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COMMONERS AND THE ASSIZE OF NOVEL DISSEISIN 1194-1221

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Janice Musson
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ABBREVIATIONS

Bracton	Henry de Bracton, *De legibus et consuetudinibus Angliæ, On the laws and customs of England,* 4 Volumes, edited by George Woodbine, translated, with revisions and notes, by Samuel Thorne (London: Harvard University Press in association with The Selden Society, 1977)
CRR, I	*Curia Regis Rolls of the Reigns of Richard I and John, Volume I, RI-2J, 1196-1201,* ed. by Cyril Flower (London: His Majesty's Stationery Office, 1922)
CRR, II	*Curia Regis Rolls of the Reigns of Richard I and John, Volume II, 3-5J, 1201-3*, ed. by Cyril Flower (London: His Majesty's Stationery Office, 1925)
CRR, III	*Curia Regis Rolls of the Reigns of Richard I and John, Volume III, 5-7J, 1203-5*, ed. by Cyril Flower (London: His Majesty's Stationery Office, 1926)
CRR, IV	*Curia Regis Rolls of the Reigns of Richard I and John, Volume IV, 7-8J, 1205-6*, ed. by Cyril Flower (London: His Majesty's Stationery Office,1929)
CRR, V	*Curia Regis Rolls of the Reigns of Richard I and John, Volume V, 8-10J, 1207-9*, ed. by Cyril Flower (London: His Majesty's Stationery Office,1931)
CRR, VI	*Curia Regis Rolls of the Reigns of Richard I and John, Volume VI, 11-14J, 1210-12*, ed. by Cyril Flower (London: His Majesty's Stationery Office, 1932)
CRR, VII	*Curia Regis Rolls of the Reigns of Richard I and John, Volume VII, 15-16J, 1213-15, Appendix 7RI-1J,* ed. by Cyril Flower (London: His Majesty's Stationery Office, 1935)
ELAR	*The Earliest Lincolnshire Assize Rolls AD 1202*-1209, ed. by Doris Stenton, Lincoln Record Society, 22 (Lincoln: Lincoln Record Society, 1926)
ENAR	*The Earliest Northamptonshire Assize Rolls A.D. 1202 and 1203*, ed. by Doris Stenton, Northamptonshire Record Society, 5 (London: Northamptonshire Record Society, 1930)

Glanvill	*Tractatus de Legibus et Consuetudinibus Regni Angliae qui Glanvilla vocatur* (The Treatise on The Laws and Customs of the Realm of England commonly called Glanvill), ed. by George Hall (Oxford: Clarendon Press, 1965)
Pleas, I	*Pleas before the King or his Justices 1198-1202, Volume I,* ed. by Doris Stenton, Selden Society, 67 (London: Selden Society, 1953)
Pleas, II	*Pleas before the King or his Justices 1198-1202, Volume II,* ed. by Doris Stenton, Selden Society, 68 (London: Selden Society, 1952)
Pleas, III	*Pleas before the King or his Justices 1198-1212, Volume III,* ed. by Doris Stenton, Selden Society, 83 (London: Selden Society, 1967)
Pleas, IV	*Pleas before the King or his Justices 1198-1212, Volume IV,* ed. by Doris Stenton, Selden Society, 84 (London: Selden Society, 1967)
Pollock and Maitland	*The History of English Law Before the Time of Edward I*, ed. by Frederick Pollock and Frederic Maitland, 2 Volumes (Cambridge: Cambridge University Press, 1968)
RJL	*Rolls of the Justices in Eyre Being The Rolls of Pleas and Assizes for Lincolnshire 1218-9 and Worcestershire 1221*, ed. by Doris Stenton, Selden Society, 53 (London: Selden Society, 1934)
RJY	*Rolls of the Justices in Eyre Being The Rolls of Pleas and Assizes for Yorkshire in 3 Henry III (1218-19),* ed. by Doris Stenton, Selden Society, 56 (London: Selden Society, 1934)
Three Rolls	*Three Rolls of the King's Court in the Reign of King Richard the First AD 1194-1195*, ed. by Frederic Maitland, Pipe Roll Society, 14 (London: Pipe Roll Society, 1891)

INTRODUCTION

Preliminary Remarks

The assize of novel disseisin, meaning a 'proceeding on a recent ejectment' from a property,[1] was one of several new or re-formulated laws issued early in the reign of Henry II. The reforms were available solely to freeholders[2] and the actions restricted to one of the king's own courts, either at Westminster, or before the king while he was on progress round the country, or before itinerant justices at designated venues, usually county towns.[3] Justices were appointed by the king, and sometimes joined by him. Few received formal academic training in law but most were able to build on their practical experience and have some knowledge of Latin.[4] The civil actions dealt primarily with property disputes, mainly land, differentiating between an individual's right to, and possession of, a holding. Their competence to remove litigation from seigneurial to royal jurisdiction was realized and immediately welcomed by the lower echelons of medieval society. Royal jurisdiction was brought within their means by a new mechanism, the returnable writ. Previously, a complainant dissatisfied with his lord's court and wishing for royal justice had first to find the king, wherever he was, before he could put his case before him. It was a prohibitively expensive exercise for all but the rich. To resolve a land dispute under the reforms, once a plaintiff had removed

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[1] Donald Sutherland, *The Assize of Novel Disseisin* (Oxford: Clarendon Press, 1973), p. 1. In addition to a legal action, the term 'assize' can also denote a law, a court of law, or a directive on weights, measures or prices. It always concerns enforceable regulation or assessment.

[2] Sutherland, pp. 12, 14, 29-30.

[3] Itinerant justices were despatched on circuit from the central court at Westminster. They could be appointed to hear all civil and criminal actions when the courts subsequently became known as 'eyres', or for discrete purposes such as determining suits of novel-disseisin. For a succinct review, see James Masschaele, 'Town, Country and Law: Royal Courts and Regional Mobility in Medieval England, c. 1200-c. 1400', pp. 127-144, in *Survival and Discord in Medieval Society; Essays in Honour of Christopher Dyer*, ed. by Richard Goddard, John Langdon and Miriam Müller (Turnhout: Brepols, 2010), pp. 129-31.

[4] Ralph Turner, *The English Judiciary in the Age of Glanvill and Bracton, c. 1176-1239* (Cambridge: Cambridge University Press, 1985), pp. 31-39; John Hudson, *The Oxford History of the Laws of England, II, 871-1216*, (Oxford: Oxford University Press, 2012), p. 864; Michael Clanchy, *From Memory to Written Record* (Oxford: Blackwell, 1993), pp. 234-37.

his dispute from his lord's court,[5] he could purchase a novel-disseisin writ and take it to the sheriff to whom it was addressed. The sheriff, having fulfilled its other requirements, was required to bring it with him to the hearing instead of keeping it himself.[6] This was the 'return' element. In a manner of speaking, it brought the king to the complainant, if not literally then in the form of his justices. Non-returned writs, as before, remained with the lord or the sheriff.[7]

The assize remained in everyday use for nearly three centuries and became foundational to the development of English common law.[8] Arguably, the response of humble litigants was the single most momentous agent in its evolution which otherwise, had they been content with their local courts or pursued redress through self-help, would at best have been delayed. The most striking element within that response was the unexpected arrival before the royal courts of many hundreds of plaintiffs who ipso facto claimed to be freeholders, although their status as such vis-à-vis their lords was, at best, dubious.[9] It was unforeseen because the law makers, themselves lords of Norman extraction, considered the majority of commoners, who were English, to be serfs[10] and did not comprehend that they held a different view of themselves. Consequently, the promulgation of novel disseisin provided many commoners with the opportunity of confirming or

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[5] See p. 10, below.
[6] John Baker, *An Introduction to English Legal History*, 4th ed. (Oxford: Oxford University Press, 2007), p. 55.
[7] For examples, see *Glanvill*, pp. 137; 68-69 (XII, 2-3; VI, 18). Ranulf Glanvill, Henry II's justiciar, gave his name to the early *Tractatus de Legibus et Consuetudinibus Regni Angliae* (Treatise on the Laws and Customs of the Realm of England) written at the end of the twelfth century. Author and treatise are cited in the thesis in the same manner as Bracton: see *n*. 15, below.
[8] Sutherland, p. 5; John Hudson, *The Formation of the English Common Law, Law and Society in England from the Norman Conquest to Magna Carta* (Harlow: Longman, 1996), p. 213; Raoul van Caenegem, *Royal Writs in England from the Conquest to Glanvill, Studies in the Early History of the Common Law*, Selden Society, 77 (London: Selden Society, 1959), p. 55; Stroud Milsom, *Historical Foundations of the Common Law*, 2nd ed. (London: Butterworth, 1981), pp. 1-4, 31, 33; Baker, *An Introduction*, p. 38.
[9] This topic is discussed in Section 1, passim. Miller and Hatcher put the percentage of unfree peasants at sixty in some areas, while pointing out that Frank Stenton found it to be forty in the northern Danelaw: Edward Miller and John Hatcher, *Medieval England : Rural Society and Economic Change 1086-1348* (London: Longman, 1978), p. 120.
[10] See pp. 44-45 below.

acquiring free status at law, an entirely unintended consequence. The term 'commoner' has been used in the title of the thesis, and throughout, in order to encompass all those among the lower ranks whom the assize affected even though they were not, strictly speaking, property holders. The majority of plaintiffs in this study were peasants, who had been formally seized of a tenement by its lord and, following Dyer's definition of the term, lived off it to a considerable degree but neither employed labour to work it nor sub-let it.[11] However, some commoners appear to have tenanted tiny plots of land without necessarily going through the procedure required for the seisin of main holdings. They may have held no other tenement. Others may have been primarily wage-earners but with close ties to the family holding. Additionally, there are examples of plaintiffs who were without any means of subsistence but claimed, rightly or wrongly, to have once been tenants. Household servants who were entirely landless were also drawn into actions, usually as secondary defendants. If not peasants, these people were certainly commoners.[12] The masculine gender is used throughout the thesis, except for known females, for the sake of simplicity and following *Glanvill* and *Bracton*.

The records of novel disseisin have been used in this study for the purpose of focusing on individuals, and their grievances, from their perspective; to stand, so to speak, in litigants' shoes and follow a suit through their eyes including the attitude of the court towards them. To this end, specific cases have been selected from the large number that survive and have been researched from the period 1194 to 1221, more than two thousand. The period straddles the sealing of Magna Carta which has influenced this study mainly for the problems created by

[11] Christopher Dyer, *Standards of Living in the Later Middle Ages, Social Change in England* c. *1200-1520*, revised ed. (Cambridge: Cambridge University Press, 1998), pp. 22-23.
[12] Potential sub-tenants and minor stake-holders, landless plaintiffs, and household servants are discussed respectively on pp. 128-30, 130-31, and 155-56, below.

the civil unrest which occurred either side of it, especially afterwards when the French occupied most of the south of England, including London.[13] It caused great instability in land tenure. The charter's possible effect upon hearings is not included here because the study does not extend far enough into Henry III's reign to offer meaningful comparisons with earlier suits. The number heard gradually diminished from 1207, when John began to withdraw them from the Westminster court, and ceased altogether after the spring of 1216.[14] They did not recommence until 1218, leaving fewer than four full years of post-charter litigation for discussion. Select cases have been analysed in depth, either because they are typical of their kind or because they are good illustrations of particular circumstances, enabling an incipient appreciation of how English commoners of this period perceived their own society. The thesis discusses the experiences at law specifically of villeins, the poor, and women. Its first section examines possible reasons for the prominent place that villeinage occupied within the assize. It is surprising because the action was ineligible to unfree tenants, although this is not immediately obvious from the records. The section discusses Bracton's[15] teaching on numerous aspects of unfree status, the enrolled evidence of ways in which it was determined by the royal courts and why that was necessary, and the recorded attitude of some lords towards both their free and servile peasants. Section 2 considers the effects of poverty upon litigants, noting that it was no deterrent to them. The financial assistance provided to those who could not otherwise afford litigation seems to have created an official definition of

[13] The French were invited into the country in late 1215 by the barons, during their post-Charter struggles against King John. His death the following year united most of the nobility behind his successor, Henry III, who was only nine years old, but the French were not finally expelled until 1218.

[14] For a discussion of the king's decision, its reasons and consequences, see Turner, *English Judiciary*, pp. 135-38.

[15] Henry of Bracton was a renowned thirteenth-century justice whose name has been given to the famous legal treatise known as *De Legibus et Consuetudinibus Angliæ* (On the Laws and Customs of England). He is referred to in the thesis as 'Bracton' and the treatise as '*Bracton*', following its translator, Samuel Thorne.

poverty, at odds with the vibrant economy of numerous peasants who fell inside it. Many whom it excluded were also unable to meet their legal costs unaided, and the means by which they might have resolved the problem are reviewed. The final section considers the constraints of coverture upon litigating wives and compares their situation with the relative freedom of widows and other single females before the courts. It identifies women's rights to dower,[16] *maritagium*,[17] and direct inheritance, and discusses the extent of their control over their own property and the problems that not infrequently arose when this was misunderstood. Statistics relating to the three sections will be made available upon completion of an extensive database which analyses the records of novel disseisin in this period.

The importance of novel disseisin to the development of English common law has been extensively researched.[18] The living conditions of commoners has also attracted a great deal of attention,[19] but less has been paid to the mentalities that informed their behaviour.[20] Similarly, the arrival of numerous potentially unfree tenants in the royal courts and the latters' possible systematic definition of

[16] Dower was a widow's right to a proportion, usually one third, of her deceased husband's estate for the duration of her life. Upon her death, it reverted to the deceased's chief heir.

[17] *Maritagium* was a gift to a bride upon her marriage, usually from her parents. It remained the wife's property but her husband had total control over it to the point of selling it, although she might recover if after his death.

[18] Inter alia see: *Pollock and Maitland*, 2 volumes, passim; Sutherland, passim; Hudson, *Formation of the English Common Law*, passim; Doris Stenton, *English Justice between the Norman Conquest and the Great Charter 1066-1215* (London: Allen and Unwin, 1965), passim; Baker, *An Introduction*, pp. 235-36.

[19] Inter alia see, on the economy: James Masschaele, 'The English Economy in the Age of Magna Carta', pp. 151-167, in *Magna Carta and the England of King John*, ed. by Janet Loengard (Woodbridge: Boydell, 2010); Paul Latimer, 'The English Inflation of 1180-1220 Reconsidered', *Past and Present*, 171 (2001), 3-29; James Bolton, 'The English Economy in the Early Thirteenth Century', pp. 27-40, in *King John: New Interpretations*, ed. by Stephen Church (Woodbridge: Boydell, 1999); on physical conditions: Dyer, *Standards of Living*, passim; *The Agrarian History of England and Wales, Volume II, 1042-1350*, ed. by Herbert Hallam (Cambridge: Cambridge University Press, 1988), passim; Miller and Hatcher, *Rural Society and Economic Change*, passim; on governance: *Pollock and Maitland*, 2 Volumes, passim; Henry Richardson and George Sayles, *Law and Legislation from Aethelbert to Magna Carta* (Edinburgh: University Press, 1966), passim; David Carpenter, *Magna Carta* (London: Penguin, 2015), passim.

[20] But see especially: Susan Reynolds, *Ideas and Solidarities of the Medieval Laity: England and Western Europe* (Aldershot: Variorum, 1995), passim, and Susan Reynolds, *Kingdoms and Communities, Western Europe 900-1300*, 2nd ed. (Oxford: Clarendon Press), 1997, passim; also: Clanchy, *Memory to Written Record*, passim; Anthony Musson, *Medieval Law in Context: the Growth of Legal Consciousness from Magna Carta to the Peasants' Revolt* (Manchester: Manchester University Press, 2001), passim.

poverty have not been the object of sustained study. In focusing on these, the current research adds to existing work. The study has revealed three factors which are consistent through the records. Firstly, litigating commoners displayed a vigorous sense of their own worth. They were respectful of authority but not deferential to it, many resisting their society's constraints upon them. Secondly, there was a determination among them to resolve disputes and grievances, not by violent self-help but through due legal process, specifically the king's jurisdiction. Their immediate and positive response to the assize betokens an awareness of their need for it and an understanding of its capability. Thirdly, justices consistently demonstrated professionalism and discretion. They were careful to conduct the cases in their courts according to legal requirements, seem both attentive to litigants who were genuinely in need of assistance, and prepared to thwart those who tried to manipulate the action for dubious purposes. These observations suggest a resistance to corruption, in some measure at least.[21] In short, through their respective attitudes, litigants and the bench together forged a jurisdiction which became acceptable to both commoners and law-makers.

The extrapolation of novel disseisin cases from the rolls focuses attention upon those commoners who were most active in defending their property interests shortly after it became feasible for them to do so. With three other actions[22] it was specifically formulated to resolve property disputes and they became known collectively as the 'possessory assizes'. Humble plaintiffs brought the assize against their lords, each other and their inferiors, sometimes persistently. The records inform on the conduct, circumstances and values of lower medieval

[21] Contemporary chroniclers had more condemnation than praise for royal justices, but they were not always unbiased: Turner, *English Judiciary*, pp. 1-12.

[22] *Mort d'ancestor* (death of a forbear) dealt with inheritance: van Caenegem, *Royal Writs*, p. 319, Sutherland, pp. 43-44; *utrum* (whether) decided whether a property had been given to the church in free alms or attracted feudal service: Baker, *An Introduction*, p. 129; and *darrein presentment* (last presentment) found who had last presented a cleric, then deceased, to a particular living: Stenton, *English Justice*, pp. 45-46.

society, an otherwise largely undocumented category. They provide the earliest first-hand accounts of their responses to the pressures of different circumstances and highlight those matters which were important to them: landholding; the authority of their immediate lords; the rôle of royal justice in their affairs; personal status; the court as a vehicle for purposes other than repossession; and writing as a form of record. Few accounts altogether conceal individual circumstances, brief and terse though most of them are, and many recount the pleadings advanced by litigants. The records of novel disseisin, then, are particularly important for revealing the wide spectrum of circumstances experienced by litigants and their responses to them.

In addition, the period 1194-1221 witnessed the convergence of two major forces upon the assize: the determination by royal justices of their terms of reference towards the wide variety of issues which the writ brought before them; and the adoption of written records by the *curia regis* (courts held in the king's name). In the near-three decades following its issue in 1166, novel disseisin was revised and modified. There is some debate over whether it was initially intended as a criminal, rather than a civil, measure. There is evidence in the Pipe Rolls for the use of juries of presentment as opposed to recognition but, in Hudson's view, it is problematic.[23] Henry II's problems following Stephen's anarchic reign, then with Becket and also with his eldest son, all had a potentially positive affect upon the development of the action. The king and his advisers embarked on a sustained programme of judicial and legislative activity.[24] By 1194, the scope, structure and procedure of novel disseisin were well defined and practised in the courts without deviation. However, the details of the action were still being worked out by the

[23] van Caenegem, *Royal Writs*, p. 284; Sutherland, pp. 13-14; Hudson, *Oxford History*, p. 610-11. A presenting jury laid before a court matters which it considered might be brought to trial, a jury of recognition the true facts of a matter so far as it knew them.
[24] Hudson, *Formation of the English Common Law*, pp. 126-35.

justices themselves on a case-by-case basis.[25] They had no precedent to guide them and the circumstances on which they had to adjudicate varied greatly, encompassing accusations of villeinage, problems specific to the poor and disadvantaged, and the conventions of coverture and women's property rights. At the same time, writing was beginning to be preferred over memory as a method of recording events in the *curia regis* (court held in the king's name) and its value as a durable register of legal actions began to be understood by both justices and litigants. As a major consequence of this, litigants' fears and aspirations were immortalized in the court clerks' accounts of their litigation, half a century before the manor courts adopted writing. This research therefore informs on peasant attitudes in the law courts, and the reactions they provoked from juries and justices, when both were in a state of flux and adjustment.

The remainder of the introduction explains the four main vehicles of information on these topics: the procedure of the assize itself; the legal treatises attributed to Glanvill and Bracton, which are the basis of knowledge on the intended structure of the assize; the nature of the plea rolls in general, in which the novel-disseisin records are embedded; and the historiography on the assize, including its origins, the intentions of the king and his advisors in issuing it, and possible reasons for its popularity. The assize itself is explained in terms of how a plaintiff acquired it, the process it set in train, and the areas of dispute it could cover, which included denial of access to a wide range of rights as well as loss of a main holding. *Glanvill*, written in the late-twelfth century, sets out the main types of novel-disseisin writ which addressed the various circumstances. On this simple and straightforward basis, litigants built a superstructure of litigation as described above. *Bracton*, compiled in the mid-thirteenth century, presents a

[25] Doris Stenton, 'Introduction', pp. xvii-lxxxii, in *ELAR*, pp. xxi-xxii.

totally different picture of the action which, by then, covered a potentially infinite number of variations of circumstance. The author cites numerous examples, with case studies, but he shows that the action itself had remained true to its roots. It was clear and precise in every respect, except where unfree status of both persons and property were involved. This led to very great confusion both theoretically within the treatise and in practice in the courts.[26] The plea rolls are discussed in general for the significance of the beginnings of their survival in 1194 and their subsequent retention. Commoners' appreciation of their value as a permanent record of their property transactions forms part of the historiographical debate on the attitudes of this sector towards the assize and, more widely, towards their social superiors including the king. The latter's view of them and his intentions in issuing the assize may have differed from commoners' own perceptions, topics which are discussed in depth by scholars. The historiography is also reviewed for the possible reasons that enabled many commoners to take an assertive attitude in the management of their affairs.

The Assize

Novel disseisin was far and away the most popular of the possessory assizes, deliberately formulated to be swift in execution and address immediate problems. Though historically rooted in Anglo-Saxon and Norman procedures, it was original in its application, worked out, refined and expanded quite literally by trial and error.[27] Virtually every action began in a seigneurial court, usually the manor.[28] It heard all suits concerning its lord's villein tenants, those of his free

[26] See Section 1 below, passim.
[27] van Caenegem, *Royal Writs*, pp. 283-94; Stenton, *English Justice*, pp. 35-43; Baker, *An Introduction*, pp. 233-34, 236; Cecil Meekings, 'Introduction', Volume I, in *The 1235 Surrey Eyre*, ed. by Cecil Meekings and prepared for press by David Crook, 3 Volumes, Surrey Record Society, 31, 32, 37 (Guildford: Surrey Record Society, 1979-2002), p. 72.
[28] Great nobles held courts for their honour, a collection of manors held by lesser lords, which, like manor courts, dealt with a variety of relevant matters.

tenants who held non-freehold land, and the first stages of freeholders' disputes.[29] Disagreements arose between lord and tenant and also between tenants, not always of the same lord, Lords' motivations to disseise a tenant frequently involved withheld services, for which their first response was to distrain the tenant by removing his non-essential goods.[30] These could not be substituted for services owed, nor sold or used by the distraining lord, the point being that they would be returned when the tenant made good. If they were not, he could sue for their recovery. The distrained tenant who did not respond as required was summoned to the manor court where his case was judged by his peers, not his lord. If he failed to appear without an acceptable excuse after three separate summonses, his lord confiscated the holding for the duration of three further court sittings. If he still defaulted, it could be re-allocated.

The servile tenant, or one who held for servile dues although personally of free status, had to abide by the decision of his manor court. By contrast, a disappointed freeholder could begin proceedings for his case to be heard under novel disseisin by removing it from the manor to the county court by a procedure known as 'tolt'. From there it could be sent to the royal court by the writ *pone* (put). No specific writ was needed for tolt but it was effected through a *breve de recto* (writ of right), a royal order to the tenant's lord to do *plenum rectum* (full right) by him or the sheriff would do so.[31] It complements Glanvill's statement that, in a seigneurial court, no tenant was obliged to answer for his free holding without a writ from the king or his chief justice.[32] However, the tenant had to hold 'at least for his own full lifetime, or...hereditarily', the criteria of a *liberum*

[29] A freeholding tenant had the right to hold his tenement of his lord for the duration of his life, subject to his rendering him the services due from it. It did not give him the right to bequeath it to his heir, for which he had also to hold it in fee: Milsom, *Historical Foundations*, pp. 103-04.
[30] Hudson, *Oxford History*, p. 612.
[31] *Glanvill*, p. 137 (XII, 3).
[32] *Glanvill*, p. 148 (XII. 25).

tenementum (free tenement) upon which the assize turned as specified in the writ.[33] Plaintiffs thought to be villein could be challenged over these conditons.[34] This was such a 'cumbersome way', in Baker's view, of initiating a common-law procedure that it fell out of use, but it contributed to the declining authority of local jurisdictions and a corresponding surge in the activity of the central courts which, van Caenegem believes, were 'waiting with wide open doors'.[35] Hudson, however, concludes that the multiplicity of courts and the passage of business back and forth between them suggest an effective integration.[36] If a tenant had not begun a land dispute in his manor court, the king's court might dismiss it or, more often, a lord complained that it had been removed from his court prematurely, without the necessary proof of default of justice, and successfully petitioned for its return.[37] Even so, default led to the transfer of 'a very considerable...proportion of land cases' out of seigneurial jurisdiction. A tenant wishing to sue his lord, who could not be tried in his own court, had to apply to a higher jurisdiction, logically the court of his lord's lord.[38]

Meekings speaks of the assize as a triple action, since there are separate writs for simple novel disseisin, novel disseisin of common, and of nuisance.[39] The procedure was always the same. The action was initiated by the aggrieved party who purchased the appropriate writ from the chancery, that is, the royal writing-office in London, or from the clerk of a travelling royal court, and took it

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[33] Sutherland, p. 13. Sutherland also points out that land held by termors, that is, tenants for a fixed period of time only, was not covered by the assize. Similarly, land which a lord held in wardship or leased out at will was excluded: Hudson suggests that lords increased their use of these measures in the inflationary period at the end of the twelfth century: Hudson, *Oxford History*, p. 662.
[34] See Section 1 below, passim.
[35] Baker, *An Introduction*, pp. 235-36, 23; van Caenegem, *Royal Writs*, pp. 25-26.
[36] Hudson, *Formation of the English Common Law*, p. 51.
[37] Hudson, *Oxford History*, pp. 558-59.
[38] *Pollock and Maitland*, I, p. 589.
[39] Cecil Meekings, 'Introduction', Volume I, in *The 1235 Surrey Eyre*, ed. by Cecil Meekings and prepared for press by David Crook, 3 Volumes, Surrey Record Society, 31, 32, 37 (Guildford: Surrey Record Society, 1979-2002), p. 68.

to the sheriff of the county wherein the disputed property lay. In the king's name, the writ summarized the complaint and named the litigants, the location of the property, and the date and place of the hearing. It required the sheriff to assemble twelve local men to view the disputed holding and obtain an understanding of the situation. The twelve were termed 'recognitors' and subsequently sat in court as the jury. The sheriff was responsible for adding their names to the writ and for summoning the defendant to the trial. Both litigants had to provide sureties, men who would guarantee the attendance of their principals in court, and their names were endorsed on the writ. Its terminology could vary, as *Glanvill* shows, according to the nature of the alleged dispossession, but the basic format and requirements remained the same.[40] The following is a writ for simple novel disseisin from about 1188:

> *Rex vicecomiti salute. Questus est mihi N. quod R. iniuste et sine iudicio desaisivit eum de libero tenemento suo in illa villa post ultimam transfretationem meam in Normanniam; et ideo tibi precipio quod si predictus N. fecerit te securum de clamore suo prosequendo, tunc facias tenementum illud resaisiri de catallis que in ipso capta fuerunt, et ipsum tenementum cum catallis esse in pace usque ad clausam Pascha. Et interim facias duodecim liberos et legales homines de visneto videre tenementum illud, et nomina eorum inbreviari. Et sumone eos per bonos sumonitores quod tunc sint coram me vel iusticiis meis parati inde facere recognitionem. Et pone per vadium et salvos plegios predictum R., vel bailivum suum si ipse inventus non fuerit, quod tunc sit ibi auditurus illam*

[40] For the variety of writs, see *Glanvill*, pp. 167-69 (XIII, 33-37).

recognitionem. Et habeas ibi summonitores et hoc breve et nomina plegiorum. Teste etc.[41]

The king to the sheriff, greeting. N. has complained to me that R. unjustly and without a judgement has disseised him of his free tenement in such-and-such a vill since my last crossing 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 the Sunday after Easter. And meanwhile you are to see that the tenement is viewed by twelve free and lawful men of the neighbourhood, 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 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.

Most hearings were straightforward and short. Successful plaintiffs were at once repossessed of their property and, as the writ directed, any movables that they had lost with it;[42] winning defendants remained in situ. Losing principals and their supporters were amerced, that is, they fell into the mercy of the king as convicted wrong-doers and fined accordingly. The action failed if the writ were incorrect or the plaintiff absent. In the defendant's absence, the plaintiff won by

[41] *Glanvill*, p. 167 (XIII, 33).
[42] In time, the restoration of movables was replaced by an award of damages: see pp. 163-64 below.

default. Non-attendance was excused only for proven serious illness or for a recognized absence such as the king's service. Missing principals, their guarantors whether present or absent, and defaulting jurors were all amerced. It was therefore in the interest of litigants to appear and argue their case. Cases were recorded by the clerk of the court consecutively as they were heard, in identical format and in Latin, although pleas and verdicts are likely to have been voiced in dialect English. While formulaic and frequently terse, many records still convey a sense of the atmosphere of a particular hearing.

The practical applications of the assize were almost infinite. The simple form was the most numerous of the three and its range increased with time. From the first, it also protected 'incorporeal things', as Bracton terms them, specifically rents and rights. Bracton also calls these 'servitudes' from the viewpoint of those obliged to allow them.[43] They multiplied over time so that 'there may be an infinite number' through the variety and complexity of circumstances. However few cases were complex enough, in Meekings' view, to require reasoned judgement. The short accounts of the majority and the laconic verdicts of most juries lead him to conclude that most actions 'conceal much more subtle dispossession' than physical ejection, such as boundary markers and 'other interferences with quiet enjoyment', although he concedes that the assize was originally against forcible expulsion.[44] He cites Bracton in his support but the majority of Bracton's marked cases come from Henry III's reign, when the assize had been in operation for half-a-century. While it would seem likely that it was considerably refined and altered over such a time-span, in fact many examples of

[43] *Bracton*, II, p. 39; *Bracton*, III, pp. 129, 166. See also William Holdsworth, *A History of English Law*, 16 Volumes, 5th ed. (London: Methuen, 1942), III, pp. 19-20, 99-101; *Pollock and Maitland*, II, pp. 124-49. Maitland sums up the position in that 'the seisin of services [including rent] is fully protected by possessory actions': *Pollock and Maitland*, II, p. 128.

[44] *1235 Surrey Eyre*, I, pp. 265-67. Meekings cites boundary markers and 'many other interferences with quiet enjoyment'.

physical, and violent, dispossession are found in the early assize rolls of the reign, possibly to do with the preceding strife in the country.[45] Equally, the terse nature of many accounts can be explained by the technical failure of suits and the ignorance of litigants,[46] and need not imply a less-than-physical ejection from house and home. These may be particularly applicable to the earliest accounts, from 1194 to 1215, which tend to be shorter than later records.

However, the ejection of tenants from their main tenement was the core raison d'être of the assize and must have been the principal reason for its prosecution, certainly in its earlier years.[47] Glanvill states that the violent element dictated that the losing party should be amerced,[48] and it is doubtful if trivial wrongs would have been sufficient motivation for plaintiffs to go to the trouble of bringing the assize. The weight of royal justice against such disseisins would also begin to look disproportionate. However, Hudson suggests that Glanvill also reflects concern for the potential for violence 'in a spiralling dispute', of which the disseisin was only one stage.[49] A defeated plaintiff who had been physically dispossessed probably returned to work his former holding for his successful opponent. Unless the defendant were landless or the tenement very small or his family large and unemployed, he is more likely to have added the land to his demesne, or put in his own tenant, than farm it personally. There would have been little visible change to the holding or even, perhaps, to the services rendered for it, nor to the agricultural routine. The greatest difference may have been an intangible alteration in the relationship between lord and tenant, an irreducible

[45] See *n*. 13, above. For an indication of the war's impact see Doris Stenton, 'Introduction', pp. xi-lxxiv, in *RJL*, pp. lxii-lxiii; also *RJL*, *cc*. 319, 119, 1018, discussed on pp. 235-37 below.
[46] For examples, see pp. 145-50 and Chapter 5, passim, below.
[47] Sutherland describes them as 'unpleasant but common incidents', sometimes perpetrated by thieves or bullies but usually caused by genuine property disputes: Sutherland, p. 3. Baker observes that disseisin came to mean physical dispossession as it lost its 'feudal connotation' of a tenant's removal by his lord: Baker, *An Introduction*, pp. 233-34.
[48] *Glanvill*, p. 170 (XIII, 38).
[49] Hudson, *Oxford History*, p. 613 and *n*. 220.

legal gulf between them with the potential for the one to bear down more heavily upon the other at will.

Novel disseisin of common dealt with rights which, although theoretically 'incorporeal things' as noted above, in practice translated into physical elements which were very real indeed, vital extensions to a free tenement without which it was impossible for peasants to sustain their holdings. The right of common of pasture was essential for the maintenance of livestock, and was very frequently the subject of actions. Bracton points out that, far from limited to grassland, it included *herbagii, pessonae, sive glandis sive nucis...foliorum et frondium* (herbage, mast, whether acorns or nuts...leaves and foliage) which might or might not be exercisable *omni tempore* (at all times). Some *rationabilia defensa* (rightful fenced-in portions) were also regarded as pasture but only in specific circumstances, such as after harvest, and land held in common might also be cultivated.[50] Bracton specifies a great number of further common rights, including access to wood and water, rights of way, and to dig, hunt and fish, but even he was reduced to admitting that there were *alia plura quae infinita sunt...cum libero accessu et recessu* (many others, infinite in number...with free access and departure).[51] The assize could also be used for the return of *in re communi* (a thing held in common), such as baulks, stones and trees which defined the boundaries of estates.[52] It was a highly complex system, clearly open to abuse, and demanded a greater involvement to establish the facts on the part of jurors than simple freeholdings.[53]

The assize of nuisance as it is usually termed was, in a way, the reverse of disseisin of common. The latter involved the rights of one individual in the

[50] *Bracton*, III, pp. 167, 129.
[51] *Bracton*, III, pp. 188-89.
[52] *Bracton*, III, pp. 30-31.
[53] *1235 Surrey Eyre*, I, p. 74.

holding of another, but a nuisance was usually, though not invariably, perpetrated by a freeholder on his own land to the disadvantage of neighbours. It is described by Fifoot as 'a pleasing variety of agricultural diversions falling short of total disseisin'.[54] Bracton specifies the introduction of a bank, wall, hedge or palisade which *viam omnino obstruat* (completely obstructs the way), or the destruction of a legitimate barrier, or the extension of a pond which flooded neighbouring property, and much more of the same.[55] He concludes that such a nuisance was substantially the same as a disseisin and *ideo tolli debet per assisam* (ought therefore to be removed by the assize).[56] The prevalence of the problem is probably indicated by the fact that, from the first, novel disseisin provided a means of redress for it.[57]

Glanvill and Bracton

As already noted, the law treatises commonly known as *Glanvill* and *Bracton* are fundamental to an understanding of, respectively, the basis of the action and the ramifications of its development.[58] Ranulf Glanvill is thought to have overseen rather than written the *Tractatus de Legibus et Consuetudinibus Regni Angliae* which bears his name. He himself was an experienced and trusted servant of Henry II and became his justiciar, although probably not legally trained. It is thought that the *Tractatus* was written in about 1188 and, becoming immediately popular, was still used by the incipient legal profession seventy years later.[59] Bracton draws heavily upon it in his own *De Legibus.* Its purpose, according to Richardson and Sayles, was to clarify the royal ordinances which had been rapidly

[54] Cecil Fifoot, *History and Sources of the Common Law, Tort and Contract* (London: Stevens, 1949), p. 5.
[55] *Bracton*, III, pp. 190-92.
[56] *Bracton*, III, p. 190.
[57] Richardson and Sayles, *Law and Legislation*, p. 109; *1235 Surrey Eyre*, I, pp. 75-77.
[58] See pp. 8-9, above.
[59] Sutherland, p. 6; *Pollock and Maitland*, I, p. 166.

drawn up during the previous three decades.[60] Plucknett points out that it was necessarily 'a short, simple book' because common law was then 'neither very extensive nor very complicated'. Nevertheless, the innovative way in which it was written set a precedent in legal composition for centuries.[61] Concerned wholly with the customs of the royal courts at the Exchequer and itinerant in the country, it concisely expounds the law as it then stood, largely through the writs which originated actions and, significantly, when the full recording of court cases was probably in its infancy. It therefore contains no case law. Scholars agree that it marks a momentous advance in English law which the king and his counsellors had developed to the point of treating the fixed customs of the royal courts as, in Baker's words, 'the law and custom of the realm'.[62]

Glanvill sets out the basic writ for a straightforward novel disseisin, given above, and a further four which deal with nuisances.[63] Stenton terms the basic writ 'elaborate' for a 'simple' action,[64] yet it contains nothing superfluous to its purpose, and yields a great deal of information about the crown's priorities. By insisting that the associated chattels should be returned to the disputed property and that the defendant be left in peaceful possession of it until the hearing, the writ provided for the continued quiet and productive use of the holding as an entity. Although the plaintiff doubtless took a different view, the order enforced a truce between the opposing parties which, at a time when many people readily resorted to physical violence as the crown pleas show, must have been of inestimable benefit to the neighbourhood as a whole. It also enabled the

[60] Richardson and Sayles, *Law and Legislation*, p. 110. See also Alan Harding, *Medieval Law and the Foundations of the State* (Oxford: Oxford University Press, 2002), p. 130.
[61] Theodore Plucknett, *A Concise History of the Common Law*, 5th ed. (London: Butterworth, 1956), p. 256.
[62] Baker, *An Introduction*, p. 13; Paul Brand, *The Making of the Common Law* (London: Hambledon, 1992), p. 79; Michael Clanchy, *England and its Rulers 1066-1307*, 3rd ed. (Oxford, 2006), p. 127.
[63] *Glanvill*, pp. 167-70 (XIII, 32-39).
[64] Doris Stenton, 'Introduction', pp. 1-170, in *Pleas*, I, pp. 23-24.

agricultural routine to continue, minimizing disruption to the vital production of food which was equally essential to the maintenance of law and order. Van Caenegem considers this writ to be 'entirely judicial' in that it embodied the culmination of a writ's development from its origins as an executive tool.[65] It had become a vehicle for the sustained delivery of recognized law rather than a means of expressing and achieving the royal will, employed by Anglo-Saxon and Anglo-Norman kings. It was still evident in the early writs of Henry II's reign, and van Caenegem discerns it in the origins of Glanvill's judicial form.[66] Clanchy confirms that the earlier peremptory tone is unashamedly maintained, writing that 'the emphasis throughout is on effective enforcement of the law by giving orders that are unambiguous and specific'.[67] There is no contradiction here. In the newly devised writs promulgated in *Glanvill*, the king left nothing to chance in his directions for a wholly judicial procedure.

In his own treatise, Henry de Bracton goes to great lengths to emphasize the importance of preventing further violence in these situations, reflecting the similar concern of later kings. Novel disseisin alone occupies half of his exposition on the possessory assizes and dower, an indication of its importance in his eyes. More than one quarter of it deals with the ways in which a disseisin may and may not be resisted or remedied and the parameters within which it is and is not applicable. It is at once striking that this law could not have been determined by the ancient traditions of trial by ordeal and combat, still in use elsewhere, without undermining itself.[68] Baker refers to these methods as 'proof' rather than

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[65] Raoul van Caenegem, *The Birth of the English Common Law*, 2nd ed. (Cambridge: Cambridge University Press, 1988), pp. 45-46; van Caenegem, *Royal Writs*, pp. 302, 179.
[66] van Caenegem, *Royal Writs*, pp. 300-301, 179.
[67] Clanchy, *England and its Rulers*, p. 127.
[68] The ordeal was usually the carrying of a hot iron over a prescribed distance, or it could be through recovering an object from very hot water. If the affected limb healed well, the individual was deemed innocent; if it superated, he or she was guilty. Similarly, trial by combat inflicted defeat upon the guilty.

'trial' because they were 'absolute and inscrutable; no legal questions were asked, no reasons given, no facts found, no rules declared'.[69] The rationale was that God alone knew for certain who was guilty and punished accordingly. Bracton constantly deprecates the use of chance and physical might in favour of due process and intellectual argument, writing that *regulariter verum est quod vis est quotiens quis quod sibi deberi putat non per iudicem reposcit* (it is regularly true that there is force whenever anyone claims what he believes to be his own by other than legal process).[70] He gives no reasons to support his implication that force is undesirable but, as a law man, he probably thought they were self-evident. The wronged freeholder must commit no unlawful injury *si alio modo suam tueri possit possessionem* (if he may protect his possession in some other way), that is, through the law.[71]

At the same time the law insists that a plaintiff must himself make every effort to regain possession before resorting to the courts. Bracton emphasizes that to quickly re-occupy the property is *primum et principale competit remedium tale...dum tamen sine aliquo intervallo, flagrante disseisina et maleficio* (the first and most important remedy...while the disseisin and *maleficium* are still fresh).[72] This appears to advocate physical redress and contradict all that had just been written on non-violent legal process. Nevertheless, both remedies are promoted but in strict sequence. If self-help is applied in the very first instance, the original disseisor cannot claim that he himself has been ejected. However, if it is not done for whatever reason, the disseised person *amittat utramque possessionem,*

[69] Baker, *An Introduction*, pp. 72-73. See also *Pollock and Maitland*, II, pp. 509-601.
[70] *Bracton*, III, p. 21.
[71] *Bracton*, III, p. 21.
[72] *Bracton*: III, p. 21.

naturalem videlicet et civilem, et disseisitor utramque habere incipiat (loses possession, both natural and civil, and the disseisor begins to have both).[73]

The remedy here is recourse to the assize, but if the tenant tries to use force instead at this point, his disseisor can turn the tables and use the assize against him. The disseisor can claim that he himself is dispossessed, not wrongfully but *sine iudicio, et quia...incepit habere posssessionem* (without judgement, and because...he began to have possession).[74] In this way the assize is withdrawn from the original dispossessee who did not use it early enough to recover his or her property. To the modern mind this looks contradictory, but Bracton is underlining the central position of the assize with regard to physical possession as distinct from right.[75] The time allowed for immediate repossession is four days unless the disseised *absens fuerit ex quacumque causa necessaria* (is absent for some necessary reason) when he will be allowed longer depending upon where he is. If in the Holy Land, he is permitted a little over three years, *cum non currat tempus nisi a tempore scientiae, et ex quo post scientiam venire potuit commode* (for time does not run against him except from the time of knowledge, and after that from the time at which he could reasonably arrive).[76] Otherwise it is assumed that the disseised has abandoned the property.[77] The criterion for bringing an action was restricted to those who held *nomine suo* (in their own name), although someone else might occupy a tenement for them. A tenant holding property for life or in fee was eligible but not if for a term as guardian, mortgagor, creditor or other termor. Otherwise, anyone could access the assize

[73] *Bracton*, III, p. 23.
[74] *Bracton*, III, p. 23.
[75] *Bracton*, III, p. 24.
[76] *Bracton*, III, pp. 22-23.
[77] *Bracton*, III, p. 23.

quicumque sint tales (whoever they may be), male or female, rich or poor, of age or a minor, free or even, depending upon the circumstances, bond.[78]

As the courts were accessible only to freeholders, inclusion of the last category seems contradictory and problematic. However, the length at which Bracton writes on the topic may in itself be indicative of the shifting nature of villeinage. Free men might hold land for villein services and a serf might hold a free tenement by permission of his lord without himself becoming free. *Est enim ratio et regula generalis* (the general rule is this), says Bracton, *quod liber homo nihil libertatis propter personam suam liberam confert villenagio, nec liberum tenementum e contrario in aliquo mutat condicionem villani* (that a free man because of his free person confers no freedom on a villeinage, nor conversely, does a free tenement change in any way the status of a villein).[79] Complexities arose if a villein were outside the jurisdiction of the lord, married to a free woman or vice versa, and for children of a mixed union. Legal ramifications abounded around these topics. The rolls reveal few such cases of novel disseisin before the courts but provision had been made for them. If a plaintiff were accused of villeinage, the assize could not proceed until his or her status was established as discussed in Chapter 2. Much of the detail is abstruse and must have been intended for the benefit of justices faced with exceptionally complex actions. It is an indication of how problematic the situation could be and that Bracton was fully aware of it.

Defendants could be drawn from the same categories as plaintiffs, that is, regardless of sex, age or financial status. They might be clerk or layman, Christian or Jew, sane or insane, and also unfree *ne servus melioris condicionis sit quam liber cum deterioris esse debeat* (lest the bondman, whose position ought to be

[78] *Bracton*, III, p. 26.
[79] *Bracton*, III, p. 39.

less advantageous, be in a stronger position than one who is free), that is, through being beyond challenge.[80] An insane defendant was only admitted *dum tamen in adquisitione tenementi habuerit sanam mentem* (provided he is of sound mind at the time of acquiring the tenement).[81] A defendant had to be the actual disseisor to prevent an innocent person from being found guilty. The heirs or successors of an original disseisor were thus exonerated from blame and therefore escaped punishment, but not necessarily from an obligation to restore the property.[82]

The Plea Rolls

Turning to the court records known as the plea rolls, which are the primary material for this research, these chronicle all the civil actions in the order in which they were heard and there is no separate file of novel disseisin suits. Although many such actions appear to have been deliberately grouped together, presumably by court officials in order to be heard consecutively, more often they are scattered throughout the records apparently at random. The following discussion of the rolls per se is therefore not specific to the assize. It is nevertheless important to a study of novel disseisin because the inception, development and employment of the rolls were primarily motivated by those who used the courts, whether as judge or litigant, and have implications for the evolution of the action's increasingly important rôle in, and impact upon, the lives of common people. It can also be argued that, conversely, the action was instrumental in shaping those factors through the demands which it generated.

The earliest extant rolls date from 1194, almost thirty years after the promulgation of the assize in 1166. There is, though, convincing evidence for a much earlier, systematic enrolling of pleas, tangential and fragmentary though that

[80] *Bracton*, III, pp. 40-41.
[81] *Bracton*, III, p. 28.
[82] *Bracton*, III, p. 44. However, there were occasions when novel disseisin or a writ of entry could be used to regain a property in those circumstances: *Bracton*, III, pp. 157-59.

may be. Maitland dates it to 'the later years of Henry II' and certainly 1181, on the basis of the 1207 resolution of a case which referred to an agreement made *anno xxvij^{o} regni Regis Henrici* (in the twenty-seventh year of the reign of King Henry [II]), twenty-six years previously.[83] Clanchy initially also suggests that the rolls began under Henry II, citing a case of mort d'ancestor before the 1219 Lincoln eyre which referenced an enrolled action in the earlier reign.[84] But he immediately calls their creation into question, on the grounds that the required record was never produced and that the defendant denied there having been a previous hearing. This is an unconvincing argument as very many rolls have been altogether lost and, moreover, litigants frequently denied and manufactured claims as it suited them. Such proof as there is of the enrolment of cases before 1194 is perhaps strongest in the directives of later justices. Unless the bench was being unduly sardonic in 1219, it apparently expected that a case heard at least thirty years earlier had not only been recorded but also that, as Stenton observes in her note, the record itself had been kept and was still accessible.[85] Baildon draws attention to a similar mort d'ancestor case of 1203 which referred to the rolls of 1189, the first year of Richard I's reign.[86] This seems to allow a more credible possibility of recall, but the fact remains that the later justices appeared confident in the required retrieval, which was certainly warranted in Maitland's example from 1207. Brand offers evidence for an Exchequer plea roll dated 1181. He also cites Richardson and Sayles' arguments for the certain existence of plea rolls in 1179 and their probable beginnings in 1176, with which he agrees.[87] The rolls of

[83] Frederic Maitland, 'Introduction', pp. vi-xxviii, in *Select Plea Rolls of the Crown, Volume I, A.D. 1200-1225*, ed. by Frederic Maitland, Selden Society, I (London: Selden Society, 1888), pp. vii-viii.
[84] Clanchy, *Memory to Written Record*, pp. 96-97.
[85] *RJL*, *c*. 853.
[86] William Baildon, Introduction', pp. ix-xx, in *Select Civil Pleas, Volume I, A.D. 1200-1203*, ed. by William Baildon, Selden Society, 3 (London, 1890), pp. ix-x; *c*. 155.
[87] Brand, *Making of the Common Law*, p. 95.

the 1194 eyre, then, would seem to be a continuation of, and not a departure from, regular practice.

Yet the question of why they were retained in 1194, and thereafter, persists. To put it another way, why did most of the earlier rolls disappear? The answer may lie in the approach to record-keeping of individual clerks which, initially, cannot have been other than random. It must have been one thing for judges to instruct their clerks on what they wished to be recorded, and quite another for them to keep copies. Few occupants of the bench at that time were trained, or even experienced, as justices. For example, of the five who presided over the Lincoln eyre of 1202, only two were trained in the king's service.[88] These were Simon of Patteshall, the lead justice, and Eustace of Fauconberg. From an obscure Northamptonshire family, Simon first appeared on the bench in 1191 and served there until the end of John's reign. He was 'reputed a great judge' by the chronicler, Matthew Paris. Eustace was born into a Yorkshire baronial family and served as a judge throughout John's reign and into Henry III's. Unlike Simon, he was also employed by the crown in other capacities, first as ambassador and then as treasurer when he relinquished the bench. In contrast, the qualifications of the third of the Lincoln justices, Richard Malebisse, 'do not seem to have been high', to use Stenton's words. He experienced a chequered career of land forfeiture and redemption and, with the fourth, Henry of Northampton who is described as living a life of 'obscure but useful labour', rarely sat on the bench. The fifth, Alexander of Pointon, came of a knightly family with high connections and was a frequent litigant himself. The members of so disparate a body as this and other benches could scarcely be expected to arrive at a simultaneous appreciation of recorded, logic-based decision-making, particularly as the same justices sat in the criminal

[88] Stenton, 'Introduction', in *ELAR*, pp. xxiii-xxvi.

courts where, as previously noted, the ordeal and combat were more frequently used.

The survival of many rolls appears, then, to have depended upon specific justices and their clerks. Simon of Patteshall, whose clerk Martin became Henry de Bracton's master, is notable for the survival of his rolls. Stenton considers that they 'may well have been more worth preserving' than those of other judges because, unusually, Simon offered legal opinion.[89] It may also be that Martin, who became as prestigious a judge as both his master and pupil, understood the value of referencing them, not only for the corroboration of future claims but also for their jurisprudence. Bracton certainly seems to have been acutely conscious of the intrinsic and didactic value of previous judgements, retaining a number of earlier rolls in which he marked many cases as illustrative of one or another point of law. There must have been other clerks of the same persuasion but, even though the spasmodic retention of rolls may be attributable to individuals, it does not explain why they survived in number after 1194. Why does this year stubbornly retain the appearance of a watershed? Hudson sees the influence of Hubert Walter, 'Richard and John's great minister', who in the same year of 1194 was appointed justiciar to the earlier king.[90] Clanchy too credits Hubert with the retention of the rolls, writing that if 'the proliferation of documents…were to be associated in England with one man, he would be Hubert Walter'.[91] There is also the point that royal records were initially kept for the benefit of the king and the idea that they 'might and should serve the private interests of the king's subjects was clearly an afterthought'.[92] Richardson dates the first evidence for this concept to about 1180,

[89] Stenton, 'Introduction', in *ELAR*, pp. xxii-xxiii.
[90] Hudson, *Formation of the English Common Law*, pp. 136-38.
[91] Clanchy, *Memory to Written Record*, p. 73.
[92] Henry Richardson, 'Introduction', pp. xi-xcviii, in *The Memoranda Roll for the Michaelmas Term of the First Year of King John (1199-1200),* introd. by Henry Richardson, Pipe Roll Society, 59, New Series 21 (London: Pipe Roll Society, 1943), pp. li-lii.

when Hubert was already under the patronage of his uncle, Ranulf de Glanvill, who himself became justiciar that year to Henry II. It is possible that Hubert's wide experience over the years in the service of crown and church alerted him to the demands of litigants upon the legal system and the implications of those for government. This, with his natural ability for organization, may well have led him to order the retention of the plea rolls when he became justiciar in 1194, and would reasonably account for that year marking their earliest survival.

The records of these early rolls are not standardised apart from the initial mantra. Some are brief to the point of excluding essential information while others include apparent irrelevances, as if the clerk were uncertain as to which part of the information he was hearing would prove valuable and which was superfluous.[93] They had heard actions of novel disseisin continually for some twenty-eight years, yet they appear in these early accounts to be feeling their way. The significant alteration to their long-established practice of minimal record-keeping may have been arduous and, perhaps, alarming to those accustomed to noting down only fines and payments.[94] At the same time and in contrast, the legal process itself can be seen to be clear and sure whether the account is sparse or verbose. There is no doubt that it provided a strong framework within which jurors and justices deliberated. Their verdicts and judgements are remarkably uniform and coherent and give every appearance of continuing a long practice of being so. There therefore seems to be a distinction between the practical experience of the courts per se and that of its clerks. It confirms the likelihood that the records became systematic in response to an order, especially as it seems to have occurred simultaneously and so is unlikely to have been at the desire of individual justices.

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[93] For example, *RJL*, *c*. 923 includes the information that the plaintiff's parents had been in love.

[94] Records of payments to the exchequer in the form of fines from civil cases were transferred, almost from the first, from the plea rolls to the pipe rolls, which were retained: van Caenegem, *Birth of the English Common Law*, p. 72; *Pollock and Maitland*, I, p. 156, *n*. 2.

The Historiography

Scholars are wholly of a mind as to the assize's procedure. Sutherland's concise volume, the only one to deal exclusively with the action, is a definitive exposition of the developments through its lifetime and the causes of its demise, and is central to a study of this law. The close analysis of aspects of the assize undertaken by scholars as part of broader works has resulted in a rich, though dispersed, historiography of the action. Three key topics from it are debated here: the assize's antecedents and their pertinence to its success; Henry II's motivations in issuing it and his attitude to his commoners; and the factors that enabled commoners to respond positively to the action.

Regarding the assize's antecedents, there is no doubt that, with other actions, it illustrates the continuity between Anglo-Saxon and Norman legal structures. William the Conqueror himself decreed that 'all men were to have and to hold…the old English law - but with certain additions' of his own.[95] The additions were, in essence, a powerful centralised government and the Norman system of landholding, frequently termed 'feudalism'.[96] Every occupier of property, other than the king, held it of another individual, initially for military service of one form or another. Hudson finds that the most important elements in the Anglo-Saxon legacy concerned administration, violence, theft, and peasant tenure.[97] They were worked out through 'the recognition, the sworn inquest, the formal oath, the writ' which Stenton sees as the basis of the Angevin reforms.[98] Yet the specific strands are difficult to pin down. There were writs, but they were not judicial. There was access to the king's justice but, usually, not until the

[95] *Pollock and Maitland*, I, p. 88.
[96] For an explanation of the controversy over the use of the term 'feudalism' in connection with the Normans' introduction of their system of land tenure, see Clanchy, *England and its Rulers*, pp. 59-62.
[97] John Hudson, *Land, Law, and Lordship in Anglo-Norman England* (Oxford: Clarendon Press, 1994), p. 21.
[98] Stenton, *English Justice*, p. 26.

provisions of the hundred and county courts had been exhausted. There was the king's peace, but it was not universal. There were free and unfree, but the latter were slaves, over whom their owners had the power of life and death, rather than villeins, who had certain rights at law. Nevertheless, these distinctions may be found, with others, in the thirty-nine pages which Pollock and Maitland devote to Anglo-Saxon law for its relevance to 'the subsequent history of the laws of England'.[99] Baker traces the connection back to the unification of England as one kingdom in the tenth century.[100] This gradually led to the crown's prerogative over justice which begins to be discernible before the Normans arrived. Within the general academic agreement, however, there are divisions over the origin of certain legal procedures. Van Caenegem, for example, argues for 'the whole common law process' to be understood as 'the outcome of an organic development' of the Anglo-Saxon administrative writ which, eventually but steadily, led to the judicial writs set out by Glanvill.[101] He is strongly opposed by Stenton who finds no inexorable progress from one to the other down the centuries but, rather, that 'genius was at work' under, and perhaps in, Henry II.[102] Interestingly, van Caenegem also refers to Henry II as a genius, but Clanchy disagrees with both on the grounds that their view of Henry was not shared by his contemporaries.[103] Clanchy believes that, were they correct, Henry would have overseen similar legal progress in Normandy and Anjou, which did not occur. While these arguments are central to an understanding of the development of English law, their pertinence to this study is the explanation they offer of why the Angevin reforms were not wholly foreign to English commoners and the

[99] *Pollock and Maitland*, I, pp. 25-63.
[100] Baker, *An Introduction*, pp. 6, 9.
[101] van Caenegem, *Royal Writs*, p. 15.
[102] Stenton, *English Justice*, pp. 25-26.
[103] van Caenegem, *Birth of the English Common Law*, p. 100; Clanchy, *England and its Rulers*, p. 129.

consequent influence on their acceptability to them. The pre-Conquest English link they provided was still remembered a century and a half later, the time of the present study.[104] As a familiar element in the assize, it must have been an important factor in its immediate popularity.

Turning to Henry's motivation, his rôle in the formation of the assize, genius or not, is also pertinent to its success. Broadly speaking, historians follow either Maitland's belief that he occupies a position of 'supreme importance' in legal history,[105] or Hudson's view that most prerequisites for the common law were in place before his reign began, namely the continuation of custom and strong kingship.[106] A third and conflicting element is introduced by Milsom who argues that the nub of the petty assizes was the relationship between lord and tenant.[107] They were not a higher jurisdiction imposed upon a lower, an erroneous conclusion based on the assumption that they reflected decay and disorder in lords' courts. Rather, they were an almost organic development of the latter in providing a safeguard against the closed nature of a system for which there was no alternative. Milsom systematically analyses the novel-disseisin writ to show that almost every phrase was generated by the customary procedure of seigneurial courts. His explanation for the paucity of evidence for his thesis in the rolls, which he readily acknowledges, is that, once the assize began to be brought for reasons beyond its original usage, lords found it expedient to allow it to proceed and trusted to the recognitors. It is a seductive exposition but, in an equally detailed and illuminating critique, Brand explains why he ultimately disagrees with

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[104] Christopher Dyer, 'Memories of Freedom: Attitudes Towards Serfdom in England 1200-1350', pp. 277-95, in *Serfdom and Slavery, Studies in Legal Bondage*, ed. by Michael Bush (London: Longman, 1996).
[105] *Pollock and Maitland*, I, p. 136. See also van Caenegem, *Royal Writs in England*, p. 301; Sutherland, p. 42.
[106] Hudson, *Formation of the English Common Law*, pp. 20-1, 23. See also Clanchy, *England and its Rulers*, pp. 123, 132.
[107] Milsom, *Legal Framework*, pp. 7-17.

Milsom on the grounds that Henry was concerned with public order, his own authority and the expansion of trial by jury.[108] The thesis is nevertheless influential and important for offering a radical and consistently argued alternative to the traditional view of seigneurial courts as fora for decision-making by lords and tenants.

However, whether or not Henry was an innovator, the action of novel disseisin enabled him to enforce for the first time his 'rights as overlord of all freemen' and, through the introduction of routine writs, extend his authority across England.[109] Its immediate acceptance by the common people indicates that they perceived it as a positive move in their favour, shaping their good opinion of the king and his courts. Did he deserve that trust? There is no doubt that he followed his predecessors in their concern for the lawful possession of property.[110] Harding's view that property disputes were the 'most disruptive of a landholding society' complements Stenton's belief that the reforms were driven by 'the overriding necessity of securing peace and order'.[111] The legacy of Stephen's violent reign, leading to the near total collapse of government, has frequently been cited as Henry's reason for issuing the assize.[112] Clanchy, on the other hand, disagrees, believing it to be too long a time between the king's accession in 1154 and novel disseisin's introduction twelve years later.[113] He proposes the conflict with Becket, which began in 1163, as a more likely reason. This bruising experience with the formalised canon law which Becket employed persuaded the king, Clanchy believes, of the value of writing and caused him 'to reinforce the

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[108] Brand, *Making of the Common Law*, pp. 203-25.
[109] Clanchy, *England and its Rulers*, p. 132.
[110] Brand, *Making of the Common Law*, p. 224; Sutherland, pp. 27-29; van Caenegem, *Birth of the English Common Law*, p. ix.
[111] Harding, *Medieval Law*, p. 129; Stenton, *English Justice*, p. 34.
[112] Richardson and Sayles, *Law & Legislation*, p. 110; Alan Harding, *The Law Courts of Medieval England* (London: Allen and Unwin, 1973), p. 49; Stenton, *English Justice*, p. 29.
[113] Clanchy, *England and its Rulers*, pp. 129, 131. See also Sutherland, pp. 20-21.

customary law of England by written instructions'. The opposing view is put by Stenton, who argues that the drama of the Becket affair overshadowed earlier, legal moves made by the king.[114] She is supported by van Caenegem, in that Henry spent the first twelve years of his own reign 'in undoing the wrongs' of Stephen's.[115] Brand, however, suggests that novel disseisin goes further than this; that had the intention been only to rectify Stephen's legacy there would be 'some trace of it in the very words of the writ' which, to the contrary, is phrased to suggest a more general purpose.[116] He concludes that the king deliberately engaged in 'building up the business of the royal courts', not so much to undercut his lords as to increase his own prestige and authority.

