HENRY II

NEW INTERPRETATIONS

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The reign of Henry II has long been regarded, and rightly, as a period of major importance in the history of English law. For most legal historians, it is the period when it first becomes possible to recognise the existence of an English ‘Common Law’: both a set of national legal institutions bringing law and justice to the whole of England, and a body of legal rules applicable over the whole or almost the whole of England. The clearest overall view of this newly emergent English ‘Common Law’ is to be found in the pages of the legal treatise known as *Glanvill*, which was completed, though not necessarily all written, in the final years of Henry’s reign, between 1187 and 1189. Within a few years of the death of Henry II we get the first direct evidence for the operation of the new Common Law in the earliest surviving plea-roll records of the king’s courts, the first of which dates from 1194. Our picture of the process by which that Common Law began to emerge is much less clear, since it depends on scattered and fragmentary evidence that is difficult to interpret. It is with that process of emergence that this paper will be mainly concerned.

Let me start, however, by reviewing both what had been achieved and what had not been achieved by the end of Henry II’s reign. This is not meant to sound teleological, as though there was some grand plan gradually being put into effect by the king and his advisers. It is merely intended to serve as a useful heuristic device for measuring both how much had actually changed during Henry II’s reign and how much had yet to change before the Common Law took on the kind of general shape and features it possessed in the later Middle Ages and after.

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Although there is some evidence for royal justices visiting more than one county and holding sessions in them as early as the reign of Henry I, there can be little doubt that the General Eyre, as a systematic arrangement for the nationwide visitation of all counties within a limited period of time by groups of royal justices possessing both civil and criminal jurisdiction and bringing royal justice to the countryside (and also with a remit to make local enquiries on the king’s behalf) was indeed a creation of the reign of Henry II. The General Eyre as thus created continued to play an important, though gradually declining, role in the functioning of the English legal system down to the end of thirteenth century. It was not in a strict sense a single court with a continuous institutional existence. In many respects, however, it functioned as though it were such a court, with multiple divisions each possessing the same jurisdiction, but with the court itself enjoying only a discontinuous existence and mutating in shape and even in jurisdiction over time. There was no fully separate Common Bench at Westminster, no institutionally distinct central royal civil court with a nationwide jurisdiction, during the reign of Henry II. This was only to emerge a few years later, around the middle of Richard I’s reign. Its eventual emergence was, however, clearly foreshadowed during Henry’s reign, when the Exchequer at Westminster began to hear ordinary civil litigation, unconnected with royal revenue, on a regular basis. What happened about 1195 was that this part of the Exchequer’s functions came to be exercised by an institution that was visibly separate and distinct from the Exchequer, though still functioning in close proximity to it in Westminster Hall.

Henry’s reign also saw the intermittent existence of a court held in the presence of the king and travelling around the country with him. This has sometimes been seen as the direct ancestor of the later court of King’s Bench. It is, however, probably more accurate to see that court as coming into existence for the first time in the early 1230s. It was only from then onwards that the King’s Bench enjoyed a continuous institutional existence, whether or not the king was in England, and also began to possess its own distinctive jurisdiction.

Various characteristics distinguished the court(s) of the General Eyre and the civil-jurisdictional side of the Exchequer (soon to become the Common Bench) that had been created in Henry’s reign, and the other royal courts that were to be created later in the thirteenth and fourteenth centuries, from the earlier types of communal, feudal and even royal courts that had hitherto existed in England. Judgements within these newer courts were made by relatively small groups of justices who were commissioned to act by the king, as opposed to suitors — groups of local landowners with a tenurial obligation to attend court and partici-

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4 Ibid., 89–97.
pate in the making of collective judgements there in accordance with the custom of the court or of the community or lordship. The royal justices who ran these new courts also required specific royal authorisation for all the business they heard. In the case of civil litigation, this took the form of a royal writ ordering the local sheriff to have the defendant summoned to appear on a specific day to answer a specific case in that court, and also instructing the sheriff to produce the writ in court on that day. In the case of criminal pleas (pleas of the Crown) it took the form of a more general authority from the king to hear pleas of the Crown in the county where the eyre was holding its sessions. No such specific authorisation had ever been required by communal or feudal courts. These new courts seem from an early stage to have kept a full written record of the business with which they dealt, although no original records survive before 1194 other than a few final concords originally in private custody. It was only later, and perhaps in deliberate imitation of the practice of the royal courts, that communal and feudal courts began to keep their own written records; before that the court’s only ‘record’ was in the memory of its suitors. The new courts seem to have held daily sessions. In the case of the Eyre, there seem to have been continuous or almost continuous daily sessions during their visitations of individual counties; in the case of the Exchequer, to have been daily sessions during term times, though we do not know how ordinary civil litigation fitted in to the hearing of other, specifically financial, business, which probably took a higher priority. It is only with the emergence of the Common Bench as a separate institution that we can see the new court hearing litigation on a daily basis during four terms of the year. The contrast is, however, a marked one with the practice of communal and feudal courts, for these seem only to have met for part of a day at fixed intervals of time, never on a daily basis.

The institutional developments associated with Henry’s reign went further than the development of new nationwide royal courts with the novel characteristics I have just been describing. Writs issued by chancery in the name of the king and authenticated by his seal had been used since at least the reign of William the Conqueror as a way of initiating litigation or authorising particular commissioners to hear litigation in the king’s name, and inevitably these writs (or rather those that survive) show some use of particular, recurrent phrases. It is, however, only in Henry II’s reign that we find what were later to be called writs ‘of course’ (de cursu), a limited range of standard forms of writs available from Chancery apparently on demand for the initiation of litigation not just in the king’s courts, but also (for some types of litigation) in county courts and even over a small range of types of litigation in seignorial or feudal courts. Their forms varied only in the specific details of the names of the litigants and of what was at stake in the

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1 The classic study of these is the work of R. C. van Caenegem, Royal Writs in England from the Conquest to Glanvill: Studies in the Early History of the Common Law (Selden Society 77, 1959).
litigation and in the names of the counties to whose sheriffs they were addressed (or the lord to whom they were addressed, in the case of writs initiating litigation in seignorial courts). It is not clear whether there was some kind of official, or even unofficial, ‘register’ of Chancery containing the standard forms of writs in Henry’s reign, though something of the sort, it has been suggested, might have been available to the author of *Glanvill* and may therefore have been the source of the writs used in the treatise.¹

Nor is it entirely clear whether the decision to make these individual standard forms of writ generally available, and as to the specific wording of each of the standard writs (or later alteration of that wording), was something that required any kind of prior consultation or consent. This was certainly true later, and both practice and principle may go back to the beginnings of such standard writs in Henry’s reign. The standardisation seems also to have applied to the judicial writs issued in the king’s name by the courts during the course of litigation to authorise the further measures needed to ensure the appearance of the defendant or others involved in litigation and to take any measures needed to put a court’s final judgement into execution.² Any ‘register’ of approved forms used in the courts is, however, unlikely to have been held by Chancery and is more likely to have been held by the clerks of these courts themselves, or the justices.³ One other important development seems also to have taken place in respect of writs during the course of Henry’s reign, though only in respect of writs initiating or issued in the course of litigation in the king’s court. This was the invention of the ‘returnable’ writ: a writ that ordered the appropriate local sheriff not just to have the defendant summoned (or, in the case of judicial writs, to have other measures taken to ensure the appearance of the defendant or others involved in litigation) for a specific day in court, but also to return that writ to the court by that day. This not only demonstrated that the sheriff had indeed received the writ, but also allowed the writ itself to function as a warrant for the court to hear the case and for the issuing of further process in the case. During the thirteenth century it became the practice for the sheriff to report in writing on what he had done, on the dorse of the writ or on a separate schedule when he returned the writ (making a ‘return’

¹ See the discussion in *Glanvill*, pp. xxxiii–xxxiv. Hall concluded that it is as likely that the author used ‘a collection of actual writs’. The earliest datable surviving register of writs seems to have been that compiled for sending to Ireland in 1210; see Brand, *Making of the Common Law*, 450–56. This was specially tailored for Irish use but certainly suggests the existence of similar registers by the same date in England. On the wider question of whether or not there was ever an ‘official’ register, see G. D. G. Hall in *Early Registers of Writs*, ed. E. de Haas and G. D. G. Hall (Selden Society 87, 1970), pp. cxvi–cxxiii.

