

## SECTION 4. THE AGE OF PROPERTY: THE ASSIZES OF HENRY II

### A. THE ASSIZES OF CLARENDON AND NORTHAMPTON

in D.C. DOUGLAS & G.W. GREENAWAY, EDS., *ENGLISH HISTORICAL DOCUMENTS*, II (2d ed., London, 1981) 440–6 (nos. 24–25)<sup>†</sup>

#### THE ASSIZE OF CLARENDON (1166)

This important document is the first of the great legislative enactments of the reign of Henry II, issued at Clarendon early in the year, probably in February; and it provides evidence for the administrative changes introduced by the king, particularly in local jurisdiction. Visitations of itinerant justices have become regular, and they have increased powers of police jurisdiction. The sworn inquest is applied extensively for the settlement of criminal cases, and juries of presentment and recognition are a normal part of the administration of justice. The assize is therefore a landmark in the history of the jury. It also throws light upon the changes introduced in the formal procedure in criminal cases, in which compurgation and trial by ordeal are to be supplemented by recourse to the previous record and reputation of the accused. The Latin text of the assize is in Roger of Howden's *Chronica*, ed. W. Stubbs, *Rolls Series* (1871) vol. II, 248; another version is in *ibid.*, II, App., cii; and the latter is also in W. Stubbs, *Select Charters* (1913 edn), p. 170. An English translation is given in Adams and Stephens, *Select Documents of English Constitutional History*, p. 14. The text has been frequently discussed, e.g. F. Pollock and F. W. Maitland, *History of English Law*, vol. I, 137 f.; M. M. Bigelow, *History of Procedure in England* (1880), pp. 99 f.; G. B. Adams, *Origin of the English Constitution* (1912), pp. 112 f. H. G. Richardson and G. O. Sayles, *The Governance of England* (Edinburgh, 1964), App. 4, pp. 438–44, question the authenticity and validity of the texts of the Assize of Clarendon, and the Assize of Northampton (No. 25); they believe that these were private compilations of judicial reforms rather than official records, but this view has been criticised or rejected by most modern scholars.

HERE begins the Assize of Clarendon made by King Henry II with the assent of the archbishops, bishops, abbots, earls and barons of all England.

1.<sup>1</sup> In the first place the aforesaid King Henry, on the advice of all his barons, for the preservation of peace, and for the maintenance of justice, has decreed that inquiry shall be made throughout the several counties and throughout the several hundreds<sup>2</sup> through twelve of the more lawful men of the hundred and through four of the more lawful men of each vill upon oath that they will speak the truth,<sup>3</sup> whether there be in their hundred or vill any man accused or notoriously suspect<sup>4</sup> of being a robber or murderer or thief, or any who is a receiver of robbers or murderers or thieves, since the lord king has been king. And let the justices inquire into this among themselves and the sheriffs among themselves.<sup>5</sup>

2. And let anyone, who shall be found, on the oath of the aforesaid, accused or notoriously suspect of having been a robber or murderer or thief, or a receiver of them, since the lord king has been king, be taken and put to the ordeal of water,<sup>6</sup> and let him swear that he has not been a robber or murderer or thief, or receiver of them, since the lord king has been king, to the value of 5 shillings, so far as he knows.

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<sup>1</sup> Paragraphs are not numbered in the original.

<sup>2</sup> i.e. through the visitation of the itinerant justices; for a discussion of the restoration and subsequent experiments in the development and reorganisation of the eyre system, see Nos 59, 60 [chronicle accounts of the "deeds of Henry II"].

<sup>3</sup> The sworn inquest is here applied to criminal jurisdiction in the form of the "accusing jury" or jury of presentment, operating within the hundred unit in conjunction with the frankpledge system.

<sup>4</sup> *rettatus vel publicatus*. Note the importance attached to the previous record of the accused.

<sup>5</sup> i.e. the sheriff is here left with certain powers of criminal jurisdiction.

<sup>6</sup> *juisam aquae*; for the various ordeals in operation, see the account given in Glanville's treatise, below, No. 58, pp. 510–11.

3. And if the lord of the man, who has been arrested, or his steward or his vassals shall claim him by pledge within the third day following his capture, let him be released on bail with his chattels until he himself shall stand his trial.
4. And when a robber or murderer or thief or receiver of them has been arrested through the aforesaid oath, if the justices are not about to come speedily enough into the county where they have been taken, let the sheriffs send word to the nearest justice by some well-informed person that they have arrested such men, and the justices shall send back word to the sheriffs informing them where they desire the men to be brought before them; and let the sheriffs bring them before the justices. And together with them let the sheriffs bring from the hundred and the vill, where they have been arrested, two lawful men to bear the record of the county and of the hundred as to why they have been taken, and there before the justice let them stand trial.
5. And in the case of those who have been arrested through the aforesaid oath of this assize, let no man have court or justice or chattels save the lord king in his court in the presence of his justices; and the lord king shall have all their chattels.<sup>7</sup> But in the case of those who have been arrested otherwise than by this oath, let it be as is customary and due.
6. And let the sheriffs, who have arrested them, bring them before the justice without any other summons than that they have from him. And when robbers or murderers or thieves, or receivers of them, who have been arrested through the oath or otherwise, are handed over to the sheriffs, let them receive them immediately and without delay.<sup>8</sup>
7. And in the several counties where there are no gaols, let such be made in a borough or some castle of the king at the king's expense and from his wood, if one shall be near, or from some neighbouring wood at the oversight of the king's servants, to the end that in them the sheriffs may be able to guard those who shall be arrested by the officials accustomed to do this, or by their servants.
8. Moreover, the lord king wills that all shall come to the county courts to take this oath, so that none shall remain behind on account of any franchise which he has, or any court or soke,<sup>9</sup> which he may have, but that they shall come to take this oath.
9. And let there be no one within his castle or without, nor even in the honour of Wallingford, who shall forbid the sheriffs to enter into his court or his land to take the view of frankpledge<sup>10</sup> and to see that all are under pledge; and let them be sent before the sheriffs under free pledge.
10. And in cities or boroughs let no one hold men or receive them into his house or on his land or in his soke, whom he will not take in hand to produce before the justice, should they be required; or else let them be in frankpledge.
11. And let there be none in a city or a borough or a castle or without it, nor even in the honour of Wallingford, who shall forbid the sheriffs to enter into their land or their soke to arrest those who have been accused or are notoriously suspect of being robbers or murderers or thieves or receivers of them, or outlaws, or persons charged concerning the forest;<sup>11</sup> but the king commands that they shall aid the sheriffs to capture them.
12. And if anyone shall be taken in possession of the spoils of robbery or theft, if he be of evil repute and bears an evil testimony from the public and has no warrant, let him have no law.<sup>12</sup> And if he has not been notoriously suspect on account of the goods in his possession, let him go to the ordeal of water.

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<sup>7</sup> The king claims the sole right to the profits of jurisdiction in this new procedure.

<sup>8</sup> i.e. speed and promptitude of action on the part of the sheriff are essential for the success of the new procedure.

<sup>9</sup> Right of private jurisdiction often granted by privilege or charter; this clause is directly aimed at the limitation of the franchise of feudal courts and the scope of their jurisdiction.

<sup>10</sup> Customarily taken twice a year by the sheriff as a measure of local police jurisdiction.

<sup>11</sup> Offences against the forest law. For Henry II's Assize of the Forest, *see* No. 28.

<sup>12</sup> i.e. criminals taken red-handed and without surety are to be punished without trial.

13. And if anyone shall confess to robbery or murder or theft, or to harbouring those who have committed them, in the presence of the lawful men or in the hundred court, and afterwards he wish to deny it, let him not have his law.<sup>13</sup>

14. Moreover, the lord king wills that those who shall be tried by the law and absolved by the law, if they have been of ill repute and openly and disgracefully spoken of by the testimony of many and that of the lawful men, shall abjure the king's lands,<sup>14</sup> so that within eight days they shall cross the sea, unless the wind detains them; and with the first wind they shall have afterwards they shall cross the sea, and they shall not return to England again except by the mercy of the lord king; and both now, and if they return, let them be outlawed; and on their return let them be seized as outlaws.

15. And the lord king forbids that any vagabond, that is, a wanderer or unknown person, shall be given shelter anywhere except in a borough, and even there he shall not be given shelter longer than one night, unless he become sick there, or his horse, so that he can show an evident excuse.

16. And if he shall remain there longer than one night, let him be arrested and held until his lord shall come to give surety for him, or until he himself shall procure safe pledges; and let him likewise be arrested who gave him shelter.

17. And if any sheriff shall send word to another sheriff that men have fled from his county into another county, on account of robbery or murder or theft or the harbouring of them, or on account of outlawry or of a charge concerning the king's forest, let him (the second sheriff) arrest them; and even if he knows of himself or through others that such men have fled into his county, let him arrest them and guard them until he has taken safe pledges for them.

18. And let all the sheriffs cause a record to be made of all fugitives who have fled from their counties; and let them do this before the county courts and carry the names of those written therein before the justices, when next they come to them, so that these men may be sought throughout England, and their chattels may be seized for the needs of the king.

19. And the lord king wills that from the time the sheriffs shall receive the summons of the itinerant justices to present themselves before them, together with the men of the county, they shall assemble them and make inquiry for all who have newly come into their counties since this assize; and they shall send them away under pledge to attend before the justices, or they shall keep them in custody until the justices come to them, and then they shall present them before the justices.

20. Moreover, the lord king forbids monks or canons or any religious house to receive any men of the lower orders as a monk or a canon or a brother, until it be known of what reputation he is, unless he shall be sick unto death.<sup>15</sup>

21. Moreover, the lord king forbids anyone in all England to receive in his land or in his soke or in a house under him any one of that sect of renegades who were branded and excommunicated at Oxford.<sup>16</sup> And if anyone shall so receive them, he himself shall be at the mercy of the lord king, and the house in which they have dwelt shall be carried outside the village and burnt. And each sheriff shall swear an oath that he will observe this, and shall cause all his officers to swear this, and also the stewards of the barons and all knights and freeholders of the counties.

22. And the lord king wills that this assize shall be kept in his realm so long as it shall please him.

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<sup>13</sup> The case is not to be tried after the accused has once pleaded guilty to the offence. In all these clauses the particular importance attached both to the past record of the accused and to local opinion concerning him should be noted.

<sup>14</sup> A new feature in criminal law administration; even those who have been acquitted on a particular indictment are not regarded as free and lawful men if their past record is shady.

<sup>15</sup> This provision is virtually a corollary to clause 16 of the Constitutions of Clarendon, 1164 (No. 126).

<sup>16</sup> The sect mentioned were Cathari. cf. No. 12, pp. 355-7 [chronicle of William of Newburgh].

## THE ASSIZE OF NORTHAMPTON (1176)

This document is in the main a recapitulation and enlargement of the decisions taken at Clarendon in 1166. The penalties for various offenses are here more severe, and the powers assigned to the justices are substantially enlarged at the expense of the sheriffs. This may be held to reflect the changes consequent to the inquest of sheriffs in 1170 (No. 48). Nor is there much doubt that this assize is connected with the reorganisation of the system of itinerant justices, since it is drawn up in the form of instructions to six groups of justices appointed to newly delimited circuits. The latter clauses contain important new legislation: the king claims the right to have certain cases respecting the feudal incidents brought to king's courts; and it makes provision for the employment of the sworn inquest. Here also is the first mention in an official document of the recently instituted possessory assizes of *mort d'ancestor* and *novel disseisin*, although the latter was certainly in operation as early as 1166. [Nothing about the assize can be said "certainly." CD] The assize was passed early in the year probably at the council held in Northampton in January of 1176. The authenticity of this text has been questioned by Richardson and Sayles (*see* the note to No. 24).

The Latin text is to be found in *Gesta Regis Henrici Secundi*, ed. W. Stubbs, Rolls Series, vol. II (1867), 89; and in Stubbs, *Select Charters* (1913 edn), p. 179; and a translation is in G. B. Adams and H. M. Stephens, *Select Documents of English Constitutional History* (1901), p. 20.

THESE are the assizes made at Clarendon and afterwards revised at Northampton.

1.<sup>1</sup> If anyone has been accused before the justices of the lord king of murder or theft or robbery or of harbouring men who do such things, or of forgery or arson by the oath of twelve knights of the hundred or, if knights be not present, by the oath of twelve free and lawful men and by the oath of four men from each vill of the hundred,<sup>2</sup> let him go to the ordeal of water,<sup>3</sup> and if he fail, let him lose one foot. And at Northampton it was added for the sake of stern justice that he shall likewise lose his right hand with his foot, and shall abjure the realm and within forty days be banished from the kingdom. And if he shall be cleared of guilt at the water, let him provide sureties and remain in the kingdom, unless he has been accused of murder or some other base felony by the common report of the county and of the lawful knights of the country; moreover, if he has been accused in the aforesaid manner, although he may have come safely through the ordeal of water, nevertheless let him depart from the realm within forty days, and let him take his chattels with him, saving the rights of his lords, and let him abjure the realm at the mercy of the lord king.<sup>4</sup> Moreover, this assize shall remain in force from the time the assize was made at Clarendon continuously up to the present time and from now on, so long as it shall please the lord king, in cases of murder and treason and arson and in all the aforesaid articles, except in cases of petty thefts and robberies, which have been committed in time of war,<sup>5</sup> as of horses and oxen and lesser things.

