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The Feudal Framework of English Law

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RECENT BOOKS

THE FEUDAL FRAMEWORK OF ENGLISH LAW

*Robert C. Palmer**

THE LEGAL FRAMEWORK OF ENGLISH FEUDALISM. By *S.F.C. Milsom*. New York: Cambridge University Press. 1976. Pp. xi, 201. \$28.50.

The legal changes during the reign of Henry II (1154-1189) are the foundation for the study of Anglo-American legal history; their characterization is a major issue in constitutional history. More than eighty years ago, F.W. Maitland propounded as the basis for the standardized twelfth-century writs a set of decisions to provide protection to property rights on both a proprietary and possessory level.¹ Maitland's vision has dominated legal and constitutional thought on the subject since then. In *The Legal Framework of English Feudalism*, S.F.C. Milsom provides a different vision. Where Maitland saw property rights to be protected, Milsom sees only contractual obligations to be enforced. Where Maitland saw purposeful, far-sighted innovation, Milsom sees limited innovations magnified by juristic accident. His ideas are thus strikingly different; and his book, exceptionally important for those interested in legal and constitutional history or in the early law of property and obligations. Because of the book's philosophical component, those who are interested in the development of law will find here, although hidden behind the strange technicality of late twelfth-century law, a very important contribution to the conceptualization of legal change.

It is therefore regrettable that the book, although carefully written, is almost impossible to understand. It is true that with a bit of fortitude and some knowledge of Maitland's version of the development of the law one can glean some of the general ideas, but the weight and complexity of his argument is hidden from those without

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The author has preferred to translate most of the documentary material in the notes from the original (often abbreviated) Latin for the convenience of a wider audience; as is usual in historical work of this period, he retains the responsibility for these translations.

1. F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* (1895).

some experience in working with early writs and, preferably, in reading the early plea rolls. Even one with that experience, however, will be plagued by Milsom's style. He has raised allusion, hint, and obscure suggestion to an art. This reader is better prepared than most, but there remain points at which Milsom remains determinedly inscrutable. Few books, however, so repay diligent attention with such insights.

Milsom's avowed goal is to reconstruct the feudal component of English society around 1200. That sounds deceptively simple. The book is not really about English society and feudalism around 1200, but rather about the process of legal change from the 1180s to the 1230s. In only 200 pages it sets out the societal practices of English feudalism and the way in which they were altered as they were put into the abstract form familiar to those who study late medieval English law. Part of this is done merely by hint; many of the most important events are only briefly summarized; some of the process is hidden by elaborate case dissection. The book amounts to an ambitious undertaking and a monumental achievement. If any further justification were needed for Milsom's eminence in the field of legal history, this would be it: he is still willing to question the basic assumptions of traditional learning.

Both the difficulty and the novelty of this book necessitate a thorough review. Since it was published in 1976 there have been three good reviews.² The perplexed reader will find there brief learned descriptions of the book. This Review will provide a more extensive and technical consideration of Milsom's argument and suggest alternatives. The direction of his argument, its implications, and the range of opinion it can generate can thus be more accurately ascertained. I do this with some hesitation, because no one has a better grasp of medieval legal technicality than the author of the introduction to *Novae Narrationes*. But unless the issues are put into active historical discussion, the profession will remain nonplussed by Milsom's work.

2. Brand, Book Review, 10 IR. JUR. 363 (1975); Hyams, Book Review, 93 ENG. HIST. REV. 856 (1978); White, Book Review, 21 AM. J. LEGAL HIST. 359 (1977). Bruce Lyon's review, 86 YALE L.J. 782 (1977), will be of interest as a traditional response from a constitutional historian. His thorough rejection of Milsom has sadly resulted in the relegation of this book to a mere mention in a section bibliography of the new edition of his *A Constitutional and Legal History of Medieval England*, making it obsolete at the outset. B. LYON, A CONSTITUTIONAL AND LEGAL HISTORY OF MEDIEVAL ENGLAND 325 (2d ed. 1980). Other reviews of Milsom's book do not profess to add much to historical discussion. As far as I have seen, neither Professor Thorne nor Professor Sutherland has reviewed the book.

I

The Legal Framework of English Feudalism has three themes: one philosophical, one polemical, one analytical. The philosophical theme is at once the most understated and the most important for understanding the book. It consists of two simple principles. The first is that juristic accident is a (the?) major component of legal change. Legal historians have long pointed to great decisions to explain legal change. Milsom prefers to find rather more limited decisions that then have results broader than those intended. This principle should long ago have become part of the intellectual approach of legal historians. It demands nothing other than the consideration of men, ideas, and law in their contemporary context, and it reduces the occasions at which we have to judge that a person transcended his contemporaries and his training to reach out and change society. This principle of caution, ultimately historical in approach, will nevertheless demand more difficult explanations because it will require historians to explain changes using conceptions not their own: the requisite conceptions are those from the other side of the legal change. Milsom's kind of history may thus be harder for students to understand and less valuable for those whose use of legal history is limited to the search for particular precedents, but it is a better guide to what actually happened and to the way in which law works in society.³

Milsom's second philosophical principle is more limited: review procedures operate to change customary practice into rules of law. He spends little time defining what this means, but it is the heart of the book. Custom is law that is congruent with popular conceptions of how things should be. It can be very certain and can provide great security of tenure and of rights. Still, in those situations in which the application of the normal practice would produce an untoward result, there is sufficient discretion to produce a result consistent with popular conceptions of justice. Custom is completely congruent with a popular morality. Law with genuine "rules of law" is distinctly different from customary law. Since rules of law grow out of customary norms, their content will be largely identical. In the marginal situations in which custom requires discretion, however, rules of law demand strict application, even though the result is untoward. Rules of law produce anomalous decisions in fringe cases. The mechanism that Milsom observes changing twelfth-century custom into rules of law is the supervision of one court by an-

3. See, e.g., pp. 2-3, 177-86.

other. That supervision eliminated the discretion necessary to the continuance of custom. His argument thus always focuses on supervision and the curious situation at the edge of the law, where odd things happen. It is that oddity which, precisely because it is not congruent with popular justice and past practice, produces novelty, either in legal rights or in the production of new laws.⁴

The polemical theme of the book is a respectful refutation of Maitland; that theme constitutes the overt argument of each chapter. Maitland thought that the assize of novel disseisin⁵ was instituted as a possessory protection of freehold property rights. Milsom maintains that the assize was instituted to regulate the lord's court's disciplining of acknowledged tenants to perform their obligations. This assurance of due process by the assize constitutes the review procedure which produced rules of law (chapter 1).

Maitland thought that the assize of novel disseisin accomplished a relatively painless transfer of jurisdiction over disputes concerning abstract property rights from one set of impartial courts to another parallel set of courts. Milsom maintains that the courts were not parallel since the assize was regulatory in nature; that the process was far from painless because it involved the rigid application of rules made from discretionary custom; that there were no abstract property rights to be transferred at that time; and that the lord's courts were not impartial but rather immoveably biased (chapter 2).

Maitland thought that the writs of entry were provided to fill a gap between possessory and proprietary actions. Milsom, after a long analysis of the rule that no one need answer for his free tenement unless challenged by writ, concludes that the writs of entry grew organically from the untoward consequences of the assize of novel disseisin. The assize limited the lord's court, disjointed the rational allocation of jurisdictions, and necessitated a *precipe* writ which came, because (?) of Magna Carta, to have included in it the reason why its issuance was not a violation of a lord's jurisdiction. That reason, for Milsom, is that the lord himself was the plaintiff: writs of entry were essentially lords' claims against their tenants' "downward-looking claims" (chapter 3).

Maitland pronounced himself unwillingly forced to believe that by Bracton's time a lord had little choice about accepting a new tenant as his man. Milsom explores the theoretical background of the

4. See, e.g., pp. 58-59, 119-21, 177-86.

5. The assize was a procedure to settle a dispute related to the possession of land. It was initiated by purchase of the appropriate writ. For an example of a writ of novel disseisin, see note 11 *infra*.

use of subinfeudation and substitution in the lord's court in making grants and allowances of land. He concludes that the lord-man bond persisted as a personal relationship in Bracton's time so that the lord did not have to accept a new tenant as his man, although he might not have been able to pry him loose from the land (chapter 4).

Over all, Maitland thought that the writ of right and the writ of summons (the so-called writ of right *precipe*), the writs of entry, and the assizes of novel disseisin and mort d'ancestor had been provided to protect property rights and extend royal control. Milsom, on the contrary, thinks that the intent behind the writs was much more limited: it was only an attempt to make the feudal world operate according to its own morality and assumptions. The external enforcement, however, created rules of law that were the basis of the defined estates in land. Instead of the classical, calculating Henry II who cleverly undermined the barons by providing limited but faster and more efficient protection, Milsom sees a Henry II who believed in feudal ethics. The king's originally limited enforcement of those beliefs produced anomalies; the legal system grew from progressive responses to those anomalies (chapter 5).

