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## Henry II and the English Common Law

### Lecture:

### Henry II and the English Common Law.

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### Plantagenet Society of Australia. 20 July 2002.

The personality of Henry II, his great energy and aptitude, the length of his reign and the success of his kingship have made him the subject of fascinated attention for eight centuries, usually revolving around his conflicts with the church and with Thomas Beckett, the close associate and Chancellor whom he caused to become Archbishop of Canterbury, followed by years of severe conflict which the king did not foresee and a tragic outcome for which he has largely escaped historical responsibility. King Henry has also claimed attention because of the breadth of his dominions and powers, the energy with which he maintained them, and the conflicts in his personal life with Queen Eleanor and with his sons. I am not concerned so much to speak about his personality and political career as to depict something of the law of England as it was in his time, and of the impact he made on it, and to point to some threads of connection between the law of his time and the continuous development of the English Courts of Common Law and of the Common Law under their care. Uninterrupted threads of development can be seen from his time to our own and from England to the law in Australia, and undercurrents of continuity lie beneath unrecognisable transformations in the form and function of institutions over centuries.

It is perilous to point to a particular time or event as the point when some institution began. It is always possible to find something which was there earlier and to say that what took place was a development of it. Henry II can be given large credit for the development of a royal court staffed by professional judges and functioning throughout England in regular circuits. He also had a large part in making trial by jury one of the institutions of the common law. He promoted the continued existence of properly staffed courts which were not assembled to meet the needs of a particular controversy but functioned as a regular part of the government of the country, and by doing so he promoted the development of the common law of England. However it cannot be said that he invented these institutions.

King William and his Normans in conquering England claimed to be acting as of right, with a show of legitimacy for William's claim to be the ruler of England, supported by a commission from the Pope, and while their conquest was extremely disruptive of English society, it was the Normans' claim that it was not, and that local institutions were continued.

I will give a speculation on what arrangements may have existed for government in a Germanic war band as they swept across the frontier which the Romans had held for centuries, defeated the unpaid and dispirited legionaries and settled themselves in the territory of the empire, not thinking that they had destroyed the world of government and prosperity, but supposing that even though they behaved as they did, they could enter it and share its benefits. What a disappointment! The war band may not have had a king, but it can be supposed that they gathered around a leader, or a few leaders of strong arm and nimble wit, in a band composed of about a hundred warriors. If there are more than that the organisation is incoherent, fewer and no-one takes any notice of you. As a speculation, bands like these formed the Angles, Saxons and Jutes who conquered England and settled in it; a band or hundred found its own district, and many hundreds joined together formed a small kingdom under the headship of a king, or of an under-king or subregulus. By processes which are no longer known, England came to be divided into shires and hundreds; each shire having been, at least in theory, at one time a small kingdom or having been cut up out of one. To shear or cut up is one of the etymologies offered for "shire", although not favoured by the Oxford English Dictionary.

By the time of the Conquest much of England was divided into shires and counties which were continuing political entities and had existed for centuries, and conducted much of their own government, under the control of a Royal officer, the reeve or sheriff. In many ways the county governed itself; the men of the county assembled fairly frequently, twice or perhaps four times a year, and under the presidency and activity of the sheriff collected taxes, placated the king's demands and resolved disputes; as far as there was a court, the county, that is the assembly of the men of the county under the presidency of the sheriff, was the court. Each shire had its own folk-ways, traditional rules, customs and liberties. Law was not uniform and there were no institutional processes which worked for uniformity throughout England. Kent had markedly different law on entitlement to land on the death of its owner to other counties. Some districts including some boroughs had a different system

again. The eastern counties which had been settled by Danes had different customary law to shires where English settlement had taken place much earlier.

The county was not the only court. The men of each Hundred formed a court, a smaller version of the County Court. The king could impose justice when so minded, and he decided what was just before so doing, but it is unlikely that there was much consciousness of a line between royal justice and politics. Many other institutions administered justice; custom, past royal grants and asserted royal grants in the distant past created many instances when local magnates or local bodies exercised powers to punish offenders and redress wrongs. Many magnates and many towns and districts had liberties, that is, powers to punish, for example murderers caught red-handed, or thieves caught with stolen property on their persons, and they acted without anything which we could recognise as a trial or hearing. According to the old English law, the outcome of most criminal cases in the county court, and in any other of the courts which claimed power over criminal cases was to ascertain and require the payment of the appropriate compensation, which could be an extremely complex affair, based on laws and scales of compensation which originated in Anglo-Saxon times, very various, local, and highly dependent on circumstances. When the compensation was ascertained it was to be paid; if it was not paid, the accused would be enslaved, hanged or mutilated. There were few certainties about criminal justice.

It was a Norman claim that they continued English law as it was at the time of King Edward's death. In 1072 a sitting of three days of the County Court at Penenden Heath in Kent heard many disputes about land ownership between Bishop Odo, Earl of Kent and Archbishop Lanfranc, both Normans. The assembly met for several days of debate in which, in some way in which we cannot clearly see, the rights in question were argued out or reasoned out. People who were said to know the law were brought from great distances to contribute to the debate. Bishop Geoffrey of Coutances was appointed by the King to preside.

The Normans brought with them and imposed an institution largely new, interpreted and named in retrospect as feudalism. The perception that there was a feudal system and that it was imposed with the Conquest is a perception formed centuries later. To the conquering Normans nothing was more natural than that English nobles who resisted them should forfeit their land, and that William should grant it again to people on whom he could rely. William was the rightful ruler and English owners who resisted him were rebels and outlaws. The process of conquest was not completed at Hastings and continued for some years; not all English noblemen who held land forfeited their land; but most of them did. After a generation there were very few of them left, and for practical purposes all persons of wealth and influence were Normans or as they referred to themselves, French. Although this is not exactly what happened, the legal theory of the Normans was that with the Conquest William had become the owner of all land in England and that he granted it out to his own tenants in chief, who were in a bond of faith with him. His tenants in chief entered into feudal bonds with him supported by oaths on sacred relics, by which the tenant in chief became William's man, swore fealty to him, received a grant of land and promised to render service to the king. The advantage to the king was that he had a loyal follower who had an interest in the peace and prosperity of the land granted, and had an obligation to provide service to the king, assisting the king to fight his wars and maintain his kingship. The most usual service was knight service, the duty of the landholder to serve the king, arrayed as a knight, when the king required his services. The obligation was not limited to the personal service of the landholder himself. William had about 180 tenants in chief and each of these owed the service of an established number of knights, sometimes as many as 100 and sometimes one or two or some small number, usually in multiples of five, depending on what military force the land granted could be expected to support.