2. Item, let no one either in a borough or in a vill entertain in his house for more than one night any stranger for whom he is unwilling to be responsible, unless there be a reasonable excuse for this hospitality, which the host of the house shall show to his neighbours.<sup>6</sup> And when the guest shall depart, let him leave in the presence of the neighbours and by day.

3. If anyone shall have in his possession the spoils of murder or theft or robbery or forgery, and shall confess the fact or any other felony, which he has committed, before the reeve of the hundred or borough and in the presence of lawful men, he cannot afterward deny it before the justices.<sup>7</sup> And if he shall also confess anything of this kind in their presence without having the spoils thereof in his possession, he cannot deny this either before the justices.

4. Item, if any freeholder has died, let his heirs remain possessed of such "seisin"<sup>8</sup> as their father had of his fief on the day of his death; and let them have his chattels from which they may execute the dead man's will.

<sup>1</sup> The conventional numeration of paragraphs has no place in the original.

<sup>2</sup> No. 24, Clause 1.

<sup>3</sup> No. 24, Clause 2.

<sup>4</sup> No. 24, Clause 14.

<sup>5</sup> A reference to the recent fighting in England between the king and the feudal magnates in the rebellion of 1171-1174.

<sup>6</sup> No. 24, Clause 15.

<sup>7</sup> No. 24, Clause 13.

<sup>8</sup> The technical term describing legal possession or tenure of a fief (*see* below, No. 58, pp. 505 f. [*Glanvill*, XIII, 1]).

And afterwards let them seek out his lord and pay him a “relief”<sup>9</sup> and the other things which they ought to pay him from the fief. And if the heir be under age, let the lord of the fief receive his homage and keep him in ward<sup>10</sup> so long as he ought. Let the other lords, if there are several, likewise receive his homage, and let him render them what is due. And let the widow of the deceased have her dow[er] and that portion of his chattels which belongs to her.<sup>11</sup> And should the lord of the fief deny the heirs of the deceased “seisin” of the said deceased which they claim, let the justices of the lord king thereupon cause an inquisition to be made by twelve lawful men as to what “seisin” the deceased held there on the day of his death<sup>12</sup> And according to the result of the inquest let restitution be made to his heirs. And if anyone shall do anything contrary to this and shall be convicted of it, let him remain at the king’s mercy.

5. Item, let the justices of the lord king cause an inquisition to be made concerning dispossessions<sup>13</sup> carried out contrary to the assize, since the lord king’s coming into England immediately following upon the peace made between him and the king, his son.

6. Item, let the justices receive oaths of fealty to the lord king between the Octave of Easter and the final term, the Octave of Pentecost, from all who wish to remain in the kingdom, namely from the earls, barons, knights and freeholders, and even villeins. And whoever shall refuse to take an oath of fealty may be arrested as an enemy of the lord king. The justices shall also order that all who have not yet paid homage or allegiance to the lord king shall come at a time appointed for them and pay homage and allegiance to the king as their liege lord.<sup>14</sup>

7. Item, let the justices determine all suits and rights pertaining to the lord king and to his crown through the writ of the lord king, or of those who shall be acting for him, of half a knight’s fee or under, unless the dispute is so great that it cannot be determined without the lord king, or is such as his justices shall refer to him, or to those who are acting for him, by reason of their uncertainty in the case. Let them, nevertheless, apply themselves to the utmost to act in the interest of the lord king. Let them also hold the assize for wicked robbers and evildoers throughout the counties they are about to traverse, for this assize is enacted in accordance with the advice of the king, his son, and his vassals.

8. Item, let the justices see to it that the castles which have been destroyed are utterly demolished, and those which are due for destruction are razed to the ground. And if they do not do this, the lord king will have the judgment of his *curia* upon them, as on men who have held his commands in contempt.

9. Item, let the justices make inquiry concerning “escheats”,<sup>15</sup> churches, lands and women, who are in the gift of the lord king.<sup>16</sup>

10. Item, let the bailiffs of the lord king answer to the Exchequer both for the revenue from the assize and also for all the profits they make in their bailiwicks, with the exception of those pertaining to the sherifffdom.

11. Item, let the justices make inquiry concerning the custody of castles, as to who owes service for them, and how much, and where,<sup>17</sup> and afterwards let them send word to the lord king.

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<sup>9</sup> Payment made by the heir to the lord before entering into possession of a fief (*see* No. 70, pp. 587–8 [*Dialogue of the Exchequer*]; No. 268, 1007–9 [*Glanvill*, IX, 2–4]).

<sup>10</sup> Wardship is another of the incidents of feudal tenure (*see* No. 70, pp. 586 [*Dialogue of the Exchequer*]; No. 268, 1007–9 [*Glanvill*, IX, 2–4]).

<sup>11</sup> *See* No. 19 [coronation charter of Henry I, 1100].

<sup>12</sup> A reference to the newly instituted assize of *mort d’ancestor*, one of the three possessory assizes (*see* No. 58, pp. 506–7 [*Glanvill*]; No. 268, p. 1009 [*Glanvill*]). This clause, while safeguarding the legitimate rights of feudal lords, enacts that disputes concerning testamentary disposition of property should be brought before the king’s court and decided by the sworn inquest procedure.

<sup>13</sup> Assize of *novel disseisin* (*see* No. 58, p. 509 [*Glanvill*]).

<sup>14</sup> This clause is primarily of political significance; the king desired the renewal of the oath of homage from those who had lately been in arms against him. None the less the wide terms of reference are remarkable.

<sup>15</sup> The reversion of a fief to the lord, generally through failure of an heir. *cf.* No. 268, pp. 1006–7 [*Glanvill* IX, 1].

<sup>16</sup> A reference to the feudal incident of wardship (*ibid.* pp. 1007–8 [*Glanvill*, IX, 4]).

<sup>17</sup> A reference to castle guard (*see* No. 243 [writ of Henry I concerning castle guard, c. 1100]).

12. Item, let a thief be handed over to the sheriff of the place where he is arrested for safe-keeping. And should the sheriff be absent, let the accused be brought to the custodian of the nearest castle, and let him keep him in ward until he may deliver him to the sheriff.<sup>18</sup>

13. Item, let the justices cause search to be made according to the custom of the land for those who have fled from the kingdom; and unless the fugitive be willing to return within the appointed time and stand trial in the king's court, let them henceforth be outlawed; and let the justices report the names of the outlaws at Easter and at Michaelmas to the Exchequer, and from thence let their names be sent to the lord king.<sup>19</sup>

## B. GLANVILL

G.D.G. HALL, ED., *THE TREATISE ON THE LAWS AND CUSTOMS OF ENGLAND COMMONLY CALLED GLANVILL* (London, 1965), pp. 1-7, 22-43, -136-54, 160-70 [trans. only; some footnotes omitted]<sup>†</sup>

*Here begins the treatise on the laws and customs of the realm of England, composed in the time of King Henry the Second when justice was under the direction of the illustrious Rannulf Glanvill, the most learned of that time in the law and ancient customs of the realm.*<sup>1</sup>

### PROLOGUE

Not only must royal power be furnished with arms against rebels and nations which rise up against the king and the realm, but it is also fitting that it should be adorned with laws for the governance of subject and peaceful peoples; so that in time of both peace and war our glorious king may so successfully perform his office that, crushing the pride of the unbridled and ungovernable with the right hand of strength and tempering justice for the humble and meek with the rod of equity, he may both be always victorious in wars with his enemies and also show himself continually impartial in dealing with his subjects.

No-one doubts how finely, how vigorously, how skillfully our most excellent king has practised armed warfare against the malice of his enemies in time of hostilities, for now his praise has gone out to all the earth and his mighty works to all the borders of the world. Nor is there any dispute how justly and how mercifully, how prudently he, who is the author and lover of peace, has behaved towards his subjects in time of peace, for his Highness's court is so impartial that no judge there is so shameless or audacious as to presume to turn aside at all from the path of justice or to digress in any respect from the way of truth. For there, indeed, a poor man is not oppressed by the power of his adversary, nor does favour or partiality drive any many away from the threshold of judgment. For truly he does not scorn to be guided by the laws and customs of the realm which had their origin in reason and have long prevailed; and, what is more, he is even guided by those of his subjects most learned in the laws and customs of the realm whom he knows to excel all others in sobriety, wisdom and eloquence, and whom he has found to be most prompt and clear-sighted in deciding cases on the basis of justice and in settling disputes, acting now with severity and now with leniency as seems expedient to them.

Although the laws of England are not written, it does not seem absurd to call them laws—those, that is, which are known to have been promulgated about problems settled in council on the advice of the magnates and with the supporting authority of the prince—for this also is a law, that ‘what pleases the prince has the force of law.’<sup>2</sup> For if, merely for lack of writing, they were not deemed to be laws, then surely writing would seem to supply to written laws a force of greater authority than either the justice of him who decrees them or the reason of him who establishes them.

<sup>18</sup> cf. No. 24, clause 17.

<sup>19</sup> cf. No. 24, clauses 14, 18.

<sup>†</sup> © G. D. G. Hall 1965.

<sup>1</sup> One ms. adds: “and it contains only those laws and customs according to which pleadings take place in the court of the king at the exchequer and before the justices wherever they are.”

<sup>2</sup> Fritz Schulz thought that the words [from ‘laws’ to the end of the sentence] were probably interpolated (‘Bracton on Kingship’, *E.H.R.* LX (1945), 171). The words are in all the manuscripts. His argument, which assumes that authors always write clearly, could be used to dispose of substantial parts of the treatise. [The quoted words are from Justinian's *Institutes* 1.2.6 and *Digest* 1.4.1.pr. CD]

It is, however, utterly impossible for the laws and legal rules of the realm to be wholly reduced to writing in our time, both because of the ignorance of scribes and because of the confused multiplicity of those same laws and rules. But there are some general rules frequently observed in court which it does not seem to me presumptuous to commit to writing, but rather very useful for most people and highly necessary to aid the memory. I have decided to put into writing at least a small part of these general rules, adopting intentionally a commonplace style and words used in court in order to provide knowledge of them for those who are not versed in this kind of inelegant language. To make matters clear, I have distinguished the kinds of secular cause in the following manner:

[BOOK I]

*The division of secular causes*

[1] Pleas are either criminal or civil. Some criminal pleas belong to the crown of the lord king, and some to the sheriffs of counties. The following belong to the crown of the lord king:

*The chapters*

[2] The crime which civil lawyers call lèse-majesté, namely the killing of the lord king or the betrayal of the realm or the army; fraudulent concealment of treasure trove; the plea of breach of the lord king's peace; homicide; arson; robbery; rape; the crime of falsifying and other similar crimes: all these are punished by death or cutting off of limbs.

The crime of theft is not included because this belongs to the sheriffs, and is pleaded and determined in the counties. If lords fail to do justice, then sheriffs also have jurisdiction over brawling, beatings, and even wounding, unless the accuser states in his claim that there has been a breach of the peace of the lord king.

*The division of civil causes*

[3] Some civil pleas are to be pleaded and determined only in the court of the lord king; others belong to the sheriffs of counties. The following must be dealt with in the court of the lord king:

*The chapters*

Pleas concerning baronies; pleas concerning advowons of churches; the question of status; pleas of dower, when the woman has so far received none; complaints that fines made in the lord king's court have not been observed; pleas concerning the doing of homage and the receiving of relief; purprestures<sup>3</sup>; debts of laymen. All these pleas concern solely claims to the property in the disputed subject-matter: those pleas in which the claim is based on possession, and which are determined by recognitions, will be discussed later<sup>4</sup> in their proper place.

*Civil pleas belonging to the sheriffs*

[4] The following belong to the sheriffs of counties: pleas concerning the right to free tenements, begun by a writ from the lord king, where default of right is proved against the lords' courts in the manner stated below<sup>5</sup>; pleas concerning villeins begun by a writ from the lord king.<sup>6</sup>

*Here begins the discussion of pleas*

<sup>3</sup> i.e. encroachments on royal lands; see ix, 11.

<sup>4</sup> xiii, *passim*

<sup>5</sup> xii, 7

<sup>6</sup> With this inadequate statement of the sheriff's jurisdiction compare the comprehensive generalisation at the end of xii, 9. An account of the sheriff's judicial activity, based on the writs in the treatise, is given by Van Caenegem, pp. 204–6, and criticised as unfair to the sheriff by G. D. G. Hall, *E.H.R.* LXXVI (1961), 318–19.

[5] When anyone complains to the lord king or his justices concerning his fee or free tenement, and the case is such that it ought to be, or the lord king is willing that it should be, tried in the king's court, then the complainant shall have the following writ of summons<sup>7</sup>:

*The writ for making the first summons*

[6] The king to the sheriff, greeting. Command N. to render to R., justly and without delay, one hide of land in such-and-such a vill, which the said R. complains that the aforesaid N. is withholding from him. If he does not do so, summon him by good summoners to be before me or my justices on the day after the octave of Easter, to show why he has not done so. And have there the summoners and this writ. Witness Rannulf Glanvill, at Clarendon.

*What the law is when the party summoned neither comes nor sends an essoiner in response to the first summons*

[7] On the appointed return day the party summoned either comes or does not. If he does not come, then he sends a representative or an essoiner, or neither. If he neither comes nor sends anyone, the other party who is claiming against him should appear before the justices on the appointed return day and present his case against the tenant; and he shall wait three days in court. If the tenant does not come on the fourth day, but the summoners appear and allege that he has been properly summoned and offer to prove this in whatever way the court may decide, then the court shall direct that the tenant be summoned again by a further writ to come on a return day at least a fortnight later. This writ shall direct him to come and answer both as to the principal plea and as to his not coming at the first summons.