The book is thus structured around the polemical theme, but woven into that argument is an analysis of the development of abstract rules of law about property right and inheritance in English society. While the effects of that change range from the destruction of the feudal relationship to the centralization of authority, Milsom does not approach these topics straightforwardly. Instead, those themes are implicit in his occasional reference to rules of law. By its very nature, the change cannot be verified by analyzing the security of tenure or the regularity of succession by heirs; both tenure and inheritance were fairly secure by custom. Milsom is concerned with a relatively small incremental increase in security, which had an immense qualitative effect on the way people viewed their rights. Establishing the stages of that development, Milsom's third theme, is thus necessary, but inevitably it will be more precise in chronology than he would like.

The initial situation was that of the "truly feudal world," characterized by obligations, legal simplicity of title to land, discretion, and almost absolute seignorial control. The truly feudal society knew nothing of property right, only of mutual obligation. Land was held — not owned — in return for services. If the services were not performed, the tenants would be evicted: the land would escheat. If the tenant was threatened from outside, it was the lord's obligation — not the state's — to maintain him. The tenant's right was thus a

right against an individual, not a property right good against the whole world. The tenant's "title" to the land, if it can be called that, flowed only from the lord's acceptance. That acceptance was shown by the lord taking the man's homage and then seising him of the land. Thereafter they were strictly bound to each other; no normal outsider could break that bond. Since that bond was a relationship, however, there was always discretion in the initial determination of who would become the lord's man. The regularity of custom was assured by the lord's court, but the court would reject untimely or unacceptable heirs as easily as the lord himself. There was thus neither an abstract rule of law for inheritance nor an abstract rule of law of warranty. Moreover, since right to land was a contractual obligation and not ownership, default by the tenant would result in a just disseisin. Anything that endangered either the services or the feudal incidents — and that "anything" would include defaults of service, excessive grants without permission, and unlicensed marriage — would justly result either in forfeiture by the tenant or rejection of the heir. The lord was decidedly the master of the tenant and his land. Obligation, simplicity of title, discretion, and seignorial control characterized the truly feudal world, the ground from which the common law developed.

Milsom does not expressly state when this truly feudal world existed. He does infer its properties, however, from events narrated in the early *curia regis* rolls and from *Glanvill*⁶ — roughly, then, from the 1180s to the 1230s. He thinks that this was a period of decisive change, a time at which the feudal relationship was far from dead. It is not an unfair conclusion, then, that he must consider England truly feudal prior at least to the late 1170s. That conclusion will trouble some historians, not because it is obviously false, but because it relies on Milsom's use of the word "feudal." His truly feudal world can accommodate customary inheritance and security of tenure; his use of the word is based on the decisive quality of the development of rules of law and the limitation of customary discretion. Many historians have accepted de facto inheritance as antithetical to a truly feudal world and may not easily perceive Milsom's distinctions.

Within the time of that truly feudal world there was an innovation that would have but did not in fact destroy it: the regularization

6. THE TREATISE ON THE LAWS AND CUSTOMS OF ENGLAND COMMONLY CALLED *GLANVILL* (G. Hall ed. 1965) [hereinafter cited as *GLANVILL*].

of the writ of right patent.⁷ Since the book focuses on the consequences of the assize of novel disseisin — seeing there the mechanism that in fact destroyed the feudal world⁸ — the regularization of the writ of right receives very limited treatment.⁹ Milsom concurs with previous historians in concluding that the writ of right was regularized shortly after Henry II became King in 1154. Instead of a monumental decision, however, he would have it be merely a great decision to settle an immediate problem, the impact of which was intended to be of short duration. Henry had to reconcile parties who were deeply divided during the anarchy of Stephen's reign (1135-1154), parties who often had forfeited lands for their allegiance to King Stephen or to the Empress and Henry. The resolution of conflicting claims against lords, of whom Henry himself was one, was to be by the application of a neutral standard: the situation as it had been at the death of Henry I in 1135. Such a standard favored neither party and was thus politically acceptable, but it erected a standard of title that was essentially external to the present lord's acceptance. As such, it threatened the very basis of the lord's discretion in selecting his tenants.

Milsom believes that the writ of right patent in fact had a very modest impact on the lord's court. In a truly feudal society, a lord would simply ignore an outside claimant to a tenement already occupied. That studied partiality toward the accepted tenant was the lord's obligation to his man; it was his warranty. It required an outside force even to bring the claim into litigation: a writ. As a brute statement of fact, then, no one had to answer for his free tenement if the claimant did not have a writ. That writ, however, did not alter what would happen in the lord's court. The court would surely default still, in obedience to its obligation to the tenant. The writ

7. The following is a writ of right patent from between 1155 to 1189 clearly patterned in an "upward-looking" orientation, that is, the claimant is merely claiming to hold of the lord:

Henry king of the English . . . to the prior of Bromholm, greetings. I order that you hold full right without delay to Simon of Ludham concerning three shillings worth [annually] of land in Westwick which he claims to hold from your church. And if you do not, the sheriff of Norfolk will. Witness: Simon fitz Peter at Northampton.

ST. BENET OF HOLM, 1020-1210, at 27 (J. West ed. 1932) (Norfolk Rec. Socy., Pub. No. 2) (Writ No. 50).

8. Some historians find it repugnant to say that a writ could destroy the feudal world. *See, e.g.,* White, *supra* note 2, at 364. Such a statement is quite sensible, however. One cannot — and I would think that Milsom does not — isolate the piece of parchment from the legal process, the legal process from the royal servants, the royal servants from the increased royal authority and power, and that authority and power from the economic structure that made it possible. Reference to the writ is a quick and accurate means of referring to the direction in which all these things are brought to bear in a regular manner; a set of writs can thus obviously change society.

9. Pp. 177-79.

would serve only to notify the lord of the new claimant and permit removal of the case into the county court. There or in the king's court right would be done against the lord and the sitting tenant. The writ of right, therefore, did not radically change process in the lord's court. Moreover, Milsom claims that the king's court would even *require* the lord's court to default: that was part of the tenant's customary due process.¹⁰

The destruction of the truly feudal world was accomplished not by the writ of right patent but by the assize of novel disseisin;¹¹ we may say it inaugurated the time of change. The assize, like the writ patent, was grounded in a very modest intention: to require lords to give their accepted tenants process customarily due. That would have seemed no large change; few people would have liked to have been seen arguing that they could violate popular ideas of justice, that they should have the option of being unjust. The problems that arose in the assize derived from the strict feudal conceptions by which it was originally molded. "Having been seised" had meant that one was accepted by the lord; the assize thus determined that all who had been seised should be accorded customary due process, and could not be disseised except justly and by judgment.

The anomaly that caused the development of rules of law concerned those who had been seised but who had not been accepted and had no claim to be accepted by the present lord. One such marginal case was that of the Countess Amice.¹² Her husband had seised a tenant of some of her land prior to their divorce. After the divorce, the tenant could claim to have been validly seised, although he had no claim against the countess herself. In a truly feudal world, the countess would have examined his claim and ejected him: he had no claim against her. By 1200, however, the brute statement of

10. This last assertion is made amid a flurry of questions and reiterations of the word "perhaps." See p. 64.

11. The best and earliest form of the writ of novel disseisin is contained in GLANVILL, *supra* note 6, at 167:

The king to the sheriff, greetings. N. has complained to me that R. unjustly and without a judgment has disseised him of his free tenement in such-and-such a vill since my last voyage to Normandy. Therefore I command you that, if N. gives you security for prosecuting his claim, you are to see that the chattels which were taken from the tenement are restored to it, and that the tenement and the chattels remain in peace until the Sunday after Easter. And meanwhile you are to see that the tenement is viewed by twelve free and lawful men of the neighbourhood, and their names endorsed on this writ. And summon them by good summoners to be before me or my justices on the Sunday after Easter, ready to make the recognition. And summon R., or his bailiff if he himself cannot be found, on the security of gage and reliable sureties to be there then to hear the recognition. And have there the summoners, and this writ and the names of the sureties. Witness, etc.

12. Pp. 45-47. This is the single most important case in Milsom's analysis; to a large extent it is his thesis in a nutshell.

fact that a tenant need not answer a claimant without a writ had been turned into an abstract rule of law. It was now turned around and applied not only against outsiders, but also against lords.¹³ Custom would never have brought that about. Thus when the countess turned the tenant out and the tenant brought the assize against her, the king's court required her to have a writ to challenge the tenant. By further irony, however, no writ was available that would bring the challenge to her court:¹⁴ the writ had to be addressed to *her* lord. The case inevitably wound up in the king's court — or would have, had it been brought — where a downward claim by the lord was expressed in a special mise to the grand assize.¹⁵ That special mise was gradually separated out into matter for a special recognition; the special recognition by further evolution was later incorporated into the original writ. The product was a writ of entry. The countess would have obtained a writ of entry *cui ante divorcium*¹⁶ had her case not arisen before such writs were available. The assize of novel disseisin thus produced a distortion that separated "being seised" from the active acceptance of the lord; it focused on what had been the all

13. Milsom does not express the point this clearly, but it must be what he means. His failure to enunciate it like this does not destroy his thesis, but it does leave some serious problems. If the rule was originally a well-known custom applied only against outsiders and not against lords, and if the feudal world was still very much alive at the time of the Countess Amice case, one wonders how the justices ever even considered the rule to apply against lords. One would have thought several steps and some passage of time — longer at least than a decade — after the assize had come to produce odd consequences would have been required. This twist should have been stated explicitly in the book; it is one of the points at which readers are likely to lose their way.

