Communities and Courts in Britain 1150-1900

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Edited by

Christopher Brooks and Michael Lobban

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Preface

This volume of essays arises from the Twelfth British Legal History Conference, which was held at Durham Castle on the 19th–22nd July 1995, but it is not simply a record of the proceedings. In selecting the papers for inclusion, we have aimed for a coherent collection that focuses directly on the multifaceted and rich theme of the relationship between communities and courts in Britain over some eight centuries. The essays show how the law was used by contemporaries, and how legal processes fitted into the social and political life of communities. In so doing they illuminate social, economic and political, as well as legal history. We are grateful to the contributors for their coöperation in enabling us to keep to our production schedule. Martin Sheppard of the Hambledon Press has committed time and care in helping us to prepare the book for publication. We hope that readers will find it a useful introduction to work that has already been done, and a stimulus to further research on a subject that is of increasing interest to general historians as well as legal scholars.

We would also like to take this opportunity thank all those who attended the Conference, and the staff of University College, Durham, for making it an enjoyable and successful meeting of over 125 legal historians from the British Isles, North America and continental Europe. The *Journal of Legal History* contributed significantly to the conviviality by providing a reception. Sheila Doyle, the University Law Librarian, and Linda Drury added intellectual fare by assembling 'Communities and Courts in and around Durham', an interesting exhibition of manuscripts and early printed books from the University Archives and Special Collections, which was on display in the Palace Green Library during the Conference.

Christopher Brooks Michael Lobban

Durham

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The British Legal History Conference

The first British Legal History Conference was held in 1972 in Aberystwyth on the initiative of Professor Daffyd Jenkins. Since then there have been meetings at London/Cambridge (1974 and 1975), Edinburgh (1977), Birmingham (1979), Bristol (1981), Norwich (1983), Canterbury (1985), Cardiff (1987), Glasgow (1989), Oxford (1991) and Exeter (1993). The Conference has become established as a leading forum for the discussion of all aspccts of the history of law in Britain.

Proceedings of the Conference have been published as follows:

Legal History Studies 1972, ed. D. Jenkins (University of Wales Press, Cardiff, 1975).

Legal Records and the Historian, ed. J. H. Baker (Royal Historical Society, London, 1978).

Law-Making and Law-Makers in British History, ed. A. Harding (Royal Historical Society, London, 1980).

Law, Litigants and the Legal Profession, ed. E. W. Ives and A. H. Manchester (Royal Historical Society, London, 1983).

Law and Social Change in British History, ed. J. A. Guy and H. G. Beale (Royal Historical Society, London, 1984).

Customs, Courts and Counsel, ed. A. Kiralfy, M. Slatter and R. Virgoe, in *Journal of Legal History*, 5 (1984), and as a separate volume (Frank Cass, London, 1985).

The Political Context of Law, ed. Richard Eales and David Sullivan (The Hambledon Press, London, 1987).

Legal Record and Historical Reality, ed. Thomas G. Watkin (The Hambledon Press, London and Ronceverte, WV, 1989).

Legal History in the Making, ed. W. M. Gordon and T. D. Fergus (The Hambledon Press, London and Rio Grande, OH, 1991).

The Life of the Law, ed. Peter Birks (The Hambledon Press, London and Rio Grande, OH, 1993).

Law Reporting in Britain, ed. Chantal Stebbings (The Hambledon Press, London and Rio Grande, OH, 1995).

In organising the conference in Durham, the editors were keen to follow the recent example of the 1993 meeting at Exeter by focusing the programme around a broad general theme. Given the amount, and methodological diversity, of the work currently being undertaken by younger, as well as more senior, scholars on 'Communities and Courts', we were also anxious to maintain an open forum, and, if possible, to encourage the presentation of research from other countries both within and beyond the common law tradition. The Call for Papers was, therefore, designed to cast a wide net, and we were able to fit forty papers into a full, and varied, programme which reflected the almost limitless scope for the interaction between social history and legal history.

The final selection of papers for inclusion in this volume was inevitably a compromise between the publication plans of the various authors, limitations of space and the aim of the editors to sustain the theme. A number of interesting areas of work are therefore not represented. First, despite the presentation of several papers on North American legal history, and a very lively session which examined the strategies open to litigants using local jurisdictions in early modern London, South Jutland and the Netherlands, it has not proved possible to include any of this work, at least partly because the numbers of papers submitted was relatively small. The conference did, however, indicate how fruitful a comparative approach, crossing the borders of the common law and civilian worlds, can be. Secondly, there were fewer contributions than might have been expected on the history of crime, the history of gender and of the family, all of which have made extensive use of court records. But as can be seen from the following list of papers given at the conference but not included here, the interest in each of these areas was reflected on the programme.