Three summonses shall be sent out in this way. If the tenant neither comes nor sends anyone at the third summons, then the land shall be taken into the lord king's hand, and shall remain thus for a fortnight; if the tenant does not come within the fortnight, seisin shall be adjudged to the other party, and the tenant shall not be allowed to reopen the issue except on the question of property by means of a writ of right. If, however, the tenant comes within the fortnight and wishes to replevy<sup>8</sup> the tenement, he shall be ordered to come on the fourth day, when he shall have justice done to him; and so, if he comes then, he can get back his seisin.

If the tenant does come at the third summons and admits the previous summonses, he immediately loses his seisin unless he is able to save the previous return days by royal warrant; this is done by showing straight away the following writ:

*The writ for saving a return day by royal warrant*

[8] The king to his justices, greeting. I warrant that by my command N. was in my service at such-and-such a place on such-and-such a day, and therefore could not appear before you on that day at your assizes.

<sup>7</sup> This writ is called from its opening word of command, a *Precipe*. There are nine such writs in the treatise (i, 6; iv, 2; vi, 15; viii, 4; ix, 5; x, 2, 4, 7 and 9) and in form they are all a command to a person to do a certain thing, coupled with the sanction of summons to the royal court 'nisi fecerit' [if he does not do it]. This form no doubt reflects the executive origins of the writ, but in the examples given in the writ there is no expectation that the thing commanded will be done; and the writ has become 'judicialised' and is in substance a writ of summons initiating litigation between the parties in the royal court, as the rubric to this first *Precipe* shows. The same form continued to be used in writs which appeared at about this time or later, such as covenant, account and entry. It is to be contrasted with the later *Quare* form in which there is merely a summons to show why ('quare') a wrong has been committed; trespass writs are the most important examples of this form. The *Precipe* for land given here makes no mention of tenure in chief of the king and has therefore been regarded by historians as striking at feudal jurisdiction, which should be vested in the lord of whom the parties claim to hold their land, the proper writ being that given in xii, 3; moreover, Magna Carta, c. 34, seems to suggest that contemporaries saw the matter in the same light. But xii, 7 gives a procedure by which the lord could recover a case by 'claiming his court'; Miss Hurnard has argued that this procedure also applied where the original writ was a *Precipe*, and has given other reasons for abandoning the view that the *Precipe* was an 'anti-feudal' writ: see *Studies in Medieval History Presented to F. M. Powicke* (Oxford 1948), pp. 157–79. For subsequent discussion of the *Precipe* see Van Caenegem, pp. 234–51; *Concise History*, pp. 355–6; M. T. Clanchy, 'Magna Carta, Clause Thirty-Four', *E.H.R.* LXXIX (1964), 542–8. For examples see Stenton, nos. 3481, 3486, 349, 3509, 3522, 3537 and 3541, and comment, *ibid.* p. 10.

<sup>8</sup> i.e. redeem it on giving sureties



Therefore I command you that you shall not put him in default for his absence on that day, nor shall he in any way lose thereby. Witness, etc.

[9] If the tenant denies all the summonses, he shall swear twelve-handed<sup>9</sup> in respect of each of them. If any one of the oath-helpers defaults on the appointed day, or if a lawful and unanswerable objection can be made to one of them on personal grounds, then the tenant loses his seisin at once on account of the default. If, however, the oath-helping is duly accomplished, then the tenant shall answer to the plea on that same day.

[10] If the party summoned does not come on the first return day, but essoins himself, the essoin shall be received if it is reasonable. He can essoin himself in this way on three successive return days. Now, since essoins can lawfully be cast for a variety of reasons, let us look at the different kinds of essoins.<sup>10</sup>

#### *Essoins*

[11] Some essoins are based on sickness, and some on other grounds. The former may be for sickness on the way to court, or for house-sickness. ...

[The remaining 22 sections of Book I are concerned with essoins and absences.]

### [BOOK II]

#### *Presense of both parties*

[1] When both demandant and tenant appear together in court and the demandant claims the disputed tenement from the tenant, the tenant can ask for a view of the land. To decide whether this postponement can be allowed to him it is necessary to distinguish whether the tenant has other lands in the vill where the disputed land lies or not. For if he has no other lands there, this delay shall not be granted him. If, however, he has other lands there, a postponement shall be allowed to him, and another day assigned him to be in court. In such a case, when the tenant has left the court he can again have three reasonable essoins, and the sheriff of the county wherein the tenement lies shall be commanded by the following writ to send free men from his county to view the land<sup>11</sup>:

#### *The writ for holding a view of the land*

[2] The king to the sheriff, greeting. I command you to send without delay free and lawful men from the neighbourhood of such-and-such a vill to view one hide of land in that vill, which N. claims against R. and concerning which there is a plea between them in my court. And you are to have four of them before me or my justices on a certain day to attest the view. Witness etc.

#### *The demandant's claim*

[3] When both parties appear again in court after the three reasonable essoins and the view, the demandant sets out his claim and suit as follows: 'I claim against this N. the fee of half a knight and two carucates of land in such-and-such a vill as my right and my inheritance, of which my father (or grandfather) was seised in his demesne as of fee in the time of King Henry the First (or since the first coronation of the lord king),<sup>12</sup> and

<sup>9</sup> i.e. with eleven compurgators or oath-helpers; see P & M, II, 634-6

<sup>10</sup> Essoins are excuses for non-appearance in court, and were available to both parties. Medieval law, looking at civil litigation as a contest between the parties, was reluctant to proceed to judgment in absence unless contumacy could be proved, and the long delays which resulted from essoining were a product of this reluctance; see Stenton, pp. 150-70. The parallel system of 'excusationes' in the Exchequer is discussed in the *Dialogus*, pp. 81-4.

<sup>11</sup> cf. Stenton, nos. 3478, 3480 and 3484, and comment *ibid.* p. 12

<sup>12</sup> A characteristic feature of common law writs is the period of limitation which is generally written into the writ itself but occasionally, as here, is stated in the count (on which see [xii, 24 and *n.*]). The treatise states limitations in the writs for boundary division (ix, 14 and xii, 16), *ne vexes* (xii, 10), *de natiuis* (xii, 11), mort d'ancestor (xiii, 3-6) and novel disseisin (xiii, 33 and 35-7). The limitation in the present count is repeated in the count of the *Precipe* for advowsons (iv, 6). Professor Southern has pointed out to me that there is never a mention of Stephen, and that this is in accord with Henry II's general attitude toward the reign of his predecessor. With the exception of novel disseisin (Henry's last voyage to Normandy) the required period in the writs mentioned above is always either the reign of Henry I or since the first coronation of Henry II. More remarkable are the two *Precipe* counts which give a choice between these two periods and reject Stephen's reign as the starting point for ancestral seisin. At an earlier state in Henry

from which he took profits to the value of five shillings at least, in corn and hay and other profits: and this I am ready to prove by this free man of mine, H., and if any evil befalls him then by this other man or by this third man, who saw and heard it.' (He can name as many as he likes but only one of them shall wage battle.) Or the claim may be in other words, thus: 'And this I am ready to prove by this free man of mine, H., whose father in his last minutes enjoined him, by the faith binding son to father, that if ever he heard of a suit concerning this land, he should offer to prove it as something seen and heard by the dying man.'

When the plaint and claim of the demandant have been heard, it is for the tenant to choose whether he will defend himself against the demandant by battle, or will put himself upon the assize of the lord king and seek a recognition to determine which of the parties has the greater right in the land.<sup>13</sup> If he chooses to defend himself by battle, then he himself, or some suitable person on his behalf, must deny the right of the demandant word for word as he has set it out. It should be noted that once the battle has been waged<sup>14</sup> the tenant must defend the land by battle, and cannot any longer put himself upon the assize. After the battle has been waged the tenant can again have three reasonable essoins himself, and another three in the person of his champion.

When all the available essoins have been cast, then, before the battle can be fought, the demandant must appear in court and bring his champion with him ready to fight. The champion must be one of those on whom he relied for proof in his claim and, once battle has been waged, he cannot substitute another in his place. However, if the champion who waged the battle dies a natural death before the fight and this is attested by the neighbourhood, as it ought always to be if there is any doubt about it, then the demandant may have recourse to one of those on whom he relied for proof in his claim, or even to another suitable person notwithstanding that he originally named no other, provided that this other is a suitable witness: in this way the plea shall begin again. If the champion dies through his own fault, his principal shall lose his case.

I put this question: may the demandant's champion produce a substitute in court to make the proof which he himself undertook? The answer is that according to the law of the realm and ancient custom he may not do so, unless it is his son. Note that the demandant's champion must be one who is a suitable witness of the facts. The demandant is not allowed to prosecute his appeal in person, because prosecution can only be by a suitable witness who heard and saw the facts. The tenant, however, can choose whether he will defend himself in person, or by another who is suitable for the task. If he chooses to defend himself by a champion who dies in the meantime,<sup>15</sup> I question what the law is; that is, whether the tenant can defend himself by another, or whether he loses the case, or loses only seisin? Here the previous distinction must again be made. It should, moreover, be noted that the tenant's champion cannot produce a substitute in court to undertake the defence, unless it is his son.

It often happens that a hired champion is produced in court to make the proof for reward. If the other party objects to him on this ground, saying that he is not suitable because he took a reward for undertaking the proof, and saying further that he is ready to prove this against the champion (should he deny it) either in person or

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II's reign the *de natiuis* accepted events in Stephen's reign, but it did so by speaking of them as 'post mortem regis Henrici aui mei' [after the death of Henry my grandfather]; see Van Caenegem, nos. 114, 117, 119 and 123. None of the writs in Van Caenegem which come from Henry II's reign mentions Stephen.

<sup>13</sup> The normal method of trying title to land in feudal and in royal courts was battle. The intention was that the combatants should be witnesses of the facts, but the mention of hired champions shows that theory and practice might differ; professional champions became common and the institution of battle disreputable. Yet it survived until abolished by statute in 1819. Its chief use in the later Middle Ages was by confessed felons who had turned approver and who fought battles against those whom they had accused of felony. On battle generally see P & M, II, 632-4, and *Concise History*, pp. 116-18. 'The assize of the lord king' is the Grand Assize which can probably be attributed to a great council at Windsor in 1179. This gave to the tenant an option: he could avoid battle by putting himself upon the Grand Assize in the manner described in II, 7-21. In addition to the obvious advantages over battle which are extolled in II, 7, the tenant's decision to use the Grand Assize had the important effect of removing cases in feudal or county courts into the royal court. But the procedure set out in the treatise—writ of peace, summons of four knights, summons of twelve knights—was cumbersome and slow. It is not therefore surprising that the new procedures by petty assize (XIII, *passim*) and the writs of entry (in which a jury replaced the Grand Assize) proved popular. Van Caenegem, pp. 87-91, gives full references.

<sup>14</sup> To be distinguished from 'fought'; battle is waged when the parties have given security for proceeding with the fight.

<sup>15</sup> i.e. between wager and fight

by another who saw the champion when he took the reward, then this objection shall be heard and the principal battle shall not take place. If the champion is convicted of taking the reward by being defeated in battle, then his principal shall lose his suit and the champion, as a vanquished man, shall lose all his law; that is to say, he shall never again be allowed as a witness in court and therefore can never make proof for anyone by battle; he may, however, do battle on his own behalf either in defending himself, or in prosecuting an outrageous injury to his own body amounting to a breach of the lord king's peace; he may also defend by battle his right to his fee and inheritance.

When the battle has been fought, the vanquished champion is liable to a penalty of sixty shillings for crying craven, and shall also lose his law. Moreover, if the tenant's champion is defeated, his principal shall restore the disputed land with the fruits and profits found on the fee at the time when seisin is delivered, and shall never again be allowed to bring this same plea in court. For those matters which have been determined in the lord king's court as the result of a battle are settled forever. Then the sheriff shall be commanded by the following writ to see that the victor is given the land he has recovered by his proof, and to put him in seisin of it:

*The writ for delivering seisin after a battle has been fought*

[4] The king to the sheriff, greeting. I command you to put M. without delay in seisin of one hide of land in such-and-such a vill concerning which there was a plea between him and R. in my court, because that hide of land has been adjudged to him in my court as the result of a battle. Witness Rannulf, etc.

[5] This is what is done if the demandant wins the battle; but if he is beaten in the person of his champion, then the tenant shall go quit from the demandant's claim forever.

*The Grand Assize*

[6] If the tenant chooses to defend himself by battle against the demandant, then the procedure is as stated above. But if the tenant prefers to put himself upon the lord king's Grand Assize, then the demandant will either do the same, or he will not. Once the demandant has stated in court that he has put himself upon the assize, and has expressly said this to the justices sitting on the bench, he cannot afterwards retract, but must stand or fall by the assize. But if he is unwilling to put himself upon the assize he must show some cause why there should be no assize between them, for example, that they are of the same blood, and descended from the same parentelic stock<sup>16</sup> from which the inheritance has descended. If the demandant makes this objection, the tenant will either admit it or not.

If he admits it in court, then the assize shall not proceed, and the case shall be verbally pleaded and determined in court by means of a due enquiry as to which of them is nearer to the original stock and therefore the more rightful heir. In this way the nearer heir will prove his right, unless the other party can show in court that the nearer heir or one of his ancestors lost his right, whether temporarily or forever, by making a gift or sale or exchange or other effective alienation, or can show that by reason of a felony (and this will be discussed below<sup>17</sup> in greater detail) he or his ancestors have completely lost all right. If for any of these reasons the case cannot proceed, then the verbal allegations may lead to determination by battle.