14. This is an odd implication that Milsom simply asserts as fact. Why should there have been no writ which would bring the case into the countess' court? We cannot assume that the writ forms the chancery could issue had already been restricted; indeed, one can imagine a form in that such a writ might have issued: "The king to countess Amice, greetings. You are to hold justly and in peace all that land you had prior to your marriage to the earl of Clare and which you received by inheritance during that marriage free from any claims which might be made against you from the time of that marriage, which has been lawfully dissolved, saving, however, the right of those who may wish to bring my writ." It is interesting that such writs were not issued. The anomaly of the rule was becoming known. Lords certainly felt they could handle such things in their courts. There is an implication of great formalism and lack of imagination. A better explanation would be desirable.

15. The grand assize was a panel of twelve knights called upon to answer who had the greater right to the land as between the two parties. The question stated in that way was a general mise. It could also be stated as a special mise, as "does claimant have greater right to hold in demesne than tenant to hold of him." P. 7 n.4.

16. The form of the writ *cui in vita* was as follows:

The king to the sheriff, greetings. Command B. that justly and without delay he render to A. ten acres of land with appurtenances in N. which she claims to be her right and her inheritance into which he has no entry save through R., formerly her husband, who gave them to him whom in his lifetime she could not oppose.

EARLY REGISTER OF WRITS 10 (E. Haas & G. Hall eds. 1970) (Selden Socy. Pub. No. 87) (Hib. 26) (form slightly altered). The *cui ante divorcium*, the writ appropriate to the Countess Amice case, does not appear in the registers until the fourteenth century, although it was known at least as early as the reign of Edward I.

important proprietary moment at the beginning of the relationship, thus leaving out the relational content of "having been seised." The produce was seisin, a property right increasingly good against the whole world and increasingly independent of the lord. By juristic accident, the assize came to protect possession; the intent behind it had only been to enforce due process. Property right thus emerged from the regulation of feudal mutual obligations.

The assize increasingly prohibited lords from inquiring, as the Countess Amice had at first, into the tenant's title; the king's court thus took over the protection of all those claims against lords that had customarily been honored and renewed in the lord's court. Thus gifts to younger sons, marriage portions, and reasonable grants to third parties were all maintained by the king's court because lords now found it too dangerous to determine such things in their own courts. At first, the king's court used the grand assize with a special *mise*, but an assize of knights of the county was not the lord's court and could not exercise precisely the same discretion as could the lord. Anyway, that discretion operated in situations often difficult to form into rules of law — discretion was concerned, after all, with reasonableness — and such concerns were shunted out of the realm of consideration by the justices into consideration by the grand assize: who has more right? Warranty, however, was clear and customary and was enforced rigidly. Discretion was amorphous and was first concealed and then, finally, eliminated. *Maritagia* and allowances to younger sons, customarily honored, came to be enforced rigidly by the king's court. They thus became virtually indistinguishable from other grants and therefore much more secure. Grants themselves came to be so well protected that the lord's control over his tenant's services and the feudal incidents ultimately came into doubt. This was the beginning of the age of ownership.

The discretion of the lord as to his acceptance of the tenant was limited by the writ patent, by the assize of novel disseisin, and by the assize of *mort d'ancestor*. By the enforcement of customary succession, the law was investing the heir with an indefeasible right. By the same process — application of the customary strict obligation of the lord to maintain his man — it was fixing on the heir the burden of his father's obligations. On the one hand, then, the heir gained an abstract right of inheritance good against the world; on the other hand, he was subjected to a strict obligation of warranty, now with no ameliorating discretion. Out of this grew a power to alienate both by subinfeudation and by substitution, a power that had previously been limited by the lord's control and by the heir's discretion. Only

as that process continued did the lord's concern about his power to restrict his tenant's alienation and to control the feudal incidents begin to surface in legal considerations. Prior to the thirteenth century, control had been so firm that the lord required no protection. Writs had produced rules of law; rules of law had produced abstract property rights. Those rights vitiated the lord's power and destroyed the feudal world. No one, however, had intended that to happen. Henry II had only wanted to make the feudal world operate according to its own morality and its own assumptions.

II

This framework, although it has its own weaknesses, is a priori more believable than Maitland's. It is impressive in that it relates the development of the law to popular morality and the decisions of normally intelligent men reacting to particular problems. Moreover, it has the attractiveness both of careful documentation and of great conceptual unity. On the other hand, however, it is a study of particular sources from a very limited time frame — *ca.* 1189-1230. That study purports to have broad implications for the next previous age. As Maitland himself discovered, there is seldom a more dangerous — or courageous — task for the historian than hypothesizing from one's documents what the next previous age must have been like. There can be no doubt that Milsom's thesis contains a large measure of truth. Indeed, as between Maitland and Milsom, we must choose Milsom. But it may be that we should not accept either completely.

In what remains of this review essay, I shall present an alternative hypothesis, one which grew from a consideration of specific objections to Milsom's thesis. This is a rather unusual task for a review, but it will be useful. At the lowest level, it will delineate what is at stake in the various parts of Milsom's argument and thus aid the reader in understanding a very difficult work. Moreover, it will treat the major objections to Milsom's thesis in a rational order. That should provoke some much needed discussion on the topic. *Legal Framework*, after all, does not seem the kind of book written to end discussion. My hypothesis will provide one of the possible conceptual frameworks that can preserve Milsom's insights while accounting for specific difficulties with his thesis. Otherwise it might seem that we must simply reject Milsom's work, and that would be a grave mistake. Finally, even though this hypothesis is not the product of exhaustive research, it is quite possible that it is correct. If it is correct, it is fitting for it to appear in a review of *Legal Framework*, because the two should be read together.

The contention here is that England was not as feudal in 1200 as Milsom maintains. He argues that the assize of novel disseisin and its untoward consequences imparted a form of property right in the decades around 1200, thus decisively changing the feudal world. On the contrary, the change began earlier with the compromise of 1153 and the circumstances surrounding the succession of Henry II. Tolt process prior to 1153 will suggest that the enforcement of the tenurial aspects of the compromise created a distinction between seisin and right. That distinction indicates a title other than the mere acceptance of the lord and thus a world not entirely feudal. The assize of novel disseisin was indeed a large part of this, but it was operating long prior to 1200. The slow growth of property right made possible the writs of entry, which, while they retain a seignorial aspect, embodied also some new ideas of ownership. Moreover, those new ideas were seemingly not completely excluded from the lord's court, which, while irrevocably biased in favor of the accepted tenant, was not necessarily unjust to the outside claimant. In all this, much of Milsom's argument must be maintained; the processes that he describes certainly strengthened concepts of property. But although the development of the common law was not the far-sighted and planned achievement of the Angevins, neither was it a complete accident.

Milsom implies that, prior to the reign of Henry II, the lord's court was free from any regular outside influence. It is, however, accepted historical opinion that the process of tolt intervened in the lord's court even early in the reign of Henry I (1100-1135). Tolt process allowed a claimant to remove the case from the lord's court into the county court after proof of default of right. Either Milsom or current opinion must be wrong, but Milsom does not treat the problem. As it happens, Milsom is probably correct, but the required modifications to our conceptions of tolt will be significant for his thesis.

There is indeed much evidence of tolt process prior to 1154.¹⁷ I have seen no evidence, however, that tolt would ever have been used — at least any more than very exceptionally — in a situation in which the lord was presented with a claim for a tenement for which

17. See 2 REGESTA REGUM ANGLO-NORMANNORUM, 1066-1154, at 99, 103-04 (C. Johnson & H. Cronne eds. 1956) (Nos. 975, 997) (and the account in D. STENTON, ENGLISH JUSTICE BETWEEN THE NORMAN CONQUEST AND THE GREAT CHARTER, 1066-1215, at 138-39 (1964) (year 1111)); 2 *id.* at 212, 274 (Nos. 1516, 1824) (late Henry I); 3 *id.* at 135, 92, 50, 323 (Nos. 353-54, 257, 133, 885-86) (Stephen before 1139); 3 *id.* at 79, 94, 358, 176, 73, 32, 77, 85, 265, 81, 8 (Nos. 220, 264-65, 967, 472, 201, 84, 212, 239c, 719, 228, 22) (Stephen possibly as late as 1140 or later).

he already had an accepted tenant. All the evidence fits with the hypothesis that *tolt* was appropriate when the tenant had been dis-seised (for disciplinary reasons) or when the lord held the land after the death of a tenant. Such an outside supervision of the lord's court by the sheriff and county court would have been regular, but it would have interfered in only the uncomplicated situations. To regulate a lord to do justice to his accepted tenant or to accept the heir would not require the lord, at the same time, to break a bond with another tenant. Moreover, since the county court was dominated by the lords of the county, it is unlikely that its judgment would deprive the lord of the discretion Milsom presumes. Until a more detailed study demonstrates the contrary — and I rather doubt that it will — *tolt* procedure prior to the reign of Henry II will not form the basis for defeating Milsom's depiction of an immoveably biased lord's court.