* * * *

Hans Henrik Appel (University of Copenhagen), 'Court and Local Community in Skast Hundred, Southern Jutland, 1636–1700'.

Lynette M. Costello (London Guildhall University), 'The Jurisdiction and Procedure of the Stannary Courts'.

Daniel R. Coquillette and Mary E. Basile (Boston College Law School), 'The Community of Merchants in the Late Thirteenth Century and Their Special Courts: A Study of *Incipit Lex Mercatoria*'.

Faramerz Dabhoiwala (All Souls College, Oxford), 'The Prosecution of Sexual Offences in Late Seventeenth- and Early Eighteenth-Century London'.

Florike Egmond (University of Leiden), 'How to proceed? Defendants' Strategies in Criminal Cases in Early Modern Netherlands'.

Susan E. Grace (University of York), '*The Land of Ginger* v. *Whip-Ma-Whop-Ma-Gate*: Variations in the Treatment of Female Offenders in Nineteenth-Century York and Hull'.

William C. Harris (North Carolina State University), 'The North Carolina State Supreme Court's Resistance to Confederate Encroachments on Civil Liberties'.

Steve Hedley (Christ's College, Cambridge), '"The Needs of Commercial Litigants" in Nineteenth-Century English Contract Law'.

Steve Hindle (University of Warwick), 'Authority, Dispute and Settlement: Measuring the Activity of the Early Modern State'.

Louis A. Knafla (University of Calgary), 'The Morphology of Civil Litigation in the Local, Secular Courts of Kent in the Early Seventeenth Century'.

Gernot Kocher (Karl-Franzens-Universität, Graz), 'Visual Aspects of the Relations between Litigants and Courts on the Basis of Medieval Illustrations'.

Stephan Landsman (De Paul University College of Law), 'The Treatment of Medical Experts in the Old Bailey during the Eighteenth Century'.

David Lemmings (University of Newcastle, Australia), 'Was Bentham Right? Westminster Hall and the Lawyers in the Eighteenth Century'.

John McLaren (University of Victoria, British Columbia), 'The Despicable Crime of Nudity: Civil Disobedience among Canada's Doukhobors, 1899–1935'.

W. B. Maynard (Arkansas State University), 'The Role of Clerical Magistrates in the Eighteenth Century'.

Gwenda Morgan (University of Sunderland), 'Race, Law and Community in Colonial Virginia'.

V. R. Parrott (Manchester), 'The Manchester Law Association and Malpractice in the Salford Hundred Court'.

C. G. Roelofsen (Institute of Public International Law, Utrecht), 'The Grand Council of Mechlin and the Admiralty at Veere and their Relations with the Seafaring Community: Privateers and Merchants Before the Burgundian Courts'.

G. R. Rubin (University of Kent), 'If Hitler's Invasion Had Begun: British Plans for War Zone Courts, 1940–1945'.

J. Beverley Smith (University of Wales, Aberystwyth), 'Collective Judgement under the Law of Wales'.

Llinos O. W. Smith (University of Wales, Aberystwyth), 'Court and Community in a Medieval Welsh Marcher Lordship'.

Mary Sokol (University of Sussex), 'Jeremy Bentham's Equity Dispatch Court'.

Tim Stretton (Clare Hall, Cambridge), 'Women and Litigation in the Elizabethan Court of Requests'.

David Sugarman (University of Lancaster), 'The Law Society and the Legislative Process in the Nineteenth and Early Twentieth Centuries'.

Tim Thornton (University of Huddersfield), 'The People of Cheshire and the "Declining Years" of the Palatine Court of Chester'.

S. M. Waddams (University of Toronto), 'The English Ecclesiastical Courts in the Nineteenth Century'.

Several of the papers presented at the conference were derived from, or constitute part of, book-length studies which have been recently, or are about to be published: for example, D. R. Coquillette's and M. B. Basile's edition of *Incipit lex mercatoria* (forthcoming, the Ames Foundation); L. A. Knafla, *Kent at Law, 1602*, ii, *The Local Jurisdictions: Borough, Liberty, Franchise and Manor* (forthcoming HMSO); Tim Stretton's book on female litigants in the Elizabethan court of Requests (forthcoming Cambridge University Press), and Steve Hindle's work on recourse to law and state formation in early modern England.