If the tenant who has put himself upon the assize denies that he is in the same parentela as the demandant, or at least denies that they are from the same stock from which the inheritance has descended, recourse must be had to their common blood relatives, who must be summoned to court so that the parentela of the parties may be investigated on the basis of their evidence. If they all join in affirming that the parties are descended from the same stock as the inheritance, this statement is to be accepted unless one of the parties strongly denies it; in that case recourse must be had to the neighbourhood, whose testimony, if it confirms that of the blood relatives, shall be conclusive. The same course is to be followed if the kindred cannot agree among themselves; in that case recourse must be had to the neighbourhood, whose verdict shall be conclusive. When a careful

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<sup>16</sup> A person's *parentela* is 'the sum of those persons who trace their blood from him,' that is, all his issue. [Here the rule seems to be that the assize will not be taken if the objector can show that the parties have a common ancestor. CD]

<sup>17</sup> xiv, 1.

investigation has been made in this way, if it is found and proved that the parties are descended from the same stock as the inheritance, the assize shall not proceed, and the case shall be tried by verbal allegation, as I have already said. On the other hand, if the court and the lord king's justices take the contrary view, then the demandant, who by pleading that the parties were of the same stock maliciously attempted to frustrate the assize, shall lose his case.

If nothing happens to prevent the assize from proceeding, then the case will be as conclusively settled by assize as by battle.

*The nature of the Grand Assize*

[7] This assize is a royal benefit granted to the people by the goodness of the king acting on the advice of his magnates. It takes account so effectively of both human life and civil condition<sup>18</sup> that all men may preserve the rights which they have in any free tenement, while avoiding the doubtful outcome of battle. In this way, too, they may avoid the greatest of all punishments, unexpected and untimely death, or at least the reproach of the perpetual disgrace which follows that distressed and shameful word which sounds so dishonourably from the mouth of the vanquished. This legal constitution is based above all on equity; and justice, which is seldom arrived at by battle even after many and long delays, is more easily and quickly attained through its use. Fewer essoins are allowed in the assize than in battle, as will appear below,<sup>19</sup> and so people generally are saved trouble and the poor are saved money.<sup>20</sup> Moreover, in proportion as the testimony of several suitable witnesses in judicial proceedings outweighs that of one man, so this constitution relies more on equity than does battle; for whereas battle is fought on the testimony of one witness, this constitution requires the oaths of at least twelve men.

The preliminaries of the assize are as follows: the tenant who has put himself upon the assize should first purchase a writ of peace,<sup>21</sup> to prevent the other party from proceeding further with the case by means of the original writ which began the plea between them about the tenement in question. The writ of peace is as follows:

*The writ prohibiting a plea on account of the assize*

[8] The king to the sheriff, greeting. Prohibit N., unless battle has already been waged, from holding in his court the plea between R. and M. concerning one hide of land in such-and-such a vill, which the said R. is claiming against the aforesaid M. by my writ; because M., who is tenant, puts himself upon my assize, and seeks a recognition to determine which of them has the greater right in the land. Witness, etc.

If the tenant, as he may lawfully do, puts himself upon the assize in a plea concerning service, then the writ shall be as follows:

*A variant of the same writ*

[9] The king to the sheriff, greeting. Prohibit N., unless battle has already been waged, from holding in his court the plea between himself and M. concerning the service of two shillings and a sester<sup>22</sup> of honey and two sticks<sup>23</sup> of eels which the aforesaid N. is demanding from the aforesaid M. as annual service from the free

<sup>18</sup> A reference to the 'loss of law' that followed defeat in battle.

<sup>19</sup> ii, 12 and 16

<sup>20</sup> cf. the praise of itinerant justices in the *Dialogus*, p. 77

<sup>21</sup> The writ of peace stops the proceedings, and it is for the demandant to restart them with the writ summoning four knights (ii, 11). The writ of peace is appropriate and necessary where the case is in a feudal or county court, both of which need a royal warrant to stop a case begun by royal writ. It is presumably not necessary where the case is already in the royal court: the account of its working by H. G. Richardson, 'Glanville Continued', *L.Q.R.* LIV (1938), 384-99, says nothing about such a situation, and a simple directive by the court would suffice to authorise the summons of the four knights (as in *Bracton's Note Book*, no. 248). But the author, in order to work in the writ of peace, switches without warning from proceedings on a *Precipe* for land in the royal court to proceedings on a writ of right for land or services in a feudal court.

<sup>22</sup> A liquid measure, generally used for beer, wine and cider; about six gallons

<sup>23</sup> A measure of quantity in small eels; about 25 or 26

tenement which he holds of him in such-and-such a vill, and for which tenement the said M. acknowledges that he owes him eight shillings a year for all service. For M., from whom that service is demanded, puts himself upon my assize and seeks a recognition to determine whether he owes eight shillings a year for all service, or eight shillings and in addition two shillings and a sester of honey and two sticks of eels. Witness, etc.

[10] The tenant who has put himself upon the assize secures peace by such writs until the demandant comes to court and purchases another writ, which provides that four lawful knights of the county and of the neighbourhood shall elect twelve lawful knights of the same neighbourhood, who are to declare on oath which of the parties has the greater right in the land in question. The writ for summoning the four knights is as follows:<sup>24</sup>

*The writ for summoning four knights to elect twelve knights*

[11] The king to the sheriff, greeting. Summon by good summoners four lawful knights from the neighbourhood of Stoke, to be before my justices at Westminster on the Sunday after Easter to elect on oath twelve lawful knights from the same neighbourhood who best know the truth of the matter, and who are to declare on oath whether N. or R. has the greater right in one hide of land in Stoke, which N. is claiming against R. by my writ, and in respect of which R. the tenant has put himself upon my assize and seeks a recognition to determine which of them has the greater right in the land. And you are to cause their names<sup>25</sup> to be endorsed on this writ. And summon by good summoners R. the tenant to be there at that time to hear the election. And have there the summoners and this writ. Witness, etc.

*The tenant's essoins after the assize has been summoned*

[12] On the appointed day the tenant may esoin himself and again have recourse to three reasonable essoins; and this is lawful because, as was said above,<sup>26</sup> whenever a person appears in court and does there what he is legally bound to do, he can have recourse to his essoins again. But this might lead to as many essoins in the Grand Assize as in trial by battle, which is inconsistent with what was said above.<sup>27</sup>

Suppose, for example, that the tenant essoins himself on three successive return days appointed for the election of twelve knights by the four knights. When he comes to court after the three essoins, any one or more of the four knights may esoin himself or themselves on that day. If this happens, then, when their essoins are exhausted, the tenant can begin again to esoin himself. In this way the assize would seldom, if ever, be brought to a conclusion. Note, however, that a certain constitution has been ordained for good and equitable reasons; this provides that when the four knights appear in court on the appointed day, ready to elect the other twelve, the court may expedite the proceedings by directing that the four knights shall make the election on their oath, whether the tenant has come or not. Now, if the tenant were present in court he might be able to take legal exception to one or more of the elected twelve, and would be entitled to have this objection heard; therefore it is best, when he is absent, to choose not just twelve, but as many more as will beyond doubt or question satisfy him when he returns. The grounds for taking exception to these jurors are the same as those for rejecting witnesses in an ecclesiastical court.

Note, moreover, that if the tenant who has put himself upon the Grand Assize comes to court, then, with the consent of the parties, the court may award that, although all four knights have not come, one of them may elect the twelve by joining with two or three other knights of the same county if any such can be found in court, even if they were not summoned for that purpose. For greater safety and to avoid all quibbling it is customary for six or more knights to be summoned to court to make the election. For the effective settlement of these points it is far better to rely on the discretion of the court than to insist on the settled law and custom

<sup>24</sup> cf. Stenton, nos. 3516 and 3517, and comment, *ibid.* pp. 12–13

<sup>25</sup> i.e. the four knights

<sup>26</sup> i, 21

<sup>27</sup> ii, 7

of the court; in this way it is left to the foresight and judgment of the lord king or to his justices so to adjust this assize as to make it more practical and equitable.

*The cases in which a party can put himself upon the Grand Assize*

[13] A party can put himself upon the assize in cases concerning land, or services, or excessive demands for services, or the right to the advowson of a church. He can do so not only against a stranger but even against his own lord, as in the case of a recognition to determine whether the lord has the greater right to hold in demesne or the tenant to hold in demesne of the lord.<sup>28</sup> It is easy to formulate writs to fit the different circumstances.

*The content of the oath which the twelve knights swear*

[14] When the twelve knights have been elected, they must be summoned to come to court ready to declare on oath which of the parties, that is whether the demandant or tenant, has the greater right in his claim. The summons shall be by the following writ:

*The writ for summoning the twelve knights who have been elected for the assize*

[15] The king to the sheriff, greeting. Summon by good summoners the following twelve, namely A. and B. and so on, to be before me or my justices at such-and-such a place on a certain day, ready to declare on oath whether N. or R. has the greater right in one hide of land (or other thing claimed) which the aforesaid R. claims against the aforesaid N., and in respect of which the aforesaid N., who is tenant, has put himself upon my assize and has sought a recognition to determine which of them has the greater right in the thing claimed. And meanwhile the twelve shall view the land (or tenement from which the services are demanded). And summon by good summoners N., who is tenant, to be there to hear the recognition. Witness, etc.

*The tenant cannot essoin himself on the day appointed for taking the assize*

[16] On the day appointed for the twelve knights to make the recognition the assize shall proceed without delay, whether the tenant comes or not, and he shall not be allowed to essoin himself. His presence is not indispensable to the making of the recognition because, even if he were present, he would not be allowed to allege any reason why the assize upon which he had put himself in court should not proceed. It is otherwise if the demandant is absent; for if he, as he lawfully may, essoins himself on the appointed day, then the assize shall be postponed for that day, and another day in court assigned him; the reason is that one may lose by defaulting, but may not gain while wholly absent.<sup>29</sup>

*What the law is when some jurors know the truth of the matter and some do not*

[17] When the assize reaches the stage where the recognition is made, then either the true legal position is well known to all the jurors, or else some know and some do not, or else none of them knows. If none of them knows the truth of the matter, and they have stated this on their oath in court, recourse shall be had to others until such as do know the truth of it are found. If, however, some know the truth of the matter and some do not, those who do not shall be rejected and others summoned to court until at least twelve can be found to agree on it. If some of them declare in favour of one party and some in favour of the other, then further jurors are to be added until at least twelve agree together in favour of one party. Each juror summoned for this purpose must swear that he will not declare falsely, nor knowingly suppress the truth. The knowledge required from the jurors is that they shall know about the matter from what they have personally seen and heard, or from statements which their fathers made to them in such circumstances that they are bound to believe them as if they had seen and heard for themselves.

*How the assize proceeds when all twelve are certain of the truth of the matter*

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<sup>28</sup> The writ is at ix, 7.

<sup>29</sup> The gloss in *B* says that xiii, 10 is to the contrary, but this merely shows that an absent tenant may stay in seisin if the recognitors in mort d'ancestor find in his favour; can he, strictly, be said to gain thereby?

[18] When twelve knights who are all certain of the truth of the matter appear to make the recognition, then the assize shall proceed to declare which of the parties, demandant or tenant, has the greater right in the land claimed. If they declare that the tenant has the greater right therein, or make some other form of declaration from which it sufficiently appears to the lord king or his justices that this is the case, then the court shall award that the tenant be sent away, quit forever from the demandant's claim; moreover, the demandant shall never again effectively be heard in court on this matter. For suits decided in due form by the Grand Assize of the lord king shall on no account be revived again in future. On the other hand, if the judgment of the court based on the assize is in favour of the demandant, then the other party shall lose the land in question, and shall restore with it all fruits and profits found on it at the time seisin is delivered.

*The penalty for those who swear rashly in the Grand Assize*

[19] A penalty for those who swear rashly in this assize is ordained by, and appropriately set out in, the royal constitution. If the jurors are duly convicted<sup>30</sup> in court of perjury, or confess to it in court,<sup>31</sup> then they shall be deprived of all their chattels and movable goods which shall pass to the king, by whose great mercy their free tenements are excepted from this forfeiture. They shall, moreover, be cast into prison and kept there for a year at least. In addition they shall lose their law<sup>32</sup> forever, and thus rightly incur the lasting mark of infamy.<sup>33</sup> This penalty is justly ordained, so that the fear of such punishment shall prevent all men from swearing a false oath in such a case. It should be noted that there can never be a battle where there cannot be an assize, and the converse is also true. If<sup>34</sup> the tenement is adjudged to the demandant, he shall be sent to the sheriff of the county in which the tenement lies to receive seisin by authority of the following writ:

*The writ for delivering to anyone seisin of a tenement recovered by this assize*

[20] The king to the sheriff, greeting. I command you to put M. without delay in seisin of one hide of land in such-and-such a vill which he claimed against N., and in respect of which the said N. put himself upon my assize, because the said M. has recovered that land in my court as the result of the recognition. Witness Rannulf, etc.

*What the law is if there cannot be found twelve knights from the neighbourhood who know the truth of the matter*

[21] If, however, there cannot be found twelve knights from the neighbourhood, or even in the county court, who know the truth of the matter, what is to be done? Does it follow that the tenant shall prevail against the demandant? If he does so, then the demandant will lose whatever right he may have. This difficulty gives rise to the following problem. Suppose that two or three lawful men, or more (but less than twelve), claim to be witnesses of the matter and offer to prove it in court, and suppose further that they are of an age to make proof by battle, and that they pronounce in court all the words required for the court to award battle; shall any of them be allowed to make proof in this way?