If *tolt* did not operate prior to 1153 to force a lord to reject an accepted tenant in favor of an outsider, even greater caution is required in interpreting the compromise of 1153. The two accounts of the tenurial aspect of the compromise are unofficial, but both indicate an undertaking to restore tenurial relations using the reign of Henry I as a standard.¹⁸ Historians thus far have concluded either that the tenurial compromise was ignored in fact or that accepted tenants were ejected in favor of outside hereditary claimants.¹⁹ That now seems unlikely. An alternative hypothesis will suggest a rational origin of the distinction between *seisin* and *right*, a distinction that one reviewer has already noted was being made early in the

18. See 4 CHRONICLES OF THE REIGNS OF STEPHEN, HENRY II., AND RICHARD I., THE CHRONICLES OF ROBERT OF TORIGNI, ABBOT OF THE MONASTERY OF ST. MICHAEL-IN-PERIL-OF-THE-SEA 177 (R. Howlett ed. 1889) (Pub. No. 82 in RERUM BRITANNICARUM MEDII AEVI SCRIPTORES); R. DAVIS, KING STEPHEN, 1135-1154, at 122 (1967) (translation slightly modified: "It was also sworn that possessions which had been snatched away by intruders would be recalled to the ancient and legitimate possessors whose they were in the time of the excellent King Henry [I]."); GESTA STEPHANI 241 (2d ed. K. Potter trans. 1976) (translation slightly modified: "So it was provided and firmly established that, arms having been completely laid down, peace should be restored everywhere in the kingdom, the new castles should be demolished, the disinherited should be recalled to their own, the rights and laws commanded to all according to pristine custom.").

19. Davis thought that evictions were impractical and that the tenurial compromise of 1153 finally resulted only in compromises. R. DAVIS, *supra* note 18, at 122-25. John T. Appleby thinks the provision was purposely eliminated from the treaty. J. APPLEBY, THE TROUBLED REIGN OF KING STEPHEN 197 (1969). It should be noted, however, that Stephen's son was a beneficiary in the treaty through a closely related provision. See 3 REGESTA REGUM ANGLO-NORMANNORUM, 1066-1154, *supra* note 17, at 97-99 (No. 272) ("Treaty between King Stephen and Duke Henry"); P. HYAMS, KINGS, LORDS AND PEASANTS IN MEDIEVAL ENGLAND THE COMMON LAW OF VILLEINAGE IN THE TWELFTH AND THIRTEENTH CENTURIES 251-52 (1980).

reign of Henry II.²⁰ Milsom has not inquired deeply into the early part of Henry's reign; but, if his ideas are taken seriously, such an inquiry is necessary.

The compromise was conditioned necessarily by both feudal morality and political necessity. The evidence available suggests that the rejection of an accepted tenant was not something Henry II would ask. It would undermine the lordship upon which he himself relied, and it would cause disorder in the kingdom. He had, after all, come into England by compromise, not by conquest. His position would not be advanced by large-scale evictions of important people. Nor would he have wanted to undermine lordship by eliminating feudal discretion in the formation of the lord/man bond. It would thus seem improbable for them to have decided to treat the situation under Henry I as a rigid guideline for settlement of claims.

The tenurial compromise of 1153 must have been that the situation as of 1135 would constitute an important criterion in settling disputes. It would not have been formulated in such words, but an express reservation of the lord's normal discretion would have been ludicrous. The precise application would vary by the nature of the dispute. In the simple situation, that of mere encroachments, 1135 would serve as an absolute standard. The encroacher had no protection and the proper claimant would merely be reinstated.²¹ The righting of blatant encroachments could hardly have been the main substance of the compromise, however, because that would have been expected of any king.

The accounts of the compromise refer to the disinherited. Since Henry's side had been most active in disinheriting, a restoration of lands would mean that Henry would be evicting his most loyal followers: an improbable course of action. One more likely avenue of compromise, however, would be for Henry to honor claims of the disinherited to those lands which had not been granted out again by using the standard of 1135. Past support of King Stephen would no longer be regarded as a disqualification: Henry now had little reason to undermine staunch support of a crowned king. Use of 1135 as a

20. See Brand, *supra* note 2, at 366.

21. Early examples of the remedy of encroachments by the standard of the compromise can be found in regard to the church of Ranworth and the bishopric of Salisbury. See ST. BENET OF HOLME, 1020-1210, *supra* note 7, at 17 (Writ No. 23) (Ranworth); A. SALTMAN, THEOBALD, ARCHBISHOP OF CANTERBURY 465-66 (1956) (Charter No. 241) (year 1157) (Salisbury). Another example appears in *Glanvill* and was of greater effect: the writ for establishing the rightful boundaries between townships. See GLANVILL, *supra* note 6, at 116 (Writ No. IX, 14). The writ apparently envisages the parties as lords and speaks of occupation made unjustly and without a judgment to be remedied by restoration to the situation as it had been in the time of Henry I.

criterion, however, would not have meant that he was obliged to accept or maintain current enemies. The choice of tenant could not have been automatic; the claimant had to be loyal and give promise of being loyal in the future. Henry did not abandon discretion; he merely agreed to overlook what had happened between 1135 and 1153. Henry's studied ignorance of Stephen's reign was thus a boon to Stephen's supporters. Henry agreed to forget past injuries and look back to the time when the claimant's ancestors would last have been loyal.

It is also possible that the compromise extended to lands that had been granted out again. The principles of lordship would require that the currently accepted tenant be maintained, while the compromise would insist that the disinherited be recalled to their own. The obvious method of applying the compromise would be to allow the current tenant to live out his tenure without ejection. At the tenant's death, however, the lord would have to decide, as always, on a new tenant. The compromise would dictate that the deceased tenant's heir be overlooked and the claimant alleging ancestral possession in 1135 accepted — if he was acceptable to the lord. That application of the compromise would have been a piece of consummate good judgment.

Such a settlement would maximize compromise, provoke the least litigation, and spread what litigation there was over a relatively long period of time. The tenant would be motivated to compromise to ensure some position for his heir. The claimant would want to compromise so that his gain would not be indefinitely postponed. The lord himself would pressure the parties to compromise. If he let the situation reach litigation at the tenant's death, he would be forced to reject the good and loyal heir of a good and faithful tenant. He would thus appear a faithless lord. But likewise he knew that the claimant would someday be his man; it would be impolitic to ignore him until that fateful day. It would be much better for all three parties if claimant and tenant could compromise by intermarriage or if one could buy the other's right. If necessary, of course, the lord himself had heiresses at his disposal; he would lose nothing by bestowing one either on the tenant's heir or on the claimant to settle the matter before it matured in embarrassing litigation. Litigation would be infrequent. What little litigation there was would neither destroy the peace of the kingdom nor overtax the judicial structure.

Such a hypothesis is logical, but it suggests an extremely odd situation. The tenant was on the land and accepted by the lord. He had all the title which a feudal world knew. But at the same time,

there was an outsider, not accepted by the lord, who had some kind of claim bolstered by a royal undertaking. It was a right founded in the past — 1135 to be precise — but in the nature of an expectation. It could be enforced only at the current tenant's death. One person had seisin, the other, right.

If no compromise was made, the tenant's death would produce a very painful situation. The claimant would present himself, asking to be seised. The tenant's heir would also present himself; he would be known to the court and would have a clear customary claim. Could the lord have simply dismissed the tenant's heir? After all, the lord had not been a party to the compromise of 1153. To bring the consequences of that compromise to bear, it is likely that the claimant would need a royal writ. Such outside interference would allow the lord to disclaim responsibility and retain his reputation.

If the lord accepted the tenant's heir — either precipitously or after careful thought — the claimant would challenge a sitting tenant — but a *newly* seised tenant — and put a lord's position in jeopardy. This threat may account for one development in the writ of right. In its earliest forms the writ makes no mention of the tenant; it consists entirely of an order to the lord to hold full right to the claimant. It was at that time that the formal count would have been worked out, the count which largely ignores the tenant. But around 1170 the writ was altered to make mention of the tenant as deforciant.²² There was now some relationship between tenant and claimant, although less relationship than either had to the lord. The tenant's heir had stayed on the land, asserted his hereditary claim, and put the lord in a position in which the lord had to choose between seising an outsider or maintaining the heir. The altered writ was thus good against a tenant's heir who happened to be in and refused to leave as well as against a tenant's heir who had been accepted. Against neither would the lord have acted on his own. It would be in this way that the law first started to act to bring lords to eject an accepted tenant and still to feel that they had to make escambium (compensation).