Yet Henry and his advisors may have been simply perpetuating tradition, albeit differently, and all schools of thought accept that Henry was a deliberate advocate of customary procedure.[117] It is pivotal to Milsom's thesis that the reforms' rupture of custom, as he understands it, was a mistake. He points out that the very title of the treatise which sets out the new writs, attributed to Henry's justiciar, Glanvill, specifies the customs of England. At the same time, there is agreement among scholars, with the exception of Milsom, that Henry's laws were intended to be innovative. Van Caenegem suggests that the old procedure was decayed and 'so inadequate and untrustworthy' that it vanished in two generations on the appearance of a 'satisfactory substitute'.[118] Stenton agrees, believing that Henry's advisers created 'a new and highly individualistic legal system'.[119] Her view seems to be implicit in Brand's careful argument that king and counsellors

[114] Stenton, *English Justice*, p. 26.
[115] van Caenegem, *Royal Writs*, p. 286.
[116] Brand, *Making of the Common Law*, pp. 221, 224. See also: Sutherland, p. 8; Richardson and Sayles, *Law & Legislation*, p. 110.
[117] Clanchy, *England and its Rulers*, p. 131; Hudson, *Formation of the English Common Law*, pp. 144-45. Both Clanchy and Hudson observe that Henry was content for his English subjects to observe the customs of his grandfather, Henry I, as he said.
[118] van Caenegem, *Royal Writs*, p. 46.
[119] Stenton, *English Justice*, p. 26.

deliberately attempted 'to create something quite new and very significantly different [from] the fragmented, localized and inefficient system they had inherited', including the reduction of irrational resolutions.[120] However, Stenton appears to imply further that Henry's motivating factor was his subjects' welfare, unambiguously identifying novel disseisin and mort d'ancestor, in particular, as 'from the first *beneficia* proceeding from the king…to the individual litigant'.[121]

Hudson's argument for 'a new degree of routine royal contact with individual subjects' under the Angevins appears to agree with Stenton. However, it is based on the entirely different premise that the reforms characterised the altered basis of monarchical power, forced by the problems of the previous reign. They were driven by the need to stabilize the kingdom rather than to assist individuals but they had a snow-balling effect because of consumer demand coupled with the nature of Angevin administration. Hudson also here discerns an element of reciprocity between the imposition of power and a 'responsive capacity to satisfy requests for justice', which is in accordance with van Caenegem's sense of collaboration between 'a powerful crown and a responsible population'. Does this suggest that Henry was deliberately anti-feudal? Neither van Caenegem nor Baker believes he was, although the feudal courts lost authority through his reforms.[122] Clanchy agrees, arguing that they differed from previous measures only in their 'set procedures', probably stimulated by Henry's encounter with canon law.[123] The king wished to 'overcome the indecision and confusion' which then prevailed at law but there is no vestige of anti-feudalism on his part. Had the reforms 'not been acceptable...to the landlords in particular, [they] could not have

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[120] Brand, *Making of the Common Law*, pp. 101-02, 224.
[121] Stenton, *English Justice*, p. 49.
[122] Hudson, *Formation of the English Common Law*, p. 146; van Caenegem, *Birth of the English Common Law*, p. 46 *n*. 71, p. 55; Baker, *An Introduction*, p. 9.
[123] Clanchy, *England and its Rulers,* pp. 125, 131. Clanchy cites Henry's biographer, Wilfred Warren, that the king 'could not be anti-feudal without destroying the society in which he lived'.

worked at all'. Brand, however, finds it 'much less difficult' to credit Henry with 'an underlying anti-feudal bias', which was clear enough, he points out, in his control over castles.[124] Further, if Milsom were correct and Henry's laws not directed against his lords, the king would have had no need to take the litigation exclusively into his own courts. The assizes could have operated as effectively in the manorial courts. Baker too is unambiguous that the assize was 'an alternative and more direct way of controlling feudal lords'.[125] Avoiding the term 'feudal', Hudson argues that Henry certainly tried to increase monarchical power from its low point under Stephen, but that its further growth through the reforms was probably unforeseen, although he was not slow to capitalize on it.[126] Sutherland is ambivalent, agreeing on the one hand that novel disseisin was 'consciously directed against lords' but, on the other hand and following Milsom, only when lords unjustly disseised their tenants.[127]

Scholars seem united then in the belief that Henry wished his legal procedures, whether or not they were innovative, to be recognized as a continuation of English legal custom, but are divided in their understanding of the king's motivation, particularly regarding baronial power. In the event the resulting curbs upon the feudal structure, foreseen or otherwise, were probably unattractive to neither Henry nor his humbler subjects. However, that does not make them anti-feudal measures, and they are very far from linking king and peasant in a common aim. But it is also possible that peasants perceived the matter differently, believing they had the support of the king against their lords. Henry's intentions are important to this study for the pivotal questions they raise concerning the extent to which commoners were aware of them or, at least, entertained their own

[124] Brand, *Making of the Common Law*, p. 224.
[125] Baker, *An Introduction,* p. 233.
[126] Hudson, *Formation of the English Common Law*, pp. 145, 128.
[127] Sutherland, pp. 33-34: though the effects were anti-feudal, 'no such purpose was ever acknowledged'.

perceptions of them but, among so many possibilities, is it possible to identify them with any confidence? Clanchy dismisses the idea altogether. He writes that 'Henry II's intentions were an enigma to his contemporaries' and must therefore 'remain an enigma to us', a surprisingly defeatist remark.[128] Whether or not he took his counsellors into his confidence, the benefit of hindsight suggests that this energetic and successful ruler knew exactly what he wished to achieve in his kingdom. It is not fanciful to suppose that the stability of his realm through the establishment of law and order by judicial means was at the forefront of his mind. The reforms enabled him to have confidence that this would continue, during his prolonged absences in his continental territories, through the legal process he had set in train. Henry is unlikely to have wished to bring down the system of land tenure which he headed, but it is doubtful that he was averse to curbing his lords' power. All of this profited commoners. It is impossible to separate the assize's benefit to them from its profit to the country but, had it been otherwise, would the king have considered them? It seems unlikely. Likewise, commoners doubtless saw novel disseisin as a means of improving their situation but probably did not believe it to be an Angevin *beneficium* specifically for them although, no doubt, Henry saw an advantage to himself if they did. It appears from the records of novel disseisin that king and commoners gained jointly from the assize, although each approached it for none other than personal advantage.

Is it possible to identify more specifically Henry's view of his common subjects? It appears to have been positive since he allowed them to be empanelled as jurors for his new laws.[129] Humble tenants of largely English stock were long accustomed to sit as jurors in the lower courts and their combination with a bench

[128] Clanchy, *England and its Rulers*, p. 129.
[129] David Carpenter, *The Struggle for Mastery, Britain 1066-1248* (London: Penguin, 2004), pp. 240, 410-11. Earlier writs show a readiness to use juries in most major civil actions: Richardson and Sayles, *Law and Legislation*, p. 110.

of Norman or Angevin lords was not necessarily the unexpected and risky strategy which it might superficially appear to be, particularly on the many occasions when a humble petitioner put his lord in the dock. It is plausible that Henry, given his desire to provide continuity, may have hoped his English subjects would perceive it as a continuation of custom, albeit in a greatly altered form.[130] Van Caenegem argues that a jury of local people must have been 'attractive to a peasant population accustomed to parley', opposing Clanchy's view that the populace accepted it because they had no choice.[131] The point is that they did have a choice and could have chosen to favour the local courts for the resolution of their property disputes, had they wished. It was a known option but, to the contrary, they flocked to the royal courts; a development which corresponds, in the view of Reynolds and others, with the evolution of social and political ideas among their class.[132] It must have been an exciting and liberating period for many people and may have given the king reason to believe that the involvement of commoners in his reforms would aid the improved delivery of justice which he sought.

What, then, can be known about the mentality of commoners which allowed them to respond to the legal reforms as they did. Beginning where Hudson ends, with Magna Carta, Musson expounds on the attitudes of medieval lay people which influenced, and were influenced by, the growth of the common law.[133] In a compelling argument, he shows that commoners developed a 'legal consciousness', internalised as well as experiential, through increasing intimacy with procedures and concepts. Prima facie this may imply self-awareness, defined

[130] See *Pollock and Maitland*, I, pp. 140-43, for an explanation of the fundamental differences between Anglo-Saxon doomsmen and Norman jurors. The latter's verdict was the opinion of the neighbourhood or, in van Caenegem's words, 'the *vox populi*': *Pollock and Maitland*, I, p. 141; van Caenegem, *Birth of the English Common Law*, p. xii.
[131] van Caenegem, *Birth of the English Common Law*, pp. xi-xii.
[132] Reynolds, *Kingdoms and Communities*, pp. 1-11; Clanchy, *England and its Rulers*, pp. 150-52; Richard Hodges, *The Anglo-Saxon Achievement* (London: Duckworth, 1989), pp. 43-44; Colin Morris, *The Discovery of the Individual, 1050-1200* (London: The Society for Promoting Christian Knowledge, 1972), p. 7.
[133] Musson, pp. 84-85, 3, 25.

by Morris as the perception of a distinction between society and self and nourished by the Christian belief in an individual's value to God.[134] It has support in Reynolds' belief that the medieval laity's 'capacity for rational and independent thought has often been underestimated', pointing out that it developed piecemeal over time.[135] Musson's many examples chime with this view, and the same idea of gradual mental development may account for the explanations historians have found in earlier periods for later activity.[136] The aptitude with which many commoners embraced the new methods cannot have suddenly appeared without antecedents. Rather, it indicates a well established attitude of enquiry and the ability to take a reasoned view on a topic. However, it can also be argued that any 'consciousness' evolving within a social group could be evidence of a corporate mentality, rather than a co-incidental fusing of ideas which were independently reached. On that basis, Musson's individuals may have been merely aping their betters, and scholars are divided over the issue. In Hilton's view, the cohesion of community living ruled out any suggestion of individuality but Coss believes that the cohesive factors were balanced by others, demonstrated by the popularity of the possessory assizes, and Reynolds warns of an anachronistic modern tendency 'to think of collectivity as an enemy of individual liberty'.[137] The increasing use of writing is a strong argument for self-awareness, as litigating commoners began to evaluate the written word in terms of legal records which related to their individual circumstances. There is no doubt that literacy was encouraged from the

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[134] Morris, pp. 1-4.
[135] Reynolds, *Ideas and Solidarities*, p. vii, I 40.
[136] For example, Hilton argues that the origins of the Peasants' Revolt in 1381 lie in the early thirteenth century: Rodney Hilton, *Class conflict and the Crisis of Feudalism, Essays in Medieval Social History* (London: Verso, 1990), p. 49.
[137] Hilton, *Class Conflict*, p. 45: the infusion of lordly power into peasant lives resulted in the 'limited ideology' of the 1381 revolt; Peter Coss, *Lordship, Knighthood and Locality; A Study in English Society c.1180–c.1280* (Cambridge: Cambridge University Press, 1991), pp. 155-56: Coss argues that, in bringing actions, individual families exhibit 'as vigorous a defence of personal rights as that demonstrated by any lord'; Reynolds, *Kingdoms and Communities*, pp. lii-liii, 4-5: the development of lay social and political ideas and the increasing enterprise of ordinary people must, she believes, be considered within a corporate context.

later-twelfth century by the proliferation of documents under Henry II, and that it slowly permeated the lower ranks of society.[138] The driving factors included the church, whose village priests often freely educated 'the clever poor', personal aspiration and ambitious parents.[139] From the early records of novel disseisin, this paper finds that it was well advanced among commoners by the turn of the thirteenth century and, alongside it, a high degree of individual action.

The research has found no difference in attitudes towards literacy, or litigation, between male and female litigants. Women figure largely in the early records of the assize, but little has been written on them in this period, especially those of humble birth, other than the religious.[140] Bennett's study of medieval countrywomen is one of several that focus on the early-fourteenth century but, judging by their counterparts in the twelfth- and thirteenth-century rolls, her observations can often be applied to the earlier time.[141] For example, the position of daughters and widows was quite different from that of married women and moved them 'across the boundaries that marked their subordination as a sex', widows in particular having 'to assume the public tasks of householders'.[142] The case records abundantly illustrate this, discussed in Chapter 8. Stenton and Wilkinson both make some use of early charters and law records to illustrate the lives of low-ranking women of the earlier period.[143] However, Stenton

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[138] Carpenter, *Struggle for Mastery*, pp. 460-65; Clanchy, *Memory to Written Record*, pp. 241-45. Bischoff describes the 'enormous increase in book production' in the twelfth and thirteenth centuries, of a piece with its move into lay society where 'writing became a tool in daily life': Bernard Bischoff, *Latin Palaeography, Antiquity and the Middle Ages*, trans. by Dáibhá Ó Cróinín and David Ganz (Cambridge: Cambridge University Press, 1990), p. 224.
[139] Clanchy, *Memory to Written Record*, pp. 238-45; Hodges, p. 201.
[140] Virginia Blanton, *Signs of Devotion : The Cult of St. Aethelthryth in Medieval England, 695-1615* (Pennsylvania: Pennsylvania State University Press, 2007); Samuel Fanous and Henrietta Leyser (eds), *Christina of Markyate : a Twelfth-Century Holy Woman* (London: Routledge, 2005).
[141] Judith Bennett, *Women in the Medieval English Countryside : Gender and Household in Brigstock Before the Plague* (Oxford: Oxford University Press, 1987), passim.
[142] Bennett, *Women in the Medieval English Countryside*, p. 178.
[143] Doris Stenton, *The English Woman in History* (London: Allen and Unwin, 1957), pp. 76-80; Louise Wilkinson, *Women in Thirteenth-Century Lincolnshire* (Woodbridge: Royal Historical Society, 2007), pp. 23-24, 76-81.

acknowledges that the best source of information is the manor-court rolls, which do not begin until the mid-thirteenth century, and Wilkinson's research is based on these.[144] Perhaps because of the paucity of early records, there is a tendency in some women's studies to generalize, and references to low-class females within broader works are also often of a general, or legal, nature.[145] The possibility of literacy among low-ranking lay women is specifically explored by Clanchy and Hodges and both also refer to its potentially much earlier beginnings.[146] There have also been wider studies on the possible extent of literacy among female religious from different backgrounds, in addition to discrete work on individuals.[147] All of this reinforces Reynolds' warning against the assumption 'that people in different societies...have fundamentally different thought processes'.[148] It encourages the examination of the behaviour of both women and men, captured in the early novel-disseisin records, for evidence of their modes of thought.

Conclusion

The assize of novel disseisin is known to have been innovative while containing familiar elements, which account in part for its immediate acceptance by

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[144] Stenton, *The English Woman*, pp. 81-82; Wilkinson, *Women in Thirteenth-Century Lincolnshire*, pp. 117-18, but see p. 119 for early-thirteenth-century inheritance and pp. 128-29 for examples of family pressures and widows with under-age children, which are applicable to an earlier time and a wider field.

[145] Jennifer Ward, *Women in England in the Middle Ages* (London: Hambledon Continuum, 2006), passim: Ward deals largely in generalities concerning peasant women, with few examples earlier than the fourteenth century. For examples of broader works which mention women see: James Raftis, *Peasant Economic Development within the English Manorial System* (Montreal: McGill-Queeen's University Press, 1997), p. 33, on the provision made by peasants for younger sons and daughters; Paul Hyams, *King, Lords and Peasants in Medieval England: The Common Law of Villeinage in the Twelfth and Thirteenth Centuries* (Oxford: Clarendon Press, 1980), p. 175, *n*. 76, on the admissibility of women as kin in claims of villeinage; Dyer, *Standards of Living*, pp. 132-33, 196, on women's occupations.

[146] Clanchy, *Memory to Written Record,* p. 252; Hodges, p**.** 201.

[147] Bella Millet, 'Women in No Man's Land: English recluses and the development of vernacular literature in the twelfth and thirteenth centuries', pp. 86-103, and Jocelyn Wogan-Browne, '"Clerc u lai, muine u dame": Women and Anglo-Norman Hagiography in the Twelfth and Thirteenth Centuries', pp. 61-85, in *Women and Literature in Britain 1150-1500*, ed. by Carol Meale (Cambridge: Cambridge University Press, 1993).

[148] Reynolds, *Ideas & Solidarities*, p. I 40.

commoners. They were further encouraged by the simplicity of the action, its speed of delivery and the apparent impartiality of the courts before which they appeared. The fundamental reason for its success, however, was that it efficiently addressed the greatest problem that could befall any individual in the Middle Ages, loss of livelihood through dispossession of property. The significance of the assize to the common law, its rôle in maintaining civil peace, and the intentions of Henry II in issuing it have been widely discussed; the importance of litigants' attitude towards it, less so. Their stance at the outset was necessarily reactive. It was a new law, additional to the modes of redress that already existed in the local courts, and they were not obliged to use it. In the event, they used it in great numbers but no records have survived of the earliest cases which were, perhaps, only accounting notes of straightforward, text-book suits. However, examples of justices referencing earlier hearings of cases before them suggest that before very long the assize was used to resolve complex situations. The first extant records, almost thirty years into the life of the assize, contain examples of innovative thinking on the part of litigants, as well as many routine suits. It was frequently employed under overt false pretences in order to permanently record a land conveyance, when no dispossession had taken place. It also seems to have been deliberately used by possible villeins to secure free status, and perhaps also by lords to depress tenants into servitude. The thesis discusses these and further uses of the action by litigants, beyond the straightforward recovery of property. They suggest the active and imaginative manipulation of an essentially straightforward action by commoners which, in turn, indicates an assertive approach on their part to the determination of their affairs. The object of this thesis is to obtain a better understanding of how commoners viewed their rôle in medieval society and how they, in turn, were regarded by their equals and superiors in the royal courts.

SECTION 1
VILLEINS AND TENEMENTS IN VILLEINAGE
INTRODUCTION

At the Lincoln assizes of 1218, Anger son of Hugh brought an action of novel disseisin against Robert son of Robert only to have a charge of villeinage levelled against him.[1] The author of the treatise *De Legibus et Consuetudinibus Angliæ* (On the Laws and Customs of England), commonly known as *Bracton*, found the case to be of interest and marked it in the roll.[2] It illustrates one of the many points he thought necessary to make on villein status. The direct references to the twin topics of villeins and villeinage in the early records of novel disseisin carry a significance which justifies the space devoted to them in this work. This is despite the fact that both were ineligible to come before the royal courts, to which the assize was limited.[3] The concerns of servile tenants and disputes over tenements held for servile dues, by tenants of either status, were restricted to seigneurial courts.[4] Yet it was not rare for plaintiffs bringing an action of novel disseisin to be accused of villeinage in the *curia regis* by their defendants. Such charges were resolved on a case-by-case basis: either, through the jury's local knowledge; or, its verdict on the evidence set before it; or, by judicial decision. The results, however, were not consistent. The lack of uniformity is highlighted by the arguments that could occur between litigating parties over the nature and significance of the dues required for a disputed property. There are also numerous cases which seem to concern potentially unfree litigants who are not directly identified as such. Bracton appears to have found the situation extremely problematic. In Baker's

[1] *RJL*, *c*. 176. The case is discussed on pp. 92-93 below.
[2] A few judges, Bracton in particular, or their clerks, marked cases of especial interest or importance by running a line down the side of the text, probably with a lead pencil: Doris Stenton, 'Introduction', pp. xi-lxxiv, in *RJL*, pp. xi-xv.
[3] See p. 1 above.
[4] For the different seigneurial courts, see John Hudson, *The Oxford History of the Laws of England, II, 871-1216* (Oxford: Oxford University Press, 2012), pp. 556-65.

words, he 'devoted much space to villeinage', far more than he gave to common rights and, for that matter, most other issues.[5] Furthermore, his advice is scattered almost haphazardly throughout the section on novel disseisin, rather than laid out with the same methodical care that he gave to other issues.

In a fresh perspective which emphasizes this disharmony, it is argued in the following three chapters that there was a direct link between these two phenomena: the appearance of potential villeins in a forbidden legal arena; and Bracton's unco-ordinated advice to his colleagues on how to deal with them. The hypothesis is that the former was a wholly unexpected and entirely unintended consequence of the assize of novel disseisin, and the latter an urgent attempt by a senior lawyer to bring a degree of order into the confusion. The common law was the unplanned progenitor of villeinage[6] but the legislators did not foresee that it would be pervaded by its own creation. It is argued that novel disseisin ipso facto provided successful plaintiffs with irreversible proof that they were free men or women and, consequently, many humble tenants of uncertain status sought to use it to that end.[7] It was a high-risk strategy because personal status was a binary classification: a tenant was either free or villein. No matter how convoluted the arguments over the type of services rendered, nor how extenuated the procedure of assembling juries to give an opinion, nor how uncertain they or the presiding justices were in their verdict or judgement, the ultimate decision had to be in

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[5] John Baker, *An Introduction to English Legal History*, 4th ed. (Oxford: Oxford University Press, 2007), p. 468. In Volume III of *de Legibus*, some thirty-five pages are devoted to villeinage and twenty-seven to rights of common: *Bracton*, III, respectively pp. 83-118 and 162-89.

[6] Phillipp Schofield, *Peasant and Community in Medieval England, 1200-1500* (Basingstoke: MacMillan, 2003), pp. 35-36; John Hudson, *The Formation of the English Common Law, Law and Society in England from the Norman Conquest to Magna Carta* (Harlow: Longman, 1996), p. 236; Michael Postan, 'Medieval Agrarian Society in its Prime: England', pp. 549-632, in *The Cambridge Economic History of Europe, Volume I, The Agrarian Life of the Middle Ages*, ed. by Michael Postan, 2nd ed. (Cambridge: Cambridge University Press, 1966), p. 605.

[7] Ralph Turner, *The English Judiciary in the Age of Glanvill and Bracton, c. 1176-1239* (Cambridge: Cambridge University Press, 1985), p. 133; Paul Hyams, *King, Lords and Peasants in Medieval England: The Common Law of Villeinage in the Twelfth and Thirteenth Centuries* (Oxford: Clarendon Press, 1980), p. 1; *Pollock and Maitland*, I, p. 202.

favour of one or the other category. There was no third option, and it is the finality and enormity of irrevocably consigning men and women of doubtful status to villeinage that give some scholars reason to believe that the bench operated a policy of *favor libertatis* (a bias to liberty).[8] This was not the case regarding the status of tenements. While they were most frequently either freehold or in villeinage, they could also be subject to a variety of 'other limited forms of control' which fell into neither category.[9] Novel disseisin, then, drew attention to distinctions of tenure which, like personal status, had not previously been of concern to most people. Consequently, in the same way that it offered tenants the possibility of acquiring or affirming free personal status, the assize also gave lords the opportunity of confirming at law the status of their land.

Whether free or servile, a tenant who witheld the dues for his tenement, whatever it was, could be distrained by his lord.[10] His case was adjudged by his manor court and, if he were unfree, he had to abide by its verdict. However, dissatisfied freeholders could take steps to bring an action of novel disseisin against their disseisor, whether their lord or another tenant.[11] If the primary concern of disseisor lords were to receive the full dues to which they were entitled from their holdings,[12] it was clearly in their interests to maintain and affirm their control over tenements which were not freehold. Novel disseisin offered them a legitimate opportunity of achieving this. If they were successful in their defence against a plaintiff tenant, the tenement could not be freehold but be held either at their will or in villeinage. If the latter, it was possible that the tenant was also villein. Chapter 3 argues that the assize also provided the unscrupulous lord with the possibility of enserfing a tenement of doubtful status. A tenant who was

[8] Discussed on pp. 66-68 below.
[9] Hudson, *Oxford History*, p. 632.
[10] See p. 10 above.
[11] See pp. 10-11 above.
[12] Hudson, *Oxford History*, pp. 630-32, 662.

provoked into suing his lord under the assize ran the risk of being accused of villeinage and, if the charge carried, it could label the tenement as villein also.[13] Even a personally free tenant who blundered in his suit, perhaps through ignorance, could find himself in this position.[14] Equally, plaintiff tenants might have acted in the hope of confirming the free status they believed or wished themselves to possess.

However, many of the numerous unsuccessful cases which were recorded without any explanatory information may simply indicate the royal court's confirmation of the manor court's verdict, that is, that the tenement in question was not freehold. It implies neither that the holding nor the tenant were villein. On the other hand, free or no, the unsuccessful complainant stood in danger of condemning himself into villeinage were he known to hold for servile dues. In that situation he had to convince the court, against any counter argument put forward by his lord, of the distinction between himself and his tenure. There was also the possibility that a charge of personal villeinage might be fabricated against him. Conversely, it was the successful plaintiff who by definition always secured personal freedom for himself based on the presumption that a litigant before the royal court must be of free status unless proved otherwise, whatever the true nature of his holding or his own position.

The legislators seem not to have fully appreciated these possibilities, and the unwelcome sequences to their endeavours forced them into belatedly assembling a body of rules in order to define unfree persons and unfree property. It has to be asked why the highly educated élite of the legal world was apparently caught off-guard in this manner. Part at least of the answer almost certainly lies in the

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[13] See pp. 88, 94-101 below and the following discussion on *ELAR*, *c*. 423. Hyams notes that lords, rather than litigate themselves, acted 'so as to invite their villeins to litigate': Hyams, *King, Lords and Peasants*, p. 118.

[14] For a possible example see *ELAR*, *c*. 1311, discussed on pp. 61-62 below.

question. The élite were of Norman stock and viewed the defeated English as servile. Van Caenegem quotes Richard fitz Neal who, writing about the inter-marriage between English and Norman families in the penultimate decade of the twelfth century, added almost as an after-thought that *de liberis loquor* (I speak of free people).[15] As a lord himself, he was referring only to 'the people who count'. Are they likely to have included the English peasantry? Clanchy defines a freeman as a Norman noble, and English birth, according to Hyams, 'almost carried a presumption of servility'.[16] Maitland thought the jurisprudence of the Norman court in England was only for 'great men', implying that men who were not great were not free.[17] The legal records themselves reflect a society in transition. A Norman life was of greater value than an English one since a murdered man was assumed to be Norman, and the locality fined accordingly, unless it could be proved otherwise.[18] It needs no leap of imagination to extend that logic to the status of peasants: that lords assumed their peasantry to be servile.

The rôle of the reforms in separating free from servile tenants does not imply that it formed part of the original purpose in the formulation of the assize. Nor does it signify, as Hatcher points out, that the century between the Conquest and the promulgation of novel disseisin was occupied by a largely free peasantry which thereafter found its liberties to be severely curtailed.[19] The historiographical debate turns on the degrees of servitude which transferred from Anglo-Saxon into Anglo-Norman society, and broadly concludes that the situation was no less

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[15] Raoul van Caenegem, *The Birth of the English Common Law*, 2nd ed. (Cambridge: Cambridge University Press, 1988), p. 5.
[16] Michael Clanchy, *England and its Rulers 1066-1272*, 3rd ed. (Oxford: Blackwell, 2006), p. 124; Hyams, *King, Lords and Peasants*, p. 253.
[17] *Pollock and Maitland*, I, p. 108. However Schofield believes that landholding peasants were 'not formally distinguished as unfree' until the Angevin reforms: Schofield, *Peasant and Community*, pp. 12-13.
[18] *Pollock and Maitland*, I, p. 91; Cecil Meekings, 'Introduction', Volume I, in *The 1235 Surrey Eyre*, ed. by Cecil Meekings and prepared for press by David Crook, 3 Volumes, Surrey Record Society, 31, 32, 37 (Guildford: Surrey Record Society, 1979-2002), pp. 106-07.
[19] John Hatcher, 'English Serfdom and Villeinage: Towards a Reassessment', *Past and Present*, 90 (1981), 3-39 (pp. 28-29).

complex before than after the Angevin reforms.[20] Humble tenants had always been obliged to work within the customs of their manor which bore more or less heavily upon them, and the law-makers' astonishing ambition to bring a unified legal code to every corner of England was intended for the benefit of the king's free subjects alone. It is probable that they anticipated an attempt by some to acquire freedom through a manipulation of the assize, but no more than that. Had it been their intention to bisect the peasantry according to personal status, there would be some evidence for it in the efficiency of method otherwise exhibited in the procedure of the assize. There is none, indicating that the courts were unprepared for the arrival of large numbers of humble plaintiffs apparently convinced that they were free. The bulk of Bracton's treatise, then, may have been written in theoretical terms and its author subsequently forced to deal with the problem as it arose. It is possible that, rather than embarking on a restructuring of his opus, he inserted his counsel where appropriate with the resulting haphazard effect, giving it every appearance of urgent after-thought.

The following three chapters put the case for the courts' enforced, almost ad hoc, manner of dealing with the unforeseen situation through: Bracton's theory of the relativity of villeinage and the evidence for it in the rolls; court procedure in the determination of villein status through jurors' knowledge and judicial decision; and tenure and service. Villeins are referred to in the masculine throughout, following Bracton. Although very many women were also of servile status, no bondwoman has been identified as a plaintiff in the early novel-disseisin records.

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[20] See inter alia Rodney Hilton, 'Freedom and Villeinage in England', *Past and Present*, 3 (1965), 3-19; Rodney Hilton, *A Medieval Society, The West Midlands at the End of the Thirteenth Centur*y (Cambridge: Cambridge University Press, 1966), pp. 127-29; Edward Miller and John Hatcher, *Medieval England, Rural Society and Economic Change 1086-1348* (London: Longman, 1978), p. 84; Robert Brenner, The Rises and Declines of Serfdom in Medieval and Early-Modern Europe', pp. 247-76, in *Serfdom and Slavery, Studies in Legal Bondage*, ed. by Michael Bush (London: Longman, 1996), p. 261.

CHAPTER 1
VILLEINAGE AND THE THEORY OF ITS RELATIVITY

Introduction

The theory of the relativity of villeinage was worked up in the treatise *De Legibus et Consuetudinibus Angliæ* which bears Henry of Bracton's name.[1] In the opinion of its translator, the treatise was largely written in the 1220s and 1230s when Pateshall and Raleigh were judges and not, as Maitland thought, twenty or so years later.[2] Thorne's evidence rests on references to the 1236 Statute of Merton which appear as insertions in the text, suggesting that it was compiled at a time when Bracton himself was too young to have written it.[3] It was probably 'already a substantial volume' when he took it over as a reviser.[4] The original author is likely to remain unknown. He was a highly educated English jurist, learned in Roman and canon law and wrote, in Hyams' view, 'for insiders like himself' with none other in mind.[5] His work became increasingly academic to following generations who were less knowledgeable in the origins of English law, and was amended by more than one hand until 'along came an editor' who rendered it generally more usable. The published edition, the only one now extant, is consequently an amalgam of judicial observation and opinion of various dates.[6]

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[1] See p. 4 *n.* 15 above.

[2] Samuel Thorne, 'Translator's Introduction', pp. xiii-lii, in *Bracton*, III, pp. xv-xxix; Paul Brand, *The Making of the Common Law* (London: Hambledon, 1992), p. x. The judges were Martin of Pattishall, who died in 1229, and William de Raleigh, who left the bench for a bishopric in 1239. Bracton came from one of the two 'Bratton' villages in Devon, almost certainly Bratton Fleming: Doris Stenton, 'Introduction', pp. xi-lxxiv, in *RJL*, p. xv. He was probably clerk to Martin of Pattishall and rose to become an outstanding judge himself.

[3] *Bracton*, III, pp. v, xvii. The Statute of Merton dealt inter alia with dower, illegitimacy, and the rights of and constraints upon manorial lords in enclosing common land.

[4] *Bracton*, III, p. v; see also Alan Harding, *Medieval Law and the Foundations of the State* (Oxford: Oxford University Press, 2002), pp. 198-99.

[5] Paul Hyams, *King, Lords and Peasants in Medieval England: The Common Law of Villeinage in the Twelfth and Thirteenth Centuries* (Oxford: Clarendon Press, 1980), pp. 84-86 and *n.* 17.

[6] The folios are not consistent and Bracton's original is lost but it is still considered, in Maitland's words, 'the crown and flower of English jurisprudence': *Pollock and Maitland*, I, p. 206.

However six main themes emerge: the interactions of a villein with his lord;[7] with one not his lord;[8] the rights of a fugitive or freed villein;[9] proof of villeinage and its denial;[10] the distinction between the villein status of people and property;[11] and mixed unions.[12] The first three are considered, albeit briefly, in this chapter. The proof and denial of villeinage falls under the procedure of the courts considered in Chapter 2. Villein status and villein tenure are discussed in Chapter 3. The problems created by mixed unions tended to surface in the courts under the action of mort d'ancestor and are therefore largely excluded from this study.

That the problem of ascertaining villein status arose at all in courts forbidden to the unfree was inevitable given the extraordinarily confused situation created by the voluntary involvement of free tenants in villeinage, through taking land for servile tenure and marriage into villein families. Anger son of Hugh is a good illustration of the former among the records of novel disseisin, and the tribulations that Edith, a free woman, encountered on the death of her unfree husband, of the latter.[13] There was the additional complication of lords allowing

[7] *Bracton*, III, pp. 84, 85, 86, 87, 88, 94, 93-94, 95, 97, 99, 100-01, 103-04, 105, 112.
[8] *Bracton*, III, pp. 84, 85, 87, 88, 97, 98-99, 100, 101, 104-05, 112.
[9] *Bracton*, III, pp. 86, 87-92, 88, 94, 98-100, 102, 104-05, 112.
[10] *Bracton*, III, pp. 88-96, 106-09, 111-13.
[11] *Bracton*, III, pp. 101-02, 107-10.
[12] *Bracton*, III, pp. 92, 93, 94, 96, 113-15.
[13] Respectively: *RJL*, *c*. 176, discussed on pp. 92-93 below; *CRR*, VI, p. 355. The latter recounts that, at Westminster in 1212, Edith claimed to have been disseised of her free tenement in Bretteby (unidentified, probably in Yorkshire) by Simon of Kyme (Lincolnshire). He pleaded that Edith had remitted her claim to the property for two marks to his father, Philip of Kyme, and he had the chirograph to prove it. Philip had installed his villein, Ailmer, as its tenant. On Ailmer's death, his son Geoffrey had taken over the tenancy and done villein services for it throughout his life. He had married Edith, a free woman, who, upon being widowed, had not wished to continue with those services, and therefore Philip had taken back the holding. Edith, in her turn, pleaded that her entry to the holding was not through Geoffrey but that she had impleaded Philip over it *aliquando* (at some point) and he had returned it to her. The argument therefore hung, as the bench pointed out, upon whether Edith had had possession through her unfree husband, or Geoffrey through his free wife. The jurors began their verdict by saying that both Ailmer and Geoffrey had held the property throughout their lives as villeins, which advanced the matter very little. Tantalizingly, the remainder of the record is illegible but for an indication that the holding was taken *in manu capitalis domini* (into the hand of the chief lord). This was probably the king, to whom Simon had previously referred. Both he and his father were tenants-in-chief, that is, holding directly of the crown, as well as of other lords. If Edith was found to have held through her husband, her case would have collapsed as disputes over land held for villein services, even if by a free tenant, were barred from the royal courts.

land to be sold out of villeinage.[14] So much would have been known and taken into account by the sophisticated legalists who compiled the assize. However, these circumstances are insufficient to account for all the cases involving villeinage which came before the king's courts. Those who claimed redress of alleged disseisin through the assize claimed in the writ that the holding was *liberum tenementum* (a free tenement), upon which the royal court's judgement turned. Milsom makes the point that 'for the purpose of winning the assize, it is enough for the lord that the tenement is unfree'.[15] It was of no consequence to him whether the tenant himself was of free or villein status, since the same dues were required from a villein holding whoever held it. And yet in practice this was not always the case, exemplified by the imposition of *merchet*.[16] As discussed below, the presence of this requirement among the dues rendered from a tenement came to be widely accepted as proof that the tenure was in villeinage. At the same time, however, *merchet* was a deeply personal exaction which struck at the heart of an individual's family life, unlike many rules of tenure such as, for example, the number of days the tenant was obliged to work on his lord's land. Because it was so distinctive, *merchet* highlights the complexity of the relationship between a tenant and his tenure. It also, with other factors, began to make a distinction between free and unfree persons which was heightened, but not clarified, as Hudson points out, by the assize.[17] He suggests that where status determined the

[14] See *CRR*, VII, p. 62.
[15] Stroud Milsom, *The Legal Framework of English Feudalism: the Maitland lectures given in 1972* (Cambridge: Cambridge University Press, 1976), p. 22.
[16] *Merchet* was the payment that was frequently demanded by a lord before he permitted a villein tenant's daughter to marry. However Hyams argues that even its 'humiliatingly servile nature' was not proof positive of villein status or it would have been used by the courts: Hyams, *King, Lords and Peasants*, pp. 187, 191 and *n*. 30; Kosminsky, following Vinogradoff, shows it was also paid by free tenants, particularly in the north: Evgeny Kosminsky, *Studies in the Agrarian History of England in the Thirteenth* Century, ed. by Rodney Hilton, trans. by Ruth Kisch (Oxford: Blackwell, 1956), pp. 135, 200.
[17] John Hudson, *The Oxford History of the Laws of England, II, 871-1216* (Oxford: Oxford University Press, 2012), p. 666.

result of a novel-disseisin action, it indicated 'the nature of tenure'.[18] Milsom writes that the royal courts had authority only over those tenures 'for which the services due were capable of exact specification'.

Therein lies the rub, for services were frequently incapable of being so specified.[19] For those involved, it was 'a new question'.[20] Juries could find themselves at a loss to say whether a tenement was free or unfree and at the same time, were quite certain that the tenant was free.[21] On the other hand, there are numerous actions, of which examples are given in these chapters, which were brought by litigants of whose personal status the courts could not be immediately certain. This was unsurprising in that free and unfree peasants had hitherto lived cheek by jowl, as Baker points out, with little to differentiate between them.[22] Yet Carpenter is confident that 'by 1215 the king's judges had developed a very clear test to decide who was unfree'.[23] If they had, and it is doubted by Hatcher among others as well as Hudson, the records of novel disseisin suggest that any confidence they may have had in its theory probably diminished as they put it into practice.[24]

Hyams extends Thorne's 'unexpressed assumption' that Bracton's primary motive was to describe English law as it existed at that time, concluding that he wished not only to reorganize but also to reform it.[25] This, he argues, is evident in the author's 'famous statement of purpose'.[26] Bracton observed judicial confusion

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[18] Hudson, *Oxford History*, p. 578.
[19] Chapters 1 and 2 passim, below; pp. 91-92, 98-106 below.
[20] Milsom, *Legal Framework*, p. 38.
[21] See *CRR*, II, pp. 122-23, discussed on ppp. 76-77 below.
[22] John Baker, *The Common Law Tradition; Lawyers, Books and the Law* (London: Hambledon, 2000), p. 328.
[23] David Carpenter, *Magna Carta* (London: Penguin, 2015), p. 109.
[24] John Hatcher, 'English Serfdom and Villeinage: Towards a Reassessment', *Past and Present*, 90 (1981), 3-39 (pp. 29-30). See also Carpenter, *Magna Carta*, p. 109; *Pollock and Maitland*, I, p. 393.
[25] Hyams, *King, Lords and Peasants*, pp. 83-84.
[26] *Bracton*, II, pp. 19-20: *communis intentio est de iure scribere ut rudes efficiantur subtiles, subtiles subtiliores, et homines mali efficiantur boni et boni meliores* (the general intention is to

over doctrine and principles which led the bench into 'arbitrary decisions on the one hand and indecisiveness on the other'.[27] His logical reaction was to use 'the two learned laws', Roman and canon, in which he was steeped, most particularly the former, and not the growing body of cases as a basis for his reforms. However, Baker believes that Bracton based his treatise on the king's writs supported by cases 'selected from the plea rolls', as well as 'speculative learning' from classical and ecclesiastical sources.[28] All that can be said with confidence is that Bracton cited numerous examples from the rolls, but it is unclear whether they informed or supported his views.

The relativity of villeinage

However, scholars have found a deeper purpose in *de Legibus* which relates specifically to status, underpinning and enveloping the whole of the author's teaching on villeinage. This is Bracton's 'relativity of serfdom' in that personal villeinage was not an absolute condition but relative to others.[29] 'Serfdom with him', writes Maitland, 'is hardly a status; it is but a relation between…serf and lord'. Vis-à-vis his lord, the serf was all but rightless; with regard to the rest of the world, he was all but free. Substituting 'villeinage' for 'serfdom', Hyams advances the theory as specifically created by Bracton for the purpose of teaching his readers, current and future members of the judiciary, the correct manner of dealing with suits involving servile peasants.[30] Glanvill taught that villeinage was, in Baker's words, 'an indelible status', in that a liberated serf was free only of his lord but remained servile to all others.[31] Bracton, on the other hand, argued for the

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treat of law that the unskilled may be made expert, the expert more expert, the bad good and the good better).

[27] Hyams, *King, Lords and Peasants*, pp. 84-86, 87, 88-90.

[28] John Baker, *An Introduction to English Legal History*, 4th ed. (Oxford: Oxford University Press, 2007), p. 176.

[29] *Pollock and Maitland*, I, p. 415.

[30] Hyams, *King, Lords and Peasants*, pp. 88, 107.

[31] Baker, *An Introduction*, p. 468; *Glanvill*, pp. 57-58

reverse on a wholly different principle which 'leaned in favour of liberty' to the point of presuming against villeinage. Baker is strongly at odds with Hyams in his support of this notion, as discussed in Chapter 2, but agrees with him on the relativity theory per se.[32] The evolving view of villeinage must have created difficulties for the king's justices even if they had possessed a basic formula for dealing with unfree litigants. The lack of any reference to such a formula in Bracton's pedagogy on servile tenants suggests that none existed.

If Hyams' view is accepted, that Bracton created his relativity theory to teach justices how to deal with villeins in an orthodox manner, it cannot be used to identify the true position of unfree people at the times it was written or revised and can never have been intended to do so. It explains why a point made in the treatise may be illustrated by one case in the rolls and apparently contradicted by another. It also demonstrates the lack of any precise definition of villein tenure. On the contrary its terms were complex and inconsistent and, as evident in the records, varied between manors to an extraordinary degree which at times baffled even those most nearly involved.[33] It is no wonder then that Bracton, as Hyams suggests, observed irresolution and inconsistency on the bench as judges discovered the impossibility of applying nationally uniform legal criteria to locally divergent lawful conditions.[34] It supports the hypothesis that the situation was unforeseen and took the judiciary unawares. An examination of the theory therefore goes some way towards comprehending the turmoil into which peasants

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[32] Baker, *An Introduction*, p. 468.

[33] See Brenner, 'The Rises and Declines of Serfdom in Medieval and Early-Modern Europe', pp. 247-76, in *Serfdom and Slavery, Studies in Legal Bondage*, ed. by Michael Bush (London: Longman, 1996), p. 261; Mark Bailey, 'Villeinage in England: a Regional Case Study, c. 1250-c. 1349', *The Economic History Review*, 62 (2009), 430-57 (pp. 431, 452); James Raftis, 'Social Structures in Five East Midland Villages: A Study of Possibilities in the Use of Court Roll Data', *The Economic History Review*, New Series, 18 (1965), 83-100, (pp. 93-94). However, Raftis also shows that Ramsey Abbey, despite its heavy impositions, was careful to encourage its unfree tenants: James Raftis, *Peasant Economic Development within the English Manorial System* (Montreal: McGill-Queen's University Press, 1997), pp. 119, 125.

[34] Hyams, *King, Lords and Peasants*, pp. 1-2 and passim.

were plunged by the nascent common law, of which novel disseisin was a major constituent.

Bracton's theory can be summed up as: 'nobody is *servus* to the whole world'; and, only the lord of an alleged villein could successfully accuse him of being so.[35] Both seem surrounded at times by a mass of apparently contradictory explanation, but the 'prime key' lies in the belief that villeinage was a two-person relationship and not comprehensive bondage.[36] Bracton himself seems initially to overthrow the first leg of his theory, that no-one is entirely bond, in stating that *nemo pro parte servus et pro parte liber, sed omnino servus vel omnino liber* (no-one is partly servile and partly free, but wholly servile or wholly free). However, he reconciles the two by adding that *quod esse poterit diversis respectibus* (which he may be in different respects).[37] In other words, bondage and freedom were absolute in their degree but relative to the individuals who owned them; so that a villein was wholly bound to the lord who owned his freedom, and simultaneously wholly free in his relationship to another who did not. Here then is the resolution of villeinage's apparently contradictory, twin properties of absolutism and relativity. A lord's control over his villein, which Bracton terms as being *in potestatem…naturalem* (in natural possession) of him,[38] is emphasized in the second leg of his theory, that only a bondman's own lord could prove his unfree

[35] *Bracton*, III, p. 101.
[36] Hyams, *King, Lords and Peasants*, pp. 90, 92-93. Hyams skilfully extrapolates the thread of Bracton's rationale from the scattered references in the treatise.
[37] *Bracton*, III, p. 101. Thorne notes that the line is probably an insertion: Thorne, 'Translator's Introduction', in *Bracton*, III, p. xiii. It is as though the author had become so absorbed in legal minutiae that he almost lost sight of the larger picture and suddenly found himself in danger of reasoning villein status out of existence. For distinctions within the condition itself, see Paul Vinogradoff, *Villainage in England, Essays in English Mediaeval History* (Oxford: Clarendon Press, 1892), pp. 55-56.
[38] *Bracton*, III, pp. 86-87. Interestingly, the author briefly drops the impersonal pronoun to speak of those *in nostram…potestatem* (in our…posssession).

status.[39] It is an obvious and necessary corollary to the principle of relativity and automatically caused any action brought by a proven bondman to collapse.

Interactions between villeins and lords not their own

The inverse argument, that a plaintiff so accused could proceed by objecting that his accuser was not his lord, was equally disastrous.[40] It caught him 'in his own trap' for he had ipso facto admitted that his freedom was not his own to possess but belonged to another lord.[41] He could only succeed in an action against a stranger-lord if the latter made no such accusation against him or, having been accused, he remained silent and no proof was brought. Doris Stenton seems not to have pursued this potential development in an action of novel disseisin. She notes only that, according to Bracton, a villein might hold of one not his lord and, if disseised by him, might sue under the assize.[42] A plaintiff, then, who was stayed in his suit of novel disseisin by his opponent's accusation that he was a villein, might defend himself on the grounds that the accuser was not his own lord. This would render the accusation out of order but simultaneously condemn the plaintiff out of his own mouth as the villein of another lord. It followed that the plaintiff had lost nothing since, as a villein, he could possess nothing and therefore his suit was void. He must look to his own lord to sue the defendant for the return of the property for it was his lord who at law had suffered the loss. If the villein-plaintiff received no help from that quarter, he remained disseised in practice though not de iure (in law) and the stranger-lord continued in situ.[43] Hyams points out that most defendants, when accusing a plaintiff of being a villein, omitted the word *suus* (his own), finding only sixteen in all the actions before the king's courts

[39] However, a lord had to bring such proof to the king's court before he might recover his villein since the latter also had 'public rights': Harding, *Medieval Law*, p. 224.
[40] *Bracton*, III, p. 103.
[41] Hyams, *King, Lords and Peasants*, pp. 95-96. Bracton himself made the further point only once, yet Hyams believes that it was close to what actually happened in the courts.
[42] *RJL*, editor's note to *c*. 78; *Bracton*, III, p. 102.
[43] *Bracton*, III, pp. 102-03.

which involved unfree status, including but not limited to novel disseisin. At the same time, he suggests that lord were likely to have pointed it out if they were being sued by their own unfree tenants.[44] This argument implies that the majority of villein plaintiffs were suing stranger lords, surely an unlikely possibility.

However, some cases may record situations where this did happen. One such example lies in an accusation of villeinage against Robert son of Aldwin by Matillda de Cameis whom he was suing for disseisin of a property in Dencheswrth' (Denchworth), Berkshire.[45] Matillda went further than most defendants when she told the Westminster court of 1202 not only that Robert *villanus est* (is a villein) but also that he was unfree *ex nativitate et ex parte patris sui qui villanus fuit* (by birth and through his father who was a villein), and put herself upon the jury. The pair later reached an agreement between themselves over an exchange of land which looks, very interestingly, as though it was conducted on nigh-equal terms. What was the lord-tenant relationship here? Robert acknowledged that one virgate of land in Denchworth, with its appurtenances, belonged to Matillda by right. He returned it to her, with four marks, and quitclaimed it *de se et heredibus suis inperpetuum* (on behalf of himself and his heirs for ever). In return Matillda granted him half a hide of land, also in Denchworth and with its appurtenances, to be held of her and her heirs for an annual rent of 6s. *pro omni servicio salvo forinseco servicio* (in the place of all services except outside services).[46]

Did Robert hold the virgate as a villein? Manorial custom usually gave villeins a right to remain on their land for as long as they rendered its dues, which he evidently had. Matillda was equally evidently anxious that he should no longer

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[44] Hyams, *King, Lords and Peasants*, pp. 100-01.
[45] *CRR*, II, pp. 93, 94, 132; cited by Cyril Flower, *Introduction to the Curia Regis Rolls, 1199-1230 A.D.*, Selden Society, 62 (London: Professional Books, 1944), p. 351.
[46] The latter phrase probably means services rendered off the manor, perhaps as a messenger or carrier.

tenant it, for reasons unlikely ever to be known. Yet, if Robert had been a villein tenant of it and she had wished to take it into her demesne or grant it away, he would simply have remained on it as a labourer whether she continued as his lord or not. There would have been no need to mention that *esse jus ipsius Matillidis* (it was Matillda's by right) for no villein could have any influence over a lord's right in land. Robert, then, must have been a freeholder of a free tenement so far as the virgate was concerned.[47] On the other hand, if he were a freeholder, what was the purpose of Matillda's outburst? Her request for a jury was clearly not opposed by Robert, for the bench permitted her to take out a writ *ad summonendum xij liberos et legales homines* (to summon 12 free and lawful men) to constitute a jury later that term. Its purpose was to decide on Robert's status but there is no record of its conclusion or, indeed, that it ever met. It may have been precluded by their agreement.

Is it possible, then, that Robert was an escaped villein and that Matillda suspected, or perhaps knew, as much and attempted to expose him? It would have been to her profit had she succeeded for she could have disposed of her lands as she wished without considering him and acquired a villein family into the bargain. He seems to have made no reply to her accusation, which would certainly have been recorded, but kept his counsel throughout which prevented her from forcing him to define his status. It strongly suggests that he was indeed a villein. Nor did Matilda offer any proof, which she certainly would have done had Robert been in her *potestas*, but relied upon determination by jury. Why, then, was she not content with the jury before her but requested another? Was it, perhaps, to give her time to come to terms with Robert? An agreement would have suited them both. Matillda was saved time, money and, if the jury found against her, the

[47] The arrangement over services for the half-hide which eventually replaced the virgate could have applied equally well to a free or villein tenant.

possibility that Robert would become uncooperative. He was confirmed as a free man de facto (in practice) though not, it should be noted, de iure (in law). There remained the possibility that his status would again be challenged in the courts, particularly if his real lord learned of his whereabouts and brought a writ of naifty against him within the time allowed.[48] However, from the record Robert has every appearance of success and prosperity and may have been outside his own lord's *potestas* for some time. The trial cannot have been a comfortable experience for him but he had no choice, for he would have subsided into villeinage as Matillda's unfree tenant if he had not challenged her disseisin of him. It is clear that she met her match in him, for he displayed knowledge, skill and courage in what became a game of cat and mouse. The case seems to be a clear example of a villein challenged by one not his lord.

A second, much later illustration comes from the Worcester eyre of 1221, another of Bracton's marked cases.[49] Alexander son of William admitted that he had disseised Osbert of Eshide (Rashwood in Dodderhill), Worcestershire, *quia tenuit eum ad villanum* (because he held him as a villein). He pleaded that Osbert had refused to render the service due on a quarter-virgate and so *posuit se in terram suam* (he had put himself in his own land). So far as Alexander was concerned, there were no two ways about it. The bench took a different view and enquired of him if Osbert *unquam cognouit se ad villanum suum* (had ever acknowledged that he was his own villein). The justices' use of the possessive adjective here is interesting. Why did they employ it when Alexander had not? If he had, and its omission in the record was a clerical error, he would surely have brought proof as Matillda might have been expected to offer. That he did not do

[48] The writ instructed the sheriff to deliver an escapee to his lord and could be resisted by the former bring a further writ to prove his liberty.
[49] *RJL*, *c*. 1057. On the marked cases, see p. 41 *n*. 2 above.

so indicates that, like Matillda, Alexander was not the accused's own lord. Were the justices seeking clarification, perhaps having their own suspicions about Osbert's true status? Alexander replied that Osbert *non cognovit neque defendit* (neither acknowledged nor denied it) and for the second time embarked on a justification of his action. Osbert *detinuit ei redditum suum* (had withheld his rent), despite doing fealty to him for the holding, *scilicet ad tres terminos ad quemlibet terminum xv denarios* (namely for three terms at 15d. for each term). The bench however was interested more in Osbert's refusal to admit villein status than in his withholding of rent. It adjudged that, *ex quo non cognoscit se ad villanum* (because he has not acknowledged that he is a villein), the claim of dispossession should proceed and Osbert was reseised.

If Alexander had not accused Osbert of villeinage but concentrated upon the withheld payment, he might have won the case. However he was an irascible and headstrong man, given with his sons to violent and vengeful behaviour. The jury subsequently informed the court that father and sons had carried away five of Osbert's houses *et gardinum suum exstirpaverunt ad valenciam trium marcarum et plus* (and dug up his garden to the value of three marks and more). The bench had them gaoled and their lands and goods taken into the hand of the king, with whom they were obliged to come to a financial agreement to secure their own and their property's release. Osbert took the opportunity of complaining that *ad perquisitum ipsius Alexandri* (at the suit of this Alexander) he had been imprisoned by the sheriff for nine weeks *et ideo inde loquendum* (and therefore this is to be spoken about). Through this information Osbert appears as a prosperous and successful peasant, like Robert before him, abused by a powerful

family of bullies.[50] It seems from the record that the intimidation he suffered was a result of the action he brought to recover the quarter-virgate, perhaps seven or eight acres. It may not have been the first problem he had with Alexander but it was the point at which he moved against him, and it seems disproportionately small compared with the reaction it provoked. Again like Robert, Osbert knew what he was doing in refusing to define his status and possessed remarkable fortitude in enduring Alexander's attacks upon him without retaliating, which would have brought him into disrepute before the court.

Both cases confirm the view that a villein who escaped his lord's *potestas,* and remained outside it for long enough to build a successful career as a freeholder, would have been astute enough to know how to maintain his liberty when accused of villeinage before a court. It is not known how many there may have been, but they were an additional strand in the complex problem of villeins and villeinage which continually confronted the royal courts. The cases illustrate specifically the difficulty in identifying an escaped villein, compounded by his ability to legally morph over time into a free man de iure (in law). This does seem on the face of it to be extraordinary, but it entirely conforms with Bracton's principle of relativity concerning serfdom. It returns the discussion to his point that only a bondman's own lord could furnish proof of his unfree status. Outside his lord's *potestas*, an escaped villein's legal position improved incrementally with time as he increasingly came into possession of his own freedom. If Robert and Osbert were not aware of the theory, they probably knew that the longer they operated as free men the more the law would accept them as such.

[50] It is possible that Alexander son of William was one and the same as Alexander de Holewey who was found to have dispossessed another tenant in Rashwood: *RJL*, *c*. 963.

Interactions between villeins and their own lords

Bracton's theory of a villein's position relative to his own lord was analogous to land tenure, in that freedom and serfdom were personal properties that might be in the possession of a different individual. So, a villein's bondage was possessed not by him but by his lord, in the same way that a man's property might be possessed by another. The lord, however, also held the freedom of both. 'Serfdom and liberty', writes Maitland, 'are treated as things of which there may be…legally protected possession'.[51] This led naturally to the conclusion that only a villein's lord might lawfully make an accusation of bondage against him because he alone possessed that bondage and therefore, resuming the tenure analogy, only he suffered dispossession and had the right to seek redress. By the same token, an escaped villein's lord began to lose possession of him just as a dispossessed tenant gradually lost his right over a holding to an individual who was in situ:

> *et sic iuste vel iniuste, eo solo quod est in possessione plus iuris habet in re possessa quam ille qui est extra possessionem et nihil iuris habet in re, propter commodum possidendi, sive servus sit sive liber*[52]
>
> and thus rightfully or wrongly, from the mere fact that he is in possession he has more right in the thing possessed than he who is out of possession and has no right in the thing, because of the advantage of possessing, whether he is bond or free

The sooner each took steps to recover possession of either, the less difficult it was. If a lord delayed, perhaps *per impotentiam vel negligentiam* (through weakness or negligence), the villein gradually assumed the mantle of freedom

[51] *Pollock and Maitland*, I, p. 417.
[52] *Bracton*, III, p. 98.

which could be reversed only by writ.[53] There are countless unsuccessful actions in the rolls, briefly recorded with no hint of explanation as to why they failed, which may represent tenants' attempts to hold freely.[54] Ocasionally there is an indication of what might have occurred, such as Richard Swann's unhappy experience discussed below,[55] but on the whole and despite the circumstantial evidence the real situation can only be conjectured.

Richard Swann simply *concessit se esse villanum* (acknowledged that he was a villein) in response to Walter's accusation and thereby abruptly terminated his own case. Did he intend to do that? It seems highly improbable. There is no indication of poverty, so he would have paid for his originating writ. The sparse account of his failed attempt demonstrates a state of ignorance on his part about the terms of the assize, which was seized on and manipulated by his lord. William offered no proof for his claim and all Richard needed to do, had he known, was to deny it.[56] He may have been one of Vinogradoff's 'third group' between free and servile tenants, a free man holding an unfree tenement and unaware of the distinction.[57] Or perhaps both he and his holding were free and he understood *villanus* in the old sense of 'villager' or 'country dweller', unaware of its heightened import. It certainly cannot be thought that he appreciated the consequences of using it. Probably he was altogether unaware of the obverse of the Angevin reforms and interpreted them solely in terms of securing his tenure. Whatever the circumstances he was fined half a mark and more importantly designated a serf de iure (in law) for evermore.[58] There must have been many

[53] *Bracton*, III, pp. 85-88. Bracton gives a closely argued explanation on how a lord could reclaim his own.
[54] For examples, see *ELAR*, *cc*. 1359, 1360, 1377, 1381.
[55] *ELAR*, *c*. 1311.
[56] The ability of an accused to block a charge of villeinage is discussed in Chapter 2 below, passim.
[57] Vinogradoff, *Villainage in England*, p. 146.
[58] A self-confessed villein in a court of law could not retract: *Pollock and Maitland*, I, p. 425.

Richard Swanns, humble free tenants who saw a chance to improve their and their families' lot and may even have believed that the crown was deliberately aiding them. They were defeated by a lack of knowledge and experience.

The brief sad account of Richard's ruined hopes and wrecked ambition somewhat perversely provides a wealth of possible insights into the mentality of others, then and later. It can be confidently deduced that he believed himself to be a free man or he would scarcely have gone to the trouble of bringing the suit. If he had given little thought to his status before, the loss of his property must have focused his mind upon it and he knew enough about novel disseisin to be able to bring his disseisor into the royal court. Evidently Richard and others like him were not content to allow lords to reduce their independent status to one of servitude. Freedom must have been desirable to them and worth the trouble, time, expense and no doubt seigneurial opprobrium in seeking it. The unexpected turn of events which so rudely catapulted him into proven serfdom must have shocked his contemporaries and perhaps had a double effect. Those who found themselves in similar circumstances and resisted them as he did would have received a sharp lesson in what they needed to know before they came to court. Others may have weighed free status against servitude and found it not worth the struggle. It was perhaps too abstract a concept for those who saw little practical difference, as Baker shows, in the burdens of free and unfree neighbours,[59] and had not the foresight to consider further possible consequences. But their neighbours who did may have begun to doubt the stability of their own futures, perceiving the two-edged nature of the royal reforms towards their class, and make preparations to defend their position. The evidence for this is discussed in Chapter 3.

[59] See p. 50 *n*. 18 above.

Still others were no doubt alerted to the ability of the assize to make bondmen free and used it to overturn their own known or suspected servile status. All would have benefited from Richard's experience, broadening the sum of peasant awareness of the law and their own condition. It seems not to have been anticipated that lords might use the assize for their own purposes in villeinizing free men. The widespread difficulty of maintaining free and unfree in their separate condition caused considerable anxiety and may have led to the disputed *favor libertatis* (bias towards liberty), discussed in the following chapter. The possibility of seigneurial abuse of novel disseisin brings Richard's lords under the spotlight. Did Walter and his son deliberately disseise him to render him a villein? They may have genuinely believed him to be unfree and wished to confirm it, or were concerned that his status was uncertain and again wished to be sure of him, or knew him to be free and had every intention of reducing him to villeinage. It perhaps surprised them that he agreed, and so readily, to their charge against him and it is possible that they came to court ready to prove his villein status. It will be recalled that they were the prime movers, Richard's suit being a reaction to their dispossession of him.