[BOOK III]

*The various kinds of warrantor*<sup>35</sup>

<sup>30</sup> Preferred to 'attainted' notwithstanding Woodbine, pp. 204-05. ...

<sup>31</sup> A reminiscence of the Roman law distinction between 'confessio in iure' and 'confessio in iudicio' which is inappropriate here.

<sup>32</sup> Explained in ii, 3

<sup>33</sup> See Introduction p. xxxvii, for this use of 'infamia'.

<sup>34</sup> This sentence follows naturally on the end of c. 18: the preceding discussion of rash swearing interrupts the argument, and would have come better after c. 17.

<sup>35</sup> Warranties can be classified into two broad groups. Implied warranties resulted from a lord's receipt of homage from a tenant to whom he had subinfeudated land: express warranties were sometimes given in cases of the above kind, and generally where land was alienated by substitution (to the alienee to hold of the chief lord and not of the alienor) or where chattels were sold (see x, 15). The warranty express or implied, bound the warrantor and his heirs to defend the title of the grantee and his heirs who were able, if their title was challenged in litigation, to vouch to warranty—that is, to call on the warrantor to come to court and defend the case. If the defence was unsuccessful and the case concerned land, the demandant got the land and it was the duty of the warrantor to compensate the grantee with lands of equal value (iii, 1): if the case concerned chattels, the rules were *mutatis mutandis* the same save

[1] When only the tenant and no-one else needs to be present to answer to the case, the order of pleading which is observed in court is that which we have stated above. The presence of a third party is, however, required if the tenant says in court that the thing claimed is not his, but that he holds it as lent to him for use, or deposited to be looked after, or let to him, or given as a gage, or in any other way which implies that it is not his; similarly, if the tenant says that it is his, but that he has in respect of it a warrantor from whom he got it as a gift, or by sale, or in exchange, or some other such way. If he says in court that it is not his but another's, then that other shall be summoned by a further writ similar to the original writ; and thus the plea will begin again against that other, who, when he eventually appears in court, will either agree in admitting that the thing is his, or will say that it is not. If he says that it is not his, then the tenant, who previously alleged in court that it was, shall in consequence lose that land without any right to recover it, and shall be summoned to come to court and hear judgment against him in the case. Thus the other party, whether he has come to court or not, shall recover seisin.

When the tenant in court vouches another to warranty, a reasonable return day is assigned him in court on which to have there this warrantor of his; and thus he can again have recourse to his essoins, namely three for himself and another three for his warrantor. When the vouchee to warranty<sup>36</sup> eventually appears in court he will either warrant the thing for the tenant or not. If he is willing to warrant it for him, then the demandant shall plead solely with the warrantor, in whose name, from that moment, all the requisite pleading shall be done. It follows that if the tenant has prior to this essoined himself, he cannot rely on his essoin to prevent himself from being deemed in default on account of the warrantor's absence.

If the warrantor is present in court and defaults in his warranty to the tenant who brought him there to warrant, then there shall be a plea between them, which may, in consequence of the formal words alleged therein, result in battle; and this is so whether the tenant who vouched him to warranty has a charter of his or not, provided that he has a witness who is suitable for proving the case and is willing to do so. Note also that when it is established that he who is brought to warrant is bound to warrant the thing, then from that moment he for whom he ought to warrant it cannot lose it, because, if the demandant proves in court that the thing is his, the warrantor shall be bound to give to him who vouched him an equivalent in exchange, if he has property out of which he can do this.

*What the law is when the vouchee to warranty is unwilling to come to court*

[2] It sometimes happens that he who has been vouched to warranty in court is unwilling to come to court, either to warrant the thing or to prove there that he is not bound to do so. In such a case the court, at the request of the party who vouched him to warranty, and in exercise of its discretion and pleasure, shall compel him to come, and he shall be summoned by the following writ<sup>37</sup>:

*The writ for summoning a warrantor*

[3] The king to the sheriff, greeting. Summon N. by good summoners to be before me or my justices at such-and-such a place on a certain day to warrant for R., if he is willing to do so, one hide of land in such-and-such a vill, which R. claims as a gift from N. (or from M. the father of N.); or to show why he is not bound to warrant it for him. And have there the summoners and this writ. Witness. etc.

*Whether the warrantor is allowed to essoin himself*

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that, if the successful plaintiff alleged theft, he got the chattel, the unsuccessful warrantor was hanged, and the grantee lost his chattel (x, 15; P & M, II, 162-4).

On warranties generally see P & M, I, 306-7 and II, 662-4; P & M, II, 162-4 for chattels. There are detailed studies of early warranties of land by S. J. Bailey, 'Warranties of Land in the Thirteenth Century,' *C.L.J.* VIII (1942-4), 274-99 and IX (1945-7), 82-106 and 'Warranties of land in the Reign of Richard I,' *C.L.J.* IX, 192-209. The relationship between homage and warranty is discussed by S. E. Thorne, 'English Feudalism and Estates in Land,' *C.L.J.* (1959), 193-209.

<sup>36</sup> 'Vouchee to warranty' and 'warrantor' are alternative terms to describe the same person.

<sup>37</sup> cf. Stenton, no. 3496, and comment, *ibid.* p. 13



[4] On the appointed day the warrantor must either be allowed to essoin himself or not. If not, then a right which is conceded to others is denied to him and without any fault of his, which not only is inconvenient but seems unjust. On the other hand, if he is allowed to essoin himself, I put this question: suppose that he essoins himself lawfully three times and that on the third occasion, in accordance with the law and custom of the court, he is directed to come or to send an attorney on the fourth return day; if he neither comes nor sends an attorney on that day, what is the law on this point? If the tenement is taken into the hand of the lord king, this seems unjust and contrary to the rights of the tenant, for he was not personally judged to have defaulted; yet if this is not done, then such rights as the demandant may have seem to be unjustly postponed. The answer is that the former possibility prevails,<sup>38</sup> in accordance with the law and custom of the realm, because, if the tenant loses the land or seisin of the land by default of his warrantor, the latter is bound to give him equivalent lands in exchange (*escambium*), and can therefore be constrained to come to court either to warrant the tenement or to show cause why he is not bound to warrant for the tenant.

*What the law is when a party fails to vouch his warrantor in court*

[5] It sometimes happens that the tenant, although he has a warrantor, does not vouch any warrantor in court, but undertakes the denial of the demandant's right by himself alone. If he does this and loses the land after a battle, he shall have no further rights against the warrantor. This may give rise to a question: if the tenant can defend himself by battle without the consent or presence of his warrantor, can he likewise put himself upon the Grand Assize of the lord king without such consent or presence? The answer is that, as with battle, so by the assize he can defend himself.

*Postponement of the plea on account of the absence of chief lords*

[6] Moreover, a case is often delayed by the absence of lords; for example, when the demandant claims that the tenement in question belongs to the fee of one lord, and the tenant says that he himself holds it as of the fee of another lord. In such a case both lords shall be summoned to court,<sup>39</sup> so that the case may be heard and determined in due form in their presence, lest in their absence some injustice may seem to be done them. On the return day for which they are summoned to come to court, both or either of the lords may lawfully cast essoins, and can do this on three successive return days in the customary manner.

Suppose that the tenant's lord has essoined himself three times, and has been directed by the court to come in person or send an attorney; if he neither comes nor sends an attorney, the court will rule that the tenant shall answer in person and undertake the denial; if he is successful in his denial, he shall retain the land for himself and shall in future do the service for it to the lord king because his own lord shall, on account of the default, lose his service until such time as he comes to court and does there what he is bound to do.

The demandant's lord is also allowed to essoin himself in the same manner; when eventually he comes to court, the question arises whether the tenant's lord can begin again to essoin himself: the answer is that he can do so until he has once appeared in court, for then he is bound to show cause why he need not wait any longer. The same rule applies to the other lord. If, however, the demandant's lord is absent after his three essoins, I question what the law is in such a case: the answer is that, if he has previously essoined himself, the essoiners shall be imprisoned and he shall also be attached in person for his contempt of court, and in this way compelled to come to court, where whatever he wishes to say shall be heard.

*The reply of the tenant's chief lord*

[7] When both lords are present the tenant's lord will either warrant that the land in question is of his fee, or he will deny it. If he warrants it, then he shall have a choice between undertaking the denial himself and committing it to the tenant; whichever he does, his rights and those of his tenant will be preserved if they are successful in the plea; but if they are defeated, then the lord shall lose his service and the tenant the land without any right to reopen the issue.

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<sup>38</sup> i.e. the tenement is taken into the king's hand.

<sup>39</sup> Presumably the county or royal court; see xii, 8.

If, however, the tenant's lord is present in court and fails to make good to the tenant his warranty, then the plea can be changed into a plea between tenant and lord: for this to happen the tenant must say that his lord unjustly fails to make good to him as lord of that fee the warranty—'unjustly' because the tenant performed for him in respect of the land a specified service of such-and-such an amount (or because his ancestors performed it for him or his ancestors)—and must produce persons who heard and saw this and some person suitable for proving it, or else some other suitable and sufficient proof of whatever kind the court may direct.

*The reply of the demandant's chief lord*

[8] A similar distinction must be made in respect of the demandant's lord. When he appears in court he will either claim the land in question for his fee or not. Again, if he does warrant the demandant's suit and claims the land for his fee, he shall have a choice between relying on the proof offered by the demandant and personally proving his right against the tenant; in either case both his right and that of the demandant will be preserved if they are successful in the plea. If, however, they are defeated, both will lose thereby. On the other hand, if the lord does not warrant the demandant's claim, then he who vouched him to warranty in court shall be liable to amercement by the lord king for making a false claim.

[Eight books are omitted here. They deal, in order, with pleas concerning advowsons (the right to present a parson to a church), those concerning status (villein or free), those concerning dower and *maritagium* (a remarkable treatise in two books on marital property and inheritance), final concords (a type of conveyance), homage and relief, debt (reproduced in part below, Section 7B), and attorneys.] ...

[BOOK XII]

[1] The foregoing pleas which concern the right come directly and in the first instance into the court of the lord king, and are tried and determined there as stated above. Sometimes, however, certain pleas which concern the right, and do not come into the court of the lord king in the first instance, are removed there when the courts of different lords are proved to have made default of right<sup>40</sup>: in such a case they pass to the county court, from which they can be transferred to the chief court of the lord king for various reasons which have been explained above.<sup>41</sup>

[2] When anyone claims to hold of another by free service any free tenement or service, he may not implead the tenant about it without a writ from the lord king or his justices.<sup>42</sup> Therefore he shall have a writ of right,<sup>43</sup> directed to the lord of whom he claims to hold; if the plea concerns land, it will be as follows:

*The writ of right*

[3] The king to Earl William, greeting. I command you to do full right without delay to N. in respect of ten carucates of land in Middleton which he claims to hold of you by the free service of one hundred shillings a year for all service (or by the free service of one knight's fee for all service, or by the free service appropriate when twelve carucates make up one knight's fee for all service; or which he claims as pertaining to his free tenement which he holds of you in the same vill or in Morton by the free service, etc., or by the service, etc.; or which he claims to hold of you as part of the free marriage portion of M. his mother, or in free burgage, or in frankalmoin; or by the free service of accompanying you with two horses in the army of the lord king at your expense for all service; or by the free service of providing you with one crossbowman for forty days in the army of the lord king for all service): which Robert son of William is withholding from him. If you do not do it the sheriff of Devonshire will, that I may hear no further complaint for default of right in this matter. Witness, etc.

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<sup>40</sup> Discussed in xii, 6-7

<sup>41</sup> vi, 8

<sup>42</sup> cf. xii, 25 and *n.*

<sup>43</sup> For the relationship of this writ to the *Precipe* see [above, ii, 5 and *n.*] See generally Van Caenegem; cf. examples in Stenton, nos. 3551-4, and comment, *ibid.* pp. 20-1.

There are many varieties of these writs of right for different cases, as will appear from the different forms of writ set out below. If the plea concerns service the writ will be as follows:

*The writ of right*

[4] The king to N., greeting. I command you to do full right without delay to R. in respect of one hundred shillings of rent in such-and-such a vill which he claims to hold of you by the free service, etc. (or by the free service, etc.). If you do not do it the sheriff will, that I may hear no further complaint for default of right in this matter. Witness, etc.

*Another writ of right*

[5] The king to R., greeting. I command you to cause N. and A. his wife to have, justly and without delay, their reasonable share which belongs to them in one messuage in such-and-such a vill, which they claim as pertaining to their free tenement which they hold of the lord king in the same vill by the free service of two shillings a year (or in one mark of rent in the same vill which they claim as part of the free marriage-portion of A.); which they complain that B. sister of the said A. is withholding from them (or which G. is withholding from them). If you do not do it the sheriff will, that they need no longer complain for default of right in this matter. Witness, etc.

*Now the courts of lords are proved to have made default of right*

[6] These pleas are tried in the courts of lords, or of those who stand in their place, in accordance with the reasonable customs of those courts, which cannot easily be written down because of their number and variety. [7] Proof of default of right<sup>44</sup> in these courts is made in the following way: when the demandant complains to the sheriff in the county court and produces the writ from the lord king,<sup>45</sup> the sheriff will, on a day appointed to the litigants by the lord of the court, send to that court one of his servants, so that he may hear and see, in the presence of four or more lawful knights of that county who will be there by command of the sheriff, the demandant's proof that the court has made default of right to him in that plea; the demandant will prove this to be the case by his own oath and by the oath of two others who heard and understood it and who swear with him. With this formality, then, cases are transferred from certain courts to the county court, and are once again dealt with and determined there; and neither the lords of those courts nor their heirs may contest this or recover jurisdiction for their courts in respect of the particular plea.