It is in such a context that one should consider the origins of the assize of novel disseisin. In the early years of the reign of Henry II, seisin — the lord's acceptance embodied — was title; it was but slightly modified by the interest embodied in the writ of right. A claimant faced by a recalcitrant tenant might well be tempted to dis-

22. See ST. BENET OF HOLME, 1020-1210, *supra* note 7, at 21 (Writ No. 34) (probably 1163-1166). Van Caenegam suggests that the addition of the deforciant clause came no later than 1170. R. VAN CAENEGAM, ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL 212 (1959).

seise the tenant immediately instead of waiting for his right to mature at the tenant's death. A lord might not act swiftly and surely to restore the tenant when the claimant was certain to be his man soon. Moreover, the lord might himself grow impatient and finally ignore the recalcitrant tenant who refused all compromise. It was in this context that the tenant's seisin was endangered, both by the lord and by the outside claimant. The assize of novel disseisin was a protection against both, not, as Milsom suggests, only against the lord. His suggestion is therefore not convincing,²³ but his criticism of Maitland is devastating. This analysis incorporates Milsom's insights, but allows a more traditional structure. To be successful, the compromise of 1153 would have to protect accepted tenants from disseisin by lords or by outsiders. It would be an assurance that the expectation did not extinguish the title of seisin.

Accounts of cases lend some support to this interpretation of the compromise of 1153. The church of Marcham had been the subject of a complicated settlement between a steward of King Henry I (1100-1135) and Abingdon Abbey late in Henry's reign.²⁴ After the death of Henry I and during the war that produced the compromise, the steward's descendants found themselves unable to render the farm (rent) required for the manor they had received in exchange for Marcham, so that the manor was forfeited. The steward's son, Turstin, thus tried to reverse the whole settlement, claiming that the abbey, his lord, had fraudulently invaded Marcham. Although he had been a supporter of the empress and Henry II, Turstin received, according to the compromise of 1153, the executive assistance of King Stephen in being returned to possession of Marcham. He thus entered the land "as if the king were ordering and giving judgment."²⁵ The king had thus interfered when the claimant alleged that his lord had disseised him unjustly and without judgment — by fraudulent invasion.

When Henry II succeeded to the throne, the abbey sought his

23. See text at notes 35-37 *infra*.

24. The steward had made a hereditary claim to land which had been held only for life by one who had entered the abbey and quitclaimed the land to the abbey. Since the claim was made during an abbatial vacancy, the king's support was decisive and the steward was seised of the land. When a new abbot was elected, the steward compromised, quitclaiming Marcham to the abbey. The abbey in return confirmed him in other lands and gave him the manor at a farm (rent) of £15, with the provision that default on the farm would result in automatic reversion without any contradiction. The steward put his daughter into the manor, the manor constituting the endowment of her marriage with the heir of a former claimant to the manor. It was apparently the war that devastated the manor, resulting in the default.

25. Stephen issued two writs, one to the abbot and later one to the sheriff of Berkshire. The latter ordered the sheriff to treat the case according to "royal law." No trial is mentioned.

assistance against its tenant. The writs spoke of disseisin unjustly and without judgment, but here it was the tenant disseising the lord. This was not, of course, a case of novel disseisin,²⁶ but it is a precursor of the Countess Amice case, because the lord needed the king's writ to proceed against his tenant: the tenancy had been royally assured by King Stephen and had been settled by that king according to the compromise of 1153. This is just one of the situations in which a tenant did not have to answer to his lord without a writ.²⁷ King Henry eventually had to settle the case himself.²⁸ True to the spirit of the compromise, he not only returned the abbey to its possession of Marcham, but he also attempted to restore the manor's farm to the steward's descendants to regain the status quo of 1135.²⁹ This is an excellent example of the war-related cases around 1154 and of the outside influence which was altering the lord/man relationship.

The *Chaddleworth* case, also involving Abingdon Abbey, shows a different aspect of the compromise. Here the grandson of Ralf Basset, the famous justice of Henry I, attempted to reverse a grant made by Basset in expectation of his death and with the consent of his heirs. The claimant prepared his case at the time of the succession of Henry II. He must have been hoping that the abbey would buy off his claim, because it was very weak;³⁰ but the abbot instead obtained

26. The period mentioned was 1135; the writ is not in the form of the writ of novel disseisin; the case was to be heard in the abbot's court if that court had not defaulted.

27. Those who had been put in by royal order might be numerous, since one would have to include both those put in by order of a royal court as well as those put in judicially while the lord was in wardship to the king. A further class of people against whom a lord might not be able to proceed were those whom the king had granted the privilege of not being impleaded except by his order or before himself or his justices. See 3 REGESTA REGUM ANGLONORMANNORUM, 1066-1154, *supra* note 17, at 3, 78, 198, 225, 252, 319, 325, 363 (Nos. 10, 215, 536, 610, 680, 871, 892-93, 983); ROTULI DE OBLATIS ET FINIBUS IN TURRI LONDINENSI ASSERVATI, TEMPORI REGIS JOHANNIS 28, 52, 67 (bis), 86, 176, 189, 243, 247, 256, 303, 438 (T. Hardy ed. 1835) [hereinafter cited as ROTULI DE OBLATIS]. A third class might be those whose tenancy had been confirmed by the king. See 3 REGESTA REGUM ANGLONORMANNORUM, 1066-1154, *supra* note 17, at 148 (No. 386) ("*teneant de quocumque tenebant, et non mittantur in placitum . . . sicut tenebant*"); 15 (No. 43); 16 (No. 44); 332 (No. 912) ("*concessisse et confirmasse . . . omnia tenementa . . . de quocumque illa teneret*"). A fourth class would be those tenants who were more powerful than their lords. A lord might thus have other motivations than merely his warranty obligation in refusing to listen to outsiders.

28. King Henry II delegated the Marcham matter to his justices, who ultimately decided to let Henry decide it himself so that the decision would be more firm. Of course, the king's participation would make any decision more firm; the reasoning must have been that the case was a reversal of Stephen's order in a matter of implementation of the compromise of 1153.

29. The whole case and the writs are given in 2 CHRONICON MONASTERII DE ABINGDON 166-68, 183-89, 222-23 (J. Stevenson ed. 1858) (RERUM BRITANNICARUM MEDII AEVI SCRIPTORES) (Rolls Series). See 3 REGESTA REGUM ANGLONORMANNORUM 1066-1154, *supra* note 17, at 1, 4 (Nos. 3, 13).

30. The grant had been confirmed by the heirs, and the claimant could not allege his grandfather's seisin in 1135 — the crucial year — but only at some time in the reign of Henry I.

from Henry II a confirmation of the abbey's tenancy as it had held in 1135. The confirmation also included a prohibition against impleading the abbey unjustly. The claimant was thus put in dangerous straits, since he had already begun his plea. He was forced to capitulate and make out a chirograph in favor of the abbey.³¹ The compromise of 1153 went as much to assuring tenants as to helping claimants.

The *Stisted* case is somewhat less clear, but it, like the *Marcham* case, shows the lord — here, Canterbury Cathedral — in need of royal help against a tenant. A son of a life tenant had “invaded” the manor after the death of Henry I and managed to hold it until he himself died. Archbishop Theobald had then restored the manor to the cathedral, granting it at farm to Matilda de St-Saëns for life. Why the litigation began is uncertain, but either the invader's brother or Matilda or her heirs precipitated the problem, because the archbishop had to obtain a writ from Henry II.³² The writ spoke of disseisin done unjustly and without judgment after the death of Henry I, that is, it was a downward-looking claim based on the compromise of 1153. Disseisin language is used not because the cathedral's lord — the king — had misused his disciplinary jurisdiction, but because a person considered an outsider had taken the land. Disseisin by an outsider could obviously result in a claim against the lord: it was the lord's duty to put the tenant back in. That claim, particularly if the lord was the king, could sound very much like allegations of novel disseisin. In this situation, however, the language indicates that the compromise of 1153 had been applied to undo some successions not assented to by the cathedral and thus considered an intrusion during Stephen's reign.

The most difficult case — translated in full in the note³³ — arose

31. 2 CHRONICON MONASTERII DE ABINGDON, *supra* note 29, at 170-71, 189-90, 225.

32. Matilda's tenancy had been confirmed by King Stephen. Either that or perhaps some difficulty the cathedral had in exercising authority in Essex made the writ necessary. See A. SALTMAN, *supra* note 21, at 271-72 (Charter No. 44) (years 1154-1160).

33. By order of our lord King Henry it has been determined by judgment of our court in this manner. For when the said Peter demanded the seisin of the aforementioned land because his father, as he said, had possessed it on the day on which King Henry I died and thereafter his mother had had the same possession until she was violently ejected, no mention, however, being made of heredity or of fee, and when the canons would “infect” his paternal and maternal possession from which succession would be owed to him or another, Peter neither indeed produced instruments or witnesses nor had any other proof at all nor would promise any in the future, the court judged that he ought not further seek seisin. And because Peter had fatigued them already for three years and had always failed in proof, the canons are absolved from the petition of seisin which he would have had had he had proofs, saving, however, the question of right (*juris*) if Peter believed it should be instituted.