In later times services of other kinds became common, such as acting as the king's chamberlain or as his marshal, or taking some other high responsibility in the kingdom, or humbler services, as an example of humility, providing a sergeant for the whores of the king's army, Pimp Tenure, or nominal services, providing a horseshoe or rose annually, or a peppercorn. But in the age of the Conquest what the king required was armed knights, not the graces of life, and a grant of land for knight service meant what it said. In a part of England which was relatively peaceful a tenant in chief could get on with managing his manors, maintaining his knights and his family, and living off his property; but the closer a manor was to dangerous territory such as Yorkshire, Scotland or Wales, the more continuous would be the need to be in arms and to fight. A landowner must maintain knights to accompany him and to perform his service. In the earliest days the knights maintained were horse soldiers of practically no means and no great dignity; and the word "knight" comes from an English word which referred to a young retainer. Most of them must have been violent savages lacking grace or wealth, rapacious, dangerous to be near and poor company to anyone who was not very much like them. The summit of the ambitions of a landless knight was to gain recognition for success in conflict and be rewarded perhaps by a grant of land, perhaps by marriage to an heiress or widow; widows were plentiful. A more

realistic ambition would be to survive his next conflict and steal something valuable. The Latin word for knight, 'miles' meaning soldier, is a clear indication of what a knight was. The age of chivalry still had not happened, if it ever happened. Conflicts were frequent, with the Scots, with the Welsh and within England. There were rebellions, and the North of England was a recurring scene of savage conflict.

King William granted land to or accepted direct feudal relationship with about 180 tenants in chief. The size and value of the holdings of tenants in chief varied greatly. The greater tenants in chief usually held land in a number of parcels, scattered widely in different parts of England. Many also had fiefs in Normandy; kings of England were often Dukes of Normandy although there was no necessary connection and at times they were separated. The larger holdings were sometimes called Honours, sometimes Baronies. To own one was to be committed to ceaseless activity to manage one's property and defend it in a tumultuous society where borders were ill-defined, border fighting was continual, rebellions happened recurringly and there were sudden conflicts in association with successions to the crown. There was some logic in having widely separated manors, some in relatively peaceful areas. To get the economic benefit and to protect them, the owner was committed to travel. In particular the king was committed to travel around his dominions to use the resources of his own scattered manors, and to exert his presence and power. Two or three times a year the king would display himself at an assembly of the powerful, wear his crown in public and attend to public business. On these occasions, and no doubt on any occasion when access to him could be gained, claims would be made for the exercise of his power to redress wrongs and achieve justice.

In the logic of feudalism, the person to whom the king has granted land, who has entered into a bond of homage and fealty, is the only person who can own that land; if that person rebels or dies, the king has no tenant and can keep the land or dispose of it. This logic never worked in all practicality. In the logic of feudalism, land could not be sold: the feudal bond between feoffee and lord was personal. But sales took place, in the form of surrender to the king and regrant to the buyer; so the king was a party to the sale, and his participation was purchased with some advantage to him. Or sales took place as purely personal arrangements: if the purchaser was challenged he called on his vendor to warrant his title, as to the rest of the world the vendor was still the owner. Tenants in chief who rebelled or committed other crimes against the king ended their feudal bond and forfeited their land; the king could retake it if he had the power. Many tenants in chief forfeited their estates through rebellion or unfaithful behaviour; a powerful man faced many conflicts, particularly if he held land in several different kingdoms, or held land in England and in Normandy at a time when they had different rulers. But Norman barons, like other people, wish to have their lands available after their deaths to provide for their widows and daughters and to descend to their sons. If society is to function and loyalty is to be gained, this wish has to be granted. The logic of feudalism could not prevail, and it was the custom, or the law, or something in between, that the king had to accept the heir of his deceased tenant in chief if the heir would also do homage, swear fealty and make a large payment, called a relief, to be accepted as the new tenant in chief. Where the son and heir was a minor, or where the deceased left a widow or daughters, they were in the king's wardship, the king would care or make provision to care for the minor, collect the revenue, and when he reached a suitable age, collect a relief and admit him as the new tenant in chief; or would arrange for the marriage of the widow, or arrange for daughters who were heirs to be married to some person who could be relied on as tenant in chief. A claim that an heir has rights which the king must recognise is a challenge to the king's own interests; he wants the land to be held by someone capable of fighting for him, not by the tenth possessor of a foolish face. Laws identifying heirs and their rights grew slowly, and the succession to the crown in Norman times illustrates that there were not settled rules identifying with certainty who the heir was, or dealing with such cases as where a man is survived by daughters, but has a brother, or has a nephew who is the son of a deceased brother; and so forth.

King William provided himself with entitlements to the service of about 6,000 knights. As the knights were to serve for 60 days, (but later 40 days) each year, this gave him an entitlement to raise a large force for a few months, averaging out at about 1,000 knights all the time. But knights, like everyone else got old, got sick, or did not want to fight again, and were open to financial arrangements in lieu of service. Soon arrangements appeared for paying money instead of actually rendering knight service; paying scutage or shield tax instead of actually serving under arms, and paying castle-guard instead of garrison duty. In one way or another many entitlements which could be expressed in money accrued to a Norman king. He needed officers to collect these, principally his sheriffs in every shire. He needed an administration to keep track and to see to enforcement of his rights.

The system for administering justice functioned in different spheres. One was the continuation of the old system in which the counties administered themselves and the assembly of the county was a court of justice as well as the means of self-government. The county is a court; disputes present themselves there and they get resolved under the presidency of the sheriff at the meetings at the county town several times per year. Such was the theory, although disruptions were frequent and many disputes

must have been resolved by local politics rather than any attempt at the justice. Another was the profusion of local liberties, jurisdiction vested in local lords or boroughs. The rights of the king, particularly in what we call the feudal system, do not fit easily within the county administration. The king could not attend County meetings and submit his rights to the judgment of the men of the shire: not with hope of success. The king needs officers and a system of administration of his own if his rights are to mean anything. In the logic of feudalism the king and his tenants in chief are a court; he is entitled to the service and support of each tenant in chief, in fighting his wars and enforcing his will, and also in giving him counsel and assistance in many matters, including deciding disputes. The king with such of his magnates and high officers as he chooses to associate with him in the process are a court for decision of disputes about entitlements to lands held of him, or about obligations arising out of them; recording and enforcing forfeitures caused by rebellion and crime, and allocating inheritances. These are functions which a feudal king could not avoid and could not leave to the courts which continued from before the Conquest.

The king also necessarily was involved in some criminal law. Local authorities could be relied on to pursue thieves and murderers, and to hang them on trees where their conduct was flagrant; it was also open to private persons to prosecute criminal cases by a process called Appeal; but some crimes specially touched the king himself. Crimes by tenants in chief which broke the feudal bond and resulted in escheat, in which a fief fell back to the king, must be punished by the king. Then too, some areas were specially within the king's protection; the verge, meaning the area of a few miles around where the king actually was at the time, was protected by his authority and crimes within it, of whatever kind and by whomever, were punished by royal power; they were within the king's peace. As time passed the king's peace was extended further. It was extended early to all the main roads of England, and with the growing effectiveness of royal judicial power it was extended to all parts of England. A very early extension was to all Normans; if someone was found dead any criminal business arising out of the death was left to the shire to deal with; but it was early established that it was an obligation of the local community to prove that the deceased was an Englishman, meaning not a Norman or as the Normans said, not a Frenchman, and it was the responsibility of the local community to swear to this; to make a Presentment of Englishry.