² Many of these standard forms are to be found in *Glanvill*.

³ The earliest surviving register of judicial writs (in roll form) dates from the 1220s; see *Early Registers of Writs*, pp. lxxx–lxxxiv.
to the writ, as it was later to be called). This practice had only just begun by the end of Henry II’s reign.¹

There is also some evidence for the occasional use of sworn local juries as fact-finders in litigation prior to Henry II’s reign.² Again, it was only during his reign that jury trial became available as a standard procedure in the king’s courts, though only in civil litigation, and then only for certain specific types of civil litigation. There were two different forms of jury trial in Henry’s reign. In some of the standard original writs created during the reign, a jury was summoned to appear in court at the same time as the defendant, and was provided in advance with a specific question or series of questions to answer (typically questions that mixed questions of law and fact). This was the procedure of the petty assizes, and the initiative in securing jury trial in them lay with the plaintiff.³ The defendant was, however, given a chance to show why the questions as formulated might give misleading answers, or other reasons why the assize should not be allowed to proceed.⁴ The second form of jury trial (of which there was as yet only a single exemplar) was that represented by the grand assize. Here, proof by jury trial was not foreseen in the writ summoning the litigation, but was something chosen (by the defendant) during the course of litigation. Here, too, the question put to the jury had to be framed in terms of one of a limited stock of formulas, and the questions also typically mixed what would later be seen as questions of fact and questions of law.⁵ Even by the end of the reign of Henry II, however, jury trial was used only in litigation about land and similar types of property. It had not yet developed into the all-purpose fact-finding procedure for all kinds of civil litigation that it was to become in the thirteenth century and beyond. It seems also at this time to have been a procedure confined to the king’s courts proper, and not yet to have become available (as it was later) in the county court, in litigation initiated by the king’s writ.⁶

By the end of the reign, the new king’s courts had come to exercise jurisdiction over a number of very important areas. In land law, perhaps the key area of civil jurisdiction, they provided a series of important and valuable remedies that seem from the first to have proved attractive to litigants. One (the assize of novel

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¹ For evidence that by the time of Glanvill the sheriff was expected to endorse the names of the jurors on the writ in the assize of mort d’ancestor, see Glanvill, xiii, 7 (p. 152). For evidence that some useful information had begun to be endorsed on writs but not returns as such by 1200, see the writs printed in Pleas before the King or his Justices, 1198–1202, i, ed. D. M. Stenton (Selden Society 67, 1953), app. ii.
³ See Glanvill, bk xiii.
⁴ Most fully discussed in Glanvill in connexion with the assize of mort d’ancestor in xiii, 11 (pp. 153–6).
⁵ Ibid., ii, 6–21 (pp. 26–37).
disseisin) protected a tenant in possession of a free tenement from wrongful dispossession (from being disseised ‘unjustly and without a judgment’), whether by his lord or by a third party, and also protected his right to some of the appurtenances of his free tenement (such as rights of common) and against certain types of ‘nuisance’ that might cause damage to his property without wholly dispossessing him of it. A second remedy (the assize of mort d’ancestor) enforced the right of a close heir to succeed to the inheritance of an ancestor who had died in seisin (possession) of land, although the remedy was available only against the lord of whom the land was held or a stranger, not against a rival heir. A third important remedy was that provided for the widow. A widow who had received none of the dower to which she was entitled on the death of her husband, whether this took the form of a specific assignment of particular lands made at the church door at the time of the marriage, or a general entitlement to a third of the lands the husband had held during the marriage, could bring an action of dower *unde nichil habet* in the king’s court to assert her rights.

More generally, by the end of the reign, the existence of a rule that no free man was required to answer for his free tenement without a royal writ ensured that all litigation about land had to be initiated by royal writ. This did not mean that all land litigation was now heard in the king’s courts, for the king’s writ of right existed as a means of initiating litigation in the court of the lord of whom a claimant claimed to hold his land. But the need for the lord to have the authority of the king’s writ before he could hear such litigation turned him into the king’s delegate in hearing it. The limited and conditional nature of the grant of authority to hear the case was emphasized by the existence of a routine mechanism (*toll*) for the removal of the litigation out of the lord’s court into the county court for ‘failure of justice’, whence it could be further removed into the king’s court by *pone*, and of a different mechanism for the removal of the case directly into a royal court if the defendant opted for jury trial in the grand assize, as opposed to battle. Side by side with the writ of right, there also existed, by the end of the reign, a generic writ of *precipe quod reddat* for claiming land, which initiated litigation directly in the king’s court, if the claim was such that it ‘ought to be or the king wished it to be’ heard in his court. Jurisdiction over title to free land was therefore, by the end

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1 See the various different types of writ in *Glanvill*, xiii, 33–7 (pp. 167–9).
3 *Glanvill*, vi, 14–18 (pp. 66–9); Biancalana, ‘For Want of Justice’, 514–34.
6 *Glanvill*, 1, 5 (p. 5).
of the reign of Henry II, something already exercised either directly by the king’s courts, or by seigniorial courts but only with specific royal authorisation. There was to be a massive expansion in the range of land-law remedies offered during the course of the thirteenth century, and a massive transfer of jurisdiction from feudal courts to the king’s courts, but the basic principle of royal control over this area of jurisdiction was already clearly established.

A second significant area over which the king’s courts had come to exercise jurisdiction by the end of the reign of Henry II was in relation to litigation between patrons about the advowson of churches: the right to nominate suitable candidates to ecclesiastical benefices when they fell vacant, for institution to those benefices by the local ordinary.¹ The king’s courts offered two different kinds of remedy. One (the assize of darrein presentment) was intended for use where the living was currently vacant; the other (the writ of right or precipe of advowson) was intended for use where the living was not currently vacant and the dispute was about the right to present at future vacancies. They also offered patrons a mechanism (one form of the writ of prohibition) to prevent litigation in ecclesiastical courts between clerks with rival claims to the possession of a living, where the outcome might be prejudicial to the patron’s right of advowson. Although there was to be a later expansion in the range of remedies offered, the basic principle of royal jurisdiction was already clearly established.

A third area with enormous symbolic significance, though perhaps less actual significance in terms of the amount of litigation generated, was a jurisdiction over disputes about ‘personal status’, the subject of a complete, albeit short, book of Glanvill (book v). Glanvill is clear that where a lord was claiming that a man (with his descendants) was his villein, but not currently under his control, and the man claimed that he (with his descendants) was free, the matter could be appropriately dealt with only by the king’s courts.² This emphasized that it was the king and his courts who were the ultimate arbiters in such questions and the ultimate guarantors of personal freedom.

One final major area of jurisdiction for the king’s courts by the end of the reign of Henry II was over ‘pleas of the Crown’: those major criminal offences that were punishable by death or mutilation. The most important of these were homicide, arson, robbery, rape, treason and the forgery of the king’s seal or coinage.³ Two quite different procedures were involved. One was private prosecution (appeal) brought by the individual against whom the offence had been committed or (in the case of homicide) by a close surviving relative. The other was prosecution ‘at the king’s suit’, when an offender was named by a presentment jury of the locality

¹ Ibid., bk iv (pp. 43–53).
² Ibid., i, 3 (p. 4) (questio status is a matter for the king’s court); v, 1 (p. 54).
³ Ibid., i, 2 (p. 3) (he also includes breach of the king’s peace and fraudulent concealment of treasure trove).
as having committed an offence or when an appeal had been withdrawn or had failed on technical grounds. Thirteenth-century practice required appeals to be commenced in the county court and allowed them to proceed to the outlawry of the appellee if he did not appear. If the appellee did appear, he was arrested and imprisoned pending trial before the king’s justices at the next session of the eyre. It is not entirely clear whether this was already the position by the end of Henry II’s reign, but it seems quite likely.\(^1\) By 1194 at latest, the articles of the eyre simply required the presentment of all new (and any undetermined old) ‘pleas of the Crown’ (not further specified) at the eyre. This may well have been the position already reached by the end of Henry II’s reign.\(^2\) Such presentments would then form the basis for trial of those accused of such offences at the king’s suit.