Id. at 389-90 (Charter No. 167) (years 1154-1161).

between 1154 and 1161 and shows that, even early in the reign of Henry II, there was a distinction between seisin and right, between *seisina* and *jus*. The distinction was not one between possession and ownership; in that much of Milsom's prediction about this earlier time is correct. The claim was based on hereditary seisin in 1135 of land which had later been lost by a violent ejection in Stephen's reign. The case is clearly not novel disseisin;³⁴ the claimant was merely making a petition for seisin, making use also of a royal writ. He wanted to fill an opening, and he thought he was entitled to fill that place by the terms of the compromise of 1153. Nevertheless, the lords — here, the monks — rejected his writ-enforced petition, specifically leaving him free to claim his *jus*. That new claim would be more serious, since the lord had now rejected this claimant and would probably proceed to accept someone else. The claimant's new writ would probably look little different from his first, except that it would now have a *nisi feceris* clause so that the case could be removed into county court. But the whole affair would be different. The claimant might indeed have *jus*; and, since his petition for seisin had been rejected, that royally assured but lordly rejected expectation could now force the lord in a new plea to reject its newly accepted tenant. Claimant and lord were now in an adversary relationship, and the case could go to battle. Here, then, is a property right distinct from the lord's acceptance well before the assize of novel disseisin could work the havoc which Milsom argues produced property right by accident. It was, on the contrary, the compromise of 1153 early in the reign of Henry II, not the assize of novel disseisin around 1200, which began to vest in tenants the germ of ownership by way of a royally assured claim.

III

If the nature of the compromise of 1153 was as suggested above, the nature and origins of the assize of novel disseisin are different than proposed by Milsom. He argues that the intent behind the assize was solely regulatory, because anything else would suppose a property right being protected and thus a society not thoroughly feudal. Investigation of the origins and purposes of the assize will show that the history of novel disseisin is more compatible with the hy-

34. The writ started a case in the lord's court, not the king's court; the action is centered more on the possession in 1135 than on the violent ejection; the violent ejection was done not to the claimant, but to the claimant's mother. Everything would indicate that this was a case which later would have been handled by a writ of right, not a writ of novel disseisin.

pothesis proposed here than with Milsom's argument. The intent behind the assize was related to property right.

Donald Sutherland, on the basis of earlier comments by Milsom, has already convincingly argued against a solely regulatory nature for the assize.³⁵ Sutherland will agree that lords were the largest but not the *only* class of foreseen defendants. On the one hand, the writ was framed very broadly so as not to exclude other defendants. On the other hand, in Henry II's world lordship was extremely varied. Some lords would have been incapable of protecting their tenants against outsiders; others might not have cared to do so. Incapacity may have been common with lesser lords, and many lords must have had difficulty exercising power in areas where they had few tenants. Likewise, in some situations most lords would have hesitated, the prime example being the one posed by the hypothesis about the compromise of 1153: the lord confronted by a disseisin of an accepted tenant by one who had a future claim against him.

No one, then, would have assumed that lords were the only parties capable of successfully disseising tenants. Both the broadly framed writ and the reality of lordship argue for an intent to do more than regulate lords.

Other arguments can be made against a solely regulatory intent behind the assize. Milsom acknowledges that disseisins had been the subject of criminal inquiries.³⁶ Such inquiries would almost surely have included outsiders; and the final civil process would probably have been intended to include them also. Moreover, while Milsom argues by analogy to the assize of mort d'ancestor, his argument from the Assize of Northampton seems overstated.³⁷ The Assize says only that such a recognition (an assize of mort d'ancestor) will be held if the lord denies seisin to the heirs. One situation in which a lord would deny seisin was that in which he was physically incapable of delivering it. Thus neither the Assize of Northampton nor the writ of mort d'ancestor says that the lord was the *only* foreseen defendant. To fashion an effective remedy, the designers of both novel disseisin and mort d'ancestor had to take into account not only willful lords but also impotent lords and assertive and strong third parties. Finally, if novel disseisin was meant also for the king's tenants — and it probably was — it would be that lord's method of performing his duties to tenants who had indeed been ejected by third par-

35. D. SUTHERLAND, *THE ASSIZE OF NOVEL DISSEISIN* 30-31 (1973). Milsom does not treat this part of Sutherland's work.

36. P. 178.

37. P. 166.

ties. The form of the writ does not show that the assize was intended only to supervise lord's courts.

The definition of the purpose of the assize is dependent on the dating of the origins of the assize as a civil procedure. He seems to suppose that early mentions of the assize refer only to a criminal procedure, with the civil procedure being formulated *after* the assize of mort d'ancestor, that is, after 1176.³⁸ If novel disseisin was that recent an innovation for Glanvill, the assize really would have been changing the law only in the first rolls, as Milsom maintains. But Sutherland has challenged that dating for the assize, showing that there is no evidence of a criminal variety of novel disseisin after 1168, and that a civil procedure coexisted with the criminal procedure for at least a time before that. Sutherland believes there was a definitive assize ordinance very early in Henry II's reign, and at the latest by 1166.³⁹ Since the evidence requires only minor modifications in Sutherland's dating, Milsom's assumption seems difficult to maintain.

Writs of protection and writs of confirmation constitute an essential background to the assize of novel disseisin. In December 1154, just prior to Henry II's departure for England to claim his throne, he issued a writ of protection to Savigny Abbey in Normandy. That writ required speedy remedy for evictions committed within a short period of limitation, and the remedy had "criminal" overtones.⁴⁰ A similar protection was given to Reading Abbey in England by the Empress Matilda between 1159 and 1160.⁴¹ These protections would set in motion remedies containing the essential elements of novel disseisin, even though they were not general remedies and a recognition procedure need not have been used. Likewise, there was already something special about free fees. When Henry II confirmed William de Vescy's tenures — *from whomever they were held* — he confirmed them with "all their liberties which pertain to a free fee."⁴²

38. Milsom, *Introduction* to 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* at xxxix (2d ed. reissued 1968). Milsom seems to maintain the same view in *Legal Framework*. See p. 178.

39. D. SUTHERLAND, *supra* note 35, at 6-14.

40. See 3 REGESTA REGUM ANGLO-NORMANNORUM, 1066-1154, *supra* note 17, at 299 (No. 813). The writ extended Henry II's personal protection to the abbey, its monks, its property, and its men; it forbade his barons and justices to allow the monks to be impleaded of anything of which they were seised on the day he passed over to England; it ordered them to do full and speedy justice to anyone who contravened his order *as against one who had affronted the king himself*.

41. See *id.* at 261-62 (No. 711). This protection was limited to those things of which the abbey was seised when Henry crossed over into Normandy and was to last until Henry returned to England.

42. *Id.* at 332 (No. 912).

Part of that "liberty" might have been a royal assurance of the protection a lord should provide. Henry II was not reluctant to interfere in the relationships between lords and their men; he could provide the protection they were unable to or he could see to it that their mutual obligations were kept. Such writs are the conceptual background for early novel disseisin.

Henry's early disseisin edicts show his desire to supervise actions pursuant to the compromise of 1153. When he was in England, of course, no edict would be necessary; he could settle matters by personal intervention. When preparing to leave the realm, however, he put a temporary halt to such actions by edict. Three writs, apparently from 1162, authorize exceptions to that assize: they order the situation to be put back as it had been in 1153. One concerned the definition of a tenement;⁴³ another, tithes which had been subtracted;⁴⁴ the third, lands which had been occupied.⁴⁵ The earliest such edict which can be documented — from either 1155 or 1158 — was indeed a protection issued in advance of a departure from the realm for a limited duration and of a general nature.⁴⁶ The concern was clearly to stabilize matters in his absence. The result would be to accustom people to legal remedies.⁴⁷

It is difficult to show that the edicts were directed also to preserving accepted tenants' seisin from claimants with right. The cases, however, are conformable to that hypothesis. Moreover, cases from the plea rolls around 1200 reveal individuals who in fact waited until the current accepted tenant died before asserting their right, imply-

43. R. VAN CAENEGEM, *supra* note 22, 423-24 (Writ No. 23).

44. ST. BENET OF HOLME, 1020-1210, *supra* note 7, at 22 (Writ No. 36).

45. *Id.* at 23 (Writ No. 39). See D. SUTHERLAND, *supra* note 35, at 8 n.1.

46. See 1 THE LETTERS OF JOHN OF SALISBURY 162-63, No. 102 (W. Millor & H. Butler eds. 1955); D. SUTHERLAND, *supra* note 35, at 8. In the translation, it seems *petitorium* should be translated as "claim" rather than "proprietary suit." The tenant had apparently been forcefully and violently evicted during the war; the new holder of the fee had his nominee appointed to the church. The first tenant at some — seemingly much — later time regained his fee and seemingly in the first years of Henry II evicted the priest. All this would be in accord with the compromise. The Archbishop of Canterbury then threatened the tenant, who had to return the priest to his position. He then introduced a claim before the archbishop reciting the earlier violent ejection and introduced a royal writ based on the unwilling return of the church to the priest, a return forced by the archbishop after the king's departure and against his edict. The assize thus worked to preserve in possession those who were newly repossessed pursuant to restitution.