Conclusion

The cases cited in this chapter were worked through the royal courts before *De Legibus* was penned or its author had developed his ideas on the relativity of villeinage. The purpose of the treatise was didactic, to instruct justices on the correct way to deal with villeinage cases, and it is probable that he used the records he marked to reinforce his views rather than as a basis for them. Scholars largely agree that the Angevin reforms unintentionally divided peasants into free and unfree through denying the latter access to the royal courts, but they differ as to how villeinage, of persons or tenure, was legally defined. There seems to have

been no certain test at the end of the twelfth century because, in the author's view, it had not been anticipated that so many peasants would consider themselves to be on the 'free' side of the divide. There is support for this in Bracton's detailed exposition of the numerous situations in which a villein might find him- or herself. The records provide evidence that the complexity of the situation was used by some peasants of doubtful, if not villein, status to obtain personal freedom but that, conversely, free men may have fallen into servility through ignorance of its pitfalls. By the same token, some lords may have taken advantage of it to villeinize possibly free tenants. Whether or not they were successful, there was little change to the land itself or the manner in which it was farmed. Bracton's theory, in direct contrast with that of Glanville fifty years earlier, was that villeinage related only to the servile tenant's lord and that, relative to others, he had free status and his position was analogous to the tenure of property. The theory's consequences were far-reaching but lay more in the future than at the time Bracton wrote.

CHAPTER 2
THE DETERMINATION OF VILLEINAGE IN THE ROYAL COURTS

Introduction

The royal courts directly involved themselves in the determination of villeinage in actions of novel disseisin in two ways: through jurors' knowledge; and by judicial decision based on evidence. As discussed in the previous chapter it was the legal reforms themselves, issued by Henry II in the mid-twelfth century and of which the assize was a major part, which split the peasantry into free and servile tenants. The latter were denied access to assize and courts but there seems to have been a great discrepancy between humble and seigneurial definitions of servility which resulted in a 'widespread and intense insistence on freedom' by many peasants, evident from their appearance in the royal-court rolls.[1] The reason, in Hilton's view, was the shocking immediacy of the split. The early plea rolls, then, record disputes over status at a time when freedom 'was something that was only just being lost'.[2] They therefore inform on peasant perceptions of free status and the seigneurial arguments levelled against them. They show that a common factor was the lack of consistency in defining servility; that both sides to a dispute might agree on the services or conditions imposed but not what they meant in terms of status.[3] They also illustrate the modes of proof acceptable to the courts but at the same time demonstrate their inconsistency and vulnerability to abuse.[4] They support not only the view that peasants were taken by surprise, but also the hypothesis that the courts were too. Little guidance was provided to them by the jurists, because the situation was an unexpected consequence of their own

[1] Rodney Hilton, 'Freedom and Villeinage in England', *Past and Present*, 31 (1965), 3-19 (p. 14).
[2] Hilton, 'Freedom and Villeinage', p. 14.
[3] For an example, see *CRR*, VII, pp. 60-61.
[4] For examples, see *ELAR*, *c*. 423; *CRR*, I, pp. 187, 262, 278, 283. Vinogradoff writes that there are 'discrepancies and confusion' from the outset in the legal approach to the origin of an individual's villein status: Paul Vinogradoff, *Villainage in England, Essays in English Mediaeval History* (Oxford: Clarendon Press, 1892), p. 59.

measures. The chapter deals sequentially with the attitude of the courts towards peasants of uncertain status, the modes of proof, the several rôles played by juries, and the bases of judicial decision.

The attitude of the courts

Scholars are divided as to whether the royal courts were lenient or oppressive towards potentially unfree litigants. Maitland, quoting Bracton, writes that the king's justices 'openly profess a leaning in favour of liberty'.[5] Bracton himself wrote that *semper erit pro libertate iudicandum donec probetur in contrarium* (we must always presume in favour of liberty until the contrary is proved).[6] Vinogradoff agrees that court procedure concerning status 'was decidedly favourable to liberty' which he openly conflates with the altogether antipathetic 'liberation of the servile class'.[7] This is strenuously opposed by Hyams who comprehensively demolishes five of the six examples which Vinogradoff supplies as evidence of the position in the thirteenth century, particularly its early decades, and consigns the sixth, and in his view correct, point to a later time.[8] Nevertheless he finds that the courts exercised a 'surprising impartiality' concerning villeinage, illustrated by the rules on the onus of proof. In Carpenter's view, however, they were oppressive to all litigants including the unfree.[9] Milsom also writes that the bench always favoured lords against their tenants whenever possible.[10] How is this later opinion to be reconciled to the principle of *favor libertatis* (a bias towards liberty) which Bracton affirms several times, and to the enrolled

[5] *Pollock and Maitland*, I, p. 417.
[6] *Bracton*, III, p. 88.
[7] Vinogradoff, *Villainage in England*, pp. 83-85.
[8] Paul Hyams, *King, Lords and Peasants in Medieval England: The Common Law of Villeinage in the Twelfth and Thirteenth Centuries* (Oxford: Clarendon Press, 1980), pp. 206, 208-12, 218. Hyams adds that all Vinogradoff's arguments may be applicable to a subsequent period: Hyams, *King, Lords and Peasants*, p. 209 *n*. 33.
[9] David Carpenter, *Magna Carta* (London: Penguin, 2015), p. 209.
[10] Stroud Milsom, *A Natural History of the Common Law* (New York: Columbia University Press, 2003), pp. 140-41.

examples which appear to show the bench giving an accused tenant the benefit of the doubt over his status?[11]

Exactly what, then, was *favor libertatis*? Hyams believes that it was based on Roman law and an 'entirely new idea' to English jurisdiction, arguing that the late twelfth- and early thirteenth-century courts used it for the sole purpose of protecting 'free men against wrongful accusations of servility'.[12] Essentially he argues that there is evidence for its presence, neither in previous English law, nor in the procedure of the early common law as shown by his critique of Vinogradoff, nor in the onus of proof which is discussed below. It is a wholly unwarranted self-image cultivated over time. Allowing that the law-givers, the king's counsellors, were concerned to maintain free men and villeins in their respective states,[13] it was nevertheless extremely difficult in some circumstances to differentiate between them. It follows that at times justices were faced with the prospect of not knowing if the decision which they had to make would enserf a free tenant or enfranchise a villein. Did Bracton observe in the early records that the common law, by freeing enserfed tenants and villeinizing free men, was causing inconsistency and chaos within a previously unexceptional and orderly populace and write to rectify it? On the other hand, did his academic preoccupation with the niceties of status have the effect of perpetuating the problem?[14] Whichever is correct, nowhere does Bracton state that a known villein should be freed. *Favor libertatis* was far from expressing a desire to free a given tenant from his proven servile condition. It was perhaps even further from

[11] *Bracton*, I, p. 417 *n*. 4; for possible examples, see *ELAR*, *cc*. 51, 1419.
[12] Hyams, *King, Lords and Peasants*, pp. 203-04, 206-07. The principle eventually led to the abolition of serfdom.
[13] Hyams, *King, Lords and Peasants*, p. 118.
[14] A 'tiresome preoccupation with donnish trivialities' in Hyams' words: Hyams, *King, Lords and Peasants*, p. 93.

anticipating the eventual disappearance of serfdom from the established order of society, which would have been unthinkable to the educated élite.

On the contrary it was an absolute; freedom itself was to be protected in the context of the possessory assizes *quia praeiudicialis est disseisina* (because disseisin is preliminary).[15] In this, it would seem, is the basis of Maitland's dismissal of the idea that a lenient judicial approach was responsible for an escaped villein's ability to claim freedom.[16] Rather, it rested on the rigorous principle that a situation which existed de facto (in practice) should be protected until proved not so de iure (in law), which was, in his view, 'one of the great constructive exploits of medieval law'. Hence, a dispossessed tenant of alleged villein status was allowed to bring an action of novel disseisin to recover his holding, and to proceed with it, unless the accusation could be proved. Doris Stenton's view that where a man's status was uncertain 'the judges acted on the presumption of his freedom' is therefore correct but, by omitting to explain the reason for the presumption which she would certainly have known, she implies an inexact motive for it.[17] Nor was the tenant regarded as a free man de iure even though he continued as such de facto. Bracton terms him a *statuliber*, one as in a state of liberty, because his freedom was circumstantial and not proven and might be overturned.[18]

Modes of proof

Villeinage might be proved in one of two ways: through status; and by tenure. Regarding status, an accusation of serfdom was no proof in itself but had to be accompanied either by evidence or by an appeal to the jury, otherwise it failed. The exception was when the accused admitted it, either immediately or later when

[15] *Bracton*, III, p. 88.
[16] *Pollock and Maitland*, I, p. 417.
[17] Doris Stenton, 'Introduction', pp. xvii-lxxxii, in *ELAR*, p. lxxviii.
[18] *Bracton*, III, p. 93.

he returned to court to withdraw his initial denial.[19] The most common way to prove villein status was by suit of kin, to show that the accused was born into villeinage and therefore unfree *de sank* (by blood).[20] The accuser brought into court at least two near relatives of the accused who were prepared to vouch for their own unfree status and thus implicate him. It was an uncertain method. The bench might ask the jury to decide on the validity of the accusation or the accused might flatly deny the charge and produce his own evidence to the contrary.[21] Since many accusers were lords, the courts' impartiality towards the charges they levelled must at times have been compromised by seigneurial power and influence, inevitably largely obscured from view.[22] Nevertheless there are plenty of records which show that the rules were followed. In 1204, for example, the Westminster bench gave scant credence to Richard de Nevill's claim that he would bring proof of his accusation of villeinage against his complainant, a miller, *ad diem et ad horam* (at a later date).[23] They allowed the action of novel disseisin to proceed, to Richard's discomfiture, upholding the rule that an accusation must be proved or fail.

Proof of villein status by tenure was preferred by lords, in Hyams' view.[24] By proving their right to a villein's dues and services, they secured the law's help in implementing them. Tenure was complicated by the holding of land for servile dues by free tenants whose status should not thereby have been compromised. Bracton is wholly clear on this, yet there always remained the possibility that it

[19] *ELAR*, *c*. 1311; *Pleas*, IV, *cc*. 4072, 4102.
[20] John Baker, *An Introduction to English Legal History*, 4th ed. (Oxford: Oxford University Press, 2007), p. 468. For an example, see *CRR*, V, pp. 193, 212.
[21] For an example of the former, see *CRR*, VI, p. 355; and of the latter, *CRR*, IV, p. 196, both discussed below.
[22] Hyams, *King, Lords and Peasants*, pp. 218-19. A possible example may be found in *Three Rolls*, p. 70.
[23] *CRR*, III, p. 140, discussed on p. 81 below.
[24] Hyams, *King, Lords and Peasants*, p. 118.

might happen.[25] It was obviously easier to maintain the distinction if a free tenement was held simultaneously with the villein holding.[26] Those, on the other hand, who had long held a single tenement for disputable services could find themselves in a very difficult position.[27] Maitland sets out the services required of a servile tenant but complains that Bracton 'never undertakes to tell us precisely what it is that makes them villein'.[28] It has been the medieval historian's constant refrain. Bailey gives a useful résumé of the historiography from Vinogradoff onwards, agreeing with the latter that villeinage was 'a complex mould' and with Hyams that it was extremely difficult to identify in practice.[29] He also remarks on the gap between villein practice and theory of which the royal justices were well aware; in fact, listening as they did to jurors from various regions distinguishing between free and villein services in their different locations, none could have been more so. The Westminster bench of 1204, for example, considering a case of novel disseisin from Oxfordshire, heard a lengthy and detailed description of the services and obligations due from the tenement including those which frequently carried the stamp of servitude.[30] It was enough to cause the plaintiff to withdraw his suit, but there was no mention of his being a villein. Possibly he was a free man holding unfree land for villein services, yet one of the obligations was to present a lance to the lord or his serjeant (the jurors were uncertain which) when his daughter was married. This was perilously close to *merchet*, a sign of villein status since it impinged upon personal freedom. Maitland concludes that *merchet* was 'generally regarded as a base payment', unhelpfully adding 'though not a

[25] *Bracton*, III, p. 107.
[26] For an example of the same free tenant holding both a free and a villein tenement, see *RJL*, *cc*. 174, 176, discussed on pp. 92-93 below.
[27] For an example, see *CRR*, VII, pp. 60-61. The topic is discussed on pp. 93-101 below.
[28] *Pollock and Maitland*, I, pp. 366-68, 369.
[29] Mark Bailey, 'Villeinage in England: a Regional Case Study, c. 1250-c. 1349', *Economic History Review*, 62 (2009), 430-57 (pp. 431-32).
[30] *CRR*, III, p. 143. Services and dues are discussed on pp. 97-106 below.

conclusive mark'.[31] Bailey finds it ubiquitous proof even in Suffolk where serfdom was comparatively rare but this was later in the thirteenth century when it became conclusive.[32] Earlier, it was an uncertain indication since the abrupt penetration of custom by the common law did not neatly divide it into free and unfree practices.

Juries

Strictly speaking, the twelve men empanelled for an assize were recognitors, appointed to give the court background information on the disputes before them. It becomes clear from the rolls that they could play several parts. They could present the court unprompted with their knowledge of an alleged villein or unfree tenement, or they might be asked by the bench to decide on the evidence of the litigants. Either of these could occur during the initial possessory hearing.[33] However, an accusation of villeinage against the plaintiff suspended the court as an assize and with it the role of the recognitors while the bench weighed the evidence for the plaintiff's status. If he were free, court and recognitors resumed their original function. If, however, the litigants pre-empted the bench and *ponunt se super juratam* (put themselves on the jury), they brought, in Maitland's words, 'a method of testing the truth…within easy reach'.[34] The court's function as an assize remained in abeyance and, instead, it became an inquest with the twelve converted from recognitors to jurors required to give a verdict:

> *Cum sic agatur de consensu partium cadit assisa, nec est capienda ut assisa sed vertitur in iuratam, et fiat sacramentum ita quod veritatem dicent...quia non est actum in hoc casu*

[31] *Pollock and Maitland*, I, p. 373.
[32] Bailey, 'Villeinage in England', pp. 438, 451.
[33] For the former, see *CRR*, VI, p. 383 and *CRR*, II, pp. 122-23; for the latter, *CRR*, VI, p. 355. All are discussed below.
[34] *Pollock and Maitland*, II, p. 617 and *n.* 1.

> *principaliter de disseisina...sed an talis sit vel talis, scilicet liber vel servus*.[35]
>
> When the matter is so raised, by consent of the parties, it is not to be taken as an assise but turned into a jury, and let an oath be taken thus that they will speak the truth...because what is here in question is not primarily the disseisin... but whether one is true or the other, that is, whether he is free or bond.

If they found for the plaintiff, again they became recognitors in the recommenced novel disseisin. The procedure offered a smooth transition from assize to trial and, if necessary, back to assize, saving expense and time to both litigants and court. It was a clever, cheap and efficient legal mechanism. However, it could founder on the crucial phrase, 'by consent of the parties'. If one disagreed, neither this nor the two further options open to litigants could proceed. One or other might request the bench for leave to assemble a different jury of xij liberos et legales homines (12 free and lawful men) to bring in a verdict at a later date on the evidence presented to it; or to empanel twenty-four knights for the same purpose. The latter was obviously far more expensive and took much longer to assemble, usually at the behest of a wealthy lord, but could equally well be prevented by the dissenting party. The distinction between recognitors and jurors is obscured by the modern use of the word 'jury' to describe the panel of twelve in both types of court, although it served a different purpose.[36] However, it is used here to mean either for the sake of simplicity.

The most straightforward manner in which a jury determined status was when it apparently took the initiative in presenting the court with its knowledge of an alleged villein, almost invariably the plaintiff, or of the status of the disputed

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[35] *Bracton*, III, p. 90.
[36] For an explanation of the distinction, see *Pollock and Maitland*, II, pp. 617-26.

property. It is also possible, however, that the information was given in answer to a question from the bench. In an assize of novel disseisin brought by David of Cudinton (Cuddington, Buckinghamshire) before the Buckingham eyre of 1212, it unequivocally stated that *villanus fuit et vilenagium tenet…villane vendite et empte* (he was a villein and holds in villeinage [and is] bought and sold as a villein).[37] It seems to have pre-empted any such accusation by the defendants. Unfortunately the latter part of the account is largely illegible, recording only *pro falso clamio* (for a false claim). The case evidently collapsed and David was amerced. The reverse occurred in a similar action at Westminster a decade earlier. The jury was equally certain that the plaintiff here was a free man, although they were unsure about his holding.[38] The account is concise to a degree, typical of a straightforward novel-disseisin action with the addition of the villeinage element, and is worth giving in full:

> *Surr'. Assisa venit recognitura si Simon de Sutton' injuste et sine judicio [dissaisivit] Ghedricum cum Barba et Saivam uxorem suam de libero tenemento suo in Clopham infra assisam. Juratores dicunt quod Simon dissaisivit eos, sed nesciunt utrum sit liberum tenementum necne, sed dicunt quod Cedricus non est villanus. Dampnum ij solidi.*
>
> Surrey. The court meets to determine if Simon of Sutton injustly and without a judgement [has disseised] Cedric with the Beard and Saiva (possibly Sarah) his wife of their free tenement in Clopham (Clapham) within the assize. The jurors say that Simon has disseised them, but they do not know whether it is a free tenement or not, but they say that Cedric is not a villein. Damages 2s.

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[37] *CRR*, VI, p. 383.
[38] *CRR*, II, pp. 122-23, cited in Cyril Flower, *Introduction to the Curia Regis Rolls, 1199-1230 A.D.*, Selden Society, 62 (London: Professional Books, 1944), p. 222.

Again there is no indication that the defendant intended to accuse Cedric but perhaps the jury knew of an intention to do so and moved to thwart it. They were adamant that the plaintiff's personal status was free which, interestingly, appears to have over-ruled any potential problem with the status of the tenement.[39] The reason for this is shrouded in the clerk's economy of effort in his account of the hearing, for he did not even bother to record the judgement of the bench, nor that it amerced the defendant, which it must have done and, in the absence of any information to the contrary, for the usual sum of half a mark. He merely noted the damages; it was enough to indicate that due process had occurred. All of these with the details of the tenure of the Clapham holding would have been common knowledge. These and similar verdicts seem based solely on the jury's knowledge and not on an assessment of evidence; the jurymen simply put the facts as they knew them before the court. An example of an assessment of evidence occurred at Westminster in 1212 where the justices, following a heated exchange between Edith, the dispossessed free widow of a villein, and her formidable defendants over the status of the disputed property, decreed, somewhat cravenly one feels, that it was up to the jury to decide.[40] The case is a good illustration of the problems inherent in mixed unions, and also of the interaction between a lord and a villein tenant.

The jurors' information casts a glow of righteousness about them as *legales homines* (lawful men), but this was not necessarily the case. For example, in a minimal account of a novel disseisin action before the Wiltshire eyre of 1194, jurors pleaded ignorance of the nature of a disputed holding in Melkesham (Melksham), saying with the later Westminster jury that *nesciunt sit liberum*

[39] See pp. 69-71above.
[40] See p. 48 *n*. 13 above.

tenementum an non (they do not know if it is a free tenement or not).[41]It was not a rare verdict.[42] This jury made no mention of the plaintiff's personal status and appears to have been maintaining a prudent distance, legally speaking, from either litigant. The bench damningly advised the plaintiff, Walter son of Philip, that *querat alios iuratores si voluerit* (that he should seek other jurors if he wishes). There is no further information on the circumstances, no accusation by the defendant, no suggestion that the plaintiff might have been unfree, and no possibility of the case being concluded given the uncertainty. The justices' dry and pithy remark potentially conveys a great deal more than its brevity might suggest. They needed to know the situation before they could adjudicate on it. Clearly they thought the jurors' performance inadequate, but did they believe them to be more than simply inept or idle? May they have been bribed or threatened? The case has a taint of corruption about it, lending a faint air of menace to the defendant, *Ricardus le Cras* (Richard the Fat), and it may be an example of undue seigneurial pressure on the jury which did not extend to the bench. However, as explained above, the moment an accusation of villeinage was made, the procedure of novel disseisin was arrested and the nature of the court changed from an assize to an inquest. The panel of twelve, who were now true jurors rather than recognitors, might be called upon by either side to adjudge whether or not the evidence presented to them proved the plaintiff to be unfree. However, for the process to continue, both litigants had to agree to it. An example of what happened when one party dissented comes from the Norwich eyre of 1209 when the prior of Well (Hall in Gayton), Norfolk, was thwarted in his attempt to prove that the original plaintiff, Geoffrey son of Hugh, was a villein.[43] His initial

[41] *Three Rolls*, p. 70.
[42] Stroud Milsom, *The Legal Framework of English Feudalism* (Cambridge: Cambridge University Press, 1976), p. 23.
[43] *Pleas*, IV, *cc*. 4072, 4102.

difficulty was that *nullam produxit sectam* (he brought no evidence). Even so, he seems to have thought it worthwhile to ask the jury to determine *utrum sit nativus suus vel non* (whether he is his villein or not). Geoffrey, however, refused to follow suit but said that *petit assisam suam ut liber homo* (he seeks his assize as a free man) and the hearing came to an abrupt halt. Was the prior really so confident of the jury, and why had he brought no evidence for his accusation? Why, too, did the justices allow him to proceed without proof? It seems to flout the rule that, without proof, a court reverted from trial-mode to its original nature as an assize.[44]

It is possible that this is an example of collusion between the prior and his fellow lords on the bench. On the other hand, the prior was not the defendant but had arrived apparently for the purpose of terminating the action by revealing Geoffrey as a villein. It seems that he must have been the defendant's immediate landlord, as well as the plaintiff's owner-lord, but there is no record that he was called upon to help his free tenant. Is it conceivable, then, that the affair was an intrigue between peasants rather than lords, and came to the prior's notice too late for him to assemble proof of villeinage? Without him, would the jury have allowed the original action to proceed and even have found in Geoffrey's favour? Geoffrey was certainly adamant that he was no villein, but his refusal to join his accuser in applying to the jurors suggests that he knew they would find against him. It would have been one thing for them to acquiesce in a neighbour's attempt to acquire free status, and quite another to reach an incorrect, let alone false, conclusion on his behalf which would have incurred penalties. The circumstances suggest that this may have been an attempt at self-help between neighbours and that the jurors were prepared to use their position to that end to the disadvantage of their lord; but this must remain conjecture.

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[44] See pp. 71-72 above.

The process was prolonged for days or weeks if the defendant wanted a different jury. Matillda de Cameis, for example, appears to have been altogether dissatisfied with the jury she saw before her at Westminster in 1202 to the point of requesting another.[45] She had accused the plaintiff, Robert son of Aldwin of Dencheswrth' (Denchworth), Berkshire, of villein status and, in the absence of any reply from him, *ponit se super juratam patrie legalem* (put herself upon a lawful jury of the country).[46] The bench gave her leave to procure a different panel of *xij liberos et legales homines* (12 free and lawful men) which meant an adjournment. Neither Robert's agreement to Matillda's request nor her payment to secure it are recorded, but both must have occurred or her application could not have proceeded. There must always have been good cause for an accuser to request a different jury and not have the matter settled on the spot. The time lag may have suited Matillda for reasons discussed previously[47] and there is the ever-present possibility of malpractice, that jurymen were brought in who could be relied upon perhaps through bribery to support the accuser.

The procedure became more complex if the accuser requested and paid for a different, larger jury of twenty-four to adjudicate on the evidence, but the same principles applied. The case concerning the dispute at Holbeach, Lincolnshire, heard at Westminster in 1200 and alluded to in the previous chapter, is a good illustration of a larger jury in action, and also of proof of villeinage by suit of kin.[48] It began as a straightforward assize of novel disseisin, brought against Conan of Holbeach by Ailric son of Agg *de libero tenemento suo in Holebech* (concerning his free tenement in Holbeach). The defendant immediately stepped in to accuse Ailric of being his villein. This altogether changed the nature of the

[45] *CRR*, II, pp. 93, 132. The case is fully discussed in the previous chapter.
[46] Maitland explains that a jury's verdict was the opinion of the community in that area, and not only of twelve men: *Pollock and Maitland*, II, p. 624.
[47] See pp. 55-57 above.
[48] *CRR*, I, pp. 187, 262, 278, 283. See also *RJL*, *c*. 78.

assize, as previously discussed, and the court's prime purpose then turned from determining possession to ascertaining status. Both parties then *producit sectam de progenie* (brought forward witnesses concerning kin), the regularly accepted form of proving status.[49] In this procedure it was not the jury but the bench which decided who had the stronger case and, to Conan, it appears to have been unattractive. Before a decision could be reached, he offered ten marks for a jury of twenty-four to be convened to confirm the relationship between his own unfree witnesses and Ailric's family, specifically whether Ailric's father *fuit villanus et tenens in vilenagio* (was a villein and holds in villeinage), and the case was adjourned.

In fact a third option had been open to Conan and to his tenant. With the consent of the other, either could have requested the original jury to decide on Ailric's status, as the Norfolk prior, above, asked concerning his alleged villein. Evidently Conan disliked this also, nor did he wish for a further panel of twelve. The resumed hearing involved a jury which was not only entirely different from, but also twice the size of, the first. They were also of higher status being *legales milites de comitatu* (lawful knights of the county), whereas the twelve would have been *liberos et legales homines* (free and lawful men) but not necessarily knights. Did Conan have reason to think that the twelve would find in favour of his tenant? Through his determination to secure a knightly panel, he prevented first the bench and then the original jury from reaching a conclusion. The new jury, for which he paid the hefty sum of ten marks, found that Ailric *debet esse villanus* (ought to be a villein) and the bench reiterated that Conan had furnished sufficient evidence to prove that Ailric *esse villanum suum* (was his villein). It added that *ideo habeat*

[49] See p. 69 above.

eum tanquam villanum suum (therefore he should hold him as if [he were] his villein).

The construction of this sentence seems to cast doubt on the jury's verdict but it may have been an accepted form of words. Even so, the size of Conan's payment and his procurement thereby of a high-status jury seem to undermine Hyams' belief 'that lord and villein were procedurally on a par in status cases'.[50] While a case is argued below for a degree of detachment and objectivity on the bench, it stretches credulity that twenty-four knights summoned by one of their own would have viewed his troublesome tenant dispassionately. Is it not likely that they would have mentally reviewed their own tenantry in the light of Conan's problem and considered the possible impact on their own affairs if they granted his peasant the free status he claimed? This is not to suggest that all were automatically oppressive, although some may have been, but that account must be taken of seigneurial mentality and the mores of the age. The original suit of novel disseisin, now found to have been brought by a proven villein, collapsed. This, with the bench's possible misgiving over the knights' verdict, suggests that Conan knew his tenant's status to be extremely problematic and was particularly anxious to secure him as his villein, in which he succeeded.

The procedure of litigants putting themselves on a jury in any of the three possible ways outlined[51] was straightforward. There is every indication that it had been well thought out from the first by the law-givers and further honed by justices through long practice. An alleged villein's refusal to follow his accuser's lead was close, if not tantamount, to an admission and it put him in a sort of limbo. He remained unfree, not because there was no proof to the contrary but

[50] Hyams, *King, Lords and Peasants*, p. 214.
[51] The present jury might be asked to reach a verdict on the accused's status, or the bench's permission might be sought for twelve different men, or twenty-four knights, to be empanelled. Whichever party made the request, the other had to consent or it could not be implemented.

because he had prevented any decision on it. Maitland points out that he himself had invoked the plea by claiming free status, and he had either to submit or lose his original action by default because he had not shown himself to be free.[52] It put him in a bad light and a worse position, as Geoffrey son of Hugh discovered.[53] His whole defence was negative and insufficient for a legal system which required proof positive of free status as well as of villeinage. The content of the procedure could, however, be problematic, as the dispute between Matilda and Robert, and Geoffrey son of Hugh's case, suggest. It became potentially more open to abuse where suit of kin was involved. Conan, above, effectively tied the justices' hands in obtaining a jury of twenty-four knights to adjudicate on Ailric's pedigree and could be accused of purchasing the required result. It would be interesting to know what made Ailric so desirable as a villein tenant. Such juries were not unusual but less frequent than their socially and numerically inferior counterparts.

The latter were not immune to corruption but, on the whole, they seem to have exercised a degree of independent thought. There is evidence that in practice they were required to deal with situations not envisaged by those who constructed the judicial framework within which they worked. Would sophisticated legalists have anticipated that David of Cudddington would appear in their courts, or even the bearded Cedric? Little trouble was caused by either specifically, but their number was legion. Further, what of juries who found in favour of a known villein plaintiff, thus deliberately and irrevocably bestowing freedom upon him? Had that indeed been the aim of the jury before which Geoffrey son of Hugh appeared, it was no more than a humble equivalent of Conan's knights and cannot have been unique. If, as Hyams maintains, the bench avoided any bias towards freedom, the

[52] *Pollock and Maitland*, II, pp. 617-18; *Bracton*, III, p. 89.
[53] In the event Geoffrey submitted to the inevitable. He reappeared to withdraw his action and put himself in mercy.

sentiment may perhaps have lodged within a jury. If there were little *favor libertatis* for Ailric from the twenty-four, there may have been for Geoffrey from the twelve. But for the prior's intervention, there would be no whiff of it and it raises the possibility of its concealment in other outwardly unremarkable cases.

Judges

Where the plaintiff was accused of villeinage but the jury not called upon to give a finding, his status was determined by the justices after hearing all the evidence.[54] What seems to be a textbook example of this rule is found in a Wiltshire case heard at Westminster in 1204.[55] A miller, one Richard, claimed dispossession by his lord Richard de Nevill in Chiverel (Great or Little Cheverell). Nevill's defence was that *villanus est* (he is a villein), pleading that *ad diem ad horam habebit probam sufficientem* (he would offer proof enough in due course) although he had none to hand. So far as that court was concerned, then, the miller continued to stand before them as a free man because he had not been proved otherwise. The bench accordingly allowed the assize to proceed as was the right of a free man and it was entirely straightforward. The jury brought in a verdict of disseisin, the justices amerced the defendant and reseised the plaintiff. They appear to have followed Bracton's instructions to the letter, until it is remembered that they sat more than twenty years before his treatise was written. Whether they held an opinion on the miller's true status was irrelevant in the circumstances, and cannot be known. The large damages they awarded, 27s. 8d. as opposed to the customary amercement of 6s. 8d., might be taken as an indication that they believed he was a free man and suspected Nevill of a deliberate attempt to depress him into villeinage, but it must remain conjecture.

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[54] The property dispute was set aside until this had been accomplished. Only then, when the original suit was reopened, did the jury resumed its former function and delivered its verdict on the alleged dispossession.

[55] *CRR*, III, p. 140.

However the rules are of no help in understanding why justices reached their conclusion on status in those cases where evidence was given. For example, a high-profile and vociferously conducted plea of villeinage which similarly developed from an assize of novel disseisin, relating to land in Suffolk, was heard at Westminster in 1206.[56] No record of the possessory action itself has been found but its under-age plaintiff William of Stamford was claimed by the defendant William de Sine Fide (the Faithless)[57] as *villanum suum et consuetudinarium* (his own villein and customary tenant). He produced five men in evidence, countered by the accused with three which the justices decided were *sufficientem sectam quod liber est* (enough evidence that he is free). There is no record of their reasons for finding the three more convincing than the five although, again, there is a possible clue. The fifth of Sine Fide's witnesses was *quendam Willelmum* (a certain William) who, having been presented to the court as a villein, announced *se esse liberum hominem Eustacii de Braham* (that he was the free man of Eustace de Braham). This embarrassing error put the accuser in the king's mercy, probably for half a mark. Did it turn the justices to *favor libertatis*, allowing the original novel disseisin to proceed?[58] Would William of Stamford have found himself a designated villein like Ailric if Sine Fide had followed Conan's example and forestalled the bench by obtaining a kinghtly jury? On the other hand, it cannot be assumed that a given bench was not influenced by something altogether less than Maitland's 'constructive exploit'[59] and it would be valuable to compare the outcome of cases under specific justices. The Holbeach case discussed above, in which the defendant paid heavily for a jury of twenty-four knights to decide on his

[56] *CRR*, IV, pp. 121, 163, 195-96; cited in Edward Miller and John Hatcher, *Medieval England, Rural Society and Economic Change 1086-1348* (London: Longman, 1978), p. 113.
[57] A probably deliberate misspelling: see the note following.
[58] Flower is of the opinion that it did and also concludes that the accuser 'produced a bad impression on the scribe' who altered his name from 'de Sancta Fide': Flower, *Introduction to the Curia Regis Rolls*, p. 232.
[59] See p. 68 *n*. 16 above.

tenant Ailric's status, is a very good illustration of the manner in which a bench could be hamstrung, emphasized by the faint suggestion of doubt among its occupants over the verdict. As previously observed there was no *favor libertatis* for Ailric in the jury's decision. The question here is, might there have been *favor libertatis* in this situation with the bench's input?

The argument, then, begins to turn away from whether or not the bench defended liberty per se and towards its possible motivations. Were justices driven by legal principle, religious conviction or class prejudice? Hyams points out that they and others in authority who were themselves serf-owners 'must have experienced temptation' towards a prejudice against villeins.[60] The seigneurial mentality may have extended this to encompass all peasants, a lowly category associated in Norman minds with the beaten English.[61] To experience temptation, though, is not to fall into sin and there may have been a religious connotation to *favor libertatis* which would have been attractive to educated men. Brundage makes a convincing argument for the influence of Christianity on thirtenth-century legal procedure in general.[62] Many justices, and almost all the clerks, were priests. They were familiar with Christ's instructions on the treatment of the poor and needy and with their application in both canon and common law. More particularly, Maitland finds that Bracton's work has a 'sacerdotal spirit'.[63] Whether religious conviction prevented prejudice and corruption from colouring legal decisions, or a lack of it encouraged partiality, are moot points. Vinogradoff entertains the possibility of 'enlightened and humanitarian views' among the élite,

[60] Hyams, *King, Lords and Peasants*, pp. 218-19. The same type of partiality is noted elsewhere with respect to the male judicial approach towards women plaintiffs under coverture: Chapter 3 below, passim.
[61] See pp. 44-45 above.
[62] James Brundage, 'Legal Aid for the Poor and the Professionalization of Law in the Middle Ages', *The Journal of Legal History*, 9 (1988), 169-179.
[63] *Pollock and Maitland*, I, p. 208 and *n*. 3. Hyams also suggests that Bracton may have been in part religiously motivated: Hyams, *King, Lords and Peasants*, p. 86.

and it is important to balance the judiciary's known or suspected negative qualities with a presumption of a counter-weight of principle and fair-mindedness.[64] Those disposed to the latter would have been strengthened, and others perhaps encouraged to join them, by the strict requirements of proof. However, the original question of motivation remains unanswered. An understanding of justices' motives would clarify medieval attitudes to villeinage and liberty but it would not explain why Bracton was impelled to devote so much of his treatise to these topics more than half a century after the promulgation of novel disseisin.

Conclusion

It is evident from the rolls that there were clear procedures for dealing with villeinage when it was integral to an action before the royal justices. It suggests that this was expected to occur from time to time and that the authorities had it well in hand. The arrangements were sophisticated and the lawyers had every right to believe that they had made provision for almost all eventualities. In sum a jury might: either, volunteer information at the beginning of a case on persons and properties in villeinage; or, following an accusation of personal villeinage against a plaintiff, bring in a verdict then or later on the balance of the evidence presented to them, usually by suit of kin; or, adjudicate on the customary nature of a tenure, whether it was free or servile. Justices might elicit information from the jury, but were also able to arrive at a decision on status independently of it although they could be prevented, by juries' verdicts, from offering their own judgements.

However, Bracton deals far more with the possible content of cases concerning villeinage than with their structure. He gives the impression that he is confident of the latter but that the former is of greater concern; even, that he is

[64] Vinogradoff, *Villainage in England*, p. 85; Hyams, *King, Lords and Peasants*, p. 208.

working out how best to advise the courts on a case by case basis, suggesting that the number of alleged villeins before them was not envisaged, nor the complexity of their disputes. He seems to be developing methods of handling villein cases as they arose, supporting the notion that their number and variety were scarcely anticipated. Had they been, it is almost inconceivable that an orderly procedure would not have been put in place to enable justices to deal with them, in the same regulated manner that impoverished litigants were processed through the courts.[65] For example, *merchet* might have been introduced as legal proof of villein status. It was already widely accepted as such, albeit often in conjunction with other dues, and would have been a logical measure. There was, however, nothing. Bracton's ambivalence is reflected in the historiography, scholastic opinion being divided over the attitude of royal justices towards potential villeins and on the bench's possible inclination towards *favor libertatis*. It is difficult to reconcile the strong views held by some historians against this with evidence in the records of the bench's sympathy towards litigants whose legal situation appeared almost impossible to determine, even by customary measures.

An explanation for the dichotomy may lie in the particular time-span of the study. The first thirty years of recorded novel-disseisin suits fall into a period when the details of the assize were being hammered out by trial and error. There was no precedent. In fact, it was these cases which were setting precedent and which Bracton marked in the rolls for future reference. The presiding justices were far more likely to give a plaintiff the benefit of the doubt then than they were several decades later. When proofs of villeinage and legal procedures had both hardened, there was neither the room nor the need for *favor libertatis*. It is testament to the impartiality of the bench as a whole at the earlier time that they

[65] See Chapters 4 and 5 below.

took pains over the status of the individuals then before them. Insufficient weight may have been given to the influence of Christianity on judicial decision. It would be strange if this had not also been observed, as a matter of course, in the common law. There is also evidence that lords may have worked together, as knightly juries supporting a knightly defendant, as it was in all their interests to prevent a plaintiff from proving or acquiring free status. Similarly, there may have been an element of covert collaboration between ordinary jurors and potentially villein plaintiffs to confirm the latter in free status. From time to time, there is a hint of such a covert operation which, again, would have been in the mutual interest. Given the uncertainty over status, not every juror can have been confident of his own personal freedom and would have had reason to support, where possible, a neighbour who, as plaintiff, found his free status threatened by his defendant. Both situations may be further indicators that the law-givers were unprepared for the details of villeinage to be worked out through the courts.

Chapter 3
TENURE AND SERVICE

Introduction

Personal status was a binary condition, as opposed to a tenement which might be neither freehold nor villein but held conditionally.[1] It was not possible therefore to define free and villein tenure in comparative terms. Villeinage hinged upon customary service yet cannot be determined by that because free peasants also performed services which were customary for land which was freely held.[2] The distinction between free and villein tenure therefore hung upon the kind of customary service which denoted servility but, again, this was compromised by variability from manor to manor and region to region. What was unarguably servile in one local court might be nothing of the kind in another.[3] While this was of no consequence within an area served by such a court, it had potentially catastrophic results for a tenant who, considering himself to be free in his locality, yet found his liberty threatened by national jurisdiction. His dilemma was compounded by the lack of any consistent definition of what constituted servile custom.[4] Baker's view that Bracton discovered and taught a criterion in 'the distinguishing mark…that the services were uncertain' does not provide a complete solution.[5] In Bracton's own words:

> *ille qui tenet in villenagio, sive liber sive servus, faciet*

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[1] John Hudson, *The Oxford History of the Laws of England, II, 871-1216* (Oxford: Oxford University Press, 2012), p. 632.
[2] Wendy Davies, 'On Servile Status in the Early Middle Ages', pp. 225-46, in *Serfdom and Slavery, Studies in Legal Bondage*, ed. by Michael Bush (London: Longman, 1996), p. 238; Georges Duby, *Rural Economy and Country Life in the Medieval West*, trans. by Cynthia Postan (London: Arnold, 1968), pp. 195-96; Edward Miller and John Hatcher, *Medieval England, Rural Society and Economic Change 1086-1348* (London: Longman, 1978), p. 118.
[3] See p. 52 above; also Miller and Hatcher, *Rural Society*, pp. 122-24.
[4] Miller and Hatcher, *Rural Society*, pp. 112-13: 'lawyers used a variety of criteria, none of which proved altogether satisfactory'.
[5] John Baker, *An Introduction to English Legal History*, 4th ed. (Oxford: Oxford University Press, 2007), p. 307.

> *de villenagio quidquid ei praeceptum fuerit, nec scire*
>
> *debet vespere quid facere debeat in crastino, et*
>
> *semper tenebitur ad incerta*[6]
>
> he who holds in villeinage, whether free or bond, will do from the villeinage whatever he is ordered, nor need he know at night what he will need to do on the morrow, and he will always hold by uncertain requirements.

The passage here defines the status not of the tenant but the tenement which, as rehearsed above, was crucial in determining land claims.[7] Maitland writes that an unfree tenement could be identified by labour services which were 'the test usually applied by the king's court'.[8] These were were likely 'to be done all the year round' which obliged the tenant 'to obey, within wide limits, whatever commands' he received. In other words, an unfree tenement was very likely to be held ipso facto by an unfree tenant. Hudson also finds that the best a jury might achieve in determining the status of a tenement was to 'identify the status of the tenant'.[9] Yet these were not complementary, in that the latter was binary and the former was not.[10] Efforts to determine the status of holdings was further undermined by the well documented and probably widespread tenantry of villein holdings by personally free peasants, and by Bracton's 'uncertain requirements' which leave plenty of room for argument as the records discussed below demonstrate.[11] The early novel-disseisin cases are not rich in examples of villein

[6] *Bracton*, III, p. 131; *Bracton*, II, p. 89.
[7] See p. 49 above.
[8] *Pollock and Maitland*, I, p. 372.
[9] Hudson, *Oxford History*, p. 667.
[10] See pp. 42-43 above.
[11] See *nn*. 15, 16 below.

services, but those that exist vividly illustrate tenants' confusion over where they stood with them.

A common element throughout the records is the defendant position of lords. How did they so provoke their tenants that they considered it worth their while to sue in the royal courts? The large number of such cases suggests a surprisingly high level of dissatisfaction with their manor courts. There was no external appeal and security of tenure 'relied upon the needs of the lord and the customs and decision of [that] court'.[12] Two possible explanations present themselves: increased pressure from lords through the imposition of more onerous dues or the absorption of holdings into demesne land; or attempts by tenants to reduce their obligations possibly by claiming to be freeholders. The author's hypothesis is that, as the latent possibilities of novel disseisin dawned on both lords and tenants, elements of each strove to use it to their own advantage. This chapter argues for a deliberate seigneurial strategy on the part of some lords to manoeuvre their tenants into a position in the royal courts where they could be identified as villeins, whether or not they were so. It was a cynical manipulation of the assize. There is supporting circumstantial evidence that it may have been recognized and resisted by justices. Given the general concern at the time that no free man should be villeinized, it is likely that this was an unintended consequence of the assize as much as its attempted and sometimes successful manipulation by aspiring freeholders.[13] If the hypothesis is correct, it would superficially appear to fit in with Milsom's argument that the assize was

[12] Hudson, *Oxford History*, p. 666. See also Stroud Milsom, *Historical Foundations of the Common Law*, 2nd ed. (London: Butterworth, 1981), pp. 101-02.
[13] Paul Hyams, *King, Lords and Peasants in Medieval England: The Common Law of Villeinage in the Twelfth and Thirteenth Centuries* (Oxford: Clarendon Press, 1980), p. 207.

originally intended as a corrective to seigneurial abuse.[14] It falters, however, when viewed against the backdrop of what actually happened during court hearings. The confusion over services and the absence of clear guidelines for justices on the definitions of freedom and servitude are strong indicators that the situation was never anticipated by the sophisticated legalists who otherwise drew up the assize with care and forethought, whatever their original intentions.[15] It is scarcely conceivable that they would not have provided a common denominator at the outset, had they anticipated so great a number of potentially free tenants seeking the protection of the king's court. The chapter considers the theory through the evidence in the novel disseisin records. It examines cases which concern: the position of free men holding customary tenements; the confusion in determining villein services; and the possible use of the assize by lords for the purpose of impressing free men as villeins.

Free men holding customary tenements

Bracton is clear that holding a tenement in villeinage did not affect a tenant's personal status.[16] In practice, however, it is evident that the one word *incerta* (uncertain), when applied to services, plunged a great number of people into a legal sub-category of exclusion in which those of free status could find themselves entangled.[17] Hyams reasons that a family could slide into villeinage in a generation through the sale of a holding from one lord to another, since no-one would concern himself to distinguish between a humble free peasant, whose services were transferred with the property, and a villein who was sold bodily

[14] See p. 30 above.
[15] Hyams notes that no precise tests of villein tenure existed until later in the thirteenth century: Hyams, *King, Lords and Peasants*, p. 186; Miller and Hatcher refer to 'lawyers hammering out a doctrine of villeinage' at the turn of the twelfth century: Miller and Hatcher, *Rural Society*, p. 117.
[16] *Bracton*, III, pp. 101, 106-07. Equally, a bondman holding a free tenement was not thereby enfranchised: *Bracton*, III, p. 90.
[17] *ENAR, c*. 769; *CRR*, II, p. 99; *CRR*, VI, p. 355.

with it.[18] He goes so far as to suggest that Bracton's theory of villeinage might include the presumption 'that families could become villein by virtue of dwelling on villeinage land for a given length of time'.[19] To rent a villein property, then, was a dangerous course of action but the drawbacks appear to have been considered worth trading for the greater prestige and economic advantage that accrued with larger, albeit villein, acreages.[20] Maitland believed that 'there may have been many free men with villein tenements.[21] These are Vinogradoff's 'customary freeholders' whom Bush calls 'unfree tenants', whose personal free status should not have been impaired by holding villeinage tenements.[22]

These men ought not to appear in the records because, although free themselves, the servile nature of their property denied them access to the Angevin reforms and the royal courts. This was the theory but, in practice, who was to stop them? The clerk issued the originating writ at the plaintiff's instruction and there seems to have been no test of eligibility, no proof of entitlement required, before he did so. This may have been for the very good reason that the whole point of the legal exercise was to test the claim. On the other hand, would the legislators not have introduced more specific qualifying criteria had they envisaged such an influx of potentially unfree litigants? It is argued here that, in restricting the assize

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[18] Hyams, *King, Lords and Peasants*, p. 5. See also Cyril Flower, *Introduction to the Curia Regis Rolls, 1199-1230 A.D.*, Selden Society, 62 (London: Professional Books, 1944), p. 427.
[19] Hyams, *King, Lords and Peasants*, p. 114. See also David Carpenter, *Magna Carta* (London: Penguin, 2015), pp. 114-15.
[20] Michael Postan, 'Medieval Agrarian Society in its Prime: England', pp. 549-632, in *The Cambridge Economic History of Europe, Volume I, The Agrarian Life of the Middle Ages*, ed. by Michael Postan, 2nd ed. (Cambridge: Cambridge University Press, 1966), p. 614; Michael Bush, 'Serfdom in Medieval and Modern Europe: a Comparison', pp. 199-224, in *Serfdom and Slavery, Studies in Legal Bondage*, ed. by Michael Bush (London: Longman, 1996), p. 222. See also Flower, *Introduction to the Curia Regis Rolls*, p. 427. Men and women also married into villein families, presumably for love, which incurred additional problems for surviving partners and offspring: Miller and Hatcher, *Rural Society*, p. 113; *Bracton*, III, pp. 92-94.
[21] *Pollock and Maitland*, I, p. 381.
[22] Paul Vinogradoff, *Villainage in England, Essays in English Mediaeval History* (Oxford: Clarendon Press, 1892), pp. 146, 80-81; Bush, 'Serfdom in Medieval and Modern Europe', p. 200. See also Phillipp Schofield, *Peasant and Community in Medieval England, 1200-1500* (Basingstoke: MacMillan, 2003), p. 13.

to free persons, they may have thought they had done so. On the face of it, there is no clearer example of a customary freeholder before the king's court than Anger son of Hugh who was alluded to in the introduction to this section.[23] Anger complained to the Lincoln assize of 1218 that he had been disseised of his free tenement in Cuningesholm (Conisholme) by Gilbert son of Harold, but the jury found against him for the reason that *terra est vilenagium eiusdem Gileberti et idem Angerus illam tenet in vilenagio* (the land is Gilbert's villeinage and Anger holds it in villeinage). He was accordingly amerced for a false claim. Two entries later is the record of a failed attempt to accuse him of being a villein which, Doris Stenton notes, was marked by Bracton as illustrative of the principle that the onus to prove a charge of villeinage lay with the accuser. In this suit Anger was successful against Robert son of Robert for dispossessing him of land in Yeresburc (Yarborough). The two locations, both in Lincolnshire, are barely three miles apart and Stenton concludes that 'Anger was presumably a free man of Yarborough holding villein land in another village'.

Is this a justifiable interpretation? The jury was silent on the issue of his status in the second case, and so was he. Only Robert the defendant spoke to object to Anger's suit, claiming that *ipse villanus est et corpus suum villanum est* (he is a villein and his body is villein). He brought forward two men to prove his point but they were deficient as witnesses. There is no indication as to the reason and Robert did not invoke a jury. If Anger were unfree, he would have had a very strong reason to remain silent for the reason given in Chapter 2.[24] In the absence of further action from Robert, his silence also allowed his action to proceed *ac si*

[23] *RJL*, *cc*. 174, 176.
[24] See pp. 41, 76-78 above. Briefly, if Anger had objected to the accusation on the grounds that it could be brought only by his own lord and Robert was not he, he would have condemned himself out of his own mouth.

nihil dictum esset quare assisa remaneret (as though nothing was said as to why the assize should be stayed).[25] For want of fuller accounts, as so often, it is impossible to know if there were more to these cases than meets the eye but, in the end, the Conisholme tenement remained under its lord's full control and that in Yarborough was permanently identified as a freeholding. The first serves as a clear illustration of what happened to a plaintiff-tenant and his land when he sued for dispossession and failed. For all practical purposes, it is probable that nothing happened; that Anger remained on the holding, continuing to cultivate it in accordance with the traditional practice at Conisholme and paying the customary servile dues for it.

Confusion in determining villein services

In practice, whatever the theory, a tenant holding a single property stood to be personally defined by the services he rendered for it. Maitland finds that 'in the estimation of their lords – and, we must add, of their neighbours - the holders of unfree tenements were as a general rule unfree men'.[26] Hilton observes that freedom was relative 'even within the peasant social context'.[27] Had Anger held only the Conisholme tenement, he is likely to have been considered unfree. Although villein tenants seem most to have resented their lack of autonomy in choosing the day's work,[28] the greatest practical difference was the magnitude of the economic and personal burdens which their lords placed upon them.[29] There

[25] *Bracton*, III, p. 109.
[26] *Pollock and Maitland*, I, p. 383.
[27] Rodney Hilton, 'Freedom and Villeinage in England', *Past and Present*, 31 (1965), 3-19 (p. 11).
[28] Phillipp Schofield, 'Lordship and the Peasant Economy, c.1250-c.1400: Robert Kyng and the Abbot of Bury St. Edmunds', pp. 53-68, and Chris Wickham, 'Conclusions', pp. 304-16, in *Rodney Hilton's Middle Ages: An Exploration of Historical Themes*, ed. by Christopher Dyer, Peter Coss and Chris Wickham (Oxford: Oxford University Press, 2007), pp. 58, 308.
[29] Postan, 'Medieval Agricultural Society', pp. 603-04. On the whole, great lords were more exacting than smaller lords and large religious houses most exacting of all: Mark Bailey, 'Villeinage in England: a Regional Case Study, c. 1250-c. 1349', *The Economic History Review*, 62 (2009), 430-457 (p. 436).

has been and continues to be strong debate over the severity of these impositions. Postan thought them 'much less oppressive' than legal theory suggested and Baker points out that it was not in lords' interests to treat workers so badly that they became unproductive.[30] However Schofield has said that the defining characteristic of villeinage 'was the lord's ability to change what was deemed customary'.[31] This appears to run counter to the largely prevailing view that custom may have mitigated the worst of seigneurial demands.[32] It also returns the discussion to the problem of defining the uncertain services which constituted an unfree tenement.

Hyams is clear that defendant lords levelling a charge of villeinage against a litigating tenant preferred to argue in terms of servile tenure rather than status which, he believes, was 'archaic and full of legal pitfalls'.[33] Tenure, on the other hand, encompassed 'all the most valuable rights of lords over their villeins' which, once established, the common law enabled them to enforce. Miller and Hatcher seem not to agree, stressing the independence of status from landholding 'even though it was commonly associated with it.[34] This is, perhaps, to look at the same situation from two entirely different viewpoints. The value of his tenanted land to a lord lay in the value of the services he was owed from it, whether by a freeman or a villein. A free tenant of villein land is very unlikely not to have also been a freeholder, whereas most villeins held only in villeinage. The value of his personal status to a free tenant of villein land must have lain, then, in the avoidance of the extra burdens shouldered by his unfree neighbour, but there

[30] Postan, 'Medieval Agricultural Society', p. 611; Baker, *An Introduction*, p. 470. See also James Raftis, 'Social Structures in Five East Midland Villages: A Study of Possibilities in the Use of Court Roll Data', *The Economic History Review*, New Series, 18 (1965), 83-100 (p. 93).
[31] Schofield, *Peasant and Community*, p. 15.
[32] Bailey, 'Villeinage in England', 431; Bush, 'Serfdom in Medieval and Modern Europe', pp. 206-07.
[33] Hyams, *King, Lords and Peasants*, p. 118.
[34] Miller and Hatcher, *Rural Society*, pp. 112-13.

seems also to have been an element of desiring freedom for its own sake. From the evidence of the novel disseisin records, many peasants, perhaps a majority, cherished the notion of their own freedom enough to wish to have it confirmed at a higher level than their local court. Those desirous, possibly confident, of their free status are likely to have been encouraged by the reforms. It was these tenants who could find themselves ensnared by the new royal courts' efforts to find a nationally applicable characteristic of servile tenure, none of which was satisfactory.[35] Conversely, the confusion might offer opportunities to the unfree to find a route into liberty or dangle the prospect before the wholly mistaken.

One tenant who fell into the latter category was Nicholas son of Norman, who brought the assize against Humphrey, sergeant of the castle governor of Berg (possibly Northampton), and three others for disseising him of his free tenement at Askebi (possibly Castle Ashby) in Northamptonshire.[36] At the Northampton eyre in 1214 he was doubtless dismayed to hear the jury say that he and his father had held *per consuetudines serviles ad furcam et flagellum* (by the servile customs of fork and flail). The jurors continued that neither had they been able to marry off their daughters *sine redemptione* (without relief), that is, without payment to their lord for his permission, commonly called *merchet*. Additionally, the father had only sought to have these obligations commuted to money rent *quamdiu ei placeret* (for as long as it pleased him). The bench decided that Nicholas had not been disseised and he was accordingly amerced.

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[35] See pp. 88-89 above.

[36] *CRR*, VII, pp. 60-61. See also Flower, *Introduction to the Curia Regis Rolls*, p. 227. Flower interprets 'Askebi' as Ashby Mears but Castle Ashby is favoured here on the grounds that an earlier name for the settlement supplied by British History Online is nearer 'Askebi' than any found for the alternative: http://www.british-history.ac.uk/vch/northants/vol4/ pp. 230-236 (accessed 08/06/2015). 'Berg' seems likely to refer to the borough of Northampton, site of an important royal castle, which is the same distance north-west of Castle Ashby as the crow flies, about eight miles, as it is south-west of Mears Ashby.

Why did it reach that judgement and how come the family was so woefully mistaken? The information about the terms of the tenure falls into two distinct categories: that provided by the jury; and that by the older tenant. The former again bisects and the jury was unambivalent that the two separate and distinct obligations on the family were proof of villein tenure. They did not accuse either Nicholas or his father of being villein themselves, nor was that suggested by the bench. Proceeding on the verdict of unfree tenure, it reached its decision on the grounds that a villeinage tenement was possessed by its lord and not its tenant, whatever his or her status. It followed that such a tenant could not be disseised of that which he had never possessed. There was therefore only one decision possible for the bench, that Humphrey had no case to answer. The logic was irrefutable and remorseless. Had Norman argued that the family's conditions of tenure had never been servile, then the case might have been opened up although, given the jury's apparent certainty, that seems unlikely. They appear to have had no doubt that customary service *ad furcam et flagellum* denoted villein tenure and gave the payment of *merchet* as secondary proof. Hyams observes that *merchet* 'was often decisive' as an indication of villein tenure but not certain proof until later in the thirteenth century.[37] It was used, as here, in support of other, stronger proofs, rather than advanced as a sole indicator. The family's cardinal error seems to have been reliance upon the belief that the commutation of their services to a money rent had transformed the nature of the holding from a villein to a free tenement.[38]

[37] Hyams, *King, Lords and Peasants*, p. 198.
[38] Maitland shows that even where a villein tenant commuted all his dues from labour service to money-rent he was still servile: *Pollock and Maitland,* I, p. 375.

Flower uses the case to show that 'even a bondsman…could temporarily commute his services for a money payment'.[39] He assumes that not only the tenement but also the tenants were unfree, that Nicholas had followed his father into the holding and that Humphrey had ejected him. These are all large assumptions. A villein tenement, whether held by a free or unfree tenant, was of no concern to the royal court as Hyams notes.[40] No unfree holding could be bequeathed by its tenant, since it was not possessed by him, and no villein, being himself a possession of his lord, could have anything to bequeath. If a defendant's objection on the grounds of the tenement's status were upheld, it prevented the case from continuing, in the same manner that a successful accusation against a plaintiff's free status negated his suit. On that basis, neither Nicholas nor his father were necessarily villeins themselves but may have been free men holding villein land for villein services as Anger, above, may have been, in which case it was not they who were being judged but the tenement. Flower seems also to assume that the dues were such as to prove that they too were unfree, and he may well be correct. Certainly the jurors appear convinced that they were villein services and it is interesting that they make no mention of a money-rent. There may, however, be a different interpretation.

It was noted by the jury that the commutation had been *quamdiu ei placeret* (for as long as it pleased him) which may refer, not to the tenant as Flower supposes, but to the lord on whom it would sit much more easily. It seems unlikely that any tenant, and certainly not a villein, would be given so much autonomy over his services and it is possible that Humphrey had just become alive to the fact that the tenement could be slipping out of his lord's grip.

[39] Flower, *Introduction to the Curia Regis Rolls*, p. 227.
[40] Hyams, *King, Lords and Peasants*, p. 50.

Schofield shows that money-rent was becoming a 'mode of proof' of freedom and this family had been accumulating its benefits for two decades.[41] It may be that Humphrey had merely reversed the arrangment that Nicholas wished to continue. If the family had not understood that the commutation was not absolute, they may well have considered themselves dispossessed in that sense and brought the assize to recover it. They identified their holding on the writ as a free tenement and it is possible that they believed themselves to be free people, or perhaps they saw an opportunity to lever themselves into freedom on the back of the long-paid money-rent. Whatever their beliefs and hopes, the family was consigned at least into servile tenantry for that holding if not into well-nigh irrevocable personal villeinage, which may have been their correct status, perhaps by Nicholas's own words.

The absence of *merchet* was noted in an assize brought before the Westminster court in 1212 when the jurors found for Henry of Burtun (possibly Burton Salmon), Yorkshire, and his family against William de Valoines who had dispossessed him of his holding there on the grounds that it was a villein, and not a free, tenement.[42] The jurors found that *possunt et semper potuerunt antecessores filias suas maritare sine redempcione et sine licencia tam liberis quam aliis hominibus ad libitum suum* (they could and their forebears always had been able to marry off their daughters without a fine and without permission as freely as other men at their own will). If William voiced his reason it was not recorded, but it becomes clear through the verdict and the justices' subsequent judgment that *tenementum illud liberum est et quod propter hoc disseisivit eum de libero*

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[41] Schofield, *Peasant and Community*, pp. 35-6; but see *Pollock and Maitland*, I, p. 375.
[42] *CRR*, VI, p. 335.

tenemento suo (that tenement is free and, that being so, he has disseised him of his free tenement). This bench also was unequivocal, and yet the jurors' detailed enumeration of the services performed by Henry, and his father and grandfather, appear to contain servile elements.[43] They said that Henry's family *semper tenuit tenementum illud per servicium subscriptum, scilicet reddendo per annum de qualibet bovata xij denarios et faciendo per annum duas aruras ad cibum domini et iij precarias ad cibum domini in autumpno, scilicet de qualibet bovata j falcem* (always held that tenement for agreed services, namely for an annual rent of 12d. for whichever bovates he wishes and to plough twice a year with food provided by the lord and three boonworks with food provided by the lord in the autumn, namely one mowing of whichever bovates he wishes).[44] It seems to have been the jurors' view that these were tempered by Burton having *aliquando* (at one time) been a part of Burg (Burghwallis), also in Yorkshire and about twelve miles south of Burton Salmon, *que fuit dominicum domini regis* (which was the demesne of the lord king). The implication is that this was an ancient-demesne holding, that is, land which had been held by William I at the time of Domesday Book which gave tenants and their descendants free or quasi-free status in perpetuity, regardless of whether or not the tenement was still in the king's hand.[45]

The jurors added that the family had always been able to marry off its daughters without paying a fine or seeking permission *tam liberis quam aliis hominibus ad libitum suum* (as freely as other men at their own will). They may

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[44] *Precaria*, literally 'things obtained by petition', hence 'boonworks', was extra labour ostensibly freely given to the lord for work on his land during the busiest seasons of the year. Peasants were frequently supplied with their meals at these times: *Pollock and Maitland*, I, p. 367; Vinogradoff, *Villainage in England*, pp. 281-82

[45] See *Pollock and Maitland*, I, pp. 383-406.

have been offering further proof of the holding's ancient-demesne status, rather than relating the absence of *merchet* specifically to the plaintiff's family. Yet this was a wholly personal issue that had no relevance at all to a holding per se in terms of its productivity and size, factors which dictated its rental value in money or kind. It is easier to understand it as a determinant of an individual's condition but here it conflates tenant with tenancy. William was amerced for half a mark and Henry awarded the same amount in damages, but William obtained a jury of twenty-four knights to attaint the original panel. The clerk recorded that it was the king, at William's petition, who empanelled the knights; a reversal of the usual wording, that the litigant offered the crown a certain sum for permission to assemble such a jury, but whether or not this was significant is not clear and requires further research. If John were involved, it did not influence the twenty-four who *dixerunt idem quod xij* (said the same as the twelve) and William was amerced again, this time for the enormous sum of one hundred marks.