Contributors

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Penny Tucker held a Wellcome Institute Fellowship to research the history of Bethlem Royal Hospital until September 1996. Since then she has been doing further work on London's courts in the late medieval and early modern period.

Elizabeth M. P. Wells did research for a doctorate on the manuscript and printed traditions of common law reports, 1550–1650, particularly *Croke's Reports*. Since completion, she has worked as a research assistant, first at the Law Commission, in the Statute Law Revision section, and then at the University of Leiden.

Thomas Glyn Watkin is a Senior Lecturer in Law at the University of Wales, Cardiff.

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Abbreviations

BL British Library, London, Department of Manuscripts.

CP 40 Plea rolls of the court of Common Pleas, Public Record Office, London.

PCC Prerogative Court at Canterbury.

PRO Public Record Office, London.

PROB Records of the Prerogative Court at Canterbury, Public Record Office, London.

STAC Records of the court of Star Chamber, Public Record Office, London.

In this volume, cases are cited using the standard legal abbreviations, principally to named law reporters. The vast majority of reported cases are to be found reprinted in the *The English Reports* (1900–32), a multi-volume collection of most of the printed law reports from the mid sixteenth to the nineteenth centuries. Legal citations are more fully explained in Donald Raistrick, *Index to Legal Citations and Abbreviations* (2nd edn, London, 1993).

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Introduction

Christopher Brooks and Michael Lobban

The past twenty years has seen a flowering of research drawing heavily and to good effect on legal records. Alongside traditional legal historians, a new generation of social and economic historians has begun to use these sources to explore the wider relationship between the law and the community. Whereas in the past legal historians (in law faculties) have concerned themselves primarily with questions about the forms and substantive rules of law, while social historians (in history faculties) have concentrated more on the impact of legal authority on the community, there are now signs that each school is beginning to address the questions raised by the other. Linking the two approaches allows the historian to investigate the ways in which legal forms apparently provide the matrix within which personal interactions are carried out. At the same time, changes in the wider society frequently lead to changes in legal forms and institutions.

While much of the impetus for earlier work connecting social and legal history arose from an interest in crime, attention has turned more recently to a number of other areas including, for example, the history of the legal profession, defamation and slander, sex and marriage, arbitration and the history of evidence. Furthermore, legal history is no longer predominately the preserve of medievalists, since the chronological range of studies has extended into the early modern and modern periods. Even so, much remains to be done in discovering the precise workings of the myriad of different institutions in the localities as well as at the centre, the number and nature of litigants who sought to use them, the decision-making processes, and the impact of outcomes on individuals and communities. It is questions such as these which are addressed by the essays in this volume.

Several of the authors consider the workings of central courts which have been under-researched in the past, but which provided important forums for litigants. Elizabeth Wells's pioneering investigation of the Admiralty shows the volume and nature of litigation in a jurisdiction whose records vividly portray the trials and tribulations of life at sea during the Elizabethan war years.[1] Lloyd Bonfield's study of the Prerogative Court of Canterbury

[1] See below, Chapter 6, pp. 83–97.

provides an analysis and explanation of the legal issues involved in obtaining probate of wills.[2] This is particularly valuable since, while the study of wills has long been the bread and butter of much early modern social history, the legal and institutional mechanics of proving wills have not been given the attention they merit. The rivalry between the common law courts, King's Bench and Common Pleas, and the Chancery is, on the other hand, hardly unknown territory. Nevertheless there is little work on the relationship between law and equity after the Restoration in 1660, mainly because it is too often assumed that their relative functions had been settled. Mike Macnair argues that the situation was more complex than this, as many lawyers and parliamentarians continued to question where the boundary should lie.[3] So long as these issues remained unresolved, the lack of a clear division provided scope for the creation of new remedies and enabled litigants to 'forum shop'. Neil Jones draws on manuscript law reports and lectures in order to show how, after the Statute of Uses (1536), the Chancery and the court of Wards protected the king's feudal revenue and at the same time allowed the development of trusts.[4] Each of these studies provides important perspectives on courts, to some degree outside the common law tradition, which provided vital remedies not merely (as in the case of trusts in Chancery) for the landed gentry, or (as with Admiralty) for merchants, but (in the case of the Prerogative Court of Canterbury) for almost anyone, high or low.