47. John S. Beckerman has provided greater clarity to this issue by splitting the development of novel disseisin into parts. Beckerman, Book Review, 83 YALE L.J. 625-29 (1974). It seems clear, however, that the early edicts did indeed refer to recent disseisins. The change which came in 1176 was the expression of such a limitation during a time in which the king was present in England, implying that such remedies were henceforth not directly under the king's supervision.

ing that they could not act earlier.⁴⁸ Finally, only such a hypothesis will account both for the feudal mindset in 1153 and for the legal consequences by 1200. Novel disseisin was a royal assurance to accepted tenants of both the king and his magnates, an outgrowth of the compromise of 1153. By 1190 it had been around for decades in some form, even though the writ in *Glanvill* may have been much more recent.

The dislocation of Milsom's argument that results may be substantial. Our analysis of *tolt*, the compromise of 1153, and now the origins of the assize of novel disseisin leads to the hypothesis that early in the reign of Henry II there already was a form of property right — royal assurance, something far short of ownership — which was not solely the feudal obligation of the lord to his tenant. The early distinction between seisin and right and the royal assurance and protection of both require a modification of Milsom's chronology. A truly feudal world could no longer exist in the presence of such a royal assurance. The compromise of 1153 must have inaugurated a transitional period, a period initiated not by ideas of sovereignty and ownership — the origins Milsom opposes — but by a dual protection of the conflicting claims of seisin and right. In doing this Henry II had to be concerned not only with supervising lords and their courts, but also with justicing his own tenants and the tenants of impotent lords. There is thus a royal element in addition to Milsom's feudal component. The property right resulting from the compromise of 1153 was progressively strengthened by the assize of *mort d'ancestor* and then by the bureaucratization of the law. That bureaucratization, which Milsom does not emphasize, applied the protection of the writs to a much wider segment of society in a more regular form. Milsom rightly observes the decline of customary discretion around 1200, but customary discretion had been progressively modified since 1153. Although the result was a realized property right in the early decades of the thirteenth century, the changes around 1200 could be neither as sudden nor as radical as Milsom maintains. The ground had already been well prepared.

IV

The real beauty of Milsom's thesis is that it is so cohesive; every part of the argument seems to necessitate every other part. The major objection to the hypothesis above is thus his analysis of the writs of entry. Milsom's explanation of the origins of those writs is quite

48. See note 76 *infra*; 1 ROTULI CURIAE REGIS 93 (F. Palgrave ed. 1835).

clear. They began, he asserts, with downward-looking *quo warranto* type claims by lords in their own courts; the requirement of a writ anomalously brought them into the king's court; there the issue — on a writ of right or a *precipe* — was sorted out first by a special *mise*, later by a special inquest on the issue of the entry. Finally, and this he qualifies with a “perhaps,” the entry words were regularly inserted into the original writ itself as one consequence of Magna Carta.⁴⁹ The late insertion of the words of entry into the original writ, the seignorial overtones to the word “entry,” and the downward-looking orientation of these actions all buttress the idea that England around 1200 was still very feudal and that tenants in 1200 were only beginning to gain any kind of property right. This explanation greatly clarifies methods of analysis,⁵⁰ and many of Milsom's conclusions are valid. Nevertheless, it must be maintained that there were writs of entry before 1215, that the word “entry” also had “ownership” overtones, and that some of the writs of entry were upward-looking. In short, the origins of the writs of entry are more varied than Milsom supposes; these writs demand a less feudal world than he saw.

Many of these conclusions could be drawn solely from the writ of entry *sur disseisin*, which was made a writ of course in 1204. While G.D.G. Hall has indeed shown that this writ should not play a large part in the discussion of the first writs of entry,⁵¹ it is perplexing that Milsom accords it no role at all.⁵² The writ of entry *sur disseisin* is important in two ways. First, it shows the existence of a writ of entry well prior to Magna Carta and thus must fortify the possibility that there were other early forms of entry writs. Likewise, the writ was originally available only when an assize of novel disseisin would otherwise fail because of the death of the plaintiff while the assize was pending. That shows that the writ *sur disseisin* grew out of the assize of novel disseisin and not from a writ of right patent. The writ's classical orientation is thus upward-looking and not downward-looking. And that upward-looking orientation must cast some doubt on the exclusively seignorial overtones which Milsom attrib-

49. Pp. 93-101, 158.

50. It should be noted specifically that Milsom has shown the kinds of issues which could be concealed in a grand assize, the seignorial overtones to the word “entry,” the possibility of writs of entry growing out of the writ patent, and the difficulty of using the plea rolls to establish the forms of writs. I am contesting none of this, only asserting that there are additional sources and other aspects which must be considered.

51. Hall, *The Early History of Entry sur Disseisin*, 42 TUL. L. REV. 584 (1968).

52. Milsom simply excluded this writ from his discussion. P. 95. This treatment is strange because his mention of *sur disseisin* is followed by an assertion that writs of entry have a “pre-natal history” in the writs of right, whereas *sur disseisin* is so clearly related to the assize.

utes to the word "entry." Here it is the tenant asking his lord how he entered, a demand which must resemble more the demand of an owner against a stranger rather than that of a lord against his tenant. Of course, assertions made on the basis of entry *sur disseisin* alone would remain very weak. Fortunately, however, the hints provided by that writ can be proved otherwise.

The forms of writs can at times be ascertained from the *Rotuli de Oblatis et Finibus*, which records payments made for writs prior to the time of pleading. This source is thus not subject to the difficulties Milsom has shown in the plea rolls, and it shows the existence of writs of entry prior to 1215. In 1213 a writ of entry *cui in vita* was purchased for three palfreys;⁵³ the case was pleaded in 1214.⁵⁴ In 1207 the abbess of Caen paid one mark for a writ of entry *ad terminum qui preterit*.⁵⁵ In 1206 Geoffrey son of Richard gave twenty shillings for a writ of entry after a tortious feoffment made by a guardian.⁵⁶ In 1205 William of Albernun gave one half mark for a similar writ,⁵⁷ which has been regarded as entry *sur disseisin* but is clearly centered on the feoffment by the guardian.⁵⁸ There were thus at least four kinds of writs of entry prior to Magna Carta, although there is no way now to determine the frequency of their use. What is certain is that Magna Carta could only have had a very limited im-

53. Matillidis de Candos dat tres palefridos pro habendo quodam precipe coram domino rege in crastino Sancti Nicholai de feodo dimidii militis cum pertinenciis in Hild' quod clamat esse jus et hereditatem suam versus Radulfum Morin juniorem in quod non habet ingressum nisi per Philippum de Columbariis quondam virum ipsius Matillidis qui eidem Radulfo feodum illud dedit cui ipsa Matillidis in vita sua contradicere non potuit. Habet precipe, et preceptum [est] vicecomiti quod ab eadem Matillide securitatem capiat de predictis tribus palefridis ad opus domini regis pro brevi illo. Teste Willelmo Briwerr' apud Wodestok iij die Novembris. Coram domino Wint' episcopo. Per S. comitem Winton.

ROTULI DE OBLATIS, *supra* note 27, at 502.

54. 7 CURIA REGIS ROLLS OF THE REIGNS OF RICHARD I. AND JOHN, PRESERVED IN THE PUBLIC RECORD OFFICE 85 (1935) [hereinafter cited as CURIA REGIS ROLLS].

55. pro habendo quodam precipe ut Radulfus de Veyn juste et sine dilacione reddat ei j messuagium cum pertinenciis in Pendeb' in quod idem Radulfus non habet ingressum nisi per Thomam de Veyn fratrem suum cui ipsa illud dimisit ad firmam ad terminum qui preterit ut dicit et nisi fecerit quod sit coram justiciariis domini regis apud Westmonasterium ab octabis sancti Johannis Baptiste in tres septimanas ostensurus quare non fecerit. ROTULI DE OBLATIS, *supra* note 27, at 378.

56. pro habendo quodam precipe coram justiciariis domini regis apud Westmonasterium in octabis sancti Hilarii inter ipsum et Henricum Ruffum de j carrucata terre cum pertinenciis in Pilesde in quam non habuit ingressum nisi per canonicos de Messenden qui in eam nullum habuerunt ingressum nisi per Willelmum filium Gaufridi qui eam habuit in custodiam ut dicitur.

Id. at 340.

57. *Id.* at 334.

58. See Hall, *supra* note 51, at 588-89. Hall notes that the writ did not have the limitaton clause, which makes it a strange candidate for *sur disseisin*. Classifying it as *per* guardian strengthens Hall's conclusions about infrequency of the use of *sur disseisin*.

pact here. With the so-called *precipe* writ of right Magna Carta initiated really new forms of writs, writs which included a jurisdictional explanation. With the writs of entry Magna Carta would at most only have further encouraged their use. Even the serious reader might have thought that Milsom was hinting at a more important role for Magna Carta, although it is barely possible he was not.⁵⁹

Investigation of the origins of the writs of entry should center on their early forms, particularly on entry *ad terminum qui preteriit* and entry after a feoffment by a guardian. Milsom's argument for the relationship between the early writs of entry and the writ of right patent finds its best evidence in cases concerning entry *cui ante divorcium*⁶⁰ and *non compos mentis*,⁶¹ writs which were not formulated until after the middle of the thirteenth century. When he treats entry *ad terminum qui preteriit*, however, he does not seek to trace its history from *Glanvill*, but only to show the difficulty of inferring the form of the writ from the plea roll entry.⁶² He does not even go that far with the problem of the guardian's feoffment. A more rigorous examination is needed.