The tenants in chief were not the only persons to own land in fee. A tenant in chief could himself grant land, to someone who gave him obligations of homage and fealty and undertook to perform services as part of his feudal bond. Each mesne lord who granted land by subinfeudation encumbered himself with the administration of the rights he had created, with the need to hold a court to deal with surrenders, regrants, forfeitures and disputes, and with the right to the attendance and participation of his own feoffees in the business of his court. By sharing in a decision they shared in responsibility for it and in a way gave a guarantee that it would be enforced. A tenant in chief with an obligation to provide, say, the service of five knights might subinfeudate land to a tenant of his own who undertook an obligation to provide the service of one knight; not indeed to provide it to the intermediate or mesne lord, but to provide that service to the king. English feudalism did not give anyone but the king the right to knight service. With passage of time the complexities became great. There could be, say, three or four levels of subinfeudation. Services may be different at different stages. At the bottom might be a tenant in common socage, who is not obliged to render military service, but is obliged to make payments to someone higher up, who uses the payments, among other things to meet an obligation to provide knight service. For some the obligation may be to provide the service of half a knight or some other fraction; land subject to the service of two knights may have descended to three daughters, each of whom may be obliged to provide a fraction of a knight. Someone down the chain may have died without heirs, leaving his interest to escheat to the mesne lord, or if he rebelled, to escheat to the king. The king may come to be the owner of a piece of land with feudal obligations to one of his own tenants. Obligations may have been divided up into fractions among many people who held parts of the land out of which the obligation issued; one may pay his share but find distress levied on his goods when someone else did not. By the time of Edward I two centuries after the Conquest, the feudal system was becoming incoherent, further creation of feudal relationships was stopped and land could simply be assigned. There was no such law in Scotland, where subinfeudation continued until recent days. When inflation came, much later in the Middle Ages, obligations measured in money became nominal and were forgotten.

Below these 180 tenants in chief and the feoffees who held from them was the world of ordinary people, difficult to number, but perhaps one million of them. In the countryside most people lived on manors and were tied to them by their villein status. Land within manors was held in a system of grants, surrenders, rights of succession, rights of dower and customary entitlements administered by the lord of the manor, or by his steward, in a court of his own, and under laws and customs special to each manor. Not for centuries after King Henry did the common law and its courts give any protection the manorial rights of villeins. Everybody had to be within the law; otherwise he was an outlaw. To be within the law, one had to be an accepted member of the household of a magnate who was

responsible for one's good behaviour, or an accepted member of a vill, or of an incorporated city or borough, of which there were at first very few. It was the yearly duty of the sheriff to attend each vill, or to send a deputy, summon the inhabitants and obtain a report on oath of the persons who lived there and of their being accepted members and law-abiding. This was the View of Frankpledge. The vill had responsibility for misdeeds by its members and for crimes and untoward events within its territory and could be punished collectively, by fines or otherwise. Almost all inhabitants of the countryside, if they did not own land in fee, were villeins, with inherited obligations of service which they could not escape. Cities and boroughs had special and direct relationships with the King; they had been given privileges by him, actually or in theory, at some past time and owed him special obligations of payment or service which were defined by the grant.

Beside all this existed a parallel world of government, the Church, with its own powerful men, archbishops, bishops and abbots, an array of churches, abbeys and manors, and a hierarchy at the head of which was the Pope far away in Rome. All had rights and revenues of their own, and a claim to stand apart from temporal rulers in the exercise of authority over every person, including kings themselves. The claims of the Church were very wide, and extended to claims that its clergy should be exempt from the power of kings and other authorities, including the power to punish crimes. Abbeys and Episcopal sees held much land, some of it Free Alms, without obligations of service such as knight service, but much of it Lay Fee, and subject to whatever obligations were attached to it when the Church acquired it.

For a Norman king it was not enough to have the service of 6,000 knights. Maintenance of the king's interests and his revenue required that the king have officers of his own and means of establishing information about his rights and enforcing them. In addition to armed force and personal authority the king had three things available to him; he had officers whom he appointed, including his familiares, his official family which attended him whenever he went, and his sheriffs in each shire (and some may have had several shires at once); he had the knights, who were present throughout the country and owed him homage and faith for their land and who had a strong interest in the success of the regime; and he had the local inhabitants who had lively fears of God and of their Norman rulers and could be summoned and required to swear to the truth of local affairs. Putting these resources together, King William required the compilation in 1087 of the Domesday book, a huge assemblage of information, most of which was directly or indirectly about rights of the king, assembled by commissions of trusted officials and knights who required the local inhabitants to swear to the state of the rights which had existed in the reign of Edward the Confessor. Collection of information in this way on the oath of persons in each locality, referred to as an inquisition, can be seen as an early form of establishment of facts by the finding of a jury; this however, is not a completely accurate or comprehensive account of what took place, and there is not a direct connection with what later became jury trial.

I illustrate the Domesday Book and its processes with some extracts. The first is the introductory words of the Return from the inquisition in Cambridgeshire.

*Here is written down the inquisition of the lands [of Cambridgeshire] as made by the king's barons. namely, by the oath of the sheriff of the shire; of all the barons, their Frenchmen, and the whole hundred [court]; of the priest, the reeve, and six villeins of each vill. Then [is set down] how the manor is called, who held it in the time of King Edward, who holds it now, how many hides there are, how many ploughs in demesne, how many ploughs of the men, how many men, how many villeins, how many cotters, how many serfs, how many freemen, how many sokemen, how much woods, how much meadow, how many pastures, how many mills, how many fish-ponds, how much has been added or taken away, how much it was worth altogether and how much now, and how much each freeman or sokeman had or has there. All this [information is given] three times over: namely, in the time of King Edward, when King William gave it out, and how it is now – and whether more can be had [from it] than is being had.*

The Return lists the names of the representatives of each Hundred who swore to the facts in the Return.

The second extract is some of the information about the manor of Leominster, which fell in to King William when Queen Edith, the widow of Edward the Confessor, died.