These studies of the central courts reveal the relevance of national legal institutions to ordinary people, something which has on occasion been underestimated. As is shown in Joshua Getzler's essay on nineteenth-century hunting disputes, the study of economic and social conflict, which inevitably involved litigation, cannot be complete unless it takes into account the intensely complex web of traditional legal learning as well as the moral assumptions of the judges who decided those cases.[5] Indeed, there are unlikely to have been many periods in British history when law and legal institutions were not deeply embedded in the life of families and individuals at all social levels. Hence the relationship between communities and courts cannot be fruitfully understood in terms of simple dichotomies between official, or legal, norms versus those of a society which somehow operated independent of them. This is illustrated by two papers on the medieval period which explore the use of language. Thomas Glyn Watkin's essay argues that the phrase *dominus rex* was increasingly used during the reign of Henry II to underline the unity of the realm and justice under one king.[6] Hector MacQueen's essay traces the use of Celtic vernacular, Latin, French and Scots

[2] See below, Chapter 9, pp. 133–53.
[3] See below, Chapter 8, pp. 115–31.
[4] See below, Chapter 7, pp. 99–113.
[5] See below, Chapter 12, pp. 199–228.
[6] See below, Chapter 1, pp. 1–12.

languages in medieval Scotland, showing the complex and mutable interaction of the language of courts, litigants, written treatises and documents.[7]

These same issues are also reflected in the essays on local jurisdictions between the fifteenth and eighteenth centuries. Christopher Harrison offers a timely and vigorous call for a reconsideration of the vitality of manorial courts in the late sixteenth and early seventeenth centuries.[8] Penelope Tucker's paper investigates the working, business and effectiveness of the fifteenth-century local London jurisdictions,[9] while Craig Muldrew's chapter impressively documents the importance of local courts in helping to mediate the credit relations of both townsmen and country folk.[10] As he shows, people in even the most remote areas had access to courts and made extensive use of them.

These essays are important reminders to medieval and early modern historians of the need to take seriously the ongoing importance of that part of the legal life of the realm which took place beyond Westminster Hall. Such work reveals the similarities, as well as the differences, between litigation carried out at the centre and that conducted in local courts. Bill Champion's work on the rise and subsequent decline of litigation in the Shrewsbury local courts shows the way in which local court business mirrored the trends in the central courts. He discusses the way in which the popularity of the jurisdictions in the sixteenth and seventeenth centuries was followed by a profound decline in the amount of business they entertained.[11] In what appears to have been part of a widespread phenomenon of the period from 1660 to 1800, institutions which had previously been well tuned to the needs of the community evidently ceased to be so. In part, according to Champion, this was because the 'professionalisation' of local courts led to increasingly complex procedures and increases in costs, but it may also have been part of a more general social and cultural development which led inhabitants to be less willing than they had been previously to accept local institutions as an appropriate means of monitoring personal relationships.

If one objective of Champion's essay is to explain the decline in court usage, which was evidently characteristic of nearly every jurisdiction within the English legal system during the eighteenth century, it is also the case that the number of lawsuits began to increase rapidly again during the nineteenth century. A large proportion of this business flowed into the new system of county courts which was introduced as a major reform in 1847. Yet, although the county courts provided important new venues for local business, Patrick Polden demonstrates that they did not operate without complaint.[12] County

[7] See below, Chapter 2, pp. 13–23.
[8] See below, Chapter 4, pp. 43–59.
[9] See below, Chapter 3, pp. 25–41.
[10] See below, Chapter 10, pp. 155–77.
[11] See below, Chapter 11, pp. 179–98.
[12] See below, Chapter 14, pp. 245–62.

court judges were appointed by national authorities rather than the local community, as had been the case within *ancien régime* local jurisdictions. They were sometimes authoritarian and tyrannical and hence could be sources of discord as well as the agents for mediating disputes. Under these circumstances complaints about county court judges spilled out into controversy in both the local and the professional press. Local attorneys frequently took it upon themselves to check autocratic tendencies. Unfavourable reports about the judges probably did much to limit the further expansion of the county court system during the 1870s, something which many important sections of the legal profession opposed.

Many of the essays question the distinction which social historians are frequently inclined to make between informal, 'community' or 'popular' values and customs and those which were associated with 'the law' and legal institutions. This issue is explored in Richard Ireland's essay on infanticide in nineteenth century Wales, a study of the nature and incidence of child killing as well as the ways in which courts and jurors dealt with it.[13] The point emerges particularly vividly from Martin Ingram's reëvaluation of the nature of charivari, or rough music, as a sanction for punishing breakdowns in household order.[14] Long seen by E. P. Thompson and others as a manifestation of popular control of social relationships which parodied, and even ridiculed, official sanctions, Ingram shows instead that they were in fact closely associated with official punishments which were widely used (especially in towns) during the fifteenth and sixteenth centuries, only gradually losing their association with them.

