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# The Origins of Property in England

Robert C. Palmer

The English common law of real property, as S.F.C. Milsom has argued, took shape between 1153 and 1215.<sup>1</sup> The common law gave royal protection to free tenements, replacing feudal relationships as the primary bond structuring society. The law thus constituted the institutional core of the

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1. The short forms for frequently cited works, primary and secondary respectively, are the following:

Bracton: Henry de Bracton, *De Legibus et Consuetudinibus Angliae*, ed. G.E. Woodbine and trans. S.E. Thorne, (Cambridge, Mass. and London, 1968).

Glanvill: *The treatise on the Laws and customs of the Realm of England Commonly Called Glanvill*, ed. G.D.G. Hall (Oxford, 1965). The author will, as is customary, be referred to as 'Glanvill' for reasons of convenience.

CRR: *Curia Regis Rolls* (London, 1922) [entry numbers instead of page numbers after vol. 10].

RCR: *Rotuli Curiae Regis*, ed. F. Palgrave (1835).

PKJ: *Pleas before the King or his Justices, 1198-1212*, ed. D.M. Stenton, Selden Society, vols. 67 (London, 1948), 68 (1949), 83 (1966), 84 (1967).

PRS XIV: *Three Rolls of the King's Court in the Reign of King Richard the First, 1194-1195*, ed. F.W. Maitland, Pipe Roll Society, vol. XIV (London, 1891).

Registers: *Early Registers of Writs*, ed. E. de Haas and G.D.G. Hall, Selden Society, vol. 87 (London, 1970).

Milsom, *Historical Foundations*: S.F.C. Milsom, *Historical Foundations of the Common Law*, 2nd ed. (London and Toronto, 1981).

Milsom, 'Inheritance by Women': S.F.C. Milsom, 'Inheritance by Women in the Twelfth and Early Thirteenth Centuries', in Morris S. Arnold, Thomas A. Green, et al., *On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne*, (Chapel Hill, 1981), 60-89.

Milsom, *Legal Framework*: S.F.C. Milsom, *The Legal Framework of English Feudalism*, (Cambridge, 1976).

English state.<sup>2</sup> But no Machiavellian monarch constructed the English state.<sup>3</sup> Henry II was, rather, a king who presumed the morality and necessity of feudal relationships. His innovations, though intentional and carefully planned, were directed at narrower and less far-sighted ends.<sup>4</sup> Other changes were the result of bureaucratic action.<sup>5</sup> The complex interplay between present-oriented political or juridical decisions and bureaucratic rigor generated a legal system.

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Palmer, Feudal Framework: R.C. Palmer, 'Feudal Framework of English Law', *Michigan Law Review* 79 (1981), 1130-1164.

Pollock and Maitland, *Hist. Eng. Law*: F. Pollock and F.W. Maitland, *The History of English Law Before the Time of Edward I*, 2nd ed. with introduction by S.F.C. Milsom (Cambridge, 1968).

Thorne, 'English Feudalism': S.E. Thorne, 'English Feudalism and Estates in Land', *Cambridge Law Journal* (1959), 198-209.

2. R.C. Palmer, *The Whilton Dispute, 1264-1380: A Social-Legal Study of Dispute Settlement in Medieval England* (Princeton, 1984) 16-17, 215-20; R.C. Van Caenegem, *The Birth of the English Common Law* (Cambridge, 1973), 6-7; Sir Frank Stenton, *The First Century of English Feudalism*, 2nd ed. (Oxford, 1961), 256-57; Joseph Strayer, *On the Medieval Origins of the Modern State* (Princeton, 1970), 38-47. The role of the Exchequer (as a bureaucratic financial organization) in the growth of the English state has been overestimated. It provided a financial base for a strong monarchy and functioned bureaucratically in revenue matters from the reign of Henry I. It could not, however, form the base for a state until it produced bureaucratic judicial organs. Until then it lacked the capacity to impact in a direct beneficial manner on a broad range of the population making people associate its existence with their own well-being. Only the social impact, not the mere existence of bureaucracy, is relevant to state creation.
3. Bryce Lyon bluntly summarized the traditional evaluation of the Angevin monarchs: 'To accelerate the disappearance of feudal law and the concomitant centralization of power in their hands, the kings and their counselors developed courts and procedures to adjudicate legal differences more rationally and efficiently. The more cases adjudicated in royal courts, the more revenue and power for the kings'. (Bryce Lyon, 'The Emancipation of Land Law from Feudal Custom', *Yale Law Journal* 86 (1977), 784.) This approach determines monarchical intent from results. Maitland, forced to be brief, did little better: 'Speaking briefly, we may say that [Henry II] concentrated the whole system of English justice round a court of judges professionally expert in the law. He could thus win money—in the Middle Ages no one did justice for nothing—and he could thus win power; he could control, and he could starve, the courts of the feudatories. In offering the nation his royal justice, he offered a strong and sound commodity'. F.W. Maitland and F.C. Montague, *A Sketch of English Legal History* (New York and London, 1915), 36. Jolliffe's portrayal of the Angevins similarly suffers from an anachronistic valuation of *vis, voluntas, ira* and *malevolentia*. J.E.A. Jolliffe, *Angevin Kingship* 2nd ed. (London, 1963). It is also not useful to label the Angevins 'autocrats'. (Jolliffe and Lyon [Bryce Lyon, *A Constitutional and Legal History of Medieval England*, 2nd ed. (New York, 1980), 244-45]) In a feudal and discretionary society, structured by personal relationships such matters were relatively acceptable bases for decision-making. See Stenton, *English Feudalism*, *supra* note 2, 51; Milsom, *Legal Framework*, 183-86.
4. Milsom, *Legal Framework*, 183-86; text accompanying notes 46-63.
5. See text *infra* accompanying notes 68-98; Palmer, 'Feudal Framework', 1163; Palmer, *Whilton Dispute*, *supra* note 2, 215-18; Milsom, *Legal Framework*, 45-51 (although Milsom does not speak straight-forwardly to the nature of bureaucratic action).

This article argues that, although Milsom is correct in the direction of his revisionist argument about the origins of the common law, his thesis needs careful reworking. His *Legal Framework of English Feudalism* provided a daring, but oracular challenge to Maitland's traditional framework. In the second edition of *Historical Foundations of the Common Law*, Milsom summarized his thesis. Both the original work and the summary provide a new basis for conceptualizing the origins of the common law. Milsom's work assumes a sophisticated notion of property that is not explicitly argued. He argues that the common law came about not by a transfer of jurisdiction over property claims from feudal courts to the king's court, but rather by regulation of feudal contractual obligations: not a painless change of jurisdiction, but the production of a body of law by regulation according to customs made rigid by bureaucrats.<sup>6</sup> The thesis provides a new conceptual framework for evaluating social mores, legal change, and property rights.

Milsom's thesis remains incomplete. He does not provide a clear chronology for the development of the law. Chronology may seem secondary, but only through a full chronology can the new conceptualization be tested. For instance, Milsom argues from the language of the Assize of Northampton, c.4, that mort d'ancestor was directed against lordly action.<sup>7</sup> That seems clear. But the reasons why the lords became subject to regulation then and the purpose for the regulation remain unspecified. Likewise, the relationship of the Assize of Northampton to surrounding events, not least the Compromise of 1153, constitutes a substantial problem. Until these matters are treated, Maitland's framework will survive, because, fortified by a century of scholarship, it still coordinates better the existing data. This article completes Milsom's thesis in these particulars.

Milsom's thesis likewise misconceptualizes the writs of entry. He maintained, correctly, that early litigation was not horizontal: not owners defending title to property against equals.<sup>8</sup> Early litigation took place in a world and according to a model that was strictly hierarchical. The assize of novel disseisin, the assize of mort d'ancestor, and the writ of right patent were conceptually upward: they were tenants' claims against lords. The writs of entry, however, were downward looking: claims of lords against their tenants. They became necessary in the thirteenth century only because lords had been disabled from challenging tenants' warrants in the lords' own courts. The entry words in the writ were therefore jurisdictional words: the writs were properly within the jurisdiction of the king's court because the lord to whom the case would ordinarily pertain was himself the claimant. The lord thus remitted his court by buying the writ.<sup>9</sup>

There is much to Milsom's conceptualization of the writs of entry: it does demonstrate a social situation behind the writ. The thesis, nevertheless, fails

6. See Palmer, 'Feudal Framework', 1132-33.

7. Milsom, *Legal Framework*, 164-66; *Historical Foundations*, 137-39.

8. Milsom, *Historical Foundations*, 119-24.

9. *Ibid.*, 147-48.

to address the legal conceptualization and the formal development of the writs. The social and legal conceptualizations of writs were different even this early. Milsom's conflation of the two prevents a successful explanation of the mechanics and development of the rules pertaining to the writs. Distinguishing the social and legal conceptualizations, moreover, lays the foundation for explaining, in a later article, the economic impact of the origins of the common law. Explaining legal technicality is not merely the legal remedy for insomnia: it can have immense historical interest.

This article, then, provides a structure for a social-legal understanding of Angevin law and society in the twelfth and thirteenth centuries. The argument draws heavily on Milsom's work, in particular his theses about the nature of legal change, of property, and of Angevin England. The result here, however, is decidedly different. The chronological structure, the identification of problems avoided by Milsom's approach, the solution of new problems suggested by his assumptions, and the necessary correctives to his thesis yield an account of the development of property law that relates explicitly to social phenomena.

### Property and Feudal Relationships

Property right was antithetical to twelfth-century feudal relationships. Such a contrast is traditional, but the indices for gauging both have been mistaken. Some recent scholarship declines to consider feudal relationships vital after the mid-twelfth century.<sup>10</sup> On the contrary, however, England was decisively feudal throughout the reign of Henry II; property only appeared around 1200.

The feudal relationship involved profound mutual obligations, represented and secured by a precarious grant of land. The lord provided protection and maintenance of his man. The man's obligation in return was symbolized by the homage, the 'man-ing', he gave the lord for his fee. By that ceremony he entered into a relationship of subordination: in all things he

10. See J.C. Holt, 'Politics and Property in Early Medieval England', *Past and Present* 57 (1972), 3-52; J.C. Holt, 'Feudal Society and the Family in Early Medieval England: I. The Revolution of 1066', *Transactions of the Royal Historical Society* 32 (1982), 193-212; and J.C. Holt, 'Feudal Society and the Family in Early Medieval England: II. Notions of Patrimony', *Transactions of the Royal Historical Society* 33 (1983), 193-220 which concern only social notions of inheritance and dismiss jurisdictional matters and enforcement as irrelevant. The problem with Holt's argument is that there is a difference between social notions—essentially, then, ideas about what is just and moral and expected—on the one hand and property and ownership on the other. The existence of social ideas about inheritance logically must precede the appearance of property, but the social ideas are neither equivalent to property nor do they necessitate it. Social ideas about inheritance were controlled by social ideas about the lord's authority: jurisdictional matters are not irrelevant trivia. Moreover, indeterminacy of rules concerning descent is not mere vagueness: it connotes lordly authority, not that the thought about descent had not been considered. Finally, some thought about the nature of inheritance was inevitable from ecclesiastical practice; that consideration weakens whatever force arguments relating notions of heirship to land have.

was to further his lord's earthly honor.<sup>11</sup> Obviously he had to render his knightly or other services conscientiously. The ways in which the relationship dominated the tenant's family are revealing. The lord, not the widow, would be the heir's guardian.<sup>12</sup> The lord as guardian would designate the heir's spouse.<sup>13</sup> Not only in the battlefield, but also in the familial context, the man's personal interests were subordinated to his lord's. Default in those obligations forfeited the fee.<sup>14</sup>

Politico-moral considerations moderated lordly control. A good lord functioned by the counsel of his men: they constituted his court; they rendered the judgments.<sup>15</sup> Together, lord and men constituted a unit for the exercise of force and influence. Group benefit dictated a balance between assuring the lord the services of his tenants and the insistence on the lord's standing by his undertakings. The tyrannical or capricious lord could not expect loyalty indefinitely, nor could the unreliable man expect to continue to reap benefits without shouldering burdens. Given that balancing consideration, feudal relationships could not be governed by any strict definition of the rights or obligations of lords. Results probably varied according to the prestige of the lord, the reputation and past history of the man, and the needs of a particular group at the time, in addition to the facts involved in a given dispute.<sup>16</sup> Feudal courts had vast discretion. Claims to land were claims for the benefit of a personal relationship.<sup>17</sup> Personal relationships and the tenures dependant on them were essentially different from property rights.

The heir's succession was an important part of the relationship.<sup>18</sup> The lord was buying a man; loyal knights were valuable. Loyalty only came from those without choices or from those fairly treated and fairly bought. The fee, the price of the man, was maintenance for life and provision for survivors: both his heir and his widow.<sup>19</sup> Dower—the widow's portion—and succession to the fee necessarily had roots in family structures, but they attached to

11. Glanvill, IX.1; *English Historical Documents*, vol. II, 1042-1189, ed. David C. Douglas, George W. Greenaway (New York, 1913), 725.

12. Glanvill, IX.4; Milsom, *Historical Foundations*, 107-109.

13. Milsom, *Historical Foundations*, 108.

14. *Ibid.*, 109, 406.

15. 'The Constitutions of Clarendon', *Select Charters and Other Illustrations of English Constitutional History*, ed. William Stubbs, 9th ed. (Oxford, 1913), 165-166; Milsom, *Historical Foundations*, 102-103; Stenton, *English Feudalism*, supra note 2, 45; Pollock and Maitland, *Hist. Eng. Law*, 1:592.

16. See e.g., *Chronicle of Battle Abbey*, ed. Eleanor Searle (Oxford, 1980), 174-208; *English Historical Documents*, vol. II, supra note 11, 724-33.

17. Milsom, *Legal Framework*, 42, 63; Palmer, 'Feudal Framework', 1134-35.

18. Milsom, *Legal Framework*, 179-80; S.E. Thorne, 'English Feudalism', 195-200.

19. For dower as part of the fee, see text infra accompanying notes 58-63.

a precarious life-time tenure only as the lord's obligation to his former tenant: not a right in the heir or widow to certain lands, but an obligation of the lord to his deceased man.<sup>20</sup> That price, however, was fair: the widow could be married off again,<sup>21</sup> and the heir had been raised in the lord's service.

Succession was only a matter of price, not a gauge of the strength of the feudal relationship. Lordly control might seem seriously impaired once he could no longer arbitrarily accept a stranger rather than the deceased tenant's descendant, that is, when the land was functionally heritable. The lord, however, usually wanted the heir anyway: he was at hand, loyal, and familiar. Loyalty can be passed down the generations as easily as can land. Lords could accommodate the occasional stranger by marrying him to an heiress. Such an arrangement provided for the girl. Her husband would then do homage for the land,<sup>22</sup> so the lord had his new man but still had fulfilled his undertaking to his now deceased old tenant.<sup>23</sup> Moreover, there was a strong presumption that the eldest male son would be available and familiar to the lord: he would normally be chosen the heir. Primogeniture was sensible custom before it was a rule of law.<sup>24</sup> But as custom it was not a rule: an unacceptable eldest son would be rejected in favor of another, but acceptable, descendant, now heir.<sup>25</sup> Succession was no danger to the lord: it was an advantage. Succession of heirs is thus no gauge of the strength of feudal control.

The real gauge of the strength of the feudal relationship is the lord's disciplinary power: his ability to disinherit the tenant for disloyalty. Choice of a tenant mattered less than the lord's power to evict the disloyal or incompetent tenant. Regardless of regular succession, the tenement re-

20. The widow or heir could still claim dower or fee: they would remind the lord of his undertaking and the propriety of the heir being the recipient. But the undertaking to the late tenant was equally well fulfilled if the eldest son, a scoundrel, was passed over in favor of the second son. The right thus was not in a person designated by abstract law, even though there certainly were customs for preference.

21. Glanvill, VII.12.

22. Glanvill, IX.1.

23. Originally, a grant 'to A. and his heirs' was only an undertaking to A. It did not commit the lord to acceptance of any particular person or to heirs in perpetuity. The lord's obligation would be fully met by marrying the heiress to a man. The heiress would be secure for her life. The grant to the husband when he did homage for his wife's inheritance would again be in the form 'to B. and his heirs'. Since husband and wife might have the same heir, the land could continue to descend apparently to A.'s heirs. Moreover, there was no undertaking to the heirs directly; if A. was disloyal or incompetent, he forfeited the tenement completely without his heir receiving anything. The lord's undertaking was completely to the tenant until he had likewise committed himself to a specific person as A.'s heir. See Milsom, *Historical Foundations*, 106; Thorne, 'English Feudalism', 193.

24. Thorne, 'English Feudalism', 196-98.

25. RCR, 1:360 (younger son preferred to weak older brother during Stephen's reign).

mained precarious as long as the lord had his disciplinary authority intact. The regularity of succession in the early twelfth century only shows feudal relationships operating normally in an increasingly settled society primarily structured by feudal ties. Because the lord's disciplinary authority remained intact, feudal relationships remained vital in England into the 1190s.<sup>26</sup>

Property rights were inherently antithetical to feudal holdings. Property, however, was neither an elemental idea nor a primordial fact. Property is not merely a distinction between 'mine' and 'yours'.<sup>27</sup> Such a differentiation can be found in most societies and at a very early stage. Even in our own society that distinction does not uniformly indicate property; at times it indicates mere attachment. For historical purposes the 'mine'—'yours' distinction is useless. Property as a legal phenomenon occurs only when an individual's claim to a parcel of land is not dependent on his own strength or on a personal relationship: when title is protected by a bureaucratic authority according to set rules. Property derives from the state; it cannot exist prior to the state.