*The land of the king. . . . The king holds Leominster. Queen Edith held it. . . . In this manor . . . there were 80 hides, and in demesne 30 ploughs. In it were 8 reeves, 8 beadles, 8 ridingmen, 238 villeins, 75 bordars, and 82 serfs and bondwomen. These together had 230 ploughs. The villeins ploughed 140 acres of the lord's land and sowed it with their own seed grain, and by custom they paid £11. 52d. The ridingmen paid 14s.4d. and 3 sesters of honey; and there were eight mills [with an income] of 73s. and 30 sticks of eels. The wood rendered 24s. besides pannage. Now in this manor the king has in*

*demesne 60 hides and 29 ploughs; and 6 priests, 6 ridingmen, 7 reeves, 7 beadles, 224 villeins, 81 bordars, and 25 serfs and bondwomen. Among them all they have 201 ploughs. They plough and sow with their own grain 125 acres, and by custom they pay £7. 14s. 8½d.; also 17s. [worth] of fish, 8s. of salt, and 65s. of honey. In it are eight mills [with an income] of 108s. and 100 sticks of eels less 10. A wood 6 leagues long and 3 leagues wide renders 22s. Of these shillings 5 are paid for buying wood at Droitwich, and thence are obtained 30 mitts of salt. Each villein possessing ten pigs gives one pig for pannage. From woodland brought under cultivation come 17s. 4d. An eyrie of hawks is there. . . . Altogether this revenue, except the eels, is computed at £23. 2s. This manor is at farm for £60 in addition to the maintenance of the nuns. The county says that, if it were freed [of that obligation], this manor would be worth six score, that is to say, £120.*

These excerpts give a brief glimpse of a society which was not governed only or even largely by power and force. Elaborate schemes of definition of rights existed, everyone expected to get right and justice, and often they did; but with huge exceptions arising from the generally disordered state of the kingdom. If people were to receive justice according to what they expected it was necessary that there be internal peace and order, but very frequently there were not. A common point of reference was the state of affairs in the time of King Edward the Confessor, particularly on the last day of his life.

The Conqueror apportioned Normandy to his first son Robert and England to his second son William Rufus; this apportionment was made good by determined action of Rufus, who held his kingdom against several rebellions, and later received Normandy as mortgagee in possession when his elder brother went crusading. Rufus distinguished himself by military capacity, rapacity for money and habits of careless blasphemy and disrespect for the church. He governed Normandy better than Robert had. On Rufus' sudden death while hunting, his younger brother Henry, who was a member of the hunting party, seized power in England and established himself by astute measures, including marrying an English princess, and addressed conflict with his elder brother Robert, who had claims both to England and to Normandy. Henry I was hardly challenged in England and in 1106 conquered Normandy. He reigned for 35 years with, on the whole, internal peace and with great competence in government, one aspect being his ability to recognise competent officers and promote them to high places, however humble their origins. His long reign provided stability and institutionalisation of means of enforcing the financial rights of the crown through a government department called the Exchequer. He also began the institutionalisation of his court and made the beginnings of continuity in the service of justices and their circuits throughout the country to hear cases in which the royal power was involved. As judicial records of this period have not survived, we do not have a complete picture of what took place but depend on references which remain in other sources of which preservation of a complete and accurate record was not the main purpose. What we know of judicial business in this period depends on references in chronicles, abbey records or other incidental references. Accounting for revenue in the Exchequer was the occasion for determination of disputes by officers of the Exchequer and the beginnings of one of the courts of common law, the Court of Exchequer, which existed in later centuries. By chance the Pipe Roll recording the exchequer records of 1131 has survived. I set out a small part of it to illustrate what it records.

*Lincolnshire. . . . And the same sheriff renders account of 1m. of gold for the weavers' gild of Lincoln. In the treasury £6 in place of 1m. of gold. And he is quit. . . . Lucy, countess of Chester, renders account of £266. 13s. 4d. for the land of her father. In the treasury £166. 13s. 6d. And she owes £100; also 500m. of silver that she need not take a husband inside five years. And the same countess renders account of 45m. of silver for the same agreement, to be given to whom the king pleases. To the queen 20m. of silver. And she owes 25m. of silver. And the same lady owes 100m. of silver that she may hold justice in her court among her own men. . . . The burgesses of Lincoln render account of 200m. of silver and 4m. of gold that they may hold the city of the king in chief. . . . Lambert Fitz-Peter renders account of one palfrey for the land of his father. In the treasury 30s. in place of one palfrey. And he is quit. . . .*

It seems that Lucy inherited estates in Lincolnshire from her father the Earl of Chester and paid a large relief for the land, so that she would be accepted as the heir, and an even larger sum to be free for five years from the king's right to give her in marriage. Perhaps she found someone of her own choosing in the five years; if she did, she would have to persuade the king to give her in marriage to the man she chose. The revenue opportunities are clear enough.

In the time of Henry I the King's court and royal justice began to assume some regularity. The power was essentially the King's, and he with magnates and officers, usually several barons and prelates, would hear the litigation of the magnates of the kingdom and give judgment on them. He would sometimes send an officer to preside in a county court, for a session of the court or perhaps for a particular controversy. The law to be applied cannot have been precise or readily ascertainable, as those who could know English law were the freeholders attending the county court, who knew the local customs and local history, while the king and his officers can hardly have known them and for some generations would have not have been able to speak English. The King's Court had the power to call

up litigation from other courts to hear and determine it. Many landowners, abbeys or other bodies claimed local jurisdiction and actually exercised it, in cases defined by tradition, custom and by shadowy royal grants from long past times. The closest institution to a continuous royal court with professional staff was the Exchequer, where royal officers held two sessions each year at which sheriffs and other persons with obligations to account to the King for collecting his revenue had the task of explaining what they had done, justifying their accounts and producing and paying in what was due. The royal officers who presided in the Exchequer and decided whatever disputes arose there came to be drawn on when the king sent justices to make journeys throughout the kingdom to hear lawsuits, or to preside at particular county courts.

Later in the century the reign of Henry I became another reference point for a period of stability back to which arguments and claims of right could refer. Henry I was not uniformly successful and in particular could not gain acceptance by his Baronage for his succession by his daughter Matilda or Maud, with her husband Geoffrey of Anjou who would be King and Duke of Normandy with her, but was not acceptable to the Normans as his county Anjou had long been their rival and enemy. Henry's nephew Stephen was able to establish himself as king, precipitating the Anarchy, 19 years of conflict in England and Normandy, in which Stephen on the whole prevailed in England, but did not appropriately exercise the royal power over its barons, while Geoffrey of Anjou conquered Normandy and became its duke. Matilda and her half brother campaigned in England for almost 10 years; and when they were defeated her son Henry began invasions and raids into England, supported by Geoffrey and showing great military ability from the age of 14 onwards. The conflict was resolved by an arrangement in which Henry, who succeeded as Duke of Normandy when he was about 18, would become king of England after Stephen, and Stephen fulfilled this arrangement by dying about a year later. Henry had already accumulated wide lands in Normandy and Anjou, and even more extensive lands in Aquitaine in right of his wife Eleanor whom the French king had imprudently divorced. Henry II became king of England in as favourable a state as could be imagined, 21 years of age, with a proven record of success in war, and already Duke of Normandy with wide lands and great wealth. As a true Norman his life was a long chapter of conflict, in England, conflict with the Scots, in Ireland, as ever with the Welsh, conflict in his lands in France, and as his sons grew, conflict with them.