Nearly all of the essays illustrate the point that the boundaries between what is traditionally viewed as 'legal' and as 'social' were often blurred. Nor can changes in the relationship be assumed to have occurred in a simple linear fashion as the centuries progressed towards the present. Even words such as 'community' or 'neighbour', according to context, were rich in legal meanings and connotations. 'Popular culture' fed from and fed back into legal culture. This means that the history of legal institutions and legal doctrine is an important terrain for the social historian. Equally it means that the languages and expectations of the communities are a vital context for the historian of substantive law.

[13] See below, Chapter 13, pp. 229–44.
[14] See below, Chapter 5, pp. 61–82.

1

The Political Philosophy of the Lord King

Thomas Glyn Watkin

In the year 1152, in the fifth book of his treatise *De consideratione* dedicated to his fellow Cistercian Pope Eugenius III, St Bernard of Clairvaux wrote that there were different kinds of unity. St Bernard's primary concern was to elucidate the nature of the Holy Trinity, how three persons could be one God, but he noted that it was not uncommon for many things to be one. Many stones could be gathered together to compose one heap; distinct limbs and members were united to form one human body. The unity of the body was however different from that of the heap: the unity of the heap was not dependent upon an ordered arrangement of the stones; that of the body required that its parts be assembled in a particular way. St Bernard described the unity of the heap as collective or cumulative; that of the body he termed constitutive.

Many writers on the culture, thought and art of the twelfth century have taken this insight of St Bernard to be representative of a new emphasis upon achieving unity by orderly arrangement. It has been recognised that the use of dialectic to harmonise apparent contradictions in scripture and the writings of the Fathers, as exemplified in Peter Abelard's *Sic et non* and the work of the glossators and early canonists at Bologna in producing a concord from seemingly discordant legal texts, both bear witness to a belief in the importance of finding the underlying constitutive unity in the subjects of their study. It has even been argued, some might now say accepted, that the advent of gothic architecture at this time was a translation of such ideas and ideals into stone and structure.[1]

The legal literature of twelfth-century England contains a remarkably clear example of this shift from a collective to a constitutive concept of unity. The

[1] This was most cogently argued earlier this century by E. Panofsky, *Gothic Architecture and Scholasticism* (Latrobe, 1951). The thesis is pursued further by George Henderson, *Gothic* (Harmondsworth, 1967), and most recently by Charles M. Radding and William W. Clark, *Medieval Architecture, Medieval Learning: Builders and Masters in the Age of Romanesque and Gothic* (New Haven and London, 1992). The author is grateful to Dr John W. Cairns, Professor Charles Donahue Jr, Dr Joshua S. Getzler and Professor David J. Seipp for their questions and comments on this paper following its delivery at the Durham Conference. He has attempted to incorporate some of his answers in the footnotes.

century begins and ends with the production of a law book. From the second decade of the twelfth century comes *Quadripartitus*, with its unordered assembly of extant legal codes, while from the penultimate decade comes the (by comparison) sublimely ordered, reasoned presentation of the laws and customs of the royal courts in the treatise which goes by the name of Glanvill. Whereas *Quadripartitus* gathers, Glanvill arranges. The focus of his arrangement and the unifying factor of his presentation are the writs which brought litigation and litigants before the royal courts. Throughout his treatise, Glanvill refers to the king as *dominus rex*, the lord king, a phrase which is a standard form in both the writs and his discussion of them. This marks another difference from the earlier treatise. The author of *Quadripartitus* is usually accredited with the compilation of the *Leges Henrici*, but nowhere in the *Leges Henrici* is Henry I referred to as *dominus rex*. He is referred to as *Caesar*, *princeps* and indeed *rex*, but never as *dominus rex*.[2] Indeed, the author of the earlier work clearly regards kingship and lordship as very different things.[3]

It will be argued that this change of nomenclature between the *Leges Henrici* and Glanvill is not just a matter of style, or of an increase in formal respect for the person or office of the king. Rather it is submitted that it is full of political and legal meaning. Indeed, the difference between a king, *rex*, and the lordship of one entitled to be king and referred to as *dominus* (or where appropriate, *domina*) was understood at the time and has long been noted by historians. The title *rex* was reserved for a king who had been consecrated and crowned. Even though entitled to be consecrated and crowned, until the ceremonies were performed, the future king was only *dominus* of his realm. This usage was certainly established when Richard succeeded Henry II in 1189, and when John succeeded Richard ten years later. John indeed continued to refer to himself as 'lord of Ireland' throughout his reign, as he had never been crowned king of that land.[4] At an earlier date, the Empress Matilda was regularly referred to as *domina Anglorum* during the years when she disputed Stephen's right to the English throne. Significantly, her title was based on the oath which her father Henry I had exacted in favour of

[2] *Leges Henrici Primi*, ed. L. J. Downer (Oxford, 1972), proemia 1 (Caesar); 8.6 and 55.3 (*princeps*); 76.1b (*rex*).