People were often vociferously attached to particular tenements prior to the late twelfth century. That phenomenon does not weaken the argument. One who lost his land by disciplinary action or warfare would feel himself wronged, regardless of the merits: real life knows few stoics. In the victim's eyes, righting the wrong would involve restoration of the tenement. The elemental idea, however, was that of wrong, not property.<sup>28</sup> Similarly, a son could claim to succeed his father, but his claim appealed to the lord to honor the undertaking made to the claimant's ancestor. Even if the claimant enlisted the king's intervention, the situation still only revealed an

26. Thorne, 'English Feudalism', 209; Milsom, *Legal Framework*, 1-35. For the emphasis on regularity of succession, see Holt, 'Politics and Property', *supra* note 9, 30-31 (with some recognition of disciplinary action); RaGena DeAragon, 'The growth of secure inheritance in Anglo-Norman England', *Journal of Medieval History* 8 (1982), 381-91 ('In conclusion, the Anglo-Norman baronage enjoyed fairly secure inheritance in the reign of Henry I as long as they remained loyal to the king'. *Ibid.*, 389).
27. A good example on how reliance on 'mine-yours' terminology results in an inadequate view of the nature of property is Jeffrey Hackney, 'Review of S.F.C. Milsom, *Historical Foundations of the Common Law*, 2nd ed.' *The Journal of Legal History*, 5 (1984), 79-84.
28. The tradition of scholarship in medieval materials obscures the point. Consider an apartment dweller prior to state regulation of landlords. The tenant might well be secure; his parents might have occupied the apartment before him. He could easily be very emotionally attached, and even a new tenant would refer continuously to 'my apartment'. No one, however, would maintain that he owned the apartment. His claim to continued residence there depended on the mutual obligations between himself and the landlord, and the consequence of a minor fault could be eviction. The tenant in such a situation would feel greatly wronged. But his feeling of injury would not mean that he thought he owned the apartment: the reality of his dependence was one of the basic data of his existence. The definitional element in all this is crucial. Properly defined, the emergence of property is an extraordinarily important matter of social structure. The increased independence of apartment dwellers after state enforcement of commonly accepted landlord practices is the modern analogue of the medieval phenomenon.



obligation.<sup>29</sup> There were only two elemental legal ideas in twelfth century England: wrongs and obligations.<sup>30</sup> Bureaucratic justices created property by myopic regulatory decisions that eradicated the discretionary character of the feudal relationship and thus the precarious quality of the fee. The creation of property was subtle, but momentous.

### Political Settlements and the Beginning of the Common Law

Political settlements often have legal ramifications. When 'substantive law', however, was still normative and not cast in rules of law, politics had a greater capacity to affect legal phenomena. Political settlements produced the momentous changes in late twelfth century England. The two great political events were the Compromise of 1153 and the Assize of Northampton of 1176. The former introduced the first, albeit narrow, categorical protection of tenants against lords: the first time the king resolved to interfere between lords and men in a regular instead of an *ad hoc* manner. The latter, the Assize of Northampton, established regular, intensive supervision of feudal courts. The Compromise of 1153 made the Assize of Northampton possible, but did not cause it. The Compromise of 1153 was a temporary measure oriented to the past; the innovations of the Assize of Northampton were permanent and future-looking. Neither, however, was anti-feudal; indeed, both assumed the necessity and desirability of strong feudal relationships.

The Compromise of 1153 resolved the warfare endemic in the reign of Stephen (1135-1154). The Compromise had two components. The first was the Treaty of Westminster, the settlement of the claims to kingship.<sup>31</sup> King Stephen, it was agreed, would remain king for the rest of his life; Henry, the grandson of Henry I, was to become king at Stephen's death to the exclusion of Stephen's son and heir. The followers of both leaders undertook to preserve the terms of the Treaty. The dynastic settlement alone would not

29. The king, in intervening, was claiming a favor as well as trying to assure order in the ranks. Even when itinerant justices presided over cases under Henry I, the important consideration is the standards they applied. In Henry I's day, the standards would have been discretionary. No body of abstract property law governed adjudication; nor was the lack of rules of law considered a deficiency. The court considered only what would be just in the given instance, the decision usually then relating to proof.

30. Wrongs and obligations are different, despite modern conceptions. They cannot be collapsed into each other, even though the non-fulfillment of an obligation may be a wrong. When an heir asked to be recognized, he was claiming the benefit of an obligation: no wrong had been done, but there was a case in court. Obligations properly look toward performance; wrongs, toward damages. Remedies for wrongs increasingly suppressed elemental ideas of obligation.

31. *Regesta Regum Anglo-Normannorum*, vol. 3 (1135-54), ed. H.A. Cronne and R.H.C. Davis (Oxford, 1967), 272; R.H.C. Davis, *King Stephen, 1135-1154* (Berkeley and Los Angeles, 1967), 122-23.

have pacified the countryside. The second component of the Compromise, therefore, was the resolution of the competing claims of the followers of Stephen and Henry.<sup>32</sup> Warfare had occasioned many disinheritances, either by conquest and regrant or by disciplinary action. The second component thus had to resolve those competing tenurial claims. The alternative would have been continued military skirmishes.

The two components were conceptually identical: the Treaty of Westminster was the model for the restoration of the disinherited. An accepted tenant currently possessed of lands would remain tenant for life. At his death, however, his heir would be denied in favor of an outside claimant whose ancestor had been tenant in fee in 1135 such that, in the normal course of things, he would have been regarded as heir. The Compromise thus projected royal power into lord-man relations at their weakest point: since a feudal grant could only be for a life, it was most precarious at a death. This compromise did not abolish the lord's authority to control and discipline his men: lords were only prevented from disciplining for matters relating to Stephen's reign. That was a minor exception to their control. Current tenants in 1153 had the chance to be loyal; if they proved disloyal, they could be ejected.<sup>33</sup> Most tenants and outside claimants found a com-

32. *Chronicles of the Reigns of Stephen, Henry II, and Richard I, The Chronicles of Robert of Torigni, Abbot of the Monastery of St. Michael-in-Peril-of-the-Sea*, ed. R. Howlett (Pub. No. 82 in *Rerum Britannicarum Medii Aevi Scriptores*, 1889), 4:177; Davis, *King Stephen*, supra note 31, 122 (translation slightly modified: 'It was also sworn that possessions which had been snatched away by intruders would be recalled to the ancient and legitimate possessors whose they were in the time of the excellent King Henry [I]'); *Gesta Stephani*, K. Potter, trans., 2d ed. (Oxford, 1976), 240 (translation slightly modified: 'So it was provided and firmly established that, arms having been completely laid down, peace should be restored everywhere in the kingdom, the new castles should be demolished, the disinherited should be recalled to their own, and rights and laws commanded to all according to pristine custom'.) See Davis, *King Stephen*, supra note 31, 122-25; J. Appleby, *The Troubled Reign of King Stephen* (New York, 1969), 197; and W.L. Warren, *Henry II*, (Berkeley and Los Angeles, 1973), 333 for less optimistic assessments of the effects of the Compromise of 1153. Recognition of property right or strict acceptance of the 'hereditary principle' would allow no delay in the restoration of property to the owners. That 'all-or-nothing' approach seems to lie behind the pessimistic assessments in Davis, Appleby, and Warren. Davis supposed that the royal settlement was the pattern for the barons, but in the sense of an acceptance of the hereditary principle. Sons succeeding fathers as a phenomenon was fairly regular under Henry I, barring disciplinary action (supra note 26). Milsom seems to think the Compromise had some importance. Milsom, *Legal Framework*, 178-79.

33. This applied preeminently to the king. CRR, 8:357; 9:332. In one case Henry II was said to have disseised a tenant *per voluntatem* because of a discord between the tenant and an outsider; in the other he disseised a tenant for not receiving his dogs. In each case, however, the tenant lost his whole fee instead of merely a portion: that was proper in disciplinary disinheritance. Warren, *Henry II*, supra note 32, 101, 110, 233, 242, 247, 367. It was likewise true for other lords: Glanvill, VII.12 (a father to be disinherited for marrying off a prospective heiress without the lord's consent; a dowress to be disinherited for marrying without consent of the lord; incontinent heiresses to be disinherited); VII.17 (a convicted felon to be disinherited); IX.1 (disinheritance of

promise of their own attractive: the tenant, to assure his heir of some standing; the outsider, to procure some immediate gain instead of a long-delayed expectancy. From the lord's perspective, compromise was the duty of both. A tenant's intransigency that forced the lord to reject an acceptable heir hardly furthered the lord's earthly honor; moreover, the disruption in the present occasioned by the existence of an outside claimant inevitably affected the homage group.<sup>34</sup> A compromise or the death of one party without heir resolved most problems; relatively few situations came to litigation.<sup>35</sup> The Compromise was masterful: it encouraged peaceful, con-

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those who do anything to the lord's disinheritance, who do violence to him, who deny the service due); IX.11 (disinheritance for purpresture against the lord). The matters in IX.1 come within the cognizance of the lord's court explicitly without the necessity of a writ.

34. Henry II was not constrained by royal supervision. Nothing prevented him from demanding compromise and disciplining the inflexible, except the indeterminant bounds of his own adherence to his undertakings and the expectations of his tenants-in-chief.
35. The following cases recount events in Stephen's reign that precipitated a compromise or resulted eventually in litigation: (1) *Piron v. Piron*, PRS XIV, 9 (a forfeiture granted thereafter by the Empress Matilda and Brian of Wallingford; a subsequent marriage between the descendants of the new grantee and the descendants of the disinherited line; alleged pressure by Henry II involved in the marriage); (2) *Raimes v. Welles*, RCR, 1:93 (a wartime seizure granted thereafter by Henry II, with a subsequent dispute after the new grantee died); (3) *Son of Hamon v. Son of John*, RCR, 1:360 (dispute between grandson of firstborn passed over and son of second son preferred in wartime); (4) *Holewell v. Son of Ascelin*, RCR, 1:440-41 (the lord preferred an outsider to a minor during the Anarchy; afterwards they divided the land and intermarried, but a dispute remained about whether the disinherited party had received his portion of the land from the new tenant or from the lord); (5) *Cotele v. Constable*, CRR, 5:147-48 (a disciplinary disinheritance by Stephen and a grant to an outsider; Henry II later concorded them, with lands remaining to Stephen's grantee for life, reversion to the disinherited party, although Constable alleged a disseisin by Henry II *sua voluntate et sine iudicio*. See Warren, Henry II, *supra* note 41, 333: there had been a previous disciplinary disinheritance by the Empress); (6) *Baiocis v. son of Nigel*, CRR, 5:181-82; 6:17 (a younger son intruded on land in Stephen's reign and granted to a woman in maritagium; elder line sued under Henry II in lord's court, where they were concorded, the beneficiary of the grant after the intrusion received other lands for life [capable of being termed escambium]); (7) *Niger v. Panton*, CRR, 6:46 (tenant's title based on entry through marriage to a dowress, whose first husband had held in 1135; tenant was greatgrandson of second husband; 1210 was possibly the first chance available to sue after his death); (8) *Abbot of Stanley v. Bloet*, CRR, 6:178-79 (a grant by the Empress, with a subsequent arrangement of a life estate, but the text is too damaged to ascertain the context; see CRR, 6:234 for the issue); (9) *Gurnaco v. Tingrie*, CRR, 6:272-73 (Stephen granted to claimant's father, who held it through the first years of Henry's reign; Henry II seized the land shortly after 1160 [for disciplinary reasons or at death of tenant?], but had confirmed the wife in her dower lands; Henry then granted the land to tenant's father); (10) *Badele v. Tateshale*, CRR, 8:18-20 (a wartime disciplinary disinheritance of tenant's ancestor with grant by Stephen to claimant's grandfather, who then granted to another; under Henry II the disinherited tenant sued and recovered in the king's court *prior* to the death of either Stephen's grantee or the grantee's grantee, the latter receiving escambium. The now restored disinherited's heir held for seven years, when the dispute was compromised by marriage. One side, however, alleged that the

sensual resolutions and spread the consequences over the years. The mastery of the compromise, however, derived solely from the pattern of the royal settlement: that resolution was the outgrowth of stalemate and thus a genuine compromise.

The tension produced by the second component of the Compromise necessitated two kinds of royal intervention in a lord's affairs. The first was in favor of the outside claimant. Since the Compromise was a royal undertaking, even though it was based on strong magnate consensus, lords would be reluctant to enforce its consequences within their own homage groups. A lord dealing with a deceased tenant's son would probably want to accept him. The writ of right patent was the royal intervention reinforcing the outsider's claim, pressuring the lord to consider the treaty's terms in this instance.<sup>36</sup> If the lord refused to honor the writ, the claimant could remove it into the county court.<sup>37</sup> The outsider's claim was not a claim of property, but a royally-reinforced demand that the lord hold right to him:<sup>38</sup> that he stand to his prior obligations or those of his ancestors.

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woman had the land only in dower; the other that she had it by *maritagium* by grant from the other side. At the time of the marriage the issue was probably buried).

There are other claims from 1135, but without sufficient specification to know whether they contain an 1153 issue: CRR, 7:20; 7:293; 8:43; 8:252; 8:295; 8:356; 9:251; 9:234; 9:364; 9:474; 10:108; 10:114; 10:148; 10:137.

36. The writ of right patent became standardized shortly after Henry II became king. See R.C. Van Caenegem, *Royal Writs in England from the Conquest to Glanvill*, Selden Society, vol. 77 (London, 1959), 421 (no. 19): (translation modified) 'Robert, earl of Leicester; to Reginald de Warenne, greetings. I order you to hold full right without delay to Robert de Mandeville concerning the land of Digswell with its appurtenances which was William de Mandeville's, his brother, which he claims to hold from you. And if you do not, Robert de Valognes will. And if he does not, I shall make it to be done'. Compare this with Glanvill, XII.3: (translation modified) 'The king to earl W. greetings. I order you to hold full right without delay to N. concerning ten carucates of land in Middleton which he claims to hold from you by the free service of one knight's fee for all service, of which R. son of W. deforces him. And if he does not, the sheriff of Nottingham will, that I hear no further complaint thereof for default of justice. Witness, etc'.

Compromise enforcement was not the only reason for the writs; Henry II was also interested in restoration of lands stolen from ecclesiastical establishments (Palmer, 'Feudal Framework', 1147-49). Compromise enforcement, however, explains the standardization and also the operational peculiarity of the writ of right patent that the demandant could buy his writ long before it was needed and keep it in his possession. (Van Caenegem, *Royal Writs*, 171-72.) That retention by the claimant was unique among royal writs. The oddity served two purposes. It reassured the demandant, in advance, of royal backing. It also made it possible for the outsider to intervene immediately on the death of the tenant. Otherwise, outsiders, occupied in searching for the writ, would come too late and face the tenant's heir already accepted.

37. *Placita Anglo-Normannica*, ed. M.M. Bigelow (Boston, 1881), 212; Glanvill, XII.6,7; R.C. Palmer *The County Courts of Medieval England, 1150-1350*, (Princeton, 1982), 144-47.
38. The Latin is '*plenum rectum teneas*', which has traditionally been rendered 'do full right' (Glanvill, XIII.3; Registers, 1 (Hib. 1), 18 (CA.1); Milsom, *Legal Framework*,

The second kind of categorical royal intervention protected the current tenant. The easiest situation for royal intervention was that in which a lord disseised a man for disloyal actions prior to 1153. That period was to be cast into oblivion.<sup>39</sup> There would be no retaliation. The difficult case was the tenant who was unwilling to compromise with the outside claimant despite pressure from the lord. The Compromise dictated a certain immunity for the tenant who was loyal except for his refusal to compromise with the outsider. If he chose to ignore the consequences for his heir and to enjoy his tenancy as had King Stephen, he could rely on royal support. But such intractability ran against the lord's normal interests and the tenant's normal duty: the temptation to discipline such a tenant would have been great.<sup>40</sup> Such action by a lord—or lordly inaction by which a tenant lost his tenement<sup>41</sup>—was precisely an action against the king because it was contrary to his undertaking. Contempt of the king in this way led to the quasi-criminal appearance<sup>42</sup> of the pre-history of the assize of novel disseisin,<sup>43</sup> the remedy for disseisins made unjustly and without judgment.

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58, 72; Milsom, *Historical Foundations*, 124, 127.) That translation embodies a Maitland view of the writ of right patent: that feudal courts were impartial fora. The phrase literally is 'hold full right': a rendition that properly conveys an obligation deriving from a relationship and that illustrates the connection between the obligation grounding this writ and the obligation grounding covenant (prior to the specialty rule).

