's action was colorable. On the other hand, Stephen White did not mention, nor does Biancalana seem to see, that the heavily argued chapter on removal is based completely on the problems with sheriffs and bailiffs; the only way around those problems was limiting de facto county jurisdiction, causing the decline of the importance of the county court in the fourteenth century. I treated almost all the things Biancalana believes I ignored.

75. Palmer, *supra* note 1, at 184-85.

that this was a precursor. I explicitly related the Jewish chyrographs to the viscontiel *justicies* writs and specialty at the end of the treatment of the reasonable showing clause.⁷⁶

Nothing that Biancalana has to say on the subject of the *justicies* writ of debt holds up. His analysis is undercut by the assumption that all county plaintiffs in debt were forced to buy *justicies* writs. That allowed him to hypothesize control and revenue motives, instead of inquiring about the reason why litigants would pay to have an optional writ. Moreover, he compartmentalized certain portions of the text out of the discussion, particularly that having to do with the forty shilling rule, and did not examine *Glanvill* with sufficient care. The thesis on the *justicies* writs is not proven; a more explanatory thesis may surface. Until then, it must seem that the *justicies* writs were provided to keep debt/detinue and covenant suits out of the king's court, particularly when they involved few legal problems: the perception of the suit when plaintiff had specialty.⁷⁷

III. Biancalana's Approach to the Covenant Rule

Unpersuaded by the *justicies* debt material, Biancalana was understandably sceptical about my thesis on the origins of the specialty rule in covenant: both relied heavily on the construction of the reasonable showing clause in the *justicies* writs. He preferred to hypothesize that the specialty rule in covenant simply grew up in both county and king's court during the thirteenth century.

On one point Biancalana is undeniably correct. The strongest direct evidence I adduced for mid-century practice relating *justicies* covenant directly to specialty came from the comparison between two cases in the Berkshire eyre of 1248. He points out, correctly, that I over-construed the *justicies* case.⁷⁸ The loss of that piece of evidence, however, does not defeat the thesis; it merely removes one piece of confirmatory evidence. What remains from the original data is what I consider a strong argument from the origins of the *justicies* writs as a class at the beginning of the thirteenth century, and a very strong argument about the reasonable showing clause late the thirteenth century. Evidence in between was desirable, but not necessary, since what was argued was continuity and what the plea rolls provide is a very uninformative record on the necessary points.

Biancalana's approach to the covenant material must change, if he acknowledges the thesis in regard to *justicies* debt; the idea that the custom of a specialty requirement simply grew up along

76. *Id.* at 211.

77. Palmer, *supra* note 1, at 214-15.

78. Biancalana, *Medieval County Courts*, *supra* note 4, at 1013.

with growing literacy seems positively obscurantist. Moreover, Biancalana's hypothesis does not fit well with the analysis of Ibbetson's thesis.

IV. Reasonable Showing

At the time I wrote the book, I had four cases from the 1290s which used the words *reasonable showing*, all in reference to specialty. Two of these cases had originally been brought in county court by *justicies* writs of debt. The third had been brought in the court of King's Lynn. The fourth was a case probably but not surely removed from a lower court by *pone*.⁷⁹ All of the cases were in debt, whereas it would have been desirable to have evidence that the reasonable showing clause was similarly construed in covenant. The evidence nevertheless was strong enough to demonstrate the meaning attached to the clause in the 1290s. Further evidence is now available that goes beyond what I had then.

The evidence of the association between the reasonable showing clause in debt litigation and specialty is now overwhelming. *Prior of Barnwell v. B.* was a claim of ten marks in which the defendant referred to the plaintiff's proffered writing as *reasonable demonstrance*.⁸⁰ *Prioress of Westwood v. Prior to Malverne Parva* is a case of debt for twenty pounds in which the defendant twice referred to the proffered writing as *renable demunstraunce*.⁸¹ *De la Chape v. Anon.* was a claim for fourteen marks in which the defendant challenged a variance between count and the plaintiff's proffered writing, his *resonable demonstrance*.⁸² *Fitz Richard v. Richard*,⁸³ *Anon v. Anon*,⁸⁴ *A v. Executors of D*,⁸⁵ *R de P v. W. de M*,⁸⁶ *Executors of Steven de Bedeford v. Giffard*,⁸⁷ and *Lay v. Skelton*⁸⁸ are further examples in which plaintiffs' proffered writings in actions of debt are termed *resonable demonstrance*. None of these cases mention removal, so that it cannot be shown that they were actually brought originally by *justicies* writs and removed. Nevertheless, the frequency with which *justicies* writs were removed from