Services were the subject of a heated exchange before the eyre at Bury St. Edmunds in 1203 which was recorded twice, the second time in greater detail.[46] The jurors found in favour of the tenant, Peter son of Ailwin, and said that he had been disseised by Hamo of Hottot (Huttoft), Lincolnshire, with three others, but that *nesciunt utrum sit liberum tenementum necne* (they do not know if it is a free tenement or not). His daughter might not marry without his lord's permission and a payment to him (*merchet*), he must feast his lord annually and he owed him *precaria (*boonworks) with food provided by his lord. Here permission to marry and a payment of *merchet* are listed first, unlike the secondary order in the cases

[46] *ENAR, cc*. 789, 793. I am grateful to Professor Hyams for his material help to me over these passages, which saved me from many errors. He points out that the justices probably questioned the jurors, leading to the further entry in the roll which seems not to be a separate hearing. This appears to be unusual, but possibly because the first entry in similar situations would normally have been erased.

discussed above, but evidently neither they nor the other services were certain marks of servility. There were no grounds on which the justices might base a decision and the defendant offered a full mark for a second hearing. The record was cancelled and begun again a little further down the roll. This is a fuller account of what the jurors *dici audiverunt* (had heard said) regarding the many obligations of the plaintiff to his lord, but they were still uncertain of the holding's status.[47] It also includes the plaintiff's plea, in which he denied the alleged *consuetudines* (customary dues) and claimed that *libere tenuit et tenere debuit terram illam scilicet per ix s. et vj d.* (he held and ought to hold that land freely namely for 9s. and 6d), presumably an annual rent. At the same time he acknowledged that he also owed certain services, continuing with a list of which much is now unfortunately illegible. The defendant claimed that these were customary but produced no proof and the justices adjourned their decision until *xv dies post festum sancti Michaelis* (the quindene of Michaelmas), that is, between 29 September and 13 October 1203. However Hamo paid three marks, an unusually large amount, for it to be further postponed so that he might consult the justiciar.[48] This dramatic account emphasizes the vexed uncertainty of villein services, the term *consuetudines* evidently as confusing to property holders in 1203 as it is to historians now.[49] There is nothing to indicate, however, that agricultural practice on the holding was disturbed.

Possible use of the assize to depress tenants into villeinage

[47] The obligations included the payment of *merchet* on the marriage of Peter's daughter and sisters, a gift on the birth of his child, and details of his duties to reap and harrow for his lord and provide a feast for him.
[48] The decision, which has not been found, was given at Westminster in the octaves of St. Hilary, 20–26 January 1204.
[49] See also *CRR*, VII, pp. 240-41.

Hilton, of the Marxist school of historians, clearly admired 'the fighting spirit' which he found among peasants of all degrees, 'members of an oppressed class, constantly reminded of its inferiority'.[50] They were united by the 'extraordinary force' of their resistance to seigneurial pressure which, he believes, first became significant in the thirteenth century. He attributes this to 'a considerable, and possibly sudden, intensification' of their exploitation by lords who were encouraged by an expanding economy to take more of their land in hand. Carpenter agrees with Hilton's view, adding that lords were hindered in their ambition by the growing population which led to the sub-division of freeholdings and generated a peasant land market.[51] He argues that Magna Carta further enabled seigneurial greed by confirming a lord's ability to disseise not only an unfree tenant but also a free tenant of land he held in villeinage, as noted in Anger's case above, echoing Hilton that at the turn of the twelfth century lords had every reason to seize, and be grateful for, such opportunities as the new laws afforded them. However, although Hilton cites many examples of alleged villeins before the royal courts where, as he says, they had no right to be, neither author seems to suggest that their lords may have tried to tighten their control over them by taking advantage, through the new jurisdiction, of an unforeseen legal loophole. On the other hand, Maitland appears to observe lords acting quite deliberately in order to repress their tenantry, writing that 'we cannot altogether acquit' them of attempting to exact from the free tenant of an unfree holding 'new and degrading services which would make him an unfree man'.[52]

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[50] Rodney Hilton, 'Peasant Movements in England Before 1381', *The Economic History Review*, Second Series, II (1949), 117-36 (p. 127). Dyer also remarks that many novel disseisin actions 'were brought by freeholders of apparently low status…even against great magnates': Christopher Dyer, 'Conflict in the Landscape : the Enclosure Movement in England, 1220-1349', *Landscape History*, 28 (2006), 21-33 (p. 16).
[51] David Carpenter, *Magna Carta* (London: Penguin, 2015), pp. 114-15, 113-14.
[52] *Pollock and Maitland*, I, p. 378.

Where this occurred, it was undoubtedly aided by the nascent common law. A peasant who believed himself to be free and sued his lord under novel disseisin, when distrained by him, was likely to discover should he lose that he had rendered himself of villein status. The verdict confirmed the lord's right to behave as he had, which almost always meant that the tenant not only held in villeinage but was himself a villein.[53] It was a circumstance which Hyams believes to have been 'perhaps quite common' and he suggests that Bracton may have been more favourable to lords, in his teaching on villeinage, than he initially seems.[54] This is not to say that villeinage was deliberately created by the common law 'for the economic benefit of the seigneurial classes'.[55] It was, Hyams argues, a by-product of it and rather that the division between free and unfree tenants and free and unfree property was more keenly felt by, and recognition of it forced upon, the peasant population through the exclusion of its unfree element from the new legislation. Flower points out that 'the smallholder often remained in placid uncertainty both of his tenure and of his personal status' until their importance and potential loss were thrust upon him.[56] Common-law doctrines, then, far from clarifying the conditions which placed peasants on one or the other side of the divide disseminated confusion, as discussed earlier in this chapter. In addition, they enabled opportunistic lords in the economically straitened circumstances of the early-thirteenth century to attempt to increase the extent of their villein holdings and the number of their unfree peasants.

With all of this in mind, it would be easy, though mistaken, to see the grasping hand of tyrannical lordship in every villein-related court record. Then

[53] See p. 88 above.
[54] Hyams, *King, Lords and Peasants*, pp. 251, 119.
[55] Hyams, *King, Lords and Peasants*, p. xxi.
[56] Flower, *Introduction to the Curia Regis Rolls*, p. 234.

again, it is unlikely to be entirely absent from the rolls and may also be concealed in cases which superficially appear to have nothing to do with villeinage.[57] The following examples illustrate what seem to be attempts by lords to villeinize their tenants and the latters' efforts to maintain their free status. A Marxist persuasion is not required in order to recognize and applaud the spirited opposition displayed by Robert Drop to his lord's charge of villeinage, before the Lincoln assize of 1202, which transformed a routine proceeding into a courtroom drama.[58] With all due regard to Vinogradoff's warning against the snare of 'unbounded imagination',[59] it is difficult to see this as anything other than a lord's blatant attempt to destroy the free status of his tenant, supporting Hyams' view that the legal reforms encouraged lords 'to meet their tenants' complaints with force'.[60] If Hilton is correct in his suggestion that some early actions were test cases brought by individuals on behalf of fellow tenants as well as themselves, then this may have been such an exemplar.[61] The case began as a standard suit of novel disseisin brought by Robert against his lord, Hawisa de Kyme, regarding his free tenement in Croft, Lincolnshire. This was later identified as thirteen acres of land which, at Croft, is likely to have been on the fertile coastal strip behind the salt marsh, a valuable and productive holding. Hawisa, a wealthy landowner, was represented in court by her heir, nephew and factor, Simon of Kyme. This was a powerful family. Like his father Philip, Simon was a tenant-in- chief and held land in Lincolnshire, Yorkshire and elsewhere. He was a frequent litigant and a formidable opponent.[62]

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[57] For examples, see *ELAR*, *cc*. 1313, 1319, 1332, 1339
[58] *ELAR*, *c*. 423, cited in Miller and Hatcher, *Rural Society*, p. 113.
[59] Vinogradoff, *Villainage in England*, p. 5.
[60] Hyams, *King, Lords and Peasants*, p. 267.
[61] Hilton, 'Peasant Movements in England', p. 124.
[62] See *ELAR*, *cc*. 2, 5, 12, 14, 48, 64, and passim.

Simon immediately said that *ipse Robertus origine est villanus* (this Robert is a villein by birth) and without more ado produced three of his close relatives: *Simonem fratrem suum ex 1 patre et 1 matre* (Simon his brother of the same father and mother); *Simon filium Willelmi avunculi ipsius Roberti* (Simon son of William, Robert's uncle); *et Francum quendam qui dicit quod mater patris sui fuit soror patris ipsius Roberti* (and a certain Frank who says that his own father's mother was Robert's father's sister). All three confessed themselves to be villeins which should have been sufficient to prove that Robert too was unfree. In fact, he acknowledged that *predicti sunt parentes sui sicut dicunt* (the aforesaid are his relatives as they say) but then launched into a close scrutiny of his family's genealogy, saying that Frank's grandmother *fuit mater patris sui et non soror* (was his own father's mother and not sister). Nevertheless Simon must have thought he had him in the bag, admitting as he did that three self-confessed villeins were such near kin. Robert however continued with a remarkable accusation of his own. He said that *si ipsi volunt propter mercedem vel alio modo avilenare se ipse ideo non vult esse villanus* (if they wish for money or for another reason to villeinize themselves, he himself did not wish to be a villein).

Simon's reacton was swift and comprehensive. He appears to have abandoned any thought of winning the case. Everything he subsequently did suggests that his one thought was to limit the damage which the unexpected turn of events might inflict upon him and his family's estates. He immediately offered the king, through the court, three marks to come to an agreement with Robert, which was permitted. This was a customary procedure but three marks was six times the normal amount. In addition, he and Hawisa's steward, Robert of Mannebi (Manby) in Lincolnshire, also a frequenter of the royal courts,

redidderunt eidem Roberto seisinam suam, scilicet de 13 acris terre (returned to the same Robert his seisin, namely of 13 acres of land). Together, Simon and Robert *ceperunt in manu quod predicta Hawisa concedet hoc* (undertook that the aforesaid Hawisa conceded this). All this was recorded by the court clerk, thereby securing for Robert not only his home and livelihood but also inalienable free status for himself and his children. What was Simon's concern here? The discomfiture of a great lord at the hands of a humble tenant in open court, and a royal one at that, could not have done other than reverberate around north Lincolnshire. It is likely to have dismayed Simon's peers and emboldened their peasants. His defeat was irreversible but he still possessed, and employed, an important capability. He prevented the case from being worked through to a legally verifiable conclusion.

Why was this important? Had Simon not intervened when he did, one of two actions would have happened as discussed in Chapter 2. The litigants might have put themselves upon a jury, that is, invited a jury then or subsequently to evaluate their respective evidence and decide between them. If only one litigant took that course and the other refused, the whole action was stalled until the latter either agreed or, more commonly, acknowledged himself to be in the wrong. If a jury were not called upon, the justices reached their own decision and concluded the case. Simon arrested both these possible processes and seems to have offered over the odds to prevent the case from being worked out by legal process. It is particularly interesting that he permitted Robert to succeed, almost insisted upon it, rather than have the court come to a decision. In effect, he bought Robert off. It must have been galling in the extreme and yet his tenant's success and all its potential repercussions on the rest of his tenantry seem to have been less

important to him than a judicial decision. His actions were the damage-limitation exercise of a worried lord. They indicate his belief that Robert might well have succeeded at law which would not only have made his own corrupt practice difficult for the court to ignore but also, crucially, would have overturned suit of kin as an accepted mode of proof in determining personal status.

Suit of kin was used ubiquitously and seems widely regarded as almost foolproof.[63] It was one thing to argue over who was a villein and who was not, as Hilton points out, but quite another to disbelieve three, acknowledged, near relatives who admitted unfree status. Simon's future dealings with other freeholding tenants would almost certainly have been severely tested if Robert had won outright, and his fellow lords equally likely to face increased resistance from their own peasants. Robert may have been one of Hilton's peasants 'who faced their lords in the courts' on behalf of their fellows in order to deliberately challenge seigneurial activity.[64] If his suit were indeed a test case, Simon's action disabled it. In any event, it is tantamount to a darker side of medieval rural life since Simon cannot have been the only lord to deliberately seek to depress the status of his tenants. On the other hand, it also demonstrates the irrepressible nature of many in that class. Eight hundred years later, this hearing still bears the hallmarks of a set piece with a large cast, high courage, humour and even farce. If Hilton is correct about test cases, it indicates a deep desire for personal freedom among the peasantry leading to co-ordinated subversive exploitation of the assize and the royal courts. It would seem that both sides, lords and commoners, took advantage of the Angevin reforms for their own purposes in ways which were not anticipated by the reformers.

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[63] Flower, *Introduction to the Curia Regis Rolls*, pp. 231-33.
[64] Hilton, 'Peasant Movements in England', p. 124.

There may be further evidence for this in the many successful cases for disseisin in which damages were frequently much smaller than amercements. They are often grouped quite close together within the rolls and are sometimes in the same geographical area. If the dispossession had taken the form of physical ejection, there would surely have been some indication in the records of the social problems resulting from large numbers of homeless labourers and their families. Neither would it have been in the interest of lords to be bereft of their workforce. From the tenant's viewpoint, once his lord had moved to undermine his status, he had either to acquiesce or sue. There was no further option other than flight but, by suing, a tenant stood a chance of regaining the position which he would otherwise lose for ever. Although for some, perhaps many, this may have been preferable to incurring the possibly vindictive wrath of a bullying superior, to judge from the evidence of existing records and by extension of the numerous lost rolls, there were many more who offered strong resistance. Not all, perhaps not the half, are visible. It cannot be known how many may have banded together in support of Robert Drop and others of his ilk, nor how many more tenants of the Kyme estates and of neighbouring lords rode on the back of his success. Nor can it be adjudged to what extent lords generally may have modified their behaviour towards their peasants as opposition to their strategies increased and spread, in order to avoid the possibility of losing a court case.[65]

Indications of increasing resistance may possibly be found in thirty-two successful cases before the Lincoln assize of 1206 in which the plaintiffs were almost all awarded smaller damages than the amercements levied against their defendants. The locations are in Lincolnshire. No plaintiff received more than half

[65] At the same time, it has to be born in mind that some lords may have been provoked into acting more oppressively.

a mark (6s. 8d), the standard amercement, although several defendants were fined higher amounts.[66] Twelve plaintiffs were awarded between 2s. and 4s. inclusive, seven received 12d. and one 3d. For example, Eudo the clerk of Hagwrdingham (Hagworthingham) and John of Sauztorp (Sausthorpe) received damages of 12d. and 2s. respectively but both disseisors, William son of Robert and Robert Canis, were amerced at the standard rate.[67] On the other hand, Geoffrey of Normannebi (Normanby le Wold) was amerced 10s. but paid damages of only 12d. to Margery of Beningeworth (Benniworth) whom he had dispossessed of her free tenement in Claxebi (Claxy by Normanby); similarly Gilbert Scrop paid 3s. to William son of Robert in Baston (Baston) against his amercement of one mark (13s. 4d).[68] It cannot be proved that these plaintiffs were poor. However they are sufficiently alike and are recorded close enough together in the roll, although not continuously, to hold the reader's attention.[69] Some are also close geographically. The first two examples given above are four miles apart and, with another eight disputed properties, lie in an area to the north and east of Lincoln and bounded by the coast. There is a cluster of five around Boston and a further four centred on Grantham. Is it possible to infer more information from the discrepancy between these figures? Might the high amercement betoken the court's disapproval of rapacious lordship?[70]

Low damages to great lords are not unknown and the dangers of conflating them with smallholdings and these with smallholders are pointed out by Fowler.[71] He warns that dower and inheritance often fractured estates across a

[66] All the locations are in Lincolnshire unless otherwise stated.
[67] *ELAR*, *cc*. 1457, 1417.
[68] *ELAR*, *cc*. 1346, 1378.
[69] *ELAR*, between *cc*. 1310 and 1463.
[70] *ELAR cc*. 51, 1419; *RJL*, *c*. 52*n*.
[71] *Roll of the Justices in Eyre at Bedford, 1202*, ed. by George Fowler, Bedfordshire Historical Record Society, 1 (Apsley Guise: Bedfordshire Historical Record Society, 1913), p. 140.

wide area, and that a suit brought for a few acres does not necessarily mean that they were the whole livelihood of the plaintiff. Hyams altogether opposes the notion that 'direct challenges to seigneurial authority' were common and believes that smallholders were on the whole absent from the plea rolls.[72] An entirely different view is taken by Maitland, Hilton, Campbell and others.[73] The records themselves suggest the possibility that clusters of low damages, as here, may represent smallholdings which were sole properties. If so, there must also be failed smallholder plaintiffs who are largely invisible in the records. However, as discussed elsewhere, little practical change would have been noticeable whether suits were won or lost.[74]

Similar illustrations of damages smaller than amercements, for plaintiffs and defendants respectively, is provided by the Northamptonshire assize rolls of 1203. Of nearly sixty successful novel-disseisin suits believed to have been brought by humble tenants, ten are of disseisin of common of pasture, three of nuisance and the remainder apparently of simple disseisin. Among the last, Robert of Welebrun (Welborne) regained from Walter son of the chaplain of Bikerston (Bickerston) his free tenement in Brandon (Brandon Parva), all in Norfolk.[75] Bickerston was very small and divided between two rectors so it would seem unlikely that the chaplain or his son were other than tenants. Robert may have been lord of Welborne, a predecessor of James de Welborne who held a fee there in 1267, and a tenant in Brandon Parva. On the other hand he may have been no more than a tenant in either place but simply moved from one to the other, taking the name of the first as his means of identification in the second. The facts will

[72] Hyams, *King, Lords and Peasants*, p. 249 and *n*. 111.
[73] See pp. 127-28 below.
[74] See pp. 15-16 above.
[75] *ENAR, c*. 810. This and *cc*. 845, 832, 806 and 816 were heard at Bury St. Edmund's, Suffolk.

probably never be known for certain, but the record adds that Robert was awarded damages of 3s. while his disseisor was amerced in the unusually high sum of 10s. The clerk to the court recorded fifteen awards of 3s. or less and a further five of 5s. against amercements of at least a half-mark, sometimes much higher. They amount to one-third of the successful plaintiffs before this eyre and it is tempting to discern in them free smallholders struggling against their lords. Was the eponymously named Hullaria of Hulle (Hillmorton) a tenant of Baldwin of Eston (possibly Easton Neston), both in Northamptonshire, whom she successfully sued for dispossession of her free tenement there and was consequently awarded 12d?[76] Might the same be said of sisters Alice and Agnes, daughters of Richard, who received 2s. for their dispossession in Heveringelond (Haveringland), Norfollk, by no fewer than fifteen named defendants, two of them women, led by Hugh the clerk of Haveringland and William the reeve; and also of Godfrey son of Edric, again awarded 2s. for disseisin by another clerk, Richard of Stanighal (Stanninghall), Norfolk, of his tenement in the same vill?[77] All these defendants were amerced in half a mark and it seems likely that they were lords and not merely neighbouring tenants.

On the other hand there is no immediate clue as to whether the widow Goda and her son Walter were the lords or neighbours of Ralf son of Sigered, whom they dispossessed of iiij sulcis terre (four furrows of land) in Bacunestorp (Baconsthorpe), Norfolk, through ploughing and sowing them.[78] On this occasion no damages were awarded, probably because the re-seised Ralf had the benefit of their trouble. In a similar case the damages of one mark for the loss of corn and aliis rebus (other things) in Bressingham, Norfolk, were nullified because the

[76] *ENAR, c*. 926. The case was heard at Northampton.
[77] Respectively: *ENAR, c*. 832; *ENAR, c*. 845.
[78] *ENAR, c*. 806.

remaining corn was of greater value.[79] The plaintiff, Alice of Brisingham (Bressingham), had evidently been dispossessed in the same manner as Ralf by Guy de Verdun, whose family had long held the manor. Guy first argued that he had repossessed the land with the authority of his own court for default of services, producing witnesses to that effect, but subsequently withdrew and re-seised his tenant. Were these lords acting with the intention of downgrading their tenants' free status? It is clear that neither dispossession involved ejection from house and home but were relatively small affairs which seem to fall into Meekings' category of subtle dispossession.[80]

Conclusion

Tenure of property was defined by the services owed for it by the tenant to the landlord. These varied greatly in both type and severity, not only from region to region across the country, but even between neighbouring manors. Research has shown that they fell heaviest upon villein tenants, who had little option but to comply, but the burden of work upon all peasants was so great that there was little division between villein and free among the peasantry within a particular community. The situation changed radically with the introduction of the Angevin reforms because these were available only to free men and women and therefore drove a wedge between free and villein tenants in terms of litigation. The popularity of the assize of novel disseisin highlighted this division which, however, was not wholly observed by commoners of apparently doubtful status. Many humble tenants took out a writ because: either, they considered themselves to be unequivocally free and had every right to do so; or, they wanted to acquire

[79] *ENAR, c*. 816.
[80] Cecil Meekings, 'Introduction', Volume I, in *The 1235 Surrey Eyre*, ed. by Cecil Meekings and prepared for press by David Crook, 3 Volumes, Surrey Record Society, 31, 32, 37 (Guildford: Surrey Record Society, 1979-2002), p. 73.

free status or confirm their possession of it; or, they knew that they held villein status and hoped to escape it. The overwhelming attraction to them was that success as a plaintiff in the assize automatically affirmed them as free tenants whatever their true circumstances.

The number of humble tenants of dubious or even unfree status who presented themselves before the royal courts was an unforeseen consequence of the assize and problematic for the courts. It also presented lords with serious difficulties, for they were faced with the prospect of diminished authority over, and services from, peasants who had previously been their tenants in villeinage. As defendants, they could resist the situation by using one of two options. They could directly accuse the plaintiff of villein status, a charge which the royal courts took very seriously and which, if not accepted by the accused, had to be proved. This was achieved either, by producing near kin of the accused who were prepared to confess themselves villein or, by showing that the services rendered by the accused for the holding were servile. Both could be problematic, as the case studies show. Historians consider that lords preferred tenure over status as proof, but it seems unlikely to have been effective through a litany of dues and services unless the tenant were indubitably villein and recognized as such by the royal-court jury. Its predecessor in the manor court must have sanctioned the lord's demand for dues, or the tenant would have had no cause for complaint. As it was, he must have refused to the point that his lord distrained his chattels, and perhaps even the holding, before removing his case to the county, and thence the king's, court. As the records reveal, these courts were confronted with a confused mass of customary services with no clear indication as to which were servile in a given locality, let alone on a national basis. At the time of this study, the turn of

the twelfth century, the rules of common-law villeinage were being worked out on a case-by-case basis and would not reach clarity until the mid-thirteenth.

It is possible that some lords tried to overcome the problem through deliberately provoking some tenants to bring an action of novel disseisin in the hope of their being adjudged of villein status in the royal court. Once disseised, they had nothing to lose but historians have also shown that many commoners strongly resented villein status and prized personal freedom. Some sued as lone individuals; others, perhaps more commonly, in groups acting together and sometimes putting up one of their number initially as a test case. The problem was further complicated by an unknown number of free tenants who held villeinage properties. The same inference can be drawn from both types of activity; that lords and tenants were making an unintended use of the assize.

SECTION 2
IMPOVERISHED LITIGANTS
INTRODUCTION

There is a consensus of academic opinion that many tenants at the turn of the thirteenth century were smallholders living below subsistence level.[1] Further, a large number of these were of free status and, as such, appeared before the royal courts.[2] The research carries the implication that numerous litigants who brought and defended suits of novel disseisin during the period studied must have been impoverished. This is borne out in the records of the action, most obviously by the clerk to the court noting in the roll that the amercement of an unsuccessful litigant was cancelled because he or she was poor.[3] However, this occurs relatively infrequently and leads to the conclusion that there must have been many more impoverished failed litigants who did not qualify for the cancellation and yet were apparently considered able to to find the amount. The circumstances are not altogether dissimilar from the arrival of unfree tenants in the royal courts which, it is argued in Section 1, was an unexpected consequence of the assize.[4] Was the appearance of free but impoverished litigants also unforeseen by lords? It may well be that they were surprised by such a large number of them. As argued in the previous section, those who formulated the assize were educated, high-status men of Norman extraction whose forbears had over-run the English peasantry in the previous century. They believed poor peasants, on the whole, to

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[1] Rodney Hilton, *A Medieval Society: The West Midlands at the End of the Thirteenth Century* (Cambridge: Cambridge University Press, 1966), pp. 114-15. See also Edward Miller and John Hatcher, *Medieval England, Rural Society and Economic Change 1086-1348* (London: Longman, 1978), pp. 144, 149, 156; Bruce Campbell, 'The Land', pp. 179-237, in *A Social History of England 1200-1500*, ed. by Rosemary Horrox and Mark Ormrod (Cambridge: Cambridge University Press, 2006), p. 231.

[2] See pp. 127-29, 134-37 below.

[3] For examples, see: *Three Rolls*, p. 130; *CRR*, V, p. 237; *ENAR*, *c*. 917.

[4] See p. 42 and Chapter 3 passim above.

be serfs.[5] Why would they have thought otherwise of them when many prosperous peasants were villeins and a community's leading members, the reeve and other officials, usually unfree? Any misgivings they may have entertained that the action could be used by villeins were probably not allayed by the wording of the writ, which stipulated that none should be dispossessed of his free holding *iniuste et sine judicio* (unjustly and without a judgement [of a court]).[6] This was the core of the assize, but it specified the status of the tenement and not the tenant. Its possible use by villein tenants, to whom it was denied,[7] is thereby implied and perhaps accounts for Bracton's convoluted advice around this problematic topic.[8]

However, it can have taken no-one unawares in the late-twelfth and early-thirteenth centuries that novel disseisin was for the use of all free tenants whatever their financial circumstances. Its whole point and purpose was recovery of possession by a wronged freeholder, high or low. The premise was reinforced by Magna Carta in Chapter 39 which states that *nullus liber homo… dissaisiatur…nisi per legale iuditium parium suorum vel per legem terre* (no free man…is to be disseised…save by the lawful judgement of his peers or by the law of the land).[9] Both writ and Charter specify status only and lay down no financial criteria of any kind**.** On the contrary, it quickly becomes obvious from reading the rolls that there was an initial form of monetary assistance in the provision of the originating writ at no charge to the very poor. It was probably in place from the first and certainly long before the date of the Charter, presumably to ensure that

[5] See p. 45 above. This is not to suggest that villeinage was synonymous with poverty, nor that all peasants were averse to villeinage.
[6] *Glanvill*, p. 167 (XIII, 33). The use of the masculine possessive adjective, as in most documents of the period, including Magna Carta, did not preclude women, although neither were they always included: David Carpenter, *Magna Carta* (London: Penguin, 2015), p. 101. From the records of novel-disseisin actions, it is clear that the assize was available to free people of both sexes.
[7] See p. 1 above,
[8] See p. 22 above.
[9] Carpenter, *Magna Carta*, p. 53. The Charter reinforced the subjection of the unfree to their lords: Carpenter, *Magna Carta*, pp. 110-11.

no free tenant was hindered by lack of means from accessing the action, including those unfortunates who had lost everything. Unsuccessful litigants who qualified for the initial aid would also have had their amercements cancelled, that is, the routine fine levied upon the losing party. Part of the rationale behind both forms of aid was no doubt to prevent free persons who had fallen on hard times from descending into servitude, of which the upper ranks had as great a horror as they had of villeins gaining free status.[10] The jurists who worked out the procedure of the action must, then, have expected a number of plaintiffs to be poor, even destitute. They must have been well aware of the exigencies of civil unrest, which affected the high as well as the low, and also of the possiblity of seigneurial predation.[11] The level of the excused amercements seems not to have exceeded half a mark and thereby introduced, it is argued, a legal definition of poverty. However, this was apparently arbitrary since several strata of economically viable peasants, who engaged in land transactions and were able to meet damages awarded against them, can be discerned below it.

Chapter 4 discusses these related topics by drawing on the considerable scholarship that exists on peasant economy. Hitherto, the pardoning of amercements has been studied more for its benefit to litigants than for the legal definition of poverty which it may have provided.[12] Similarly, the obligation to pay them on those not so pardoned has rarely been linked into the wealth of

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[10] Paul Hyams, *King, Lords and Peasants in Medieval England: The Common Law of Villeinage in the Twelfth and Thirteenth Centuries* (Oxford: Clarendon Press, 1980), p. 207: 'twin fears – of freemen wrongly enserfed and villeins wrongly enfranchised'.

[11] It was in the interests of lords to retain not only their villein tenants but also those of uncertain or possibly free status who had not hitherto been distinguished as such. Their affirmation at law as freeholders removed them from seigneurial control, but their definition as villeins brought them irrevocably within it: see **p**p. 90-92 above

[12] Cecil Meekings, 'Introduction', Volume I, in *The 1235 Surrey Eyre*, ed. by Cecil Meekings and prepared for press by David Crook, 3 Volumes, Surrey Record Society, 31, 32, 37 (Guildford: Surrey Record Society, 1979-2002), p. 86; Cyril Flower, *Introduction to the Curia Regis Rolls, 1199-1230 A. D.* (London: Professional Books, 1972), p. 472.

research into the commercially active poor.[13] There is also relatively recent and rapidly growing work on the inter-connection of free and villein within the wider rural family, the strength of feeling for core family land on the part of distant kin, and the almost infinite permutations of income available to a commoner household.[14] Yet, again, this is only beginning to be translated into an understanding of the practical support which an extended family together may have provided for the retention of a holding. It is argued here that these factors combine into concluding that the half-mark level of aid was set by the jurists for pragmatic reasons to do with ease of collection and maximum returns to the treasury. It is possible that it was found to be the sum which could be most efficiently returned to the Treasury.[15] Those who set the level would have known of the multiple resources available to individual smallholders and, perhaps on that basis, judged that the bulk of such demands could be met by them. Although in practice collection was problematic and many debts were found to be irrecoverable,[16] there does not seem to have been any attempt to raise or lower the most common level of amercement from the ubiquitous half-mark.

Chapter 5 looks at examples of poverty within the rolls which may be inferred from the clerks' accounts of individuals' cases. In particular, damages are discussed for the information that can be extrapolated from them regarding the financial circumstances of those involved. This expands on the topic of economically viable peasants who were identified by the legal system as too poor to meet the amercements, discussed in Chapter 4. Poverty can also be seen in

[13] See pp. 128-30 below.
[14] See pp. 129-30 below.
[15] Half a mark was frequently levied as a penalty, amercements being the most common by far since they applied to almost every case. They were imposed not only on losing parties and the sureties of those who withdrew or defaulted, but also for misdemeanors by litigants, jurors and court officials: Flower, *Introduction to the Curia Regis Rolls*, pp. 465-67.
[16] See p. 123 below.

individual circumstances through additional information which the clerk provided in his account. They are valuable not only intrinsically but also for the wider light they throw on society at that time. The cases selected for analysis inform particularly on local government and the plight of illegitimate orphans. Both chapters illustrate the kindly attitude of justices towards fragile litigants, without compromising due process, which must have played a significant part in the continuing popularity of the assize through the trust placed in it by commoners.

CHAPTER 4
A LEGAL DEFINITION OF POVERTY

Introduction

The novel-disseisin records show that an unsuccessful litigant's amercement could be cancelled on the grounds that he or she was too poor to pay it.[1] Meekings writes of the futility in pursuing those whose 'small store of chattels', after allowing for the permitted retention of life's necessities, 'would hardly have yielded the half-mark...minimum of an amercement'.[2] Half a mark was also the most usual amount set and the proportion of those pardoned its payment must have been small. It is argued here that the benefit was dispensed according to individuals' perceived financial need at the time of its provision and reflected neither their original, alleged status nor their actual financial circumstances. If the inability to find half a mark defined the level of poverty set by the courts to trigger the cancellation, it was a contrived definition since several strata of poverty, but not insolvency, can be discerned below it. Crucially, it almost certainly distorts to later historians what it meant to be poor in real terms in the late-twelfth and early-thirteenth centuries. It is not known why that sum was chosen in preference to another, but it may have been for pragmatic reasons to do with realizing the maximum possible returns to the Treasury compatible with economy of collection.

The definition, despite its fabrication, is valuable for drawing attention to the categories it excludes, if for nothing else. Its prime importance, however, is its potential as one of the few extant contemporary criteria of poverty, and for its

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[1] For examples, see pp. 141-43 below.

[2] Cecil Meekings, 'Introduction', Volume I, in *The 1235 Surrey Eyre*, ed. by Cecil Meekings and prepared for press by David Crook, 3 Volumes, Surrey Record Society, 31, 32, 37 (Guildford: Surrey Record Society, 1979-2002), p. 86.

inherent implication that the majority of freeholding litigants were able to pay it. Poor litigants who were successful are correspondingly much more difficult to identify as there was no need to record their financial situation. Additionally, it is believed that a significant number of unsuccessful litigants whose amercements were not cancelled must also have been impecunious, for the reasons outlined above.[3] It would also be irrational to assume that the only litigants who were poor were those acknowledged as such by the courts; or that every would-be plaintiff who was denied a free writ at once abandoned all thoughts of legal redress. If medieval men and women really were as 'incurably litigious' as scholars believe them to have been, it is reasonable to conclude that the paucity of the records conceals the poverty of very many claimants and defendants.[4] If this is accepted, it must then be asked why these people did not qualify for the cancellation of their amercements and were consequently judged able to meet them.

The cancellation of amercements at the half-mark level raises two important questions: how should high-medieval poverty be defined in real terms; and what were the financial circumstances of litigants who did not come within the legal definition? The chapter looks for answers by identifying different strata within the peasantry and analysing the financial circumstances of the lower ranks. It finds that individuals might experience varying degrees of poverty throughout their lives, from extreme need which rendered them dependent upon charity, to a state of plenty relative to their previous condition or to the situation of their neighbours.[5] Poverty could therefore be both real and perceived. It further finds that poverty did not prevent litigation, for the poorest including the destitute were

[3] See p. 118 above.
[4] Stenton , 'Introduction', pp. xvii-xxix, in *ELAR*, p. xvii.
[5] Poverty and plenty could both also be relative, from an historical perspective, to others areas or periods.

enabled to litigate through the financial aid provided to them by the authorities. Additionally, it seems possible that there were many smallholders who did not qualify for aid although they also may have found difficulty in meeting their amercements. The chapter concludes firstly that, in the latter situation, the cost is most likely to have been met by litigants' families, sometimes extended, whose members pooled their resources from the various activities in which they were engaged, both on and off the holding. Unsuccessful poor litigants may have initially turned to credit, which was widely available, and some may have been able to prosper in the prevailing economic climate. Secondly, it suggests the possibility that a currently unquantified number of litigants who appear to be smallholders were, in fact, well-to-do tenants with multiple holdings, only one of which was the subject of the action. The inference is that these circumstances were known to, and understood by, the lawyers responsible for overseeing the assize, and that they set the limit to legal aid accordingly.

Impoverished debtors would certainly have been assisted by the delayed procedure of collecting amercements which involved several stages. It began with the transfer of the names of amerced, and otherwise penalised, parties from the civil or crown rolls of a court's sitting onto a new roll and the amount of their debt entered alongside.[6] This roll, which Meakins terms an 'amercement roll' since it contained more of those than anything else, was attached to the relevant plea or criminal roll and a copy despatched to the Chancery. There the king had the opportunity to divert such moneys as he wished to third parties, and the amended roll was sent to the Exchequer. Finally, it was forwarded thence to the appropriate sheriff with instructions to collect the debts in two instalments usually

[6] Meekings *Surrey Eyre*, pp. 128-29; John Hudson, *The Oxford History of the Laws of England, II, 871-1216* (Oxford: Oxford University Press, 2012), pp. 547-48.

several weeks apart.[7] The payment of all moneys collected by the sheriff and amounts outstanding were recorded on the Exchequer's pipe rolls. Hudson gives an account from the *Dialogus de Scaccario* of the chattels that the sheriff might, and might not, seize if the debt were not paid, including action to forestall those who moved their goods across the county border to evade their confiscation.[8] It was no doubt a game often played among the poor on a much smaller scale until their debts were eventually written off as not worth the trouble. Records show that the payment of amercements and other debts were often delayed, or staggered, or were simply not forthcoming,[9] presumably through the destitution, disappearance, deception, or even death of the debtor. Stenton notes that the Pipe Roll of 1199 includes 'a solid mass of debtors' who had made no attempt to pay any part of their debt'.[10] This situation at first sight seems to conflict with the argument, set out in the first paragraph above, that there were many unsuccessful poor litigants who did not attract monetary assistance yet found the means to settle their liabilities. However, they are two separate sets of circumstances and not necessarily correlative. The suggested reasons behind the courts' cancellation of individual amercements are not compromised in principle by the cumbersome process of medieval debt-collection, although it may have undermined them in practice.

The chapter engages with the historiography in a number of different ways. Firstly, it identifies the late-medieval peasantry and the strata within it; secondly, it defines the financial circumstances of its lower ranks; and thirdly, it explains the means by which unsuccessful poor litigants might have paid their

[7] Michael Clanchy, 'Introduction', pp. xv-lxxix, in *The Roll and Writ File of the Berkshire Eyre of 1248*, ed. by Michael Clanchy (London: Selden Society, 1973), pp. xxxiii-xxxiv.
[8] Hudson, *Oxford History*, pp. 703-06.
[9] Hudson, *Oxford History*, p. 746.
[10] Doris Stenton, 'Introduction', pp. 1-170, in *Pleas*, I, pp. 42-43.

amercements. Subsequently, it discusses the provision of monetary legal aid[11], followed by case histories of individuals officially defined by the courts as poor.

The Historiography

The late-medieval peasantry

Who precisely were the peasants who engaged in novel-disseisin disputes in the late-twelfth and early-thirteenth centuries? The immediate difficulty for historians of this time is the paucity of records which obviously hinders research. The majority of studies concentrate on the mid-thirteenth century onwards, when the proceedings of the manorial courts began to be written down, and thereafter. Those volumes which raise hopes by spanning the earlier period on their covers, the magisterial *Agricultural History...1042-1350*, for example, or Miller and Hatcher's *Medieval England...1086-1348*, disappoint by giving it little room in their content.[12] Horrox and Ormrod, and Dyer, encouragingly begin their three-hundred-year reviews of English society in the year 1200, but most of their examples occurred after the middle of that century.[13] However, the later research can sometimes be cautiously related back, especially where it can be re-inforced by what is known of the earlier economy.

The critical, defining characteristic of a peasant was the possession of land which the family essentially worked themselves, either entirely or with some help.[14] It might have been sufficient to grow all their food or only some it. They

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[11] A distinction is made between monetary and judicial legal aid. The latter was dispensed by justices in the form of their treatment of, and advice to, confused or mistaken litigants who appeared before them. For an example of the latter, see pp. 260-63 below.

[12] *The Agrarian History of England and Wales, Volume II, 1042*-1350, ed. by Herbert Hallam (Cambridge: Cambridge University Press, 1988); Edward Miller and John Hatcher, *Medieval England, Rural Society and Economic Change 1086-1348* (London: Longman, 1978).

[13] *A Social History of England 1200-1500*, ed. by Rosemary Horrox and Mark Ormrod (eds) (Cambridge: Cambridge University Press, 2006); Christopher Dyer, *Standards of Living in the Later Middle Ages, Social Change in England c. 1200-1520* (Cambridge: Cambridge University Press, 1989).

[14] Rodney Hilton, *A Medieval Society: The West Midlands at the End of the Thirteenth Century* (Cambridge: Cambridge University Press, 1966), p. 88; Dyer, *Standards of Living*, pp. 22-23.

may have supplemented their income by labouring or craftwork, and their children might initially have worked full-time in wealthier households, if not needed at home. The small scale of their operations made co-operation with neighbours essential in the organization of their communities, the open fields, and their varied rights in common to benefits such as access to pasture, woodland and water, which were vital for their survival.[15] In Dyer's words, the appellation 'is a convenient, if rather elastic, term to describe many types of small-scale cultivators'.[16] Perhaps half the peasantry, at least, held by villein tenure, which disabled them from using the assize.[17] It follows, therefore, that peasant litigants either were, or had been, freeholders. Defendants were in possession of property, rightly or wrongly, at the time of the action. Dispossessed plaintiffs may have lost only a portion of their holding and were continuing to function as free tenants, or been deprived of the whole to the point of destitution, that is, devoid of self-help and wholly dependent upon external assistance. They may have always been humble peasants or once occupied a much higher position. Litigants can therefore be said to fall simultaneously into two, quite different, economic strata: their current and real financial state; and the economic status to which they claimed entitlement. What is that likely to have been? What was the minimum acreage adequate to support a peasant family, and did most of the impoverished plaintiffs fall into this bracket or were a number below it?

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[15] Hilton, *A Medieval Society*, pp. 116-21.
[16] Dyer, *Standards of Living*, p. 22.
[17] See p. 2 *n*. 9 above. For a region-by-region assessment see: Herbert Hallam, 'Social Structure: Eastern England', pp. 594-620; Herbert Hallam, 'Social Structure: South-eastern England', pp. 621-33; Herbert Hallam, 'Social Structure: Southern England', pp. 650-59; James Raftis, 'Social Structure: The East Midlands', pp. 634-49; John Hatcher, 'Social Structure: South-western England', pp. 675-84; Christopher Dyer, 'Social Structure: The West Midlands', pp. 660-74; Edward Miller, 'Social Structure: Northern England', pp. 685-98; Ian Jack, 'Social Structure: Wales and the Marches', pp. 699-714, in *The Agrarian History of England and Wales, Volume II*, ed. by Herbert Hallam (Cambridge: Cambridge University Press, 1988). Unfree peasants were obliged to continue to use their local courts for the settlement of property disputes.

Historians have divided the peasantry into artificial divisions depending upon the amount of land they held. The wealthiest, a small minority, 'begin to slip outside the characterization of the peasantry' through the large size of their holdings.[18] Dyer puts this at more than eighty acres, which is surprisingly high. It seems likely to remove holders of smaller, though still sizeable, acreages, which would be very large for a family to work without considerable outside help, also out of the peasant category. Miller and Hatcher's figure of more than forty acres seems to be a more practical assessment.[19] These wealthier tenants appear in this study as ancillary to the main issues under debate.[20] Just below them came the virgaters, or yardlanders,[21] 'a far larger group of substantial tenants', perhaps 20 per cent, who frequently employed outside labour. Their holdings produced enough and to spare in good years and sufficient to live on in bad.[22] Dyer considers this number to be too high and that 'yardlanders were in a distinct minority'.[23] Lower still were middling peasants, subsistence cultivators with less than a virgate, 'but something more than a smallholding', who were able to produce enough food to support themselves and their families without reliance on rents or hired help.[24] How much land was necessary to sustain them? Miller and Hatcher, reviewing scholastic opinion, arrive at the figure of ten acres but this must presume fertile and productive land.[25] Hallam puts it at ten as the minimum.[26] Lighter soils, heavier clays and additional regional factors, such as

[18] Dyer, *Standards of Living*, p. 23.
[19] Miller and Hatcher, *Rural Society*, p. 149.
[20] See pp. 155-56, 173-75 below.
[21] A virgate, or yardland, averaged about thirty acres and related to the arable land of the open-field system. However, it was variable across England: Hallam, 'Social Structure: Eastern England', p. 595, and Raftis, 'Social Structure: The East Midlands', p. 638.
[22] Miller and Hatcher, *Rural Society*, p. 150.
[23] Dyer, *Standards of Living*, p.119.
[24] Miller and Hatcher, *Rural Society*, p. 151; Dyer, *Standards of Living*, p. 117.
[25] Miller and Hatcher, *Rural Society*, pp. 147-49.
[26] Herbert Hallam, *Rural England 1066-1348* (London: Fontana, 1981), p. 67.

wetter summers in the west of the country and later springs in the north, would all require larger acreages to achieve the same result. It seems safer, then, to be less precise and put the figure at between ten and fifteen acres. Even half-virgaters of good holdings could not have been self-sufficient in the face of prolonged bad weather which drastically reduced the corn harvest and spread disease among livestock,[27] but their circumstances were certainly more stable than the smallholders on the bottom rung of the peasant hierarchy.

Smallholders, the lowest tenants, were in an altogether different bracket. They held fewer than ten acres, often far fewer and certainly not enough to sustain them, and they were prominent among the peasantry across England. Further, far more of them appear to have been freeholders than servile, and therefore were able to access the new assizes through the royal courts. Hilton notes that, in Warwickshire, 'the poorest people in the village were often free men' and Miller and Hatcher find similar evidence from Lincolnshire. [28] Schofield also agrees that free tenants often held 'very small plots'.[29] It was the reverse of the position of free virgaters, who were better off than their servile equivalents because the dues they owed their lords were considerably less. Hilton offers evidence from the west midlands of a great variation of smallholdings from cottage yards, to odd corners of land, to four or five acres in the open fields, occasionally described as 'gooselands' or 'swinelands' to indicate their holders' means of subsistence, at least in part.[30] He takes his examples from the end of the thirteenth century, but research shows that they might also be relevant to the earlier time. For example, in Wiltshire, the median holding was a half-virgate, about fifteen acres, in 1200

27 They were 'on the very edge of subsistence': Hilton, *A Medieval Society*, p. 114.
28 Hilton, *A Medieval Society*, pp. 114-15, 131; Miller and Hatcher, *Rural Society*, pp. 144, 156.
29 Phillipp Schofield, *Peasant and Community in Medieval England, 1200-1500* (Basingstoke: MacMillan, 2003), p. 21.
30 Hilton, *A Medieval Society*, p. 131.

and ‘smallholders were not usually numerous’ although, simultaneously, in parts of Norfolk ‘there were many smallholders’.[31] In addition, many took tiny areas of land as sub-tenancies concealed within larger tenements and not revealed in the legal records.[32] These variations were multiplied many times across the country and throughout the century. They make the point that Hilton’s fractional holdings could have existed a hundred years earlier than their first recorded appearance. Also, more importantly, they show that, although it is not possible to find a simple pattern to the fluctuations in the location, time and variety of small tenements, the great majority of them were worked by freeholders.

There were further complications through the practice of partibility and, surprisingly among people who were so poor, the existence of a land market.[33] In some areas, partible inheritance contributed substantially to the poverty of smallholders, especially when it co-existed with assarting which removed ‘the reserve of waste whose profits the poor cottager might use for his livelihood’.[34] In parts of Lincolnshire in the early decades of the thirteenth century, partibility increased to the extent that smallholders relied upon income from the fen and labouring in order to survive, and the same circumstances prevailed in discrete areas across England: in a Norfolk settlement, for example, fifty-eight tenements accommodated ninety-four tenants.[35] Hallam gives an example of an ecclesiastical lord from Suffolk who tried to reverse the custom, and he cannot

[31] Hallam, ‘Social Structure: Southern England’, pp. 655, 595. At the same time, fewer than ten acres were held by 59 per cent of the tenantry in Lancashire, 52 per cent in Yorkshire and 35 per cent in Northumberland: Miller, ‘Social Structure: Northern England’, p. 688. The ‘median’ is the middle number of a run and not the mean average.
[32] Miller and Hatcher, *Rural Society*, p. 149; Bruce Campbell, ‘The Land’, pp. 179-237, in *A Social History of England 1200-1500*, ed. by Rosemary Horrox and Mark Ormrod (Cambridge: Cambridge University Press, 2006), p. 231
[33] See pp. 138, 151-53 below.
[34] Hallam, ‘Social Structure: Eastern England’, pp. 594, 601-03, 634.
[35] Hallam, ‘Social Structure: Eastern England’, pp. 598, 602.

have been alone in his concern.[36] There was a similar effect in areas where inheritance was not partible, because many parents provided for their daughters and younger sons by splitting up their property. This did not happen everywhere as many lords, and families, were keen to keep tenements viable. Holdings could also be reconstituted as ambitious heirs bought back land which had been given to younger siblings or sold outside the family. The kaleidoscopic pattern seen in the dispersal and coagulation of tenements reflects the fluctuations in their location and timing. In addition, there is evidence that the poor, as well as the better-off, dealt in land; in Campbell's view, 'typically a single strip, plot or parcel in the open fields'.[37] Dyer shows that charters survive from the year 1200 for the conveyancing of areas of less than two acres, and it is clear from the manorial rolls of the mid-thirteenth century that sub-letting, which increased the numbers of both small and large tenements, had been going on for many years.[38] A number of peasants were doubtless driven by ambition to rise above the smallholding class, but a more common reason for sub-letting may have been to concentrate an individual's entitlement to the arable in one place, rather than it be inconveniently scattered across the common field.[39]

Given the often very small size of their tenements, it is scarcely surprising that smallholders engaged in occupations on and off their land, other than farming it, in order to live. They laboured on bigger holdings, took employment in larger households, baked and brewed, spun yarn and produced a great variety of tools

[36] Hallam, 'Social Structure: Eastern England', pp. 603-04; Dyer, *Standards of Living*, p. 120. On the other hand, Campbell argues that smaller holdings could be in lords' interests as they increased the number of entry fines and the amount of business in seigneurial courts: Campbell, 'The Land', p. 231.
[37] Campbell, 'The Land', pp. 208-09.
[38] Dyer, 'Social Structure: The West Midlands', pp. 670-71; Dyer, *Standards of Living*, pp.121-23.
[39] Hilton, *A Medieval Society*, p. 115.

and artifacts for everyday use.[40] Women as well as men, and also children, were obliged to turn their hands to whatever work was available to keep their families viable. Successful smallholding craftsmen whose wares were in constant demand may have found that they provided by far the greater part of their income. Dyer cites thirteenth-century examples of Wiltshire potters who each held four acres and a Suffolk brewer and bread-retailer who 'was otherwise dependent upon an acre'. These men may well have been subsidising, from their commercial activities, the dues levied on their tenements. They probably continued to hold them as a mark of prestige in a land-based society, and also as a safety net, however inadequate, for the inevitable hard times to come. Campbell, however, takes the debate a stage further by arguing that some members of peasant families worked exclusively away from the holding. He refers specifically to agricultural labourers who, other than vagrants and indigents, were the 'poorest members of rural society'.[41] Although they were not seised of holdings as tenants and were therefore landless, they were still part of the peasantry in practice, although not theoretically, through their family connections. Full-time wage-earners did not become a separate class until later.[42] This must have contributed to a peasant family's economic stability in good times, even more so if its extramural members were engaged in occupations more prosperous than labouring, such as those cited by Dyer above, which may have helped it to survive in lean years.

There is a further, even lower, category of people who had once tenanted land but lost it. They were not peasants, but they had been. They were destitute in

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[40] Dyer, *Standards of Living*, pp. 131-34; Hallam, 'Social Structure: Eastern England', p. 617; Hilton, *A Medieval Society*, p. 114.
[41] Campbell, 'The Land', pp. 216, 219. See also Miller and Hatcher, *Rural Society*, pp. 151-52; Stephen Rigby, *English Society in the Later Middle Ages, Class, Status and Gender* (Basingstoke: MacMillan, 1995), p. 49; Dyer, *Standards of Living*, pp. 22, 212-13.
[42] Dyer, *Standards of Living*, p. 26; Campbell, 'The Land', p. 219.

that they were wholly dependent upon the charity of other people for their survival. It is not always easy to perceive them in the rolls and they are perhaps most obvious as bands of men and women who appear to have been dispossessed as a result of civil unrest.[43] The solution to 'the mysterious ability of the poor to survive' in hostile conditions was charity, in Dyer's view, motivated largely, though not exclusively, by Biblical teaching.[44] His findings may be an indicator of the numbers of people who were dispossessed and reduced to begging. Failed litigants who were involved in disputes with relatives were probably subsumed into their families, and cannot be considered destitute as they had some means of support, however disagreeable it may have been to them. For the same reason, peasants who kept their holdings but were forced, in hard times, to turn to charity, are excluded from this category.

It seems, then, reasonable to conclude that: litigating free peasants who held a virgate or more were prosperous enough to meet a half-mark amercement if they failed in their suit; and half-virgaters also may be thought potentially able to do so, other than in very bad years. However, on the above evidence, smallholding families could not necessarily be confident of an income surplus to their everyday requirements even in prosperous times, and yet many of the failed litigants among them appear to have paid the fine. How poor, then, were they?

The poverty of smallholders

A poor freeholder at the turn of the thirteenth century may have seen his poverty in relative terms compared with the situation of his neighbours: less than those who were more heavily burdened than he with manorial exactions; and greater than virgaters. In difficult times, though, poverty was more likely to appear as a

[43] See pp. 236-38 below.
[44] Dyer, *Standards of Living*, pp. 234, 311

stark reality, especially if it met Dyer's definition of 'life-threatening deprivation...a permanent condition for some and a periodic problem for many'.[45] However, 'life-threatening deprivation' as a permanent state is close to, if not synonymous with, destitution and is inapplicable to the lower ranks of the peasantry according to the historiography outlined above. The threat of it was no doubt ever-present, but it must have receded in years of plenty. Poverty among lesser tenants at the turn of the thirteenth century is therefore probably best thought of as a fluctuating material state between severe want and plenty, governed largely by external circumstances and especially the weather.

The difficulties of assessing peasant income and expenditure, particularly among those prone to poverty, are well known. Farmer points out that the sources are few, significant factors such as population, climate, and soil fertility difficult to assess, and payments to workers were of a 'bewildering variety'.[46] When compared with the information available, the originating writ of novel disseisin which is generally put at 6d. would seem difficult enough to find,[47] let alone an 80d. amercement. For example, the daily rate of a skilled carpenter was about 2.5d. with no food provided.[48] Thatchers and tilers could expect the same, out of which they had to provide for their mates, but unskilled labourers would receive much less. However, Campbell shows that 'the real value of their wages...held up reasonably well' in the early part of the thirteenth century. This would have put more money at their disposal, assuming they were in multiple occupations,

[45] Dyer, *Standards of Living*, p. 234.
[46] David Farmer, 'Prices and Wages', pp. 716-817, in *The Agrarian History of England and Wales, Volume II, 1042*-1350, ed. by Herbert Hallam (Cambridge: Cambridge University Press, 1988), pp. 716, 718, 760, and passim for information on the costs of living. See also Dyer, *Standards of Living*, passim.
[47] See p. 140 below.
[48] Farmer, 'Wages and Price', pp. 768, 772.

despite the run of poor harvests which increased the cost of food.[49] By the same token, though, peasants' income from surplus produce must have remained static or even dipped. If the above carpenter were also a smallholder as the historiography indicates,[50] it seems unlikely that his overall purchasing power was significantly increased.

What is to be made of this picture? It leads Miller and Hatcher to the gloomy conclusion that 'a very large area of genuine poverty existed in many English villages'.[51] The records bear witness to this, and perhaps to the desperation that could accompany it, but they also show a fuller, brighter scene of determination and hope on the part of low-ranking tenants who brought the assize. This is difficult to understand. Their poverty as recorded by the court clerks, whether actual, relative or artificially defined, cannot necessarily be taken at face value. The payment of amercements illustrates this well. The ability to find half a mark prima facie suggests a reasonable level of prosperity and would certainly seem to exclude deprived smallholders who scratched a living. Yet, if it is accepted as argued above that there must have been many more poor litigants before the royal courts than those excused their amercements, then this latter group must be well represented, although concealed, within the novel-disseisin records, paying their penalty alongside the better-off.[52] The real circumstances of defendants are particularly difficult to determine. Those who failed may have sunk back into the penury they had tried to escape, or were possibly lords or wealthy neighbours of the plaintiff. Some information may occasionally be gleaned from damages awarded against them, or details in the clerks' accounts.

[49] Campbell, 'The Land', p. 216; Dyer, *Standards of Living*, pp. 27, 37.
[50] See pp. 129-30 above.
[51] Miller and Hatcher, *Rural Society*, p. 149.
[52] See pp. 118, 121 above.

The financial situation of plaintiffs is potentially less difficult to ascertain, though seldom easy. As the dispossessed, or allegedly so, they originated the action and there may be some indication whether or not they qualified for aid to procure their originating writs. The focus of the court was more on the accuracy of their claim than the activity of their opponents, and therefore any additional information within the record may concern them, and their previous financial state, rather than the defendant.

Returning to the income of the smallholding carpenter, above, if he brought a suit of novel disseisin but failed in it and his amercement of half a mark were not cancelled, he would have had to work for thirty-two days to meet it out of his day wages, on top of his living expenses. Clearly, his holding would have needed to yield a great deal of surplus produce that could be sold for ready cash before he could contemplate such an enterprise. Yet, if the conclusions of scholars such as Doris Stenton, Maitland and others are accepted regarding the numbers of very humble people before the royal courts,[53] then the money must have been found by many subsistence, or below-subsistence, smallholders who were unsuccessful in litigation and did not qualify for aid. How did they achieve this, and why did the legal minds which formulated the assize think they could?

Sources of surplus income to smallholders

Several possible answers present themselves to the question of how impoverished failed litigants, who did not qualify for monetary aid, paid their amercements. These include the possibility that: they were not as poor as scholars believe; far fewer of them were involved in litigation than is thought; they in some way had access to extra cash; they were supported by family, and perhaps also neighbours

[53] See the notes following.

if they were opposing a lord; they were not smallholders at all, but single tenants of numerous small plots. Taking these in sequence, the continual temptation to think that most of the poorest litigants in the court rolls must have been better off than they appear is always overturned by the evidence in the records themselves. Scholars generally are at one on this. Maitland's conclusion from his reading of the early plea rolls, that many novel-disseisin actions 'are brought by very humble persons and deal with minute parcels of land', has been re-asserted ever since.[54] Holdsworth echoes his words and Stenton writes of the 'very widespread poverty among men whose status allowed them' into the royal courts.[55] This answer also deals with the second possibility, that few smallholders engaged in litigation.

The third answer, that they had access to ready money, does not contradict the evidence for poverty if it were intermittent; in other words, if they had access to credit as necessary. Latimer points out that credit was 'crucial [to] the functioning of the economy', both as ready cash and delayed payments.[56] It is known that the payment of amercements was hindered through the procedure of collection, which would have allowed time for credit arrangements to be made.[57] Given the prevalence of borrowing, it seems very likely that smallholders were customarily debtors and there seems to be no reason why they should have made an exception of legal costs. At the same time, the idea of peasant money is an attractive theory in the light of the large amount of currency that is known to have been in circulation in the late-twelfth and early-thirteenth centuries, more than

[54] *Pollock and Maitland*, II, p. 48.
[55] William Holdsworth, *A History of English Law*, 15 Volumes, 5th ed. (London: Methuen, 1942), III, p. 8; Doris Stenton, 'Introduction', pp. xi-lxxiv, in *RJL*, p. lxiii. See also Donald Sutherland, *The Assize of Novel Disseisin* (Oxford: Clarendon Press, 1973), p. 48.
[56] Paul Latimer, 'Money and the English Economy in the Twelfth and Thirteenth Centuries', *History Compass*, 9 (2011), 246-56.
[57] *1235 Surrey Eyre*, I, pp. 130-32.

doubling between 1180 and 1205.[58] Masschaele gives a brief résumé of conflicting scholarly opinion on whether inflation or deflation dominated the economy during John's reign. Latimer agrees with Harvey that peasants paying money rents would have benefited from the rise in prices, and points out that these were likely to be freeholders, the very people who could access the royal courts.[59] Although further enquiry into this fascinating topic is beyond the scope of the present study, there remains the fact that the poor found enough money, extra to their normal requirements, to pay legal costs and to engage in land deals. This is very surprising and, although it does not answer Masschaele's question of 'where was all this silver coming from', it might indicate that some of it was going to the peasantry, either directly or through the medium of money-lenders. It may have provided a reason for the popularity of the assize, further to those discussed elsewhere.[60] Nevertheless, there is still the question of how peasants repaid borrowed money.

The answer to the puzzle may lie in the fourth possibility suggested above, that peasant litigants were frequently supported by family members for their common good. It has been shown that smallholding families were flexible and resourceful even though extremely poor, and that their family ties were strong and inclusive.[61] Individual members engaged in a variety of activities in addition to running the holding. It has been strongly argued that the prevailing conditions of an overall more stable society, better weather, and an increase in the supply of silver, in the late-twelfth century and for most of the thirteenth, enabled

[58] James Masschaele, 'The English Economy in the Age of Magna Carta', pp. 151-67, in *Magna Carta and the England of King John*, ed. by Janet Loengard (Woodbridge: Boydell, 2010), pp. 166, 151-53.
[59] Paul Latimer, 'The English Inflation of 1180-1220 Reconsidered', *Past and Present*, 171 (2001), 3-29 (p. 7).
[60] See pp. 36-38 above.
[61] See pp. 129-30 above.

commoners to expand their commercial activities.[62] This in turn drove up the population, as the increase in prosperity enabled larger families and a virtuous circle was established.[63] Under such circumstances, it is likely that family members would have pooled resources in order to embark on mutually beneficial litigation, confident that their combined incomes would meet potential expense. There may have been interested relatives who were not part of the central household at the time but had a related interest in the land; possibly adult children working away from home, with the intention of returning when their parents became too old or infirm to continue in physical work. Razi points out that families encompassed villein as well as free peasants, through the mixed-status nature of rural life.[64] Freemen could therefore be adversely affected by the problems of their bond relatives, but the reverse situation would also have operated, enlarging the number of contributors to a failed litigant's fine. Further, there is evidence of a strong desire within the wider family to recover and retain dispersed property originally given as *maritagia*, which seems to have inspired deep feelings, as noted elsewhere.[65] It seems entirely plausible, then, that dispersed kin joined forces to recover family land that had been alienated, and that the payment of legal costs and fines, either directly or as re-imbursement to money-lenders, became a group effort.