39. The often-noted studied avoidance of Stephen's reign, usually interpreted as a Tudoresque comment on the previous reign, was a benefit to Stephen's followers. Palmer, 'Feudal Framework', 1143-44. Note that acquisitions by marriage were secure, even by the terms of the Treaty of Westminster as related to Stephen's son William.
40. See *supra* note 31.
41. Palmer, 'Feudal Framework', 1150-51. Protection could not be simply against lordly action, because calculated lordly inaction was an effective way of eliminating an intransigent tenant challenged by a better-positioned outsider.
42. The history proposed for regulation of disseisins prior to 1176 in Palmer, 'Feudal Framework', 1149-53, seems mostly still acceptable, except that the analysis of the Assize of Northampton here suggests strongly the regulatory purpose behind the assize and thus is closer to Milsom's view. The role of writs of protection while Henry was away, however, together with the relationship to the Compromise, probably provided the quasi-criminal element (Glanvill, XIII.38) as well as the sporadic nature of early edicts. Henry handled matters directly when he was in England and had no need of edicts then; he prohibited certain matters when he left the country. Edicts were thus forward-looking in time until the Assize of Northampton, which has a limitation in the past.
43. See the form of the writ in Glanvill, XIII.33: 'The king to the sheriff, greetings. N. has complained to me that R. unjustly and without a judgment has disseised him of his free tenement in such-and-such a vill since my last voyage to Normandy. Therefore I command you that, if N. gives you security for prosecuting his claim, you are to see that the chattels which were taken from the tenement are restored to it, and that the tenement and the chattels remain in peace until Sunday after Easter. And meanwhile you are to see that the tenement is viewed by twelve free and lawful men of the neighborhood, and their names endorsed on this writ. And summon them by good summoners to be before me or my justices on the Sunday after Easter, ready to make

These early royal interventions deriving from the Compromise were not considered as possessory and proprietary remedies. They were not jurisprudentially calculated to provide rational treatment of property rights: a possessory level to discourage self-help and a proprietary level to determine title.<sup>44</sup> The interventions were designed rather for specific situations and specific persons. Nor were the interventions general property right remedies: they were available not for all tenants and claimants but only for special cases on an *ad hoc* basis and for those affected by the Anarchy.<sup>45</sup> The consequences of the Compromise of 1153 were significant, but they were limited. They do not reveal royal machinations to produce a centralized royal government freed from feudal relationships.

The Assize of Northampton (1176) was made possible by, but was otherwise unrelated to the Compromise of 1153; ultimately, it was more significant. The Assize of Northampton resulted from the war between Henry II and his eldest son, Henry the Young King, in 1173-74. The Young King had been crowned in 1170, while his father still lived. By 1173 he was sufficiently disturbed about having the title without the power that he revolted, joined by many magnates.<sup>46</sup> They had done homage to him also, and he was their immediate lord. Henry II survived the revolt, but dealt generously with the rebels in the Treaty of Mountlouis.<sup>47</sup> This is not consistent with a view of Henry II as a strong king who distrusted feudal power. He did not wish to discourage loyalty to lords, but he would prevent rebellion.

The Assize of Northampton was oriented to the present and future, not the past. It did not derive from the Treaty of Mountlouis, but only sought to avoid future uprisings. Chapters 4 and 5 are those relevant to this purpose:

4. Item, if any freeholder has died, let his *heredes* (here, 'heiresses') remain possessed of such seisin as their father had of his fee on the day of his death; and let them have his chattels from which they may execute the dead

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the recognition. And summon R., or his bailiff if he himself cannot be found, on the security of gage and reliable sureties to be there then to hear the recognition. And have there the summoners, and this writ and the names of the sureties. Witness, etc.'

44. See e.g., Van Caenegem, *Birth of the English Common Law*, supra note 2, 40-44; D.W. Sutherland, *The Assize of Novel Disseisin*, (Oxford, 1973), 2-5.

45. This general purpose does not exclude usages that kings generally advocated, such as restoration of ecclesiastical holdings lost during a previous reign. Palmer, 'Feudal Framework', 1143.

46. For an account of the war, see Warren, *Henry II*, supra note 32, 117-41. The coincidence of Becket's murder in 1170 falling before the war is usually mentioned (*Ibid.*, 135) as a factor; what has not been associated with the uprising and the magnates' discontent is that also in 1170 the deforciant clause was included in the writ of right patent (see supra, note 36). In addition to the more important implication of the king's intrusiveness in the magnates' relationships with their men, that would have meant an increased incidence of escambium obligations. Some lords may have felt disadvantaged.

47. Warren, *Henry II*, supra note 32, 140-45.

man's will. 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 fee. And if the *heres* (here, 'heir') be under age, let the lord of the fee receive his homage and keep him in ward so long as he ought. Let the other lords, if there are several, likewise receive his homage, and let him render them what is due. And let the widow of the deceased have her dower and that portion of his chattels which belongs to her. And should the lord of the fee 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.

5. Item, let the justices of the lord king cause an inquisition to be made concerning disseisins carried out contrary to the assize, since the lord king's coming into England immediately following upon the peace made between him and the king, his son.<sup>48</sup>

48. *Select Charters*. supra note 15, 179-80:

'4. Item, si quis obierit francus-tenens, haeredes ipsius remaneant in tali saisina qualem pater suus habuit die qua fuit vivus et mortuus, de feodo suo; et catalla sua habeant unde faciant divisam defuncti: et dominum suum postea requirant, et ei faciant de relevio et aliis quae ei facere debent de feodo suo. Et si haeres fuerit infra aetatem, dominus feodi recipiat homagium suum et habeat in custodia illum quamdiu deberet. Alii domini, si plures fuerint, homagium ejus recipiant, et ipse faciat eis quod facere debuerit. Et uxor defuncti habeat dotem suam et partem de catallis ejus quae eam contingit. Et si dominus feodi negat haeredibus defuncti saisinam ejusdem defuncti quam exigunt, Justitiae domini regis faciant inde fieri per cognitionem per duodecim legales homines, qualem saisinam defunctus habuit die qua fuit vivus et mortuus; et sicut recognitum fuerit, ita haeredibus ejus restituant. Et si quis contra fecerit et inde attaintus fuerit; remaneat in misericordia regis.'

'5. Item Justitiae domini regis faciant fieri recognitionem de dissaisinis factis super Assisam, a tempore quo dominus rex venit in Angliam proximo post pacem factam inter ipsum et regem filium suum.'

I do not maintain that '*heredes*' as the plural form always means 'heiresses'; it obviously does not. Only the omission of the duty of homage, together with the contrasting mention of homage later on in connection with the mention of the '*heres*' justifies this understanding.

Warren apparently felt that the substance was adequately conveyed without the infant heir and doweress clauses, omitting them by an ellipse (Warren, *Henry II*, supra note 32, 343). *Sources of English Constitutional History*, ed. Carl Stephenson and F.G. Marcham, (New York, 1972), 1:81, and Doris M. Stenton, *English Justice Between the Norman Conquest and the Great Charter, 1066-1215* (Philadelphia, 1964), 44 translate '*dotem*' in the doweress provision as 'dowry', ignoring Glanvill's cautions about the two means of '*dos*' in England (Glanvill, VI.1; VII.1). D. Stenton (Ibid.) perplexingly translates '*pater suus*' as 'his father' despite the fact that the reflexive refers to '*heredes*' and thus is 'their father'. For the proper treatment of the reflexive in identical instances, see Hall's translation in Glanvill, VII.1 (p. 73), VII.3 (pp. 76, 78), VII.5, and VII.9 (p. 82: following the words of the Assize of Northampton).

Finally, the regulatory purpose that this translation allows relates the Assize to the preceding war in a way that obviates Sutherland's criticisms of previous formulations (Sutherland, *Novel Disseisin*, supra note 44, 10).

The terms demonstrate the concerns. Property rights, not yet conceptualized, were not the motivating considerations. Chapter 4 considers three separate categories of people. The third is widows, precisely mentioned. The first portion refers to heiresses,<sup>49</sup> because homage is not mentioned. Women, of course, could not do homage until sometime after 1215.<sup>50</sup> The omission of homage contrasts sharply with the directions to the second category: the underage heir. The underage heir had to do homage; the *heredes* of the first category only paid relief and did whatever else was required. Moreover, the mention of heirs in the plural raises the presumption of heiresses instead of heirs. Males succeeded by primogeniture, that is, there would be only one heir. If there were only daughters, however, there would be plural heirs: heiresses.<sup>51</sup> And indeed, in mentioning minor males, the language is in the singular. Chapter 4 concerned the survivors of a deceased tenant, but mentioned only heiresses, minor heirs, and widows.

Chapter 5 dealt with the disciplining of already accepted tenants. The provision established a time limit for its application: only disseisins occurring after the king's arrival back in England *after* the peace was made were affected.<sup>52</sup> The reference to disseisins carried out against the assize is somewhat oracular.<sup>53</sup> Chapter 5 involved some protection for accepted tenants against disciplinary actions. Handling accepted tenants as a matter distinct

49. Warren, *Henry II*, supra note 32, 344 notes the problem with the plural form of *heres*, but refers it to the family collectively ['Clearly the concern here was to prevent the disseisin of the deceased family (referred to collectively as 'the heirs') before the formal installation of the rightful heir'], even though younger son and daughters could not be considered an heir, nor could the widow. Milsom did not see the significance of the plural form of '*heres*', since he transformed the plural nouns and verbs into the singular form when quoting the Assize. Milsom, *Legal Framework*, 164. Nevertheless, he later paraphrased the provision correctly, although he omits the doweress provision. Milsom, *Historical Foundations*, 135. Milsom supposes that the problem leading to the Assize might have been the demand for excessive reliefs. Ibid., 135. This explanation separates the provision from any concern over the recent war. The solution suggested here reconciles the normal security of holdings with the social and political context. Note that the first recorded payments for writs of *mort d'ancestor* sought the wife's inheritance. D. Stenton, *English Justice*, supra note 48, 44.

50. Glanvill, IX.1; Pollock and Maitland, *Hist. Eng. Law*, 1:305-306.

51. Stenton, *English Feudalism*, supra note 2, 39 (the divided succession of daughters the subject of a '*statutum decretum*' in Stephen's reign; see Milsom's perceptive comment about the moral tone of the provision: Milsom, 'Inheritance by Women', 78); Glanvill, VII.12.

52. Palmer, 'Feudal Framework', 1151-53; Sutherland, *Novel Disseisin*, supra note 44, 10.

53. The problem is that the first surviving form of the writ of novel disseisin is in Glanvill, ca. 1188. The date for the provision of the writ is thus conjectural. Sutherland argues for a writ of novel disseisin from at least 1176 and probably from a decade or more earlier: Sutherland, *Novel Disseisin*, supra note 44, 7-9. John Beckerman has argued for a later origin (John Beckerman, 'Review of Sutherland, *The Assize of Novel Disseisin*', *Yale Law Journal* 83 (1974), 625-29, as have I (Palmer, 'Feudal Framework', 1151-53).



from the problems raised in chapter 4 shows the reality of the distinction between 'proprietary' matters and disciplinary matters: between decisions related to who should be accepted as a new tenant and whether this tenant should continue to be tenant.<sup>54</sup> The concern in this part of the Assize of Northampton thus is the broad range of tenurial problems involving heiresses, widows, minor heirs (chapter 4) and already accepted tenants (chapter 5).

The concerns of the Assize of Northampton were not comprehensive. Neither chapter 4 nor chapter 5 explicitly concerned the adult male heir. Yet, adult male heirs were *prima facie* more likely to receive protection. Several explanations are possible for this omission. There might have been a separate provision for adult male heirs. The Assize of Northampton, then, would only fill a gap. There is no record of any such provision, unless it was the writ of right.<sup>55</sup> The writ of right, however, did not initially protect direct heirs of a recently deceased tenant, but rather an outside claimant.<sup>56</sup> The writ of right, since its origin, had acquired other functions, but chapter 4 still is not compatible with a gap-filling function. The remedy provided, the assize of mort d'ancestor, would have given heiresses and minors better protection than adult male heirs. Finally, neither the provision for widows nor chapter 5 fits easily with such an explanation. Alternatively, chapter 4 might have protected the vulnerable in society. The ascription of altruistic motives to rulers, however, is suspect, particularly when the social consequences are significant. A more plausible explanation, then, is that chapter 4 exhibits no concern for these groups as such, but concern rather for what lords would be doing in ignoring widows, minor heirs, or heiresses.

The Assize of Northampton, chapters 4 and 5, was a declaration that, since the king and magnates had agreed to a peace, the magnates could not prepare for war. A lord who expected hostilities would find it politically acceptable to his homage group to pass over heiresses and minors perhaps in favor of a stranger, but more likely an adult male of the blood, although not a descendant.<sup>57</sup> He might likewise severely discipline widows who were not readily amenable to remarriage to an appropriate spouse. He might also deal more severely with assertive tenants if preparing for war rather than if expecting peace. But adult male heirs would be in no jeopardy. It was the vulnerable who would be passed over or treated rigorously. Thus, the Assize of Northampton was designed not to protect them, but to inhibit the mag-

54. The terminological distinction between proprietary and disciplinary decisions is Milsom's. Milsom, *Legal Framework*, 39-44, 165. The distinction does not appear in words in the medieval documents. The differentiation between chapters 4 and 5 in the Assize of Northampton here justifies the introduction of those terms, if any justification were needed.

55. Milsom, *Legal Framework*, 184-85; *Historical Foundations*, 128-36.

56. Text *supra* accompanying notes 36-38.

57. *Supra* note 35 (no. 3).

nates' power to prepare for hostilities. The concern was thus purely political; the Assize of Northampton was not an adjustment to a (nonexistent) body of substantive property law.

The political nature of the concerns leading to the Assize caused a lack of appreciation of the problems occasioned by the enactment. Widows would receive their dower as had been normal. But from whom would they hold it? While dower certainly had social roots,<sup>58</sup> the immediate rationale for allowing dower from a precarious life tenure had been feudal. A widow retained for her own life a portion of her husband's tenement, because that was part of the fee: part of the price a lord had to pay to claim a man's loyalty, part of his obligation to his deceased man. A lord provided for his man's survivors. Even if the husband failed to nominate dower, the lord had an obligation to provide for the widow: what became at common law reasonable dower, as distinct from nominated dower.<sup>59</sup> But since lords did not take homage from minor heirs prior to 1176,<sup>60</sup> the widow would not have held her dower from the heir: he would not be heir or be capable of having tenants until he had given homage.<sup>61</sup> While the prospective heir was underage, the widow must have held her dower from the lord. That custom survived for tenants-in-chief.<sup>62</sup> For other widows, however, the Assize of Northampton occasioned

58. Socage tenants certainly knew of dower rights (Pollock and Maitland, *Hist. Eng. Law*, 2:421) as did customary tenants: Eleanor Searle, 'Seigniorial Control of Women's Marriage: The Antecedents and Function of Merchet in England', *Past and Present* 82 (1979), 38-39.

59. Glanvill, VI.

60. Milsom, 'Inheritance by Women', 62.

61. I know of no one who addresses this problem, but the arguments in Milsom, *Legal Framework*, 163-64, equating escheat and wardship apply with equal force in making the widow tenant of the lord prior to the Assize of Northampton. A few cases touch on the matter. Stenton, *English Feudalism*, supra note 2, 52-53, 91. The last case might be taken to indicate that a widow was holding from the heir, but that is not clear. *Regesta Regum*, (*Regesta Regum*, supra note 31, 3:306) only has one indexed mention of dower, but that entry shows the reality of the power of the lord's confirmation in 1153-54.

62. 'Prerogativa Regis' in *Prerogativa Regis: Tertia Lectura Roberti Constable de Lyncolnis Inne Anno 11 H. 7*, ed. S.E. Thorne (New Haven, 1949), 159. The translation of the Latin there is:

'4. Item, [the king] shall assign to widows after the death of their husbands who hold of him in chief their dower which pertains to them even if the heirs be of full age, if the widows want. And before the assignment of the dower, the abovesaid heirs being minors or of full age, those widows shall swear that they will not marry without royal license. And if they do, then the king shall take into his hand all the lands and tenements they hold of him in dower until they shall make satisfaction at the will of the king'. Thorne dates the *Prerogativa Regis* at between 1279 and 1285 (p. xl) and remarks (but citing only a fifteenth century reading on the tract) that the doweress still held of the heir (p. xxviii). The words of chapter 4, however, are quite explicit: 'omnes terras et tenementa que de eo tenent in dotem'. F.W. Maitland ('The 'Prerogativa Regis', in *The Collected Papers of Frederic William Maitland*, ed. H.A.L. Fisher (Cambridge, 1911), 2:182-89) talks about the document. Maitland, *ibid.*, p. 189,

a change. When the lord took the heir's homage immediately on the death of the ancestor tenant, the widow would always hold of him. In some ways, nothing would change: the lord would be guardian of the heir and would look after the widow as before. Nevertheless, the tenement was now the heir's in some special way, so that the guardian's actions—the widow's allotment of dower—might be more challengeable now when the heir came of age.<sup>63</sup> Chapter 4, however, addresses none of this complexity. The concern was with politics, not property.

The purposes of the Compromise of 1153 and the Assize of Northampton were limited. They aimed at immediate political-military problems, not at erecting a state. Neither provision abolished lordly discretion or lordly discipline. They only restricted lordly decision within the bounds dictated by the royal treaty or by peace-time standards. Even though the intention behind the Assize of Northampton was not monumental, the institution of regular supervision of feudal courts was momentous. No longer was royal intervention available only to those who could interest the king or to those, decreasing in number, affected by the Compromise. Royal assistance was available potentially to anyone who claimed a free tenement. Feudal courts now would be made to operate according to the peace-time norms of the feudal world.

The exclusive role of political considerations in legal origins terminated with the Assize of Northampton. Enforcement of its provisions necessitated full-time justices in 1179.<sup>64</sup> The number of specialized justices expanded in the 1190s,<sup>65</sup> so that the justices began to act as a bureaucracy. The minor anomalies in *Glanvill*<sup>66</sup> presaged the beginning of genuine rules of law.

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thought that it might have been 'a document issued by the king to his serjeants', but at any rate thought it a respectable source for thirteenth century law. Sue Sheridan Walker ('Feudal Constraint and Free Consent in the Making of Marriages in Medieval England: Widows in the King's Gift', *Canadian Historical Society Papers* (Ottawa, 1979), 97-110) has examined widows. Neither addressed the question of from whom the widow of the tenant-in-chief held her dower while the heir was a minor in the thirteenth century.