[3] Ibid., 33.1c and 55.3. The latter states: 'Omnis homo fidem debet domino suo de vita et membris suis et terreno honore et observatione consilii sui, per honestum et utile, fide Dei et terre principis salva'. The title *dominus rex* was not routinely used by the Anglo-Saxon kings of England, and the Roman law texts which were being studied in the emerging universities speak of Justinian as *dominus noster Iustinianus* and not as *dominus imperator*. The author is grateful to Dr Patrick Wormald of Christ Church, Oxford, for his advice in relation to the Anglo-Saxon evidence.

[4] W. L. Warren, *The Governance of Norman and Angevin England, 1086–1272* (London, 1987), pp. 9–10, 19; H. G. Richardson and G. O. Sayles, *The Governance of Medieval England* (Edinburgh, 1963), pp. 147, 151; Desmond Seward, *Eleanor of Aquitaine* (London, 1978), p. 152. The title *dominus* was not automatically accorded to the uncrowned heir but required that an oath of loyalty be taken to him if it had not already been sworn.

her succession, first in 1127 and again in 1131. Matilda was again recognised as *domina Anglorum* by the legatine council summoned by Henry of Blois, bishop of Winchester, in 1141.[5] Henry I had clearly intended the taking of the oath to establish Matilda as his heir. He had also used the same device earlier, in 1116, in an attempt to secure the succession for his only legitimate son, William, who died in 1120 in the disaster of the White Ship.[6] Interestingly, when Henry II sought to secure the succession for his eldest son, Henry, he chose to have him crowned. Henceforward, Prince Henry was known as 'The Young King' and referred to as *rex*, but never as *dominus rex*.[7]

Although some writers state that the title *dominus rex* was standard form after the Norman Conquest,[8] it did not in fact become regular until the reign of Henry II. The question therefore deserves to be asked as to why Henry or his ministers sought to emphasise the conjunction of kingship and lordship which his royal person embodied. It is submitted that the title emphasised the unifying role of the king as lord to all his free subjects, and not just to those who held their lands directly of him – his tenants in chief. Instead of lordship and the loyalty that went with it being fragmented hierarchically throughout the kingdom, the title *dominus rex* underlined that the king was also the lord of all his subjects, and that their allegiance to him was superior to their loyalty to any other, lesser lords from whom they held land or to whom they had done homage or fealty. The kingdom therefore was no longer a collection of disparate lordships at the head of which was a king who was lord to the chief lords of the land, but a realm, united by the allegiance which each subject owed the lord king, who was the unifying factor in this unified community.

This overriding allegiance to the king as lord of all had its roots in the great oath-taking ceremony at which William the Conqueror required '*ealle þa land sittende men þe ahtes waeron ofer eall Engleland*' to swear allegiance to him before any other lord, which ceremony took place at Salisbury in 1086 and thereby became known as the Sarum Oath.[9] The Conqueror's sons and successors, William Rufus and Henry I, followed their father in exacting

[5] Judith A. Green, *The Government of England under Henry I* (Cambridge, 1986), pp. 11–12; Charles Petit-Dutaillis, *The Feudal Monarchy in France and England from the Tenth to the Thirteenth Century* (London, 1936), p. 104; Marjorie Chibnall, *Anglo-Norman England, 1066–1166* (Oxford, 1986), p. 94 n. 103.

[6] Green, *Henry I*, pp. 11–12.

[7] The text of chapter 5 of the Assize of Northampton, given in R. C. Van Caenegem, *Royal Writs in England from the Conquest to Glanvill*, Selden Society, 77 (London, 1959), p. 287: 'Item iustitiae domini regis faciant fieri recognitionem de dissaisinis factis super Assisam de tempore quo dominus rex venit in Angliam proximo post pacem factam inter ipsum et regem filium suum.'

[8] E.g., Warren, *Governance*, pp. 9–10.