The fifth possibility is that some plaintiffs were not the smallholders they appear to be from the records. They may have been multiple operators, holding a number of extremely small tenements and with sufficient resources at their

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[62] John Langdon and James Masschaele, 'Commercial Activity and Population Growth in Medieval England', *Past and Present*, 190 (2006), 35-81 (pp. 37, 36).
[63] Langdon and Masschaele, 'Commercial Activity', pp. 41-42.
[64] Zvi Razi, 'Serfdom and Freedom in Medieval England: a Reply to the Revisionists', pp. 182-87, in *Rodney Hilton's Middle Ages: An Exploration of Historical Themes*, ed. by Christopher Dyer, Peter Coss and Chris Wickham (Oxford: Oxford University Press, 2007), p. 183.
[65] See pp. 252-54 below.

disposal to meet legal costs without much difficulty.[66] They appear as smallholders because records relate only to the disputed property, even if it were one of several, or even many, minuscule areas in the plaintiff's possession. The remainder were irrelevant to the matter in hand. The sum of such operators appears, at first sight, likely to have been small for two reasons: the peasant land market was restricted in certain areas by individual lords and local custom;[67] and the distribution of holdings between tenants was volatile.[68] However, research also shows that multiple operators were not uncommon. Their number almost certainly fluctuated from area to area, but this would be in line with the fluctuations in other comparative factors such as size and location.[69] The question then becomes proportional. How many tiny disputed parcels of land were held by such tenants, and how many were the sole holdings of impoverished plaintiffs? Some light might be shed on this by a comparison of novel-disseisin actions between counties where there is evidence for multiple tenancies and, between those where there is little, to discover if there were a larger number of disputed, ostensible smallholdings in the former. The common-law rolls offer no direct evidence in support of this theory but they do provide a good deal of circumstantial information about smallholding litigants through the record of the damages awarded for and against them, discussed elsewhere.[70]

The one certainty, through the evidence of the novel-disseisin rolls themselves and its interpretation by scholars, is that many genuine smallholders brought the assize and, when necessary, found the half-mark amercement. It is not altered by the strong possibility that a number of apparent smallholders were in

[66] A possible candidate might be Gilbert son of Andrew, discussed on p. 174 below.
[67] Dyer, 'Social Structure: The West Midlands', p. 671.
[68] See pp. 128-29 above.
[69] See pp. 127-28 above.
[70] See pp. 165-73 below.

fact prosperous multiple tenants. The weight of probability falls on the fourth answer, the first three having been discounted, that those who did not qualify for monetary aid found their amercements through contributions from their kin, and that the situation was well known to the lawyers who set the half-mark limit to legal aid accordingly. However, those who did qualify cannot all be defined by their lack of supportive relatives, for many were solvent enough to pay damages and some dealt in land. The degree of poverty experienced by peasants who fell within the courts' definition of it can therefore sometimes be inferred from the accounts of their actions.

The provision of monetary legal aid

The very poor were first aided in monetary terms, in the chronological order of a novel-disseisin action, with the procurement of the originating writ and in finding guarantors. There is uncertainty among historians over how much, if anything, the writ cost, largely because, as Meekings laments, the process 'was so familiar to contemporaries that no-one bothered to describe [it]'.[71] The great majority of writs were for routine actions and therefore known as *de cursu* (of course), or pro forma in today's idiom. They followed a set composition which could be penned in advance for speed of issue by chancery clerks known as 'cursitors', after the writ's appellation. They were subsequently completed with plaintiffs' details as and when required. Unless the plaintiff requested that his case be heard before a particular court, Meekings finds no evidence of payment for the writ to the crown. If there were a charge, it was usually 'a customary fee' payable by the plaintiff and probably divided between the scribe, the official who sealed the writ with the king's great seal, and the chancellor who was entitled to a part of the income from

[71] *1235 Surrey Eyre,* I, pp. 26-27.

the use of the seal.[72] Carpenter puts the cost of the customary fee at 6d. on the basis of evidence, which he does not specify, for this sum at a later date, so it is possible that it was less than 6d. at the period of the earliest court records.[73] Musson also puts the fee at 6d. but believes it was waived altogether 'if the applicant could swear to poverty'.[74] George Turner writes that 'all original writs initiating proceedings in the county court…were writs "of course" issued without fee', presumably to the crown.[75] The cost of taking out a writ was therefore kept to a minimum which, with their mass issue, accounts in Carpenter's view for 'the great expansion in royal justice'.[76] Although it is not always immediately clear whether historians mean administrative costs or treasury demands when they refer to 'fees' in this connection, it seems safe overall to conclude that the treasury took nothing for the initiation of a routine hearing and that the fee which could be waived was for the necessary secretarial and procedural expenses. If this is so, it follows that applicants must have sworn to poverty before the scribe, which seems to give the latter a great deal of authority but it is reasonable to suppose that he would have summoned a superior to grant the affidavit. Once that was done, plaintiffs were secure not only in their access to royal justice but also in the knowledge that, should they fail, the amercements would be cancelled by reason of their poverty.

The second aid concerned those who were unable to find guarantors. All plaintiffs were required to put up two persons who agreed to be amerced on their

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[72] Meekings, Volume 1, *Surrey Eyre*, p. 27.
[73] David Carpenter, *The Struggle for Mastery, Britain 1066-1284* (London: Penguin, 2003), p. 238.
[74] Anthony Musson, *Medieval Law in Context: the Growth of Legal Consciousness from Magna Carta to the Peasants' Revolt* (Manchester: Manchester University Press, 2001), p. 165.
[75] George Turner, 'Introduction', pp. xv-clvii, in *Brevia Placitata*, ed. by George Turner, completed with additions by Theodore Plucknett, Selden Society, 66 (London, 1951), p. liii. The work is an instructional tract from the thirteenth century.
[76] David Carpenter, *The Struggle for Mastery, Britain 1066-1248* (London: Penguin, 2004), p. 238. Previously, originating writs were issued on an ad hoc basis usually at great expense.

principal's behalf if he or she defaulted and caused the suit to collapse. It was a way of reducing wastage of the court's precious time and of providing some recompense, again to the king, if it occurred. Meekings writes that those plaintiffs 'without substantial connexions, such as a poor freeholder, especially a single woman or widow' who were unable to find sureties 'were permitted simply to pledge their faith that they would prosecute'.[77] Musson adds that a pledge might be substituted for 'items of clothing or property'.[78] Very poor plaintiffs could be confident, therefore, that redress was within their monetary reach and that they would not be made insolvent by the cost of failure. The destitute had nothing to lose. The lack of sureties' names in a record of novel disseisin usually indicates that the litigant had produced none, otherwise the court clerk noted that there were amerced for default. Occasionally, he spelled out that *fides erat plegium* (his, or her, faith is his, or her, pledge), but more frequently it was understood.

The third aid, the cancellation of amercements, is now the most obvious form because the order was clearly inscribed by the clerks as it was given, but it happened relatively infrequently. It indicates litigants, both plaintiffs and defendants, who could not meet the fine, but not necessarily that they initially needed help to bring their suits. In other words, a correlation existed between waived amercements and cancelled fees, but in one direction only. An unsuccessful plaintiff who swore to poverty at the outset must have been pardoned the later amercement, but the latter does not automatically indicate a free writ. In a few cases the clerk recorded poverty as the reason for their cancellation. In others he observed either that they were pardoned or that the litigants were impoverished, with the other being understood. Sometimes he

[77] Meekings, Volume 1, *Surrey Eyre*, pp. 27-28.
[78] Musson, p. 167.

inserted a laconic *nichil* (nothing) over an individual's name. A good example, although her circumstances may have been unusual, is Alice daughter of Estmer, the woman involved in a property deal alluded to below.[79] Her amercement, for withdrawing her suit, was pardoned *quia pauperrima est* (because she is very poor) but she had been able to find guarantors and, on that basis, perhaps had also paid the customary fee for her writ. Amercements were set by the justices who arrived at the amount knowing the unsuccessful litigant's financial position, probably through the jurors who were his or her neighbours.[80] However, as Hudson points out, Magna Carta instructed that amercements should be proportionate to the gravity of the offence, suggesting that this had not always been the case.[81] The degree of the injury must have been reconciled with an individual's ability to pay. At the same time, half a mark was so widely levied that it begins to look almost like national policy, although no evidence has been found for that and it may be too grand a claim. It must, however, have been considered within the reach of the majority of poor tenants or else jurists and justices displayed a degree of illogicality in setting amercements which is otherwise entirely absent from their proceedings. Given that a large proportion of peasants were, as would have been known, either at or below subsistence level, the figure must have brought within its ambit many litigants who fell just outside the criteria for aid and struggled to pay it, as already discussed.[82] Why was a lower, more affordable sum not levied, instead of it being set too high and cancelled? This is a different question from the issue of why the lawyers were confident that, on the whole, it would be paid. As previously suggested, half a

[79] *CRR*, VI, p. 382, discussed on pp. 156-57 below.
[80] Meekings, Volume 1, *Surrey Eyre*, p. 129.
[81] Hudson, *Oxford History*, p. 746.
[82] See p. 121 above.

mark may have been a pragmatic amount which combined efficiency of collection with maximum returns. Perhaps the expense of pursuing smaller sums was as counter-productive as chasing a litigant for a half-mark that he could not pay, leading legalists to the practical conclusion that it was more cost-effective in the circumstances, and avoided a great deal of potentially fruitless trouble, to cancel the fine at source.

Many unsuccessful litigants whose fines were quashed appear to have been in more-or-less dire financial straits,[83] but others, like Alice, seem to have had their lives under control. This also gives reason for supposing that the customary fee for a writ was within the reach of, and paid by, many whom the courts officially classified as poor. The awarding of damages which, though small, were still in excess of 6d. strongly suggests that a cancelled fine was not ipso facto proof of severe impoverishment nor triggered by the plaintiff's swearing to poverty. However, the number of those poor enough to need assistance at the outset is not known. The provision of monetary aid is probably among the most important causes of the assize's popularity with the lower peasantry. It brought the means of redress within the reach of impoverished, dispossessed freeholders, and it was perhaps even more important as a statement of intent: that all the king's free subjects, of whatever social or financial degree, should have access to his justice through the medium of his courts. It must have strengthened and confirmed the populace's perception that the monarch's attitude towards them was positive and benevolent. Further elements which may have influenced commoners' view of the crown are discussed elsewhere.[84]

[83] See pp. 145-50 below.
[84] See pp. 31, 35-36 above.

Litigants

What, then, can be gleaned from the following accounts about the behaviour and aspirations of litigants who qualified for monetary aid? Those labelled in the rolls as having nothing were often part of a group supporting a defendant lord, and may have been relatively secure within the lord's household. It is not clear if they were tenants as well as servants, or landless *famuli* (household members) and therefore not peasants. Freeholders with tiny parcels of land may have been less financially secure than they, but maintained a comparative independence which, however, must have become theoretical in hard times when they could not support themselves. Occasionally the record supplies details of a tenant's precarious hold on a property, evidently the only one, highlighting the ease with which it could be lost and the individual depressed into the landless, or perhaps villein, class. A significant number of suits failed on a technicality, being out of time, and some of them imply a loss of self-sufficiency. It is not always clear if an award of low damages indicates a smallholder fighting to recover a sole property and resume his or her place in society, or one of many smallholdings tenanted by the same individual. Where several are grouped together, they may signify predatory action on the part of lords to extend their own holdings. Women are regularly and frequently present in all the above categories.

Although the subjects discussed below all fell into the legal definition of poverty, there are clear distinctions between them in its degree. The first three female plaintiffs, Matillda, Mabel and Muriel, were probably destitute and bear comparison with the fourth, Alice who dealt in land and continued as a freeholder. There is a similar distinction between defendants. Two, Benedict and William, were adjudged 'poor' or 'very poor' and therefore, like the four women, pardoned their amercements, but they must have possessed enough in the way of goods or

income to meet the damages which were awarded against them.[85] Not so the third defendant, Stephen, a poor clerk who was adjudged unable to meet both amercement and damages.[86] Benedict and William seem better off than the female trio and Stephen, but poorer than Alice, and occupy a middle ground between destitution and relative prosperity. They can be bracketed with Alice in that they possessed a measure of control over their lives but, within that, there appears to have been a considerable distinction between them. The cases are divided into plaintiffs and defendants.

Plaintiffs

The following is a typically terse account of an action, among the earliest, brought in 1195 at Buckingham by one Matillda, daughter of Richard:

> *Assisa venit recognitura si henricus Bat iniuste et sine Judicio disseisavit Matilldam filiam Ricardi de libero tenemento suo in Longeleia Infra assisam. Juratores dicunt quod henricus non disseisavit eam. Judicium Matillda quieta de misericordia pro paupertatem.*[87]
>
> The court meets to determine if Henry Bat unjustly and without a judgement has disseised Matillda, daughter of Richard, of her free tenement in Longley (Buckinghamshire) within the assize. The jurors say that Henry has not disseised her. Judgement: Matillda is free of [her] amercement because of [her] poverty.

Nothing here indicates the degree of Matillda's poverty. She may always have been one of the many poor smallholders identified by historians. Perhaps poverty had rendered her incapable of performing the services due for the holding and she

[85] *CRR*, VII, p. 62; *ELAR*, *c*. 409; discussed on pp. 168-69 below.
[86] *CRR*, III, p. 346; discussed on pp. 170-71 below.
[87] *Three Rolls*, p. 130.

had suffered distraint of her chattels and ultimately the land itself. Or again, as a widow, she may have obstructed her late husband's heir from taking possession of his property. What, then, of Henry who, with the jury, would have known the intricacies of the situation, none better if he were a relative? It is impossible to deduce the true circumstances or the morality of the actors but the very impenetrability of the record shows how commonplace to rural life were the several possible causes of the action's genesis. Where the circumstances were extraordinary, they were usually recorded.[88] The royal court's decision did not necessarily confirm that of her manor. It is possible that she brought the action too late and failed on a technicality: that the disseisin had occurred before the time limitation.[89] Whatever her experience, it motivated her to act from a greatly disadvantaged position.

A similar example was recorded more than a decade later, in 1208 at Westminster.[90] Hugh of Bastwod with his wife Edith brought an action for dispossession of a tenement in Estham (Eastham), Worcestershire, against Margaret of Bastwod and Walter le Blak and lost. Again, it is a very short account with an identical verdict other than the addition of the one word *ita* (thus): the defendants *non ita disseisiverunt eos* (have not thus disseised them). Does this also relate back to the conditional *infra assisam* (within the assize) of the opening mantra to signify that the plaintiffs were outside the court's time limitation? It must indicate something, for royal-court clerks did not often make meaningless additions, but it may refer to the qualifying *iniuste et sine judicio* (unjustly and without a [court] judgement), which meant that the dispossession had not previously been legally authorized. However, details were usually given in the

[88] For an example see pp. 173-77 below.
[89] Time limitations were set intermittently at a date that would be known: Sutherland, pp. 55-56.
[90] *CRR*, V, p. 237.

latter circumstance and they are unlikely to have been omitted, least of all at the Westminster court which was a higher authority than the county eyres.[91] Hugh was amerced *pro falso clamore* (for a false claim) but the clerk did not add that he was poor or that the fine was excused. He simply wrote *pardonatur* (he is pardoned). This meant exactly the same thing but the singularity of the word gives the impression that it was spoken rather than an unvoiced clerical explanation and, if so, it can only have been uttered by one of the justices. It may be an illustration of Ralph Turner's belief in the sympathy of the bench towards the poor and disadvantaged which did not, however, extend to the compromise of justice.[92] The locational name of the principal litigants suggest that they were probably closely related, since it has not been possible to identify a Bastwod within reasonable distance of Eastham.[93] It could be topographical but that could also indicate kinship by blood or marriage and it seems probable that this was a family quarrel.

The possibility that these litigants did not observe the time limitation in bringing their suits is sharpened by the example of a case brought at Northampton eight years later by Mabel daughter of Andrew.[94] In 1203 she sued William son of Roger for dispossessing her of her holding in Sirinton (Sherrington), Buckinghamshire, and lost because the jury found that *Willelmus non disseisivit eam...infra assisam* (William has not disseised her…within the assize). The last phrase is a valuable addition to the usual verdict, relating directly back to the opening mantra given in Matillda's record above. The implication of the verdict is

[91] Milsom believes that *ita* did in fact refer to the phrase *injuste et sine judicio* and gives an example of its use in a sentence identifying the court involved in the previous judgement: Stroud Milsom, *The Legal Framework of English Feudalism* (Cambridge: Cambridge University Press, 1976), pp. 15-16.
[92] Ralph Turner, *The English Judiciary in the Age of Glanvill and Bracton, c. 1176-1239* (Cambridge: Cambridge University Press, 1985), p. 262.
[93] The closest found is Bestwood in Nottinghamshire.
[94] *ENAR, c.* 917.

that she had indeed been disseised *iniuste et sine judicio* (wrongfully and without a [court] judgement) but before the time limitation which applied to that court. She lost on a technicality, as Matillda may have done.[95] The cut-off date, which the Northampton clerk helpfully gave, was John's coronation at Canterbury, his third crowning, which took place on Easter Sunday, 25 March 1201.[96] Mabel had therefore been dispossessed for at least two-and-a-half years and perhaps longer before her case was heard *in crastino nativitatis Beate Marie* (on the morrow of the nativity of the Blessed Mary) which, in 1203, fell on 10 September. The record continues that *Mabillia in misericordia pro falso clamore et pauperima est* (Mabel is in mercy for a false claim and she is very poor). The clerk's reference to Mabel's poverty indicates that the amercement was waived, although he did not spell it out in the manner of his Buckingham colleague. It was understood by all concerned. Here again was a lone woman in wretched circumstances with the courage and energy to undertake the process of approaching the king's court; one example among many to support the conclusions of Musson and others on peasant self-awareness, esteem and confidence.

When tenants such as these lost possession, what happened to them? They may have re-entered the tenement under altered personal circumstances, or perhaps had to resort to charity. The records raise the question of whether the degree of poverty experienced by such plaintiffs was the direct result of the loss they claimed. They may always have been poor, originally possessed of tiny holdings as outlined by the scholars cited above. Would they have been so very impecunious if they had known enough to bring their actions sooner? It is notable

[95] Mabel was one of six losing plaintiffs before that eyre, about whom the jury used the phrase *infra assisam* in their verdict: *ENAR*, *cc*. 893, 917, 923, 927, 929, 930.
[96] Medieval kings were habitually crowned more than once, presumably to reinforce their authority.

that none provided the two sureties normally required of both parties to guarantee the prosecution and defence of a suit.[97] When this was not possible, the individual promised that he or she would appear at court. These three must have so promised, or pledged their faith, without the clerk recording it, but it was spelled out in the account of a case heard at the Buckingham eyre of 1195 as follows:

> *Assisa venit recognitura si Ricardus filius Osain disseisavit Muriellam de libero tenement in Stifeld infra assisam. Muriel non prosequitur. Fides erat plegium.*[98]
>
> The court meets to determine if Richard son of Osain has disseised Muriel of [her] free tenement in Stifeld (unidentified) within the assize. Muriel has not prosecuted [her suit]. Her faith was her pledge.

Muriel offered no further identification of herself on her writ although she must have had one, if only locational. Evidently the scribe did not prompt her to provide it, which was perhaps a sign of contempt for her. Her case is recorded very shortly after Matillda's but at the top of the membrane's dorse. This may signify that a fresh clerk with his own methods was inscribing the rolls, hence the difference in style. Failure to prosecute a suit usually signified the plaintiff's default through non-appearance. It was a collapse of the case for a negative reason and totally different from the plaintiff appearing in court to withdraw the claim. This briefest of records probably conceals a personal tragedy and Muriel may well have died before her case came to court, particularly if she were seriously impoverished or even destitute. It appears to be a further example of self-belief in the direst of circumstances by a plaintiff who had not only lost what

[97] This is discussed on pp. 140-41 above.
[98] *Three Rolls*, p. 131.

little she may have possessed but also knew no-one who would support her as a surety. It is worth noting again that the jurors and Richard, particularly if he were a relative, are almost certain to have known what happened to her. They may well have told the court what they knew but, as extraneous information to the legal process of this suit, it did not need to be recorded.

On the other hand, justices at the Northampton eyre of 1202 received information about a defaulting plaintiff on which they could, and did, act.[99] Walter of Quedhavering (Quadring), Lincolnshire, had taken out a writ for dispossession of his tenement there by Bartholomew of Muleton (Moulton)[100] but the case collapsed because *venit vel se essonoiavit* (he has not come or excused himself). The clerk wrote that *non invenit plegios nisi fidem* (he found no pledges other than his faith). The wording may be nothing more than an example of that particular scribe's method of recording a litigant's professed financial state. However, the defendant or the jurors must have supplied the court with contradictory information which led to the bench amercing him in the sum of one mark, twice the usual amount, to be paid at Lincoln at a later date. Given the judiciary's pragmatism in waiving fines that a litigant could not meet, this bench evidently considered that Walter's inability to find pledges had little to do with his solvency. He now begins to appear as an unpleasant individual, a man of some means but few friends, and unlikely ever to have paid the amercement. One wonders why he brought the action and if it had affected his plans that the case was heard at Northampton, one of many Lincolnshire suits before that eyre. He echoes down the centuries as a bad lot, apeing the plight of his hapless contemporaries. However, even if the latter had found sureties, their amercements

[99] *ELAR*, *c*. 1168.
[100] Probably also in Lincolnshire.

would not necessarily have been enforced, as illustrated by the following example.

In 1212 Alice daughter of Estmer returned to the Buckingham eyre to withdraw the claim for dispossession which she had previously brought against Alexander de Hamslap and Edith his wife *et posuit se in misericordiam* (and put herself in mercy).[101] It meant that the defendants remained in the erstwhile disputed holding at Stoni Stratford (Stony Stratford), Buckinghamshire. The withdrawal of a plaintiff was not unusual and suggests a deliberate use of the law and the court to record the conveyance of property.[102] Were Alice and Edith sisters and this a formal division between them of inherited land? Whatever the facts, the parties had arranged matters between them in such a way as to enable Alice to bring a bogus claim, the whole purpose of which was to have the desired arrangement permanently recorded in writing. It is very unlikely, therefore, that she had been truly dispossessed but had probably voluntarily vacated the holding in favour of the defendants. This would have been known to everyone in the courtroom, including the jurors who were local men. It is interesting that this relatively common occurrence, in the absence of title deeds, was clearly acceptable to the courts. It was perhaps viewed as a sensible preventative measure against potential future problems, since it provided security of tenure. It is of further interest in this instance that Alice *pardonatur quia pauperrima est* (is pardoned [her amercement] because she is very poor) even though she had found two sureties, John of Witechericheche (Whitchurch), Buckinghamshire, and Robert of Bedford. They were both amerced, because their principal had not prosecuted her suit. The sum is not specified which suggests the standard half-mark. The plan

[101] *CRR*, VI, p. 382.
[102] *1235 Surrey Eyre*, I, p. 73.

must have been in the best interests of all concerned and illustrates the importance given to smallholdings by every level of society; a measure of their value for the numbers of humble peasants they supported, discussed in the above historiography.

Alice presumably held another property, where she lived, that was truly her possession but the waiving of her amercement through poverty seems not to fit in with the rest of the information, although this may very well be because not all the information is given. It is the historian's continual lament that clerks constantly omitted material that was common knowledge or superfluous to requirements. It is possible that John and Robert were the parties' landlords. If so, their official involvement would have further strengthened the conveyance as it was done with their consent. They may also have been instrumental in the pardoning of their tenant's amercement, which Flower observes could occur through 'the intervention of a powerful friend'.[103] The procedure of the assize meant that the plaintiff had to be seen to be in the wrong and accordingly bore the legal costs. It seems only right, then, that the amercement for withdrawing the action should be paid by those reaping the benefit. The very complexity of the possibilities that present themselves to the modern reader of this short account suggests that in fact the case was straightforward and commonplace, as observed of Matillda's suit. As already noted, clerks frequently omitted what everybody knew and usually recorded complex suits in much more detail. On that basis, poverty seems to have been no bar to a freeholder utilizing the assize for the purpose of conveyancing property, and there must have been many who, like Alice and her associates, took advantage of the opportunity. The legal system

[103] Cyril Flower, *Introduction to the Curia Regis Rolls, 1199-1230 A. D.* (London: Professional Books, 1972), p. 472.

judged her to be poor but she gives every appearance of being much better off than Matillda, Mabel or Hugh. Perhaps she was on the lower periphery of Miller and Hatcher's 'middling layers'.[104] Certainly she had sympathetic acquaintances, if not friends, of means. Her suit reveals a sophisticated and manipulative use of the common law by many actors of different standing; jurors and justices, a poor but not insolvent freeholder, and prosperous landlords, co-operating to achieve a satisfactory result for all concerned.

Defendants

Failure by the defendant in an action of novel disseisin implied 'a personal wrongdoing' and for that reason the amercement was rarely excused.[105] Plaintiffs could fail on a technicality, such as an incorrect writ. At worst, their fault was to claim dispossession falsely, but defendants were aggressors. It was they who, rightly or wrongly and whether or not they were physically violent, put out the sitting tenant from the whole or a part of his tenement and provoked him into activating the assize. One defendant whose amercement was pardoned, however, was Benedict, son of John.[106] He was convicted in 1202 at the Lincoln assize of disseising Gilbert son of Andrew of his tenement at Wrenhill (Wrangle) in that county and amerced, but the clerk made a marginal note that he was *pauper nil misericordia* (a pauper with nothing to pay the fine). The manner in which the clerk has doubly emphasized Benedict's poverty gives the sparse Latin a resigned appearance and Gilbert may not have been optimistic about receiving the 4d. he was awarded in damages.[107] It has to be asked how Benedict could have inserted himself into a holding without the tenant taking immediate, remedial action as he

[104] See *n*. 24 above.
[105] See pp. 15-16 above.The implication was not necessarily present in other actions: Flower, *Introduction*, p. 466. See also p. 20 above.
[106] *ELAR*, *c*. 409.
[107] Damages pertaining to this and other cases are discussed further on pp. 1659-70 below.

was permitted to do.[108] No clue is given in the record. However, the clerk similarly recorded that *pauperimus est* (he is very poor) of the unsuccessful defendant in a case with a complicated history which the jury knew well.[109] William Piscator (the baker) was convicted, with his wife Cecilia, of dispossessing John Aurifabrus (the goldsmith) of his Northamptonshire tenement in Burgo (Broughton) at Westminster in 1214. John was awarded 2s. in damages. The holding had originally been held in villeinage by one Walter Spuldebe who sold it, *per gratum et permissionem domini* (with the good will and consent of the lord), to the plaintiff's father, Fulco Aurifabrus. Walter himself must have been a free tenant holding an unfree tenement for servile dues and this is an interesting and uncommon example of the sale of a property held in villeinage. Presumably it was pertinent to the case for the clerk to record what the jury had to say but it does not explain its relevance to the defendant, nor if it had anything to do with his poverty, all of which was no doubt perfectly clear to everyone in court. Probably equally self-evident to those present were the reasons why Stephen son of Alfred did not have even the consolation of damages when, in 1205 at Westminster, he won his case against Stephen son of Roger who was amerced.[110] The clerk noted that *disseisitor pauper clericus est* (the disseiser is a poor clerk), evidently feeling no need to spell out further his inability to pay. The justices added that Stephen son of Roger *reddat dampnum nichil* (should pay no damages) either, the import of which is discussed elsewhere.[111] Whatever his defendant's circumstances, this plaintiff had to be content with the recovery of his holding in Colintre (Collingtree), Northamptonshire.

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[108] *Bracton*, I, pp. 21-23. I am grateful to Professor Hudson for pointing out to me that disseisins were often committed by subservients on behalf of their superiors.
[109] *CRR*, VII, p. 62.
[110] *CRR*, III, p. 346.
[111] See pp. 170-71 below.

Again, the pardoned amercement of some defendants can be deduced because the clerk directly recorded them as destitute. This can be substantiated by the lay-out of a case from 1214 heard at Westminster in which no fewer than twenty-seven men were convicted of disseising Simon of Barton, Warwickshire.[112] Over nineteen names the clerk inserted the amount of that man's amercement but over six he wrote *nichil* (nothing). The epithet referred to the individual's lack of money and not the levy itself although, again, the two were for all practical purposes one and the same in this context. The amercements of the remaining six were added at the end of the record. The majority were for half a mark although the leader, William of Buckingham, was relieved of twenty shillings and a steward, presumably his, with another man, of one mark each. It was not unusual for the first defendant, in whose name the alleged disseisin had taken place, to be absent from such a hearing, particularly if he were a lord with scattered estates.[113] In this instance, however, no defendant was present and the case was taken by default which invariably meant that, as here, the jury found for the plaintiff and Simon was awarded damages of two marks. Like almost all plaintiffs, Simon was particular in recording his many disseisors' names and there is no suggestion that any was incorrect. The six with no means to pay their amercement were Nicholas Bagge (Bag), William of Hulm (Hulme), Simon son of Aldith, John of Grena (the Green), Robert Largus (Large) and Walter Nobilis (Noble).

Who were they? Their names are locational, patronymic or descriptive and offer no clue. The remaining defendants included the reeve and his son, a serving man, a skinner, a miller, a merchant and a gardener. Raftis makes the point that

[112] *CRR*, VII, p. 287.
[113] Bailiffs frequently stood in and could speak for their lords, but could not compromise the defence: Sutherland, p. 45 and *n.* 1.

occupational names were often used 'where it may be expected that servants only are indicated'.[114] However, it cannot be concluded from that that they must have been serfs. To the contrary, the historiography shows that many free smallholders took extra-holding work of a variety of sorts. Were the twenty-seven a mix of free and unfree tenants, bearing in mind that reeves were almost always villein? If so, for what reason would free peasants join this affray? It is impossible to reach any conclusion but the balance of probability is that they were mixed, given the inclusive nature of peasant families and the small distinction between villagers in terms of peasant-lord relations. Simon would probably have known them all as neighbouring fellow-tenants or landless workers. William's identification is probably historically locational, although a certain William was archdeacon of Buckingham at about that time[115] and there is a hamlet named Barton close to the town. However, the writ specifies Warwickshire and Simon's village must have been Barton-on-the-Heath in that county, some twenty miles to the west of Buckingham. It therefore seems more likely that William was local although that cannot be verified. He was evidently Simon's lord and had assembled enough men to eject him by force for reasons which remain obscure. The capitulation of so many of William's inferiors to his demands, whether they were tenants, paid workers or *famuli*, highlights not only the coercion which people might have had to endure but also the courage with which others, equally vulnerable, opposed it. The list also shows, by the inclusion of the reeve, that amercements, like taxes, were levied as much upon villeins as the free.

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[114] James Raftis, 'Social Structures in Five East Midland Villages: A Study of Possibilities in the Use of Court Roll Data', *The Economic History Review*, New Series, 18 (1965), 83-100 (p. 98).
[115]http://www.british-history.ac.uk/fasti-ecclesiae/1066-1300/vol3/pp39-4 (accessed 20 July 2015).

The gradation of the amercements, here from 20s. to one mark, to a half mark, to nothing, appears to have been standard practice. For example, in a Northamptonshire case before the county eyre of 1196, three related defendants were convicted of dispossessing Geva of Burcot (Wood Burcote in the parish of Towcester) of her holdings there and at Karswell (Caswell) but each was treated differently.[116] John son of Geoffrey was amerced 10s. but of his brother Hugh it was recorded that *nichil habet* (he has nothing). Their mother Juliana was not mentioned although she claimed in court to hold half a virgate in Caswell. She said that the sheriff had seised her of it at the direction of justices, and she called him to warranty. John claimed *quoddam pratum* (a certain meadow) in Burcote and put himself upon the assize. Perhaps he expected that this would transform the hearing into an enquiry, as discussed in Chapter 2 with regard to villeinage. It was, however, ignored and the jury brought in the verdict that Hugh had disseised Geva *et postea tradidit terram illam Johanni* (and afterwards handed over that land to John). Damages of 10s. were awarded, balancing the amercement. Was Hugh a simple-minded individual exploited by his scheming family but recognized as vulnerable and to a certain extent protected by the court? It is notable that he did not plead. But why was Juliana, a competent woman and apparently outside a husband's coverture, not amerced? It remains a mystery. What is clear, from the information supplied by the jury, is that the family had physically ejected Geva from her holdings. John and Juliana also seemed confident that they knew enough about the operation of the common-law courts to mount a defence and did so, employing all the catch phrases they had heard. In the event, they come down the years as greedy and ignorant but also cunning and

[116] *CRR*, I, p. 29. Caswell, meaning 'cress spring', is a deserted settlement in the parish of Greens Norton to the north-west of Towcester and lies beside a small tributary of the river Tove: http://carswell.com.au/wp-content/DebrettsCarswell.htm (accessed 28 July 2015).

physically powerful, and were adjudged sufficiently solvent to find goods or cash to the value of one mark. They were thwarted by due process and are a measure of the inestimable value of this action to those dispossessed after its introduction, and of the corresponding plight of the many who suffered loss of property and livelihood before its enactment and could not afford the means of redress.

A similar mix of graded amercements were handed down at the York eyre of 1208 to six defendants convicted of extending a mill pond in Warlageby (Warlaby), Yorkshire, to the detriment of Robert de Renevill's property there.[117] All were fined, the first- and third-named each for one mark, the last three for an unspecified amount which suggests the standard half-mark. The same was specified for the second-named, Richard Cocus (the cook), but the justices directed that *perdonatur Ricardo* (Richard is pardoned). He was evidently too poor to meet his amercement. His name suggests that he may have been one of the famuli of the principal defendant, Rannulf de Manegebi; a house servant with no money or possessions of his own to speak of. Again, his experience shows the care with which fines were given, that no-one was amerced more than could be reasonably found.

Conclusion

Poverty may have been legally defined in the records of novel disseisin as the inability of failed litigants to meet the standard amercement of half a mark, and they were accordingly pardoned from paying it. It was an assessment which had little to do with their real financial circumstances but set for pragmatic reasons which combined ease of collection with the maximum returns to the treasury. It was one of three monetary aids provided by the government, the first two

[117] *CRR*, V, p. 262. Renevill has not been identified.

concerning the procurement of the originating writ and the requirement to find two guarantors against the plaintiff defaulting. Several strata of impoverished but solvent peasants can be discerned below the half-mark level, and it is probable that peasants who fell within the legal definition of poverty represent only a small proportion of the poor. Those who were successful are concealed from view as no fine was imposed upon them. Many who failed but were considered able to meet their amercement must also have been impecunious, which may have been obvious to those perusing the accounts of their suits at the time but is unrecognized by the modern reader. There is a large corpus of work on the penury of the lower ranks of the peasantry and it is known that perhaps a half held tiny and fragmented holdings which must have forced them to supplement their income through labouring or craft work. It is also known that their poverty did not deter them from actions at law, both from the research of scholars into peasant mentalities and the evidence of the rolls. The latter reveal a gradation in the levels of poverty, from utter destitution to a precarious hold on sustainability, to a relatively stable financial position. There is also a distinction between plaintiffs and defendants in that all the former, de facto, were or had been freeholders, or claimed to be. The latter, on the other hand, may never have been peasants but always landless labourers or house servants of a lord and appear as members of large groups.

The poverty of unsuccessful litigants who did not qualify for monetary aid raises the question of how they met their legal costs. The chapter reviews several possible answers and concludes that the weight of evidence falls upon combined family commitment to the retention of family land. Near and distant kin to the smallholder pooled their resources from work undertaken on, or away from, the

holding. The motivation was both a strong attachment to land traditionally held within the extended family, and also practical reasons in that holdings were continually split and reconstituted, enlarged and diminished, according to the needs, aspirations and inheritance practices of family members. It is possible that a number of peasants initially paid their amercements with borrowed money, as credit was widely used, but they may have had to rely upon the extended family to reimburse the lender. Others, through the economic circumstances of the time, may have amassed sufficient additional resources to meet the debt outright, but these are likely to have been few. It should also be taken into consideration that some apparent smallholders were, in fact, prosperous tenants of multiple holdings who were in dispute over one of their several plots.

The failure of litigants was not due to their poverty per se. It is clear that there were provisions within the common-law system to enable its use by all freeholders regardless of their solvency and also, crucially, by those who were no longer tenants. This, of course, was the essence of the assize and is proof, if any were needed, that it was structured to nurture and support all unjustly dispossessed free persons back into tenancy. A further distinction between unsuccessful, poor plaintiffs and defendants centres on the reasons for their failure. Plaintiffs seem frequently to have stumbled on a technicality, particularly the time limitation, which is occasionally indicated by a tell-tale phrase in the often very brief account of their grief. For whatever reason, they were too late in bringing the action and the court, however sympathetic to their plight, never compromised on the delivery of justice through due process. It is likely that the many similar accounts fall into the same category, although omitting the salient phrase. Defendants, on the other hand, were in situ but not necessarily through

aggression and sometimes in a minor capacity. Poverty was not synonymous with insolvency. Unsuccessful defendants who were pardoned their amercements might still be expected to pay damages; similarly the fine of a poor plaintiff who withdrew her suit was cancelled although she went on to engage in a conveyance.

It is notable that the majority of plaintiffs who appear particularly stricken by adverse circumstances seem to be female. The obvious conclusion is that women per se were at a greater disadvantage, or more vulnerable, than men. It is also a reasonable conclusion, given that the practice of coverture endowed men with a pre-eminent position as landholders.[118] However, these women also show determined self-help and opposition to adversity although in the direst straits, comparable with the resistance shown by many male peasants who felt threatened by lords over their free status. Their refusal to submit to their situation without a fight is a strong indication that coverture may have been observed more in the letter than the spirit. Many of the recorded poor of both sexes seem to have re-acted positively to their disseisin though from a greatly disadvantaged position. In this respect the rolls support much of the historiography on peasant mentality, reviewed in the Introduction.[119] The cases illustrates the royal court's approach to poor litigants, combining pragmatism towards the unsuccessful, concern for the oppressed and action against their oppressors.

[118] For a discussion of coverture, see pp. 199-201 below.
[119] See pp. 36-38 above.

CHAPTER 5
INFERENCES OF POVERTY WITHIN THE RECORDS

Introduction

The records of novel-disseisin in the common-law rolls reveal instances of poverty which do not fall within the legal definition which was discussed in the previous chapter. They are therefore not always so obvious, but can be inferred from additional information which the court clerks sometimes added to the formal record. Details of an individual's circumstances, and the amounts set for damages, are particularly useful. Examples of the former include: unusual incidents on which clerks often elaborated; unsupported litigants who appear confused or fragile; and the problems confronting illegitimate orphans. Individuals' economic viability could also be affected by the negative impact of civil unrest, which is discussed elsewhere.[1] The majority of these matters concern plaintiffs. Damages, on the other hand, the second source of inferred poverty, can inform both on the defendant who had to pay them and the plaintiff who expected to receive them. Low awards of a few shillings or even pence are especially interesting. They may be proportionate to the level of injury inflicted, or identify strata of peasant society which were below that deemed by the court to be too poverty stricken to find half a mark, the amercement usually required of the losing party. In these circumstances, the fine was cancelled as one of the provisions of monetary aid available to the poor. This has been previously debated, with its significance for the popularity of novel disseisin among the lower peasantry.[2]

Many suits for disseisin seem to represent small encroachments and scraps between peasants, perhaps equally impoverished, which might have threatened a

[1] See pp. 235-38 below.
[2] See pp. 139-41 above.

greater insecurity than villeinage. Freeholders depressed into serfdom lost their independent status but did at least retain their holdings. Those dispossessed by another tenant, often a relative, at best faced reduced circumstances and possibly loss of home and livelihood. The three impoverished female plaintiffs discussed in the previous chapter certainly lost their personal independence when they failed in their suits.[3] What is to be made of the motivations of such lowly people? Far from having no choice, they opted to activate the assize and assist their situation as much as they could, rather than take a passive and, in the annals of time, anonymous rôle. The legal options open to peasants can be found to some extent in *Glanvill* and *Bracton* but it is their application of them in their own lives, seen in the early records of the king's court, which offers 'an understanding of the place of law in men's lives'.[4] The records are particularly valuable for their information on humble persons whose experiences usually passed unrecorded. Occasionally tantalizing glimpses are offered of possible causes for their social and economic decline including legal technicalities, social unrest, family quarrels and, doubtless, improvidence.[5]

Damages

In his short chapter on the damages awarded at the turn of the thirteenth century, Flower observes that they were far less standardized than amercements. Many of them were light and carefully graded according to the degree of injury caused.[6]. From 1198, the original 'chattels and fruits' which the plaintiff lost when disseised were replaced by a monetary payment, although the wording of the writ

[3] See pp. 145-150above.
[4] Doris Stenton, 'Introduction', pp. xvii-xxix, *ELAR*, p. xvii.
[5] Doris Stenton, 'Introduction', pp. xi-lxxiv, in *RJL*, pp. lxiii-lxvi. For examples, see *RJL*, *cc*. 193-94, 119, 52, 918-19, respectively.
[6] Cyril Flower, *Introduction to the Curia Regis Rolls, 1199-1230 A.D.*, Selden Society, 62 (London: Professional Books, 1944), pp. 473, 476, 477. For the main types of damage caused, see Donald Sutherland, *The Assize of Novel Disseisin* (Oxford: Clarendon Press, 1973), pp. 53-54. Unfortunately, damage wrought by the poor was rarely specified in the records.

was not changed.[7] It continued to order the sheriff to restore whatever goods had been seised with the holding. Hudson reasons that the introduction was due to the increasing time lag of the assize, which would have rendered perishables unusable if they were not consumed or sold.[8] Sutherland points out that it gave the disseisor, who may after all have been in the right, the freedom to manage the holding efficiently until the hearing. If the plaintiff won, he or she recovered the value of the goods and any profits from the land which the disseisor had enjoyed while in ocupation.[9] They therefore reflected not only the worth of the movables but also the length of time that the true tenant had been out of possession and the corresponding loss *utilitatis omnium rerum quae ille habiturus esset si non esset disseisitus* (of the use he would have had of all his possessions had he not been disseised), upon which Bracton writes at length.[10] However, they were offset by the value of work done by the defendant from which the successful plaintiff profited, such as seed sown but not harvested.[11]

Damages were usually awarded by the same jury which delivered the verdict, although the sheriff could alter its composition and they could be assessed at the time or later.[12] They were rarely pardoned, for the king could not be seen to favour one litigant over another without good cause.[13] Consequently, 'the courts took care to see that [they] were duly paid; and…the burden of enforcement fell on the sheriff'.[14] Jurors seem to have had greater scope in setting the amount than the bench enjoyed in imposing fines. Were they also tailored to an individual's

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[7] *Glanvill*, pp. 170, 167.
[8] John Hudson, *The Oxford History of the Laws of England, II, 871-1216* (Oxford: Oxford University Press, 2012), p. 619.
[9] Sutherland, pp. 52-54.
[10] *Bracton*, III, p. 77.
[11] Sutherland, p. 53 *n*. 5; for examples, see *ENAR*, *cc*. 806, 816.
[12] Flower, *Introduction to the Curia Regis Rolls*, p. 477.
[13] For an example of pardoned damages, see *CRR*, III, p. 346, discussed on pp. 170-71 below.
[14] Sutherland, p. 477.

ability to pay them, in line with the court's pragmatic approach to its imposition of amercements? It may be that most were self-regulating in that, while lords dispossessed both those of their own rank and lower, smallholders were unlikely to have tried either to seize holdings much larger than their own tenements or dispossess tenants other than their ilk. In addition, disseisors had enjoyed the benefit of the goods and land for the duration of their occupation. Meekings observes that damages for novel disseisin of common 'were very small' regardless of the litigant's estate.[15] In the cases discussed below, most damages across the board were little, commonly 4d, 6d, 12d, 2s. and 3s. They represent 5, 7.5, 15, 30, and 45 per cent respectively of the standard half-mark amercement. They may, as Meekings suggests, indicate scraps between minor freeholders or between lords, or attempts by lords to reduce the paltry holdings of the poor. The latter echoes the possible use of the assize by lords to confirm the villeinage status of tenements with potentially similar consequences for their tenants, as discussed elsewhere.[16]

At the assize of 1203 held in Stafford, there was a run of assorted claims, many successful, which included common of pasture and nuisances. The damages were in the pence bracket except for one of 2s. and another of 4s, the lowest being 3d, and almost all the amercements were for half a mark. Some have a tit-for-tat air about them. Hugh of Acovere (Okeover), Staffordshire, was found to have disseised Ralf of Blora (Blore), Derbyshire, of common pasture in Swinescho (Swinscoe), Derbyshire, which belonged to his holding in Blore. He was fined

[15] Cecil Meekings, 'Introduction', Volume I, in *The 1235 Surrey Eyre*, ed. by Cecil Meekings and prepared for press by David Crook, 3 Volumes, Surrey Record Society, 31, 32, 37 (Guildford: Surrey Record Society, 1979-2002), p. 74.
[16] See pp. 101-11 above.

half a mark and ordered to pay damages of 12d.[17] In the next-but-one case, the positions were reversed. Ralf was convicted of dispossessing Hugh of common pasture in Blore pertaining to his Swinescoe tenement, with the same result. The clerk recorded the jurors' remark that the second suit related to *quodam parvo essarto quod eis ostendit* (a certain small assart which he showed them). He then noted the amount of damages and further added that *dicunt etiam quod Hugo ostendit eis quandam placeam infra clausum Radulphi ubi ipse nullam communam habere debet* (they also say that Hugh showed them a certain place within Ralph's enclosure where he should have no common). Evidently it was thought necessary to enroll the particulars of the parcels of land involved, which perhaps indicates the additional problems of identifying individuals' rights over areas which were being cleared from the waste. Ralph and Hugh emerge from the rolls as equally humble, neighbouring tenants on bad terms. The small damages and standard fines of the above litigants were identical, with no mention of cancellation. The awards may indicate that the injury was slight relative to the holding, rather than reflect the tenants' financial means as neither fell into the court's definition of poverty.

This is supported by damages of 18d. awarded on the same day against the abbot of Burton (Burton upon Trent), Staffordshire, who was also amerced half a mark and, presumably, was well able to find both.[18] He was convicted of disseising Hugh Bagot of his free tenement in Bromleg (probably Abbots Bromley, Staffordshire), *scilicet de quodam bosco qui continet iij acras vel iiij* (namely of a certain wood which covers three or four acres). Hugh Bagot earlier

[17] *Collections for a History of Staffordshire*, ed. by The William Salt Archaeological Society, 3 Volumes (London: Harrison, 1921), III, p. 109. All three settlements are close to the county boundaries and their lands probably crossed them.
[18] *History of Staffordshire*, III, p. 111.

appeared as the defendant in consecutive cases against Simon of Cherleton (probably Charlton, a generic term)[19] firstly, in the second hearing of a claim which Simon initially said he would withdraw. Later, he had second thoughts about it. The justices amerced him for his volte face but still allowed that *recuperet ad assisam suam* (he might recover his assize). Secondly, Hugh was convicted of disseising Simon of pasture in Charlton through erecting a barrier. He had to pay damages of 12d. and was ordered to take the barrier down. He too was amerced in half a mark. Were these also scrapping neighbours or is Hugh an early example of a lord attempting to enclose common land?[20] If the location of Charlton were known and found to be at a distance from Abbots Bromley, it would provide circumstantial evidence that he was more likely to be a lord or, at any rate, a prosperous peasant. The difficulty in identifying it may suggest that it was a very small site, perhaps a single farmstead and even an outlier of Abbots Bromley, and that the litigants were fellow tenants.

Turgis of Hilun (Ilam), Derbyshire, also lost to one plaintiff and was almost immediately cleared of disseising another.[21] He first appeared against William of Ilam in a suit of simple novel disseisin, was convicted, amerced half a mark, and required to pay damages of 4s. The second plaintiff, Robert of Catsterne (unidentified), said William had disseised him of common pasture in Ilam which pertained to his Catsterne holding. The jury said that they found against Robert *quia ipse non potuit habere vel debuit pasturam illam ubi illam vellet conducere* (because he neither could nor should have that pasture where he wished to exercise [his right to] it). He had either incorrectly identified the precise

[19] The meaning is 'free peasants' farm/settlement': http://kepn.nottingham.ac.uk (accessed 19 September 2015).
[20] Christopher Dyer, 'Conflict in the landscape : the enclosure movement in England, 1220-1349' in *Landscape History*, 28 (2006), 21-33, passim.
[21] *History of Staffordshire*, III, p. 109.

location of his right of common or was attempting to gain a little more. While Turgis, like Hugh, may have been a lord, it is equally possible that both litigants were peasants keen to protect their own entitlements to common land from the predations of others. As the demands on land rose with the increasing population, tenants and lords must have shared a common anxiety to protect their rightful enjoyment of it which, at different times, may have united or opposed them and similarly fractured relations between the peasantry. However, these records do not prove that any of those involved were poor. The litigants may indeed have been smallholders on the edge of insolvency; on the other hand, they may have been entrepeneurial tenants of multiple smallholdings. If the damages were awarded on the basis of injury, there is no way of knowing if Hugh found it more difficult to assemble 12d. than Turgis 4s.[22] Flower's description of these low sums as 'light' may not have struck every litigant, given the opportunity, as applicable to their own circumstances, particularly if they also had to find half a mark.

A consideration of the damages awarded in cases previously discussed for their amercements may throw further light on this conundrum.[23] In the first example, from the Lincoln assize of 1202, Gilbert son of Andrew was a successful plaintiff awarded damages of 4d. against his disseisor, Benedict son of John, *pauper nil misericordia* (a pauper with nothing to pay the amercement).[24] It is an interesting illustration of a man officially defined as poor but considered able to find something in the way of reparation. Benedict was not destitute and may have been one of Campbell's agricultural labourers, the 'poorest members of rural society', but solvent nevertheless. The 4d. also puts a question mark over

[22] There is insufficient information in the records on the types and scale of damage inflicted to make a comparison between them and the sums awarded.
[23] See pp. 153-54 above.
[24] *ELAR*, *c*. 409.

Gilbert. Was the meagre amount proportionate to a small and unproductive holding or does it indicate a tiny intrusion into a much bigger property? In other words, was the plaintiff nearly as wretched as his defendant, or was he a prosperous farmer? If Gilbert were also a smallholder, perhaps on the brink of eligibility for legal aid but, unlike his defendant, not quite poor enough to qualify, there is the further interesting possibility that the damages may represent, at least in part, any cost involved in acquiring his originating writ.[25] The following case heard at Westminster in 1214 recorded considerably larger damages, in relative terms, of 2s.[26] They were awarded in 1214 at Westminster against William Piscator (the baker) for his dispossession, with his wife Cecilia, of John Aurifabrus (the goldsmith). However, William was still considered sufficiently poor to be pardoned his amercement. Again, 'very poor' is seen to be a subjective assessment, denoting an ability to find 2s. but not half a mark. It supports the historiography outlined at the beginning of the previous chapter which shows finely drawn levels of status below the half-mark level, which the different damages might reflect.

A staggering increase of more than forty-six fold separates the 12d. awarded to one plaintiff, Robert de Renevill, from the combined amercements, totalling three and a half marks, of his six defendants.[27] They were convicted, in 1208 at the York eyre, of extending a mill pond to the detriment of Robert's property. Can anything be gleaned about his status? Like Gilbert, his small damages could be relative to the size of his holding or may represent a minor encroachment onto a sizeable property, although the conclusion must be that in

[25] However, it was not until 1278 that the Statue of Gloucester formally provided for this: Sutherland, p. 54.
[26] *CRR*, VII, p. 62.
[27] *CRR*, V, p. 262.

either event the damage cannot have been very great. Evidence for the first proposal lies in the almost violent reaction of the bench towards the convicted defendants whose financial ability the damages certainly did not reflect. It strongly suggests that the bench was determined to punish the defendants and make an example of them, presumably for victimizing a smallholder. It has to be said that, if the punishment fitted the crime, it also benefited the crown, but the astonishing difference in the treatment of the litigants must have strengthened the poor's belief in a royal benevolence towards them through the common law.

In the third example, from 1205 and again at Westminster, Stephen son of Roger was pardoned both damages and amercement when he failed in his suit against Stephen son of Alfred.[28] The justices were unequivocal that *reddat dampnum nichil* (he should pay no damages). Why did the court differentiate between this defendant and the previous two? A clue to the answer lies in the court clerk's note that *disseisitor pauper clericus est* (the disseiser is a poor clerk), indicating that his amercement was pardoned. The additional cancellation of damages probably distinguishes between poverty and destitution and consigns Stephen to the latter. Flower cites the case when explaining that 'damages were seldom remitted' because the king could not be seen to favour one litigant over another.[29] Stephen may have fallen into his wretched state when he was ejected from his namesake's holding. If he had initially been a vagrant and inserted himself into an obscure part of the property, it would scarcely have been necessary for the plaintiff to sue him. The probability is that he was living in the tenement as the cohabitee or relative of the bone fide tenant and on the latter's

[28] *CRR*, III, p. 346.
[29] Flower, *Introduction to the Curia Regis Rolls*, pp. 478-79. See also Anthony Musson, *Medieval Law in Context: the Growth of Legal Consciousness from Magna Carta to the Peasants' Revolt* (Manchester: Manchester University Press, 2001), p. 167.

demise had remained in situ. Alternatively he may have taken advantage of the death to move swiftly in. If the property were a villein holding it was not, strictly speaking, heritable, and certainly not if held in dower, and Stephen would have been in possession of it illegally.[30] Possibly, a cleric himself, he was a priest's son. This would ipso facto have rendered him illegitimate and precluded him by law from inheriting. If any of these conditions prevailed, Stephen would have lost all his substance and possessed no means of paying a levy of any kind.

Flower finds that damages were apportioned between defendants.[31] In a further example from the previous chapter, twenty-one men were amerced out of twenty-seven defendants at Westminster in 1214 and had to find two marks in damages between them for dispossessing the plaintiff, Simon, of his free tenement.[32] It was a sizeable sum but perhaps proportionate to the amount of harm which two dozen assailants could cause and very much less than the combined amercements of fourteen and a half marks. If it can be assumed on the basis of the above findings that the six below the half-mark level were not destitute, it works out at nearly 12d. each. The group was led by an apparently powerful lord but it is not known if he, perhaps with the more prosperous defendants, took the brunt of the award. This was a case of simple disseisin. Some twenty years earlier, a case at the Wiltshire eye of 1194 seems to have been a conflation of disseisin of common with disseisin by nuisance.[33] Eight defendants, all of Foxcote (unidentified), were similarly convicted of causing harm to Michael son of Luke's tenement in Clebton (also unidentified). The jury found that

[30] Theoretically a villein could bequeath nothing because he was himself a possession but this did not often happen in practice: *Pollock and Maitland*, I, pp. 416-17. For the non-inheritability of dower and examples of the problems it could cause to dependents, including a priest, see John Baker, *An Introduction to English Legal History*, 4th ed. (Oxford: Oxford University Press, 2007), pp. 269-70, and pp. 264-67 below.
[31] Flower, *Introduction to the Curia Regis Rolls*, p. 476.
[32] *CRR*, VII, p. 287.
[33] *Three Rolls*, p. 67.

levaverunt quidam murum in libera et communi pasture in Foxcote (they raised a certain wall in free and common pasture in Foxcote), the bench ordered its destruction and they were amerced. Damages must have been set subsequently. There seems no other explanation for this than the attempted enclosure of common by a lord's dependents, all of whom were able to meet their amercements.

Other groups may have been no-one's retainers but peasants acting together in their own interests. For example, in 1204 the jury at York convicted twenty-nine men led by William de Livet of disseising Theobald Walter of his tenement in Edlinton (Elkington), Yorkshire, finding that *ipsi paverunt blade ipsius Thedberti cum warda facta* (they pastured [their cattle] on Theobald's corn with a watch set).[34] All were amerced probably each by half a mark, and Theobald awarded damages of two marks. This was clearly a carefully planned, major undertaking and feelings must have been running high for some time. It suggests that the twenty-nine were Theobald's tenants whom he had denied access to their customary common pasture, probably by enclosing it for his own use. Perhaps they had attempted to redress the situation through the local court without success, finally resorting to direct action. On the other hand, it is also possible that Theobald had been absent for some time, perhaps on the king's business, and his tenants, included a reeve and a steward, had taken advantage of him. They would have had to maintain a watch to prevent the cattle from straying off Theobald's corn and onto other people's, perhaps their own, in the open fields. At least some of such a large number must have been poor, but none enough to merit the cancellation of the amercement and all were considered able to find their 11d. share of the damages. If they were the injured party, they should themselves

[34] *Pleas,* III, *c*. 907.

have brought an action for disseisin of right of common against Theobald. As it was, they were clearly not inadequate, though they may have been ignorant and confrontational, and no justice could have countenanced such aggressive self-help.

All of the above damages were in the pence per person, except for one of 2s. and another of 4s, and well below the standard amercement of 80d. which a number of the unsuccessful parties had to pay. Others came within the legal definition of poverty and the fine was cancelled. There seems to be no pattern between the amount of the award and the losing litigant's ability to find half a mark. In fact, the two higher awards were given against defendants classified as poor. It is a further illustration of the artificial nature of the legal definition of poverty, and that many peasants who fell into it were solvent. The cases offer a picture of a vibrant and competitive economy among the lower echelons of the peasantry.

Individual circumstances

Unlike the above cases involving sums of money about which comparisons can be made, details of individual suits of novel disseisin are valuable for their legal and social, rather than their economic and financial, context. The first three of the actions cited below are interesting, among other points, in that they were allowed to proceed although, strictly speaking, they were out of order. The fourth illustrates the precarious existence of orphaned children.

An unusual event

Poverty occasionally becomes obvious through an unusually detailed account of a suit, which is valuable for the light it sheds upon its context. In a complicated case heard at York in 1204 two sisters, Juliana and Helena daughters of Arnold, sued

for dispossession of their tenement in Pickering, Yorkshire.[35] It is a record that has been marked in the roll, possibly by Bracton although, as Stenton notes, that is not certain.[36] The marker's interest was probably aroused because the justices adjourned the hearing and instructed the sheriff, Ralph de Normanville, that *deducat eas secundum consuetudinem ville de Pikering* (he should deal with them [the sisters] according to the custom of the town of Pickering). It was unusual for an assize to be relegated to a lower jurisdiction and fall under customary rather than common law. The sheriff told the court that, because the sisters had failed to render their landlord his dues, *seisivit terram illam in manum domini Regis* (he seised that land into the hand of the lord king). Above this line, the court clerk has inserted *sicut consuetudo ville est* (as is the custom of the town). Whether the insertion was spoken by the sheriff to explain his action or added by the clerk as clarification is not clear. It is the phrase echoed in the bench's decision and the clerk's insertion supports the suspicion that this was an unusual course of action. The sheriff also explained that he had reached his decision *per consilium et consideracionem wapentaci* (through the counsel and judgement of the wapentake).[37]

Taken together, there seems to have been a compelling desire on the part of the sheriff to justify himself and he may have been influenced by the presence of the king himself. John attended throughout this eyre and probably knew Pickering well, having held court there three years earlier in 1201. In the year before that he had provided for the town's inhabitants to have the customs they

[35] *Pleas*, III, *c*. 897.
[36] See p 41 *n*. 2 above.
[37] A wapentake was originally a place of administration under the Danes, who settled the eastern part of England in the ninth century. The term came to include the surrounding district, equivalent to the Anglo-Saxon hundred, and became synonymous with the court for that area.

enjoyed in the reign of his great-grandfather, Henry I.[38] It seems probable, therefore, that this had a direct bearing on the bench's decision in 1204.[39] A further twist to the case is that this was a royal tenement, the king's own land, which may indeed have brought him into the courtroom. The sheriff, the justices and the members of the wapentake must have felt themselves to be in a particularly difficult corner, additionally fraught through the sisters having initially sued, not the sheriff, but one Alan Malekake and his two brothers, Adam and Hugh. Alan had pleaded that *assisam non debere fieri* (the assize should not be taken) for he himself had no claim on the land but had held it in custody for the sheriff. According to the strict letter of the assize, the sisters' case should then have collapsed because they had named the wrong people as defendants; it was Ralph de Normanville, the sheriff, who had evicted them, not Alan Malekake. Presumably it would have collapsed anyway because they were lawfully dispossessed for not paying their rent.[40] The sheriff had behaved correctly.