63. The position of the doweress prior to 1176 has received no systematic attention. Little can be gleaned from *Royal Writs*, supra note 36. The sources are perhaps too intractable for definitive analysis. It should be noted, however, that in Henry I's Coronation Charter (*Select Charters*, supra note 15, 118) the king assured his men that their wives would receive their dower whether they died leaving children or not: he took it as his duty to his own men to provide for their survivors. Dower from a life-time fee certainly makes more sense if it is held from the lord; but it may have been usually transferred so as to be held of the heir when the heir gave homage. The lord still continued to provide the dower when the tenant died without heir. The reason for the provision was not that the lord was substitute heir; he was here acting like lords prior to the Assize of Northampton.

64. Warren, *Henry II*, supra note 32, 296-98.

65. PBK, 3:1xxix-clxi.

66. *Glanvill*, VII.1: the lord and heir rule dictated that descendants play musical chairs with the tenement to prevent the lord becoming the heir.

Rules of law are distinctly bureaucratic creations, since they are applied strictly and without regard to person or to social mores.<sup>67</sup>

The development of the common law rule that no man need answer for his free tenement without a royal writ demonstrates the impact of the bureaucratic judicial action. By 1205 it was a rule of law proper that no man need answer for his free tenement without a royal writ. As Professor Milsom has pointed out,<sup>68</sup> that maxim began as a statement of fact: a mere description of social relationships of power. The progression from statement of fact to custom and finally to rule of law measures the degree to which the political-military decisions of 1153 and 1176 generated a bureaucratic approach to law. That new approach in turn created a law decreasingly congruent with social mores.<sup>69</sup>

The maxim as a statement of fact illustrates the lord's problem with the Compromise of 1153. On taking a man's homage, the lord was committed to the man, barring disloyalty. No ordinary outsider could disrupt that relationship. Simply as a matter of fact, then, no lord would voluntarily reconsider his commitment to a tenant because of an outsider's claim. Only special interference from outside could raise again the question of tenancy. That interference was normally an order from the king: a royal writ.<sup>70</sup> After 1153 there was one occasion on which such a confrontation was inevitable: the death of a tenant leaving an heir to confront an 1135 claimant. In such a situation it would take a writ to make a lord consider the outsider.

The situation became more complex if the lord accepted the heir before the 1135 claimant presented himself. In such a case the lord had committed himself; the new tenant had been selected as heir. Now the lord's own resources were involved, because he was obliged to provide maintenance to the accepted tenant whatever happened. The already familiar word for this obligation was *escambium*: exchange lands of the same value. Lords had occasionally committed themselves to *escambium* before.<sup>71</sup> Regular royal intervention in these situations, however, came in 1170, when the deforciant

67. The statement does not apply to early, formal practices, such as the order or manner of speaking in court. Such matters are important to indicate mindset, but do not operate autonomously to produce artificial conduct at the societal level. G.D.G. Hall routinely translated '*generaliter verum est*' as 'it is a general rule', instead of the more proper 'generally it is true'. By present modes of analysis, that translation would be misleading.

68. Milsom, *Legal Framework*, 59; Palmer, 'Feudal Framework', 1137-38.

69. I have pursued this theme in later times in Palmer, *Whilton Dispute*, *supra* note 2.

70. For a treatment of the maxim as a rule, see *Royal Writs*, *supra* note 36, 212-31. Donald Sutherland still considers that the maxim was a rule rather than a statement of fact very early in the reign of Henry II. D. Sutherland, 'Review of Searle, ed., *The Chronicle of Battle Abbey*', *New York University Law Review* 56 (1981), 872. The case he cites, however, is equally evidence for the maxim as a mere statement of fact or very early custom.

71. *Regesta Regum*, 3:nos. 119, 150, 177, 221-26, 274-75, 300, 321, 360, 450, 473-74, 493, 509, 512, 568, 582, 634-35, 901.

clause was introduced into the writ of right.<sup>72</sup> Prior to that time, there was no evidence in the writ of right that the land had been regranted: the writ merely ordered the lord to hold right to the claimant.<sup>73</sup> The deforciant clause, however, named a tenant, even though it was still the lord who was ordered to hold right to the tenant. In such a situation, the escambium obligation dictated indeed that a writ was required to make a lord reconsider the tenancy.<sup>74</sup> No man, indeed, would be forced to answer for his free tenement if the claimant did not have a royal writ. That was a statement of fact, not a rule of law.

The exact progression from statement of fact to legal custom is not clear. The next person to whom the statement could apply was the widow; by the time such cases arose the statement had become a custom. A standardized writ of right of dower probably followed the Assize of Northampton, perhaps accompanied by the writ of dower *unde nichil habet* ('whereof she has nothing').<sup>75</sup> The third writ, however, is the one relevant here. When an heir, now adult, claimed that too much dower had been allotted to the widow, he was unable to challenge her in his own court. That downward looking plea was to be held in the county court pursuant to a writ of admeasurement of dower:<sup>76</sup> the claimant wanted to reduce his obligations to an accepted tenant. That was just: his lord as guardian might have allocated her dower too generously.<sup>77</sup> The venue for admeasurement of dower, however, was the county court. The heir could not challenge her in his own court. She had done nothing wrong, so his action was not disciplinary.<sup>78</sup> His proceeding against the widow was a reconsideration of the proprietary decision: who should properly be tenant. But in this situation also, then, no man (woman) would have to answer for his (her) free tenement without a royal writ. The maxim probably did not determine the venue for admeasurement of dower.

72. *Royal Writs*, supra note 36, 212.

73. Supra note 36; Palmer, 'Feudal Framework', 1141-42.

74. An honest or politically sensitive lord would have occasionally voluntarily honored a dual obligation, if only by supplying one or the other with an heiress.

75. Glanvill, VI.5, 15. The writ of right of dower was appropriate for a widow who already had part of her dower; the proper venue was the lord's court. *Unde nichil habet* was for the widow who had not been acknowledged and thus had none of her dower yet; the proper venue was the king's court.

76. Ibid., VI.17-18.

77. CRR, 16:1766 (1242); Pollock and Maitland, *Hist. Eng. Law*, 2:422.

78. One might contend that the situation was analogous to purpresture. Purpresture (Glanvill, IX.11-13) was treated as a feudal felony: stealing from the lord by enlarging the tenement. Purpresture resulted in forfeiture of the whole tenement, not merely that part that had been added to one's tenement by the purpresture. Acceptance of an excessive dower, however, was not like purpresture. The doweress had been seised of the excessive portion: had been installed by the lord. Any wrong here was on the part of the heir's lord, who as guardian was probably responsible for most excessive allocations.

Perhaps no one perceived the situation as a possible example of its workings. Nevertheless, lords could not proceed in their own courts against accepted tenants to reduce their tenements.

In *Glanvill* (ca.1188) the statement of fact had clearly become custom. It appeared in that treatise twice, but in different forms. The difference in formulation suggests that it was not properly a rule: a rule of law is normally characterized by a set formula. The first mention in *Glanvill* comes in the introduction to the writs of right patent in the context of a claim against a lord who already had a tenant:

When anyone claims any free tenement or service to be held from another by free service, he will not be able to draw the tenant into the plea without a writ from the lord king or his justice. Therefore he shall have a writ of right, directed to the lord of whom he claims to hold. . . .<sup>79</sup>

The situation envisaged in the second statement is not clear, but the difference in the formulation is important in showing that the custom was not yet a rule.

It should be known, moreover, that according to the custom of the realm, 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.<sup>80</sup>

Both statements suppose a lord who had already granted the land to a third party or was himself claiming against the tenant as part of his inheritance: they did not concern lords exercising disciplinary powers. When considering disciplinary activities *Glanvill* stated explicitly that the lord could proceed 'as of right and without any precept from the lord king or the chief justice'.<sup>81</sup> The maxim, at this point, then, left the lord's disciplinary powers intact and related solely to proprietary matters. Still at the time of *Glanvill* then, the custom left lords with discipline while regulating proprietary matters.

Disciplinary activity, of course, had ultimate proprietary consequences; its severity made it the focus of real power. A tenant who wrongfully appropriated a parcel of his lord's land forfeited not only that parcel, but *all* the tenements held from that lord.<sup>82</sup> Likewise, withholding service entailed forfeiture of the whole fee held of that lord, not just that portion from which the service issued.<sup>83</sup> Violence against the lord, an heiress's incontinence, or a father's giving of his likely heiress in marriage without consent likewise

79. *Glanvill*, XII.2.

80. *Ibid.*, XII.25.

81. *Ibid.*, IX.8; see also IX.1.

82. *Ibid.*, IX.13.

83. *Ibid.*, IX.1 ('Si vero super hoc convictus fuerit tenens ipse, de iure de toto feodo quod de domino illo suo tenet exheredabitur'.)

entailed forfeiture.<sup>84</sup> Lordly power depended on discipline: any tenant who did not live up to expectations would simply forfeit. Disciplinary power was all important; proprietary matters were important, but comparatively minor. The custom seems to have applied in proprietary matters, but not in disciplinary matters, as late as 1188.<sup>85</sup>

By 1195, however, the assize of novel disseisin was interfering with the lord's disciplinary power. Novel disseisin derived from royal contempt proceedings for treaty violations. It had been formalized into a standardized writ shortly before 1188<sup>86</sup> and remedied disseisins of free tenements made unjustly and without judgment.<sup>87</sup> When the number of justices increased in 1194,<sup>88</sup> novel disseisin became the instrument that undermined lordly control. A prior, for instance, by judgment of his court declared a tenement forfeit for default of service. The tenant brought an assize of novel disseisin, in which the court of the prior supported the prior's account. Instead of ruling for the prior, as would accord with *Glanvill*, the court mandated that the land be returned and that the prior give him a day in his court to plead about the services.<sup>89</sup> Two more such cases appear in 1199.<sup>90</sup> Distrain and forfeiture of the fee, while not necessarily punished, were no longer allowed.

At about the same time the nature of 'seisin' and 'free tenement' began to diverge from social expectations, albeit marginally. They became legal categories by the workings of the assize of novel disseisin. If the justices did anything but submit the questions to the assize panel for resolution—and they often did—they had to resolve first the questions relating to the nature of a free tenement and the lawful possession (seisin) required before one could be disseised. By 1200 the answer to the latter question—the nature of seisin—was that anyone who had some colorable installation would be seised for the purposes of the assize.<sup>91</sup>

That resolution of the scope of seisin for purposes of the assize around 1200 was momentous in that it separated title from lordly acceptance.<sup>92</sup> The

84. Ibid., VII.12, IX.1.

85. Milsom, *Legal Framework*, 55.

86. Supra note 53.

87. See generally Sutherland, *Novel Disseisin*, supra note 44, and Milsom, *Legal Framework*, 8-35.

88. PBK, 3:1xxix-clxi.

89. PRS XIV, 134.

90. RCR., 1:366; 2:294.

91. Milsom, *Legal Framework*, 21-25, 46-47.

92. Title and lordly acceptance were somewhat separated by the Compromise of 1153, but title was still based on lordly acceptance at some prior date: Palmer, 'Feudal Framework', 1149.

Countess Amice case<sup>93</sup> concerned a tenant who had been installed in part of the Countess's marriage portion by her husband. When that marriage was dissolved, the Countess had no obligation to that tenant: he was on the land without proper warrant. By judgment of her court, she ejected him. In an assize of novel disseisin, however, he regained the tenement. Against the testimony of the Countess's court, he proved by compurgation that he had not willingly entered into the plea or vouched her supposed husband to warranty.<sup>94</sup> The tenant regained his tenement and knew he could refuse with impunity to enter into a plea unless the Countess had a royal writ to make him answer. No royal writ was available, however, that would allow the case to come in the Countess's court. Since she was the claimant, her writ of right would be directed to her lord and would thus come in her lord's court.<sup>95</sup> She was thus prevented from acting against him in her own court. In such proprietary matters, no man need answer for his free tenement without a royal writ, because tenants colorably, but wrongfully, installed had seisin such that they could utilize the assize of novel disseisin.

By 1200, then, the need for a royal writ to make the tenant of a free tenement answer was a rule of law. As a statement of fact at the beginning of the reign of Henry II, it was an expression of the solidarity between lord and man against outsiders: not a legal, but a social phenomenon. In the 1180s, the venue for admeasurement of dower and *Glanvill's* statements indicate that the statement had become custom. It was not proper to allow a warrantor to proceed to diminish an accepted tenant's tenement in his own court: the case went rather to the county court. Nevertheless, everyone involved admitted that the widow was a tenant in good standing who had been properly installed, although with an excessive dower. The results were not at odds with social mores. By 1200, a tenant without right had the benefit of the rule, now decisively turned against the lord. No longer was it a maxim about normal social solidarity. Nor was it a consideration of seemliness that worked no anomalies. By 1200 the rule, enforced by novel disseisin, was insulating the tenant from his lord and protecting tenants who had no right. Moreover, and more vitally, the assize functioned to limit the lord's disciplinary powers short of disinheritance, so that lordly control became 'mere' discipline, without the ultimate impact on tenants that had made the disciplinary power so much more important than proprietary decision-making. After the disciplinary powers were limited, proprietary decisions assumed greater importance, but lords had already lost control over that sector when it had been less significant. The reality was that tenants were

93. PBK, 1:3199; RCR, 2:180; CRR., 1:186, 225, 249. For analysis, see Milsom, *Legal Framework*, 45-47.

94. CRR., 1:186 records him pleading that he was not summoned, did not come into court by summons, did not vouch to warranty, and did not lose his seisin by judgment of the countess's court. But the court decided that he should take issue on not having entered into the plea willingly and vouching: a somewhat different position.

95. *Glanvill*, XII.8; Milsom, *Legal Framework*, 92; Palmer, 'Feudal Framework', 1138.



increasingly insulated from their lords: impersonal rules dictated decisions concerning tenures. Land left the sphere of personal relationships and became property.<sup>96</sup>

Likewise by 1200 legal procedure fitted a new conceptualization: a hierarchy of possessory and proprietary actions. Prior to 1176 the various procedures were correlative: meant for different people and situations, not for the same person to be used successively. The writ of right was thus for the outside 1135 claimant; the disseisin remedy, for the Stephen analogue: the current tenant. Different people thus often properly had *jus* (right) and seisin.<sup>97</sup> The writs corresponded to social situations. But when standardized writs proliferated, possible litigants perceived that the general forms dictated by standardization enabled them to utilize the writs successively.<sup>98</sup> The possibility of a possessory-proprietary hierarchy perhaps sprang from the relationship of the assize of *darrein presentment* to the writ of right of advowson. *Darrein presentment* determined who would nominate the next occupant of an ecclesiastical position by determining who or whose ancestor had last presented. That was necessarily a fast determination, because the bishop simply made the appointment without a presentment if the position remained vacant for six months. The more complex matter of right could be settled by writ of right of advowson after the apparent rightful patron had presented for this one time: a clear possessory-proprietary hierarchy dictated by ecclesiastical pressures.<sup>99</sup> The Countess Amice case shows that this hierarchy now applied also to the assize of *novel disseisin* and the writ of right. As between the same parties and in the same dispute, the results would be different depending on the writ: the result of the possessory writ would be for the tenant, but would be reversed by the decision on the writ of right. The law then was set in a tiered form of remedies that enabled and encouraged multiple cases in the same dispute.

### The Writs of Entry I: The Legal Conceptualization

The writs of entry came to occupy a position between the assizes and the writ of right in the hierarchy of writs. They delved more deeply into 'title' than did the assizes, but not as deeply as the writ of right. Each writ of entry alleged a single flaw in the tenant's title, whereas the writ of right normally determined broadly who had greater right. The focus of the writs of entry allowed the claimant both to direct the jury precisely to the major point in the dispute and to avoid the cumbersome process of the writ of right. Finally, proceedings on a writ of entry were not final: a defective decision

96. Milsom, *Legal Framework*, 183-86.

97. Palmer, 'Feudal Framework', 1149.

98. Palmer, *Whilton Dispute*, supra note 2, 15-17. The standardization of writs was at least as important as the provision of returnable writs.

99. Pollock and Maitland, *Hist. Eng. Law*, 1:148.

on a writ of entry could be cured by a proper decision on a writ of right. These writs eventually relegated the writ of right to only an occasional phenomenon.

In the emerging legal system, the writs of entry were thus vitally important; the reasons and ways they developed are complex. Maitland considered these writs property remedies even at origins. This framework for the writs supposes a horizontal world: an owner simply challenged a point of a tenant's title. Milsom insists that feudal structures, now distorted by the king's court, form the proper context for analyzing the writs. The writs of entry were thus initially downward-looking writs: lords looking downward and challenging their tenants in the king's court now that they could not do so in their own courts. In that framework, 'entry' does not connote an owner's attitude toward property, but rather an offense against the lord on account of an unjustified assumption of a personal relationship.<sup>100</sup> Maitland did not perceive the social context, but Milsom's model does not resolve the question about the writs. An accurate account of both the social and legal context requires resolution of three distinct but interrelated problems: the legal conceptualization of the writs of entry, the development of their forms, and the rationale for their provision.

Ascertaining the legal conceptualization of the writs of entry is a very technical task, but one that shows the declining power of feudal courts and thus the increasing cohesiveness of England as a governmental unit. Chancery utilized a single model in formulating these writs. From the claimant's point of view, the writ was 'upward-downward': a triangular construct corresponding to the nature of litigation in the recently feudal society.<sup>101</sup> The crucial question is thus the position of the lord: he always had a place, either as an explicit actor or as an explicitly excluded actor. Establishing that model likewise determines those situations in which lords could no longer act. In a succeeding article, that conclusion will provide essential data for the determination of the economic impact of the origins of the common law.