Some of the sources of disorder of the Eleventh Century had abated: the new Norman landowners had been settled for three or four generations, and there was some improvement in economic prosperity. The knights, or many of them, were more settled; and some had some education. For knights who liked fighting there was still plenty available; but life was developing some graces, some knights could read and participate in the arts of government, attention could be given to ceremony in such things as conferring knighthood, and formal heraldry began to develop. With the accession of Henry II comes a turning in the history of England, away from the period of Conquest and its resulting upheavals towards a new period when the manner of governing England became relatively settled, although not without many more upheavals. Henry II is counted by later ages as the first of the Plantagenet kings, the reference being to his father's coat of arms, which displayed the broom plant. It seems however that the surname Plantagenet came to be used for the family about two centuries later and if Henry had been asked for his surname he would have replied in French to the effect that his name was "of Anjou". He was king for about 35 years, and brought high personal ability, intense energy and competence to the task. His times were not calm or peaceful. The reigns of his sons Richard and John form a continuity of a kind with his, with continuity of institutions and of some of the officers of state, coming to a turning point when in 1217 John died and was succeeded by his son at the age of nine, and his son's protectors confirmed the Great Charter, and opened a new chapter in English history when rights and claims in which the Charter, with more or less justification, entered the political lexicon. To some degree the Charter can be understood as a record of the discontent of the magnates with King John and his government.

Henry's personality and his family conflicts, and most of all his conflicts with the church in the person of Thomas a'Beckett, are the usual focus of attention on his life. I direct my attention elsewhere. Beckett, who had been Henry's chancellor and a layman, became an enthusiastic churchman as soon as Henry imposed him on the church, the first step in his career as a clergyman being his appointment as Archbishop of Canterbury. There were many points of conflict between Henry and the Church in the person of Beckett, principally the power of the King and his court over the Church, its lands and property, and also over its clergy when accused of crimes. During the Anarchy of Stephen little was done by the king to administer justice, and it seems that courts of the Church at times decided disputes on whether lands were owned by the Church or by laymen.

Henry exerted his power and ability in ways which increased his own authority, and increased the power and furthered the continuity of institutions associated with the King: enhanced central power over the existing diffusion of power, and enhanced uniformity of laws over the existing profusion. He did not impose royal will and uniformity of laws, but he enhanced tendencies towards their effective

development. King Henry in 1164 issued a legislative instrument known to history as the Constitutions of Clarendon; according to its terms it was a record and recognition of part of the customs and liberties of his grandfather King Henry and others. It was not an Act of Parliament, as Parliament was still a century away. It declares that it was a recognition, which means something like a verdict or report of an inquiry, made in the presence of the Archbishops, Clergy, Earls, Barons and Magnates of the Realm, and confirmed by promises of the Archbishops and many Bishops that they would be observed. The Constitutions declared many legal rules in terms which gave the King the upper hand over the church, including a declaration that a controversy between laymen and clergymen, and controversies about advowsons or presentations of clergy to churches, were to be decided in the King's court, and a declaration that when clergy were charged with crime they could be tried, or in any event they could, after conviction by a church court, be punished by the king's court. The Constitutions provided for an accusation jury, which seems to be the precursor of the Grand Jury, who were required to state on oath whether a person suspected of crime should go on trial. Appeals to the Pope without the assent of the King were forbidden. The Constitutions stated procedure for trial by what we would, looking backwards, call a jury before the King's Chief Justice of the preliminary question whether land involved in a dispute between a clergyman and a layman is Free Alms, meaning church land, or a lay fee; if the jury said it was Free Alms, the merits of the dispute would go to the bishop's court to decide. This appears to be the beginning of a new form of litigation, an Assize in which an inquisition, which we would call a jury, decided questions about land title. This was the Assize Utrum, meaning "whether"; that is, whether Free Alms or lay fee.

In some legislative act of which we do not have a record Henry made the power of the royal court available to everyone with a dispute about title to freehold land. That is, he made it the business of himself and his court to protect all freehold titles, not only those held directly of the King. Any litigation before a feudal lord could be called up to the King and his court for decision. Any new lawsuit about title to freehold land could be commenced in the royal court, by the Writ of Right. In a striking demonstration of his ascendancy he displaced the rights of feudal lords to decide disputes about lands they had granted by giving litigants the opportunity to bring their claims before the King's Courts. Henry also instituted the Grand Assize, by which disputed rights in such cases were decided by an Assize, an inquisition by twelve knights drawn from the locality where the land was, to decide and state on oath who had the title. This probably occurred late in his reign. There were transforming measures, taking land titles away from the power of the barons into a forum where legal rules and entitlements could have reality. The Grand Assize was the means of trial if the tenant, meaning the defendant, called for it: the demandant had to offer battle so that the defendant might decide to fight him; but it was for the defendant to decide, and actual battles must have been rare. Some instances occur whether the demandant paid the king to have a Grand Assize. The plaintiff – the demandant – had to be prepared to risk that the defendant – the tenant – would elect for combat. However the Grand Assize was seen as a great boon and quickly became the usual method of trial.

The Constitutions of Clarendon, and the uniform upper hand which they gave to the King, set off a decade of conflict with the church in which Henry, further embarrassed by the murder of Beckett, eventually had to yield some, but not all of what was important. The Assize Utrum became a continuing part of the legal scene. The jurisdiction of the Royal Court over clergymen was heavily qualified; what actually emerged was that the clergyman was tried in the royal court and if found guilty was not punished by the royal court but was delivered to the courts of the church for punishment, which could not be punishments of great severity, corporal or capital. This came to be available to clergy only for first offences; then by a curious fiction it eventually became available to most people on their first conviction, the proof that the accused was a clergyman being reduced to the mere pretence of asking him to recite Psalm 51 verse 1, known as the Neck Verse; this however was far in the future.

In 1166 Henry made some more law at Clarendon. Clarendon is not on modern maps; I cannot establish what it was, but it seems that it was a palace or hunting lodge near Salisbury; Henry seems to have done a lot public business there. The Assize of Clarendon of 1166 states that it was made by King Henry with the assent of the Archbishops, Abbots, Earls and Barons of all England. It is openly legislative: it ordains new rules and does not purport to say what have been determined to have been the rules in the time of Henry I. It plainly created the jury of accusation, the Grand Jury in which 12 lawful men from every hundred and four lawful men from each vill are to say on oath to the King's justices and sheriffs whether there is any man accused or publicly known as a robber or murderer or thief in their hundred or vill; or anyone who has harboured them since Henry became king. Anyone so found on oath to be a criminal was to be tried by the ordeal of water, and the trial was to take place before the King in his court and in the presence of his justices, that is, to the exclusion of other and older methods of trial, by the County court or by other private jurisdictions. The Assize goes on at length to make many provisions which reinforced the primacy and effectiveness of royal justice.

The third major piece of legislation for which we have the text was the Assize of Northampton of 1176.