But if a case is removed from any such court to a superior court before that court is proved, in the manner set out above, to have made default of right, the lord of that court may on the day appointed for the plea reclaim his court, on the ground that it has not yet been proved to have made default of right; in this way he shall have judgment to have his court again, unless it is proved then and there that it had made default of right as alleged.<sup>46</sup> It should be noted, however, that if a suit has been removed in this way to the chief court of the lord king, it is of no effect for anyone to claim his court on the day appointed for the plea, unless he has claimed it on the third day previous to that, in the presence of lawful men. But if no day has been appointed to the demandant, so that he has just cause to complain of the delay caused to him, it suffices for him to falsify the court in the manner set out above; he may do this wherever he pleases in that fee if the lord has no settled residence therein, just as the lord may hold his court and appoint a day to the demandant in whatever place he pleases in the fee; but he may not legally do it outside the fee.

[8] The writ must be directed to him of whom the demandant claims to hold, not to anyone else, not even to the chief lord. But what if the demandant claims to hold of one lord and the tenant holds of another? In such a case he to whom the writ is directed may not hold that plea, because he may not unjustly and without a judgment disseise another of the seisin of his court which he is deemed to have; therefore recourse must necessarily be had to the county court, and the plea will proceed there or in the chief *Curia*; both lords must

<sup>44</sup> For the wide meaning given to default of right (or justice) see N. D. Hurnard in *Studies ... presented to F. M. Powicke* (Oxford 1948), pp. 161–2; 168 n. 1; 178–9. The process is *tolt*.

<sup>45</sup> *i.e.* the original writ of right: see Stenton, pp. 20–1.

<sup>46</sup> For the significance of this rule in relation to Magna Carta, c. 34, see [above, ii, 5 and n.]

be summoned to be present there, so that the matter can be litigated in the presence of both, in the manner stated above<sup>47</sup> in the treatise on warranties.

[9] The sheriffs of counties have jurisdiction over the foregoing pleas of right in which lords' courts are proved to have made default of right, and also over certain other pleas; for example, when anyone complains in court that his lord is demanding customs and services which are not due, or more service than he ought to do him, in respect of the free tenement which he holds of him<sup>48</sup>; similarly, pleas concerning villeins, as stated above.<sup>49</sup> To put it generally, the pleas which are to be heard and determined by the sheriff are all those in which the sheriff has a writ from the lord king or his chief justice commanding him to constrain any one, or, as stated above,<sup>50</sup> to do full right unless another does it; examples will appear in the following writs:

*The writ forbidding a lord unjustly to vex his tenants*<sup>51</sup>

[10] The king to S., greeting. I prohibit you from unjustly vexing H., or permitting him to be vexed, in respect of his free tenement which he holds of you in such-and-such a vill, or from demanding, or allowing to be demanded, customs and services which he is not bound to do for you, or which his ancestors neither did nor were bound to do in the time of King Henry my grandfather. If you do not do this the sheriff will, that he need no longer complain for default of justice in this matter. Witness. etc.

*The writ of naifty*<sup>52</sup>

[11] The king to the sheriff, greeting. I command you justly and without delay to cause R. to have M. his villein and fugitive, with all his chattels and his whole household, wherever he shall be found in your jurisdiction unless it be in my demesne; who fled from his land since my first coronation. And I prohibit anyone on pain of forfeiture from detaining him unjustly. Witness, etc.

*The writ for replevying cattle*<sup>53</sup>

[12] The king to the sheriff, greeting. I command you justly and without delay to cause G. to have, in return for gage and sureties, his cattle, which he complains that R. took and kept unjustly on account of customary dues which he is demanding from G., who does not admit that he owes them; and afterwards cause him to be justly dealt with, that he need no longer complain for default of justice in this matter. Witness. etc.

*The writ for measuring pasture*

[13] The king to the sheriff, greeting. I command you justly and without delay to cause the pasture of such-and-such a vill to be measured, which L., who was the wife of P., and her sister R. complain that S. is unjustly overloading; nor are you to permit the aforesaid S. to have more cattle in that pasture than he ought to have, as pertaining to him in proportion to the size of the fee which he has in that vill; that they need no longer complain for default of justice in this matter. Witness, etc.

*The writ for having easements in free tenements*

[14] The king to the sheriff, greeting. I command you without delay to command R. to permit H. to have, justly and without delay, his easements in wood and pasture in such-and-such a vill which he alleges that he ought to have, to the extent that he ought, and is accustomed, to have them; and do not permit the aforesaid R. or any other person to molest or injure him therein; that I may hear no further complaint for default of justice in this matter. Witness, etc.

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<sup>47</sup> iii, 6–8.

<sup>48</sup> The writ is at xii, 10

<sup>49</sup> v, 1; the writ is at xii, 11

<sup>50</sup> e.g. xii, 3

<sup>51</sup> cf. Van Caenegem, nos. 159–78, for precursors and examples

<sup>52</sup> See v, 1 [...]; precursors and examples in Van Caenegem, nos. 103–24.

<sup>53</sup> xii, 15 also is a writ of replevin

*The writ for prohibiting a chief lord from vexing his tenant's tenant*<sup>54</sup>

[15] The king to the sheriff, greeting. I prohibit you from permitting R. unjustly to demand from S. more service than is due in respect of the free tenement which he holds of N., of the fee of the said R., in such-and-such a vill. And you shall cause the cattle which were taken on account of that demand, which he does not acknowledge as due in respect of his free tenement, to be replevied to him, until the suit is heard before us and it is known whether he owes that service or not. Witness, etc.

*The writ for perambulating reasonable boundaries between different tenements*

[16] The king to the sheriff, greeting. I command you to establish, justly and without delay, reasonable boundaries between the land of R. in such-and-such a vill and its appurtenances and the land of A in such-and-such a vill, as they ought to be and customarily are, and as they were in the time of King Henry my grandfather; concerning which R. complains that A. has unjustly and without a judgment occupied more than belongs to his free tenement in that vill; that I may hear no further complaint for default of justice in this matter. Witness, etc.

*The writ for upholding divisions made by those deceased*<sup>55</sup>

[17] The king to the sheriff, greeting. I command you justly and without delay to cause the reasonable division of his chattels which R. made to the brothers of the Hospital of Jerusalem to be upheld, if it can reasonably be shown that he made it and that it ought to be upheld. Witness, etc.

*The writ for restoring chattels*<sup>56</sup>

[18] The king to the sheriff, greeting. I command you to constrain R. to restore, justly and without delay, to N. his chattels, if he can reasonably show that he ought to have them; concerning which he complains that he took them unjustly and without a judgment in his free tenement in such-and-such a vill, after the disseisin which he had done to him there within my assize and for which he recovered his seisin before my justices by a recognition of novel disseisin; that I may hear no further complaint for default of justice in this matter. Witness, etc.

*Those appointed by the lord king or his justices to transact certain business may not on their own authority appoint others to transact that business*<sup>57</sup>

[19] The king to the sheriff, greeting. I command you to postpone, until some suitable day when you will be able to be present, the recognition which has been summoned between R. and M. concerning the boundaries of certain vills, which my justices in those parts ordered you and H. to take before you, and for the taking of which it is alleged that you have appointed others in your place. For it is not the custom when the transaction of any of my judicial business is entrusted to certain people that they should transfer it to others when the matter in question concerns my justice. Witness, etc.

*The writ for a woman to have her reasonable dower*<sup>58</sup>

[20] The king to the sheriff, greeting. I command you justly and without delay to cause A., who was the wife of R., to have her reasonable dower from the whole of the fee which was held by the aforesaid R., complete in all respects, but saving to the heir the chief messuage; and cause the said wife to have another messuage, unless she has been given as nominated dower land in which there is no messuage. The plea shall not be discontinued on the grounds that the fee of the aforesaid R. is in one of my baronies, for I do not wish,

<sup>54</sup> cf. xii, 12

<sup>55</sup> The same writ, with discussion, is at vii, 7.

<sup>56</sup> Repeated, with explanation, at xiii, 38-9. [...]

<sup>57</sup> This and the following writ are clumsily drafted. They were not then, and did not later become, common form; see Stenton, pp. 21-2.

<sup>58</sup> This remarkable writ on the death of a tenant-in-chief combines several operations: the sheriff is to secure reasonable dower for the widow (the king is lord, and so the writ in vi, 5 is inappropriate) and to see to the performance of the testament (cf. vii, 7 and xii, 17). The interest in payment of debts, normally the heir's duty (vii, 9), suggests that the heir is under age and in ward to the king.

nor does the law require, that the wives of knights should for this reason lose their dower. I further command you to cause all the chattels of the aforesaid R. to remain in peace so that nothing is removed, either in performance of his division or for any other purpose, until his debts are fully paid; afterwards his reasonable division shall be given effect out of the residue, according to the custom of my land. And if any of his chattels have been removed since the death of the aforesaid R., they shall be restored to his other chattels for the purpose of paying his debts. Witness, etc.

*The writ for prohibiting a plea concerning lay fee in an ecclesiastical court*<sup>59</sup>

[21] The king to such-and-such ecclesiastical judges, greeting. I prohibit you from holding in an ecclesiastical court the plea which is between R. and N. about the lay fee of the aforesaid R., concerning which he complains that the aforesaid N. is impleading him before you in an ecclesiastical court; because that plea concerns my crown and dignity.<sup>60</sup> Witness, etc.

*The writ prohibiting anyone from prosecuting a plea of this kind in such a court*

[22] The king to the sheriff, greeting. Prohibit N. from prosecuting in an ecclesiastical court the plea which is between R. and himself about the lay fee of R. in such and-such a vill, concerning which he complains that the aforesaid N. is impleading him in an ecclesiastical court before certain judges. And if the aforesaid R. gives you security for prosecuting his claim, then put the aforesaid N. under gage and safe sureties to be before me or my justices on a certain day, to show why he impleaded him in an ecclesiastical court about his lay fee in that vill, whereas that plea concerns my crown and dignity.<sup>61</sup> Witness, etc.

*Why there is no discussion here of pleas belonging to the sheriff*

[23] I omit discussion of the manner and legal process of trying or determining in different county courts the foregoing pleas or others, partly because of the different customs observed from county to county, and partly because the brevity of my plan does not require it, for I am considering only the custom and law of the chief court of the lord king.

[24]<sup>62</sup> It should be known, moreover, that sometimes less is contained in the writ of right than is put into the count in court,<sup>63</sup> whether concerning appurtenances or other things, and sometimes more. There may also

<sup>59</sup> [Compare x, 12: 'When a debtor appears in court on the appointed day, if the creditor has neither gage nor sureties nor any proof except a mere pledge of faith, this is not sufficient proof in the court of the lord king. Of course any breach of faith involved may be sued upon in an ecclesiastical court; but the ecclesiastical judge, though he has jurisdiction over such a crime and may enjoin penance or satisfaction upon the convicted, is forbidden by an assize of the realm to deal with or to determine in an ecclesiastical court, on the basis of pledge of faith, pleas concerning the debts and tenements of laymen.']

As to debt, this passage exactly echoes the 'assisa', which is the Constitutions of Clarendon (1164), c. 15. The attitude is 'head I win, tails you lose': a mere pledge of faith is not enough to found debt in the royal court, and is forbidden as a basis of jurisdiction in the ecclesiastical court. This silliness was enforced by prohibitions, exceptions being made for debts concerning testaments and marriages. Enforcement was ineffective, and the spiritual courts did a large trade in small debts; see, for examples, B. L. Woodcock, *Medieval Ecclesiastical Courts in the Diocese of Canterbury* (Oxford 1952), pp. 89-92 and 108. On the pledge of faith and its breach, see generally P & M, II, 197-203.

As to tenements, the 'assisa' may be the Constitutions of Clarendon, c. 9, but nothing is said there about *lesio fidei*; the treatise may be referring to the practice (noted in P & M, I, 251 n. 3) of adding an oath to a conveyance in the hope of ousting royal jurisdiction. Enforcement was fairly effective and was by writs such as those in xii, 21-2. The exception noted in vii, 18 for lands given in *maritagium* was denied Bracton (f. 407b), who relied on a case of 1230 (*Note Book*, no. 442). See generally P & M, I, 246-51; on prohibitions concerning lay fee see G. B. Flahiff, 'The Writ of Prohibition to Court Christian in the Thirteenth Century', *Mediaeval Studies* (Toronto), VI (1944), 272-4 and VII (1945), 259-61.

<sup>60</sup> Constitutions of Clarendon (1164), c. 9

<sup>61</sup> Constitutions of Clarendon (1164), c. 9

<sup>62</sup> cc. 24-5 are oddly placed, and are probably put here because there is no general and systematic exposition of writs of right in the treatise.