Two rules governing the writs of entry provide the legal conceptualization: the *per* and *cui* rule and the rule limiting the vouching of warrantors. The *per* and *cui* rule is the more interesting, because it seems arbitrary. The second rule will be treated later.<sup>102</sup> The *per* and *cui* rule limited access to the writs of entry by determining the reach of the writs: by limiting the kind of person who could be sued. The limitation related to devolutions of the land: the number of people through whose hands the land had passed since departing from the claimant or his ancestor (called the *propositus*). The writ had to link the current tenant back to the claimant or his *propositus* mentioning every intermediate holder using the words *per* (by) and *cui* (to whom) no

100. My previous inconclusive resolution of the nature of the writs of entry (Palmer, 'Feudal Framework', 1153-61) derived from a failure to distinguish the questions.

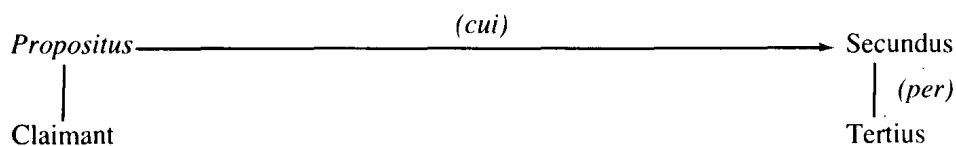
101. Milsom, *Legal Framework*, 72-74.

102. Text *infra* accompanying notes 173-183.

more than once each. No one has ever made any jurisprudential sense of the rule.<sup>103</sup>

The most important writ of entry, *ad terminum qui preteriiit* ('for a term that has expired'), illustrates the rule. This writ allowed claimants to recover against tenants holding over after an expired lease. The writ, at maximum reach, follows.<sup>104</sup>

The king to the sheriff, greeting. Command Tertius that justly and without delay he render to Claimant ten acres of land with appurtenances in Whilton into which he has no entry save by [PER] Secundus, the father of the said Tertius, whose heir he is, to whom [CUI] Propositus, father of Claimant, whose heir he is, gaged them for a term which has expired, as he says. And if he does not (so render) . . . then summon Tertius etc.



This writ was at maximum reach, since it used both *per* and *cui*. Had Tertius died leaving a son Quartus on the land, Quartus could not have been linked to Propositus using only *per* and *cui*: the writ could not connect Secundus with Propositus. Claimant thus had to use a writ of right to challenge

103. Bracton, 3:159-60 (f. 219b) Bracton probably did not quite understand the legal conceptualization, although he talked about the writs reaching the third person inclusively: 'This writ will lie against strangers who have entered through a disseisor, one or several, as far as the degrees of entry and the persons permit, as well as against the heirs of the disseisor or those who have their entry through the heirs, as far as the third person inclusively'. This was only in the context of *sur disseisin*, an obviously three-handed writ. Note, however, that Bracton did treat the vouching rule immediately after this treatment of the degrees, so that he may have thought there was some connection). Britton, ed. F.M. Nichols (Washington, 1901), 565-70 (an explanation of the way to count the degrees); *Fleta seu Commentarius Juris Anglicani* (London, 1647), 361-64 (Book 5.35) (rendition of the writs and method of counting the degrees); Sir Arthur Fitzherbert, *The New Natura Brevium* (London, 1687), 201; William Blackstone, *Commentaries on the Laws of England*, 1st ed. facsimile (Chicago and London, 1979), 3:180-82; Pollock and Maitland, *Hist. Eng. Law* 2:65-66, 71n (the latter hypothesizes some relationship between the degrees and the vouching rule, but concludes: 'There is something to be discovered in this obscure region; we cannot profess to have thoroughly explored it. It is darkened by inconsistent methods of counting the degrees'.); S.F.C. Milsom, Introduction to *Novae Narrationes*, cxxxiv-cxxxvii; S.F.C. Milsom, *Historical Foundations of the Common Law*, 1st ed. (London, 1969), 121-24 (p. 121: 'The writs of entry may therefore have started within the feudal framework; and this origin may explain a major mystery to which they were subject, that of the "degrees"'.); Milsom, *Historical Foundations* 144-46, 148-49 (see *infra* note 107).

104. See Registers, 10 (Hib. 25). The writ was apparently available at full reach from the beginning: PBK, 1:3506.

Quartus. But, had Secundus still held the land, Claimant could use a writ of entry, since he could be related back, although only using *per*. Writs of entry were framed only in the *per* or in the *per* and *cui*. After 1267 situations such as that involving Quartus were made subject to writs of entry utilizing the word *post* (after),<sup>105</sup> but that later development is irrelevant here. Such writs were said to be framed ‘within the degrees’. Prior to 1267, in the formative period, the workings of the *per* and *cui* rule thus determined the reach of the writs of entry.

An anomalous application of this straight-forward, seemingly senseless rule suggests a social-legal context to the writs of entry. The *per* and *cui* rule found two, but only two, applications. The operation of the rule considered normal is that the writ of entry could reach only the first or second holder: the writ could list only two people beyond *propositus*. The writ of entry *ad terminum qui preterit* above is such a two-handed writ. Without any contemporary comment, however, the same rule allowed certain writs of entry to mention three people after *propositus*.<sup>106</sup> A highly technical, seemingly scribal rule ought not vary in application unless there is a perception that rationalizes the rule: that makes the different applications embody the same principle.

That perception concerns the position of the lord in the writ. The three-handed writs—those that mentioned three holders after *propositus*—were actually the norm. In three-handed writs, the lord was always the first person through whose hands the land passed after *propositus*.<sup>107</sup> Three-handed writs thus fitted those situations in which Claimant’s lord had himself separated the land from Claimant’s line. In two-handed writs, however, the lord was omitted: he had done nothing and was not involved in the initial transfer. The two-handed writs were a concrete reflection of the lord’s loss of control in specific social situations. The model thus measures lordly control: the appearance of the writ indicates, but did not cause that decline in control.

The writ of entry concerning a guardian’s alienation is one of the earliest of the six three-handed writs of entry. Its tenorial orientation is clear.<sup>108</sup>

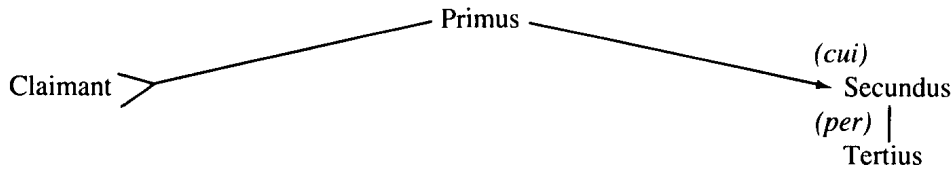
105. Statute of Marlborough, c. 29 (52 Henry III, 1267).

106. Supra note 103.

107. Milsom correctly identified the crucial question as the position of the lord in the formula. Milsom, *Legal Framework*, 92-102. He likewise suspects that the position of the lord related to the *per* and *cui* rule: Milsom, *Historical Foundations*, 148 (‘can the “downward” nature of the writs of entry throw light on the mysterious “degrees”?’). Nevertheless, he identified Claimant as the relevant lord making a downward claim, so that he assumed the writ would mirror the social fact, whereas the writ followed the legal conceptualization of the process demanded by the structure of the writs. He thought the *per* and *cui* rule still mysterious and perhaps related to the degrees in maritagium (Milsom, *Historical Foundations*, 148-49). The degrees in the writs of entry, however, were completely distinct from the degrees in maritagium.

108. Registers, 95 (CC. 198); *Bracton*, 4:38, lists only two-handed varieties of the wardship entry writ. Early writs were also three-handed. Two early cases have minor claimants,

The king to the sheriff, greetings. Command Tertius that . . . he render to Claimant, who is of full age as it is said, ten acres . . . which he claims to be his right and inheritance and into which the said Tertius has no entry save by [PER] Secundus, to whom [CUI] Primus demised them, who had only the wardship thereof while the aforesaid Claimant was underage, as he says . . .



Primus in this writ was not *Propositus*. Had *Propositus* been in the wardship of Primus, Claimant could still have reached Tertius with the writ. Primus here was the guardian. In the early cases the guardian would inevitably have been the lord or one occupying the lord's place.<sup>109</sup> The tenorial orientation of the writ is thus complex: from Claimant to Primus it is upward; but Primus made a downward grant thereafter to Secundus. The social situation that necessitated the writ will be treated later.<sup>110</sup> The legal conceptualization of the writ is that the guardian granted away his ward's lands as if they had been his own. The writ allowed Claimant to regain his lands despite his lord's actions. The legal model is thus 'upward-downward': upward to the lord, downward to Secundus, who left it or alienated it to Tertius.

The form of the early writ *Cui in vita* ('whom in his lifetime')<sup>111</sup> confirms the model. *Cui in vita* allowed a widow to reclaim her inheritance, marriage portion or dower regardless of the alienation by her late husband. The purchaser could then claim escambium from the husband's heir.<sup>112</sup> This writ has always been considered two-handed,<sup>113</sup> but the form reveals rather a three-handed writ: the husband/lord is Primus.<sup>114</sup>

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so they were presumably not bringing a writ of right but a writ of entry: CRR, 3:92-93, 114 (1204) (showing that although the legal conceptualization was upward-downward, the social situation was downward); CRR, 4:60, 115, 122-23, 141, 221-222 (1206) (for the form of the writ, see Palmer, 'Feudal Framework', 1155, note 56). Other examples of three-handed guardian writs of entry: CRR, 7:238, 291 (1214); CRR, 8:230 (1220).

109. A sale of the wardship to another may not have had to have been recounted in the writ. CRR, 11:2040.

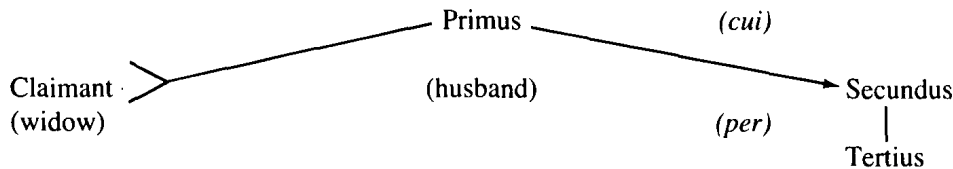
110. *Infra* text accompanying notes 173-94.

111. The writ was certainly available by 1213: Palmer, 'Feudal Framework', 1155. It may have been available in 1212: CRR, 6:399. The first writ at full reach I have found is CRR, 8:110, 329 (1219). See also CRR, 11:208. The writ was also available for the recovery of dower, a mere free tenement: CRR, 13:693 (1228).

112. *Bracton*, 4:32.

113. Milsom, Introduction to *Novae Narrationes*, cxxxv-cxxxvi: 'the degrees will accommodate only one holder between the *propositus* and the tenant. This seems to be

Command Tertius that . . . he render to Claimant ten acres . . . into which he has no entry save by [PER] Secundus, to whom [CUI] Primus, late husband of the said Claimant, demised them, whom she was not able to contradict in his lifetime . . .



*Cui in vita* could only be a two-handed writ by the ecclesiastical theory that man and wife are one flesh.<sup>115</sup> Had husband and wife really been considered one, the husband could have alienated his wife's lands absolutely. In fact, the widow could reclaim such alienations. Husband and wife were not identical at law. Moreover, Primus was not *propositus*: the widow did not derive her title from him, but rather from her ancestors. Primus here was the lord, precisely as in the guardian writ.<sup>116</sup> For these purposes a wife was like a minor in wardship, with all consequential benefits and burdens. The tenorial orientation of the writ, thus, was clearly 'upward-downward'.

Analysis of *sur cui in vita* confirms the structure of *cui in vita*. *Sur cui in vita* was a remedy for the heir of a woman whose husband had alienated her land while she was still alive.<sup>117</sup> If her heir was not also the husband's heir,

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true of *ad terminum qui preterit* already considered, *dum non fuit compos mentis*, *dum fuit infra etatem*, *sine assensu capituli*, and *cui in vita*. But it is not true of writs based on disseisin, or intrusion, in which the degrees turn out to accommodate two persons between *propositus* and tenant, the disseisor or intruder and another'. The error relates not to the actual reach, but only as to who is *propositus*.

114. Registers, 10 (Hib. 26: in the *per*), 292 (R. 795: in the *per* and *cui*). For an early writ in the *per* and *cui*, see *supra* note 111.

115. J.H. Baker, *An Introduction to English Legal History*, 2nd ed. (London, 1979), 395.

116. The husband appears as lord in at least two other situations. A wife who opposed alienation of her nominated dower land could not reclaim it after the husband's death (opposition apparently being equated to feudal felony), whereas if she consented, paradoxically, she could recover it: Glanvill, VI.3. Likewise, a wife who killed her husband was guilty of petty treason: Baker, *English Legal History*, *supra* note 115, 395. Two early situations in which a *cui in vita* formula appeared (although not in a *cui in vita* writ) reflect the obligation found in Glanvill, by expanding the formula to '*cui non potuit vel debuit contradicere*': CRR, 1:142 (1200); 4:43 (1205). The latter case and others describe the wife as being in the wardship *custodia* of the husband: CRR, 4:43 ('*custos terre cum Alicia uxore*'); 2:221 ('*custos hereditatis matris sue*'); 8:152; Milsom, 'Inheritance by Women', 85-86.

117. Registers 292 (R.797, in the *per* for husband's alienee), 293 (R.798, in the *per* and *cui* for husband's alienee's alienee). Early possible examples of *sur cui in vita* are CRR, 8:72 (1219); 10:47 (1221); and *Rolls of the Justices in Eyre for Yorkshire, 1218-19*, ed.

he could reclaim with the same assurance as the widow herself could with *cui in vita*. If the claimant was heir to both husband and wife, he was barred from recovery by his obligation to warrant his father's grants.<sup>118</sup> The distinction between *Propositus* and *Primus* is clear: when the husband was a possible *propositus* for Claimant, Claimant could not use the writ. In *sur cui in vita* the wife was *proposita*. The husband was *Primus*: lord of his wife. Both *cui in vita* and *sur cui in vita* thus fit the model suggested by the writ of entry concerning a guardian's alienations: the first hand in the writ was lord, followed by at most two tenants.

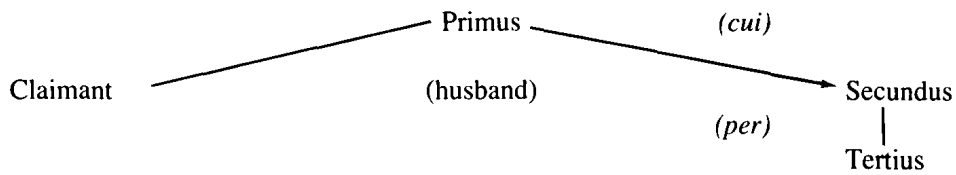
The writ *cui ante divorcium* ('whom before the divorce') mirrored *cui in vita*. It provided a remedy for a woman whose marriage had been annulled after her supposed husband had alienated her lands. This writ was three-handed.<sup>119</sup> A two-handed writ in this situation was conceivable: it would have asserted that the man had never really been Claimant's husband and lord. The law here, however, analyzed the relationship between the parties.<sup>120</sup> The man had been husband and lord to all intents and purposes, and the writ so describes him: 'formerly husband of the said Claimant'. This writ then, like *cui in vita*, will reach the (supposed) husband's alienee's alienee. Countess Amice would have used this writ had it been available; it was only provided, however, later in the thirteenth century.

Command Tertius that . . . he render to Claimant ten acres . . . into which he has not entry save by [PER] Secundus, to whom [CUI] Primus, formerly husband of the said Claimant, who demised them to him, whom she was not able to contradict before the divorce pronounced between them, as she says.

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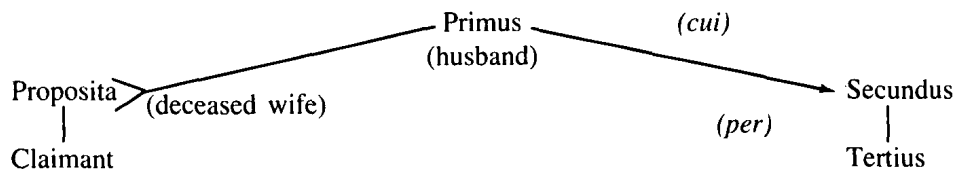
D.M. Stenton, *Selden Society*, vol. 56 (London, 1937), no. 167 (-no. 1132). All of these reach only to Secundus.

118. Bracton, 4:33. See CRR, 15:1840, *ad terminum qui preterit*, which shows that a son may not be barred from claiming his inheritance from his mother's side by a grant from his father, when the son had no inheritance from the father.
119. *Registers*, 293 (R. 800: in the *per*, but with a note that it can be made in all the degrees); *Registrum Brevium* (London, 1687), 233 (a writ in the *per*, with a note that it can also be made in the *cui*. Cases of *cui ante divorcium* are rare: Public Record Office, London, CP. 40/70, m. 31 (1278); CP. 40/135, m. 226; JUST. 1/956, m. 15 (in the *post*). The situation, although not the writ, shows up much earlier. Countess Amice, text *supra* accompanying notes 93-95, would have used such a writ had it been available, and see CRR, 4:274. CRR, 14:1549 seems to be a situation related to the Amice situation, but more in the nature of *cui in vita* than *cui ante divorcium*. CRR, 16:2411 (1242) (in the *per* for husband's alienee) is a writ *cui in vita*, but for a *cui ante divorcium* situation. The only problem with using *cui in vita* is that the writ assumed the death of the husband. That incongruity was not raised in the 1242 case, but probably eventually gave rise to the writ *cui ante divorcium*.
120. For a similar approach to a writ of entry, see R.C. Palmer, 'Contexts of Marriage in Medieval England: Evidence from the King's Court circa 1300', *Speculum* 59 (1984), 61-62.