What, then, was the problem? It may have had to do with the reasons for the sisters' disastrous poverty, which the sheriff laid squarely at the feet of their mother. He informed the court that, after the death of their father, *mater earum cum eis remansit in tenemento illo* (their mother remained with them in that tenement). Juliana and Helena can have been the only offspring and inherited their father's land equally, other than the dower provision. Evidently the unnamed widow did not move away from her married home, as she may have done if a son had inherited, but became so profligate in her widowhood that *omnia catalla earum vastavit* (she wasted all their chattels) and her own as well. She rendered

[38] http://www.british-history.ac.uk/vch/yorks/north/vol2/pp. 461-476 **(**accessed 28 April 2015).
[39] Stenton suggests that burghers, which relied on their town charters, may have found the new assizes less necessary than freemen elsewhere: Doris Stenton, 'Introduction', pp. xiii-xliv, in *Pleas*, III, pp. xxix-xxx.
[40] Sutherland, p. 77.

her family destitute. Is this what so concerned the members of the wapentake, to have a care for the wholly inadequate? It is pleasant to think that the customs of Pickering, so recently given royal approval and commended by the bench, may have dealt more kindly with the hapless women than the common law. It not only chimes with Dyer's evidence for a charitable approach to the poor by the better-off at that time but would also have been in the best interests of the town's overall welfare.[41]

However, the wapentake of Pickering was not synonymous with the town and it is interesting that the sheriff made a distinction between them.[42] Four years later in the autumn of 1208, again at York, the clerk's record of a secondary hearing is a single line: *villata de Pikering nichil aliud dicit quam wappentacum dixit* (the town of Pickering says nothing other than the wapentake has said).[43] This is very unlikely to allude to the hearing adjourned more than four and a half years previously in the late winter of 1204 and, for the sake of those concerned, let us hope it does not. The merit of novel disseisin was the speedy resolution of disputed possession and, although the sisters' predicament was found not to hinge on that, their action as such was never quashed. There are therefore grounds for believing that the adjournment was not long delayed, but it may well have reached the same conclusion as the later court. The record of the latter indicates a close co-operation between borough and district, but also the ability of the one to act independently of, and possibly in disagreement with, the other, presumably by the authority of the king. The case seems to be an example of a community dealing with its own problems in a positive manner, an encouraging aspect of a

[41] See p. 131 *n*. 44 above; Simon Walker, 'Order and Law', pp. 91-112, in *A Social History of England 1200*-1500, ed. by Rosemary Horrox and Mark Ormrod (Cambridge: Cambridge University Press, 2006), p. 95.
[42] http://www.british-history.ac.uk/vch/yorks/north/vol2/pp418-420 (accessed 4 September 2015).
[43] *Pleas*, IV, *c*. 3484.

depressing situation which was almost certainly commonplace. Although the details of the sisters' circumstances are unusual, tenants' descent into poverty was not rare. The record is interesting and important for several reasons, namely its information on: the independence of towns and their relationship to the community of their hinterland, certainly in the Danelaw; the provision each evidently made to deal with social problems; and John's probable influence on legal proceedings. It is also valuable for the precious glimpse of intimate family life which the rolls occasionally reveal.

Confused and fragile litigants

Poverty may be inferred, with caution, in cases where it is not so clear. In 1206 before the Lincolnshire eyre a woman who identified herself only as Demilda sued her lord Robert de Camera, with Eldred son of Joseph, for dispossession of her tenement.[44] The jurors found against her in that *ipsa non tenuit libere terram illam* (she did not hold that land freely) and that *non potuit facere servicium et consuetudines quod ad terram pertinent* (she could not render the service and customary dues that belong to the land). They continued that Robert had therefore taken the holding into his own hand. At this point, Robert himself came forward and agreed that *Demilde terram illam tenendam in vita sua* (Demilda should hold that land for her life) on condition that she rendered the services due for it. She gave him 3s. The justices must have consented to the agreement but their rôle was not recorded, nor mention made of the fee usually paid in that situation. Neither did the justices impose or waive an amercement. Demilda's circumstances seem precarious, she brought no sureties with her and both her landlord and the bench appear to have dealt kindly with her. She may have been unfree but it is perhaps more likely that she was a free peasant holding a tenement

[44] *ELAR, c.* 1419. The location is illegible.

in villeinage for servile dues. It was probably a tiny holding, perhaps the last remnant of family-held land and she the sole and fragile residuee. Possibly Eldred was Robert's steward and had evicted her in accordance with his duty but without his lord's knowledge. It would explain the apparent change of heart. Whatever the story behind this partially illegible account, Demilda was treated sympathetically by those in authority, the bench apparently following Robert's lead.

Similar leniency to another lone woman was displayed in Lincoln four years earlier.[45] Margaret, widow of Walter, had at least identified herself but *nullam villam nominavit* (she named no township) on her writ. This should have rendered it technically void like the sisters' writ, discussed above, which wrongly named the defendant. In both cases the breach of protocol was ignored by the bench, perhaps because of the intervention of the disseisor himself. At Pickering, the sheriff came forward to explain a complicated situation. Here, the defendant's bailiff *postea venit…et cepit in manu quod reddet ei seisinam suam* (afterwards came…and undertook to return her seisin to her). He is not named and, again, must have been the actual disseisor working on behalf of his lord, master Simon de Siwell (possibly Southwell, Nottinghamshire). Neither case was quashed yet neither proceeded as an action of novel disseisin. While the royal presence at the first suit may be thought to have influenced its continuation, there is no evidence of any undue pressure on the bench in the second. Perhaps both are examples of the court's pragmatism in over-riding the letter of the law in favour of the spirit and delivering justice to those too inadequate to fully play their part in the process. There is no clue as to why Margaret lost her holding originally but, clearly, her brave attempt at self-help in suing her lord again brought about a change of heart, at least in his bailiff. Simon himself may have known little or

[45] *ELAR, c.* 51.

nothing about it but it will be noted that his lowly tenant, unlike the sisters, knew enough to correctly identify in legal terms her defendant. While this initially seems at odds with the omission of her location, that may have been the fault of the clerk. Without advisers, the totally illiterate were utterly helpless before those who penned their writs and quite unable to recognize an error. Margaret had probably never knowingly seen the name of her village written out and had no means of checking her precious scrap of parchment, a factor which was doubtless well understood by justices and provoked their sympathy. There is no mention of the bench's fee for allowing Simon's offer, although the clerk's line that *justicii ei concesserunt* (the justices permitted it) may have been sufficient to indicate that the usual amount, half a mark, was owing, in the same way that the clerk's allusion to a litigant's poverty indicated the pardoning of his or her amercement. More unusual here is the lack of any indication of a fine, for which there seems to be no other explanation than that the absence of information was, again, enough to indicate its cancellation.

Unprovided-for children

The illegitimate were barred by law from inheriting property, a classic example of parental sin visited upon their offspring.[46] Priests' children were particularly vulnerable as clerical marriage was forbidden, again by law. There was therefore no possibility of legitimization and subsequent inheritance through a belated decision by their parents to wed. Yet the same problem beset legitimate children who were not direct heirs. Depending upon the custom followed in the locality, this could affect: all the daughters in a family unless they inherited jointly for lack of a male heir; younger sons; or older children. In some circumstances, daughters

[46] James Brundage, *Law, Sex and Christian Society in Medieval Europe* (Chicago: University of Chicago Press, 1990), pp. 226-27, 416.

who were entitled to *maritagia* may have been better placed than their brothers, other than the heir. There are plenty of examples of fathers wishing to provide for their children who were not, or not thought to be, their direct heir.[47] It was a Gordion knot they could sever by arranging for each child to be formally seised by the lord.[48] Ralf, a priest in Croft, Yorkshire, attempted to do this for his two children but only half-accomplished it with disastrous results for one of them.[49] At York in 1218, the jurors found that he had drawn up a charter for his daughter, Ismenia, concerning his tenement in Croft but that *ipsa nunquam saisita fuit* (she was never seised [of it]). The holding had passed entirely to her brother Peter, who evidently had been correctly seised and must have turned her out for she sued him for dispossession. Ismenia was amerced in the ubiquitous half-mark so cannot have been destitute.

At Lincoln in 1206, Robert son of William fell into the same double jeopardy as Ismenia when he brought the assize against the prior of Haverholm concerning his tenement in Lafford (Sleaford).[50] Both locations are in Lincolnshire. The extant record is of the second hearing of the suit, the first having been adjourned for reasons that were not stated but would have been well known. The most frequent cause of adjournment was the non-appearance of jurors, but this cannot have been the problem here as evidence had been taken at the original hearing. The clerk reiterated it, that: firstly, Robert *fuit filius sacerdotis* (was the son of a priest); and, secondly, *ipse sacerdos tenuit terram illam de ipso priore tota vita sua ut prior dixit et in ea obiit* (the priest held that land of the prior his whole life, as the prior said, and he died in it), that is, he died

[47] For possible examples, see *ENAR*, *c*. 782 and *RJL*, *c*. 150.
[48] This was known as 'livery of seisin': *Pollock and Maitland*, II, pp. 83-84. For an example of its successful accomplishment, see pp. 230-31 below.
[49] *RJY*, *c*. 21. Stephen son of Roger may be another example: *CRR*, III, p. 346, discussed on pp. 159-60 above.
[50] *ELAR*, *c*. 1335.

still seised of it. Evidently, the prior had pleaded his case at the earlier hearing. The clerk continued that William son of Alan had followed the prior with a counter plea *pro parvo* (on behalf of the young child). *Parvo*, literally 'little one', seems a curiously endearing epithet amid the weighty proceedings of a royal law-court. Did the sight of a little boy, illegitimate, orphaned, and dispossessed, tug at the heartstrings of this scribe? Was this the reason for the adjournment, to give the bench time to consider what might be done about the child's plight?

William had gamely pleaded that the priest *terram illam ante obitum suum dederat eidem Roberto filio suo* (before his death had given that land to Robert his son), but to no avail. When the court re-convened, it found that the evidence, as Stenton observes in her note to the case, 'was definite' that little Robert's father *obiit seisitus de terra illa et ipse nichil hereditarie potest clamare* (died seised of that land and he [Robert] could claim nothing by inheritance). The assize accordingly collapsed as Robert had been justly dispossessed by his lord and there was no case for the defendant to answer. However, the prior undertook *ad peticionem justiciarum* (at the request of the justices) to look after the child *quousque scierit discernere bonums et malum* (until he knows the difference between right and wrong). It was the most the bench could do. Did the prior keep his word? It is pleasant to think that Robert received a measure of kindness, was taught his letters and guided into a useful and rewarding occupation. But the age of discernment is not high to be launched upon the world, although the justices' specification of it may denote common practice. The prior probably wished neither to appear to condone clerical sin by nourishing a priest's child, nor to accept an additional financial burden, and Robert's prospects seem bleak. The widespread resistance to celibacy which is known to have existed among the

priesthood, and especially country clerics,[51] must have spawned a number of such children and few can have found a champion as Robert did in William, albeit unsuccessfully. The justices concern for the child is interesting, and heartening, and is of a piece with the practical application of sympathy observed to have operated in the royal courts.

Conclusion

The poverty of some litigants can be inferred from the accounts of their suits through the sums awarded in damages, for or against them, and through the personal details of an individual. There are many examples of small damages which probably relate to the degree of injury caused to the freeholder with regard to the property under dispute. If it were a sole holding, the adverse effect on the tenant would have been greater than if it were one of several held by the same individual. The balance of probability can occasionally be estimated if the clerk included enough background information in the record, but it is an inexact science. It is probable, on the basis of the historiography on smallholders in the previous chapter, that the majority of actions involving low awards were between parties of similar financial status. It is clear from the record where one was a lord. If several individuals were convicted, the sum was divided between them. There is also the possibility that damages were put at a level which was affordable by the losing party, which would conform with the pragmatic approach to setting amercements, previously discussed.[52] There is evidence that amercements may also have been used to express a courts' disapproval of the actions of a wealthy defendant towards a smallholder. These cases can be widely applied to an economic category of peasants. By contrast, the poverty known of individuals

[51] See pp. 188, 266 below.
[52] See p. 120 above.

through their personal circumstances is idiosyncratic, but the cases are nevertheless valuable for the background information they contain on the legal and social mores of the time. The first case indicates: the impact of borough customs on common-law procedure; the possibility of the direct influence of the king; and urban attitudes towards the social problems of its inhabitants. The second two, with the last case, illustrate the practical help afforded by the bench to apparently fragile, solo litigants.

SECTION 3
WOMEN IN THE ROLLS
INTRODUCTION

Women figure largely in the records of novel disseisin, both as plaintiffs and defendants. Many litigated as principals, often on their own, sometimes with the support of secondaries who most frequently seem to have been family members.[1] These women were either widows or otherwise single, although Bennett concludes that most females of unknown marital status probably were widows.[2] Many more women were apparently secondary litigants themselves, tagged onto male principals who were usually their husbands and sometimes not even named, but this was probably not the case in reality.[3] Women who were the second-named on a writ and categorized as wives were likely to have been the true property-holders and plaintiffs, but obliged to be subordinate to their husbands under the convention of coverture.[4] This was an expression of the church's attempt to reconcile the conflicting and potentially damning properties of the female sex. As Eve, woman was man's downfall but, as Mother of God, she was also his salvation. Under canon law she was spiritually equal with but temporally inferior to man, as the church was to Christ.[5] In practice so far as the law was concerned, this meant that she could not speak for herself in court without her husband's consent and that he had almost total control over her own property. Convenient as this was for men, it should not be thought wholly cynical. The great canonical thinkers, with perhaps the majority of churchmen, were wholly

[1] For examples and discussion, see Chapter 7 below, passim.
[2] Judith Bennett, *Women in the Medieval Countryside: Gender and Household in Brigstock before the Plague* (New York: Oxford University Press, 1987), p. 145.
[3] For examples and discussion, see pp. 212-14, 248-52 below.
[4] See pp. 204-06 below.
[5] Marie Kelleher, 'Later Medieval Law in Community Context', pp. 133-47, in *The Oxford Handbook of Women and Gender in Medieval Europe*, ed. by Judith Bennett and Ruth Karras (Oxford: Oxford University Press, 2013), pp. 135-36.

committed to saving souls from the perpetual torments of Hell and strove to advance a practical working doctrine to that end.

The above may, however, be a simplistic picture of the true position of wives at the time of this study, the late-twelfth and early-thirteenth centuries. Scholars find it difficult to conclude how far coverture was observed at any point, particularly given its variability from place to place. The relative freedom of boroughs allowed many wives to run their own businesses, yet the extent of their liberty still remains debatable.[6] Location was less of an issue concerning freedom in household marketing, undertaken by all wives, which was likely to hinge on personal relationships.[7] Loengard writes that women's rights declined from the mid-thirteenth century and, on the whole, there is academic consensus that coverture strengthened over time.[8] This view gains some credence from the situation in the earlier years when coverture itself, its application through the common law, and the king's courts also, were all in a formative stage of their development.[9] However, it is punctured by Muller's observation that fifteenth-century women, who were apparently operating outside coverture, may have been married.[10] The dichotomy can be partially explained by the considerable variation

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[6] For a brief summary of the debate, see Cordelia Beattie, 'Married Women, Contracts and Coverture', pp. 133-54, in *Married Women and The Law in Premodern Northwest Europe*, ed. by Cordelia Beattie and Matthew Stevens (Woodbridge: Boydell, 2013), p. 136.

[7] Cordelia Beattie and Matthew Stevens, 'Introduction: Uncovering Married Women', pp. 1-10, in *Married Women and The Law in Premodern Northwest Europe*, ed. by Cordelia Beattie and Matthew Stevens (Woodbridge: Boydell, 2013), p. 9; Beattie, 'Married Women, Contracts and Coverture', pp. 149-50.

[8] Janet S. Loengard, 'What Is a Nice (Thirteenth-Century) English Woman Doing in the King's Courts?', pp. 55-70, in *The Ties that Bind: Essays in Medieval British History in Honor of Barbara Hanawalt*, ed. by Linda Mitchell, Katherine French, and Douglas Biggs (Farnham: Ashgate, 2011), pp. 69-70..

[9] Canon law on marriage and the family was a relatively recent phenomenon: James Brundage, *Law, Sex and Christian Society in Medieval Europe* (Chicago: University of Chicago Press, 1990), p. 225. It underpinned the decline through the later Middle Ages of, for example, a wife's ability to make a will and her control over her own chattels: Conor McCarthey, *Marriage in Medieval England, Law, Literature and Practice* (Woodbridge: Boydell, 2004), pp. 62-63; Janet Loengard, 'What Did Magna Carta Mean to Widows?', pp. 134-50, in *Magna Carta and the England of King John*, ed. by Janet Loengard (Woodbridge: Boydell, 2010), p. 151.

[10] Miriam Müller, 'Peasant Women, Agency and Status in Mid-Thirteenth to Late-Fourteenth Century England: Some Reconsiderations', pp. 91-113, in *Married Women and The Law in*

within the legal system itself.[11] Local courts necessarily reflected local custom but the common law imposed a uniform and less forgiving structure. Its default attitude towards wives was negative and inflexible, with additional evidence of co-operation between it and male defendants to consolidate the authority of husbands.[12] This aspect of coverture in the national courts appears to have been impenetrable and confirms the view that marital authority was a 'common law supposition'.[13]

Yet there remains the impression that women did not expect it to be so, which helps to confirm a different attitude in the lower courts. As Kelleher suggests, wives usually tried to conform to the royal courts and observe its requirements, but with limited success.[14] It is difficult, then, to determine the degree of wifely resistance to coverture per se or if it was present at all. The greatest difficulty lies in the absence of information from women themselves, which becomes a tautology. The majority of records appear to have been controlled, and were almost all written, by men. Those issued by women, mainly wills and charters, were confined at this period to the higher ranks which fall outside the present study, and may also have been overseen by male relatives. The evidence, then, for the attitude of humble females is almost always identified through a male lens.[15] The frequency of re-marriage indicates that women saw advantages in it.[16] There is also a degree of apparent co-operation in the early records between married couples, which may indicate a less than coercive approach by husbands. The deliberate attornment of husbands by wives, who

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Premodern Northwest Europe, ed. by Cordelia Beattie and Matthew Stevens (Woodbridge: Boydell, 2013), p. 94.

[11] See pp. 195-97 below.

[12] See pp. 246-48 below.

[13] Beattie, 'Married Women, Contracts and Coverture', p. 146.

[14] Kelleher, 'Later Medieval Law in Community Context', p. 139.

[15] See pp. 251-53 below.

[16] Barbara Hanawalt, 'Remarriage as an Option for Urban and Rural Widows in Late-Medieval England', pp. 141-64, in *Wife and Widow in Medieval England*, ed. by Sue Walker (Ann Arbor: University of Michigan Press, 1993), pp. 141-42.

would in any case have been automatically represented by them under coverture, shows that the convention was limited in its application.[17] Its frequent occurrence[18] suggests that married couples were mutually pro-active rather than polarized between dominance and subjection. The rôle of coverture in the patriarchal context of land disputes between freeholders, virtually monopolized by the common law, may be particularly significant in assessing its strength.

Although widows and other single women were legally independent of male authority, the pervasion of male supremacy throughout that society coloured their lawsuits to a greater or lesser extent. The majority identified themselves either through their fathers or their deceased husbands, then by their location, and only a handful through female relatives.[19] The reason for the ubiquitous reference to male kin was presumably to do with a wish to reinforce their claim to the property in dispute. It was rare for a women to directly inherit land from anyone other than her father who would have to formally seise her of land, unless she were the direct heir, if he wished her to have anything of his estate. *Maritagia*, wedding gifts in the form of property which parents customarily bestowed upon their daughters when they married, were wholly in the control of sons-in-law whether or not they were included as recipients.[20] There was nevertheless a tradition that such property should pass down the distaff line, perhaps as a means of providing for subsequent generations of daughters.[21] Husbands could and did alienate it from the family as they could their wives' dower, to the point of selling it, but it was technically recoverable by their widows.[22] It is also evident from the records that there was strong feeling among family members, male as well as

[17] See pp. 209-12 below.
[18] Loengard, 'What Is a Nice (Thirteenth-Century) English Woman', p. 56.
[19] See pp. 220-21 below.
[20] For examples and discussion, see pp. 248-51 below.
[21] See pp. 248-49 below.
[22] See p. 244 and *nn*. 4, 5 below.

female, that *maritagia* should remain within the female bloodline.[23] Taken together, these conflict with the practice of lineal inheritance when grew at least in part out of the church's reforms to marriage and sexual practice. Canonical teaching that marriage should be more by a couple's consent than parental dictat also discouraged divorce, thereby funnelling inheritance down a specific route and away from lateral possibilities within the wider family.[24] Brundage writes that descent through the male line became dominant among the nobility from the late-eleventh century. The reduced opportunity for plunder as warfare decreased, the growth in population and a concomitant land shortage were among the factors that encouraged a desire to keep family wealth within a narrow compass. Whether inheritance was through primo- or ultimogeniture or partibility, it was increasingly directed through sons to avoid the transfer of assets, except *maritagia*, to other families when daughters married.[25] Women became side-lined under a system which largely removed their jurisdiction over, although not their possession of, their own land.[26] Ironically enough the system also reduced male familial jurisdiction, since heads of families lost some of the power they had previously held over kin groups.[27] Simultaneously and for the purpose of property control, the church imposed the doctrine of celibacy on the priesthood which,

[23] See pp. 252-53 below.
[24] Brundage, *Law, Sex and Christian Society*, p. 227. The church's consensual model clashed, but co-existed, with society's emphasis on property and family interests: McCarthy, p. 51; Jack Goody, *The Development of the Family and Marriage in Europe* (Cambridge: Cambridge University Press, 1983), p. 116.
[25] Primo- and ultimogeniture inheritance was, respectively, whereby the first- or last-born male heir received the bulk of the deceased's property other than specific exemptions such as *maritagia* and dower; partible inheritance was a division between all the male heirs, with the same exemptions. Land held for knight's service passed to the eldest male heir; that held otherwise varied according to custom: John Hudson, *The Oxford History of the Laws of England, II, 871-1216* (Oxford: Oxford University Press, 2012), pp. 351-52, 649.
[26] Brundage, p. 226-28.
[27] Brundage, pp. 183-84, 225.

leading to the abandonment of clerical wives and children, was strongly opposed.[28]

The retention of *maritagia* within a family harked back to the previous method of inheritance among lateral family members, including females, yet would not have been possible without male acquiescence. Similarly, dower alienated a third of a deceased man's estate from his immediate heir by settling it upon his widow for the remainder of her life.[29] It created innumerable problems. Greed could overtake the bereaved of either sex, who might be mother and son. Younger subsequent wives of older men might take their initial dower through a succession of husbands before it reverted to the heir of the first spouse. It could cause the serious fragmentation of a holding and render a modest estate unsustainable. Again, the tradition was at variance with patrilineal inheritance and took a former wife entirely outside direct male coverture. Both could have been avoided if widows had been absorbed into the heir's household, or some other provision made for them directly by him. The reasons why this route, which has direct Biblical antecedents, was not urged by the church is unfortunately beyond the scope of the thesis. Further problems were created by a widow entirely misunderstanding the terms of her dower and bequeathing it, usually to a descendant or lover, which required legal recovery by the true heir and caused dire hardship to the desired recipient.[30]

This section considers all of the above topics through the evidence in the records of novel disseisin. Chapter 6 assesses the impact of coverture upon litigating wives, finding it to vary according to personal circumstances and, arguably, the skill with which these women handled their affairs. In Chapter 7, the

[28] Brundage, pp. 226-27, 416.
[29] For examples and discussion, see pp. 256-58 below.
[30] See pp. 264-67 below.

position before the law of single, possibly unsupported, females is explored for the influence over their affairs of the male-dominated society in which they lived, even though they were outside coverture itself. Chapter 8 reviews the wider social significance of women's *maritagia* and dower. Throughout the records, female litigants appear to have pursued what they believed to be their rights with single-minded and well informed persistence, undeterred by the political, economic, legal and social disadvantages which they faced but which were 'unknown to men'.[31] Many of them also seem to have inspired the sympathy and, where appropriate, the practical help of the bench without compromising due legal process. The same attitude of the court has been observed towards potentially villein, and impoverished, litigants, as discussed in the previous two sections.

[31] Bennett, *Women in the Medieval Countryside*, p. 178.

CHAPTER 6
WIVES UNDER COVERTURE

Introduction

The tension between the legal superiority of men and the rights of women in the latter half of the Middle Ages has been and remains the subject of much debate.[1] While the claims of one man to a woman's property could be overturned by those of another, these were divisions between men and men for control of female tenure.[2] In comparison, a wife's personal control of property could be illusory and governed in practice by, on the one hand, the intimate question of her child-bearing ability and, on the other, the wide constraints upon her of the male-dominated system of coverture[3] in which she operated. However, although there is plenty of evidence for these, they do not furnish a complete picture. There are indications that wives may have worked the system or tried to,[4] and that couples may have operated jointly for their mutual advantage.[5] It is possible that the women in the common-law rolls of the late-twelfth and early-thirteenth centuries, the period of this study, managed their law suits at a time when coverture did not have the same force as later and perhaps was observed more in theory than in practice.[6] The following pages try to evaluate the extent of its power over them and their capacity for movement within it and also, perhaps more problematically, their mental attitude towards it based on their behaviour as recorded in the rolls. A discussion of the historiography of women under coverture is followed by a résumé of its growth and raison d'être. The chapter then focuses on the evidence

[1] See inter alia contributors to *The Oxford Handbook of Women and Gender in Medieval Europe*, ed. by Judith Bennett and Ruth Karras (Oxford: Oxford University Press, 2013); *Married Women and The Law in Premodern Northwest Europe*, ed. by Cordelia Beattie and Matthew Stevens (Woodbridge: Boydell, 2013); *Wife and Widow in Medieval England*, ed. by Sue Walker (Ann Arbor: University of Michigan Press, 1993).
[2] *RJY*, *c*. 22, discussed on pp. 249-52 below.
[3] Coverture was the legal dominance of men over women to whom they were related by blood or by marriage, discussed on pp. 199-201 below.
[4] See pp. 201-09 below.
[5] See pp. 209-10 below.
[6] See pp. 185-87 above.

for its application in cases which inform on married women's behaviour in court, their use of attorneys, and the possible obscurity of wives within the records.

There has been less written specifically on the experience of wives living at this time than in the late Middle Ages, perhaps through the paucity of documents although Beattie and Stevens believe that there is sufficient material in custumals and legal treatises.[7] It is also surprising that Beattie finds it necessary to justify the value of 'technical' law records to social history.[8] Their value was remarked by Walker some twenty years previously and it is perplexing that it was ever doubted since the law affected, in Musson's words, 'the entire population of medieval England'.[9] The legal records of the king's courts bring sharply into focus that half of the litigating peasantry who were free and a significant number of peasants who were not. The number among them of wives who played a part in national law courts is large. They feature prominently among the eight hundred novel disseisin records which have survived from the period between 1194 and 1221 and involve one or more females in some way. The majority appear to take a secondary rôle yet most of them were probably primary litigants, as noted by Loengard,[10] and not totally subsumed into their husbands' authority. There were

[7] Cordelia Beattie and Matthew Stevens, 'Introduction: Uncovering Married Women', pp. 1-10, in *Married Women and The Law in Premodern Northwest Europe*, ed. by Cordelia Beattie and Matthew Stevens (Woodbridge: Boydell, 2013), p. 5.

[8] Cordelia Beattie, 'Married Women, Contracts and Coverture', pp. 133-54, in *Married Women and The Law in Premodern Northwest Europe*, ed. by Cordelia Beattie and Matthew Stevens (Woodbridge: Boydell, 2013), pp. 134-35. Leongard points out that many poor women came before the royal courts: Janet Loengard, 'What is a Nice (Thirteenth-Century) English Woman doing in the King's Courts?', pp. 55-70, in *The Ties that Bind: Essays in Medieval British History in Honor of Barbara Hanawalt*, ed. by Linda Mitchell, Katherine French, and Douglas Biggs (Farnham: Ashgate, 2011), p. 58.

[9] Sue Walker, 'Litigation as Personal Quest: Suing for Dower in the Royal Courts, circa 1272-1350', pp. 81-108, in *Wife and Widow in Medieval England*, ed. by Sue Walker (Ann Arbor: University of Michigan Press, 1993), pp. 81-82; Anthony Musson, *Medieval Law in Context: The Growth of Legal Consciousness from Magna Carta to The Peasants' Revolt* (Manchester: Manchester University Press, 2001), p. 2. Bennett and Karras also stress the importance of legal records for information on women: Judith Bennett and Ruth Karras, 'Women, Gender, and Medieval Historians', pp. 1-17, in *The Oxford Handbook of Women and Gender in Medieval Europe*, ed. by Judith Bennett and Ruth Karras (Oxford: Oxford University Press, 2013), pp. 7-8.

[10] Loengard, 'What is a Nice (Thirteenth-Century) English Woman', p. 59.

some who seem to be acting independently of their spouses.[11] A few exerted a powerful influence upon the proceedings although absent and sometimes deceased.[12]

The women in these early accounts were plain enough to the clerks who wrote of them and, through them, to us. They have left a substantial impression of themselves, quite different from the Anglo-Saxon women who, from their own records written a hundred and fifty years earlier, appear almost ephemeral and much more difficult to assess.[13] They are also far more clearly visible than in contemporary records. Charters and estate accounts, compiled for the benefit of great lords, provide a wealth of information on the humble men and women involved but offer a necessarily oblique view. Even less is known about them through the local courts which they thronged since those proceedings, not committed to writing for another half-century, are glimpsed only indistinctly through other media. On the other hand, the clerk's record of the actions of a named individual in the king's court, and often the very words he or she spoke, may still be read. Through these accounts, gendered or not as discussed by Bennett and Karras,[14] many ordinary women including wives step clearly into view to pursue their claims in an often uncompromising manner. At the turn of the twelfth century, then, coverture, the common law, and written records were all still in their infancy and brought together for the first time in the royal-court accounts of the period, the focus of this study.

[11] *RJL*, *c*. 1059, discussed on pp. 208-09 below.
[12] Discussed on pp. 249-52 below.
[13] Victoria Thompson, 'Women, Power and Protection in Tenth- and Eleventh-Century England', pp. 1-17, in *Medieval Women and the Law*, ed. by Noël Menuge (Woodbridge: Boydell, 2003), p. 17.
[14] Bennett and Karras, 'Women, Gender, and Medieval Historians', p. 1.

The historiography

In the opening lines to the *Oxford Handbook of Women and Gender*, Bennett and Karras bluntly condemn pre-1970 research into medieval women for continuing the religion-based sexism which polarized the Middle Ages' view of females and treated them as 'the marked gender' apart from the male mainstream of contemporary life.[15] They consider that there is now a less prejudiced and fuller appreciation of the permutations of medieval sexuality and that coverture was probably not as oppressive as previously thought. Without censuring earlier historians, contributors to Beattie and Stevens' *Married Women and the Law* agree with the exaggeration of coverture and that relationships between the sexes cannot be adequately understood in terms of, in Müller's phrase, 'the public/private dichotomy'.[16] Similarly the authors in Walker's *Wife and Widow* are careful not 'to belabour the constraints' upon female activity.[17] Scholars, then, agree on the persistance of couverture as a 'key feature' of the law,[18] but differ over the extent to which it was applied. Bennett and Karras neatly sum up the position by observing that the widespread acceptance of women actively participating in medieval life is accompanied by 'a quiet backbeat' of ever fewer opportunities open to them.[19] However, their insistence upon the dominant rôle of gender in determining medieval female lives seems to undermine their previous

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[15] Bennett and Karras, 'Women, Gender, and Medieval Historians', p. 1. Stuard however argues that the model survives to the present day: Susan Stuard, 'Brideprice, Dowry and other Marital Assigns', pp. 148-62, in *The Oxford Handbook of Women and Gender in Medieval Europe*, ed. by Judith Bennett and Ruth Karras (Oxford: Oxford University Press, 2013), p. 159.

[16] Beattie and Stevens, 'Introduction', pp. 7-10; Miriam Müller, 'Peasant Women, Agency and Status in Mid-Thirteenth to Late-Fourteenth Century England: Some Reconsiderations', pp. 91-113, in *Married Women and The Law in Premodern Northwest Europe*, ed. by Cordelia Beattie and Matthew Stevens (Woodbridge: Boydell, 2013), p. 95. See also Sue Walker, 'Introduction', pp. 1-16, in *Wife and Widow in Medieval England*, ed. by Sue Walker (Ann Arbor: University of Michigan Press, 1993), p. 5. On the other hand Bennett finds evidence that rural households could separate into 'private wives and public husbands': Judith Bennett, *Women in the Medieval Countryside: Gender and Household in Brigstock before the Plague* (New York: Oxford University Press, 1987), p. 6.

[17] Walker, 'Introduction', p. 1.

[18] Beattie and Stevens, 'Introduction', p. 8.

[19] Bennett and Karras, 'Women, Gender, and Medieval Historians', p. 4.

criticism and is not widely shared. While acknowledging its impact Müller argues for the importance of class in this context, pointing out that 'no matter how unequal the sexes' peasant men were always inferior to high-ranking women.[20] Goldberg also warns against emphasizing gender at the expense of 'social status, age and dynamic change'.[21] Walker finds gender parity in some situations such as the increasing use of attorneys by men and women in the royal courts, and distinctions in others such as canon courts and the drawing up of wills.[22] The frequent references to 'feminist medievalists' in *The Handbook* inevitably suggest a bias and pose the question, why 'feminist'? The warning bells it sounds and the sometimes harsh judgement of earlier work[23] are an expression of the inherent difficulties in coming to grips with women's rôle in times past, created in part by the enormous variation within it.

Nowhere is this diversity clearer than in the 'bewildering variety of jurisdictions' in medieval England which, for Bennett and Karras, confirms gender 'as a critical determinant of status' while rendering comparisons between the various 'gendered legal statuses' difficult.[24] For scholars such as Müller there is a far greater distinction between common and customary law because factors came into play within the lower courts which permitted a greater or lesser degree of female autonomy.[25] Sheehan finds a stronger resistance within royal than in borough and ecclesiastical courts to married women's freedom to bequeath property, citing Maitland's 'moments of hesitation' in the development of married

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[20] Müller, 'Peasant Women, Agency and Status', pp. 92-93.
[21] Jeremy Goldberg, 'Life and Death: The Ages of Man', pp. 413-34, in *A Social History of England, 1200-1500*, ed. by Rosemary Horrox and Mark Ormrod (Cambridge: Cambridge University Press, 2006), p. 434.
[22] Walker, 'Introduction', p. 1.
[23] Bennett and Karras, 'Women, Gender, and Medieval Historians', pp. 1-2.
[24] Bennett and Karras, 'Women, Gender, and Medieval Historians', p. 7. See also Beattie and Stevens, 'Introduction', pp. 2-3.
[25] Müller, 'Peasant Women, Agency and Status', pp. 95-97. See also Beattie and Stevens, 'Introduction', pp. 7-8; Theodore Plucknett, *A Concise History of the Common Law*, 5th ed. (London: Butterworth, 1956), pp. 313-14.

women's tenurial rights before they became almost entirely limited to the male-dominated strictures of common-law procedure.[26] Yet McCarthey refers to the apparently confused, and certainly confusing, interplay between national and local courts over the freedoms permitted to wives.[27] Hanawalt discusses the relative abilities of urban and peasant, as opposed to noble, women which began to remove them from the patriarchal system.[28] Towns in particular offered this opportunity to females engaged in trade and commerce to the extent that Beattie describes the common law, in comparison, as 'geared to the running of private, non-mercantile households' rather than commercial activity.[29] Local court procedures were also infinitely nuanced.[30] Bennett and Karras' contention then that 'law strictly prescribed women's disability, but practice was often more forgiving' cannot be applied across the board for it was not everywhere the same law. It would have been well understood by women, and men, that coverture was more strictly enforced by the king's courts than in local assemblies.[31]

It is therefore particularly useful to look at women's reactions to coverture in that arena. The reasons why it was most 'closely observed' there are not far to seek.[32] If the king's courts had not striven for uniformity in all areas of their jurisdiction, including the application of this convention, they would have

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[26] Michael Sheehan, *The Will in Medieval England, From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century* (Toronto: Pontifical Institute of Mediaeval Studies, 1963), pp. 305, 235. Married women's wills are also briefly discussed by McCarthey, pp. 62-63, and by Walker, 'Introduction', pp. 10-11.

[27] McCarthey, pp. 61-62.

[28] Barbara Hanawalt, 'Remarriage as an Option for Urban and Rural Widows in Late-Medieval England', pp. 141-64, in *Wife and Widow in Medieval England*, ed. by Sue Walker (Ann Arbor: University of Michigan Press, 1993), passim.

[29] Beattie, 'Married Women, Contracts and Coverture', p. 154.

[30] See *Borough Customs*, ed. by Mary Bateson, 2 Volumes, Selden Society 18, 21 (London, 1904-1906), passim.

[31] Bennett and Karras, 'Women, Gender, and Medieval Historians', p. 8; Walker, 'Introduction', pp. 1, 10.

[32] Beattie and Stevens, 'Introduction', p. 7. On the other hand Hawkes finds that by the late-fifteenth century common law had softened to the extent that women could prevent the alienation of their land: Emma Hawkes, '"She will...protect and defend her rights boldly by law and reason...": Women's Knowledge of Common Law and Equity Courts in Late-Medieval England', pp. 145-61, in *Medieval Women and the Law*, ed. by Noël Menuge (Woodbridge: Boydell, 2003), pp. 146-47.

undermined the pan-England property of the very law they were there to enforce. Nevertheless custom did filter into their proceedings and obliged the royal justices to notice it particularly, so far as novel disseisin was concerned, in disputes over rights of common.[33] There are also a number of reasons for some variety within the personal modus operandi of the justices who, in the absence of precedent, were themselves creating the common law case by case.[34] As men and lords they benefited from the conventions of coverture respecting their own authority and inheritance and were working within the perceived best practice of their time. The potential of private experience to colour judgement is also a factor. Certainly they 'did not always agree as to what a married woman could do'.[35] What married women actually did, in and through the courts, is the concern of this chapter.

To what degree, though, is it possible to discern what they did? The many wives who appear to occupy a supporting role in their husbands' actions are, in Loengard's view, primary actors depressed by coverture into second place on the writ.[36] For example, Eliza was co-plaintiff with her husband, Richard of Houton (Houghton), Lincolnshire, in a successful action at Lincoln in 1206, *de medietate cuiusdam molendini et de quadam tofta* (concerning the half of a certain mill and a certain toft).[37] They were awarded 2s. 6d. damages and their disseisors, William de Weregrave (unidentified) and Robert the miller, amerced. Is Eliza's relegation symptomatic of medieval male dominance or of a later anachronistic emphasis on

[33] Stenton states that it was one of a jury's obligations to report new tolls and customs to the king's justices: Doris Stenton, 'Introduction', pp. xv-xxxviii, in *ENAR*, pp. xxii, xxiii. Her examples relate to criminal cases but there are many cases of disseisins through: the prevention of customary rights such as access to pasture: *ELAR*, *c*. 1394; the diversion of water courses: *ENAR*, *c*. 896; *ELAR*, *c*. 1374; the creation of ditches and walls: *ENAR*, *c*. 823; *ELAR*, c. 139; etc. The latter was particularly common. McCarthey observes that custom frequently altered wives' 'legal disability' at common law although not always to their advantage: McCarthey, pp. 60-62.
[34] They 'constantly renegotiated [common law]…with respect to married women': Beattie and Stevens, 'Introduction', p. 5
[35] Beattie, 'Married Women, Contracts and Coverture', p. 145.
[36] Loengard, 'What is a Nice (Thirteenth-Century) English Woman?', pp. 58-59.
[37] *ELAR*, *c*. 1404.

gender?[38] Müller discusses ways in which females' activity within the community, which resulted in legal action, can sometimes be deduced from the accounts of those hearings despite the women themselves not appearing at them, or if they did their appearance is not recorded.[39] Similarly, Loengard finds that 'women were litigating' whether they were present in court or not, pointing out that they might appear for the initial hearing and subsequently be represented by an attorney, often their husband.[40] However, the practice of appointing attorneys was not limited to females and, taken alone, Loengard's point could unintentionally misrepresent women's legal position. Attorneys had to be formally appointed by their principals, whether male or female, and were required to appear with them before a justice for that purpose, even if they were husband and wife.[41]

On the other hand, bailiffs could and did appear and speak for their lords, again male or female, without any such formality.[42] Occasionally, a case is found where the lord appears to have stepped in and over-ruled his steward's legally correct dispossession of a tenant.[43] The inference is that he became aware of the action after the event and was not consulted beforehand. This is not surprising. Very many lords, perhaps the majority, must have left their aides to act on their own initiative in everyday affairs. The legal position of men and women regarding attorneys and bailiffs was therefore coterminous. Loengard goes on to say that, since a man might litigate on his own account independently of his wife, but not a woman without her husband, a wife's involvement indicated that the

[38] There is some suggestion that knowledgeable litigants may have exploited the system to their advantage. Among others, the property disputes of a prosperous Lincolnshire knight, Thomas of Begering (Beckering), and his wife Alienora are instructive: *ELAR*, *cc*. 78, 114, 116, 176, 294.
[39] Müller, 'Peasant Women, Agency and Status', pp. 96-97.
[40] Loengard, 'What is a Nice (Thirteenth-Century) English Woman', p. 56.
[41] For a fuller discussion, see pp. 209-10 below.
[42] For an example, see *ELAR*, *c*. 423
[43] For possible examples, see pp. 177-79 above.

disputed property was, at least in part, her own. She does not add that the husband could not litigate on the wife's behalf without her also being present in court, unless she had previously appointed him as her attorney.[44] While coverture undoubtedly dictated a married woman's ability to act for herself, there were clear limits to its authority which were rigorously observed by the all-male judiciary. However, many of the females whose presence in court was highly visible and difficult to overlook, and whose names spring instantly to mind, such as the resourceful Agnes and the vengeful Leviva, were widows.[45] As discussed in Chapter 7, women such as they operated outside the grip of coverture although they were not uninfluenced by it. Fewer married women are as instantly memorable it must be admitted, despite the incorrigible Matilda,[46] perhaps because they were obliged to tread circumspectly to avoid transgressing the rules as Kelleher suggests.[47]

Coverture

The nub of coverture was the subjection of women to male authority, clearly set out by Hanawalt.[48] Fathers, masters and husbands were responsible respectively for the actions of daughters, female servants and wives, while males were answerable for their own actions from the age of twelve. A young unmarried girl remained in the power of her father or guardian[49] until handed over to a husband when she became a *femme couverte*, covered in all respects by the mantle of his

[44] For a discussion and example, see pp. 210-11 below.
[45] Respectively: *RJL*, *c*. 991, discusssed on p. 226 below; *RJL*, *c*. 52.
[46] *RJL*, *cc*. 918, 919, discussed on pp. 206-08 below.
[47] Marie Kelleher, 'Later Medieval Law in Community Context', pp. 133-47, in *The Oxford Handbook of Women and Gender in Medieval Europe*, ed. by Judith Bennett and Ruth Karras (Oxford: Oxford University Press, 2013), p. 133.
[48] Barbara A. Hanawalt, *The Wealth of Wives: Women, Law, and Economy in Late Medieval London* (New York: Oxford University Press, 2007), p. 11.
[49]However, Bennett shows that unmarried girls became independent of their parents: Bennett, *Women in the Medieval Countryside*, pp. 86-91.

authority under the common law.[50] It forced a startling but plastic distinction between a female's status as wife and as widow when she abruptly achieved legal parity with men, discussed in Chapter 8. How much of a burden was it upon women? Wilson and Makowski trace the progress of, and the reasons for, misogyny from Roman times to the late fourteenth century, and Brundage shows that it was not general until the eleventh century when the growing stability in Western Europe allowed the church to consolidate its teaching.[51] Yet orthodox Christianity remained ambivalent towards marriage, and the fifth-century ascetic conviction that it was less desirable than celibacy persisted.[52] Saint Paul's view that marriage existed for sexual fidelity and procreation, but not enjoyment, was expounded by Augustine and confirmed by Pope St. Gregory the Great as a means of tempering the original and perpetuated sin of pleasurable coitus.[53]

In all of this, woman fared badly. Already the source by which sin entered the world (Eve), as a wife her relationship to her husband reflected the position of the Church which was the bride of Christ, faithful to Him alone and He her superior.[54] She was therefore her husband's inferior and his temptress but also morally obligated to him sexually and he to her.[55] It was a confused message, for

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[50] Walker writes that under common law husband and wife 'were one person and that person was the husband': Walker, 'Introduction', p. 4. On the other hand, Beattie and Stevens quote Maitland that the law governing the relationship of a married couple was based on the guardianship of property and not 'an "unity of person"' but argue that nevertheless wives' legal status 'was eclipsed by their husbands under the law and customs [of] coverture': Beattie and Stevens, 'Introduction', pp. 2-3. Scholars disagree not on the reasons for coverture but on its effect. The situation of women who did not marry is considered in Chapter 7, below.

[51] Katherina Wilson and Elizabeth Makowski, *Wykked Wyves and the Woes of Marriage, Misogamous Literature from Juvenal to Chaucer* (New York: State University of New York, 1990), pp. 159-61; James Brundage, *Law, Sex and Christian Society in Medieval Europe* (Chicago: University of Chicago Press, 1990), pp. 2-4.

[52] Duby writes that everything led the church to condemn marriage: Georges Duby, *Love and Marriage in the Middle Ages*, trans. by Jane Dunnett (Cambridge: Polity Press and the University of Chicago, 1994), p. 10.

[53] Wilson and Makowski, p. 113; Duby, *Love and Marriage*, pp. 110-11; Brundage observes that Christian teaching on sex and sexuality had little to do with Christ Himself: Brundage, *Law, Sex*, p. 5.

[54] Brundage, *Law, Sex*, pp. 426-27.

[55] This was the idea of 'conjugal debt' whereby either one of a married couple was obliged to have intercourse on demand with the other in order to protect him or her from the temptation of

the same doctrine also taught sexual parity between husband and wife in that marriage was established by the consent of both parties and not by copulation, fraught as the latter was with the sinful possibility of pleasure.[56] These divergent orthodoxies were more or less condensed into a working hypothesis by Gratian in his influential *Decretum*,[57] much of which was shortly afterwards modified into ecclesiastical legislation. Thus a millenium of Biblical, patristic and clerical teaching on the nature of womanhood and marriage culminated in eleventh-century canon law, endowing men with divinely inspired dominion over women in general and their wives in particular.

Married women's behaviour before the courts

The weft of marriage in the warp of a woman's life could render legal hearings problematic for her because, although court procedure was influenced by her current position, her circumstances at the time she purchased her writ may have been quite different. For example, Alice daughter of Simon de Piro withdrew her novel-disseisin writ against Robert de Hulle at Worcester in 1221, telling the court that *non vult loqui eo quod habet virum qui non vult cum ea comparere* (she does not wish to speak because she has a husband who does not wish to appear with her).[58] In her note to the record, Stenton explains that Robert's alleged dispossession and Alice's subsequent procurement of her writ had occurred before she married the nameless husband, who may not have been her first. If her case had been called before this marriage, she could have appeared on her own behalf; as it was, the new spouse frustrated her attempt. If a woman's widowhood could not be verified, it was of paramount importance that she included her

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adultery: Mia Korpiola, 'Spousal Disputes, The Marital Property System and The Law in Later Medieval Sweden', in *Married Women and The Law in Premodern Northwest Europe*, ed. by Cordelia Beattie and Matthew Stevens (Woodbridge: Boydell, 2013), p. 41.

[56] Wilson and Makowski, pp. 118-19; Brundage, *Law, Sex*, p. 183.

[57] Brundage, *Law, Sex,* pp. 228, 254-55; Kelleher, 'Later Medieval Law', p. 134.

[58] *RJL, c*. 1273.

husband's name in the writ. The records show that, if she did not and were challenged on it, the dictates of coverture forced the common-law court to deem her out of order and the defendant had no case to answer. It was inevitable then that such omissions almost always were challenged, usually and for obvious reasons by the defendant, which for some women proved to be a serious stumbling block. Kelleher's point of a woman's need to construct a legally acceptable identity before the court is translated here into reality, although it seems not to have been understood by some plaintiffs.[59] A case in point is an action brought at Westminster in 1214 by Pientia of Oakham, Rutland, for the return of her free tenement there, which collapsed for this reason.[60] The defendant, Gregory de Sancto Petro, stated at the outset that *non vult nec debet ei respondere, quia ipsa habet virum, scilicet Johannem de Brentingeby, qui adhuc superstes est* (he neither wishes nor is obliged to respond to her because she has a husband, namely John of Brentingby, who is still alive). He then repeated his own position with added emphasis; that *sine eo non vult ei respondere* (without him, he does not wish to respond to her).

Gregory was not only relentlessly building his own defence but also reinforcing male authority against importunate women, particularly wives. Pientia was equally vehement in her denial that *nullum virum habet nec habuit die quo breve suum fuit inpetratum* (she has no husband nor had a husband on the day on which her writ was obtained). The jury however simply found that *ipsa habet virum, Johannem de Brentenebi nomine* (she has a husband, John of Brentingby by name), making no reference to his possible existence on the day she obtained

[59] Kelleher, 'Later Medieval Law', p. 139. See also Leongard, 'What is a Nice (Thirteenth-Century) English Woman', p. 58.
[60] *CRR*, VII, p. 53. Brentingby is in Leicestershire.

her writ.[61] The critical factor was the plaintiff's marital status at the time of her court appearance. Pientia identified herself solely by location and if she advanced any reason for her lack of a husband it was not recorded. She did not claim never to have been married nor that she was living with John of Brentingby without having married him. Perhaps they were married and he had simply disappeared.[62] The point is that absent husbands, real or apparent, not known to be deceased were legally presumed by the courts to exist. There is no evidence here that the law was contravened or even stretched, despite the weight of male resistance shown towards Pientia.[63] In the absence of contra-indications it was applied by default in favour of men, which was entirely consistent with the principles of coverture.

The convention caused particular problems for women whose husbands were acknowledged at law to be missing and possibly but not necessarily deceased, circumstances which seem to have been treated in an altogether different manner by the courts. A case of 1199 at Westminster which concerned a holding in Toddeworth (unidentified) in Huntingdonshire provides an illustration.[64] Agnes daughter of Gilbert sued Hugh de Scalariis for twenty acres there with a messuage and appurtenances, but Hugh said that the case ought not to proceed *quia ipsa habet virum qui non nominatur in brevi* (because she has a husband who is not named in the writ). The clerk did not inscribe Agnes' answer but she must have made a convincing plea for the next line records the justices' permission for the parties to come to an agreement between themselves, for the reason that *incertum erat de viro suo utrum vivat necne* (it was uncertain

[61] The jury reached its verdict, they said, *in fide qua tenentur domino regi* (in the faith in which they are held by the lord king). The import of this addition to the usual mantra is not fully understood. Possibly the jurors were reinforcing their own authority by linking it with the supremacy of the crown.
[62] Co-habiting was not uncommon: see pp. 263-64, 266-67, below.
[63] See also *RJL*, *cc*. 918, 919, discussed on pp. 206-08 below.
[64] *CRR*, I, p. 96.

concerning her husband whether he is alive or not). In fact they went a stage further and presumed him dead, allowing Agnes to act as if she were indeed widowed. She quitclaimed to Hugh *totum jus et clamium suum quod habuit in terra illa* (all right and claim that she had in that land) in return for one mark which he handed over there and then.

Agnes had been permitted to assume her husband's authority. What can she have said for them to reach that decision? Had her unnamed husband taken the cross at some unspecified time in the past, never to return? Or had he simply disappeared without apparent cause? If the latter, it is likely to have been noted and an explanation sought. As it stands, the lack of clerical detail in the account suggests that there was nothing untoward, that it was a common occurrence. Agnes seems to have been treated with respect by those concerned and even Hugh's opposition looks half-hearted. It strengthens the possibility of a lost crusader or soldier, which must have been the fate of many men. At any rate he seems to have been accorded a degree of respectability by the attitude of the court, suggesting an acceptable reason for his absence. It is likely that potential widows like Agnes had to wait a specific length of time before they could act as such, to allow for their husbands' return. Bracton set different time limits for the permitted immediate recovery of a property by a disposssessed tenant; four days in normal circumstances but more if the tenant were absent on the king's business or in the Holy Land.[65] A similar time scale for non-returning husbands would fit that pattern but the courts may have considered it superfluous to enroll common knowledge. It is interesting that Agnes did not style herself a widow but identified herself as Gilbert's daughter. Many widows made use of their paternity in this way, which had the dual effect of claiming widowhood without rejecting male

[65] *Bracton*, III, pp. 22-23.

authority. In Agnes' case its use was also politic in not presuming the justices' decision on her status, but whether deliberately so will never be known.

Agnes's circumstances were clearly very different from Pientia's but how far do their cases support Kelleher's suggestion that women had room to manoeuvre within the constraints of coverture, through the contribution of *ius commune* to the development of English law.[66] Rather than viewing the relationship between women and the law as 'necessarily oppositional' in the manner of previous historians, she argues that it should be seen more as a co-operative process. Women 'took pains to represent themselves' along the lines expected of them by the court, enabled by legal procedure which gave them the opportunity to manipulate the court's perception of them. Pientia and Agnes seem to have been working within given legal parameters and endeavouring to turn them to their advantage, but it must be a moot point whether they perceived themselves to be engaged on a joint venture. There is evidence that they trusted in the king and by extension his jurisdiction but that is not quite the same.[67] There is also plenty of evidence that they were skilled and knowledgeable in the law which is perhaps what Kelleher means by their 'active participation'.[68] Yet surely the very fact that they went to law at all is evidence of this. Coverture applied to every stage of a married woman's legal action, determining the wording of her writ at the outset, her conduct in court and the clerk's account of her suit.

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[66] Kelleher, 'Later Medieval Law', passim. *Ius commune* originated in Roman legislation and, when the latter was revived during the Middle Ages, affected the development of English common law. Its perceived view of female inferiority, taken out of context and overlooking the complex legal status of Roman women, strengthened the church's later teaching on the subject. It also emphasized that a woman's position relative to her male kin was crucial to her ability to engage in legal action. Additionally, both Roman and canon law incorporated the concept of an individual's reputation as evidence for the need of an enquiry into his or her behaviour when a crime was thought to have been committed. This had significant consequences for women, especially the non-conforming, and could reduce their ability to obtain legal redress of wrongs against them.

[67] Loengard , 'What is a Nice (Thirteenth-Century) English Woman', p. 70.

[68] Kelleher, 'Later Medieval Law', p. 133. See also Walker, 'Introduction', p. 1.

There must have been plenty of women (and men) who, even in an age generally considered more litigious than the present time, then as now subsided under the tactics of another.[69] Those who did not were ipso facto voluntarily participating but do their actions reveal what they thought of the system or indeed if they considered it at all? It is difficult to know what to make of a plaintiff who brought no fewer than three consecutive actions before the Worcester court of 1221, all of which failed for absence of her husband's name.[70] Matilda *la deboneir*, translated by Doris Stenton as 'the fair' but perhaps better rendered as 'good-natured', accused William Hegh and, simultaneously but *per aliud breve* (by another writ), the same William with Peter of Lench of dispossessing her of tenements in Hull (Hill and Moor), Worcestershire. However, she could not deny William's accusation that *ipsa habet virum Robertum nomine qui adhuc superstes est* (she has a husband, Robert by name, who is still alive). William added that *non vult respondere* (he does not wish to reply) without the court's judgment since *mentio non fit in brevi de eo nec ipse presens est* (mention is not made of him in the writ nor is he present).[71] The bench found he had no case to answer and Matilda was amerced. She at once brought a third action against Jordan of Childs Wickham (Gloucestershire), who was parson of Fladbury (Worcestershire) for dispossessing her of half a virgate there with appurtenances. She claimed that she had originally let it to his predecessor for a term which had expired. The clerk wrote that Jordan *venit et dicit idem quod Willelmus Hegh superius* (comes and says the same as William Hegh above), with identical results.

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[69] Medieval men were 'incuriably litigious…an inherited instinct' derived from generations of attendance at the various local courts and the necessity of knowing the customs of their manor: Doris Stenton, 'Introduction', pp. xvii-lxxxii, in *ELAR*, p. xvii.
[70] *RJL*, *cc*. 918, 919.
[71] This echoed the plea of Pientia's disseisor, pp. 207-08 above, and seems to have been the stock response.

This curious triple case twice lost the Exchequer revenue, for Matilda *pauper est* (is poor). She was therefore excused the fines that unsuccessful litigants otherwise incurred and neither would she have been required to pay for the originating writs. She must have known that she would bear no expense and, probably, that she would lose. Her own frivolous description of herself on her writ as *la deboneir*, with no supporting identification of any kind, gives her and her actions a certain tantalizing singularity and the whole episode suggests that she was playing a game of her own. That she was constructing an identity for herself seems beyond question. It is also unlikely to have been respectable and may have had the potential to encourage other wives to resist their own coverture. Does the short shrift she received at court support Kelleher's theory of legal loss through reputation rather than evidence? Both defendants appear abruptly dismissive of her claims. They were likely to be so for the obvious reasons of their own defence. Additionally however, is it possible that they were in collusion with the court with the intention of putting Matilda in her place by besmirching her reputation? The juxtaposition of her claims by the court personnel, with their reiterated defence and judgement, would have enforced the message. Matilda scarcely appears to have helped herself and it may be that she was hoist with her own petard, outwitted by the male establishment. On the other hand, by naming herself *la deboneir* and excluding all mention of her husband, was she pointing an accusatory finger at men of repute with the implication that, if she were no better than she ought to be, then neither were they? William was the serjeant of Oswaldslow hundred and master Jordan a man of the cloth.[72] Had Matilda been dispossessed in truth and become impoverished as a result? There is no indication

[72] Both were involved in a separate plea of novel disseisin before the same eyre: *RJL*, *c*. 1277. It was one of a number of actions brought against Jordan by one William the Palmer: *RJL*, *cc*. 977, 978, 1300. For further cases involving William le Heghe, see *RJL*, *cc*. 952, 991.

of where Robert, Matilda's husband, stood with respect to the holdings but her experience helps to clarify a married woman's legal position. She might act for and by herself in a case so long as her husband's existence was acknowledged, either by his presence in court or by her previous inclusion of his name on the writ. It was an odd situation, allowing a married woman the same freedom as a widow but only on the condition of her submission to the principle of her spouse's male superiority, and supports Bennett and Karras' argument for a gendered determination of status.[73]

There may have been ways round the convention of married women remaining modestly silent in court and deferring to their legally dominant spouses, on the principle that a husband's name on the writ or his presence in court indicated his consent to her conducting her own case. At first sight it would seem that Isabel the wife of Richard of Ecleshal (Eccleshall), Staffordshire, understood this well.[74] As principal plaintiff she brought an action before the Worcester court in 1221 against her brother, William Kechel, whom she accused of dispossessing her of half her father's marriage gift. Crucially she included her husband's name on the writ but it was she who was named first and spoke in court. She was therefore pleading on her husband's behalf as well as her own since under the law he had equal claim in, and more control over, her marriage gift while he lived. It is all the more interesting, then, that she made no reference at all to him during her plea and the jury referred to him only once and that indirectly in a clause concerning *medietatem quam tenent* (the half [of the tenement] which they hold). That is all. Richard is not mentioned again by name until the justices' decision. While this appears to indicate that a wife's tongue was

[73] Bennett and Karras, 'Women, Gender, and Medieval Historians', p. 14.
[74] *RJL, c*. 1059. The jurors found that Isabel had never had seisin of the other half but, *immo, per concordiam receipt de eo* (on the contrary, she received from him [William] by agreement) that half which she and her husband did hold.

legally released with her acknowledgement of her married state, there may be another explanation: that Isabel had been formally appointed as her husband's agent. The possibility suggests that Isabel's apparent legal freedom may have been at her husband's positive behest rather than through negative acquiescence, which puts a different slant upon her behaviour.[75]

Appointment of attorneys by wives

Among the lower ranks more women than men appointed attorneys, most frequently their husbands but occasionally sons.[76] The automatic legal representation of wives by their spouses under coverture begs the question of why so many women felt the need to formally attorn them.[77] Was it in some way a part of Kelleher's suggested female manipulation and, if so, what end did it serve? It would seem more likely, however, to be a precaution against a wife's potential inability to attend the full hearing, which could not otherwise proceed without her. Powerful though coverture was, it did not extend to excluding women from cases pertaining to their own property, even though their activity in the court was severely restricted and the property itself was at their husbands' disposal while he lived.[78] On the contrary, their presence was not optional but required. For example, a suit between two couples before the south-western counties' eyre at Taunton in 1201 collapsed because it concerned the dower of the plaintiff's wife who was neither present, nor had excused herself, nor had appointed her husband as her attorney.[79] It could be argued, then, that the common law, far from

[75] See Beattie, 'Married Women, Contracts and Coverture', pp. 135, 154.
[76] For husbands, see: *Pleas, II, c.* 3161; *ELAR, c.* 1330; *Pleas, IV, c.* 4083; *RJY, c.* 150; *CRR*, VII, p. 323. For sons, see: *ELAR, c.*1425; *Pleas*, IV, *c.* 4048; *RJL, c.* 304.
[77] It was essential for attorneys to be appointed by their principals personally before justices, otherwise their status would not be recognized by the court however well known the individual: G*lanvill*, p. 133.
[78] Beattie and Stevens, 'Introduction', pp. 2-3. This is illustrated by a case heard at Bury St. Edmund's in 1203, in which a husband attempted to recover property previously assigned as his wife's dower: *ENAR, c.* 783, discussed on pp. 260-61 below. See also *ELAR, c.* 1403.
[79] *Pleas*, II, *c.* 679.

obscuring women, insisted upon their visibility and confined coverture as well as enforcing it. On the other hand, the attornment of husbands could also be viewed as confirmation of the pervasiveness of coverture, in that it became customary to do so whether expedient or not.