The county court was not a new court in Henry II’s reign. As has already been seen, however, it was affected by some of the changes that took place during the reign. By the end of the reign, some of the business it heard arose not out of the county’s inherent, traditional jurisdiction invoked by a plaint made by the plaintiff, but by a specific commission to the sheriff in the form of a viscontiel writ. Like writs initiating litigation in the king’s courts, these were of a fixed form and issued only over a limited range of cases. The only viscontiel writs we know to have existed in Henry’s reign are those mentioned in *Glanvill*.\(^3\) They include writs of customs and services (the lord’s remedy to compel his tenant to perform the services he owed him),\(^4\) admeasurement of dower (the heir’s remedy where a doweress held more than a third of her late husband’s lands in dower),\(^5\) admeasurement of pasture (which triggered a quasi-administrative process for the stinting of pasture),\(^6\) and naifty (the lord’s remedy when seeking to regain possession of a fugitive villein, his chattels and his progeny).\(^7\) *Glanvill* does not mention some other viscontiel writs that were subsequently an important part of the county court’s jurisdiction, such as the viscontiel writs of debt, detinue and covenant. What was also self-evidently new in Henry’s reign was the creation of a routine procedure by a specific form of writ (or rather family of writs), the writs *pone*, for the removal of cases initiated by writ (including writs of right initiated in seignorial courts and removed into the county court by *tolt*) out of the county court into the king’s court.\(^8\) These helped to emphasize the extent to which county courts

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2. Howden, *Chronica*, iii, 262.
3. *Glanvill*, vi, 18 (pp. 68–9); ix, 9 (p. 113); xii, 11–18 (pp. 141–4).
4. Ibid., ix, 9 (p. 113).
5. Ibid., vi, 18 (pp. 68–9).
6. Ibid., xii, 13 (p. 142).
7. Ibid., xii, 11 (pp. 141–2).
8. The only example given in *Glanvill* is vi, 7 (pp. 61–2), but the discussion at vi, 8 (p. 62) suggests that it was already a generally available mechanism.
now also formed part of a single common-law legal system with the higher king's courts. One other change may also have taken place during the course of Henry II's reign that had a significant longer-term effect on the county court and its jurisdiction. Later evidence suggests that it was during Henry's reign that county courts first began to hear pleas of replevin. These allowed those distrained by the seizure of their animals or movable goods to perform services to their lords or to pay compensation in disputes over grazing and other rights to challenge the justice of those distrains in the county court.

There is less that can be said about the 'Common Law' as a general system of legal concepts and legal rules and about how much had been achieved here by the end of Henry II's reign. The very idea of a 'Common Law' of England was, perhaps, only a possibility once there were superior courts with a nationwide jurisdiction that could apply and develop it, as opposed to a multitude of local courts serving particular local or 'feudal' communities and with no regular mechanisms to review their exercise of their jurisdiction, though some of the features of that 'Common Law' may perhaps have been prefigured in the common customary law followed in these courts. Much of the early 'Common Law' that we see in Glanvill was procedural law: about the measures that were to be taken to secure the appearance of defendants in court, the availability of essoins (excuses for absence) at different stages in specific types of litigation, the availability and workings of the 'view' of land in dispute, the kinds of proof that a plaintiff was required to offer or the defendant might choose. But there were also rules of substantive law as well. Book vii of Glanvill shows the beginnings of a 'Common Law' of inheritance governing succession to land (including rules about when land should escheat to the lord of whom it was held); determining which alienations of lands were binding on a grantor's heirs (or successors); governing entitlement to the wardship of the persons and lands of those under age. Book ix of Glanvill likewise tells us quite a lot about the rules governing the mutual obligations of lords and their tenants. Of a 'Common Law' of crime we may at least say that there was a clear idea of which serious offences merited corporal or capital punishment. There was perhaps also some idea of what specific acts constituted those offences, since an appellant had probably to spell out in some detail what the appellee had allegedly done, even some idea of which circumstances might be held to justify otherwise criminal acts or to constitute grounds for pardoning an offender.

1 CRR, xv, no. 1968A.
2 Glanvill, i, 7–9, 21, 30–31 (pp. 5–7, 12–13, 17–20); iv, 3–5 (pp. 45–6); v, 3 (p. 55); vi, 10 (pp. 63–4); x, 8 (p. 122); xiii, 7 (pp. 151–2).
3 Ibid., i, 10–29 (pp. 7–17); ii, 3, 12, 16 (pp. 23–4, 31–2, 33–4); iii, 4 (pp. 39–40); iv, 3 (p. 45); xiii, 7 (p. 152).
4 Ibid., ii, 1–2 (pp. 22–3).
5 Ibid., ii, 3–21 (pp. 23–37).
Some of these changes were certainly introduced by legislation. Two different terms were used for legislation during Henry’s reign: ‘assize’ (assisa) and ‘constitution’ (constitucio). There seems, however, to have been no significant difference in meaning between them. The author of Glanvill, who elsewhere happily uses the term assisa, uses the term constitucio to refer to the lost legislation that had created the assize of novel disseisin, although elsewhere it appears to be consistently referred to as an assisa. He also uses constitucio to refer to the lost legislation establishing the grand assize, much of which he seems to summarise, although other contemporary sources call it the assisa of Windsor. We possess what purport to be texts of some of the relevant legislation: the Constitutions of Clarendon of 1164, the Assize of Clarendon of 1166, and the 1176 Assize of Northampton. Each of these, however, presents a different kind of problem.

There are no apparent textual problems with what modern scholarship calls the ‘Constitutions of Clarendon’. The difficulty relates to the purported nature of the ‘Constitutions’ themselves. They claim to be no more than a ‘record or acknowledgement of some part of the customs and liberties and dignities of the king’s ancestors, namely King Henry his grandfather and others, which ought to be observed and held in the kingdom’ and to have been acknowledged ‘by the archbishops and bishops and earls and barons and by the more noble and more ancient of the realm’, and not to be legislation (in the sense of new law) at all. They seem nonetheless to have been assimilated, at least in retrospect, to legislation, for (as Derek Hall long ago pointed out) there is a reference in Glanvill to ecclesiastical judges being prohibited from taking jurisdiction over the debts of laymen or tenements on the basis of breach of faith per assisam regni. This is most likely to be a reference to chapters 9 and 15 of the Constitutions. The legislative status of the Assize of Clarendon of 1166 is in no doubt, but the credibility of the text of the Assize that survives has been doubted. It came under sustained attack

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1 Glanvill, xiii, 32 (p. 167); xiii, 38 (p. 170).
3 Glanvill, ii, 7 (p. 28); ii, 19 (p. 35).
4 EYC, ii, 494, no. 1220 (final concord of 1182); J. H. Round, ‘The Date of the Grand Assize’, EHR, 31 (1916), 268–9 (final concord of 1197).
5 There are three separate texts, all apparently derived from the Canterbury copy of the ‘Constitutions’: in the life of Thomas Becket by William the monk of Canterbury, MTB, i, 18–23; in the collection of Becket’s letters made by Alan, prior of Canterbury and abbot of Tewkesbury, MTB, v, 71–9; and in Gervase, i, 178–80.
6 Glanvill, x, 12 (p. 126) and p. xxxv with n. 1.
7 There are two independent texts of the Assize. One is inserted in the chronicle of Roger of Howden among an appendix of legal material, as part of the entry for the year 1180: Howden, Chronica, ii, 248–52. The other is in an early-13th-century legal MS now in the Bodleian Library in Oxford (MS Rawlinson C.641), which also contains a copy of the 1170 Inquest of Sheriffs and of the 1215 issue of Magna Carta: Howden, Chronica, ii, pp. ci–cvi; W. Stubbs, Select Charters, 9th edn (Oxford 1921), 170–73.
in the 1960s from Richardson and Sayles, who described the text as a ‘private composition, without authority’. The genuineness of the text found stout and convincing defenders in J. C. Holt and David Corner, and historians seem now to accept that what we have is indeed a genuine text (or texts) of the Assize.