[9] The Sarum Oath is discussed in F. M. Stenton, *The First Century of English Feudalism, 1066–1166* (Oxford, 1960), pp. 112–114; idem, *Anglo-Saxon England* (3rd edn, Oxford, 1971), pp. 618–19. It is also discussed in D. M. Stenton, *English Society in the Early Middle Ages* (4th edn, Harmondsworth, 1965), pp. 64–65.

such an oath shortly after each ascended the throne. Undoubtedly all three were motivated by the needs of the immediate occasion: the Conqueror because he was about to leave the country and there were good reasons for him to fear possible rebellions; his sons in so far as each was aware of other possible claimants against whom he needed to be secure.[10]

It would therefore clearly be presumptuous to read into the actions of William I, William II or Henry I any deep political motive for exacting the oaths over and above the needs of the several moments. However, when in 1166 Henry II asked for the names of those who held lands of his tenants in chief, and when in 1176 he instructed his justices in eyre to take an oath from the freeholders of his kingdom, although he was following the precedent, he almost certainly realised a potential within the oath of which his predecessors had not been fully aware. Lady Stenton commented that it was Henry II who 'advanced to the logical conclusion of these arrangements'.[11] She noted that this occurred a century after the Conqueror's victory at Hastings, but it is perhaps more interesting to note that it was eighty years after the Sarum Oath that the full potential of the oath of allegiance was realised.[12] It was in 1166, rather than 1086, that 'the lesser sets of bonds were seen as merging harmoniously to create the greater unifying bond of fidelity to the king'.[13] The potential to create a constitutively united realm based on the allegiance of every subject to the king was being realised, and this was to be reinforced regularly by insistence upon the universal lordship of the king within his kingdom. The archbishop of York in 1166, Roger of Pont l'Evêque, seems to have known what Henry was about in wishing to know the number of knights his tenants-in-chief had enfeoffed. He wrote that Henry was doing this because he wished to know of any who had not yet sworn allegiance and whose names were not written in the rolls in order to ensure that they would do allegiance before the first Sunday in Lent.[14]

[10] F. M. Stenton, *First Century*, pp. 113–14; Frank Barlow, *The Feudal Kingdom of England, 1042–1216* (4th edn, London and New York, 1988), pp. 142, 173–74.

[11] D. M. Stenton, *English Society*, pp. 64–65.

[12] Eighty years is a familiar period for such developments in English legal history. It is for instance the gap that separates the Statute of Westminster II, c. 24, from the emergence of the action of trespass on the case, and more recently the period which separates the Common Law Procedure Acts from the emergence of the so-called tort of negligence: see T. G. Watkin, 'The Significance of *In Consimili Casu*', *American Journal of Legal History*, 23 (1979), pp. 283–311, and 'Towards a Common Law of Obligations', *Studies in Roman Law and Legal History in Honour of Ramon D'Abadal I. de Vinyals*, ed. J. Sobrequés and M. J. Peláez (Barcelona, 1990), pp. 1281–97.

[13] Jack Lindsay, *The Normans and their World* (Abingdon, 1974), p. 155, actually referring to a doom of King Edmund (942–46), but a very apt description of the Sarum Oath and its consequences.

[14] 'Omnium illorum nomina ... sint in illo brevi scripta, quia vultis quod si aliqui ibi sunt scripta in rotulo vestro quod infra dominicam primam quadragesime ligantiam vobis faciant', quoted in F. M. Stenton, *First Century*, p. 137 n. 5. In 1176, the justices in eyre were required to take oaths of fealty from earls, barons, knights, freeholders and even villeins who wished to remain in the kingdom, W. L. Warren, *Henry II* (London, 1973), pp. 298–99.

Sir Frank Stenton noted that this marked the beginning of a new period in the development of English feudalism, but that this was eclipsed by the legal innovations made in the same year by the Assize of Clarendon.