Attornments appear to fall into two categories, the pre-planned and the spontaneous. An example of the former is provided by Christina of Wolterton (possibly Wolferton), Norfolk, who in 1209 at Norwich appointed her husband Walter against two married couples, both the other wives appointing similarly.[80] Other than that it was a plea of novel disseisin, no further information about the action is given in that particular item. It is purely a record of the wives' delegation of representation to their spouses in preparation for the main hearing. Appointments which were apparently spontaneous arose when a case was adjourned for one reason or another and they were tagged onto the end of the record. Matilda, the wife of Robert de Cherdeburc (Cherbourg), France, attorned her husband in this way.[81] Her case was adjourned for default of the recognitors but it appears that it was expected to be heard very soon for the clerk wrote that *ponitur coram Justic' itinerantibus* (it is put before the itinerant justices) and the sheriff kept her writ by him. Her action indicates that it was she and not her husband who was the principal litigant. Similarly Emma wife of Philip of Stapleton appointed her husband in a case of novel disseisin and another of mort d'ancestor which were transferred from Nottingham to London.[82]

No explanation is given as to why women who had conducted their own cases in one court, albeit through the medium of their accompanying husbands, felt it appropriate to be represented by male proxy in another, but it may have

[80] *Pleas*, IV, *c*. 4067. This may well have been a dispute between sisters.
[81] *ENAR, c*. 910.
[82] *Pleas*, I, *c*. 3151.

been nothing more than practical expedient. A wife's domestic duties might preclude her further absence from home, particularly if the adjournment were to a distant court. On the other hand, might these women have been engaged on extra-mural activities and their attornments be early examples of the amelioration of common-law coverture? Beattie suggests a 'law of necessaries or agency' which reconciled the doctrine with country wives' marketing activities, mirroring the position of urban married women who traded as *femmes soles* (single women) under borough customs which 'modified and adapted [coverture] to suit households'.[83] Müller writes that married women 'exercise[d] active agency' in their communities.[84] However Loengard concludes that it is almost impossible to tell if such wives operated and needed to operate with their husbands' consent or at their own volition.[85] If the former there was no breach of coverture, but it remains a possibility. Whatever its reach, there is no indication in the rolls if coverture were resented or simply accepted as the status quo or indeed, as Hanawalt observes, found by some women to be a more comfortable way of life.[86]

On the other hand, in the early period of this study women were themselves appointed as attorneys, both by other women and also men.[87] They are not common, but not so rare as to be extraordinary and run through the rolls in a thin trickle. Only two of the cases found so far refer to novel disseisin.[88] In 1212 one Agnes, a Lincolnshire widow, appointed her daughter against Theobald Hautein and at York, in 1218, Geoffrey de Sacesmar attorned Matillda his wife or Robert de Aunford against the earl of Salisbury. The clerk initially omitted

[83] Beattie, 'Married Women, Contracts and Coverture', pp. 146-47, 136. Beattie give a useful précis of scholastic debate on this topic.
[84] Müller, 'Peasant Women, Agency and Status', p. 99.
[85] Loengard, 'What is a Nice (Thirteenth-Century) English Woman', p. 69.
[86] Hanawalt, *The Wealth of Wives*, p. 11.
[87] Loengard, 'What is a Nice (Thirteenth-Century) English Woman', pp. 69-70.
[88] For the appointment of: a wife, see *RJY, c.* 326; a daughter, see *Pleas*, IV, *c*. 4512.

Matillda's appointment and had to squeeze it in above the line. Perhaps he was unfamiliar with the concept. The majority of female attorneys were involved in cases to do with inheritance, not always dower, which may again indicate the primary importance of women in these actions. Most, but not all, were appointed by their husbands.[89] In the only example found of indirect speech by a female attorney, she describes herself as such although the clerk, probably in error, has written *attornatus*.[90] This does raise the possibility that where *attornatus* is inscribed elsewhere without further identification, it may conceal the appointment of a woman.

Hidden wives?

Of the three hundred or so women who appear in a supporting role to male principals, the majority were married to them and identified simply and exclusively as *uxorem suam* (his wife). Yet, as noted above, Loengard finds that most women so identified were the primary holders of the property in question, and their secondary place in their own proceedings was at one with their inferior position at law.[91] Glanvill states that *ipsa mulier plene in potestate viri sui de iure sit* (legally a women is completely in the power of her husband).[92] Did it, however, conceal them from their contemporaries? Is that not the point, rather than their possible concealment from later historians whose reading of the rolls could never have been envisaged? Those among them who were the prime movers of their suit, rather than acting under their husbands' instruction, would themselves have taken out the writ. For example, it may well have been Eliza

[89] For examples: of wives, see *ELAR*, *cc*. 113, 1473, *CRR*, IX, pp. 290, 332; of a sister appointed by her brother, see *CRR*, IX, p. 46; of a daughter by her father, see *CRR*, X, p. 191; of nuns by their prioress, see *ENAR*, *c*. 283.
[90] *Pleas*, IV, *c*. 3127: *Isabella de Brus que dixit se esse aturnatus eiusdem Ivet peciit licenciam recedendi de brevi et habuit* (Isabella de Brus who said that she was Yvette's attorney sought licence to withdraw the writ and she had it).
[91] See p. 197 *n*. 36 above.
[92] *Glanvill*, p. 60 (VI, 3).

herself who directed the clerk to write *Elis' uxorem suam* (Eliza his wife) after her husband's name, Richard of Houton (Houghton), Lincoolnshire, on her writ.[93] She was, however, reduced to *uxor eius* in the clerk's recording of the justices' decision. No plea seems to have been necessary in such straightforward cases or at least none was recorded but, had a plea been entered, it would have automatically fallen to the husband to utter it as he was his wife's representative by default.

On the other hand, coverture seems at first sight to have been taken a stage further by husbands who made no reference to their spouses, the women apparently being entirely passive. Geoffrey Spillebarc provides a good illustration of this. With five other men at Bury St. Emund's in 1203 he defended an alleged disseisin of a Norwich tenement brought by Roger Ylving and his wife Alice.[94] As the case unfolded, but not before the parties came to an agreement by licence of the justices, it transpired that Geoffrey also had a wife. He was obliged to acknowledge her at this point because she was in fact central to the action with the plaintiff's wife, Alice. It becomes clear that they were sisters and that this was a family quarrel over their partible inheritance. At no stage in the record is she named. The concluding agreement provided that the disputed land *amensurabitur* (shall be measured) so that Geoffrey and his nameless wife might have their reasonable portion, neither more nor less than they ought to have. Once again the technically inferior position of females at law is illustrated. The plaintiff made no reference in his writ to his sister-in-law, let alone supplied her name, even though she was co-heir with his own wife of the holding in question.

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[93] *ELAR, c.* 1404. The couple brought a successful action *de medietate cuiusdam molendini et de quadam tofta* (concerning the half of a certain mill and a certain toft) in 1206 at Lincoln.
[94] *ENAR, c.* 839.

Does this overturn the conclusions reached above, that women's part in legal disputes had to be acknowledged? A close reading of the case shows that it does not and that Goodwife Spillebarc was referred to as and when she should have been. We may be certain she was omitted from Roger's list of those who had actually dispossessed him because she was not there. Alice appears in the record at the outset because she was the plaintiff in a case about her land. Her sister's part in the dispute was acknowledged, albeit anonymously, so soon as it was necessary. She played no greater or lesser part in the proceedings than the named Alice. Although both were the primary actors they appear to be entirely subordinate to their husbands' coverture with little control over events, but how far is that now a construct in the mind of the beholder? Does the clerk's account of the case record their passivity or impose passivity upon them? It should be pointed out that by the same token of legal necessity, or lack of it, the deceased wife, the dying infant and the hanged husband referred to elsewhere also remained nameless.[95] They were identified only by their relative position to the litigants involved in their respective cases. However, the anonymity of the living Goodwife Spillebarc during her court hearing is not necessarily an indication of her husband's character. It may indicate her own. Müller's point that a fourteenth-century husband's courtroom visibility 'need not imply an absence of female agency' is equally applicable to the public activities of earlier married couples such as the Spillebarcs, and is a warning against latter-day assumptions.[96]

Conclusion

Kelleher's conclusion that the common law's propensity to 'effectively efface [married women] as legal subjects' was mitigated by 'a plurality of traditions'[97]

[95] See pp. 249-51, 252-53, below.
[96] Müller , 'Peasant Women, Agency and Status', p. 103.
[97] Kelleher, 'Later Medieval Law', p. 138.

does not, over all, appear to be supported by common-law novel-disseisin cases in the late-twelfth and early-thirteenth centuries. Married plaintiffs pursuing solo actions were confounded in their suits and seem to have the full weight of coverture thrown upon them, unless their circumstances were of a difficulty that was appreciated by the court. There is evidence however, through wives specifically appointing their husbands to represent them, that some couples worked together harmoniously for their mutual benefit within the convention's constraints. The position of wives as litigants was always acknowledged by strict legal protocol, despite their identity appearing at times to be concealed within the records and they themselves seeming to be disregarded by their closest relatives. Their apparent anonymity may say less about them and their milieu than about those who read the accounts of their suits and, as scholars urge, it is vital to observe them in the context of their time. Similarly the development of coverture has to be understood to appreciate its impact upon women, and also men. The historiographical debate on the relative importance of gender, status and context in determining female lives is not altogether underpinned by the women studied in these early cases. Rather, they seem to have behaved as discrete individuals who were strongly motivated to pursue their own interests. Where they acted on their own account, whether or not permitted to do so by the constraints of coverture, their presence at law ipso facto shows a positive rather than submissive approach to their several situations. Coverture forced married women who were primary litigants to be named after their husbands on their writs, but it was a purely legal convention and not suggestive of marital oppression. The wives in the early records give every indication of determining the course of their lives by their own force of character within the accepted terms of their society and its varying emphasis upon female repression and freedom.

CHAPTER 7
SINGLE WOMEN

Introduction

Single women, both widows and the unmarried, wielded far more control over their lives than their wedded sisters whose situation is discussed in Chapters 6 and 8. Widows predominate in the rolls since most women did marry at some point.[1] However, all women obviously fell into the single category at least at the beginning of their adult lives, even if they married young, and cases involving the unmarried constitute a significant if idiosyncratic sample of female liberty.[2] Of the two thousand or so records of novel disseisin which have survived from the period between 1194 and 1221, more than six hundred and fifty involve in some way one or more women of all degrees who appear to be single. The majority and the most visible are widowed principals numbering three hundred and eighty four, the ratio of plaintiffs to defendants being about two to one. Some one hundred and twenty women were not litigants but gave identity to those who were, usually their sons. A small number of individual women is also to be found within large, mainly male groups supporting a principal litigant.

The records expose two constant and opposing factors in medieval life: that the doctrine of male superiority, expressed in coverture, permeated the whole of society; and that, contrary to its teaching, many women were very far from meekly subordinate before it. It seems that at the turn of the thirteenth century they observed the letter of coverture as they found it expedient to do so, rather than its spirit. Some reconciliation of these apparently polarised forces may be found in evidence that coverture was a forced addition to the customary male

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[1] Susan Stuard, 'Brideprice, Dowry and other Marital Assigns', pp. 148-62, in *The Oxford Handbook of Women and Gender in Medieval Europe*, ed. by Judith Bennett and Ruth Karras (Oxford: Oxford University Press, 2013), p. 159.

[2] Examples are *RJL*, *c*. 991, *RJY*, *c*. 190, discussed respectively on pp. 991, 231-33, below.

supremacy and that the alterations it demanded to traditional patterns of inheritance did not sit easily in the high-medieval mind, fostering a very strong and almost subversive resistance to it by men as well as women. Following a résumé of the historiography, the cases which have led to these conclusions are discussed for their information on single women in terms of principal litigants, direct inheritance, poverty, attitudes of the courts towards them, and their provision of legal identity to men.

The historiography

Far more has been written on women of the late, rather than the high, medieval period, probably because there is altogether less material from the earlier years. There is also more on widows than on those who had never been married, who are more difficult to recognize in the records. Nevertheless, the narrow focus of this study, directed only at novel-disseisin cases of the late-twelfth and early-thirteenth centuries, reveals single women in a variety of circumstances, some living alone and others co-habiting with men. The complexities of medieval law and administration were evidently well understood, in Walker's observation, by 'the women who actively exploited them'.[3] This touches a vital point. To what extent did these legally active women represent the desires and mentality of their generation? Were they atypical or did they also articulate the unexpressed wishes, at least in public, of the rest of their sex who did not litigate because they had not the courage or the wit, or perhaps the need, to do so?

Bennett has shown that single women of all categories often lived alone and, unlike wives, were usually employed in low-skilled work of inferior status

[3] Sue Walker, 'Introduction', pp. 1-16, in *Wife and Widow in Medieval England*, ed. by Sue Walker (Ann Arbor: University of Michigan Press, 1993), p. 1.

as, for example, servants and general labourers.[4] Herlihy's finding that women were increasingly less valued during the Middle Ages[5] betokens a general lack of respect by the greater part of society, including women themselves, perhaps partly inspired by the poverty which afflicted many of single status, even widows. When men were attracted to occupations hitherto the preserve of women, such as brewing, it was because the status of the work itself had increased and not that of females which remained humble largely through the social teaching of male supremacy. This contempt is confirmed by Beattie's findings that late-fourteenth century women who were neither maid, wife nor widow, in other words mature solo females, were invariably supposed by society at large to be prostitutes.[6] Bennett's observation that even in this later period the rules on sex and marriage 'were often ignored and overlooked' applies to low- rather than high-ranking women.[7] It suggests that the prosperous conformed and the poor were considered less respectable, at least potentially. Was this also true at the turn of the thirteenth century or was the refined misogyny taught by the ecclesiastical reforms then less entrenched? It is possible, although not proven, that its effect upon single women, even in the royal courts where coverture was more strictly observed, was less severe and that society had a greater toleration for women who did not observe religious teaching. The church itself scarcely set a good example, as Brundage shows, particularly among the lower clergy with whom country people came most into contact.[8] The Pope's complaint in 1107 that many English priests were still married family men might have been replaced by the end of the century with

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[4] Judith Bennett, *Ale, Beer, and Brewsters in England: Women's Work in a Changing World, 1300-1600* (New York: Oxford University Press, 1996), pp. 40-41

[5] David Herlihy, *Medieval Households* (Cambridge, Massachusetts: Harvard University Press, 1985), pp. 100-101.

[6] Cordelia Beattie, *Medieval Single Women: The Politics of Social Classification in Late-Medieval England* (Oxford: Oxford University Press, 2007), pp. 1-2, 201.

[7] Bennett, *Ale, Beer, and Brewsters*, p. 39.

[8] James Brundage, *Law, Sex and Christian Society in Medieval Europe* (Chicago: University of Chicago Press, 1990), pp. 226, 416.

disapproval of clerical concubinage, which was then widespread as illustrated by cases in the rolls.[9]

Bennett also shows that young women were encouraged to support themselves and become less dependent upon their parents before they married.[10] She notes that it made more sense for sons who would assume full autonomy, yet daughters too 'moved legally, economically, and socially away' from parental control.[11] They were putting into practice their legal rights as individuals, noted by Beattie and Stevens.[12] The independence enjoyed by young non-married women is likely to have discouraged docility in wedlock, but Bennett takes to task those historians who speak of a golden age when women and men worked together for their mutual advantage.[13] Müller, however, believes that women's labour was essential for the survival of the rural household. She argues strongly for female agency in the countryside, and is very wary of assuming a public-private dichotomy which confines women to the domestic sphere and excludes them from all else.[14] The DeWindts find that women could be 'anything but shrinking violets' in their everyday conduct and that they used all available means 'to ensure that their concerns and interests were addressed'.[15] The problems

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[9] However Warren argues that as late as John's reign many priests went through a form of marriage: Wilfred Warren, *King John* (London: Yale University Press, 1997), p. 168; *RJL*, *c*. 1282, discussed on pp. 266-67 below; *RJY*, *c*. 370.

[10] Judith Bennett, *Women in the Medieval Countryside: Gender and Household in Brigstock before the Plague* (New York: Oxford University Press,, 1987), pp. 66, 86-91, 100, 104-05; Bennett, *Ale, Beer, and Brewsters*, p. 39.

[11] Bennett, *Women in the Medieval Countryside*, p. 86.

[12] Cordelia Beattie and Matthew Stevens, 'Introduction: Uncovering Married Women', pp. 1-10, in *Married Women and The Law in Premodern Northwest Europe*, ed. by Cordelia Beattie and Matthew Stevens (Woodbridge: Boydell, 2013), p. 3: 'single women of age…were legal individuals in their own right'. For an example, see *ELAR*, *c*. 477, discussed on pp. 223-24 below.

[13] Bennett, *Women in the Medieval Countryside*, pp. 178, 5.

[14] Miriam Müller, 'Peasant Women, Agency and Status in Mid-Thirteenth to Late-Fourteenth Century England: Some Reconsiderations', pp. 91-113, in *Married Women and The Law in Premodern Northwest Europe*, ed. by Cordelia Beattie and Matthew Stevens (Woodbridge: Boydell, 2013), p. 97.

[15] Anne DeWindt and Edwin DeWindt, *Ramsey: The Lives of an English Fenland Town, 1200-1600* (Washington: Catholic University of America Press, 2006), p. 4. The authors acknowledge that this was in spite of the 'obvious misogyny' which women had to overcome. See *CCR*, VI, p. 372, discussed on pp. 222-23 below.

caused by social unrest seem to be rarely discussed by scholars and Bennett surprisingly concludes that little can be known about 'destitute and wandering women'.[16] Her point that they rarely merited the attention of manorial clerks may suggest that they were an unusual phenomenon. If they wandered in numbers, surely they would have been noticed for the nuisance they caused. However there are several examples of apparently roving bands of impoverished men and women in the eyre rolls of Henry III's early reign, when sittings were resumed with the end of the civil war and the expulsion of the French.[17]

Principal plaintiffs

Most female principal plaintiffs were identified through another person or by location; and a third, much smaller group by a nickname, or not at all. Some fifty-five described themselves as widows and seventy-odd as daughters; in other words, by their relationship to a male relative. A few cited a sister or mother. Widows were most commonly described according to their previous status, as *N que fuit uxor* (N who was the wife), occasionally *N quondam uxor* (N previously the wife), followed by the former husband's name and sometimes his occupation or location.[18] Now and again they were simply termed *vidua* (the widow) or even the widow of a given place.[19] Of the widows, one third more won than lost and over one quarter more daughters, yet the latter were almost invariably also widows. Why did so many enrol themselves as daughters instead? The records offer no obvious reason but it is possible that it had to do with inheritance, and the

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[16] Bennett, *Women in the Medieval Countryside*, p. 180.

[17] See Introduction, *n*. 9. The conflict created great instability in land tenure and it was not uncommon for property lost at the beginning of it to be later recovered. For an indication of the war's impact see Doris Stenton, 'Introduction', pp. xi-lxxiv, in *RJL*, pp. lxii-lxiii.

[18] The former description indicates a widow who had not remarried: Janet Loengard, 'What is a Nice (Thirteenth-Century) English Woman doing in the King's Courts?', pp. 55-70, in *The Ties that Bind: Essays in Medieval British History in Honor of Barbara Hanawalt*, ed. by Linda Mitchell, Katherine French, and Douglas Biggs (Farnham: Ashgate, 2011), p. 59. Examples are: *Custanciam que fuit uxor Hugonis*: *ENAR, c*. 878; *Avicia quondam uxor Willelmi Baret*: *CRR*, III, p. 137; *Alicia que fuit uxor Johannis le Paumer*: *RJL, c*. 1002; *Mabilla que fuit uxor Willelmi de Hasting'*: *CRR*, II, pp. 213-14.

[19] Examples are: *Alvivam viduam*: *RJL, c*. 826; *Aliciam viduam de Enderbi*: *RJL, c*. 775.

topic would repay investigation. Additionally, there were ten or so women whose cases were inconclusive, usually because they had to be adjourned for default of the recognitors, and a handful who came to an agreement with their disseisors.

Those identified by location number more than ninety and comprise over one third of the total. This comes as a surprise, given the male-dominated society of the time and disagrees with Beattie's observation that women were usually categorized by marital or sexual status.[20] Some may be explained by the plaintiff's high status, at least thirty being identified as lords, but a number are clearly not so.[21] There is no indication why these women did not describe themselves by relationship. Overall more than three times as many won their suits than lost, a further 20 per cent of cases were inconclusive and, again, a small number were concluded by agreement. Of the remaining twenty-five or so principals who fall outside the above categories, about one third used only their Christian names and no other identification of any kind.[22] Another ten employed what appear to be nicknames, not always complimentary.[23] While these may be amusing, they were probably inherited names by which the possessor had always been known and which confirmed their identity. Most individuals would have taken care that their writ neither included nor excluded anything that might give their disseisor reason to challenge it and, as the rolls are perused, it becomes clear that few actions did not have sound motivations at law. About one fifth of the cases in the last group were inconclusive or agreed, and the remainder divided equally between successes and failures.

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[20] Beattie, *Medieval Single Women*, p. 7.
[21] Examples are, of lords: *CRR*, I, p. 186; *ELAR*, *c*. 1143; *RJY*, *c*. 211; *CRR*, III, p. 287; of commoners: *Pleas*, II, *c*. 456; *ENAR*, *c*. 819; *CRR*, I, p. 105; *CRR*, VII, p. 210.
[22] Examples are: Eva: *CRR*, V, pp. 247-8; Matilda: *Pleas*, II, *c*. 607; Beatricia: *CRR*, III, p. 38; Muriella: *Three Rolls*, p. 131.
[23] Examples are: Matilda Bile: *Pleas*, II, *c*. 418; Alicia Cat, Matilda Frankelain: *RJL*, *cc*. 185, 247; Alina Ribald: *CRR*, III, p. 171; Alina Britonissa: *ENAR*, *c*. 924.

Principal plaintiffs appear for the most part to have acted alone.[24] Occasionally they included on their writ one or more sisters or a daughter, a brother or a son, all of which suggest a disputed inheritance. Supporting daughters are scarce in the rolls, perhaps because they tended to move away from parental land when they married, whereas widowed mothers and sons both retained a direct interest in the family holding. The presence of brothers is even rarer and the name of a male heir written after his mother's on a writ is also interesting as it seems contrary to his pre-eminent position as landholder. Yet Agnes the widow of Hugh was not alone in including her son Roger on her writ when she acted against the prior of Sixle and Alexander of Luford (Ludford), both in Lincolnshire, in which action she failed before the Lincoln eyre of 1206.[25] Much more successful was another Agnes, daughter of Picot, whose son Henry, although the second name on his mother's writ, played a prominent rôle in their suit against Hugh de Veteri Ponte who was evidently their lord at Rokesdon, Bedfordshire.[26] The significance of his position is revealed in the record of the court at Westminster in 1212, when the pair withdrew their suit apparently in order to allow Hugh to reinstate them and for Henry to then do him homage for the land *quia frater eius eam prius tenuit* (because his brother first held it). There is no suggestion that the agreement was by order of the court, although it would have exacted the appropriate payment for it to be reached, and the procedure was probably a pre-arranged conveyance.[27] It is not clear why either of these women was the lead plaintiff. It could be explained in the case of the first Agnes if she were claiming

[24] Examples are: *CRR*, I, p. 29; *Pleas*, II, *c*. 607; *CRR*, VI, p. 358; *Pleas*, IV, *c*. 4369; *RJL*, *c*. 97; *RJY*, *c*. 86.
[25] *ELAR*, *c*. 1353. See also *ENAR*, *c*. 889; *CRR*, I, p. 105; *CRR*, III, p. 155; *Pleas*, III, *c*. 953; *Pleas*, II, *c*. 456.
[26] *CRR*, VI, p. 372.
[27] Cecil Meekings, 'Introduction', Volume I, in *The 1235 Surrey Eyre*, ed. by Cecil Meekings and prepared for press by David Crook, 3 Volumes, Surrey Record Society, 31, 32, 37 (Guildford: Surrey Record Society, 1979-2002), p. 73.

land which she had directly inherited. Her son would then have played a wholly supporting rôle. However the second Agnes was evidently the mother of the legal heir, who could have brought the case himself even if he were under-age.[28]

The majority of cases brought, other than those of inheritance and dower, seem to be of straightforward disseisin. Many records are therefore correspondingly brief and the following, from the Lincoln eyre of 1202, is typical:

> *Assisa venit recognitura si Ascerus Be iniuste et sine judicio disseisivit Hawisam que fuit uxor Godrici de libero tenemento suo in Sumercotes infra assisam. Juratores dicunt quod disseisivit eum. Judicium. Hawisa habeat inde seisinam. Dampnum 2s. Misericordia.*[29]
>
> The assize comes to investigate if Ascerus Be unlawfully and without a judgement has disseised Hawisa who was the wife of Godfrey of her free tenement in Somercotes [Lincolnshire] within the assize. The jurors say that he has disseised her. Judgement. Let Hawisa have seisin in respect thereof. Damages 2s. Amercement.

These accounts are singularly uninformative. In Milsom's words, 'the only facts stated are those required of the plaintiff, and most of what actually happened is lost in [the] general denial'.[30] In this instance, Ascerus may have been Hawisa's neighbour, relative or lord. The absence of any mention of dower or relationship is no indication that they were not involved. Hawisa's widowhood may or may not have been significant. She might have been physically ejected altogether, or merely suffered a reduction in the limits of her holding. It cannot now be known

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[28] *Bracton*, IV, p. 311.
[29] *ELAR*, *c*. 108.
[30] Stroud Milsom, *The Legal Framework of English Feudalism*: *The Maitland Lectures given in 1972* (Cambridge: Cambridge University Press, 1976), p. 2.

if, without redress, she would have been forced into destitution or villeinage or had some other recourse. Yet, paradoxically, the record also conceals a wealth of information which begins to be disclosed when considered with others of the same ilk.[31]

The record is valuable as it stands in the context of litigation brought by females, for it reveals that in 1202 one, unsupported, probably poor widow possessed the knowledge, ability and courage to bring before the royal court her male oppressor and defeat him. That in itself is remarkable, or would be if Hawisa were not one of many similar plaintiffs recorded in the rolls.[32] Occasionally an imprecise indication is given that a dispossession was more complex than most. The disseisin of Alice and Agnes, daughters of Richard, by no fewer than fifteen defendants led by the parish priest and the reeve was clearly one of considerable aggravation.[33] No hint of the motive is offered by the record but the disapproval of the court at Bury St. Edmund in 1203 may perhaps be read into the total of 56s. 8d. levied in amercements, against the sisters' damages of 2s. What motivated female plaintiffs? At least a proportion would otherwise have faced the prospect of destitution or depression into villeinage, but these seem unlikely to provide the whole answer particularly as some must have waited for years before their cases came to court.

Principal defendants

Turning to principal defendants, who number a little more than one hundred, about one third were successful and almost half as many again failed. Of the remaining cases, most were inconclusive and there was a small number of agreements. Fewer than ten defendants were described by their accusers as widows, about twenty-five

[31] See Chapter 5 passim above.
[32] For examples see: *CRR*, III, p. 91; *Pleas*, IV, *c*. 4066; *CRR*, III, p. 33; *CRR*, VI, p. 103; *CRR*, VI, p. 329; *RJL*, *c*. 874.
[33] *ENAR*, *c*. 832.

as daughters, and some fifty by location or title. Many were lords. Unlike plaintiffs and unsurprisingly, many primary female defendants of low rank had at least one named accomplice. Botilda of Keteleston (Kettlestone), for example, was accompanied by her two sons in unlawfully dispossessing Hugh of Oxewic (Oxewick) of his free tenement in Toftes (possibly Toft Monks), all in Norfolk.[34] They were poor enough to be pardoned their amercements, but even so had a guarantor who became liable for the damages of 5s. imposed by the Ipswich court in 1203. It is feasible that lone women perpetrated disseisins that were not physical ejections, for example by encroaching on another's land.[35] Anulla of Clune (Clun) appears to have been alone in dispossessing Roger de Acrig (unidentified) of his holding in Rokehull (Rockhill) of which she was convicted at Shrewsbury also in 1203.[36] Both locations are in Shropshire. Anulla was ordered to pay damages of half a mark and had a guarantor for her amercement in the same sum. No other details are given and she may have been a solo actor. Before the same court damages of 3s. were awarded to William Lestrange against Christina widow of Richard de Costentin, who was amerced a full mark for which Thomas de Costentin, probably a relative by marriage, stood surety.[37] There are, though, two other possibilities. Firstly, the apparent absence of secondary defendants might have been through the plaintiff's ignorance of their names and consequent inability to include them in his writ, which the defendant would hardly wish to point out. Secondly, Anulla, Christina and others may have been lords and used

[34] *ENAR*, *c*. 859.
[35] *1235 Surrey Eyre*, I, p. 73.
[36] *Pleas*, III, *c*. 781.
[37] *Pleas*, III, *c*. 778. See also *ELAR*, *c*. 1359; *CRR*, III, p. 135.

their *famuli* (household), whom their plaintiffs thought unnecessary to name, to act on their behalf.[38]

A remarkable example of the manipulation of the common law by a very humble woman came before the court at Worcester in 1221 when yet another Agnes, a poor widow, was sued with her son John and one other for dispossession of a tenement in the city by William Heghe, the sergeant of Oswaldslow hundred.[39] The disseisin, which she admitted, seems to have been a deliberate attempt to recover from William the outstanding monies he owed her for rent by forcing the issue into open court. The holding had been sold to William by Agnes' daughter, to whom she had originally given it but for which she was still entitled to an annual rent of 6d. which William had not paid. This was a large sum to a woman poor enough to be pardoned her amercement as the losing party. The previous courts in the Worcestershire and Gloucestershire region had been *coram rege* in 1209, twelve years before Agnes brought her debtor to book, and theoretically the debt might have been mounting throughout that time. No doubt she had attempted its recovery by other means but, having failed, 'took the drastic step of seizing the tenement'.[40] William acknowledged the truth of her accusation and the bench ordered the restoration to him of his property and the payment to Agnes *de reditu suo et de areragio* (of her rent and arrears). Both the spirit and the letter of the law were observed and Agnes with her socially superior namesake whose case was described earlier,[41] and many others in the rolls, are examples of women who, although from entirely different strata of society, successfully and lawfully manipulated the assize to achieve their objectives.

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[38] *Famuli* were the members of a lord's household, both domestic servants and farm labourers. They were often of villein status: Christopher Dyer, *Everyday Life in Medieval England* (London: Hambledon, 1994), pp. 78-79, 96-97, 174-80.
[39] *RJL*, *c*. 991.
[40] See Stenton's note to the case.
[41] See pp. 222-23 above.

Direct inheritance

Direct inheritance usually from a parent or other near relative was one of three ways in which a woman could acquire and hold property, the remaining two being dower and *maritagium* discussed in Chapter 8. Daughters could not inherit their fathers' property if they had brothers, for the eldest or only son was usually the heir to the whole, other than the widow's dower which also reverted to him upon her death.[42] There is, however, some suggestion within the records of possible parental provision for a male heir's siblings.[43] On the other hand, if the children were all daughters the property was divided equally between them. Inheritance seems frequently to have been the cause of family strife and liberally furnished the rolls with sorry accounts of dysfunctional families. Even where the bequests superficially appear to be straightforward, the complex issue of dower can sometimes be found to lurk in the background. The majority of inheritance cases were administered under mort d'ancestor but the records of novel disseisin also hold examples of various situations with which women had to deal. The latter assize could be employed when the first action was won in court but failed to be implemented, as illustrated elsewhere in connection with dower.[44]

A good example of disputed female inheritance is a claim in 1203 at Bury St. Edmund's by Claricia and Emma of Esse (Ash Bocking), Suffolk, almost certainly sisters, against Robert of Esse for their tenement there.[45] It is known that the three were related through the clerk recording that the women had previously brought a successful action of mort d'ancestor against Robert. He must have originally withheld from them their rightful inheritance, which they had subsequently retrieved at law, only to disseise them of it once they were in

[42] Loengard, 'What is a Nice (Thirteenth-Century) English Woman', p. 61.
[43] *ENAR, c.* 784, discussed immediately below.
[44] See **p**p. 261-62 below.
[45] *ENAR, c.* 784.

possession. The property amounted to no more than two-and-a-half acres, far too small to sustain the sisters on its own. Possibly Robert was their brother or perhaps an uncle, almost certainly the main heir to an inadequate estate. The sisters' portion may have been their mother's *maritagium* or perhaps an attempt by their father to make some provision for them. Evidently they were unmarried or they would have had at least to acknowledge the existence of their husbands. The unsavoury Robert was assisted by William the carpenter, for whom he stood surety, and Hugh Buret. The plaintiffs were awarded only 3s. in damages with the return of their land but the first two defendants were amerced together in the much greater sum of one mark, Hugh having nothing, and all were taken into custody. This unpleasant history illustrates Loengard's points regarding the potential problems faced by unsupported women whose meagre inheritance was coveted by unprincipled male relatives.[46]

There is also evidence of the latter usurping the power of informal wardship by prolonging it for their own purposes. In 1202 at Lincoln, Gilbert Fluri was accused by Beatrice daughter of Walter Fluri of dispossessing her of a tenement in Lissinton (Lissington), Lincolnshire.[47] She was probably his neice. Had she been a younger sister, the relationship is likely to have been made clear in the record. In any event, Beatrice seems to have been previously cared for by Gilbert who, from the evidence of his pleading, appears to have tried to present himself as a much-maligned uncle who had ever acted in her best interests. He denied her charge claiming that, far from disseising her of the land in question, he had given it to her, and that he had farmed it *ad opus predicte Beatricis sicut illi que nunquam de manupasto suo recessit* (for the benefit of the aforesaid Beatrice as for one who had never withdrawn from his household). He added that he still

[46] See pp. 261-63 below.
[47] *ELAR*, *c*. 477.

held her honourably *ucusque in hospicio* (in his house to this day), implying that he had cared for her when she was at a disadvantage, perhaps an orphaned minor, almost to his own hurt. One can all but glimpse the tears in his eyes. Gilbert concluded by throwing himself upon the assize which, without ado, immediately rejected his plea by returning Beatrice's land to her and amercing him. Eight hundred years ago he evidently appeared as slippery in court as he does today on the page, for the bench passed judgement upon him without waiting for a verdict. Certainly none was recorded.

Gilbert clearly did not have the freehold of the Lissington land, or he would have been in an unassailable position and Beatrice would have lost her case. Equally clearly, although not formally seised of the tenement he was nevertheless in possession of it. This was still a powerful position. Maitland discusses it at length, but concludes that 'seisin of free tenement' is best defined by a process of elimination.[48] If possession of a holding was not acquired 'in one of certain particular ways', it must be freehold. Continuing the debate, Hudson refers to Bracton's belief that an individual could be 'in seisin, although not seised' and discusses the limitations which prevented a tenant from 'being seised as of a free tenement'.[49] Gilbert's possession of Beatrice's holding must have fallen into such a category and although, as Hudson shows, many of these were benign, his disinclination to let go of it makes him appear duplicitous. Beatrice must have begun her case in her lord's court and transferred it, or perhaps Gilbert was her lord and had subsumed the tenement into his demesne. In that case, as he could not be sued in his own court, she may have taken out a novel disseisin writ straight away. Gilbert cannot have been unique in taking advantage of a lucrative

[48] *Pollock and Maitland*, II, pp. 34-40.
[49] John Hudson, *The Oxford History of the Laws of England, II, 871-1216* (Oxford: Oxford University Press, 2012), pp. 672-76.

position and it was perhaps Beatrice who was unusual in bringing her guardian to court. There is no mention in the record of a formal arrangement of wardship, which would have prevented her from acting in her own right without reference to him, for she would then have been under his coverture. Again, it is clear that Beatrice was unmarried. She had directly inherited the disputed land and it is likely that this was a modest family with neither the means nor the perceived need to go outside its own members.

Again at Lincoln but some sixteen years later another woman, Matilda, was circumstantially revealed as her father's direct heir to six acres of meadow in Cokerinton (Cockerington), Lincolnshire, which *tenuit in feodo ex dono predicti Rogeri patris sui* (she held in fee of the gift of their father Roger).[50] Clearly, the land was not her mother's *maritagium*. The action was brought by William, one of Matillda's three brothers, against Alan, another brother who used his sister's inheritance to reinforce his defence. Matillda by this time had died and Alan had successfully petitioned the chief lord of the fee to seise him of the meadow *ut frater ipsius Matillidis primogenitus et heres suus* (as Matilda's firstborn brother and her heir). The jury agreed with him and William lost. The case again illustrates several points: the way in which primogeniture worked; parental provision for younger sons and daughters; and the seising of an individual. William had in fact brought a double action of novel disseisin against his older brother, also claiming 'certain land' which their father *dedit ipsi Alano per cartam suam et posuit eum in seisinam* (gave to Alan by his charter and [of which] he put him in seisin). Alan however, although older than William, was not the eldest of the three. There was a first-born, named Ralf who, as the heir upon his father Roger's death, *terram illam ei concessit et confirmavit per cartam suam* (granted

[50] *RJL, c*. 150. There are now two villages of Cockerington, North and South.

him [Alan] that land and confirmed it by his charter). Ralf must have pre-deceased his sister which allowed Alan to inherit from her also. The luckless or perhaps improvident William, who acknowledged Alan's charter, was evidently the youngest of the three but, because it had no bearing on his action, there is no indication of whether his father provided for him as he had for his other children. It is noteworthy that Roger formally made over the land before his death, thereby ensuring that his younger children were fully seised of it independently of the main heir. Neither can Matilda's married state be known but it would be interesting to learn if this family, like that of Ash Bocking, had insufficient resources to adequately provide for single female children, or if the six acres were a father's additional gift to a married daughter.

A tenement in York of undisclosed origin belonging to *quedam Agnes* (a certain Agnes) was the subject of a dispute before the court at York in 1218 or 1219.[51] Yet Agnes was not a litigant and may have been deceased, for the case was brought by her erstwhile lover, William Grossus (the Fat), against his alleged disseisors, Reginald Molendinarius (the Miller) and Jordan of Paris. The jurors informed the court that Agnes, *cuius hereditas illa fuit* (whose inheritance it was), had given the holding to William on the condition that he should either marry her *honorifice* (honourably) within three years or put her in a religious house. He had done neither but she remained with him for fifteen years more until *non placuit ei moram cum eo facere et rediit ad terram suam* (it did not please her to stay with him and she returned to her land). Unfortunately the record ends at this point, leaving the account unfinished. In theory therefore, poor Agnes' land may have been her dower and Reginald the ultimate heir to whom it should have reverted upon her death, but the record does not encourage that conclusion. Widowhood

[51] *RJY, c*. 190.

would have provided her with the secure respectable status which she seems to have craved and which was ultimately denied her. There is an air of longing and bitter disappointment in the jury's lengthy account of events and Agnes's original time limit of three years to the relationship suggests that she may have hoped for a child and that William would have then married her. The delay in some marriages until children were assured suggests deliberate action to avoid disputes over the wife's wedding gift, which reverted to her own family if there were no offspring.[52]

This property, though, was no wedding gift but an outright inheritance which should alone have made Agnes desirable as a wife.[53] Propertied women were particularly attractive in this period when the rising population put extra demands upon the available land.[54] While the rolls are, somewhat sparsely, scattered with accounts of unmarried female co-habitees, their partners were generally clergymen who, since marriage was forbidden them, frequently took concubines.[55] The women seem to be widows secure in their dower or, less happily, naïve single females who perhaps thought themselves married or, at least, provided for.[56] Agnes fits none of these categories and there is no indication of whether Reginald was next-of-kin, the lord's steward or an opportunist as William probably was. If there were no heir, the property would by law have reverted to the immediate lord[57] and the justices may have suspended the case until he arrived, which would explain why the account was unfinished. Agnes's life, and death, superficially appears to have been controlled by dominant men but

[52] See p. 250 below.
[53] Walker, 'Introduction', pp. 1-4.
[54] David Carpenter, *Magna Carta* (London: Penguin, 2015), p. 114; Edward Miller and John Hatcher, *Medieval England, Rural Society and Economic Change 1086-1348* (London: Longman, 1978), p. 45.
[55] Brundage, *Law, Sex*, p. 416. He also argues that the ecclesiastical reforms encouraged prostitution: Brundage, *Law, Sex*, p. 227. Many priests, however, continued to observe a form of marriage: Wilfred Warren, *King John* (London: Yale University Press, 1997), p. 168 and *nn*. 1-6.
[56] See respectively *RJL*, *c*. 1282; *RJY*, *c*. 370.
[57] *Glanvill*, p. 90.

it was a situation which she permitted. As it was, her desertion of William seems to have been a rare, assertive move in a sad tale of unrequited love that provides an unusually direct insight, through the common-law rolls, into a private life that was unwillingly non-conformist. It is not only fascinating in itself, but also important for its reminder that individual experience informed legal theory and development, and that common-law principles were applied indiscriminately regardless of circumstance or personality.

Poverty

Loengard notes that many principal female litigants, particularly plaintiffs, were of humble rank and claimed apparently small amounts of land which were probably their sole holdings, such as the sisters of Ash Bocking above.[58] It is likely not only that these were insufficient to provide a livelihood, but also that they were largely scattered with others across the arable land of the manor or, perhaps even more problematic, dispersed about a greatly sub-divided toft.[59] Many who lost their suits shared the disadvantages of unsuccessful male applicants, notably ignorance, confusion and poverty. In 1201, Avicia daughter of Richard failed in her suit for a tenement in Renham (Rainham), Kent, because the jurors said that they had never seen her seised of the tenement *unde illa conquesta est* (of which she complained).[60] Millisent daughter of William Palmer similarly lost her suit in 1212 at York for a tenement in Alverton, Yorkshire.[61] Here the jurors added that *nec unquam habuit predictus* [sic] *terram quam modo habent* (neither had she ever held the aforesaid land which they [the defendants] now hold). Millisent was *pauperima* (very poor) and why she went to the trouble of

[58] Loengard, 'What is a Nice (Thirteenth-Century) English Woman', p. 58.
[59] George Coulton, *Medieval Village, Manor and Monastery* (London: Harper and Row, 1960), pp. 39-42; Paul Vinogradoff, *Villainage in England, Essays in English Mediaeval History* (Oxford: Clarendon Press, 1892), pp. 246-50.
[60] *CRR*, I, p. 476.
[61] *CRR*, VI, p. 331. See also *RJL*, *c*. 189.

bringing the case is a puzzle. While the verdict may have been technically correct, it might also have concealed a complex history of events which Millisent was not able to explain or, perhaps, understand. In such circumstances, unless the plaintiff had resort to a more appropriate writ which the justices sometimes advised, the letter of the law took its course.

Occasionally there are indications of how the lower ranks were caught up in the battles of their superiors. A claim by Aileva of Rucham (Rougham), Norfolk, in 1203 against Thomas Blundus and his son became a protracted affair, not without its humour, which turned on the outcome of a previous assize of mort d'ancestor between Thomas and the prior of Castle Acre, one Lambert.[62] Thomas pleaded that the action concerned twenty acres held by the prior at Rougham which they had agreed to divide between them, taking twelve and eight respectively, and displayed a chirograph to that effect. However, Aileva countered that the agreement was unlawful *quia ipsa fuit in seisina illarum xij acrarum…et non predictus prior* (because she was in seisin of those 12 acres…and not the aforesaid prior). The court recalled the jurors of the first action, which had been of mort d'ancestor, to ask who had been in seisin at that time, Thomas or the prior. However, they answered that Aileva had been *in domo cuiusdam mesagii* (in the house of a certain messuage) when they made the view. They added that the pertaining land *iacuit inculta pro paupertate sua* (lay uncultivated because of its impoverishment). It seems that the settlement lived up to its name. The case was adjourned to Ipswich and the prior attached to appear there. At this point he thought fit to reveal that, when his agreement with Thomas was made, he had not been prior of Castle Acre but *immo simplex monacus Lewesie* (on the contrary a simple monk of Lewes), the mother house many miles distant in Sussex. He

[62] *ENAR, c.* 817.

added that the priory itself had never been seised in demesne of either the twelve or the eight acres. At the same eyre, Thomas lost a second action also featuring the twelve acres to another tenant at Rougham. What his position was is not clear but it is possible that there was some connection, perhaps a family one, between him and Lambert, given that both were previously involved in an action of mort d'ancestor when the latter was in Lewes. The court put the disputed land into the king's hand and both Aileva and Lambert were given a day to appear at Westminster, but Aileva was also re-seised of her tenement and awarded damages of 8s. 9d. Thomas was amerced and the chirograph destroyed.

Stenton suggests that the incidence of 'widespread poverty' visible in the records, though always a factor of medieval life, increased through the vagaries of war.[63] She also points out that it is only visible at this time among free tenants since they alone were eligible to sue before the king's court. The lower courts to which villeins were obliged to resort did not then maintain records. Novel disseisin cases citing war mainly involved great lords[64] but lesser folk were also litigants such as Alice daughter of Stulli who, giving every indication of being an outright opportunist, complained that Thomas of Muleton (Moulton) had dispossessed her of a tenement in Boston, both in Lincolnshire.[65] The verdict in 1219 at Lincoln found that Thomas had regained his rightful property by legal means although, while he had been in prison during the war, the king had indeed seised Alice of it because *ipsa tantum clamat super dominum Regem* (she cried so much upon the lord king). The case throws an interesting light upon John's character[66] but, and more to the point of this study, it is also an indication of the

[63] Stenton, 'Introduction', in *RJL*, pp. lxiii-lxvi.
[64] *RJL*, *c*. 776: Ralf Furre recovered land in Faldingworth, Lincolnshire, *unde disseisitus fuit occasione gwerre* (whence he was disseised by reason of the war) through letters from the king.
[65] *RJL*, *c*. 319.
[66] Stenton and Warren look kindly upon aspects of John's character: Stenton, 'Introduction', in *RJL*, pp. lx-lxi; Warren, pp. 142-3.

turmoil caused by the civil unrest of his reign. Civil strife as a factor in cases of dispossession is therefore always possible and, while at this distance it appears to be unacknowledged in the records, at the time it may have been self-evident.

Its presence seems most likely, where women are concerned, in those cases involving females at the head of numerous defendants. Isabel the widow of William, son of the dean, led ten men of whom two were her brothers.[67] In 1218 at Lincoln, they were all found to have dispossessed Thomas Burrel of property in Navenebi (Navenby), Lincolnshire, for which he was awarded damages of two marks. Although their whereabouts had not been discovered, two were known to have died and the remainder, barring one, to be impoverished. Similarly at Worcester in 1221, none of seven defendants led by Avice of Kunhull (Queenhill), Worcestershire, including William the knight her son and William the reeve of Queenhill, were found to answer Nicholas de Bosco's accusation against them concerning his tenement in Queenhill, Worcestershire.[68] The jury said they had disseised him *de una haia* (of one enclosure), and awarded him 12d. It is plausible that Isabel and Avice were once bone fide freeholders, minor lords even, who had themselves suffered dispossession and were seeking somewhere to settle, either their previous location or elsewhere. Thomas Burrel's holding is not described and there is no indication of the size of Nicholas's hedged property but it does not sound large. There is an air of desperation about both groups and it is interesting that no defendant remained in situ. They had vacated the properties, doubtless under duress, before the cases came to court but, by pursuing the action, the plaintiffs had wisely validated at law their own seisin of the property. There is no way of discovering why those absent litigants who were not known to be

[67] *RJL*, *c*. 119.
[68] *RJL*, *c*. 1018.

deceased failed to attend the court, but it is very likely that they also had died by this date.

The brief accounts of Isabel and Avice and their followers give the impression of the remnants of once-stable households fallen on very hard times. There are similar cases among plaintiffs although they are never seen in large numbers, as would be expected. Sarah, daughter of John of Timelbi (Thimbleby), Lincolnshire, who defaulted in her action against the brothers Tholi and Alan, sons of Matilda, was recorded with her two sureties in 1219 as all but destitute.[69] Goda de Biri, also *pauperrima* (very poor), in the previous year failed in her action against the six defendants, all male, whom she named on the writ.[70] The properties were both in Lincolnshire, at Enderby and Wildmore respectively. There are many more such women in the rolls.[71] Some no doubt were opportunists like Stulli's daughter, but there are too many for them all to fall into that bracket. Others may have been the victims of opportunists, as Thomas of Moulton was initially, who used the social upheaval of the war with France[72] to bury the rightful but inconvenient claims of weaker neighbours or relatives. Consideration should also be given to the possibility that some of the cases which came to the royal courts before their cessation may also have been caused by the discontent which pursued John throughout his reign and which is likely to have created a degree of social dysfunction, both genuine and contrived, if only intermittently. However, the earlier extant rolls do not hold similar examples to

[69] *RJL*, *c*. 797.
[70] *RJL*, *c*. 193.
[71] Examples include Alviva widow of Godfrey and her sons, poor and with no guarantors, who at Lincoln in 1219 withdrew their action against the abbot of Kirkstead, Lincolnshire: *RJL*, *c*. 310; and Maud of Sherburn and her impoverished son who failed against James of Sherburn and fourteen others before the York eye in 1204: *Pleas*, III, *c*. 953.
[72] See p. 220 *n*. 17 above.

those above and there is no way if identifying the motivation behind many simple disseisins.[73]

The attitude of the courts

The above case of Aeliva of Rougham, Norfolk, is an excellent illustration of the application by the justices of the underlying principle of novel disseisin, to maintain a property in the possession of its rightful tenant.[74] The court had no difficulty in distinguishing between the two claims: Aileva's that she had been dispossessed of the holding by Thomas, and the prior's that he had been seised of it when he conveyed it to Thomas as his due. The mort d'ancestor jury established that Aileva had been in possession of the property when they viewed it and that was the end of the matter so far as her dispute with Thomas was concerned. The disseisin she had claimed was confirmed and she was re-seised of her property. The court then focused on the emerging dispute of who should have possessed the holding when it was given to Thomas and, apparently in the wake of the prior's conflicting assertions, transferred the land to the king and the case to Westminster. It was a wholly separate enquiry. The Westminster court would have ascertained if Aileva should have been in possession, as she certainly was, when the prior gave it to Thomas, or if she herself had disseised the erstwhile simple monk. Thomas himself was not a litigant, although his alleged inheritance may have been referred to. However, because the more recent case had established Aileva as the rightful possessor at that time, she continued as such

[73] For example, in 1212 Matilda de la Werne and her son successfully sued seven male defendants for the return *de quodam prato et de toto alio tenemento* (of a certain meadow and the whole of another holding), viewed by the jury as one, in la Werne (unidentified), Worcestershire. She was awarded 10s. and the disseisors heavily amerced for a total of six marks: *CRR*, VI, pp. 395-6. The motivation for the disseisin can only be hazarded.

[74] *ENAR, c*. 817, discussed on pp. 234-35 above.

despite the transfer of the holding to the king. It was an entirely logical, though retrogressive, chain of events pursued by the bench in the interests of justice.[75]

However the bench's insistence upon the strict application of the law seems to have been balanced by a desire to assist vulnerable litigants where possible. Justices frequently observed the spirit more than the letter of the law,[76] and their attitude appears to have been reflected by the apparent sympathy and kindness of some lords.[77] While this is to an extent conjecture, the possibility cannot be altogether dismissed and is supported by examples such as the experience of Osanna of Clawurthe (Clayworth), Nottinghamshire.[78] With her daughters Emma and Ivetta, in 1219 at Lincoln she sued her lord Walter of Clayworth for the return of five selions, *ii in uno loco et iii in alio loco* (two in one place and three in another).[79] It is likely that they were the sum of the family's property, other than their messuage, and they would certainly have had to supplement their income in other ways to avoid destitution. They were extremely poor. The case did not proceed as far as the verdict, for Walter stepped in and *per licenciam Justiciariorum* (by licence of the Justices), for which he would have had to pay a fee, *reddidit eis seisinam suam de toto tenemento* (restored to them their seisin of the whole tenement). Why did he do it? It is impossible to know, but it is pleasant to conjecture that he may have been righting the wrong of an overly zealous steward and had some compassion for the more wretched of his tenants. However, the less agreeable explanation must also be considered, that Walter was indeed a bullying lord, intent on depressing small tenants into villeinage, who had been surprised by the resistance of three

[75] On this topic see also Stenton's note to *RJL, c*. 991.
[76] A case in point is found in *RJL*, *c*. 52.
[77] If accurately observed, this attitude is more than balanced by circumstantial evidence for the deliberate dispossession of tenants by other lords, discussed on pp. 101-10 above.
[78] *RJL*, *c*. 734.
[79] A selion was a strip of land, usually in an open field, measuring about one acre. However, acres differed in size from region to region.

impoverished women. Perhaps he moved to settle the case before his motives could be questioned, possibly calling to mind the previous bruising experience of a not-too-distant neighbour.[80]

It is notable, however, that the thread of the process of law which runs through all these cases is not compromised, no matter how genuine the sympathy for an individual's plight. The tenement restored to Osanna of Clayworth was that *unde visus factus fuit* (whence view was made). The implication is that any further holding of which she may have been dispossessed had not been viewed and therefore fell outside the scope of the action. Objections were sometimes raised for this reason and the judge might order the sheriff to arrange a further viewing,[81] but it is also possible that some plaintiffs may not have fully understood the procedure and regained only a part of a lost tenement. When properly applied, the system provided a tight legal framework by which the court's adjudication on a disputed property was limited to neither less nor more than that which had been previously viewed by the recognitors. There could be no later additions. However, the procedure was clearly open to abuse and it well behoved litigants to keep a careful watch on the development of their action.

Men identified through women

The reverse of male dominance seems to be implied where men were identified by their relationship to a woman, of which there are more than one hundred examples in these records. Of these some sixty were defendants and half that number plaintiffs, both primary and supporting, with a handful of pledges, sureties and attorneys. The identifying woman was usually the mother of a principal or secondary litigant of either kind, or of a greatly inferior defendant. The latter, smaller category is of men who were in groups of subordinate

[80] See *ELAR*, *c*. 423 discussed on pp. 104-07 above.
[81] See *RJY*, *c*. 336.

disseisors, coming third, fifth or lower in the list. Osbert son of Botilda was the sixth of six convicted before the court at Norwich in 1209.[82] He appeared again on the same day with his brother Henry among sixteen defendants, including three others similarly identified, who were all acquitted.[83] Roger son of Goda, Hugh son of Emma and Ailward son of Estrilda were among twenty-five unsuccessful defendants before the same court at Norwich.[84] While it is impossible to know for certain, in these circumstances the use of a matronymic suggests the possibility of illegitimacy.

On the other hand, a male plaintiff identifying himself in this way may well indicate his hope of inheritance through the female line. It was the plaintiff who took out the originating writ and recorded on it the required information regarding not only him- or herself but also the defendant. It would have been strange if a populace so ready to go to law had not seized upon such an opportunity and used it to advantage, perhaps to emphasize near kinship and the responsibilities of family members in matters of inheritance and dower. The bestowing of a matronymic by the plaintiff upon a defendant, then, may well signify a family dispute. For example, in 1218 William son of Richilda won his suit at Lincoln against Simon son of Quenolue and four others, and was awarded 3s. in damages.[85] Why did William not identify himself by the more usual patronymic? Was it dropped because his mother was far more relevant to his case? Why did he similarly identify Simon? Perhaps Richilda and Quenolue were related, sisters or mother and daughter, and this was a dispute between their

[82] *Pleas*, IV, *c*. 4130.
[83] *Pleas*, IV, *c*. 4145: the three were Henry son of Kava, Osbert son of Hildegard and Bernard son of Ediva.
[84] *Pleas*, IV, *c*. 4344: interestingly none of these was attached because, in the reported words of the sergeant of the hundred, *fuerunt homines episcopi et noluerunt ei plegios invenire, scilicet in remis et in cussinis et aliis rebus et j coffrea x solidorum* (they were the bishop's men and did not wish to find him pledges, namely in oars and cushions and other things and one coffer worth 10s). See also *RJL*, *c*. 51; *CRR*, II, pp. 45-6; *CRR*, VI, pp. 330-31, 336-37.
[85] *RJL*, *c*. 187. Bracton explains how the proximity to an inheritance of different generations should be evaluated: *Bracton*, III, p. 314.

children over family land. If so, William's use of his mother's name would have given focus to his argument and reminded the recognitors, men of the vicinity, of the family histories. Similarly in 1203 at Northampton, one Beatrice gave herself no further recognition and identified her alleged disseisor, her son, exclusively with herself as *Rogerus filius Beatriz*.[86] She lost her suit and dower is not mentioned, but it is likely to have been at the root of what was obviously a domestic affair. Beatrice may well have used, or omitted, the nomenclature as she did in order to drive home her point, though unsuccessfully. Dower from fathers and husbands was a constant, hydra-headed presence in the resolution of land tenure and is explored from the perspective of novel disseisin in Chapter 8.

Conclusion

Other than women's ubiquitous capacity as property holders, this chapter has found that a significant proportion of female principals were identified by location although the majority were recognized, as might be expected, through their relationship to a male relative. There is evidence of parents' provision, sometimes unavoidably meagre, for younger children disinherited by primogeniture. Civil unrest increased the incidence of poverty resulting in bands of dispossessed men and women, sometimes led by females, apparently attempting to secure property. The plight of lone females seems often to have aroused the sympathy of the bench, yet never to the point of compromising legal principle. In a reversal of male superiority many women provided identification for men, usually their sons, perhaps to lend weight to the validity of a claim. There would seem to be far too many female principals in the rolls for them to be greatly different from their non-litigating sisters. The evidence suggests that women operated a degree of autonomy which met with male approval, at least at this early period. Otherwise it

[86] *ENAR*, c. 927. Beatrice's claim was for a tenement in Helpeston (Helpston), Northamptonshire.

might be expected that, in the absence of a father or husband, they would fall under the jurisdiction of their nearest male relative, but this did not happen. Instead there persisted, despite numerous caveats, an unformulated but practised belief in female ability and independence especially outside marriage. The many royal writs enabling single women to pursue their property interests indicate that not only were they expected to act in their own affairs but were encouraged to do so. The notion that females had rights was advanced by proceedings in the king's own courts and permeated society alongside coverture.

CHAPTER 8
MARRIAGE GIFTS AND DOWER

Introduction

The wives and single females discussed previously are brought together to some extent under the heading of this chapter. Marriage gifts, *maritagia*, were given by the bride's family to the couple on their marriage, were heritable and remained in the woman's ownership although under her husband's control while he lived; dower was a husband's provision for his wife should she be widowed but, upon her death, reverted to his heir.[1] Both pertained to married women, thereby falling under male authority, and passed into the hands of the intended beneficiaries only when the latter's widowhood gave them single status and their husbands' legal ability.[2] There are, however, examples of wives or their blood kin attempting to recover marriage gifts which had been alienated from the bridal family by one other than the husband,[3] and of a husband required to modify arrangements for the lawful disposal of his wife's dower.[4] Cases involving the former indicate that the blood kin strongly believed that family land should be recovered by them if the donee died childless. Widowers seem to have acknowledged the principle while requiring compensation for the loss.[5] Its continuation from the kin-based arrangement of land tenure and inheritance in which women played a far more prominent role and which was beginning to be superceded by patrilineal inheritance,[6] shows the depth of feeling involved. Similarly, female rights to

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[1] The first was most frequently to the bride from her father or another close relative although there were several possible variations including the absence of marriage itself: *Bracton*, II, pp. 76-80; on dower see *Bracton*, II, pp. 265-69, and III, pp. 357-412.

[2] Barbara Hanawalt, 'Remarriage as an Option for Urban and Rural Widows in Late Medieval England', pp. 141-64, in *Wife and Widow in Medieval* England, ed. by Sue Walker (Ann Arbor: University of Michigan Press, 1993), p. 141.

[3] See pp. 252-53 below.

[4] See pp. 260-61 below.

[5] *RJY, c.* 22, discussed on pp. 249-52 below.

[6] William Holdsworth, *A History of English Law*, 16 Volumes, 5th ed. (London: Methuen, 1942), III, p. 171-75.

dower were legally protected, limiting a husband's jurisdiction over it and denying his heir all enjoyment of it while the widow lived. In effect, as Loengard observes, 'dower turned the accepted conventions and the rules based on them inside out'.[7]

For clarity and following Bracton, McCarthy uses the term *maritagium* for marriage gifts and 'dower' or 'dowry' for the husband's provision.[8] This model is followed here, excepting the use of 'dowry' to avoid confusion with its modern, widely understood meaning as possessions taken into marriage by a bride or even as a 'bride-price'. There are far fewer novel-disseisin cases ostensibly concerning *maritagium* than dower, as Loengard observes,[9] for reasons which remain unclear. Superficially, it seems unlikely that women would be any less at risk of losing their wedding gifts than their dower and it is possible that *maritagia* were sometimes the subject of unspecified claims of disseisin or that they constituted the unidentified inheritance disputed in other cases.[10] There are also records of disseisins of property which could apply to either form.[11] On the other hand, if a bridal gift was invariably passed down the distaff line from mother to daughter, as Hanawalt remarks,[12] then it is conceivable that the family treated it as separate from the remainder of its wealth and also as a useful provision for its daughters. The critical point was that it kept to the mother's line for it could also pass to her

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[7] Janet Loengard, 'Rationabilis Dos: Magna Carta and the Widow's "Fair Share" in the Earlier Thirteenth Century', pp. 59-80, in *Wife and Widow in Medieval England*, ed. by Sue Walker (Ann Arbor: University of Michigan Press, 1993), p. 60.

[8] Conor McCarthy, *Marriage in Medieval England, Law, Literature and Practice* (Woodbridge: Boydell, 2004), pp. 55-56. Hanawalt however avoids *maritagium*, employing 'dowry' for the marriage gift of the bride's family and 'dower' for the husband's provision: Barbara Hanawalt, *The Wealth of Wives: Women, Law, and Economy in Late Medieval London* (New York: Oxford University Press, 2007), passim.