<sup>63</sup> The count ('narratio' in later Latin, 'conte' or 'encouplement' in French) is the formal oral statement of the case made in court by the plaintiff or his pleader; examples are in ii, 3, iv, 6 and vi, 8. See P & M, II, 604-7; the mid-thirteenth-century *Brevia Placitata* (S.S. LXVI) is based on French 'encouplements'.

be discrepancies,<sup>64</sup> sometimes concerning a name put into the writ, sometimes concerning the amount of service. When less is contained in the writ than in the count, no more may be claimed under that writ than is contained in the writ; but when more is contained in the writ than in the count, the excess in the writ may be set aside and the remainder claimed on the authority of the writ. Where there is a discrepancy as to name, strict law requires another writ to be sought. Similarly, when the discrepancy concerns the amount of service, strict law requires that the writ fails.

It sometimes happens that a tenement is claimed by less service than is due from it, or is customarily done, to the lord. Is the lord then bound by that writ to do right, to the detriment of his service? Certainly he is bound, but if the demandant recovers the property the lord can subsequently have a remedy against him on this point.

[25] It should be known, moreover, that according to the custom of the realm, no-one is bound to answer concerning any free tenement of his in the court of his lord, unless there is a writ from the lord king or his chief justice.<sup>65</sup> I assume here that the fee claimed is lay fee; for if there is a plea between two clerks concerning a tenement which is frankalmoin belonging to an ecclesiastical fee, or if, whoever the demandant is, the tenant is a clerk holding such an ecclesiastical fee in frankalmoin, then the plea about the right must be in an ecclesiastical court, unless a recognition is sought to determine whether the fee is ecclesiastical or lay, which is discussed below<sup>66</sup>; for then this recognition must, like all others, be dealt with in the court of the lord king.<sup>67</sup>

### [BOOK XIII]

#### *The various kinds of recognition*

[1] So far the questions which most often arise in pleas about right have been dealt with. There remain for discussion those which are concerned with seisin only.<sup>68</sup> By virtue of a constitution of the realm called an

<sup>64</sup> i.e. between writ and count

<sup>65</sup> The rule (also stated in xii, 2) does not of course mean that litigation about free tenements should be in the royal court. But the royal writ (the writ of right in xii, 3) has in it a threat of removal to the county court for default of right, and thence to the royal court vi, 6–8). So the rule, in effect if not in intent, assists the flow of cases from feudal to royal courts; for its origin and development see Van Caenegem, pp. 212–31.

<sup>66</sup> xiii, 23–5

<sup>67</sup> Constitutions of Clarendon (1164), c. 9

<sup>68</sup> Here, as elsewhere (e.g. i, 3) the author contrasts right and seisin, and is using seisin to mean possession. Earlier law felt no need to distinguish the enjoyment of property from right to property in the way in which Roman law distinguishes possession from ownership. This 'indistinct enjoyment and right' is often referred to by modern writers as seisin, but *saisina* (as distinct from *saisire*, *saisitus est* etc.) is almost unknown in England before 1164. When under Henry II *saisina* becomes a common term to denote the abstract notion of seisin it is used in the sense of possession. It is of course true that right or title is still proved by reference to seisin (as in ii, 3): but the distinction between right and seisin has become vital with the introduction of the possessory or petty assizes discussed in Book xiii. The use by historians of the term seisin to describe not only the old undifferentiated enjoyment and right but also the new possession protected by Henry's reforms is responsible for a good deal of the difficulty and controversy surrounding the mystery of seisin. On seisin, right and possession the starting points are Maitland's articles on the 'Mystery' and 'Beatitude of Seisin' in his *Collected Papers*, I, 358–84 and 407–57. Recent work is based on or reacts against F. Joüon des Longrais, whose views in *La Conception Anglaise de la Saisine* are accepted and summarised by T. F. T. Plucknett in *Harvard Law Review*, XL (1926–7) 921–5, and criticised by Woodbine, pp. 281–3. See also Van Caenegem, pp. 306–16, and the references at the end of this note.

Brief notes, dating and literature on the four principal assizes—mort d'ancestor, darrein presentment, utrum and novel disseisin—are given in the appropriate places. There is disagreement as to their working and significance. The introduction in all four cases of dual process—preliminary assize with the possibility of subsequent proprietary action by writ of right—makes it likely that there was royal policy. That the policy was deliberately aimed against feudal and ecclesiastical jurisdiction is less certain: in one case (darein presentment) jurisdiction was already royal and not feudal (iv, 2), and in another (utrum) the scope of the assize was too limited for this purpose. The provision of order and speedy justice is an alternative and reputable policy. Of course the effect was to draw cases into the royal courts. As to the means employed, romano-canonical influences may be important: the teaching of Vacarius in England and the continental parallels are suggestive. The opposing view stresses the judicialisation of native executive forms and the insular inventiveness of the English. The anti-feudal policy with romano-canonical techniques was advocated by F. Joüon des Longrais, 'La portée politique des réformes d'Henry II en matière de saisine I,' *Revue historique de droit*, 4e série, xv (1936), 540–71, and recently in a lecture at Cambridge, *Henry II and his Justiciars, had they a political plan in their reforms about Seisin?* (Limoges 1962), which is an answer to Van Caenegem. See also S. E. Thorne, 'Livery of Seisin', in *L.Q.R.* LII (1936), 345–64, and N. D. Hurnard, 'Did Edward I reverse Henry II's Policy upon Seisin?', *E.H.R.* LXIX (1954), 529–42.

assize these questions are for the most part settled by recognition, and therefore the various kinds of recognition must now be considered.<sup>69</sup>

[2] One kind of recognition is called mort d'ancestor. Another concerns the last presentation of parsons to churches; another, whether a tenement is ecclesiastical or lay fee; another, whether a man was seised of a free tenement on the day he died as of fee or as of gage; another, whether a man is under age or of full age; another, whether a man died seised of a free tenement as of fee or as of wardship; another, whether a man presented the last parson to a church by virtue of his fee which he had in his demesne, or by virtue of the wardship of someone. And if similar questions arise as they frequently do when both parties are present in court, then recognitions are used to settle the dispute, whether with consent of the parties or by award of the court. There is also the recognition called novel disseisin.

When anyone dies seised of a free tenement, if he was seised in his demesne as of fee, then his heir can lawfully claim the seisin which his ancestor had, and if he is of full age he shall have the following writ<sup>70</sup>:

*The writ of mort d'ancestor*

[3] The king to the sheriff, greeting. If G. son of O. gives you security for prosecuting his claim, then summon by good summoners twelve free and lawful men from the neighbourhood of such-and-such a vill to be before me or my justices on a certain day, ready to declare on oath whether O. the father of the aforesaid G. was seised in his demesne as of his fee of one virgate of land in that vill on the day he died, whether he died after my first coronation, and whether the said G. is his next heir. And meanwhile let them view the land; and you are to see that their names are endorsed on this writ. And summon by good summoners R., who holds that land, to be there then to hear the recognition. And have there the summoners and this writ. Witness, etc.

If, however, the ancestor who was seised in the manner stated above has set out on a pilgrimage, then the writ shall be as follows:

*Another writ of the same kind*

[4] The king to the sheriff, greeting. If G. son of O. gives you security for prosecuting his claim, then summon by good summoners twelve free and lawful men from the neighbourhood of such-and-such a vill to be before me or my justices on a certain day, ready to declare on oath whether O. the father of G. was seised in his demesne as of his fee of one virgate of land in that vill on the day he set out for Jerusalem (or for St. James<sup>71</sup>), on which journey he died, and whether he set out after my first coronation and whether G. is his next heir. And meanwhile let them view the land, etc., as above.<sup>72</sup>

If, however, the heir is under age, then the writ shall be as follows:

*Another writ of the same kind*

[5] The king to the sheriff, greeting. Summon by good summoners, etc., exactly as above, except that the first clause—If G. son of O. gives you security for prosecuting his claim—is omitted in this writ; so also is the clause in the middle—Whether O. the father of G. died after my first coronation.

<sup>69</sup> There follows a list of seven recognitions, and then novel disseisin is mentioned at the end. The first four (mort d'ancestor, cc. 2–17; darrein presentment, cc. 18–22; utrum, cc. 23–5; gage or fee, cc. 26–30) include the next three within them, and at c. 31 the long note which has got into the *beta* text (printed in Woodbine, p. 171) makes this point by referring these three to their respective chapters (under age or not, c. 16; died seised as of fee or wardship, c. 14; presented by virtue of fee or wardship, c. 21). For the postponement of novel disseisin to cc. 32–9 see [xiii, 32 n.]

<sup>70</sup> Somebody (probably the lord) has got into the inheritance before the heir. The dead tenant's seisin does not descend to the heir, who has therefore not been disseised and cannot use novel disseisin. He can use the writ of right; the Assize of Northampton (1176), c.4, provides this speedier remedy. But there are three questions in the writ, and all may give rise to technical points; some of these are already evident in the treatise, and special pleading soon became a feature of this assize. See generally P & M, II, 56–62 and Van Caenegem, pp. 316–25; cf. Stenton, nos. 3530 and 3540 and comment, *ibid.* p. 22.

<sup>71</sup> St James of Compostella.

<sup>72</sup> The reference back in this and the next two writs is to xiii, 3.



If, however, the ancestor has put on the habit of religion, then the writ shall be varied accordingly as follows:

*Another writ of the same kind*

[6] The king to the sheriff, greeting. If G. son of O. gives you security, etc., exactly as above, except that in this writ the middle part runs—Ready to declare on oath whether O. the father of G. was seised in his demesne as of his fee of so much land in that vill on the day he put on the habit of religion,<sup>73</sup> whether he put on that habit after my first coronation, and whether G. is his next heir. And meanwhile let them view the land, etc.

*The procedure leading to this assize*

[7] When the sheriff has received the writ of mort d'ancestor and security for prosecuting the claim has been given in the county court, then the procedure leading to the assize is as follows. First, in accordance with the terms of the writ, twelve free and lawful men from the neighbourhood are to be elected in the presence of both demandant and tenant, or even in the absence of the tenant provided he has been summoned at least once to attend the election. He must be summoned once to come and hear who are elected to make the recognition, and he can if he wishes reject some of them for reasonable cause so that they are excluded from the recognition. If, however, he has not come when the first summons is properly attested in court, then he shall be waited for no longer, and in his absence the twelve jurors shall be elected and sent by the sheriff to view the land or other tenement of which seisin is claimed. Here again the tenant shall have one summons only. The sheriff shall see that the names of the elected twelve are endorsed on the writ.

Then the sheriff shall arrange for the tenant to be summoned to be before the king or his justices on the day stated in the writ of the king or his justices, to hear the recognition. If the demandant is of full age, the tenant can essoin himself on the first and second return days but not on the third day, for then the recognition shall be taken whether the tenant comes or not, because no more than two essoins are allowed in any recognition which concerns only seisin. Indeed, in the recognition of novel disseisin no essoin is allowed. On the third return day, then, as stated above, the assize shall be taken whether the tenant has come or not. And if the jurors declare in favour of the demandant, seisin shall be adjudged to him and the sheriff ordered by the following, writ to have him put in seisin:

*The writ for delivering seisin after the recognition*

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

*What he shall recover in addition to seisin*

[9] In addition to the above seisin the demandant shall also recover seisin of all the goods and chattels which are found in the fee at the time when seisin is delivered. After seisin has been fully recovered, the tenant who has lost seisin may contest the question of right by means of a writ of right; but for how long after the recovery is complete can he do this?

[10] If the jurors find in favour of the absent tenant, he shall stay in seisin and the other party shall have no recourse against him, though this does not take away his cause of action for the right. Similarly, an action concerning the right in a tenement does not, until battle has been waged, extinguish a recognition in which the seisin of an ancestor in that same tenement is claimed. Yet how then is the absent tenant's contempt of court to be punished?

[11] When both parties are present in court, the tenant is asked whether he wishes to show cause why the assize should not proceed. In this connection it should be known that sometimes a man of full age seeks this

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<sup>73</sup> Monastic profession equals civil death (more or less; see P & M, I, 433–38).

kind of recognition against a minor, sometimes a minor against one of full age, sometimes a minor against a minor, and sometimes a man of full age against another of full age.<sup>74</sup>

[12] In the last case the assize does not proceed<sup>75</sup> if the tenant admits in court that the ancestor whose seisin is claimed was seised of the land in his demesne as of his fee on the day he died, and admits also the other articles set out in the writ. If the seisin only is admitted and the other articles are not, then the assize shall proceed on the contested article or articles. This kind of assize may not proceed for several reasons.<sup>76</sup> ...

[The discussion of exceptions is omitted.]

*The recognition of darrein presentment to churches*

[18] Now there follows the recognition of darrein presentment of parsons.<sup>77</sup> When a church is vacant and there is a dispute about the presentation, it can be decided by a recognition of darrein presentment, if either party asks for this in court; and he shall request the following writ:

The writ for summoning a recognition of darrein presentment to churches

[19] The king to the sheriff, greeting. Summon by good summoners twelve free and lawful men from the neighbourhood of such-and-such a vill to be before me or my justices on a certain day, ready to declare on oath which patron presented the last parson who is now dead to the church in that vill, which is alleged to be vacant and of which N. claims the advowson. And you are to see that their names are endorsed on this writ. And summon by good summoners R., who withholds the presentation, to be there then to hear the recognition. And have there the summoners and this writ. Witness, etc.