The so-called Assize of Northampton of 1176 presents a different kind of problem. There is in essence only a single surviving text of this ‘assize’, which appears both in the Gesta Regis Henrici Secundi formerly ascribed to Benedict, abbot of Peterborough, but now known to be the work of Roger of Howden, and in Howden’s own revision of that chronicle, the Chronica. Holt thought that only the first chapter of the ‘assize’ as printed by Stubbs in his Select Charters was problematic because of its quasi-editorial discussion of the relationship between the assize of Clarendon and the assize of Northampton. He accepted the genuineness of the remaining twelve clauses. A re-examination of the text, however, suggests two things. One is that Howden probably meant his text to start not with Stubbs’ clause 1 (on the procedure on accusations under the assize of Clarendon as emended at Northampton) but earlier, with the division of the kingdom into six judicial circuits each with three justices, and perhaps also to include as part of the assize the following provision on the taking of judicial oaths to observe and have observed the provisions of the assize. The second is that what our text of the ‘Assize’ records is first the decision to create these judicial circuits and then giving their justices specific instructions about what they were to do on those circuits. Those instructions seem to reflect the legislation enacted at Northampton and may even in part be repeating or paraphrasing that legislation. They are probably not the actual text of that legislation itself.

A less well known text is the so-called ‘Assize of Essoiners’. This was first

5 Only three clauses do not seem to fit into this model: clause 2 (which says nothing about judicial enforcement), clause 10 (though this may relate to the intended relationship between the justices and the bailiffs in the counties they visit, making plain that their revenues were to go to the exchequer not the justices) and clause 12 (on the custody of ‘thieves’).
6 Particularly in clauses 1–4.
7 Note the reference in clause 7: ‘Faciant eciam assisam de latronibus iniquis et malefactoribus terre, que assisa est per consilium regis filii sui et hominorum suorum, per quos ituri sunt comitatus’, which reads like a reference to a separate ‘assize’ on these points.
printed from the single known surviving text in a Bodleian manuscript (Rawlinson C 641) by Stubbs, and was later re-edited by Lady Stenton.¹ The ‘Assize’ appears in that manuscript between articles of the 1170 Inquest of Sheriffs. Lady Stenton was willing to give it the benefit of the doubt and to accept it as forming part of that Inquest, but that seems to me to be highly implausible. All the other articles of the Inquest are either instructions for holding an enquiry or the actual articles of that enquiry. These three clauses clearly form no part of that. They are general legislation, without any specific bearing on this enquiry, or indeed enquiries in general.² The first two clauses seem to be instituting measures to prevent false essoins (formal excuses for the absence from court of a litigant or one involved in litigation). Essoiners were to be required to find sureties for the appearance of the warrantor of their essoin, the litigant or his attorney. Different measures were required in seigniorial courts from those to be applied in the king’s court and the county court.³ The third clause imposed a punishment of imprisonment on anyone convicted of renewing a plea that had already been determined before the king or his justice. The appearance of all three clauses together suggests that they may have been enacted on the same occasion. Their appearance in the middle of the Inquisition of Sheriffs suggests that they may belong to legislation enacted at the same council meeting that had approved the Inquisition, and that this legislation too may belong to 1170. However, the copyist’s mistake that intruded these clauses into the Inquisition could equally have intruded something enacted elsewhere and on another occasion, or indeed on two different occasions. There is no internal evidence in any of the three clauses themselves to suggest a date.

Other legislation does not survive but its content can be reconstructed, at least in part. The assize of novel disseisin was enacted perhaps in 1166, though possibly prior to this, and Donald Sutherland believed that its terms could be known in some detail from later evidence.⁴ There is some reason to doubt this, for other legislation of the period is known to have been reissued in modified form on more than one occasion,⁵ and it seems not implausible that this was also the case with novel disseisin. Some of the details of the procedure, and perhaps even the scope of the assize, as well as its limitation date, may well have changed over time. The other lost assize whose details can probably be recovered in some detail is the Assize of Windsor of 1179. This is the legislation that established the grand assize, which Glanvill evidently summarizes (or perhaps expands on) in book ii of the treatise.⁶ We know rather less about the ‘assize on the advowsons

¹ Howden, Chronica, ii, p. cv; Pleas before the King or his Justices, i, 153.
² Ibid., 151–4.
³ In the second of the clauses (on the application of the measure in seigniorial courts) something has evidently been lost in copying.
⁴ Sutherland, Assize of Novel Disseisin, 6–20.
⁵ See p. 228 below.
⁶ See p. 224 above.
of churches (assisa de advocacionibus ecclesiarum prodita) mentioned in book IV of Glanvill. Glanvill suggests that it authorised the creation of the assize of darrein presentment. This is first mentioned in 1180, and was probably a reaction to the provisions of the Third Lateran Council of 1179, which had allowed the ordinary to collate to livings that remained vacant for longer than six months. This suggests that the assize itself probably belongs to 1179 or 1180. Whether the assize did more than this, for example by authorising the creation of the precept writ of advowson, or of a writ of prohibition for patrons, is unclear. Another legislative act whose text is lost but whose terms and whose approximate date are known is the legislation (constitutio) enacted some time not long before 1163 about the tolæ procedure for removing cases from lord’s courts, whose effect is summarised in a number of accounts relating to the Becket dispute. In the case of some other lost legislation we do not know even the date, only that it was enacted sometime prior to the completion of Glanvill. Glanvill gives us a summary of a number of the points established by an otherwise unknown assize about the extent to which a litigant could challenge in the king’s courts matters ‘recorded’ by county courts and seignorial courts as having been said and done in those courts. Glanvill also mentions an assize apparently relating to the hue and cry (the procedure for raising the alarm on the discovery of the commission of a criminal offence and following this up with measures for attempting to capture the culprit), but tells us almost nothing about its contents. The author also refers to what has been ‘laid down (statutum)’ in the kingdom in relation to clerks who had obtained their churches by the presentation of patrons who had usurped the possession of advowsons by violence during wartime. Hall took this to be a reference to secular legislation, and it might have formed part of the more general legislation on the advowson of churches. It might, however, be rather a reference to ecclesiastical legislation. Lastly, there are references to lost legislation that seems to have been enacted not long after other legislation of which we know, with the intention of modifying the earlier legislation on matters of more or less important detail. Glanvill refers to ‘another assize (alia assisa)’, amending the Assize of Northampton, as having established that the assize of mort d’ancestor should not run in respect of tenements held by burgage tenure (in towns), thereby

1 Glanvill, iv, 1 (p. 44).
2 Royal Writs, 333.
4 Glanvill, viii, 9 (pp. 100–101).
5 Ibid., xiv, 3 (p. 174).
6 Ibid., iv, 10 (p. 50).
7 Ibid., p. xxxv.
allowing such tenements to continue to be devisable.\(^1\) *Glanvill* also refers to a *constitucio* amending the procedure for the election of knights for the grand assize and allowing election to take place even if the tenant was absent, thereby amending the procedure laid down in the lost Assize of Windsor.\(^2\)