The same model explains the writ of entry concerned with grants by a tenant in curtesy,<sup>121</sup> again not hitherto identified as a three-handed writ.<sup>122</sup> The situation was similar to that in *sur cui in vita* except that the husband's grant was made after the wife's death, while the husband was holding his wife's heritable lands for the remainder of his life, because they had had children. Once again, the writ was clearly three-handed: Primus was not *propositus*, was not the person from whom Claimant derived his title. Primus was husband and lord of *proposita*. This writ also followed a tenurial orientation that was upward-downward: up to a lord, downward then to his grantees.<sup>123</sup>

. . . Command Tertius that . . . he render to Claimant ten acres . . . into which he has no entry save by [PER] Secundus, to whom [CUI] Primus demised them, who held it by the law of England [= by curtesy] after the death of *Proposita*, late his wife, etc.



The writ of entry *sur disseisin* was likewise a three-handed writ.<sup>124</sup> The writ was provided in 1204,<sup>125</sup> but was not used as frequently as the guardian

121. This writ was apparently not available prior to Magna Carta. The only pre-1215 possibility I found is CRR, 7:109, but that is just as likely a writ of right. It does appear in *Bracton*, 4:37-38.

122. *Supra* note 117.

123. *Bracton*, 4:37-38; *Brevia Placitata*, ed. G.J. Turner, Selden Society, vol. 66 (London, 1951), 198. *Registers*, 298 contains only the immediate writs provided by the Statute of Westminster II, c. 24 that allowed the heir to claim immediately on a grant in fee made by the tenant in the curtesy.

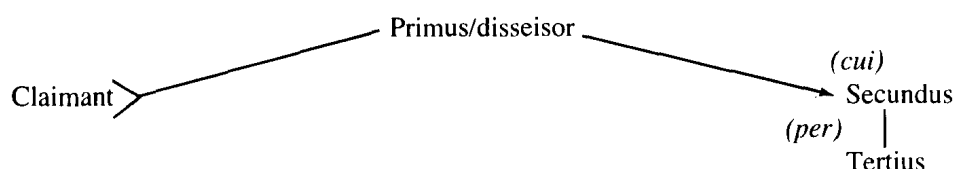
124. *Registers*, 95 (CC. 197); G.D.G. Hall, 'The Early History of Entry Sur Disseisin', *Tulane Law Review* 42 (1968), 584. The first writ at full reach was in 1230 (*ibid.*, 594). CRR, 14:49 deserves consideration also, although it may not have been a writ *sur disseisin*. It was at least a continuation of the action after the disseisee died.

125. Hall, 'Sur Disseisin', *supra* note 124, 586.



writ in the early decades.<sup>126</sup> The situation in the writ, however, is fully analogous to that of the other three-handed writs. The typical, but not the only anticipated, disseisor was the lord. That much appears from the writ of novel disseisin itself<sup>127</sup> and the analysis of the Compromise of 1153 and the Assize of Northampton above.<sup>128</sup> *Sur disseisin* alleged that the claimant or his ancestor had been disseised. Thus, the assertion that Primus here was conceptually the lord is hardly surprising. The number of cases in which a disseisor granted away the lands now makes more sense: he had never intended to hold the land in demesne, but was only installing a different tenant.

The king to the sheriff, greetings. Command Tertius that . . . he render to Claimant ten acres . . . into which he has no entry save by [PER] Secundus, to whom [CUI] Primus demised them, who disseised the said Claimant unjustly thereof etc.



The difference between this writ and the guardian writ is that in *sur disseisin* the lord deprived an adult instead of a ward. In 1275 *sur disseisin* subsumed the guardian writ.<sup>129</sup> After that time the guardian writ disappeared: deprivation of a minor was a disseisin.<sup>130</sup> The guardian writ, useful in the early decades, was then almost forgotten: it is not listed among three-handed writs, although *sur disseisin* is.<sup>131</sup>

The model generated by the three-handed writs is compelling. Previously three-handed writs seemed exceptional. Now *cui in vita*, *sur cui in vita*, *cui*

126. It seems that earlier strictures about using *sur disseisin* as an important part of the history of the writs of entry because of its infrequent use are incorrect. It was infrequently used only when compared to *ad terminum qui preterit*, *cui in vita*, and the guardian writ of entry.

127. Milsom, *Legal Framework*, 11-13; Palmer, 'Feudal Framework', 1150.

128. Text *supra* accompanying notes 31-63.

129. *Novae Narrationes*, cxxxiii.

130. T.F.T. Plucknett, *Legislation of Edward I* (Oxford, 1962), 81-82.

131. Registers, 95, 98 (CC. 198, CC. 206a) are the only writs of entry through the guardian in that collection; register R did not include the writ; *Registrum Brevium* (London, 1687), 231 only has a note that the writ has been superseded by *sur disseisin*. *Supra* note 113.

*ante divorcium*, the guardian writ, and the curtesy writ have been added to the corpus of the three-handed writs. Each three-handed writ follows an upward-downward pattern. In each the first hand was the claimant's or ancestor's lord. *Cui in vita* and the guardian writ were used frequently.<sup>132</sup> The number and importance of three-handed writs makes that model the norm. The model thus establishes the oddity of the two-handed writs. The oddity, however, was not that their reach was shorter. Both two-handed and three-handed writs reached Tertius, although no formulary used the Primus-Secundus-Tertius form to indicate that. Two-handed writs eliminated not Tertius, but Primus. This omission was proper because the lord no longer participated in the social situation. Analysis of the two-handed writs from this perspective establishes that the existence of two-handed writs of entry demonstrates the diminution of lord's power in specific situations.

The writ *causa matrimonii prelocuti* ('by reason of a marriage arranged') was a genuinely two-handed writ.<sup>133</sup> The writ supposed that the woman claimant had given her land to her expected future husband. He then declined to marry her, but retained the land. This writ allowed her to recover. The man here is not analogous to the husband in *cui in vita* or *sur cui vita*: in *causa matrimonii prelocuti* he never actually became the woman's husband and lord. The man, therefore, cannot be Primus: he must rather be Secundus. There is no Primus in the writ. But if the expected husband was thus Secundus and the writ still reached Tertius, the reach of this two-handed writ was identical to that of the three-handed writs. The form of the writ helps.

Command Tertius that . . . he render to Claimant ten acres . . . into which he has not entry save by [PER] Secundus, to whom [CUI] Claimant demised them because of a marriage arranged between them whereby he should have taken her to wife, and he has not yet taken her, as she says, etc.



132. Frequency is a relative matter with writs of entry. Between 1233 and 1242 (CRR, 15 and CRR, 16), there are records of 14 cases begun by *ad terminum qui preterit*, 18 by *cui in vita*, 7 or 8 by the guardian writ, 2 by *sine assensu capituli*, 6 for alienations by doweresses or other life tenants, 3 for intrusion, 1 for alienation by bailiff, and 1 each for *dum fuit infra etatem* and *dum fuit non compos mentis*. Writs of entry simply were not that frequently used even in the 1230s.

133. Registers, 99 (CC. 212, later revised into the *per* form on p. 296: R. 821), 296 (R. 822: in the *per* and *cui* against the man's alienee). CRR, 14:610 (1230) is an interesting example of the way in which this kind of situation with entry language appeared prior to the provision of the writ. The idea behind this writ was not 'failure of consideration', but related more to the relationship between the parties: Palmer, 'Contexts of Marriage', *supra* note 120, 61-62.

The grant supposed in *causa matrimonii prelocuti* was by substitution, not subinfeudation. Subinfeudation would have made the husband hold as his wife's tenant, whereas he obviously expected to be her lord. The grant by substitution supposed here grew up to correspond to the early practice of a husband doing homage for his wife's land to her lord.<sup>134</sup> After a woman could do homage and had a secure right in the land herself, many prospective husbands continued to feel that the land should become decisively theirs. The grant is thus by substitution, so that the man stepped into the tenurial position she and her ancestors had held *vis-a-vis* the lord. The tenurial orientation of this writ was thus not downward: a lord questioning her tenants' warrant. Since the grant was by substitution, however, the grant itself supposed the lord, even though the lord did not appear in the writ. Claimant had held of the lord; Secundus now held of him. The unmentioned lord held the position of the named lord in the three-handed writs: that of Primus. The effect of the lord continued likewise: his haunting presence still counted as one of the three hands.

Such grants by substitution shared the history of other similar grants. Through the early thirteenth century, the lord was a necessary participant. A two-party grant, such as the writ supposed, was rare. If the land concerned was the woman's inheritance, no grant was necessary. A husband did homage for his wife's inheritance, so that the land during the marriage was his more than hers,<sup>135</sup> although that was changing around 1200. Moreover, such a grant without the lord's approval was a denial of his lordship, occasioning forfeiture of the tenement: both Claimant and Secundus would forfeit. Had the land been the woman's marriage portion, the donor's line still had secure control:<sup>136</sup> the woman could not alienate without severe consequences. The writ simply did not fit twelfth century or early thirteenth-century society.

*Causa matrimonii prelocuti*, however, was not an early thirteenth century writ; it appeared later in the thirteenth century when lords had ceased being necessary participants in such transfers.<sup>137</sup> By mid-thirteenth century lords found they had no real control left over who entered their fee.<sup>138</sup> That process eventually concluded in *Quia Emptores*.<sup>139</sup> The writ was provided, then, when a woman could actually grant away her land without the lord's participation. The lord was, therefore, omitted from the writ. The reach of the writ, however, was not thereby shorter: it still reached Tertius. The lord

134. Glanvill, IX.1.

135. Milsom, 'Inheritance by Women', 63, 86-87.

136. The analysis in Milsom, *Historical Foundations*, 172-74, seems to apply to mid-thirteenth century.

137. Registers, 99 (CC. 212 *Capella v. Boyvill* (1267-68), see Palmer, 'Contexts of Marriage', supra note 120, 62-63, still without entry language), 296 (R.822: in the *per* and *cui*).

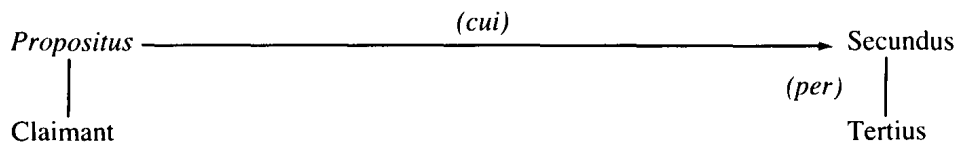
138. Milsom, *Historical Foundations*, 115; *Prerogativa Regis*, supra note 62, xxxvi-xxxvii.

139. Milsom, *Historical Foundations*, 113-16.

as Primus had been omitted. That pattern of omission, however, establishes the same tenurial orientation for this two-handed writ as was embodied in the three-handed writs.

*Dum fuit infra etatem* ('while he was a minor') was a two-handed writ;<sup>140</sup> the model derived from *causa matrimonii prelocuti* is applicable here. *Dum fuit infra etatem* provided a remedy for an adult (or his heir) who had alienated his lands as a minor. Minors could not alienate their lands. In addition to obvious matters of justice, there was a feudal reason: while a minor, his lands were in the wardship and control of his lord. *Dum fuit infra etatem* and the guardian writ are clearly analogous. The similarity explains the labelling of certain guardian writs as writs *dum fuit infra etatem*: the guardian writ included those words.<sup>141</sup> Nevertheless, the writs were distinct. *Dum fuit infra etatem* involved no action by the lord: a minor seemingly of age attempted to alienate his land. Quite properly, *dum fuit infra etatem* only appeared after purchasers would not reflexively have demanded the approval of the lord also when purchasing the land from the tenant by substitution: that is, around mid-century. The concrete difference between the guardian writ and this writ, then, is the decline of feudal control evidenced by the two-handedness of the writ: the omission of the mention of the lord as Primus. Eliminated in the social transfer, he merely haunted the writ.

. . . Command Tertius that . . . he render to Claimant ten acres . . . into which he has no entry save by [PER] Secundus, to whom [CUI] Propositus, father of the aforesaid Claimant, whose heir he is, demised them while he was underage, as he says etc.

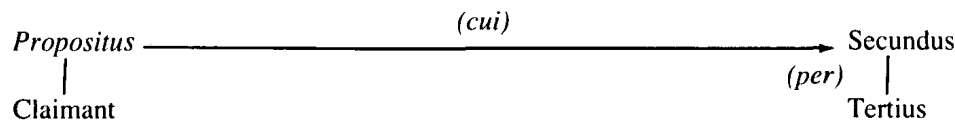


140. Registers, 96 (CC. 199: without entry language), 290 (R. 780: in the *per* and *cui*). This writ was not available prior to Magna Carta or soon thereafter. CRR, 16:2303 (1242) may have been a beginning of it: a suit by a woman against her former guardian for a sale she made to him while she was a ward, but without using entry language. For earlier alleged cases, see *infra* note 141.

141. *Supra*, note 108; *Rolls of the Justices in Eyre for Gloucestershire, Warwickshire, and Staffordshire, 1221-1222*, ed. D.M. Stenton, Selden Society, vol. 59 (London, 1940), no. 1120 is a guardian writ with the phrase *dum fuit infra etatem* (which, of course, would always have been true in guardian writs) indexed as a writ of entry *dum fuit infra etatem* (p. 752); the same classification problem appeared in *Rolls of the Justices in Eyre for Lincolnshire, 1218-9, and Worcestershire, 1221*, ed. D.M. Stenton, Selden Society, vol. 53 (London, 1934), 569 (667). The crucial difference, of course, is the alleged grantor: the ward or the guardian.

*Dum fuit non compos mentis* ('while of unsound mind') was two-handed, like *dum fuit infra etatem*.<sup>142</sup> This writ nullified grants made by those of unsound mind. It was also related to a guardianship situation. In the early thirteenth century the insane were considered in wardship to their lord; by the reign of Edward I the king was their guardian.<sup>143</sup> When the writ first appeared, however, the lords were still the relevant guardians. *Dum fuit non compos mentis* was thus not a product of the king's rights and duties to the insane. Lords would have found control over the insane difficult, particularly when a tenant had only periods of insanity. Difficulty became impossibility when both tenants and purchasers felt little need to consult lords in land transactions. The writ was therefore two-handed: the lord had not been involved.

Command Tertius that . . . he render to Claimant ten acres . . . into which he has no entry save by [PER] Secundus, to whom [CUI] Propositus, father of the aforesaid Claimant, whose heir he is, demised them while he was of unsound mind, as he says etc.



The model developed above has considerable explanatory power.<sup>144</sup> The three-handed writs were the guardian writ, the curtesy writ, *cui in vita* (widow reclaiming her land), *sur cui in vita* (widow's heir reclaiming her land), *cui ante divorcium* (woman reclaiming after an annulment), and *sur*

142. Registers, 95 (CC. 196 in both *per* and *per* and *cui*, although indexed only as second degree). CRR, 7:296 illustrates the problem of classifying cases as upward or downward without distinguishing fact from claimant's legal conceptualization. This was not a writ of entry, but claimant's claim was met by an allegation of claimant's grant to tenant for homage and service, making it seem clearly a downward claim. Claimant, however, responded that he was insane at the time and in the wardship of the tenant, who was his uncle: thus, in some sense, it was likewise upward-looking, as against his former guardian. See CRR, 13:1921 (1229); 15:1309, 1394 (1235): possibly the earliest cases.

143. Maitland, 'The "Praerogativa Regis"', *supra* note 62, 184-86; Pollock and Maitland, *Hist. Eng. Law*, 1:481.

144. Two further writs deserve some mention here: *sine assensu capituli* and the writ of entry after the revocation of an outlawry. *Sine assensu* was two-handed: CRR, 11:1187 (1223); 15:1665 (1236). I am still unsure who Primus was—perhaps the chapter, without whose consent the previous abbot had alienated the land, was Primus. Early examples: 12:560 (1225) (in the *per*, went to the grand assize by a special mise.) The writ of entry after the revocation of an outlawry is not really well-enough known to classify yet. The examples in Registers 97, are in the first and second degree, and that register in its computations would thus contemplate a third degree also, making a three-handed writ. That would make good sense, because the first-hand was always the lord of whom Claimant claimed to hold, since the land had escheated back to the lord

*disseisin* (disseisee's heir recovering from disseisor's heir or feoffee). Application of the model they generate to *dum fuit infra etatem* (adult voiding his minority grant), *dum fuit non compos mentis* (reclaiming against a lunatic's grant), *causa matrimonii prelocuti* (undoing of a marital grant), and *cui ante divorcium* (reclaiming from assumed husband's grantees) provides a uniform explanation of the *per* and *cui* rule. Writs of entry were three-handed by nature. The Primus of the three-handed writs was merely omitted in the two-handed writs, but the reach remained the same. The two-handed writs were provided as lords lost their control in specific situations.