The Assize detailed many things. It required heirs to pay reliefs and perform other feudal obligations to feudal lords, so the rights of the feudal lord were not only protected by his own court and his own power, but also by the King. It provided for the widow to have her dowry; so she too could sue before the King. It re-enforced royal criminal justice with savage penalties. It stated the rights of heirs of a freeholder to seisin, which I will render, not completely accurately, as possession of the land of a freeholder who died. If the feudal lord denied that the deceased was seised of the property, the King's justices were to obtain a recognition by 12 lawful men as to whether the deceased had seisin. This was the Assize Mort d'Ancestor. The Assize also made provision for Novel Disseisin, meaning recent dispossession of freeholder, to be remedied in the same way. In some way a similar remedy was given for the entitlement to present a new incumbent to a church: this was the Assize of Darraign Presentment. These were the Petty Assizes.

The Assize of Northampton was a far-reaching change in procedural law for disputes about land titles. The Petty Assizes, also called the Possessory Assizes, decided only whether a freeholder had been seised of land when he died, in which case his heir was put in seisin, or whether a freeholder had been disseised, in which case he was put back in seisin. The underlying rights of the matter were not investigated. If the freeholder who died should not have been in possession and was not the true freeholder older procedures for establishing the rights of the matter could be followed. The older procedure was the Writ of Right; the demandant obtained the writ from the King, and the tenant or defendant was called before the King, or the King's Justiciar or his justices, and there the merits of the matter were argued out, in such a way that in many cases the dispute was resolved after a debate about the merits of the parties' cases. It was common for a Final Concord to acknowledge the title of one side and record that a payment had been made to the other side. If the parties did not agree and come to a concord, the method of trial was combat, but as I have said Henry II gave the defendant the option of trial by the Grand Assize. In the last resort land title could be decided by the parties' fighting it out, under the supervision of the king or of his justices, either in person or by their champions. There was a kind of feudal logic in awarding the land to the stronger party, but no justice in any other sense.

The traditional Norman method for the trial of disputes about title to land was trial by combat in the Court of the feudal lord who had granted the title in dispute; if the land was held in chief, the feudal lord was the King, but if it was held of a mesne lord the King and his Court were not, before Henry II, involved. There was also an old and traditional method for settlement of disputes about debts and the other civil claims that could be brought; they were few. In most cases the proper place for such claims to be tried was the County Court. The method of trial was wager of law; complex rules decided which party had the burden of proof or disproof of a claim; that party had to establish his position not only by swearing that his position was true, but also by producing a number of oath-helpers to swear that his oath was reliable. If he failed in this method of proof, he failed in his lawsuit. Claims for debt could be and were disposed of in this way. But before they were disposed of in this way, the court, particularly a royal court, had a close look at what the parties asserted.

Henry's reforms and the Assize of Novel Disseisin and other Possessory Assizes were seen as creating a relatively simple, relatively modern and straightforward intervention in disputes; the effect of a forcible dispossession was reversed and the parties were left to pursue their rights by older and more elaborate methods. As time passed parties lost their taste for methods of trial which involved personal combat, and the Assize of Novel Disseisin came to be the usual means by which disputes about land titles were determined. In later centuries the Petty Assizes also became extremely technical, but that is not part of Henry's history.

Henry's provision of more effective procedure for bringing criminal cases to trial was part of a far-reaching expansion of the intervention of the king and his government in enforcing the criminal law. The old systems continued to exist; where the liberty to act in that way existed, thieves could still be pursued and, if caught with the stolen goods on them, hanged on a nearby tree, as could murderers who were caught red-handed, by the inhabitants of the liberty where the event occurred. By now the King's Peace extended to practically all times and places throughout the kingdom. Although there were few crimes at common law, the King's Peace covered most of the acts of violence which occurred, and the sheriffs or his officers had the means of bringing accused persons before the King's justices and pursuing the accusation.

Royal justice was not however the only means of bringing a criminal case forward. A private prosecution, called an Appeal, although quite unlike a modern appeal, existed in which a person with an interest in the crime could make a public accusation, and the issue if disputed – we can be fairly sure that it was – would be settled by combat. There were many procedural rules and points to argue before the combat took place. A woman who was an appellant or a man over 60 could fight by a champion. To bring an appeal was to initiate a fight to the death, and appeals cannot have been very frequent at any time; when embarked on, they must often have resulted in some settlement or

composition which did not adequately deal with the justice of a crime such as murder. Appeals with the theoretical possibility of trial by combat continued to exist until the 19th century. There are occasional records of combats taking place even as late as Tudor times. Parties fought it out with clubs or sticks with horn tips. Combat also existed in some civil procedures, for which the sticks did not have horned tips. For a person with a real grievance who wished to see a crime punished but did not feel equal to risking his life, there must have seemed great advantages in attempting to set the sheriff in motion to obtain a presentment by a jury and then see the accusation of crime tried before the King's justices.

When tried before the King's justices however there were again primitive methods of determining guilt. The method of trial was by ordeal. Several methods of ordeal are known to us, usually in the form of requiring the accused to hold and carry a piece of hot metal for a few paces, or to place his arm in hot water, then to bind up the wound for some days and see whether it was clean. Everything depended on the way in which the ordeal was administered; participation of the Clergy was required, and control over how hot the elements of the ordeal actually were and how much time was spent chanting prayers and scattering holy water would control the outcome of the ordeal. One of William Rufus' more celebrated blasphemies related to whether the hand of God could truly be seen in an event in which 50 persons whom he felt ought to have been convicted of crimes were all acquitted. When in the reign of King John changes in the law of the Church made it practically impossible to administer the ordeal, the inquisition, in more modern terms trial by jury, was brought into service to determine guilt, on the theory that the accused had consented to trial by jury and had not insisted on his right to be put to the ordeal. The formality was that the accused was asked to plead, and on pleading not guilty was asked "Culprit, how will you be tried." If he then conformed with what was expected of him he said "By God and by my country", "my country" referring to the jury. For centuries it was regarded as indispensable for the effectiveness of the jury trial that the accused should say this. If he would not, he would be placed under heavy weights and pressed until he uttered the phrase, or until he died.

Henry ordained other legislation. Henry instituted an inquest into misconduct of sheriffs who were removed from their offices in 1170, and this served to establish what the duties of sheriffs were and enhance the effectiveness of revenue collection. The Assize of Arms of 1181 regulated many matters relating to knighthood and privileges of knighthood and bearing arms, and the Assize of the Forest of 1184 stated many matters relating to the rights of the king to forests, and to timber and game, and to resist encroachments on forests. These were subjects which generated much litigation, although I cannot deal with them now.

Before Henry II and during his time the Crown did not offer to all its subjects in England any assurance that Royal justice would be available to hear and determine all prosecutions for crime and civil disputes. If the King gave justice it was a matter of grace, not a matter of right. It could be expected that royal justice would be available where the interests of the king were involved, but otherwise the subject had no right to it. There were other institutions to which the aggrieved could resort; they could take their debt claims to the County Court and see matters tried out by wager of law on the oath of a litigant with oath-helpers. For the murder of a near relative they could bring an Appeal and try conclusions by physical force and at the risk of their lives.