I assume that all this legislation took some kind of written form. There seems, however, to be no evidence of any attempt to ensure the safe preservation in official custody of authoritative written texts of legislation, with the significant exception of the Constitutions of Clarendon, of which one copy apparently went to the king’s treasury. This seems strange, for the evidence suggests an increasing emphasis during Henry’s reign on the importance of the written word, and, if I am right about when plea rolls began to be compiled, an attempt to keep a full and permanent record of even the fairly ephemeral doings of the courts. The obvious home for such an archive would have been the king’s treasury in the Exchequer: the repository for other records of permanent or longer-term interest and importance. It may indeed have been the lack of any written archive of legislation, rather than any regular practice of legislating without recording the terms of that legislation, that led *Glanvill*, somewhat misleadingly, to describe ‘English laws’ in his prologue as being ‘unwritten’.\(^3\)

We know surprisingly little about any arrangements made for the wider publication of Henry’s legislation. For important legislation enacted under the Conqueror and Henry I we can deduce from surviving copies that the legislation was sent out in writ form in the king’s name to the sheriffs and the men of individual counties, presumably (as in the thirteenth century) for local proclamation.\(^4\) Only one of Henry’s ‘legislative’ acts is known to have been published in writ form. That is the wholly unspecific charter of liberties issued at the beginning of his reign, possibly at his coronation.\(^5\) Much of the Assize of Clarendon of 1166 lays down procedure for local enquiries into malefactors, their arrest, imprisonment and trial. This did not necessarily require any kind of wider publicity, but those clauses (15, 16 and 21) that laid down strict rules about the provision of hospitality for unknown strangers and required stern measures to be taken against recently condemned heretics look as though they required some kind of proclamation to be effective. The short-term ‘supplement’ to the Constitutions of Clarendon edited by David Knowles, Anne Duggan and Christopher Brooke in 1972, which seems to have taken the form of an instruction sent by Henry II from Normandy to his justiciar Richard de Lucy and to Geoffrey Ridel, archdeacon of Canterbury, and Richard, archdeacon of Poitou, is described in one text as something the

\(^1\) *Glanvill*, xiii, 11 (p. 155).
\(^2\) Ibid., ii, 12 (p. 31).
\(^3\) Ibid., prologue (p. 2).
\(^5\) *Statutes of the Realm*, i, Charters of liberties §, p. 4.
king had promulgated and in the other as addressed to all the ‘princes and people of England’ to swear and keep. Some form of publication must again have been envisaged, since instructions were also given that all aged fifteen and more were to take an oath to observe these ‘decrees’.

That publication during Henry’s reign did not necessarily involve sending a text out to each county for proclamation is, however, suggested by the Assize of Arms of 1181. The Assize was to be enforced by justices holding sessions in each county and assembling both jurors and those named as liable to bear arms and ‘having this assise on having arms read before them in their common hearing (coram eis in communi audiencia illorum faciant legere hanc assam de armis habendis)’ and then swearing them accordingly. Mutatis mutandis this might also quite plausibly have been the method of publication of some, if not all, of Henry’s other legislation.

Historians have sometimes written as though Henry II and his advisers were able to promulgate binding legislation without any prior consultation or consent from a wider group of the king’s subjects. This does not, however, fit with what Glanvill tells us, nor with much of the internal evidence of the legislation itself. Glanvill talks of ‘English laws’ as being promulgated ‘by the advice of the magnates and the authority of the prince (procerum quidem consilio et principis accedente auctoritate)’. The Assize of Clarendon of 1166 (in the fuller text in the Rawlinson MS) describes itself in its proem as having been made by King Henry with ‘the assent of the archbishops, bishops, abbots, earls, barons of the whole of England’ or (in Howden’s text) ‘by the counsel of the archbishops, bishops and abbots and his other barons’. In the first version of his chronicle, Howden tells us that the 1176 Assize of Northampton was the outcome of a ‘great council on the statutes of his realm (magnum . . . concilium de statutis regni sui)’ held by the king at Northampton ‘in the presence of the bishops and earls and barons of his land (coram episcopis et comitibus et baronibus terre sue)’ and that the king had made the assize ‘by the advice of his earls and barons and knights and men (per consilium comitum et baronum et militum et hominum suorum)’. The later revision of the text only described the division of the kingdom into six circuits as taking place ‘in the presence of his son the king and in the presence of the archbishops, bishops, earls and barons of his realm (coram rege filio suo et coram archiepiscopis, episcopis, comitibus et baronibus regni sui)’ and ‘by the common counsel of all (communi omnium consilio)’ but does not ascribe to the wider group any part in advising on the making of the assize more generally.

It is not clear why Howden later chose to downplay the role of this

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2 Stubbs, Select Charters, 183–4.
3 Glanvill, prologue (p. 2).
4 See p. 225 above.
5 Howden, Gesta Regis, ii, 107–8.
6 Howden, Chronica, ii, 87–8.
wider group in the making of the Assize, but his earlier account is perhaps the more credible. Even the Assize of Woodstock of 1184, concerned with the forest, was said to have been made 'by the counsel and assent of the archbishops, bishops and barons, earls and nobles of England (per consilium et assensum archiepiscoporum, episcoporum, et baronum, comitum et nobilium Anglie').

There are only two pieces of evidence that point in the opposite direction. One is the so-called 'Supplement to the Constitutions of Clarendon' of 1169, whose provisions seem to have been determined by Henry II while in Normandy without any consultation with or advice from his English subjects. None of its provisions can really be characterised as permanent legislation, however. All seem to be temporary measures taken in the course of the king's ongoing dispute with Becket. The other is less certain. The legislation on the process of _tolt_ is described in the chronicler accounts as having been something made by the king, but as injurious to the magnates and about which they lamented in secret. The impression given is that it was something the king devised by himself, though it might just have been legislation agreed to by a wider body of counsellors without them having quite realised what its impact was likely to be.

It is, of course, possible that the 'advice' given by the archbishops, bishops, earls, barons and others was a mere formality; that they had no real input into legislation and no noticeable effect on its content. There is, however, at least one piece of evidence that suggests the contrary. This is the discussion in _Glanvill_ of the grand assize, which certainly reflects in part some of the provisions of the lost Assize of Windsor. Some of these look as though they were included to persuade a reluctant council to agree to the Assize. The discussion in _Glanvill_ may also reflect some of the arguments used in the council session to persuade a reluctant council, but which did not feature in the eventual Assize. Henry and his immediate advisers seem to have been keen on jury trial. We may therefore conclude that the provision that allowed the tenant in possession to continue to have the choice of battle was the first of the sacrifices made to ensure that the Assize was agreed by the council. A second may have been the elaborate measures adopted to have the knights of the grand assize chosen not (as in the petty assizes) directly by the sheriff but indirectly by four knights chosen as electors. These were presumably intended to provide some kind of additional safeguard against the manipulation of grand assize juries by sheriffs.