79. Palmer, *supra* note 1, at 200-202.

80. British Library Add. MS. 35116 fol. 240.

81. British Library Add. MS. 31826 fv. 379 (1305?).

82. British Library Add. MS. 35116 fv. 235.

83. Lincoln's Inn Hale MS. 188 fol. 17.

84. Lincoln's Inn Hale MS. 188 fv. 17.

85. Lincoln's Inn Hale MS. 188 fol. 18; Lincoln's Inn Hale MS. Misc. 87 fv. 31; British Library Add. 31826 fv. 67.

86. Harvard MS. 162 fv. 197.

87. British Library Add. MS. 37657 fv. 67.

88. British Library Add. MS. 37657 fv. 122.

county courts in the 1290s together with the term itself make it probable that they were brought by *justicies* and removed by *pone*. There are now thirteen known cases of debt in which the term is used; each time it refers to specialty.

In the book I was unable to adduce any proof that this usage extended beyond cases of debt; the assertion rested on the meaning of the common form of the *justicies* writs. *Neumarch v. Thornton*, however, is a case of covenant brought on a lease agreement that stipulated further that the lessee would return the manor in as good a condition as he found it, whereupon the lessee abated the house and trees. The plaintiff proffered specialty, appropriately since he was stipulating a special agreement beyond the mere lease. The defendant then challenged a variance between the writ and count on the one hand and the *renable demonstraunce* on the other.⁸⁹ *Keyser v. Crescy* is another covenant case. Lessor had leased to lessee two-thirds of a manor, reserving the remaining third as dower for the widow, including a commitment to warrant the lessee against all men. The lessor then allowed the widow to recover her dower from the lessee and would not warrant him, contrary to the covenant. The lessee in court challenged a variance between the writ and the *resnable demonstraunce*.⁹⁰ The phrase referred to the writing, because the defendant immediately clarified his challenge by reference to *le bref* and then to *le fet*.⁹¹ The meaning of reasonable showing as related to specialty in the 1290s cannot be contested, whether for debt or covenant.

One further indication of the relationship between reasonable showing and specialty comes from a yearbook note.

Why will one not have *detinet* in a viscontiel writ of debt after the *debet*, as one has in a writ pleadable in Bench? The damages supposed derive from the *detinet* and are as well recovered by the one writ as by the other. According to some, it is because of the *rationabiliter monstrare etc.* which follows the *debet* and clarifies it. By others, it is because as soon as a man obliges himself by a writing he owes the debt, but he does not detain until the day passes.⁹²

89. British Library Add. MS. 31826 fv. 139.

90. British Library Add. MS. 37657 fol. 30.

91. *Id.*

92. *Pur quey en bref de dette vescuntal si navera lem pas detinet apres le debet sicum en bref pleadable en banke. De pus qe damages qe supposez sunt par le detinet ausi bien estre recovere par lun bref cum par lautre. Secundum quosdam, par le rationabiliter monstrare etc. qe ensyut qe esclarsist le debet etc. Et per quosdam, a plus tot qe un home est oblige par escrist si deit il la dette, mes il ne detent point tant qe le ior seit passe.* British Library Add. MS. 31826 fv. 236.

Such yearbook notes are difficult, but one must try to make sense out of both the answers presented in the text. The first answer is that the phrase "as he shall reasonably have been able to show" clarifies the phrase "he owes," so that the specification about damages could come later. It is possible that this answer envisages the clarification to come in the count, such that the reasonable showing would refer to making a good count. As an answer, this is unlikely but understandable, as I will show below. The second answer is better. I take the meaning to indicate a distinction between *justicies* debt and *precipe* debt, as supposed in the question. In *justicies* debt everything flows from the writing, and thus only the *debet* is necessary. In *precipe* debt, since the plaintiff did not need to have a writing, the *detinet* serves in place of the deed. A somewhat different understanding of the second answer would suppose that *justicies* debt was normally initiated close but prior to the date on which the debt was due, whereas a *precipe* writ of debt could only be purchased after the due date. Either explanation of the second answer, however, indicates that the plaintiff in *justicies* debt would have a writing.