This model clarifies the conceptualization of the writ *ad terminum qui preteriit* ('for a term that has expired').<sup>145</sup> *Ad terminum qui preteriit* might have seemed a good example of Milsom's downward-looking hypothesis.<sup>146</sup> The termor or gage-holder was not protected at common law. He could not use novel disseisin against his debtor: his debtor retained the free tenement. The creditor's proper remedy was simply debt.<sup>147</sup> For the lessee, the remedy was covenant.<sup>148</sup> Such a vulnerability might make a gage situation seem downward-looking. The model, however, indicates that the lessor/debtor was looking upwards to a presumed lord who had done nothing and then downward to the tenant alleged implicitly to be claiming to hold of the lessor/debtor's lord. Of the numerous possible gaging situations,<sup>149</sup> then, the one embodied in *ad terminum qui preteriit*—regardless of the situations of those who actually used it—was that in which the creditor/gage-holder had received the gage on condition that he would become the fee-holder holding from the debtor's lord on default of payment.<sup>150</sup>

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after the king's profit from the escheat. Since the relationship of Primus here to claimant is explicit (lord of the fee), it is likewise similar to other three-handed writs, which specify the relationship (guardian, husband, etc.).

145. Text supra at note 104; note that while *ad terminum qui preteriit* was two-handed, on occasions a three-handed version appeared. In 1214 a writ concerning a term without the *ad terminum qui preteriit* formula was used in something like a *cui in vita* situation: CRR, 7:282. In 1228, a three-handed version was apparently modelled on the villeinage writ, with the termor holding from the claimant; CRR, 13:405.
146. Milsom, *Historical Foundations*, 146-48.
147. Glanvill, X.11; RCR, 2:247-48.
148. Baker, *English Legal History*, supra note 115, 252.
149. Glanvill, X.6 mentions the situations in which seisin of the gage is given or not, and in which there is a fixed term or not, and in which there is an agreement that on default the land will be the creditor's or in which there is not such an agreement. One can also imagine differences arising from whether the creditor was a Jew, one's lord (PRS XIV, 48 (1194); CRR, 4:40-41), one's tenants, an outsider, or one of the homage group of one's lord, and whether one was gaging the whole of the fee held of the lord or only part.
150. Supra note 149. This is a plausible situation, because the lord would then have someone to deal with from whom he could expect the services, whereas an absentee tenant would create numerous problems.

This conceptualization according to a substitution model (tenant being substituted into the grantor's position)<sup>151</sup> implies the lord's loss of control over tenants thus gaging. Prior to the Assize of Northampton (1176) lords could not have been omitted from such a gage. The condition that the creditor would hold the fee on default would have been to the lord's dishonor and disherison: it would have forced on him a tenant, were that possible. *Glanvill's* disciplinary standards in 1188 dictated confiscation of the tenement: neither creditor nor debtor would have been tenant.<sup>152</sup> The lord's participation at the time of the gage and agreement to the eventual acceptance of the creditor as tenant—perhaps we should imagine another of the lord's tenants lending to secure a younger son a position—appears in the description of the gage-holder as possessing some kind of seisin.<sup>153</sup> The lord's loss of control could have occurred at two points: the control over the initial gage and the determination of default. Slowly but increasingly after 1176 the standardized writs dictated that lords act in standard ways toward their tenants, thus insulating tenants from the lord's action. Tenants and prospective lenders may not then have reflexively included the lord in such transactions. Probably that was not the first step, unless for people who were sure the lord would not approve and had to take the risk. More likely was an initial loss of control in the determination of default. Default is a non-event, but the gage-holder would immediately claim the fee. When payment would always surely have taken place before the lord, the lord could be sure of the consequences, as could his court. But when payments were made elsewhere, a lord might well be unsure about what to do with a creditor now claiming a fee. Once he claimed a fee, he was protected until it was proved that he had merely held a gage: the over-claim resulted in forfeiture.<sup>154</sup> The only safe course for the lord was to contact the debtor and advise him to sue, on default of which the lord would then accept the creditor's homage unconditionally. But the lord would not have wanted them to litigate in his court: he was apparently committed to both parties and the court's knowledge would not extend to something done elsewhere. The lord would prefer to remain neutral. *Ad terminum qui preterit* thus corresponds to the model established by examination of all the other writs of entry.

The writs of entry were thus a single class, governed by a single model. In legal conceptualization, they were upward-downward: a claimant looking

151. Milsom supposes, probably correctly, that substitution was rare in the late twelfth and early thirteenth century. That does not prevent substitution from being the conceptual model upon which the writs of entry were based. Substitution was the artificial situation necessarily supposed by the rule that a writ of right must be directed to the lord of whom one claims to hold.

152. *Supra* note 33.

153. *Glanvill*, X.6 (creditor receives seisin of the gage), X.II (creditor loses seisin of his gage), XIII.11 (gage-holder has some sort of seisin *qualemcumque seisinam*); CRR, 5:16.

154. *Glanvill*, XIII.30.

upward to his lord, who had made a downward grant. When the lord had not actually been involved, he was eliminated from the writ; but the writ at maximum reach still was appropriate against the same tenant: Tertius. The explanatory power of the conceptual model establishes that there is a social-legal ground to the writs: at their origins the writs of entry corresponded to social power structures and were not simply protections of abstract property rights progressively provided to fill gaps in a remedy structure.

## Writs of Entry II: The Derivation of the Form

A unitary legal conceptualization, however, does not imply a single origin for the form of the writ. The writs of entry did not derive, as one might think from Milsom's argument, solely from the undifferentiated *precipe* in *Glanvill*.<sup>155</sup> In Milsom's framework the entry language was a jurisdictional justification for avoidance of the feudal courts: the claimant was himself the lord of the relevant feudal court. Moreover, in that framework writs of entry derived solely from writs that could determine in the grand assize or battle. Since that construction dictated a downward-looking orientation for the writs, they could have little in common with the upward looking assizes of *mort d'ancestor* and *novel disseisin*.<sup>156</sup> The derivation of the form, as explained below, demonstrates that the origins of the writs of entry are more diverse, explaining the assumption by writs of entry of the middle position in the hierarchy of writs.

The most important—not the sole—source of the form of the writs of entry is the gage writ in *Glanvill*. That writ is here modified only in names and land designation to correspond with the writ of entry *ad terminum qui preteriit*.<sup>157</sup>

*The king to the sheriff, greeting. Command Secundus that justly and without delay he render ten acres of land with appurtenances in Whilton to Claimant, who gaged it to him for a hundred marks for a term which has expired [ad*

155. Glanvill, I.6. Milsom's view on the development of the writs of entry remains obscure. He admits readily that several writs of entry—at least *ad terminum qui preteriit* and *sur disseisin*—existed prior to Magna Carta (Milsom, *Legal Framework*, 95, 101), although he does not deal with the origins of *ad terminum qui preteriit*. He continues to stress Magna Carta c. 34 as resulting in the incorporation of entry language into the *precipe* as a jurisdictional statement (Milsom, *Historical Foundations*, 146-48). But if several writs of entry existed prior to 1215, the effect of c. 34 would seem a subsidiary development: perhaps only the appearance of consistency. At any rate, the use of the language in writs prior to 1215 would have to be explained, and presumably the explanation would not be as a jurisdictional specification.

156. Milsom, *Historical Foundations*, 146-47.

157. Glanvill, X.9. After the provision of *ad terminum qui preteriit* (1199 or earlier), that writ would form the pattern. Each new writ would not resort back to the writ of first summons, and it is highly unlikely that *ad terminum qui preteriit* derived from the writ of first summons except insofar as the gage writ derived from it.



*terminum qui preteriit*], as Claimant says, which he alleges he has redeemed by payment. And if he does not (so render) . . . then summon Secundus etc.

The portions of the gage writ identical to the writ *ad terminum qui preteriit* are italicized. There are only a few differences. The gage writ specified the loan and alleged payment or readiness to pay. It did not include the word 'entry'. But since *ad terminum qui preteriit* was the earliest writ of entry, the two writs were so similar, and the gage writ disappeared at about the time *ad terminum qui preteriit* appeared, the gage writ is the most likely candidate for the writ that developed into *ad terminum qui preteriit*, not *Glanvill's* writ of first summons.<sup>158</sup>

The introduction of the entry language into the gage writ derived from *Glanvill's* judicial assizes.<sup>159</sup> Immediately after retailing the gage writ, *Glanvill* handled the situation in which the creditor, summoned into court by the gage writ, claimed the land as his fee.<sup>160</sup> This claim was understandable if the gage was made on the condition that the creditor would become fee holder upon default of payment. On the request of either party, then, a recognition would be made to come to answer whether the creditor held the land as a gage or as his fee. Significantly, *Glanvill* indicated that the recognition treated not only the dispute between debtor and creditor as original parties, but could also determine whether the current tenant's father or other ancestor had held in gage or in fee: this recognition, in effect, was not limited to Secundus, but reached Tertius also.<sup>161</sup> *Glanvill* also provided the writ for this recognition: the recognition fee or gage,<sup>162</sup> of which there are examples in the early plea rolls.<sup>163</sup> The word 'entry' does not appear in these judicial assizes, but the question put to the jurors was precisely that asked in *ad terminum qui preteriit*. *Ad terminum qui preteriit* was the judicial assize question incorporated into the original gage writ. As the first writ of entry it served as the model form for its companion writs.

158. There are several surviving writs *ad terminum qui preteriit* from 1199: PBK, 1:3487, 3506, 3538.

159. Palmer, *County Courts*, supra note 37, 327.

160. *Glanvill*, X.10-11.

161. It is of some interest to speculate about what *Glanvill* meant by 'father or some other ancestor' of the creditor. It seems likely that the ancestor specification was not as broad as it would have been in a writ of right, but rather the kind of limitation found in an assize of mort d'ancestor: father, mother, brother, sister, aunt, or uncle.

162. *Glanvill*, XIII.27. Note that the fee or gage recognition follows and seems patterned on the assize *utrum*. The vital question in fee or gage is 'whether (*utrum*) the carucate of land in that vill that R. claims from N. by my writ is the inheritance (or fee) of N. or a gage pledged to him by R. (or R.'s ancestor H)'.

163. RCR, 1:361 (1199); 2:137, 218 (1199-1200), and with entry language, because deriving from a writ of entry *ad terminum qui preteriit*; 2:211 (1200); 2:227 (1200); PRS XIV, 135 (1195); RCR, 1:312, 2:46-47; CRR, 1:158, 220 (1199-1200). Most of these derive from gage writs.

The writ of entry concerning the guardian derived from a similar process. An adult claimant in *mort d'ancestor* could defeat a minor tenant's attempt to postpone the plea until majority by alleging that the minor's ancestor (not named in the writ) had died seised as of wardship and not as of fee. That precipitated the judicial assize fee or wardship.<sup>164</sup> The claimant, however, would know in advance that the tenant was a minor and that he would have to proceed to the fee or wardship assize. The issue formulated could use entry language.<sup>165</sup> Claimant might well prefer to incorporate that matter into the writ; the appropriate model would be *ad terminum qui preterit*. Thus the claimant from the beginning had been oriented tenurially upwards: suing his lord. In that context, the words of the judicial assize could well be simply incorporated into a *precipe* writ, but as easily into the gage writ format as into Glanvill's writ of first summons. Moreover since *cui in vita* was a variant of the guardian writ, this development explains both the guardian writ and *cui in vita*.

*Sur disseisin* developed from the assize of *novel disseisin*, not from a *precipe*. *Novel disseisin* would fail if either of the original parties died: the assize could only pass between the original parties.<sup>166</sup> After 1204, however, plaintiffs were allowed to proceed in certain circumstances by a *precipe: sur disseisin*.<sup>167</sup> This was likewise oriented tenurially upwards, since *novel disseisin* was primarily upwards; the tenorial orientation would not change by the death of one of the parties. The four earliest writs of entry—*ad terminum qui preterit*, the guardian writ, *cui in vita* and *sur disseisin*—thus had clear roots in assize writs.

Nonetheless, the assize questions were incorporated into a *precipe* format. Professor Milsom has demonstrated that entry language and questions appeared in writs of right patent removed into the king's court.<sup>168</sup> Since a tenant of a free tenement did not have to answer unless there was a writ, a lord challenging a tenant's warrant had to have a writ. But the only writs available prior to the writs of entry were the writ of right patent and the undifferentiated *precipe* (Glanvill's writ of first summons). The latter served well if the lord claimed to hold directly of the king, but the crucial question concerned the tenant's warrant: by what warrant are you on the land? In the

164. Glanvill, XIII.13-14; Palmer, 'Feudal Framework', 1158.

165. CRR, 1:136, 116, 181; CRR, 2:219. It is hard to see how, given such upward use of entry language, Milsom states that 'The first appearance of "entry" clauses, then, is not in original writs of entry. It is in requests by demandants in "writs of right" for a special issue to be put to a jury'. Milsom, *Historical Foundations*, 147. The first appearance was not in writs of entry, but neither was it solely derivative of writs of right: the assize of *mort d'ancestor* was equally a source of such language, and in an upward context.

166. Sutherland, *Novel Disseisin*, supra note 44, 141.

167. Hall, 'Sur Disseisin', supra note 124, 586-87.

168. Milsom, *Legal Framework*, 95-102.

former situation, this lord did not hold directly from the king, but from another lord. A writ of right patent had always to be directed to the lord of whom one claimed to hold, so that the claimant lord here was prevented from pursuing the tenant in his own court: it would eventually come into the king's court by *tolt* and *pone*. The question again would be the warrant: how the tenant had entered the land. In such situations, then, entry language would occur in other than assize writs.<sup>169</sup> Moreover, this social situation may have been behind many or even most writs of entry: the pleading often reveals a downward orientation in factual terms, even though the writ was upward-downward.

The relationship of the writs of entry to the *precipe* and writ of right accounts for the legal conceptualization. The *precipe* form was most appropriate for a claimant who claimed to hold of the king. Suppose, however, the claimant to have gaged in the manner presented as typical for *ad terminum qui preteriit*: on default the creditor would become tenant in fee.<sup>170</sup> Since any gage might endanger the services or eventually involve the lord king with a new tenant, the king confirmed the gage.<sup>171</sup> At the end of the term, the creditor claimed the fee. The debtor/claimant, alleging payment, looked to his lord the king, who had been in some sense privy to the agreement, for redress by a *precipe*. Instead of waiting for the situation to emerge in court, however, the claimant included the gage allegation in the *precipe*. In such a situation the claimant's lord's court—the king's court—was a relevant jurisdiction: he had confirmed the gage. The lord's court of any lesser claimant would likewise be an appropriate jurisdiction. But neither the king nor a lesser lord would often have personal knowledge of the alleged payment or the satisfaction of other conditions. The formalized upward component to the *precipe* accounts for the orientation of the writs of entry. All writs of entry, like *ad terminum qui preteriit*, look first upwards because *precipe* writs, originally looking upward to the king as lord, easily adapted to looking upward to a non-regal lord, explicit or assumed. The lord as explicit or presumed Primus corresponds, in a twisted fashion, to the rule that writs of right had to be addressed to the lord of whom one claimed to hold.

The position of writs of entry as the middle tier in the hierarchy of writs was not mere coincidence. They derived from procedural elements of the two preceding levels. That joint derivation explains some of the less important rules surrounding the writs of entry. The relationship to the proprietary writs, thus, explains why the writs of entry could in the early decades proceed on to determination by grand assize.<sup>172</sup> The relationship to the

169. Milsom, *Historical Foundations*, 146-48.

170. Text *supra* at note 150.

171. *Supra* note 33.

172. *Bracton*, 4:43. It is unlikely that all the cases that look like entry but that end in a grand assize were actually writs of right to begin with. The claimant's option was explicitly

assizes explains how writs that were framed in a *precipe* format could be subject to a *mort d'ancestor* time limitation and why minors in the early decades could bring a writ of entry.<sup>173</sup> The writs of entry were hybrid creations. The origins of the forms of the writ reinforce the legal conceptualization—the upward-downward orientation—that appears from analysis of the three-handedness of the writs.

### Writs of Entry III: Rationale for the Writs of Entry

The model assimilating two-handed writs to three-handed writs remains inadequate until it explains also why there should have been any limit at all. There was no reason obvious in the writs to show why they did not reach to Quartus, Quintus or even Sextus before the provision of writs of entry in the *post*. Theoretically, if a middle tier of litigation was desirable in itself, there would be no jurisprudential reason for limiting it precisely to Tertius. If a limitation was necessary, a limitation in time instead of hands would have been more rational and traditional. A restriction by the number of hands the land had passed through is sufficiently curious to require investigation.

The limitation by hands reflected the protection provided tenants by the assizes. In two-handed writs like *ad terminum qui preterit*, the manner in which the assize of *novel disseisin* prevented lords from challenging the warrant of tenants in their own courts explains the vulnerability of Secundus: Claimant had approached the lord, who found he could do nothing without a writ, because Secundus had some kind of seisin. Moreover, had Claimant brought a writ of right patent in his lord's court, Secundus would vouch the lord to warranty, because in some way he had been accepted by the lord. Preferable for all was a *precipe* straight to the king's court, where the lord could remain neutral in a situation in which he was in some way committed to both litigants. Tertius became vulnerable—the writs were not all able to reach Tertius at origins—when the kind of seisin Secundus possessed was sufficient for Tertius to utilize *mort d'ancestor*. (It seems the rules were worked out with descent and not alienation in mind as related to the connection between Secundus and Tertius.) Tertius's hold on the land was solely the acceptance of Secundus; that hold was insufficient to pass to Quartus. But since *mort d'ancestor* could only be framed on the death of a parent, sibling, aunt or uncle, Quartus could not claim on the death of Secundus. Quartus was still vulnerable to lordly action, so the writs of entry stopped short of Quartus. With three-handed writs the lord was further impeded by his own actions. The writs of entry expanded only far enough to redress the dislocations occasioned by *novel disseisin* and *mort d'ancestor*.