More interesting still are those passages and provisions suggesting that Henry

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1 Howden, _Chronica_, ii, 245; Stubbs, _Select Charters_, 187–8. On the text, see also Holt, 'The Assizes of Henry II', 97–100.
2 See p. 229 and n. 1 above.
3 See p. 227 above.
4 _Glanvill_, ii, 6–21 (pp. 26–37).
5 Ibid., ii, 10–12 (pp. 30–32).
and his advisers may have ‘sold’ the grand assize to the king’s council on the basis that it was in effect a new and improved version of trial by battle, not a radical departure from it. We find it said that the knowledge required from the jurors was that they should ‘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 them for themselves’.¹ It is precisely this kind of knowledge that we find champions required to assert that they possessed for trial by battle.² The penalty for those convicted of perjury in the grand assize was one that paralleled (in part at least) the penalty for perjury imposed on a defeated champion.³ In another curious passage, the author speculates on the possibility of there being less than twelve jurors who knew the truth, but two or three who did. He says that they may offer proof as champions instead, and may be accepted as such.⁴ The close connexion between the two types of proof (in form at least) is also to be seen in the provision that the grand assize should only lie where battle would have been available,⁵ and in the author’s argument that the grand assize is preferable to battle because ‘battle is fought on the testimony of one witness, but this constitution requires the oaths of at least twelve’.⁶

It is impossible to guess how much of the legislation of Henry II’s reign we have lost. Some of that lost legislation can be reconstructed, either in part or in whole, and we know something of other lost legislation from passing references in Glanvill and other sources.⁷ There may well have been other legislation of which we now know nothing. It seems none the less likely that some at least of the significant legal changes that took place during the reign of Henry II were not such as to require formal approval or proclamation through legislation, and took place gradually, even surreptitiously, over time. It seems unlikely, for example, that any formal legislation was required to direct litigation to the king’s Exchequer in growing quantities and thereby to provide the institutional foundation for the eventual creation of the Common Bench shortly after Henry II’s death. Neither did the decision to keep a full formal record of the business of the king’s courts. The shift that turned the justices of the General Eyre into judges, not just presiding officials, may also not have required legislation or have been specifically approved in that way. It may well have been a gradual process, furthered by the use of instructions on law and process addressed to them when they were sent out on eyre and partially masked by the important role juries now came to play

¹ Ibid., ii, 17 (pp. 34–5).
² Ibid., ii, 3 (p. 23).
³ Ibid., ii, 19 (pp. 35–6); ii, 3 (p. 25).
⁴ Ibid., ii, 21 (p. 37).
⁵ Ibid., ii, 19 (p. 36).
⁶ Ibid., ii, 7 (p. 28).
⁷ See pp. 227–8 above.
in much of their business. The creation of writs of a fixed form may have been specifically approved on an individual, type by type, basis in the legislation that brought such cases into the king’s courts. This is less likely to have been true of the writs of fixed form that brought litigation into county courts. It may be that the drawing up of writ forms was left to Chancery and the use of fixed forms was a matter initially determined more by Chancery convenience than by any kind of wider legal principle. The invention of the ‘returnable’ writ was probably a distinct development. It too is quite unlikely to have required, or received, any kind of legislative approval.

When did the major legal changes associated with Henry II’s reign take place? The first visitation by royal justices to be planned on a nationwide basis with a multiplicity of circuits in order to ensure the completion of the visitation within a limited time-scale was for the exceptional Inquest of Sheriffs of 1170, with its special remit. The first nationwide proto-General Eyre dealing more generally with both civil and criminal business took place in 1175, or perhaps in 1174–5. The amount of business done by the justices of this General Eyre must, however, have been small, for only two circuits of justices, each comprising only two justices, managed to visit the whole country within a relatively short period of time. Nor is it certain that these justices actually made the judgements at their sessions. The beginnings of the General Eyre proper probably therefore belong to the following year (1176), when the Assize of Northampton established six circuits of three justices. The Assize established their jurisdiction and placed the justices in control of proceedings at their sessions and of making judgments there. Thereafter, there were regular visitations by similar groups of royal justices every second year on average through to the end of the reign. It is more difficult to assign a specific date to the beginning of the functioning of the Exchequer as a regular court for the hearing of civil litigation. It had certainly begun to hear some such litigation by the mid 1160s, and it is from about then that the first surviving (though undated) final concords made in the court survive. It is, however, only from the late 1170s onwards that the surviving evidence is plentiful enough to suggest that ordinary civil litigation was being heard on a fairly regular basis at the twice yearly sessions. Thus both the creation of the General Eyre and the regular use of the Exchequer for hearing civil litigation seem to belong to the period that followed the rebellion of the ‘Young King’ and the reimposition of Henry II’s authority in its aftermath.

Of the distinctive characteristics of these new royal courts, that of being run (and judgments in them being made) by justices appointed by the king was evidently always true of the Exchequer, and was fairly clearly also true of the General

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2 Ibid., 87–9.
Eyre from 1176 onwards.¹ That these courts functioned only with specific authorisation from the king is likely to have been true from the first occasion of the Exchequer functioning as a civil court. In the so-called ‘Assize of Northampton’ we see the specific instructions that were given to the justices who went out on eyre in 1176, authorising them to make specific enquiries on criminal matters and on matters of interest to the king and to hear various kinds of civil litigation.² Similar but regularly amended instructions were probably drawn up for each succeeding visitation. What is less clear is whether, from the first, the justices of the General Eyre also needed separate writs authorising them to hear each piece of civil litigation that they heard. The so-called ‘Assize of Northampton’ speaks of the king’s writ authorising land litigation generally (in chapter 7), but simply refers in other clauses to the justices’ making percognitionem by twelve men, if the lord refused to give the heirs such seisin as their ancestor had possessed at his death (in clause 4), and to their making recognicionem of disseisins against the assize (in clause 6). It may be that this is a general description of their jurisdiction and that the assumption (perhaps spelled out in the Assize proper) was that they would act only on receipt of a writ. But it is also possible that the procedure envisaged was that they would act on receipt of a complaint without a writ, and that it was only some time after 1176, but before the time of Glanvill, that the Eyre justices also came to act only on receipt of a specific writ authorising them to do so. I have discussed elsewhere the evidence indicating that the Exchequer was keeping a plea-roll record of its litigatory business by 1181 at latest and suggesting that this may go back to before 1178; and I continue to find persuasive the indirect evidence that suggests that the new Eyre justices from the beginning in 1176 were also keeping a plea-roll record of their business.³ The relatively short timetables allowing the itinerant justices of the General Eyre to cover their circuits suggest that from the first they were in continuous, or almost continuous, session. For the Exchequer all we can affirm with certainty is that it did not do business only for single days at periodic intervals. We may also be fairly certain that it was doing either financial or litigatory business fairly continuously during its sessions.⁴

The idea of the standard-form writ ‘of course’ is clearly implied by Glanvill’s treatment of writs, though not specifically spelled out in the treatise. This would suggest that it was not a recent development in the final years of Henry II’s reign. It is quite likely to have been a corollary of the decision to authorise the king’s courts to hear specific types of litigation. That decision goes back to at least 1176, just possibly to 1166. The invention of the ‘returnable’ writ is even more difficult to date. The forms of the writs included in Glanvill show that the ‘returnable’ writ

¹ Ibid., 83–6.
² See p. 225 above.
³ Brand, Making of the Common Law, 95.
⁴ Ibid., 94.
Paul Brand

had been invented some time before the treatise was written. There seems to be no evidence helping to pinpoint more precisely just when. The grand assize was evidently created by the lost Assize of Windsor of 1179. The other forms of jury (the petty assizes) are more difficult to date with certainty. It seems quite likely that the assize of mort d’ancestor as a procedure (with a jury being set in advance a series of questions to answer) does in fact go back to 1176, the assize of darrein presentment (with a jury being set in advance a single question to answer) to 1179 or 1180, and the assize of novel disseisin to 1166, or perhaps more plausibly also to 1176.

This also provides dates for the beginnings of the king’s courts’ jurisdiction over recent disseisins and over the enforcement of rights of inheritance. Biancalana’s work suggests that 1176 may also have been the date when the king’s courts began to exercise jurisdiction over dower claims as part of their enforcement of the Assize of Northampton. Chapter 1 of the Constitutions of Clarendon had claimed for the jurisdiction of the king’s court (‘curia domini regis’) litigation about advowsons and the right of presentation to churches, whatever the status of those litigating (laymen or clerics), but it is unclear whether and how this jurisdiction was effectively exercised before the invention of the assize of darrein presentment in 1179/80, and the precept writ of advowson, perhaps in existence by 1175. I know of no evidence earlier than Glanvill itself to suggest that the king’s courts were claiming an exclusive jurisdiction over questions of status. We can see the beginnings of the direct jurisdiction of the king’s courts over pleas of the Crown (major criminal pleas) in the Assize of Clarendon of 1166, which envisaged an enquiry into those reputed to be robbers, murderers, thieves or accessories, and the Assize of Northampton of 1176, which added further categories of offenders: those suspected of forgery or arson. The emphasis in the Assizes, however, is on suspects, not on offences, and nothing is said about an exclusive right to try those the subject of criminal appeals (private accusations). When these came to be reserved to the itinerant royal justices is not, I think, known for sure.