[9] Janet Loengard, 'What did Magna Carta Mean to Widows?', pp. 134-50, in *Magna Carta and the England of King John*, ed. by Janet Loengard (Woodbridge: Boydell, 2010), p. 151.

[10] A successful action brought by Dionisia against her brother Henry over a Hertford tenement in 1203 at Westminster may be an example of the former. Dionisia was awarded 3s. and Henry amerced half a mark; neither were further identified: *CRR*, II, p. 161. An example of the latter might be found in *RJL*, *c*. 789, discussed on pp. 259-60 below.

[11] See *ENAR*, *cc*. 783, 860, discussed on pp. 260-61 below.

[12] Barbara Hanawalt, *The Wealth of Wives*, p. 56; also Loengard, 'What did Magna Carta Mean to Widows?', p. 160.

sons, although this seems to have been in the absence of daughters.[13] Through them the system was self-perpetuating and, on the prime facie evidence of the rolls as discussed below, functioned smoothly unless the line were dislocated.

Dislocation is less likely to be revealed through the records of novel disseisin since daughters frequently moved away from parental property upon their own marriage. The overall paucity of identifiable *maritagium* cases suggests that it probably does reflect reality, especially when coupled with the spectacular nature of most of those that exist. In itself this is important for demonstrating the respect accorded to *maritagiu*m by male family members who, in contrast, were frequently in sometimes acrimonious disputes over dower. The extant records are valuable for offering a glimpse of family custom and the insistence that *maritagia* remain in the female line. By comparison, actions for dower were plentiful although these also may be concealed within apparently straightforward disseisins of a lone female by her family.[14] Despite their number, Walker warns that litigation was not the norm regarding dower and that many women entered their inheritance peacably as they should have done.[15] Even so, their 'demanding voices' continue to ring across the centuries in pursuit of these and other claims.

The historian, then, is faced with the problem of constructing medieval everyday life from records which are atypical of it. Kelleher and others point out that this is further compounded regarding women because the accounts of their litigation were written by men and potentially warped by the prevailing male view of women as inferiors.[16] But if female lives were recorded through a male lens, so

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[13] *RJY*, *c*. 309. *ELAR*, *c*. 260.

[14] Loengard, 'Rationabilis Dos', p. 59. For example in 1203 at Westminster one Ida, her only identification, successfully sued her two sons for the return of a Norfolk property and received 40s. in damages: *CRR*, II, p. 18.

[15] Sue Walker, 'Introduction', pp. 1-16, in *Wife and Widow in Medieval England*, ed. by Sue Walker (Ann Arbor: University of Michigan Press, 1993), pp. 8, 5, 6.

[16] Marie Kelleher, 'Later Medieval Law in Community Context', pp. 133-47, in *The Oxford Handbook of Women and Gender in Medieval Europe*, ed. by Judith Bennett and Ruth Karras

were the lives of the poor and the unfree although half of both these categories were themselves men. The recording eye, then, cannot be identified simply as male. It belonged to a male who was also free and relatively well-to-do; not only that, but certainly no peasant, if not a landlord; not only that, but educated.[17] Did his personal prejudices materially inform his account of the cases before him, as Kelleher suggests? If the possibility of a clerical gender bias is accepted, as it must be, then it cannot be discounted that the rolls also reflect a socially superior prejudice against peasants in general, especially the impoverished, the illiterate and the unfree. That being so, it becomes extremely important to assess the extent of this combined bias in order to have any confidence in extrapolating social information from the accounts which clerks wrote. This is particularly difficult to do from the records penned at the turn of the thirteenth century when the paucity of documentation makes comparisons problematic. Fortunately, there is a counter-weight for, if clerks' prejudices must be taken into account, so too must their finer qualities. They were professional men, many rising to become eminent justices who were careful, as the evidence of the rolls would seem to indicate, of an indifferent application of the law to those before them. It is reasonable to suppose, always allowing for the mores of the time, that these men earlier applied the same principles when serving as clerks, and that they required the records of their own scribes to be governed by legal requirements rather than personal bias. As historians have urged that women be evaluated 'in their own contexts, in their

(Oxford: Oxford University Press, 2013), p. 143; Kim Phillips, 'Written on the Body: Reading Rape from the Twelfth to Fifteenth Centuries', pp. 125-44, in *Medieval Women and the Law*, ed. by Noël Menuge (Woodbridge: Boydell, 2003), p. 142. Bailey observes the same problem in eighteenth-century legal records of marital breakdown: Joanne Bailey, 'Voices in court: lawyers' or litigants'?', *Historical Research*, 74 (2001), 392-408.

[17] Ralph Turner, *The English Judiciary in the Age of Glanvill and Bracton, c. 1176-1239* (Cambridge: Cambridge University Press, 1985), p. 28: 'royal clerks...were often cathedral canons, members of episcopal households'.

own world',[18] so too should the royal clerks whose work was influenced not only by their generation but also by their training. To consider all or any of those who then lived in terms of what was permitted or denied, of dominance or subjection, runs the risk of portraying them in the colours of a different age, and Kelleher's misgivings are perhaps unduly pessimistic.

Maritagium

Under the relatively new model of marriage introduced by the church, a bride transferred from her own blood kin to her husband's family.[19] The severance was far from total, however, for her family's marriage gift, the *maritagium*, although made to the couple and falling under the husband's authority while he lived, legally remained her property. There were several possible variations of the gift, briefly outlined by McCarthey, but it was most frequently to the bride from her father or another close relative.[20] Hanawalt notes that for obvious reasons real estate was preferred, whether inherited, purchased or leased, but money or tradeable chattels were used for the purpose by the landless poor, the custom being observed by all grades of society.[21] Loengard writes that 'it is hard to overemphasize [its] economic importance' for women, as male primogeniture largely disabled female inheritance.[22] By the fifteenth century *maritagia* had evolved into gifts of money and symbolic payments for conveyances but, when Glanvill wrote and in the decades following, it was not an outright gift to the couple but dependent upon their ability to produce viable offspring.[23] If the wife

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[18] Miriam Müller, 'Peasant Women, Agency and Status in Mid-Thirteenth to Late-Fourteenth Century England: Some Reconsiderations', pp. 91-113, in *Married Women and The Law in Premodern Northwest Europe*, ed. by Cordelia Beattie and Matthew Stevens (Woodbridge: Boydell, 2013), p. 13; Walker, 'Introduction', pp. 4-5, 10-11.
[19] James Brundage, *Law, Sex and Christian Society in Medieval Europe* (Chicago: Universitiy of Chicago Press, 1990), pp. 183-84, 225.
[20] McCarthy, pp. 55-56.
[21] Hanawalt, *The Wealth of Wives*, p. 56.
[22] Loengard, 'What did Magna Carta Mean to Widows?', p. 137.
[23] McCarthey, p. 57; *Glanvill*, p. 93.

died childless the property reverted to the donor or, if he were deceased, then the chief lord, but if children were born it descended to them. However, if the mother pre-deceased her husband, her *maritagium* fell under his control for the rest of his life through a custom known as 'curtesy', and her children had to wait for their inheritance until he too had died.[24] Even so, in one way or another, a woman's land remained in some measure with her family through her descendants and was not entirely alienated to an altogether separate line.

An only child inherited the mother's *maritagium* and, if he or she were viable initially but died later, the gift was retained by the father as next-of-kin.[25] Problems arose on the mother's death if an infant was born but lived for a short while only. Local custom decreed at which point the newborn was considered viable, dictated by the child crying and sometimes the kind of noise made.[26] The critical nature of this most intimate and potentially traumatic condition of tenure was illustrated by a tragic case which came before the court at York in 1218**,** in which the almost desperate sequence of events appear to have been overshadowed by legal and financial demands.[27] The action was brought by John de Cardol against his former father-in-law Robert of Boythorpe and four others over a tenement in Flotmanby, Yorkshire. Robert pleaded that the tenement had been his daughter's *maritagium* when she married John but she had died *sine herede apparent de corpora suo* (without apparent heir of her body) and he had therefore reseised it. John countered that his wife had born him a son *qui portatus fuit ad monasterium vivus et baptizatus et vixit ab hora medie noctis usque ad horam primam* (who was carried living to the minster and baptized and lived from

[24] Doris Stenton, *The English Woman in History* (London: Allen and Unwin, 1957), p. 34: Plucknett, p. 568.
[25] Loengard, 'What did Magna Carta Mean to Widows?', p. 159.
[26] *Glanvill*, p. 92 (VII, 18); Stenton, *English Woman*, p. 34.
[27] *RJY, c*. 22.

midnight until the first hour). He brought forward witnesses who testified that *viderunt infantem vivum* (they saw the child alive).

There seems to have been no straightforward criteria concerning the doomed infant to dictate whether the *maritagium* should have remained with his father or reverted to his grandsire. The justices established the dates of the marriage and the death, the principals agreeing that these were respectively 2nd May and 11th November of the same year. The unnamed girl must have died shortly after giving birth. Possibly it was premature but the six-months' marriage may point to a practice of ensuring the fertility of a couple before the woman became a wife, perhaps precisely to avoid the disruption to settled property rights illustrated by this case.[28] However the justices were saved the problem of reaching a decision by the litigants coming to an agreement between themselves. Possibly they would have arrived at the same conclusion, perhaps reluctant to follow in the national court the custom that must have pertained locally in such circumstances. The litigants entered into a careful arrangement, through licence of the bench for which the father paid one mark, by which the widower *remisit totum jus et clamium quod habuit in predicta terra* (gave up all the right and claim which he had in the aforesaid land) in return for fifteen marks to be paid at specified intervals. Robert's five sureties agreed that *vicecomes distringat eos ad reddendum predictos denarios ad predictos terminos nisi Robertus eos redderet* (the sheriff should distrain them to render the aforesaid moneys at the aforesaid terms if Robert should not pay them) and Robert further agreed to meet John's expenses in collecting the money. In the absence of clear critera, a reasonable bargain seems to have been struck. The husband was compensated for the loss of

[28] See also *RJL*, *c*. 357, discussed immediately below.

his equal rights in the marriage gift during his lifetime but the land itself remained within the wife's blood kin.

There are few such graphic illustrations of personal tragedy within the novel-disseisin records. Is this because such episodes were infrequent or because the central figure, the woman, is usually overshadowed in the accounts? The legalistic account of the circumstances surrounding the double death, which centred upon the length of time the infant lived, appears to cast a harsh light on the tenurial position of females and of their place in that society. The difference in the court's treatment of the fourteen male actors and the one female involved is immediately striking. The two principal litigants, the four supporting defendants, the three witnesses and the five sureties were each identified in full, but the woman who had been daughter, wife and mother and whose early death had precipitated the action, was given no name at all. She was identified only in relation to the main actors and appears otherwise discounted as irrelevant to the point at issue. Neither was the baby's baptismal name recorded, presumably for the same reason. On the other hand, should anything other be expected from a legal record which was required to focus on who had the greater right to the deceased's *maritagium*, her father or her husband.[29] These figures and others who now appear overlooked or discounted may then have stood under a spotlight in every other respect and to fear that a woman's name was omitted by a clerk through his gender bias is to court anachronism.

The case illustrates two further aspects of early-thirteenth century life. One is the scant room for sentiment allowed by the legal process, for the mother would have scarcely been cold before her father dispossessed her husband. Whatever he may have felt, the law required him to act with speed or he would

[29] *RJY, c*. 22.

have lost the initiative. The other is the inter-twined rights of men and women over the same property. The deceased wife's *maritagium* probably descended to her from her mother, as previously discussed, but it was bestowed by her father and reverted to him, not her mother. There is no way of knowing from the record if the wife's mother were still living when her daughter and grandson died, as it was irrelevant to the legal action. The situation underlines male jurisdiction over a woman's property. In different circumstances, however, the same property could leave a husband's coverture possibly against his wishes. In her note to the case next cited, Stenton gives Bracton's decision that a husband may not forfeit his wife's *maritagium,* even though he were included in the original gift, 'since the whole remains to the wife as her inheritance'.[30] A wife's property, then, could on the one hand empower her husband in terms of wealth and authority and, on the other, diminish him in both. The two competencies do not sit easily together and were clearly driven by powerful forces.

Stenton also remarks on the 'strong feeling' within the wider family that the practice of retaining *maritagia* within the donor family should continue even when, as here, a wife died childless and the original donor was also deceased. It is illustrated by the ultimately successful struggles of very humble people to keep hold of family land which reverted to its chief lord in dramatic circumstances.[31] Three sisters had each received a marriage gift from their father but one of them, Matilda, abandoned hers in flight when her husband was hanged for felony. Evidently she had no children and her father was dead before his daughter's calamity occurred. Consequently the chief lord, again the abbot of Evesham, in the absence of both donor and heirs, took possession of Matilda's *maritagium*. Her husband is not named in the record nor the crime for which he was hanged

[30] *RJL, c*. 942.
[31] *RJL, c*. 942.

revealed for, like many a woman's name, they were irrelevant to the case; a further indication of the absence of clerical gender bias although the mischievous might argue that it betrays a class prejudice. The action was brought by William Dustifot, one of Matillda's brothers-in-law, and his wife, her sister Helewisa, against Alfred Vlimaker and his wife Aubrey, the third related couple, and reveals a dysfunctional family. Matillda's *maritagium* had been sold by the abbot and eventually purchased by Alfred but the clerk recorded that *noluit concedere inde ipsis Willelmo et Helewise portionem suam* (he would not grant William and Helewisa their share thereof) unless they reimbursed him for its cost. The case was settled by William and Helewisa withdrawing their action, presumably because the four had reached an agreement. It is interesting that, despite their quarrel, each couple acknowledged in principle the other's right to a half of the vanished sister's endowment.

In Stenton's note to this tangled case she rehearses the 'divergent opinions' of two eminent judges of the day on what should happen to a wife's inheritance if her husband were outlawed: Martin of Pattishall argued that she should remain in possession unless convicted of allowing her husband to return; and Stephen of Seagrave that she should not in case it tempted him back. The justices in the case deferred their decision until the next day, giving themselves time for further consideration, but in the meanwhile the litigants reached their compromise. The concern of the bench reflects the importance of *maritagium* to women's welfare, observed by Loengard.[32] Its provision gave daughters and widows a degree of security from greedy and unscrupulous husbands and children, not to mention in-laws, and also from perhaps unmindful lords and

[32] See p. 248 *n.* 22 above. The inheritance of Geoffrey Spillebarc's nameless wife, for example, would have descended to her children on her death.

neighbours.[33] Yet it seems to have been a survival, almost an anachronism, from the wider kin-based arrangement of marriage and inheritance which appears to have been so strong that it was carried into another era by a whole people and practised almost by default. It is too large a topic to be addressed here and beyond the remit of the study, but it is worth repeating that it essentially contravened the principle of coverture, as Loengard remarks of dower, and slotted very awkwardly into the status quo.[34] Men and women co-operated to practise it for reasons that sometimes seem more sentimental than practical. Matillda's brother-in-law went to a great deal of trouble to keep her tenement in her family. He did not need to do that if he had simply wished to increase his holding. Why was the dead wife's father so anxious to have the land returned, instead of settling for monetary compensation? These are men acting with the authority of coverture to maintain women in the property rights they used to enjoy in an outmoded system.

The forceful Isabel, who spoke in court on her own behalf in her husband's lifetime, is a rare example of a wife bringing an action for her own *maritagium*.[35] If her husband had alienated it she would not have been able, under coverture, to oppose him in seeking its recovery, but it was her brother William Kechel whom she accused of withholding it from her. William argued that Isabel and her husband held half the property inherited from their father and divided between them by agreement in the abbot of Evesham's court. His sister claimed seisin of the whole *maritagio suo quod pater suus ei dedit* (as her marriage portion which her father gave her) and denied all knowledge of an agreement. The

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[33] *ENAR*, *c*. 633: Ysabel Luvel was brought into agreement with Henry Darmenters whom she accused in 1203 of disseising her of common pasture in Kislingbury, Northamptonshire, so that *Henrico remanent de eadem pasture viij partes et non pars remanet ipsi Ysabelle ut pertinens ad dotem suam* (8 parts of the pasture remain to Henry and the ninth part remains to Ysabel as appurtenant to her dower). This may have been either a family dispute or a mistaken encroachment.

[34] Leongard, '*Rationabilis Dos*', p. 60.

[35] *RJL*, *c*. 1059. Isabel either knew how to manage the legal system or was her husband's agent. See pp. 208-09 above.

jury found for the brother, and Isabel and her husband were amerced for claiming more than her due. This seems a strange case for the brother, as the only son, would have automatically inherited his father's estate, apart from his mother's *maritagium* and dower. The mother was evidently deceased or her daughter could not have claimed her marriage gift. Was it all that remained of the conjugal property? If it were and had descended in its entirety to Isabel, her brother would have received nothing from their father's estate. Had he therefore initially seized the whole, or moved to ensure that at least some of it came to him? There is no mention of the abbot's court being called to warranty and it may be, as Loengard suggests, an illustration of the law being used to formalize and validate an arrangement between relatives.[36]

Dower

As widows, women once again achieved the independence of their girlhood[37] but their freedom was not necessarily absolute. Those of financial means frequently paid their immediate lord to avoid his coercing them into a subsequent marriage and therefore to some extent remained, at least initially, under male control.[38] They were also far more constrained through acquiring 'more responsibilities than privileges'.[39] Nor, on the evidence of the very many widows of all degrees who remarried often more than once, was their freedom always desired. On the other hand, a widow obtained direct jurisdiction of her dower which had previously been at her husband's disposal. However, her circumstances could continue to be largely dictated by the kind of relationship she had enjoyed, or otherwise, as a

[36] Loengard, 'What did Magna Carta mean to widows?', p. 159.
[37] See Judith Bennett, *Women in the Medieval Countryside: Gender and Household in Brigstock before the Plague* (New York: Oxford University Press, 1987), pp. 86-91.
[38] Loengard, 'Rationabilis Dos', pp. 60-61.
[39] Bennett, *Women in the Medieval English Countryside*, p. 151.

wife and not simply, as might be expected, by the degree of conjugal prosperity.[40] The property constituting her dower may have been alienated by her husband, as he was lawfully entitled to do, but she could reclaim it through the courts after his death.[41] Even this might be denied her, however, if she had opposed her husband when he sold it because 'to such an extent is a woman bound to obey her husband...that she cannot...claim the dower from the purchaser if she confesses, or it is proved against her, in court that it was sold...against her will'.[42] Provision was made to avoid the inevitable problems that arose from the sale of dower, for both purchasers and widows, through an initial investigation of the court into the wife's wishes and confirmation of the deal by conveyance.[43] Holdsworth traces the procedure to Henry II's reign but believes it was not until well into the thirteenth century that it became established. In practice it was probably observed much earlier or the rolls would show defendants citing wifely truculence as a reason for withholding alienated dower land. More commonly, a widow's dower was retained by her husband's heir, seriously compromising her economic viability and forcing her to take legal action for its recovery.[44] She could also be required to pay for its release. Her new-found ability in this situation is unlikely to have caused her much rejoicing.[45] However, an heir's reluctance to part with his mother's or step-mother's endowment is scarcely surprising. Although it reverted

[40] While an oft-married woman of middling rank might accumulate a significant amount of wealth through a sequence of dowers and also the inheritance of under-age children living with her, a wife in a poor family was likely to become a poorer widow without her husband's support: Bennett, *Women in the Medieval English Countryside*, pp. 146-47.
[41] See *RJL*, *c*. 789, discussed on pp. 259-60 below.
[42] *Glanvill*, p. 60 (VI, 3). Hudson argues that wives may not have been so restricted in practice, but McCarthey believes that they had no control over the alienation of their inheritance by their husbands: John Hudson, *The Oxford History of the Laws of England, II, 871-1216* (Oxford: Oxford University Press, 2012), p. 796; McCarthey, pp. 59-60.
[43] Theodore Plucknett, *A Concise History of the Common Law*, 5th ed. (London: Butterworth, 1956), pp. 567-68; Holdsworth, III, p. 523.
[44] Loengard, 'Rationabilis Dos', p. 59. The heir may have been the son of a previous marriage and not the widow's child but, even then, he could be reluctant to release the full amount.
[45] By the late Middle Ages this seems to have been conditional according to local custom, from unquestioned right to an action permissable only in extreme poverty: Hanawalt, *The Wealth of Wives*, p. 102.

to him upon her death, at the very least it delayed his full inheritance and might significantly reduce his income or, if he were a minor, the value of his lord's wardship, sometimes for many years.[46]

Dower was bestowed by a husband upon his wife at the point of their marriage and might, or might not, be specified.[47] If it were not, the widow was entitled to that portion of his land which was customary according to circumstances or locality.[48] It seems seldom to have been less than one third of the husband's estate at the time of marriage, but there arose confusion over whether it might or might not include later acquisitions either by purchase or inheritance.[49] The 1217 version of Magna Carta resolved these and other difficulties, at least in theory, by decreeing that dower should be one third of the property a husband held in life unless a smaller amount had been specified. The widow must not pay for it and might reside in the main messuage, which was excluded from the provision, for forty days to allow for her affairs to be settled. Further logistical problems frequently arose, particularly if the estate were inadequate to fully service the demands upon it of both heir and widow or even widows. Unspecified dower might have to be provided out of demesne land or previously alienated land and the occupier compensated. A widow whose nominated dower was tenanted and was unable to get into it nor provided with

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[46]Campbell finds that a widow's remarriage, which frequently happened, transferred significant amounts of land away from one family to another and Loengard points out that, even where this did not happen, a teenage widow's remarriage could remove land from the original family's control for half a century: Bruce Campbell, 'The Land', pp. 179-237, in *A Social History of England 1200*-1500, ed. by Rosemary Horrox and Mark Ormrod (Cambridge: Cambridge University Press, 2006), p. 198; Loengard, 'Rationabilis Dos', p. 60.

[47] For explanations of the complexities of dower, see inter alia Hudson, *Oxford History*, pp. 447, 450, 794-803; *Pollock and Maitland*, II, pp. 420-24; Joseph Biancalana, 'For Want of Justice: Legal Reforms of Henry II', in *The Columbia Law Review*, 88 (1988), 433-536 (pp. 514-34); Stroud Milsom, *Historical Foundations of the Common Law*, 2nd ed. (London: Butterworth, 1981), pp. 124-29, 167-68; Loengard, 'Rationabilis Dos'.

[48] McCarthy gives a précis of scholars' research on the amount: McCarthey, pp. 56-58. As Walker and Loengard also find, dower was usually one-third of property held by knight's fee but could rise to one-half of socage tenure, that is, property held for money-rent: Walker, 'Introduction', and Loengard, 'Rationabilis Dos', pp. 82, and 61 and *n.* 5.

[49] *Glanvill*, pp. 59-60 (VI, 2).

alternative land, could bring a writ of right against the heir, not the tenant.[50] It followed the same path as other writs of right, being heard firstly in the manor court of the heir and then, as necessary, transferred to the county and royal courts.[51] Only if the widow received no dower at all might her suit come directly before the king's justices under the writ *unde nichil habet* (whence she has nothing).[52] It follows then that the royal courts were likely to find before them the most difficult cases and the most deprived among widows. There was also redress for heirs who believed that a widow was taking more than her rightful dower in the writ *de dote admensura*, by which the king ordered the sheriff to reassess it.[53] This was achieved through the hundred or county court.

In Milsom's words, dower was 'an internal arrangement within the inheritance'.[54] A widow rendered to the heir the services due from her dower land, but did not do homage for it or she would have been able to alienate it from the heir's ultimate use. Not all women understood this.[55] It is unsurprising, given its complexity, that litigation over dower was common for, as Plucknett observes, it 'could interfere considerably with strict feudal notions'.[56] The continual assault upon widows' property by acquisitive males is a measure of this interference, but it is balanced by the legal redress readily available to widows to resist it. Loengard writes that thousands of bereaved women were obliged to deal through the courts with obdurate men,[57] sometimes a husband whose authority through coverture could outlast him, as noted above, but more usually his still-living

[50] *Glanvill*, pp. 61 (VI, 5) .
[51] See pp. 10-11 above. A further writ summoned the heir to the royal court: *Glanvill*, pp. 61-62 (VI, 7).
[52] This was a writ *precipe* (order) in which the sheriff was required by the king to order an heir to provide his father's widow with her reasonable dower, on pain of being summoned to the royal court: *Glanvill*, p. 66 (VI, 15).
[53] *Glanvill*, pp. 68-69 (VI, 18).
[54] Milsom, *Historical Foundations*, pp. 167-68.
[55] For examples, see *RJL*, *cc*. 923, 1282, discussed pp. 264-67 below.
[56] Plucknett, *A Concise History*, p. 567.
[57] Loengard, 'Rationabilis Dos', pp. 59-60.

relatives, not to mention unrelated opportunists, who tried to take advantage of them.[58] The number of cases was further swollen by families using the courts to confirm or challenge the provision of, or claims to, dower, some concluding with an order for land to be re-measured.[59] Once again the rolls reveal a powerful and authorised but illogical dichotomy between the theory and practice of male supremacy, yet this may be an unbalanced view since many actions were settled in the local courts.[60] Nevertheless, for one reason or another, some interesting examples appear in the records of the assize.

The complexities of dower and inheritance are well illustrated by a claim brought by Agnes daughter of Geoffrey at Lincoln in 1219 for dispossession of a holding in Sumerdebi (Somerby), by Gilbert of Houton (Houghton), both in Lincolnshire, and Alan son of William.[61] The two defendants argued that they had no case to answer since Agnes' husband had sold that land to them following an agreement between them all before the court of their chief lord.[62] Agnes acknowledged this but said that she was suing for its return *quia terra illa est jus et hereditas ipsius Agnetis* (because that land is Agnes' right and inheritance). She lost because she had sued under the wrong writ, the judge advising that *perquirat se alio modo si voluerit* (she may sue in another way if she wishes).[63] There is no mention of dower nor, for that matter, of *maritagium*. Did Agnes identify herself through her father because the holding was her wedding gift from him and the use of his name strengthened her plaint? She was excused her amercement, the clerk inserting *nichil* (nothing) above the line. This may indicate poverty or it could be

[58] *ENAR*, *c*. 820, disscussed on pp. 261-62 below; *ELAR*, *c*. 1409.
[59] *ENAR*, *c*. 839, discussed on pp. 213-14 above.
[60] Doris Stenton, 'Introduction', pp. xv-xxxviii, in *ENAR*, p. xxxiv.
[61] *RJL*, *c*. 789.
[62] A wife had no control over a husband alienating his wife's inheritance: McCarthey, pp. 59-60.
[63] In her note to the case Stenton explains that Agnes would have recovered the land if she had brought the writ of entry *cui in vita* (to whom in life) against the individual to whom her husband in his life had alienated her land.

an example of the royal courts' clemency, observed by Walker, towards widows who brought the wrong writ in matters of dower.[64] This doubtless also extended to *maritagia* and is another indication of the generally sympathetic attitude shown by the bench towards humble female litigants under duress, without it compromising legal principle.

A further illustration of this combination may perhaps be found in the judgement on a case brought in 1203 at Bury St. Edmund's by Segar the carpenter to recover a tenement of which he had been dispossessed by Robert de Aldwarton in Crewarton (Theberton), Suffolk.[65] He failed by default because the holding *est dos uxoris sue et nulla fit mencio de ea in brevi* (is his wife's dower and no mention is made of her in the writ). It is a counter balance to the legal obligation on a wife to acknowledge her husband's authority by including his name on any writ she wished to take out.[66] The justices advised that Segar should purchase a second writ *quod loquitur de se et uxore sua si voluerit* (which stipulates himself and his wife if he wishes) and amerced him. Again, they observed the letter of the law while offering a helping hand, although at the time it may have seemed poor consolation to the woman from Suffolk. Her husband however took the advice and the pair re-appeared before the court at Ipswich, probably later the same month,[67] with the correct writ on which Segar acknowledged and also named his wife Amicia. He was clearly determined not to be caught out a second time and included a third plaintiff, Alicia daughter of Robert. The new writ allowed the hearing to proceed. The jurors found in Segar's favour and the plaintiffs were reseised. It is notable that the plural was used here, the justices again

[64] Sue Walker, 'Litigation as Personal Quest: Suing for Dower in the Royal Courts, circa 1272-1350', pp. 81-108, in *Wife and Widow in Medieval England*, ed. by Sue Walker (Ann Arbor: University of Michigan Press, 1993), p. 85.
[65] *ENAR, c*. 783.
[66] See pp. 198-99 above.
[67] *ENAR, c*. 860, probably heard in August 1203: Doris Stenton, 'Introduction', in *ENAR*, p. xx.

acknowledging Amicia and her tenurial rights. They awarded damages of 5s. and amerced the defendant for twice that amount.

There is much more to these two brief accounts than meets the eye. If the father of the third plaintiff is the same Robert as the defendant, the case becomes far less clear than it originally seemed. Were the two women sisters? If so, why was Alicia under her brother-in-law's roof and not with her father? Was the property not dower but Amicia's *maritagium* which Robert had attempted to withhold? Although these details are likely to remain forever tantalizingly obscure, more importantly for research the hearings provide a great deal of information on a largely undocumented social class. The plaintiffs are revealed as a humble but skilled and intelligent household, willing and quick under instruction to rectify their legal ignorance which was probably born of inexperience. It also suggests an understandable confusion over the application of coverture. The family may first have proceeded in the belief that they were in accordance with the doctrine, which they probably knew to be more strictly observed in the royal than the local courts, only to find that the husband's name alone did not suffice but they must add the wife's as well. At least twice, then, they took advantage of the opportunity offered them by the common law to right a perceived wrong. On this occasion Segar, unlike Agnes, was not excused the routine amercement of half a mark for initially failing in his action although they both brought incorrect writs. Is this coincidence, or might research indicate that justices were more lenient towards women than men?

Many widows must have been impoverished by greedy relatives, in-laws or even neighbours. The poverty of Claricia daughter of Herbert was such that the bench at Bury St. Edmund's in 1203 ultimately took steps to ensure that she

received her dower *sicut illam habere debet* (as she ought to have it).[68] It was her second effort to recover a tenement in Gissing, Norfolk. Why her first attempt was unsuccessful is not known as the record is missing, but she evidently began her second claim within the prescribed time limit or it would have failed at the start. Whatever her original action, she won it but her success was impermanent. It becomes clear that the defendant, William son of Roger, was her brother-in-law who acknowledged his fault and *libenter faciet ei inde dotem suam* (willingly renders her dower to her in respect thereof). It seems that the court was unconvinced. It noted the contrast between William's current, apparently spontaneous offer and his historical denial of Claricia's right, for she must have moved into the property initially or she could not have been subsequently dispossessed and her action of novel disseisin would have been invalid. The bench ordered the sheriff *pro paupertate ipsius* (because of her poverty) to ensure that she received access to what was probably her major, if not her only, means of livelihood.

It may have been a neighbour who dispossessed the widow Constancia *de quarta parte bosci de Thornfald* (of a fourth part of the wood of Thornfield), Hampshire, which jurors at Westminster in 1212 found that *habuit et habere debet nomine dotis* (she held and ought to hold in the name of dower).[69] The defendant, continued the jurors, *illam ei deforciavit ita quod nichil inde habere potuit* (witheld it from her so that she can have nothing in respect thereof). Constancia was awarded damages of 2s. The defendant failed to appear. There were doubtless many more such widows who brought no suit, or acted too late so that the case failed through the time limitation, and their aggressors in

[68] *ENAR, c*. 820.
[69] *CRR*, VI, pp. 240-41.

consequence legally retained their ill-gotten gains.[70] However, Loengard finds that heirs also used the action to confirm or test their own or their mothers' or stepmothers' entitlement.[71] The brevity of an action at Lichfield in 1204 belies the complexity of a suit which may well have been brought for just such a reason.[72] The plaintiff John son of Reinfrey accused his father's widow, Bella, and two brothers or step-brothers with four others of disseising him of a property in Dunnington, Yorkshire, which turned out to be Bella's dower. She and John, who may not have been her son, settled out of court *per licenciam* (by licence) that she should relinquish her claim to it for three marks but, until payment was made, it was arranged that *Gilbertus serviens cepit in manum quod faciet eidem Bele tenere terram illam* (Gilbert the sergeant undertook to arrange for Bella to hold that land). It is interesting that the court arranged to put the widow in possession of the property so that it could be correctly transferred upon the payment. Possibly it is an example of its pragmatic concern that a lone woman, perhaps with dependents, should de facto benefit from its judgement. On the other hand, apart from the situation with villeins and villeinage as discussed in Section 1, the orderly procedure was typical of the system and in itself indicates the indifferent delivery of justice in the king's court.

Loengard also makes the point that the worst assault upon a widow's claim was to accuse her of never having been a wife.[73] Agnes of Brampton, Bedfordshire, suffered this humiliation before the court at Bedford in 1202 when she tried to recover what she considered to be her dower of *terciam partem unius virgate terre cum purtinentiis* (the third part of one virgate of land with

[70] The issue of suits found to have been brought out of time is fully discussed on pp. 145-48 above.
[71] Loengard, 'What did Magna Carta Mean to Widows?', pp. 151-52.
[72] *Pleas*, III, *c*. 1003.
[73] Loengard, 'What did Magna Carta Mean to Widows?', p. 153.

appurtenances) as the widow of Reginald.[74] However Reginald's daughter Helewisa revealed that her father *superinduxit ipsam Angnetem que in adulterio ex ea suscepit quendam filium* (brought in Agnes who in adultery bore a certain son). Helewisa had previously sued Agnes for one virgate that should have descended to her *ut recto heredi* (as the true heir), involving the court Christian who found in her favour as her own mother, Emma, was still living and Agnes was no wife. Helewisa then was forced to bring at least two cases before the royal court and at least one before the ecclesiastical court before she could shake off the tenacious Agnes and enter her inheritance. She must have been her father's only child to inherit the whole of his estate. Agnes and her nameless son took nothing and may have descended into penury as a result of her lover, with whom she may have lived for many years, making no provision for them. Had he formally seised her, or their child, of property, his legitimate daughter could not have dispossessed them.[75]

The potentially disastrous problems created by widows believing that they could bequeath their dower are highlighted by two cases of novel disseisin before the Worcester eyre of 1221. An unhappy tale of thwarted care for a child concerned the attempt of a widowed grandmother, Remilda, to leave her house in Evesham, Worcestershire, to her grandson Henry who was the under-age plaintiff.[76] The clerk recorded that, upon the death of the boy's father, Remilda *venit in pleno hundredo et concessit ipsi Henrico domum illam et dedit* (came into the full hundred court and granted and gave that house to Henry). However, she had misunderstood her situation and, as the jury found, *obiit inde seisita ut de dote sua* (died seized thereof as of her dower). Upon her death, the abbot of

[74] *ENAR, c*. 624.
[75] The necessity of adequately seising a dependent is illustrated in *RJY, c*. 21, discussed on p. 180 above.
[76] *RJL, c*. 923.

Evesham must have taken possession of it as he had every right to do, as its chief lord, in the absence of an heir to the estate. Henry cannot have been the heir or his grandmother need not have attempted such an arrangement, and Galiena appears to be her daughter by another marriage. Remilda's efforts to secure the house for her grandson seem to exclude the land which she held, probably also as dower, and suggest that she had anticipated a difficulty which, evidently, she believed she had pre-empted. Henry brought the action, with his mother, against Everard de Campeden (Chipping Campden), Gloucestershire, to whom, presumably, the abbot had re-let the property and who then dispossessed the family. In Everard's absence, for which he was amerced, the royal justices ruled that *Henricus nullam habuit seisinam* (Henry had no seisin). It begs the question of why the hundred court, which must have known that the house was held in dower, allowed Remilda's arrangement to proceed. It is possible that local custom permitted dower to be temporarily alienated and that the gift was made for a specified period, perhaps Henry's lifetime.[77]

Before the royal court, however, the strict letter of the common law prevailed and the assize was worked out to its logical conclusion, that Henry could not have been dispossessed where he had held no seisin. He was accordingly amerced for a false claim but, like Richard above, *pauper est* (is poor) and so would have been excused the fine and also the cost of the originating writ. The action brought by Henry and Galiena is further evidence of the family's total failure to understand their position and the clerk's account of their predicament perhaps reflects his sympathy for them. He included information that was wholly irrelevant to the case, including that Henry's father *adamavit*

[77] The strength and spread of customary law, persisting into the late-fourteenth century, should not be overlooked: Plucknett, p. 314. For a discussion of bequests to other than the heir, see Hudson, *Oxford History*, pp. 659-61.

predictam Galienam (loved the aforesaid Galiena). Was he affected by their story or simply inexperienced at his job and unsure how much detail to include? The hopeless situation of the plaintiffs in this and the following account, who seem abandoned to their impecunious fate, contrasts with the help offered to others, cited above, who won their actions. The difference cannot be due to any bias, for there is evidence of the court's sympathy for both the successful and the defeated, but was a consequence of legal process. The victorious weak could be protected against potentially vengeful opponents until their circumstances were regularized, whereas there seems to have been no court aid for those who had legally lost everything. Occasionally, though, there is a rare glimpse of social concern for the destitute through the clerk noting a judicial recommendation for an individual's welfare, although it possessed no legal force and was therefore superfluous to the record.[78] It is likely that similar, unrecorded provision was suggested by the bench in similar situations and conceivable that it occurred here, but it would be futile to attempt an assessment of its extent.

The second example is a writ of novel disseisin served against the rightful inheritor of dower land by a deceased widow's male cohabitee whom he had turned out of the property.[79] The cohabitee was a chaplain, one Richard, and this looks very like a case of clerical concubinage or perhaps even marriage. It strongly supports Brundage's argument that the latter persisted in rural areas, even though it was then unlawful, and that the former was widely practised.[80] On the death of the widow, *quedam Agnes* (a certain Agnes), Richard remained in situ in a tenement *in suburbio Wigornie* (in the suburbs of Worcester). The heir, Alfred son of Arnold, purchased a royal writ which ordered the sheriff of

[78] *ELAR*, *c*. 1335.
[79] *RJL*, *c*. 1282.
[80] Brundage, *Law, Sex*, pp. 226, 416

Worcester to make a full enquiry and give Alfred justice. The enquiry found that Richard had disseised him and he was re-seised by the sheriff. Richard then brought the assize at the Worester eyre of 1221. It is interesting that the initial writ was read out in full as part of the defence, and not just the result of the enquiry. In his turn, Richard claimed that Agnes had given that land to him by her charter; also that he had been seised of the property for seven years before her death and three years after, and therefore *per magnum tempus ante gwerram et inicio gwerre et in guerra quousque* (for a long time before the war and at the beginning of the war and during the war). The justices ruled that his claim should be tested through the jury which found that, although Agnes had given him the property and drawn up a charter for him, *non habuit de terra illa nisi custodiam ut de dote* (she had not held that land other than as custodian of her dower). The charter was therefore invalid. The jury also found that Richard had remained in seisin for only three weeks following Agnes's death. He was amerced for claiming falsely, the court clerk recording that *nichil habet* (he has nothing). It will always remain a moot point whether or not Richard genuinely believed Agnes's charter to be a legal document but, as a homeless man, he had nothing to lose by bringing the action, his poverty cancelling the cost of the writ. His frequent references to the recent war with the French and extravagant claims to possession suggest a desperate clutching at straws.[81]

Conclusion

Wedding gifts were usually made by a bride's family to the couple but remained as the woman's possession, even though falling under her husband's jurisdiction while he lived. If a wife predeceased her spouse the gift descended to her children

[81] See p. 4 *n.* 13 above. The conflict created great instability in land tenure and it was not uncommon for property lost at the beginning of it to be later recovered. It is possible that, by claiming continuous tenancy throughout, Robert had hoped to persuade the court of the strength of his seisin.

or, in their absence, returned to the donor. If he too had died, it reverted to the chief lord of the property. The actions of litigants show a very strong belief that a woman's *maritagium* should remain with her blood line. Disputes could arise between a father and a husband if a dying wife's child were not viable, but the principle of the property's reversion to the donor family seems to have been maintained. Similarly there existed a belief that, if a wife died without dependents, her *maritagium* should be restored to her own kin. In essence this was a remnant of the outmoded endogamous system of tenure, apparently forced into the church's preferred patrilinear form, and prevented an heir from inheriting the whole of an estate. Nevertheless, if the wife died childless and her father was also deceased, the father's lord to whom the land returned was unlikely to have had any connection with her family. It illustrates the tension between a husband's authority over his wife and a married woman's rights over her own property. *Maritagia* in these rolls almost exclusively involved real estate and had not adopted the refinements of the late Middle Ages. There are few actions concerning wedding gifts in the novel disseisin records of this period and not many more in the rolls overall. This, with the dramatic nature of most of the existing accounts, probably indicates that families rarely quarrelled over the gift and that it was generally well respected.

The number of disputes over dower in the records of novel disseisin is an indication of the problems it brought both to the widow who received it and the heir whose estate was diminished by it. Like *maritagia*, it prevented full inheritance through the insistence that a widow be financially and legally independent rather than provided for by the heir within his household. The majority of dower was also bestowed upon marriage but, unlike *maritagia*, it carried a life interest only. The ability of widows to take their dower into

subsequent marriages, which threatened further economic hardship to an heir, could lead to its retention by him and her own subsequent impoverishment and led to numerous actions for its recovery. The rolls provide examples of suits brought for the re-measurement of gifted property, of greed on both sides, of the ineligibility of mistresses to receive dower, and of widows' mistaken belief that they could bequeath it. Both these latter could be calamitous when the property was recovered by the true heir, particularly among humble tenants who had few resources. There is evidence for a considerable amount of perplexity concerning the rules on dower and also the demands of coverture in common-law process. Although husbands had total control over their wives' property no matter how acquired, to the point of selling it, they were obliged to name her in the proceedings and she had the ability to recover it after his death. This confusing situation again illustrates the legal tensions over tenure within a marriage.

Disputes over wedding gifts and dower demonstrate that, while brought for different reasons, both compromised the doctrines of coverture and patrilineal inheritance by persistently and subversively demonstrating that women held property rights. Little or nothing has been found in the records of these cases to indicate a gender bias on the part of the clerks who wrote them. The reason may be that both gifts had the approval and support of the whole population, This is particularly interesting, given their noted contravention of the church's teaching on male supremacy. The emotions that are discernible in the accounts appear to emanate more from the justices, who show signs of compassion and helpfulness towards female plaintiffs in straitened and problematic circumstances. The misgivings of Kelleher and others, that court records of women litigants were skewed by the prejudices of the clerks who penned them, appear not to apply in this connection.

CONCLUSION

The Assize

The years between 1194 and 1221 are significant for the development of the common law, of which the assize of novel disseisin was a major part.[1] The assize separated the property disputes of freeholders from those of servile tenants, providing an opportunity for the former to move from seigneurial to royal jurisdiction and leaving the latter to the manorial courts. Its essence was that no freeholding tenant might be dispossessed of his or her property without the authority of a court of law. There were only two criteria: that the plaintiff was free and not bond; and that the alleged disseisin had occurred after a specified date. Thus, neither women nor the poor were excluded as litigants before the king.[2] It was immediately and enduringly popular among all strata of society, including the destitute.[3] In 1194, written records of common-law actions began to be kept. The period that has been studied therefore coincides with the acknowledgement of writing as the most reliable form of recording events, and with a nascent appreciation of the value of retaining such records for future use. Consequently, there exists a body of information on litigants at this early time, including many from the low-ranking sectors of society who were not normally then documented.

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[1] *Pollock and Maitland*, I, p. 146.

[2] For the formulation and procedure of the assize, see inter alia: Donald Sutherland, *The Assize of Novel Disseisin* (Oxford: Clarendon Press, 1973), pp. 1-2, 10, 12-13, 14-15, 18-20; Cecil Meekings, 'Introduction', Volume I, in *The 1235 Surrey Eyre*, ed. by Cecil Meekings and prepared for press by David Crook, 3 Volumes, Surrey Record Society, 31, 32, 37 (Guildford: Surrey Record Society, 1979-2002), pp. 69-77.

[3] For reasons for the assize's popularity, see inter alia: Raoul van Caenegem, *Royal Writs in England from The Conquest to Glanvill, Studies in the Early History of the Common Law*, Selden Society, 77 (London: Selden Society, 1959), pp. 56-60; Doris Stenton, *English Justice between The Norman Conquest and The Great Charter 1066-1215* (London: Allen and Unwin, 1965), pp. 22-24, 95; Sutherland, pp. 2-3; Anthony Musson, *Medieval Law in Context, The Growth of Legal Consciousness from Magna Carta to the Peasants' Revolt* (Manchester: Manchester University Press, 2001), pp. 84-85, 165-67; Michael Clanchy, *From Memory to Written Record* (Oxford: Blackwell, 1993), pp. 241-43; Paul Brand, *The Making of the Common Law* (London: Hambledon, 1992), pp. 101-02, 224.

The main findings of the study

These nigh-three decades, then, were an exciting time of legislative and administrative innovation, and not only for those who formulated and implemented the new ideas. The reforms and their procedures also inspired many thousands of commoners to forsake their local courts in favour of pursuing suits of novel disseisin in the *curia regis*, usually when it sat locally. By focusing on their use of the assize, this study shows that the separate categories of commoners approached and deployed it in different ways. It was primarily utilized by some tenants to prove that they were freeholders, which was not its original purpose. It was an unintended consequence which took the authorities aback. This view has not previously been thoroughly worked through by historians. Scholars' attention has been concentrated on the assize largely for its significance in the development of the common law and, regarding villeinage, for its impact upon the division it created between free and unfree within the peasantry.[4] It has been acknowledged that plaintiffs of doubtful status did appear in the *curia regis*, which made it necessary for lawyers to seek a consistent method of determining who were free and who were not.[5] However, the full scale and significance of these twin phenomena have not been fully addressed, nor that the unexpectedness of the first, coupled with the enormous variation in customary dues, rendered the second impossible.

Other commoners, for whom the recovery of property was the initial concern, were constrained by the constraints and conventions of their society which could cause a suit to fail if not observed, particularly coverture.[6] This was a

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[4] Rodney Hilton, 'Freedom and Villeinage in England', *Past and Present*, 31 (1965), 3-19 (p. 14); John Hudson, *The Formation of the English Common Law, Law and Society in England from the Norman Conquest to Magna Carta* (London: Longman, 1996), p. 93.

[5] Paul Vinogradoff, *Villainage in England, Essays in English Mediaeval History* (Oxford: Clarendon Press, 1892), p. 59.

[6] James Brundage, *Law, Sex and Christian Society in Medieval Europe* (Chicago: University of Chicago Press, 1990), p. 255.

husband's authority over his wife, introduced by the church. Much has been written on the subject, the majority applicable to a later period. The problems it caused litigating women of this earlier time, and the ingenuity they sometimes showed in circumventing it, supports those historians who argue for a later hardening in its application.[7] Womens' individual experiences with dower and *maritagia*, observed in this study, strengthen the views that these customs challenged the feudal structure and patrilineal inheritance.[8] The restrictive authority of lords over their tenants, on the other hand, varied in practice according to local custom. It seems not to have affected smallholders who engaged in a vigorous and widespread, if Liliputian, land market[9] which led to many novel-disseisin suits. It is more surprising that most of those who failed in their action were able to pay the relatively large amercements required from them.

The bulk of the rich historiography on peasants' economic circumstances is concentrated on their poverty, and the puzzle of how such a poor sector regularly paid heavy fines has not hitherto been resolved. This study tackles it from base level: the one known fact, through the treasury accounts in the Pipe Rolls, that the fines were paid. The conclusion, that the amounts were collected through the pooling of resources within the wider peasant family, is speculative but, thus far, the most convincing answer. The interesting research that has been carried out into the cohesion of peasant families, which may have enabled this,

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[7] Conor McCarthey, *Marriage in Medieval England, Law, Literature and Practice* (Woodbridge: Boydell, 2004), pp. 62-63; Janet Loengard, 'What did Magna Carta Mean to Widows?' pp. 134-50, in *Magna Carta and the England of King John*, ed. by Janet Loengard (Woodbridge, 2010), p. 151.

[8] Janet Loengard, 'Rationabilis Dos: Magna Carta and the Widow's "Fair Share" in the Earlier Thirteenth Century', pp. 59-80, in *Wife and Widow in Medieval England*, ed. by Sue Walker (Ann Arbor: University of Michigan Press, 1993), p. 60; Theodore Plucknett, *A Concise History of the Common Law*, 5th ed. (London: Butterworth, 1956), p. 567.

[9] Bruce Campbell, 'The Land', pp. 179-237, in *A Social History of England 1200-1500*, ed. by Rosemary Horrox and Mark Ormrod (Cambridge: Cambridge University Press, 2006), pp. 208-09.

has not previously been applied to the problem.[10] The cancellation of a small number of amercements on account of a litigant's poverty is self-evident from the records and is discussed by Flower,[11] but its implications have not, to date, been fully considered. These are that: it set a legal definition of poverty which was artificial and did not necessarily relate to the commercial activity of those who fell within it; and, the authorities had reason to be confident that the majority of poor litigants, who did not qualify for the aid, would meet their legal costs. Evidently they knew the means by which impoverished peasants had access to large sums of money.

The cases, therefore, inform on the reactions of different sectors of the lower ranks to their several predicaments, and also on the treatment that was meted out to them by their peers and lords, and by the justice system. Two main conclusions have been drawn. Firstly, the restrictive effect of conventions is not reflected in the mental attitude of litigating commoners. They seem to have discriminated between conformity and authority, frequently resisting the former with determination and often ingenuity, but not opposed to the latter per se. Secondly, they did not, with few exceptions, turn to force in order to remedy their grievances. Rather, they displayed a desire for redress of wrongs through the law. In sum, they seized the opportunity, when it was offered to them, of securing justice by legal means; not to overturn the established order, but to regulate it and curb excess. If some of their ambitions seemed revolutionary to the authorities, specifically customary tenants' claim to freedom, their preferred path to achievement was orthodox.

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[10] Edward Miller and John Hatcher, *Medieval England, Rural Society and Economic Change 1086-1348*, (London: Longman, 1978), pp. 151-52; Christopher Dyer, *Standards of Living in the Later Middle Ages, Social Change in England c. 1200-1520* (Cambridge: Cambridge University Press, 1989), pp. 22, 212-13.

[11] Cyril Flower, *Introduction to the Curia Regis Rolls, 1199-1230 A.D.* (London: Professional Books, 1972), p. 472.

The attitude of the courts

In the administration of the assize, no persistent prejudice has been found on the part of justices, or clerks, either for or against litigants on account of their social or financial circumstances. Neither can they be considered biased against women per se. Following the church's ruling on coverture, they deemed wives to be inferior to their husbands within the legal procedures which they supervised and were careful to follow. However, they were also rigorous in insisting upon respect for married women's property rights under the law,[12] and treated widowed and other single female litigants no differently from male disputants. They applied the terms of the action strictly, but with discretion. Thus, plaintiffs who had innocently erred against procedure were advised how, if possible, they might rectify their mistake. Most commonly this was because they had purchased the wrong writ for their plaint, but there are also examples of incorrect wording, the omission of personal names and locations, and the non-appearance of the individual, usually a woman, who was the true possessor of the disputed property. The records suggest that married couples could become confused, between the demands of coverture on the one hand and legal procedure on the other, as to the requirements of and options for women. The attitude of justices towards such litigants appears to have been patient, positive and encouraging. In a few cases, with the agreement of the defendant lord, they waived the rules for single female plaintiffs who seem particularly inadequate, presumably to the benefit of both parties. It also betokens a professional interest in restoring good relations and maintaining peacable neighbourhoods.

The bench could not assist litigants who contravened established rules and conventions outright. Many cases, frequently brought by disadvantaged plaintiffs,

[12] Plucknett, pp. 567-68; *Pollock and Maitland*, II, pp. 406-414; Doris Stenton's comments in *RJL*, *c*. 942.

failed because the alleged dispute had occurred before the time limitation set for that court, which the litigant had probably not understood. Similar ignorance confounded women who thought to provide for a child or partner by bequeathing them dower land, which was not heritable.[13] The disappointed party in these cases was often left destitute. The same misfortune could befall children who were not their father's heir and for whom no parental provision had been made. This affected all priests' children who were illegitimate, priests being theoretically celibate and therefore childless, and as such could not inherit.[14] Occasionally, there is an indication of the bench's pity for such a child and an attempt to ameliorate his situation. As it was not necessary for the clerk to note such interventions, they may have happened more frequently than recorded and resonate with the judicial concern for the delivery of due process with mercy which permeates the rolls. The same approach can be discerned towards married women who flouted convention by bringing an action without mentioning their husband. The bench supported defendants who objected to a case proceeding in these circumstances, as they almost always did, unless there were mitigating circumstances. These are likely to have been because the husband had simply failed to return from legitimate service overseas, a possibility known to the court although not recorded. Otherwise, there was strong disapproval for lone married women who sought to litigate on their own behalf.

The court also seems to have disapproved of litigants who tried to manipulate the assize for their own dubious purposes, suggested by the imposition of large amercements. The evidence is circumstantial but there are sufficient examples to indicate a pattern. Similarly, there are groups of cases successfully

[13] Plucknett, p. 362.
[14] Brundage, pp. 183, 226; John Baker, *An Introduction to English Legal History*, 4th ed. (Oxford: Oxford University Press, 2007), p. 489.

brought by, on the whole, smallholders against lords who were routinely amerced in sums which, while not unduly large in themselves, were significantly greater than the damages awarded to their tenants. These may hint at seigneurial attempts to depress their low-ranking free tenants into villeinage through the assize, which also incurred judicial displeasure. There is every indication that justices as a group were determined that novel disseisin, and the *curia regis*, should not be exploited by self-interest groups. Their attitude would have been marked by the lower ranks of society and strengthened their belief in the king's concern for them. These observations have been noted at various times by historians, but they have not been systematically studied from a litigant's viewpoint and evaluated for their effect upon commoners' use of the national law. If the assize had been applied to the letter, with no regard for the spirit, it is unlikely to have achieved the wholesale popularity it is known to have enjoyed. The discretion and flexibility of the bench enabled the integration of the royal reforms with the expectations of the commoners they controlled, and facilitated the expansion of the new legal system.

In one respect, however, it has been found that the courts were prejudiced: that is, in giving the benefit of the doubt to litigants whose claim to freedom was challenged but not disproved. It is difficult to study the novel-disseisin cases in the plea rolls and not identify numerous examples of *favor libertatis* (a bias to liberty) on the part of justices, although this view is strongly contested in the historiography.[15] However, when faced with a plaintiff of dubious status, it was incumbent upon a court to decide one way or the other. They had no further option. There was also a more than usually pressing need, because of the

[15] Vinogradoff, pp. 83-85; Paul Hyams, *King, Lords and Peasants in Medieval England: The Common Law of Villeinage in the Twelfth and Thirteenth Centuries* (Oxford: Clarendon Press, 1980), p. 218; Stroud Milsom, *A Natural History of the Common Law* (New York: Columbia University Press, 2003), pp. 140-41.

confusion over what constituted villein status, for the courts to show consistency in their decisions on this issue. There was therefore an obligation upon them to favour either liberty or servitude whenever they had to make the choice. This point is neglected in the historiography but it is a logical sequitur to the problem before the justices and in accord with the systematic legal process found in every other aspect of the assize. It can be no surprise that they favoured liberty. They were well aware that freeholders of every degree could fall on hard times, whether through external circumstances or improvidence, and their profound concern that they should not thereby be consigned to servitude is well known.[16] They must, as lords, have regretted their inability to precisely identify the status of those before them, for the potentially damaging effect upon the manorial system. It is believed that their bias was not an indicator of a desire for equality but, in their view, the less damaging of the only two choices they had in coping with an unforeseen and problematic situation.

Commoners' perceptions of the assize

The single telling indicator of commoners' opinion of novel disseisin, and of the *curia regis* before which the assize was heard, lies in the very large number who took out the originating writ. They approved of it in their thousands from its issue.[17] The reasons are well rehearsed and not contentious, the most significant being that it brought them as nearly into the king's own presence as it was possible for them to be.[18] They trusted him and had faith in his system. The

[16] Hyams, *King, Lords and Peasants*, p. 206.
[17] Sutherland, p. 1.
[18] James Masschaele, 'Town, Country and Law: Royal Courts and Regional Mobility in Medieval England, c. 1200-c.1400', pp. 127-144, in *Survival and Discord in Medieval Society; Essays in Honour of Christopher Dyer*, ed. by Richard Goddard, John Langdon, and Miriam Müller (Turnhout: Brepols, 2010), p. 130.

assize's continuing popularity over the following centuries shows that, on the whole, they were not disabused. Their perceptions of it reflected the attidude of the *curia regis* towards them. However, it has also to be said that those who put their trust in princes without regard to the requirements of the law, probably through a combination of ignorance and naïvety, fell foul of both. The rolls are full of brief accounts of plaintiffs' failed attempts to sue under the action. The reason can be inferred from some, usually that the dispossession had occurred before the time limitation as noted above; others are a matter of conjecture, perhaps that the plaintiff was undeniably unfree. Yet they seem to have been no deterrent to the legions that followed on, many of whom doubtless profited from their predecessors' mistakes. There is certainly evidence of plaintiffs willing to learn from their own errors, if given the chance; for example, by taking advice over the type of writ required and returning with the correct form.

The many examples in the rolls of individual ingenuity and courage on the part of alleged villeins against lords, and of actions between poor freeholders, indicate that commoners did not consider themselves inferior at law, no matter how impoverished or even destitute they were. Even former freeholders who had been deprived of their land, for whatever reason, brought the assize. It is also clear from litigants' circumstances that poverty was by no means synonymous with insolvency. Frequently, one smallholding litigant was awarded small damages in the pence or shillings and the other fined the standard amercement of half a mark. The determination of materially disadvantaged people to risk such a potential cost is further evidence of their preference for royal justice over physical redress. No difference has been found between the attitudes of men and women in this, but at the same time more female than male litigants appear to have suffered particularly straitened circumstances. This seems likely to have been due to their

vulnerable position under the system of patrilineal inheritance which degraded the landholding authority they had enjoyed under the earlier kin-based system. Nevertheless, they exhibited the same determined qualities as their male counterparts in property disputes, often over dower and inheritance against family members, and evidently did not view the courts as prejudiced against their sex per se. Where, as wives, they fell under the convention of coverture, the majority seem to have been content to operate within it, although there may be examples of some who found ways to circumvent it. Their apparent acquiescence may have been due to the strength of their position at law as property holders, which was observed both by the courts and their male kin.

Final remarks

When the records of novel disseisin began, the assize was still in a state of flux. The looser discipline in the time-span of this study, when the details of the common law regarding villeinage, impoverished litigants, and women's property rights were being painstakingly tried and tested, may have enabled the positive and vigorous response by commoners to the government's legal reforms. They were rewarded by: a law that was meticulously worked out in the first instance, although later found to be wanting in some aspects, particularly villeinage; by a judiciary whose approach was, for the most part, professional and principled; and by a body of clerks who, again for the most part, showed neither gender nor social bias in their accounts. Taken together, the information in the rolls of that time illuminates a period of optimism and achievement in the furthering of English civil society through the common law, within medieval parameters, by, on the one hand, successive kings and their legal counsellors and, on the other, litigating commoners.

Much remains to be extracted from these records. While there is no doubt that medieval commoners seized the opportunity to resolve their property disputes through the assize so soon as it was offered to them, for all the reasons rehearsed throughout this thesis, their corporate action nevertheless sits strangely with their society's unenviable reputation for violence. On the other hand, even in civil cases, legal resolution is not necessarily synonymous with an absence of pre-existing force. Bracton is keen to separate the two, which may be an indication of the prevalence of the latter. The relatively few accounts there are of violent disseisin may be an indicator not so much of its rarity per se as of the extreme nature of particular circumstances. Bracton makes much of the requirement upon the dispossessed not to recover their property by force, although he qualifies that, but he says nothing about the force which the disseisor may have used. It was irrelevant to his purpose, for his concern was solely with subsequent actions. However, that is balanced by a second theme of the treatise; that dispossession *sine iudicio* (without a judgement), even if not violent in physical terms, was a violation of a tenant's right to the peaceful enjoyment of his holding. The nature of the violation altered as society became increasingly stable through Henry III's reign, despite its problems, causing the nature of the assize to change with it. It suggests that a comparison of the records between the early and late thirteenth century would be instructive in the degree and nature of the violence of those times around property disputes.

The influence of Magna Carta on the evolution of novel disseisin is obviously of interest. Again, a study of the differences and similarities in the action's records before and after 1215 would be valuable, having regard for the variable influences on society of, inter alia, civil unrest, the weather, and increasing commercialization, as the century progressed. The Great Charter has

become a symbol of equality under the law but at the time it excluded perhaps half the commoners of England because they were not of free status. How significant was it, then, for the advancement of the common law as a whole, and particularly for the delivery of justice to commoners? Similarly, does it have any relevance for the legal position of women? Coverture seems to have tightened in subsequent centuries. That being so, how does the difference in legal attitudes to the sexes fit into the development of the law as the supreme arbiter of English society as a whole? Its consolidation seems to have proceeded despite the legal repression of at least half the population. On the other hand, the efforts of the legally disadvantaged to achieve parity with their betters, aided by enlightened thinking within the élite, may have had the effect of strengthening that process. The rôle of commoners in the evolution, as well as the foundation, of the English legal system remains an exciting field of discovery.

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