The reality is that both changes went hand in hand, for it was as universal lord of his subjects that Henry acted to supply their juridical needs. It was also as their lord rather than as their king that he was obliged to provide justice for them and therefore access to his royal courts where that justice could be supplied. Thus it was that Henry could claim that no one was to be made to answer for his free tenement without the writ of the lord king – and the inclusion of 'lord' in the rule is important. Professor Simpson has linked this rule with the idea of lordship inherent in the Sarum Oath,[15] while Professor Van Caenegem has commented on how bewildering the rule as stated by Glanvill is to students of feudalism.[16] The latter has also noted how the *breve de recto*, which was the writ which carried the policy of the *nemo tenetur respondere* rule into effect, was a writ of grace in the time of Henry I and during the early years of Henry II's reign but a writ of course by the reign of Henry III. Too little attention, Van Caenegem thought, had been paid to the question of when this momentous change took place.[17] If the view put forward here is correct, the change was part and parcel of Henry II's insistence on the logical conclusion of the Sarum Oath: that as lord of all his subjects, none of them should be made to answer for their freehold land without his writ. The rule could rightly therefore be termed customary, as it turned upon the longstanding custom of all free men owing allegiance to the king and the equally accepted rule of every lord owing his followers a duty to providing them with protection and justice. Henry was not therefore innovating but realising the potential of an already well-established position. It was, as Lady Stenton said, the 'logical conclusion' of the Sarum Oath, but nevertheless a conclusion which no king had previously been disposed to draw.

The question must next be asked as to what prompted Henry II to draw this logical conclusion in the middle years of his reign, and to insist upon the unifying universal lordship of the king within his kingdom which the title *dominus rex* thereafter consistently asserted. In part, the need to promote unity within the kingdom after the civil wars of Stephen's reign must be accounted responsible. The ease with which the great lords could switch sides in a contest for the throne, taking their knights with them as a matter of personal loyalty, cannot have failed to alert the new king to the need to ensure that the primary loyalty of all the king's subjects should be to the king and not their immediate overlord. In addition, some great lords had been able by switching sides more than once, using their entourage as a private army, to undermine law and order in pursuit of their own selfish

[15] A. W. B. Simpson, *A History of the Land Law* (2nd edn, Oxford, 1986) pp. 25–26.
[16] Van Caenegem, *Royal Writs*, pp. 225–26.
[17] Ibid., p. 227 n. 1.

interests. Geoffrey de Mandeville is probably the most obvious example. If, as has been argued,[18] Stephen was deliberately pursuing a decentralist concept of kingship, the result was, as the Battle Abbey chronicle stated, a kingdom in which the king's justice was little heeded and he who was strongest got most. In such a situation, the king's subjects would have to look elsewhere for justice – and at this time they did not have far to look. It is the chronicle of Battle Abbey which again sums up the situation: 'Now royal justice was sought, then ecclesiastical, but iniquity abounded so much that justice could not be had. '[19] The key point here is that ecclesiastical justice was seen as the obvious alternative to royal justice. It has been noted that even if in England at this time the increasing resort to the ecclesiastical courts can be explained in part as due to the political uncertainties which prevailed and the failure of royal justice, nevertheless there is evidence that the swing to ecclesiastical justice was taking place anyway independently of the shortcomings of secular justice.[20] In other words, there was a distinct possibility that the unified community within which justice was to be sought would be neither the kingdom nor the lordship, but rather the church, with the pope, rather than the king, providing the focus for a constitutive unity as universal ordinary.

In the same manner as the Sarum Oath in the eleventh century was the root from which a royal focus of unity was to grow in the twelfth, so for the ecclesiastical focus the seeds were sown in the late eleventh century by the reforms of Pope Gregory VII (1073–86). The first shoots of this planting appear above ground in England when the archbishop of Canterbury, Anselm, maintained that his first loyalty was to the pope, Urban II, and not the king, William Rufus at Rockingham in 1095. Anselm's predecessor as archbishop of Canterbury, Lanfranc, had excited a charge of disloyalty to the papacy from Gregory VII himself for refusing to demand that the king swear fealty to the pope.[21]

The pope's claim to fealty witnessed to the Gregorian idea that western Christendom was a unity, with the pope at its head. This came to be expressed in legal terms by asserting the jurisdiction of the pope over all Christian men and women as universal ordinary. This meant that instead of litigation in the ecclesiastical courts conforming to a pattern by which a case would originate before the bishop or archdeacon and then proceed to the court of the archbishop, and perhaps then by appeal to the papal curia in Rome, it was now asserted that a case could at any stage be removed to Rome by appeal or even commence there. Moreover, as well as encouraging litigants to take their cases to Rome, the popes encouraged papal adjudication by

[18] Warren, *Governance*, pp. 92–95, quoting *The Chronicle of Battle Abbey*, ed. E. Searle (Oxford, 1980), p. 212.

[19] *The Chronicle of Battle Abbey*, ed. Searle, p. 113.

[20] Chibnall, *Anglo-Norman England*, p. 197.

[21] M. T. Clanchy, *England and its Rulers, 1066–1272* (London, 1983), pp. 95 and 99–100.