More interesting still, of course, are questions of motivation, about why the various changes I have been discussing took place and what kind of overall vision

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1 See p. 224 above.
2 See pp. 227, 233 above.
4 Stubbs, Select Charters, 164.
5 See p. 227 above.
7 Royal Writs, 343–4, notes the writ de libertate probanda for removing cases raising this question out of the county court, but sheds no light on its prior history.
of the English legal system and its working there may have been behind them. The clearest evidence of some kind of overall vision for the legal system is that implied by the beginnings of the General Eyre during Henry’s reign as a court (or series of courts) manned by justices appointed by the king and under oath to him, bringing civil and criminal justice of a standardised kind on a regular basis to each county. This was a development that brought the king’s courts and royal justice to the whole country, without the king himself needing to be directly involved, while allowing the king to retain ultimate control, both through his appointment of the justices for each visitation and on each circuit and for each county they visited on that circuit, and through his control of the business the justices did on both the civil and the criminal sides. The requirement that the justices keep a full written record of their business then also allowed for the possibility of external checks on what they had done. The system seems to have been deliberately designed as a means of providing what could still be called and conceived of as ‘royal’ justice through courts that did not require the presence of the king in person but whose justices could be said to ‘represent’ the king, both because they were directly appointed by him and because they only did such business as he had specifically authorised. It was deliberately designed to provide the convenience of royal justice on a regular (and relatively frequent) basis in each county. For a king who saw one of his main functions as being that of providing justice for his subjects, this was an effective way of increasing the availability of that justice, while also keeping it under his general oversight and control. The development of the Exchequer as a central civil court looks less obviously planned and thought out in advance: more of an improvised expedient to provide a permanently-functioning central royal civil court that did not require the king’s presence but could operate under the watchful eyes of his representative, the justiciar, and utilised the trained and literate core of royal servants needed to operate the Exchequer to assist the king in another key governmental function.

The invention of standardised writs ‘of course’, available virtually on demand from Chancery, may in part have reflected the fact that each accretion of civil jurisdiction to the king’s courts came through specific legislation that authorised a particular type of remedy in the king’s courts, and may even have specified the form of that remedy and the general form of the writ. It thus reflected the process by which that expansion had taken place. It also performed the obvious practical function that it allowed Chancery to issue a relatively large volume of writs by utilising the services of junior clerks, who had only to follow the forms and fill in the necessary blanks, without requiring any greater drafting skills and without the writs needing to be specifically authorised by the king or checked by the chancellor. The separate invention of ‘returnable’ writs was a further ingenious bureaucratic device, that ensured that the courts had specific authorisation for each piece of litigation that they heard and also (in the case of both original and judicial writs) ensured that the courts could check that there were no errors in
the wording of the writ, and that the intended recipient of the writ had indeed received it.

Henry II and his advisers evidently favoured the use of jury trial in civil litigation. It is difficult not to see this as a deliberate effort at 'modernisation', at introducing a more rational method of proof that relied upon the human knowledge available in the local community, with deliberate safeguards in the process of the choice of jurors that were intended to ensure a balanced and neutral group of fact-finders, and which represented a real improvement over the reliance on God's assistance that was presupposed by trial by battle and the reliance on a partisan group of supporters without knowledge of the facts that constituted compurgation, but one that at the same time required a much smaller investment of time and effort than the process of witness proof then being introduced into Romano-canonical procedure.

Why did Henry II and his advisers introduce the two petty assizes of novel disseisin and mort d’ancestor and the widow’s action of dower unde nichil habet, the three land-law remedies that seem to have brought significant quantities of business to the king’s courts by the end of Henry II’s reign and were to continue doing so for more than a century after that? Professor Milsom has argued that the assize of novel disseisin originated in a strongly seigniorial or 'feudal' world where lords were in real control of their lordships, and that a variety of features of the assize point to its origins as a measure intended specifically for the use of tenants against their lords, giving the additional teeth of external enforcement to the customary right of the tenant not to be dispossessed by his lord except for good cause and after due process in the lord’s court. Although there is little doubt that lords were from the first envisaged among the possible defendants in the assize, even the cumulative evidence adduced by Professor Milsom to show that they were originally envisaged as the only defendants remains unconvincing. In 1166 England was still recovering from the Civil War of Stephen’s reign, and special measures had to be adopted to ensure the maintenance of order while the king was overseas. It does not seem at all improbable that the king and his advisers (and perhaps, even more, those of his council who advised on the assize of novel disseisin) were well aware that there were people other than tenants’ lords who dispossessed them: neighbours, those with rival claims to the same land, other lords. In a perfectly ‘feudal’ world the tenant might perhaps have expected his lord to help him in resisting and redressing such dispossession, but this was not such a world. It was a world where it might indeed be the ultimate lord of all lords to whom a tenant might have to look to remedy his dispossession. Paradoxically, of course, Milsom’s understanding of the original orientation of the assize makes it look much more like a weapon for use by the king to reduce the discretionary


\[2\] Ibid., 222–3, gives my answer to Milsom’s arguments in more detail.
power of lords over their tenants, by subjecting the exercise of that power to the scrutiny of the king’s courts, and my understanding of the wider original orientation makes it much less obviously a direct threat to seignorial autonomy. The king’s motives for introducing the assize must surely have included public-order ones: the desire to protect his subjects against wrongful dispossession of their lands, and to prevent the kinds of disorder that might be (and often were) associated with the forcible dispossession and reposition of valuable land. Perhaps from the start the king may also have had in mind the development and acquisition of a jurisdiction that placed him in the position of helping through his courts to secure all his free subjects in the peaceful possession of their lands and other associated rights, and remedying any dispossession.

With the assize of mort d’ancestor there can be no doubt, because of the surviving text of (or associated with) the Assize of Northampton, that the assize was originally intended specifically for the use of a close heir against the lord who had refused to admit that heir to a tenement of which his ancestor had died in seisin and who had himself taken seisin and remained in since then.¹ This is indeed a situation where Biancalana’s suggestion that the underlying justification for the assize, that this is a situation where the provision of a remedy by the king is justified because the lord had manifestly failed to provide justice for an heir, looks to be convincing.² This, or something like it, was presumably the justification that Henry and his advisers used when securing the consent of his council to the issuing of this part of the Assize of Northampton. Henry’s own motivation for the introduction of the assize may, however, have been somewhat different. It is not unreasonable to see Henry as wanting to develop a jurisdiction that placed him and his courts in the position of assisting heirs in enforcing their right to succeed to the inheritance of their ancestors, and thereby enhancing the king’s role as provider of justice to the wider national community of free tenants, in a situation where those tenants had, in the past, been particularly vulnerable to discretionary exercises of power by their lords. Biancalana’s suggestion that the precise ambit of the action of dower unde nichil habet was likewise determined by the general principle that royal action was only justified where a lord had manifestly failed to do justice is also an attractive one.³ Again, we might speculate that this might have been the argument that Henry and his advisers used to secure consent to this extension of royal jurisdiction, and suggest that Henry’s own motivations for the extension might well have been broader than this. They may again have included a wish to extend the jurisdiction of his courts to a matter of general significance to a wider community of free tenants because it enhanced his role as a provider of justice. Somewhere in the background may also have been the consideration

¹ See p. 233 above.
³ Ibid., 514–6, 533–4.
that the protection of widows and their rights was a matter in which the Church might take an interest, all the more so because the marriage ceremony at which dower was promised took place at the door of a church, and was indeed secured by a promise of the kind that the Church was willing to enforce and claimed for its jurisdiction. The provision of a remedy by the king’s court was one way of stopping the church courts offering their own remedy.