[20] The essoins allowed in this recognition are as described above.<sup>78</sup> When the assize proceeds in the presence of both or one of the parties, he who is adjudged to have last presented, whether personally or through one of his ancestors, is thereby deemed to have recovered seisin of the advowson; consequently, at his presentation, the next parson shall be instituted to the vacant church by the bishop of that place, provided that the parson is suitably qualified. The parson shall hold for the rest of his life the church which he has acquired by this presentation, whatever may happen to the right to the advowson; but he who has had judgment given against him in the recognition of darrein presentment can bring an action about the right of advowson against the other party or his heirs in the manner set out above.<sup>79</sup>

At the very beginning the question may arise whether any cause can be shown why the assize should not proceed. For example, the tenant, while admitting that an ancestor of the demandant made the last presentation as true lord and first-born heir, may say that afterwards he conveyed to the tenant or his ancestors by some good title the fee to which the advowson is appurtenant. In such a case the assize does not proceed, and the parties may then join issue on this exception, either of them being able to claim and get a recognition to settle it. Again, either party may admit that the other or an ancestor of that other made the last presentation, but as of wardship and not of fee; and he may claim and get a recognition to settle this. The recognition shall be summoned by this writ:

*The writ for summoning a recognition to determine whether the presentation to a certain church was made as of fee or as of wardship*

<sup>74</sup> This fourfold division is adhered to [...]; but it is obscured by the rubrication and by the chapter divisions. The order is (i) c. 11; (ii) most of c. 12; (iii) end of c. 12; (iv) cc. 13–17.

<sup>75</sup> i.e. it is discontinued in the *demandant's* favour, as in iv, 11

<sup>76</sup> An assertion that the assize should not proceed is called an 'exception'; examples now follow. For exceptions, very common in mort d'ancestor and darrein presentment, see P & M, II, 611–20.

<sup>77</sup> The assize of darrein presentment can probably be dated 1179/80; for its relationship to the *Precipe* for advowson see p. 182 [not included]. The early development is discussed in P & M, I, 148–9 and II 137–8; Van Caenegem, pp. 330–5; cf. Stenton, nos. 3497, 3533 and 3534, and comment, *ibid.* p. 23.

<sup>78</sup> xiii, 7

<sup>79</sup> iv, 1–6

[21] The king to the sheriff, greeting. Summon by good summoners twelve free and lawful men from the neighbourhood of such-and-such a vill to be before me or my justices at a certain time, ready to declare on oath whether R., who, by reason of a tenement which he held in that vill, presented to that church the last parson who is now dead, made that presentation as of fee or as of wardship. And meanwhile let them view the land; and you are to see that their names are endorsed on this writ. And summon by good summoners the man who withholds that presentation to be there then to hear the recognition. And have there the summoners and this writ. Witness, etc.

[22] If the recognition declares that the last presentation was made as of wardship, then the advowson of him who last presented is at an end, and the presentation belongs to the other party; but if as of fee, then the presentation shall be his.

*The recognition for determining whether a tenement is lay or ecclesiastical*

[23] Now there follows the recognition for determining whether any tenement is lay or ecclesiastical.<sup>80</sup> If either party wishes to have a recognition to settle this, the recognition shall be summoned by the following writ:

*The writ for summoning such a recognition*

[24] The king to the sheriff, greeting. Summon by good summoners twelve free and lawful men from the neighbourhood of such-and-such a vill to be before me or my justices on a certain day, ready to declare on oath whether one hide of land, which N. parson of the church in that vill claims as free alms of his church against R. in that vill, is the lay fee of R. or ecclesiastical fee. And meanwhile let them view the land; and you are to see that their names are endorsed on this writ. And summon by good summoners R., who holds the land, to be there then to hear the recognition. And have there the summoners and this writ. Witness, etc.

[25] In this recognition, as in all others except the Grand Assize, only two essoins are allowed. A third essoin is never admitted unless it be for bed-sickness, and since that essoin is not allowed in recognitions it follows that there can be no third essoin. This recognition proceeds in the manner already stated for other recognitions. It should be known, however, that if the tenement is proved by the recognition to be ecclesiastical fee, it cannot in future be regarded as lay fee, even if the other party claims it as held of the church by a certain service.

*The recognition for determining whether a man died seised of a tenement as of fee or as of gage*

[26] Next<sup>81</sup> to be discussed is the recognition which is used to determine whether a man died seised of a free tenement as of fee or as of gage. When a man claims that a tenement should be restored to him as being a gage which he or one of his ancestors pledged, then, if the tenant does not concede that the tenement is a gage but says in court that he is seised of it as of fee, this recognition is used to settle the matter. The recognition shall be summoned by the following writ:

*The writ for summoning this recognition*

[27] The king to the sheriff, greeting. Summon by good summoners twelve free and lawful men from the neighbourhood of such-and-such a vill to be before me or my justices on a certain day, ready to declare on oath whether N. holds one carucate of land in that vill, which R. claims from him by my writ, in fee or as a gage pledged to him by R. (or by R.'s ancestor H.). (Or thus: whether the carucate of land in that vill which

<sup>80</sup> This is the assize utrum, established in its final form by the Constitutions of Clarendon (1164), c. 9, and designed to settle jurisdictional disputes by distinguishing lay from spiritual tenure. It later developed, surprisingly, into the 'parson's writ of right', because the ordinary writ of right was 'not available to a parson who could not, as could bishops and abbots,' count upon the seisin of his predecessors.' See P & M, I, 144-5 and 246-50; S. E. Thorne, 'The Assize *Utrum* and Canon Law in England,' *Columbia Law Review*, XXXIII (1933), 428-36; Van Caenegem, pp. 325-30.

<sup>81</sup> Two cases, already suggested in x, 10, are discussed in cc. 26-30. In the first (cc. 26-7) the creditor is in possession and is sued by the debtor or his heir. In the second (cc. 28-9) the debtor's heir is in possession and is sued by the creditor's heir. The conclusions drawn in c. 30 apply to the first case and not to the second, and so should follow c. 27. The gloss in B makes this point. The place of cc. 26-30 in the treatment of gage is discussed below, p. 190 [not included].

R. claims from N. by my writ is the inheritance or fee of N., or a gage pledged to him by R. or by R.'s ancestor H.). And meanwhile let them view the land; and you are to see that their names are endorsed on this writ. And summon by good summoners N., the tenant of that land, to be there then to hear the recognition. And have there the summoners and this writ. Witness, etc.

*Where a man claims a recognition in reliance on the gage of his ancestor*

[28] It sometimes happens that a man who holds a tenement in gage dies seised of it in gage and that his heir, relying on this seisin, seeks a writ of mort d'ancestor against the true heir.<sup>82</sup> In such a case, if the tenant concedes that the demandant's ancestor died seised, but as of gage and not as of fee, then to settle this the recognition mentioned above<sup>83</sup> is used; and it is summoned by the following writ:

*The writ for summoning such a recognition*

[29] The king to the sheriff, greeting. Summon by good summoners twelve free and lawful men from the neighbourhood of such-and-such a vill to be before me or my justices on a certain day, ready to declare on oath whether N. the father of B. was seised in his demesne as of fee or as of gage of one carucate of land in that vill on the day he died. And meanwhile let them view the land; and you are to see that their names are endorsed on this writ. And summon by good summoners the tenant of the land to be there then to hear the recognition. And have there the summoners and this writ. Witness, etc.

[30] If the tenement is proved by the recognition to be a gage, then the tenant<sup>84</sup> shall lose it, and shall not even be allowed to use it in the recovery of the debt. On the other hand, if it is proved to be a fee of the tenant, then the demandant shall in future have no remedy except by writ of right.

In this as in all other recognitions it is uncertain whether the arrival of a warrantor shall be waited for, of whatever kind he is or for whatever reason he was vouched to warranty, especially if he is vouched in court after two essoins.

[31] The recognitions not already dealt with have been in part explained by what has already been said about recognitions and can for the rest be understood from the terms in which they are granted by the court, which formulates them from the allegations of both parties.

*The recognition of novel disseisin*

[32] Lastly<sup>85</sup> there remains for discussion the recognition called novel disseisin. When anyone has unjustly and without a judgment disseised another of his free tenement within the assize of the lord king—that is, within the limit of time which is appointed for this purpose by the lord king on the advice of his great men, which varies in length—then the disseisee can claim the benefit of this constitution, and shall have the following writ<sup>86</sup>:

*The writ of novel disseisin*

[33] The king to the sheriff, greeting. N. has complained to me that R. unjustly and without a judgment has disseised him of his free tenement in such-and-such a vill since my last voyage to Normandy. Therefore I command you that, if N. gives you security for prosecuting his claim, you are to see that the chattels which were taken from the tenement are restored to it, and that the tenement and the chattels remain in peace until the Sunday after Easter. And meanwhile you are to see that the tenement is viewed by twelve free and lawful

<sup>82</sup> i.e. the debtor's heir, who has taken possession of the land and is tenant in the action.

<sup>83</sup> xiii, 26

<sup>84</sup> i.e. the creditor, who claimed that it was his fee; the treatise reverts to the situation in cc. 26–7. The gloss in *B* makes this point.

<sup>85</sup> The postponement of novel disseisin to the end of the list in xiii, 2, and its treatment in cc. 32–9 after all other recognitions are surprising if we think of 1166 as the date of its origin (P & M, II, 47), but less so if we accept the view (Van Caenegem, pp. 271–94) that regular civil litigation by means of this writ was a very recent development when the treatise was written; further comment by G. D. G. Hall in a review of Van Caenegem, *E.H.R.* LXXVI (1961), 317, and F. Joüon des Longrais in his Cambridge lecture, *Henry II and his Justiciars, had they a political plan in their reforms about seisin?* (Limoges 1962).

<sup>86</sup> cf. Stenton, no. 3531

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.

[34] Writs of novel disseisin may vary in a number of ways corresponding to the different kinds of tenement in which disseisins take place. For example, if a bank is raised up or knocked down, or if the level of a mill pond is raised, within the assize and to the nuisance of another's free tenement, then the writs<sup>87</sup> are varied to fit the case, as follows:

*Another writ of the same kind*

[35] The king to the sheriff, greeting. N. has complained to me that R. unjustly and without a judgment has raised up (or knocked down) a bank in such-and-such a vill, since my last voyage to Normandy, to the nuisance of N.'s free tenement in the same vill. Therefore I command you that, if N. gives you security for prosecuting his claim, you are to see that the bank and tenement are viewed by twelve free and lawful men from the neighbourhood, and their names endorsed on this writ. And summon by good summoners, etc., as above.<sup>88</sup>

*A writ of the same kind*

[36] The king to the sheriff, greeting. N. has complained to me that R. unjustly and without a judgment has raised the level of his mill pond in such-and-such a vill, since my last voyage to Normandy, to the nuisance of N.'s free tenement in the same vill (or in another vill). Therefore I command you that, if N. gives you security for prosecuting his claim, you are to see that the pond and tenement are viewed by twelve free and lawful men from the neighbourhood, and their names endorsed on this writ, etc., as above.

Furthermore, if the disseisin was of common pasture,<sup>89</sup> the writ shall be as follows:

*A writ of the same kind*

[37] The king to the sheriff, greeting. N. has complained to me that R. unjustly and without a judgment has disseised him of his common pasture in such-and-such a vill which is appurtenant to his free tenement in the same vill (or in some other named vill), since my last voyage to Normandy. Therefore I command you that, if N. gives you security for prosecuting his claim, you are to see that the pasture and tenement are viewed by twelve free and lawful men from the neighbourhood, and their names endorsed on this writ, etc., as above.

*No essoin is allowed in this recognition*

[38] No essoin is allowed in this recognition. Whether or not the disseisor comes on the first day, the assize shall proceed; for the full rigour of this assize applies to all, to minors as well as to those of full age, and there is no waiting even for a warrantor. However, if anyone confesses a disseisin in court but also vouches a warrantor, the recognition shall not proceed, and he who confessed shall be liable to amercement by the lord king; afterwards the warrantor shall be summoned, and there shall be a plea between him and the party who vouched him.

It should be known that the losing party, whether appellor or appellee<sup>90</sup> shall always be liable to amercement by the lord king on account of the violent disseisin. Moreover, if the appellor does not prosecute his claim on the appointed day, his sureties also shall be liable to amercement; and the same rule applies to

<sup>87</sup> In neither of the following writs is there any mention of 'disseisin' but they were called assizes of novel disseisin. In the thirteenth century these writs were called assizes of nuisance by Bracton and assizes of novel disseisin in Registers of Writs. There is no satisfactory account of this development; for some materials and a different view see C. H. S. Fifoot, *History and Sources of the Common Law* (London 1949), pp. 3–23.

<sup>88</sup> The references back in this and the next two writs are to xiii, 33.

<sup>89</sup> For common (of) pasture see P & M, I, 620–3

<sup>90</sup> H. G. Richardson and G. O. Sayles in *Select Cases of Procedure without writ under Henry III*, S.S. LX, pp. cxxxii–cxxxiv, suggest that this inappropriate use of 'appellans' and 'appellatus' is evidence for the 'crystallising-out of a series of criminal and civil actions from a single undifferentiated action for all serious private secular wrongs.'

the other party if he absents himself on the appointed day The liability to amercement by the lord king is the sole penalty provided by this constitution.

In this recognition the party who has proved disseisin can require that the sheriff be ordered to see that the chattels and fruits, which have in the meantime been seized by command of the lord king or his justices, are restored to him. In no other recognition does the judgment make mention of chattels or of fruits. And if the sheriff has not seen to it that he gets the fruits and chattels, the complainant shall have the following writ:

*The writ for restoring chattels*

[39] The king to the sheriff, greeting. I command you to constrain N. to restore, justly and without delay, to R. his chattels, etc.

This writ can be found written above.<sup>91</sup>

[A short book on criminal actions is omitted.] ...

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<sup>91</sup> xii, 18 (in full)