To commence litigation was to incur the need to obtain some measure of grace and favour from the King at every stage. To commence a suit the King's writ had to be obtained; it had to be purchased. A Writ was a command in the name of the King to the sheriff to require the defendant to give the plaintiff what he asks, or if he will not to arrange for him to be brought before the King or his justices. Then the plaintiff and the defendant must attend before the King; but the King may not easily be caught up with; he may be in progress to some distant part of England, or he may be fighting in Aquitaine; he may stay there for several years. When the parties do attend, the King may wish to hunt. A rebellion may break out. He may be sick; he may die. He may move to his next manor. The contingency of the whole process is enormous. Then too, the king may appoint justices to hear a particular case; or he may commission justices to hear cases of a particular kind, or at a particular place. He may send justices on a journey – Iter, Eyre – through several counties to hear all cases pending from those counties.

As royal justice was given as a matter of grace, not as of right, it could be withheld. The King's favour could be granted or withdrawn, and it could be purchased. If the King did not wish to hear a case he did not hear it. If he wished his justices not to hear it this year, or not for two years or not ever, he instructed them accordingly. The King's favour could be purchased; for a payment of money the King might direct the judges not to hear a particular case or to hear it straight away. For another payment of money from the opponent he might send the judges a different direction. Where the course of the court provided for one party to demand an inquisition, in our language a jury, to decide some issue, the king might grant it to another party, not entitled according to law. Records of later times, for we do not have detailed records for Henry II, show parties making offers to the justices of so many marks if the King will summon a jury. When judges did hear a case in the absence of the King, they might refuse to

decide the case before consulting the King. When judicial records begin in 1194, they sometimes refer to postponement of a decision until the King has been consulted; - loquendum cum rege. The records of judicial decisions were kept on parchment made of sheepskin; each skin is called a membrane, and is closely inscribed with records of the principal events in lawsuits. All the membranes for a particular court in a particular term were sewn together in one long roll, and preserved. Records were maintained in this way from 1194 until the 19th century; some millions of sheepskins and many thousands of rolls. Some rolls have perished but a great many still exist and continue to receive the attention of scholars. Occasional quotations in the rolls that do exist of records from earlier than 1194 show that rolls were kept some decades earlier, but have not survived. For some centuries the rolls were stored in a cellar under Westminster Hall. The cellar was called Hell and the clerk in charge was the Clerk of Hell. As the cellar occasionally flooded, some of the rolls were damaged and some were lost.

By the time of Henry II it was usual for the King to have one or two Justiciars who were authorised to act in the place of the King and hear and determine disputes, just as the King himself might. As time passed, the regularity with which other persons were appointed as justices also increased, so that by the end of Henry's reign some royal servants can be identified as the group from whom will be drawn the justices to go to a particular place, to go on an Eyre, to hear and determine suits pending before the King. The Circuits of Justices in counties became regular events, and Eyres in response to disorder became more frequent. His justices include bishops and other clergy; but they also include laymen, apparently about equal numbers. In Henry II's time powerful landowners, earls and barons are no longer given this duty. There seem usually to have been about 10 to 12 justices, sometimes more and sometimes fewer. Their careers can be traced by very painstaking attention to the names of witnesses in charters and to other small details of records; persons who earlier in life were clerks or other assistants to justices sometimes appear later as justices themselves. That is to say, a professional judiciary was emerging. The judges were also given duties which to our minds would be administrative tasks; they were part of the King's official family, people whom he entrusted with high responsibilities. But this altered and they became professional judges, persons of education, scholars, often clergy, but just as often educated laymen, sometimes of relatively humble origins, and possibly (although this is by no means clear) including people who had studied law, necessarily in other systems of law, as at the University of Bologna.

The reign of Henry II saw a great increase of the effectiveness of royal government, the power of the king, and the regularity of the operations of his government. By the end of his reign patterns of regular procedure had become well established. There was a regular course of commencing litigation by a writ, the effect of which was to call the parties to the king's court; literally before the king himself, although parties would usually find themselves before the king's justiciar, or several of his justices exercising the royal power in the name of the king. Sometimes the summons was not to attend before the king wheresoever he may be in England, but to attend before the king's justices at Westminster. Cases which more closely touched the king's interests would usually find their way to the king or the justiciars or justices closely attending on the King; others in which only subjects were involved might well be heard before the justices at Westminster. Provision for some justices to sit at and remain at Westminster appears to begin in 1178. In some undefined way those justices had less authority than the justices attendant on the King; but a decision they gave was the decision of the King's court. From this division grew, in a later age, a clear division between the Court of King's Bench and the Court of Common Pleas.

Henry can be credited then with great parts in two things which are central to the development of English law. One was ascertainment of facts by requiring the facts to be sworn to by inquisitions or juries of law-abiding persons representing the local community, who report on oath to the king's justices on the facts of the case. The wishes of parties and the judges moved towards trial by jury, which eventually came to be practically compulsory as the means of trial. The other development was regularising and professionalising the justices to whom the King entrusted the decision of cases, first and principally cases involving his own rights and interests, but also increasingly the general administration of justice in England. With regularity and professionalism came the development of consistency in law and the means of developing law to meet changing times and institutions; the means for a Common Law, common to all England, to be established.

What I have depicted may seem to make a very primitive and unformed legal system. We do not know of any legal profession apart from the justices and their clerks working in and constituting the King's Court. We do not know of any legal training in the system, apart from working in it; the schools which taught law were in Italy, and taught a different system. Yet we have two textbooks from Henry's time which depict a highly developed functioning legal system. One is Glanvill's Treatise on the Laws and Customs of England. Ranulph de Glanvill is the name of the Chief Justiciar for the later years of Henry II reign; it is unlikely however that he actually was the author of the book. He is first heard of in about 1171, fulfilling various public duties, then in 1174, he is found rendering an account for capture and

ransom of prisoners in the war with the Scots, and he is given the credit for capturing the King of Scotland. In 1176 he is found as a justice of the King's court and a justice in Eyre, and in 1180 he is the Chief Justiciar. He was given high responsibilities, including governing the kingdom when the King was beyond sea, as well as his judicial authority. He held other administrative posts, but on Henry's death he left office and went to the Holy Land with Richard on a Crusade, and there he died. The text in his name begins by describing the procedure in the King's Court and the kinds of cases which come to it. The crimes he lists are Injured Majesty such as causing the death of the king or sedition in the realm or in the army, fraudulently concealing treasure trove, breaking the King's peace, homicide, burning, robbery, rape, falsifying money and similar pleas. The civil pleas which he says are determined only in the King's court are pleas concerning baronies, advowsons of churches, claims for dower and other claims relating to tenants in chief such as duties of performing homage, paying reliefs, breaches of compositions made in the King's Court, villeinage and debts owing by lay persons. This is a very modest list. Further, the King may, if he is so minded, require any claim to freehold land to be brought before his court by a writ of right even if the claim is not by a tenant in chief.