Milsom’s explanation for the origins of the apparently customary rule found in *Glanvill* that states that no one is obliged to answer for his free tenement without a writ from the lord king or his chief justiciar is that this rule started simply as a statement of fact.¹ In the purely ‘feudal’ world no lord would accept any claim against a sitting tenant. When the writ of right and the associated removal mechanisms came along, these did not initially force the lord to hear an outsider’s claim, but they did ensure that, when the lord’s court refused to entertain the claim, the case could be removed into a court (the county court and later, if needed, the king’s court) that would. It was thus literally true that no tenant could be obliged to answer for his free tenement without the king’s writ.² I have argued elsewhere against this explanation. If *Glanvill* reproduces the original formulation of the rule, the rule specifically states that no one is obliged to answer in the court of his lord for his free tenement without the king’s writ. This seems to presuppose that it will indeed be in the lord’s court that he will answer if the writ is produced, not elsewhere.³ It is also difficult to see how a factual statement of that kind (susceptible as it was to being falsified by changing practice) could be transformed into a statement of a normative rule that provided protection for sitting tenants. It seems more likely that what it reflects is the practice of the new king’s courts in rulings in assizes of novel disseisin on judgments given in lord’s courts dispossessing tenants, holding that a precondition for the legal validity of such judgments was that the tenant should have been summoned to the court on a writ of right and given the additional procedural protections that the removal and other processes on the writ of right afforded.

Milsom has argued that the king’s writ of right started life as a writ for the enforcement of the provisions of the Treaty of Westminster of 1153, requiring the reinstatement of those who had (or whose ancestors had) been dispossessed during the Civil War of Stephen’s reign, and allowing them to claim on the basis that they or their ancestors had been in seisin on the day of the death of Henry I.⁴ This suggestion has the great merit of tying the introduction of what may well have been the first writ ‘of course’ to a definite external political cause, but the demerit of being supported, as I have argued in more detail elsewhere, by no evidence that

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¹ *Glanvill*, xii, 25 (p. 148).
³ Ibid., 225.
⁴ Ibid., 210–12.
withstands detailed scrutiny, and of requiring us to believe that a writ drafted for this specific purpose would not have been much more explicit about its purpose.\footnote{Ibid., 221–2.}

It seems more likely that the writ was from the first intended for the more general purpose of allowing land to be claimed on the basis of the seisin of an ancestor or of the claimant’s own seisin (the standard generic form of land claim) and perhaps other kinds of claim as well, for the formula of the writ allowed some elasticity on this point. Claimants may originally have obtained the writ mainly because of its explicit threat of removal if the lord failed to do justice as instructed. For the king, the great attraction of the writ (in its developed form at least) may have been precisely that it implied that lords exercised this major jurisdiction as agents of the king and subject to the oversight of the king’s officials.

Less can be said about the other areas of jurisdiction that the king’s courts came to acquire during Henry’s reign. As has been seen, the king’s claim to an exclusive jurisdiction over advowson disputes went back to at least the Constitutions of Clarendon of 1164, but this claim was contested by the Church, which claimed such cases for its own courts. Henry’s barons may well have seen the advantages of keeping such litigation in lay courts, and may have been happy that such cases should be heard by the king’s courts because they were in a better position to ensure that the outcome of such litigation was respected by the ecclesiastical courts than judgments made in county courts or in seignorial courts would have been. ‘Pleas of the Crown’ were, of course, matters for the king’s justice, anyway (as representing an important element in his duty to uphold peace and justice). Entrusting their determination to the new royal justices meant that the detection and trial of suspects came much more effectively under the oversight of those trusted by the king than any previous arrangements had secured. They also did more to secure for the Crown the substantial profits of criminal justice.

The expansion of the jurisdiction of the county court through the invention of viscontiel writs seems to have been part of a wider realisation of the concept of integrating county courts into the wider judicial system as junior partners in a broader ‘Common Law’ legal system. Making such litigation removable by _pone_ into the king’s courts seems also to be part of that broader design. The delegation to the county court of replevin jurisdiction, however, may belong to a wider long-term design to secure jurisdiction over such disputes for the county court at the expense of seignorial and hundred courts.

Much had been achieved by the end of the reign of Henry II towards the creation of the English Common Law as a legal system, but there was much still to be done before the emergence of the classic later-medieval Common Law. A new kind of royal court with its own distinctive attributes had been created, but of the classic courts later to possess these characteristics only the General Eyre had
as yet come into existence, not the Common Bench as a separate institution or King’s Bench or any of the other lesser courts. The writ ‘of course’ had been created and the ‘returnable’ writ, and we see the beginnings of the regular, routine use of jury trial for fact-finding and helping to determine the outcome of litigation, though as yet only in a limited range of cases, mainly about title to land. The king’s courts had begun to exercise jurisdiction over a number of significant areas — over title to land, title to advowsons, disputes over personal status, major criminal offences — but little outside those areas. County courts had been given jurisdiction over a number of new areas, mainly through new viscontiel writs, but also through the creation of the new action of replevin, and they were being integrated into a national judicial system, mainly through the use of the writ *pone*, which allowed the easy removal of litigation out of the county court into the king’s courts proper. We also see the beginnings of the Common Law as a system of common legal rules and concepts, producing a common system of procedures applicable in the kings courts and common substantive rules applicable not just in them but also in other courts governing the transmission of title to land through intestate succession (inheritance), the lifetime entitlements of surviving spouses to the lands of their deceased partners, the incidents of the relationship of lord and tenant, and determining some of the main constituent elements of the criminal law. There seems, however, to be little evidence of a common law as yet outside these specific areas.

Many of the changes that had taken place had been authorised by legislation. Much of that legislation is known only from passing references. This may in part have been because there was no sustained effort to preserve official archival texts of legislation, in part because some of the legislation may have been promulgated only through oral proclamation at the session of the justices who were to apply it, rather than by sending copies of the legislation separately to each county for proclamation and thereby making it available for private copying and allowing multiple private copies to enter circulation. There was a process of consultation that preceded the promulgation of legislation, and the need to obtain wider consent for legal change may well have been a significant brake on the speed with which legal change could take place, and may even have affected the eventual form that change took. But some of the important legal changes of the reign were not such as to require specific legislative authorisation and could be achieved by executive direction, by administrative fiat alone. Most of the significant legal changes of the reign of Henry II took place in the second half of the reign, from 1176 onwards. It is only then that the new kind of royal court emerges, that a recognisable General Eyre is created and the Exchequer begins to hear litigation on a regular basis; then also that the petty assizes (with the possible and rather dubious exception of the assize of novel disseisin) are first authorised and the grand assize is created as an alternative to battle; then that the writ of course and the returnable writ are first devised.
It seems probable that the legal changes of Henry’s reign were driven, at least in part, by the desire on the part of Henry and his advisers to make the king’s justice much more widely available to his English subjects, and that they worked on both the supply and demand ends of this. On the supply side they found ways to create a multiplicity of royal courts that did not require the king’s active participation, but whose justices in a real sense ‘represented’ the king and were controlled by him, and whose courts could be said to be the king’s courts. On the demand side, the king ensured customers for those courts by offering his free subjects assistance in protecting their possession of their free tenements, in enforcing their entitlement to succeed to the lands of their ancestors and to obtain their dower entitlement, and in protecting their rights as the patrons of churches; and also perhaps by offering them more rational methods of proof (by jury trial) as a way of determining disputes on these matters. The king and his advisers were also evidently determined to do more to ensure peace and order by bringing criminal justice under more direct royal control and supervision. Together, these fit into an overall picture of an activist king, interested in justice and the law, and determined to find a more active role for the monarchy in their provision.