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asserted in CRR, 13:668 (1228), and see the cases of *sine assensu capituli*, supra note 147.

173. For the *mort d'ancestor* limitation: CRR, 10:286; 14:1101. For the minor claimants: CRR, 3:92-93, 4:203, 4:221, 13:2342 (1234).

*Cui in vita* demonstrates for three-handed writs the logic behind this explanation. In *cui in vita* the husband had granted by subinfeudation (conceptually) to Secundus: he had substituted Secundus into his wife's tenancy, taking homage. The husband's heir, bound to warrant his father's grants, would be reluctant to do anything. Secundus could use *novel disseisin*: he had given homage even to an appropriate lord.<sup>174</sup> Since he was seised in demesne as of fee, his heir was protected by *mort d'ancestor* as the son of a tenant who had been fully accepted by a lord. The lord-man relationship, however, grew tenuous when each of the parties to a homage had died.<sup>175</sup> If Primus's heir took neither the homage of Secundus nor that of Tertius, Quartus was probably vulnerable to lordly action. If Quartus was otherwise vulnerable, a writ of entry would be superfluous.

By this hypothesis the writ *ad terminum qui preterit* reached Tertius because the lord could not act in his own court on his own motion on behalf of the claimant. Had the gage-holder been a mere intruder, there would have been no problem: the lord could eject him. The gage-holder, however, had been accepted onto the land. Normally, the lord had confirmed the gage.<sup>176</sup> The gage-holder even in Glanvill's time was not so seised that he could use the assize of *novel disseisin* to protect himself.<sup>177</sup> Nonetheless, the consensual origins to his tenancy gave him some sort of seisin: *qualemcumque seisinam*.<sup>178</sup> If the gage-holder then claimed fee, it was a tenancy that the lord had accepted when he confirmed the gage. His seisin was no longer *qualemcumque seisinam* but seisin protectable by *novel disseisin*, although not proof against a writ of right. Moreover, it was a seisin that would benefit his heir. Any tenant who died seised in demesne as of fee—whether rightfully or wrongfully—was the basis for a claim by his child, sibling, nephew or niece for entry onto the land enforced by *mort d'ancestor*. The lord could not deny them that entry. Nor could he sue the person claiming the fee, although the lord thought him only a gage-holder: the lord could not claim the land in demesne. The gage-holder, however, would seek to give the lord his homage, if that had not been done conditionally at the confirmation of the gage. Even more insistent about rendering homage would be the gage-holder's heir. He was entitled to enter because his father had been seised in demesne as of fee when he died. But what about the heir's heir? Was a tenant who entered by reason of his father's seisin but who had never been accepted himself adequate foundation for his heir's claim by *mort d'ances-*

174. Compare this with the Countess Amice case, text supra accompanying notes 96-98. Note that the widow's writ of right would not go to the heir: she would not claim to hold inherited land from him. But the heir could do nothing on his own volition.

175. Thorne, 'English Feudalism', 200-201.

176. Text supra at notes 150, 171.

177. Glanvill, X.11.

178. Ibid., XIII.11.

*tor? Mort d'ancestor* claimed only from the claimant's father, mother, brother, sister, aunt or uncle: no mention could be made of one's father's father. Presumably the lord could act against such a tenant.

The vulnerability of Quartus, however, may not have lasted long. In the 1250s the magnates felt strongly that the *per* and *cui* rule unduly restricted the writs of entry: that was one of their major complaints about the law.<sup>179</sup> Belatedly writs of entry in the *post* ('after') were provided.<sup>180</sup> Thereafter, if the writ could be formulated using *per* or *per* and *cui* it had to be done in the traditional form. If the situation exceeded the traditional degrees, the writ could be framed in the *post*, merely stating that the tenant had no entry except after ('post') a demise from *Propositus* to *Secundus*: all intermediate holders were ignored. The need to expand the reach probably derived from the same pressure that resulted in the provision of aiel, besaiel, and cosinage in the 1230s.<sup>181</sup> Those writs expanded *mort d'ancestor*-type protection to heirs more distant than sons, siblings, nephews, and nieces, probably indicating a wider acceptance of people in the position of Quartus.

The magnates' desire to expand the reach of the writs of entry derived from a peculiar advantage for lords in the writs of entry. On a writ of right, the tenant could vouch whoever had given him the land. But on a writ of entry a long-standing but flexible custom—by mid-thirteenth century hardened into a rule—dictated that the tenant could not vouch outside the line.<sup>182</sup> A tenant could only vouch to warranty those people named in the writ through whom he had allegedly gained his tenancy.<sup>183</sup> His alternative to vouching or defending on his own was to deny that he had entry only through the people Claimant alleged. If the tenant was successful in denying the entry, Claimant's suit failed. The inability of the tenant to vouch outside the line, however, meant that lords who had not participated in a transfer—who were thus presumed in the writs as *Primus* but not mentioned—could not be vouched. The two parties thus had to resolve the matter between themselves. Such an exclusion was not possible in the Countess Amice case in 1200; it would be possible late in the century, when lords actually were less involved.

179. Milsom, *Historical Foundations*, 149.

180. Statute of Marlborough, c. 29

181. CRR, 16:183, 301; *Bracton's Note Book*, ed. F.W. Maitland (Littleton, 1983), 3:no. 1215; Milsom, *Historical Foundations*, 132, 137.

182. Usually if there were vouchers, the vouchers would be in the line anyway. When they were not, sometimes it is unclear who the vouchee is: occasionally a seeming stranger might be heir to one named in the line. In apparent instances of vouching outside the line, however, most were probably to prove the other entry rather than to continue the case, except when the claimant was pleading in the right: CRR, 7:122; 8:230 (allowed); 8:196 (allowed); 8:227 (jury preferred to voucher); 9:88 (voucher ignored and jury summoned); *Bracton*, 3:160.

183. *Supra* note 103.

The rule forbidding vouching outside the line was thus most relevant in two-handed writs. From the first, then, it was important for *ad terminum qui preterit*: it prevented a lord's confirmation of a gage from obliging him to stand by one or the other party when he might not know if the debtor had paid the creditor. Had he been vouched and warranted the creditor only to find out that payment had not been made, he would have been obliged to provide escambium. Only when he had unqualifiedly accepted the creditor's homage would he be obliged to warrant: but that acceptance of homage would quash the writ of entry, because the creditor would then have had entry otherwise than through the gage. But the rule was likewise relevant in writs like *cui in vita*, obviously three-handed writs. In that situation it directed the vouching back to the husband and his heirs, and did not allow the husband to vouch further the lord (usually the woman's father) who had given that land to him along with the bride. Magnates wanted to expand the reach of the writs of entry not only because they as litigants found the writs useful; the writs also limited the obligations of lords in a reasonable manner.

At this point, then, the two major rules for the writs of entry mesh, as do the concerns relating to the legal conceptualization, form, and the rationale for the writs. The legal conceptualization established that Primus, whether presumed or named in the writ, was the lord. A presumed Primus indicated that the lord had not participated in the relevant transfer: he was eliminated from the writ because he had been omitted in the situation. The vouching rule was a perfect complement to the legal conceptualization. The elimination of the presumed Primus from the writ was not only an esthetic or social statement, but a reasonable limitation on the liability of lords. The *per* and *cui* rule and the rule against vouching outside the line are, thus, not useless and irrelevant technicalities. They become social-legal statements about social structure and the interaction between law and society: about legal causation of social change and legal adaptation required by changed social context.

## Conclusion

Property in England, then, was not an intentional creation. The Compromise of 1153 was the first categorical royal intervention between lords and accepted tenants. But neither the magnates nor the king thought in terms of property: the restoration of the disinherited was not a permanent restriction on lordly authority or, indeed, any alteration in the functioning of the personal relationship of which the fee was the physical embodiment. The Assize of Northampton, the more decisive provision, likewise presumed no notion of property. Henry II was there concerned only to regulate the choices made by lords in choosing successor tenants, so that lords utilized peace-time standards instead of standards appropriate for rebellion. That regulation resulted in a variety of standardized writs; the litigation that those writs made possible generated a court that increasingly operated in a bureaucratic fashion. That court then applied customary standards as rules of law. Whereas customary standards operated with flexibility and in accord with

social mores, rules of law were inflexible. As with the Countess Amice case, these rules separated law from social mores.

The appearance of the first writs of entry around 1200 marks not only this gap between mores and law, but also the recognition of property. The existence of a difference between the legal conceptualization of the writs and the social facts that prompted litigation indicates that law already could not be equated with traditional procedures or intuited justice. The law became increasingly artificial. The word 'entry' in some sense, moreover, must connote the kind of things Maitland thought it would, although in a much different way. The presumed Primus of the two-handed writs meant that conceptually such cases were between two parties claiming to hold of the same lord, and the lord was now excluded from consideration. This comes close to a horizontal model, with 'entry' assuming connotations of ownership.

The origins of property demonstrate that law is not merely a reflection of society and social mores. Even at the beginnings of the English legal system, one can discern an interaction between law and mores. While undeniably a major portion of property law derived from social custom, part of the law developed by accident: by acts that had unintended consequences. Such consequences had substantial impact on social life. Law is, after all, bureaucratic force tightly focused on particular aspects of social relationships. From one perspective, the change was precisely the appearance of property. But property was not a 'mere' legal phenomenon, an intellectual construct without social relevance. Property, antithetical to feudal relations, determined the exercise of power in society.

## Appendix

### Deceptive Three- and Four-Handed Writs of Entry

There are writs of entry other than those treated in the body of the paper that have more complicated structures, although they correspond to the general pattern: the deceptive three- and four-handed writs. The deceptive three-handed writs all named a party who was not the lord between *Propositus* or Claimant and Secundus. That person, however, was not Primus: Primus was presumed. The extra person was simply ignored.

The writ of entry alleging an entry through a tenant at will seems three-handed but was actually two-handed.<sup>184</sup> The writ could list the tenant at

184. CRR, 14:905: Claimant's brother, a tenant at will, alienated to a bishop, who alienated to tenant, who was now vulnerable to litigation by writ of entry. CRR, 14:1758 is a further example. The writ does not appear in Registers. Early examples, CRR, 12:370 (alienor v. alienee, issue going to grand assize on a special mise.) Note that the writ of entry by alienation of claimant's farmer (CRR, 13:1465): reaching farmer's alienee's alienee, but with a *per* and *quibus*; also alienation of dower land by one's bailiff, reaching to bailiff's alienee's alienee (CRR, 15:612).



will's alienee's alienee. But the tenant at will held of the Claimant. The land at that point had not left Claimant's control. If the tenant at will had conveyed any fee at all to Secundus, it had to have been Claimant's fee. Claimant's natural recourse would be to his own lord: the Primus who is omitted and had done nothing. For the purposes of the writ, Claimant supposed that Secundus claimed to hold as he himself held: from Primus. Since Claimant controlled the tenant at will and Primus here had done nothing at all, the tenant at will was not counted; Primus was omitted: the writ was a two-handed writ reaching to Tertius. The same analysis applies to an alleged entry through a villein.<sup>185</sup> The alienation of a dowress was also treated like that of the tenant at will. Entry through a dowress<sup>186</sup> lists the dowress's husband *Propositus* and could reach the dowress's alienee's alienee: superficially a three-handed writ. But a dowress held her dower from the heir of her husband: she was Claimant's tenant and theoretically in his control. The writ was really two-handed. His control revived with the Statute of Gloucester, which allowed Claimant to recover immediately if the dowress alienated.<sup>187</sup>

The writ for the alienation of the dowress suggests a hypothetical explanation for the writs of intrusion.<sup>188</sup> The intruder was either the heir or other relative of the deceased life tenant (not the reversioner), a bastard, or a genuine outside claimant.<sup>189</sup> Some have doubted whether writs of intrusion were really writs of entry.<sup>190</sup> They developed relatively late and seem to have had their origins in ideas of wrong,<sup>191</sup> at a time when property had already become distinct from wrongs and obligations. The problem with

185. Bracton, 4:36; P.R. Hyams, *King, Lords, and Peasants in Medieval England*, (Oxford, 1980), 41-43. CRR, 11:2145 (1224): 'in quam idem (tenant) non habet ingressum nisi per (Secundum) patrem suum, cui Johannes filius Reginaldi eam dimisit ad terminum, qui eam tenuit in vilenagio'. Note the term alleged in this writ, which makes the writ somewhat like *ad terminum qui preterit*, perhaps, in the early years. CRR, 12:330 (1225) (similarly three-handed); 12:465.

186. Registers, 96 (CC. 200: in the *per*, 293 (R. 803: in the *per* and *cui* against dowress's alienee's alienee, or, here, dowress's alienee's husband); CRR, 9:252 (1220) (against dowress's alienee's alienee); 15:348.

187. The so-called '*in casu proviso*' writ: Registers, 298 (R. 833, 834).

188. Ibid., 96 (CC. 200a, 200b, 201), 294-96 (R. 805-820), 302-303 (R.855-860). perplexingly, some early cases of intrusion [CRR, 12:2057 and 12:2526 (the latter a minor claimant whose father died seised as of fee, concerning a posthumous daughter v. nephews)] alleged entry by intrusion after the death of a tenant seised as of fee.

189. Milsom, citing an early fourteenth-century report, says an heir of the life tenant would not be an intruder: Milsom, Introduction to *Novae Narrationes*, cxi, n. 5. Bracton thought differently: Bracton, 4:37. For a detailed instance of a late thirteenth-century case, see Palmer, *Whilton Dispute*, supra note 2, 147-49.

190. Registers, cv; Milsom, Introduction to *Novae Narrationes*, cxi-cxli.

191. The writ was sometimes called a writ of attachment, and plaintiffs were described as complaining. Moreover, early intrusion accusations (not writs of entry of intrusion) normally involved allegation of some royal interest, such as a breach of a final concord (CRR, 1:56; 1:170; 6:203; 14:1473) or violation of a judgment of the king's court

intrusion here is that they were seemingly four-handed. Suppose that the doweress in the preceeding writ had not alienated but had rather died in possession, whereupon her bastard took possession. The heir of her first husband could then claim not only against the intruder, but also as far as against the intruder's alienee's alienee. After *Propositus*, then, there were doweress, intruder, alienee, and alienee's alienee: four hands since *Propositus*.<sup>192</sup> One can reduce the four to three by eliminating the doweress as tenant of the heir and thus in his control. Having reduced the four to three, the intruder might necessarily have seemed to be *Primus*. That identification, however, would be contrary to the origins of intrusion<sup>193</sup> and thus gratuitous. It is more likely that, since the writ against the intruder's alienee's alienee was late, intrusion began as a seemingly three-handed writ that was two-handed, with the lord presumed. Then, in the late thirteenth century, when the difference between a disseisor and an intruder would not seem monumental since the archetypical disseisor was no longer the lord, the writ of intrusion was extended by analogy to *sur disseisin*. This scenario is believable, because *sur disseisin* at the same time superseded the writ concerning the guardian.

The extension for the writ of intrusion after the death of a doweress thus made some sense; that for intrusion after the death of a tenant in the curtesy made little.<sup>194</sup> In the fourteenth century true heir could reach intruder's alienee's alienee also when the intrusion had been after the death of a tenant in the curtesy. By that time, however, the doweress and the tenant in the curtesy were being treated similarly: the attempt by either to alienate during their tenancy enabled the true heir to claim.<sup>195</sup> Superficially, moreover, the

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(CRR, 3:28; 4:184; 8:32; 8:150; 14:235), force or force and arms (CRR, 1:104; 4:80-81; 4:118; 6:237; 8:138; 8:147; 8:204; 8:394; 10:106; 10:112; 14:2432; 15:253; 15:305), a privilege granted by the king (CRR, 3:69), a royal wardship involved (CRR, 5:221), violation of a royal order (CRR, 8:148), involvement of one in the king's service (CRR, 8:174), or other miscellaneous matters (CRR, 7:245; 8:21; 9:381; 10:325).

192. Registers, 295 (R. 815), 296 (R.819).

193. Intrusion seems to have been exactly the kind of plea Milsom portrays as typical of writs entry: a downward plea of a lord against his tenant. Intrusion inquiries could contain the *quo warranto* words (CRR, 4:250; 6:351; 8:238 (considered along with 8:236); 8:297; 10:325). Seemingly the inquiries could be on behalf of the lord's ward (CRR, 1:378; 6:321) or in his own interest. A certain number of the intrusion inquiries involving the king were probably of the former kind (*supra* note 193). The most likely positions for the lord would thus have been either as plaintiff or (and I take this alternative as the probable one) as the presumed lord who had finally dropped out of the litigation, leaving it up to his tenant.

194. Registers, 296 (R. 819). Equating the doweress and the tenant in the curtesy was possible because both were life tenants. They were different in that the doweress held of the main line, whereas the tenant in the curtesy held of the chief lord (for a woman's inherited land) or from the grantor's line (for *maritagium*).

195. For the doweress situation: the writ *in casu proviso* (Registers, 298 (R. 833-835)); for the tenant in the curtesy: the writ *in consimili casu* (*ibid.*, 298 (R. 836-838)).

two-handed (but seemingly three-handed) writ concerning the alienation of a deceased doweress seems identical to the three-handed writ concerning the alienation of a tenant in the curtesy. The analogy of the doweress situation to *sur disseisin* would thus have affected analysis in intrusion after the tenant in curtesy: the tenant in curtesy was ignored, despite the fact that he was theoretically a lord, and the writ reached intruder's alienee's alienee. This approach, at least, might account for the writs of intrusion that have proved anomalous in every other treatment of the writs of entry.