Early in the text Glanvill plunges into great complexities about Essoins, which we would call adjournments. The position appears that most lawsuits soon produced a procedural tussle about compelling the defendant to appear, then another about compelling the defendant to state his defence and finding whether that defence required another person to be summoned to join the lawsuit, a warrantor under title from whom the defendant claimed that his possession was justified. There were many essoins or excuses; they included being required elsewhere in the King's service, being on crusade, being beyond sea, being ill in bed, and falling ill on the journey. The claim to an essoin when first made, and it seems the second time it was made, was accepted, but eventually the third excuse would be investigated by sending knights to ascertain whether the excuse offered was true. Or it might be justified by obtaining a writ from the King to the justices certifying royal service, or in some other way. Essoins seem to have given endless opportunities for procedural excursions, where the court was not necessarily at a fixed place and might be following the king around England, and litigants needed to make lengthy journeys, in the conditions of the 12th century, to reach the King and his justices. Delays must often have protracted litigation until it became impossible to continue. Some difficulties might lead the court to permit or require a party to appear by an attorney, not a reference to a lawyer, but to a person who is to conduct the suit for him. It is not only the parties who must appear, or who may claim essoins; it may also be necessary for the sheriff who summoned the defendant to appear or for the summoners whom the sheriff sent to serve the writ to appear; all of them may have essoins. The instability of the whole procedure was very great.

After 33 chapters, the author reaches the point where both the litigating parties are present in court and the demandant has proceeded to state his claim to the land; the defendant may demand and the court may grant a view of the land, in which the sheriff sends some free and lawful men of the neighbourhood to view the land and testify their view; it would seem that this was to identify the land and report what was going on there and who was in control. That process depended on the cooperation of the sheriff, the selection of viewers, the conduct of the view and their return to the court, and introduced a new series of possible lengthy delays. When the view had been conducted the demandant was then to state his claim before the court concluding with identifying the champion who would duel for him. The defendant might elect to defend himself by the duel or put himself on the Grand Assize; that is to say, obtain what we would now call a jury to determine whether the demandant had the right he claimed. The duel could lead to a forest of technicalities about identifying a champion for each party, dealing with intervening sickness or death of a champion, conduct of the duel, and possible disqualification of the champion for acting for mercenary motives rather than on actual knowledge of the rights of the matter. Loss in the duel involved great marks of disgrace and the imposition of a large fine on the loser, who incurred a reputation for cowardice. If there was in truth no difference between the parties on the facts underlying their claims but they were truly in dispute about the effect of the facts, and about who was entitled to the land on the basis of undisputed facts, it seems that the rights were reasoned out by argument before the justices; or it may be before the inquisition. It does not seem that a duel was a usual outcome; most cases seem to have been composed in some way or other in a less violent manner. The Grand Assize is described with eulogy in Glanvill, and indeed it was a great advance towards a relatively more ordered society and a more rational means of deciding land titles. In time similar means of trial of other kinds of litigation concerning debts or other claims appeared, and old forms of trial by reliance on wager of law and oath-helpers, which in retrospect appear very foolish and unjust, could be avoided.

The conduct of proceedings then, even in accordance with these greatly improved systems, was very protracted, offering many opportunities for delays and excuses, many requirements for further writs and enquiries, and many occasions when the cooperation of the sheriff or some other public officer was required; at every stage, a matter for negotiation. At every stage the cooperation of the King's officers was necessary; at many stages the action of knights or of lawful men of the vicinity was required; many

people not directly involved in the lawsuit were required to turn to and take a serious part in it, and to declare the results of their consideration on oath. Delays were very great and outcomes were very uncertain.

Other kinds of litigation given by Glanvill relate to dower, heirship and inheritance and the law relating to legitimacy, the enforcement of concords and judgments in earlier litigation; the rights to homage, reliefs, services, aids, and enforcement of debts. He also deals with the Assizes of Novel Disseisin and Mort d'Ancestor and various circumstances in which disseisin occurred. He deals relatively shortly with criminal cases, including appeals.

The other legal text from the same age is *Dialogus de Scaccario*, the Dialogue concerning the Exchequer, composed about 1180, it would seem by one of Henry's justices. He describes, in great detail, proceedings at the Exchequer, which were highly developed and followed strict forms. The basic business there was that the sheriffs and other public officers attended, presented their accounts and explained what they had done to collect moneys due to the King, established the amount payable and paid it over. "Exchequer" referred to a chequered cloth on which counters were moved about to count money. A counter on the square on the first line would represent a certain value; when there were 20 counters in the square, they were replaced by one counter in the next line, representing a score as much as a counter in the first line; and so on; in an age without any command of arithmetic, this was the means of calculating large sums. The Exchequer then took on the character of a court, for disputes arose as to what sheriffs were accountable for and the disputes were decided by the royal officers who presided. The description of proceedings in the Exchequer is very detailed; there was a lower exchequer into which money was paid, and for that purpose the quality of the money was tested, apparently as a matter of course, by melting down samples of the coinage and establishing the quality of the silver in them. There were many officers, some of them knights, some of them clerks, and an usher. Every officer had rights which were fully established by custom, and had customary entitlements to money for what they did. In the upper Exchequer the role of every person was prescribed; clerks to make the records and officers to watch word by word what they wrote down and correct them if need be. High royal officers took part in the business of the Exchequer; the King's Justiciar, the Chancellor, the Constable, and two chamberlains and a marshal. Not all of these would always be present; and there might be other justices present. A second order of officers did the ministerial work; bringing in the tallies and making the calculations. A tally is a curious record, made by carving notches into a piece of wood about six inches long, which recorded an amount of money paid in; then the tally was broken down the middle and half given to the accounting party to bring back when his accounts were finalised and match it with the other half, as the two split halves fitted together. The description given is that a notch representing a thousand pounds has the thickness of a palm; a hundred pounds has the thickness of a thumb, twenty pounds, of an ear, the notch of 1 pound was about a swelling grain of barley, but that of a shilling less, so that a space is cleared out by the cutting and a moderate furrow made there; the penny is marked by the incision being made but no wood being cut away; and the author says "but you should learn all this more conveniently by looking at it than by hearing of it." It sounds like an impossible system, but it lasted until about 1840.

Among the persons mentioned as officers of the Exchequer is Master Thomas called Brunus; this Thomas Brown had earlier had high responsibilities in the Norman kingdom of Sicily but fell out of favour there and was accepted into the service of King Henry. This seems to point to a commonality of methods of government in the Norman kingdom of Sicily with methods in England and in Normandy. The Dialogue instructs the pupil in an exchange of questions between master and pupil in many details about aspects of the law which can produce money for the king, the taxes of scutage, danegeld, penalties for murder, the rights of the king in his forest, the remedies where unauthorised clearing and settlement take place in the forest, the content and use of the Domesday Book, the rights of the Crown in escheats, the duties of sheriffs, the means of enforcement of debts of the crown, and what goods of debtors are not to be sold; a knight is to be left one horse and his armour so that he can serve the king. The king may collect debts due to debtors of the king. The whole Dialogue presents a picture of complexity and mature experience in a context of consciousness of right in which the Crown is highly empowered, but is not expected to be arbitrary.