Just as interesting as the clear specialty requirement envisaged in the second answer is the implausible nature of the first answer. The implausibility, presuming that the clarification referred to would be in the count, is that this explanation would make the reasonable showing phrase superfluous. *Precipe* debt as well as *justicies* debt demanded a count that would clarify and expand on the writ. That necessity did not derive from any words in the writ. The answer would have been understandable, however, because counts began *Ceo vous moustre*. The first answer would nevertheless have received some hearing because of the date at which the note was written. The manuscript in which the note appears could have been written as late as 1308 or 1309. The reasonable showing clause in *justicies* debt writs, however, was rendered meaningless by 1295. With the writs prohibiting county courts from entertaining debt/detinue claims for forty shillings or more, it became necessary for Chancery to issue *justicies* writs and for county courts to honor such writs even when the plaintiff did not have specialty. No longer was the primary fact in purchasing *justicies* debt writs whether or not one had specialty; it was whether the claim was for forty shillings or more. If the claim exceeded forty shillings, one had to have a writ to plead in county; if it was less, one retained a choice as to whether to proceed by plaint or by writ.

The debt forty shilling rule superseded the *justicies* debt specialty rule around 1290. The change was the reason why Biancalana was able to find in my citations a case brought by *justicies* in which the plaintiff did not have specialty: the case was brought in 1298, after the specialty rule in *justicies* debt had given way to the forty shilling rule. Biancalana concluded that the specialty rule was slow

in developing;⁹³ I conclude that the specialty rule in debt had already disappeared. Certain individuals, of course, would continue to refer to specialty as *reasonable showing*, but one could expect perplexity about the writ form in the early fourteenth century.

In the book most of the analysis went to the *rationabiliter in sicut rationabiliter monstrare poterit*. I wanted to avoid any possible conclusion that specialty seemed particularly "rational." Equal attention, however, should be given to *monstrare*. Litigants never spoke about "showing" suit, but rather about "producing" suit. However, one did speak about showing deeds and tallies.⁹⁴ And, indeed, there is a case from 1241 by *justicies* writ in the county court of Buckinghamshire in which the plaintiff proved his debt by tally and suit, that is, by tally proved by the oath of six men.⁹⁵ Whether this was a sealed or unsealed tally is unknown. Since the debt for which the plaintiff was suing was assigned to him by the king, one can suspect the more formal sealed tally, which was roughly equivalent to specialty,⁹⁶ and certainly something that could be "shown." As he shall reasonably have been able *to show* can on the force of the terms themselves be seen to indicate that some physical showing must be made: writing or, perhaps, a sealed tally.

The reasoning proposed in the book for the origins of the specialty rule in covenant in king's court still seems good. The forty shilling rule in debt/detinue made the crucial phrase in *justicies* debt/detinue meaningless. Since those writs were far more common than covenant, that weakened the relationship in legal thought between the *reasonable showing* clause and specialty requirements. However, the forty shilling rule did not affect *justicies* covenant, which (by *pone*) was one if not the most frequent way of bringing litigious covenant cases into the king's court. Also, plaintiffs in those suits removed from county would still have had specialty, accustoming the justices to specialty in covenant. The juxtaposition of cases removed from county with *precipe* cases (which would not have required specialty) would produce the historical record that makes it look as if the law was ambivalent. Since the relationship between the writ and specialty became harder to perceive after the forty shilling rule appeared in debt, it is not surprising that justices

93. Biancalana, *Medieval County Courts*, *supra* note 4, at 1012.

94. Typical proffers of specialty are *Veez son fet or mist avant un escrist*. A good example of the less common usage: *Hou. Quey avez vous de la dette. Spigurnel. Siwte bone. Hou. Avez vous altre chose pur nous lier a la dette? Spigurnel. Nanyl. Hou. Sire, il nous demande une dette de x mars e il ne moustre rien a la court pur nous lier: escrist ne taille ne altre chose qe lur vaille for lor vent*. Harvard MS. 162 fv. 190. J.H. Baker, *Manual of Law French* 144 (1979).

95. 16 *Curia Regis Rolls of the Reign of Henry III* 1700 (L.C. Hector, ed. 1979).

96. British Library Add. MS. 31826 fv. 360.

began associating covenant with specialty in a more jurisprudential fashion, identifying it, contrafactually,⁹⁷ with evidentiary problems. As stated in the book, "The specialty rule in covenant was thus philosophically grounded in evidence, but historically rooted in a misconception."⁹⁸ Nothing in the Ibbetson article or in the Biancalana reviews has weakened the argument. Hopefully, this response will clear the way for furthering understanding of legal change in thirteenth and fourteenth century England.

97. There is no reason why covenant, like debt, could not have allowed for compurgation when plaintiff had no specialty.

98. Palmer, *supra* note 1, at 209.