It is highly improbable that entry *ad terminum qui preteriit* could be a derivative of the writ of right patent in the way Milsom's theory would suggest. For Milsom to be correct novel disseisin or, at least, the writ rule would have had to prevent one from ejecting a creditor from the gage (security) he claimed as fee. But no matter how we structure the dispute, both the assize and the writ rule seem irrelevant to entry *ad terminum qui preteriit*. Novel disseisin did not protect a creditor. The creditor did have a kind of seisin; *Glanvill* describes it tentatively as "*qualem qualem seisinam*."⁶³ But that seisin was not one which the assize protected. A creditor ousted from his gage could not recover the gage; he was advised to proceed

59. See, e.g., p. 102, where Milsom specifies that he is talking about proliferation of the writs, and p. 158, where he talks about the Magna Carta encouraging incorporation of the entry clause into the writ. But in light of his comments concerning assumptions that the writs of entry were early, p. 101, it is unclear whether his other comments are to be taken as referring to the proliferation of *kinds* of writs of entry or to the use of individual writs already occasionally used. The former seems to be what he is saying, in which case his interpretation can be questioned.

60. See pp. 45-47, 92-94. This case established his first stage *quo warranto* inquiry and the action of novel disseisin: the *Countess Amice* case.

61. See pp. 95-96. This is the case in which he found the statement "*talis jurata non solet fieri nisi emerisset de brevi de recto*." The temptation, of course, is to extend that statement to all issues using entry words, but it should not be taken to apply to anything except *non compos mentis* situations.

62. See pp. 98-99.

63. See GLANVILL, *supra* note 6, at 153-56 (Writ No. XIII, 11).

against the debtor for his debt.⁶⁴ A debtor who had gaged only part of his holding would probably be sufficiently powerful to oust the creditor himself, unless the creditor was his lord. If the creditor was his lord, however, the orientation of this writ of entry would be upward-looking. If the creditor had gaged his entire tenement, it is likely that he would have gone to his lord for assistance; the lord would probably have been consulted about the gage originally anyway, since it would endanger the services. No writ should have been needed; the land was not a free tenement. If a writ were needed, the lord should have been ready and willing to eject the creditor. Milsom's theory therefore does not seem capable of explaining the origins of entry *ad terminum qui preteriit*.

Entry *ad terminum qui preteriit* found its origins in the writ of gage, not in the writ of right patent. The gage writ in *Glanvill* is very close to a writ of entry, although it does not use entry words.⁶⁵ That writ has long been viewed as the forerunner of entry *ad terminum qui preteriit*, but Milsom omits it from consideration. By the time of *Glanvill*, however, there was already an alternative to the old form of trial prescribed by the process pursuant to that writ: a new recognition on the special issue of whether the defendant held as gage or as fee. That recognition is related to the assize *utrum* — which it follows immediately in *Glanvill* — in that it puts alternative tenures to the jury.⁶⁶ Maitland declined to call this recognition an assize, but it is called an assize in the early plea rolls.⁶⁷ The writ of entry was produced when the content of the recognition was inserted into the

64. See GLANVILL, *supra* note 6, at 126 (Writ No. X, 11); 2 ROTULI CURIAE REGIS, *supra* note 48, at 215, 247; THREE ROLLS OF THE KING'S COURT IN THE REIGN OF KING RICHARD THE FIRST, A.D. 1194-1195, at 67 (1891) (Pub. No. 14 of the Pipe Roll Socy.) [hereinafter cited as THREE ROLLS OF THE KING'S COURT].

65. The king to the sheriff, greeting. Command N. to restore, justly and without delay, so much land in such-and-such a vill to R., who gaged it to him for a hundred marks until the end of a term which is now past, as R. says; and to accept payment from him. If he does not do so, summon him by good summoners to be before me or my justices at a certain place to show why he has not done so. And have there the summoners and this writ. Witness etc."

GLANVILL, *supra* note 6, at 126 (Writ No. X, 9) (translation altered).

66. See GLANVILL, *supra* note 6, at 164-65. (Writ Nos. XIII, 26-27).

67. See F. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 32 (A. Chaytor & W. Whittaker eds. 1968); THREE ROLLS OF THE KING'S COURT, *supra* note 64, at 66-67, 73-74, 135; 1 ROTULI CURIAE REGIS, *supra* note 48, at 361; 2 *id.* at 211; 1 CURIA REGIS ROLLS, *supra* note 54, at 158, 220, 245 (1922). Note that 2 ROTULI CURIAE REGIS, *supra* note 48, at 137, 218, might be a transitional writ. One cannot be sure whether it is an altered writ of gage, a writ of right, or a writ of entry. The issue goes to a fee or gage assize after a proffer. The proffer here could have been for the entry words, but it may also have been for the specification of the time of Henry II. The latter would seem more probable. The assize was asked about the gage having been gaged in the reign of Henry II, and about whether the creditor had any other entry or right than by gage.

original writ. This would be a relatively straightforward procedure with some relationship to assizes and no need for legal anomaly, special mises, or particularly late origins.

Another situation which Milsom's theories cannot easily explain is that embodied in the writ of entry related to a guardian's feoffment. Here *Glanvill* contains another *utrum* style special recognition, but it derives from the assize of mort d'ancestor. At the time of *Glanvill* the recognition was perhaps used only to inquire whether a minor tenant's father died seised as of fee or as of wardship.⁶⁸ While this was also called an assize, it was an assize which could sound in the right, because a claimant who lost here had no further remedy. This assize recognition would seem also to be the origin of a writ of entry.

Cases show this writ of entry developing out of mort d'ancestor with a distinctly upward-looking orientation. *Sarnebroc v. Broy* was initiated by a payment for an inquisition framed in entry words;⁶⁹ the case appeared in the rolls twice in 1200, the latter time as an assize to recognize if the vouchee's father had other entry than by custody of the claimant's father.⁷⁰ This is a tenant claiming against his lord, an upward-looking plea framed in entry words. Similarly, *Bodham v. Traveleg*, while perhaps downward-looking, was closely related to mort d'ancestor.⁷¹ In *Fitz Robert v. Whitewell*, the assize answered the two mort d'ancestor questions and then also whether the claimant's lord had disseised him while he was in wardship.⁷² This enrollment of the pleading with entry words in 1201 is the kind

68. See GLANVILL, *supra* note 11, at 1142-43 (Writ Nos. XIII, 13-14).

69. "Henry de Sernebroc gives to the lord king 100s for having a recognition concerning the inquisition of the mill of Sernebroc: whether Walter de Broi had other entry of the abovesaid mill than by custody." ROTULI DE OBLATIS, *supra* note 27, at 5. There is no other recorded initiation for the case; it remains possible that it grew out of an assize of mort d'ancestor.

70. See 1 CURIA REGIS ROLLS, *supra* note 54, at 116, 181. The case should have appeared in between those entries in the Easter term, from which no roll is extant. The latter entry: "The assize comes to recognize if Walter de Broy, father of Robert de Broy had other entry (*ingressum*) or other right in the mill of Sarnebroc than by William, father of Henry de Sarnebroc, whom he had in custody with all his land and with the abovesaid mill while he was under age, and if the same Henry is nearest heir of the same William . . ." This is somewhat different from procedure in *Glanvill*, because the tenant does not seem to be underage.

71. 1 CURIA REGIS ROLLS, *supra* note 54, at 123, 125. The case concerned the questions of whether claimant's father had died seised in demesne as of fee, and whether tenant's entry (*ingressum*) was only through his wife, daughter of claimant's older brother, who had predeceased his father without ever having had seisin. It would result in an order to deliver seisin if the claimant should win. See GLANVILL, *supra* note 6, at 158-59 (Writ No. XIII, 15). This was not, strictly speaking, a guardian case.

72. See ROTULI DE OBLATIS, *supra* note 27, at 58; THE GREAT ROLLS OF THE PIPE FOR THE SECOND YEAR OF THE REIGN OF KING JOHN, MICHAELMAS 1200 (PIPE ROLL 46), at 169 (D. Stenton ed. 1934) (Pipe Roll Socy. Pub. No. 50, new ser. vol 12).

that Milsom carefully shows could derive from the writ of right patent; here, however, it developed from a mort d'ancestor variant.⁷³ From this point it is easy to see how the special inquest could be cut off from the assize and modelled on the gage writ turned writ of entry, resulting in the earlier mentioned upward-looking writ of entry found in 1205 and 1206.⁷⁴ Milsom was thus correct in thinking that the writs of entry derived from special inquests, but those special inquests could derive not only from the writ of right patent, but also from the writ of gage and the assize of mort d'ancestor.

Even when Milsom's logic concerning the restriction of lord's actions works well — and it often does — the result is not necessarily a writ patent removed into the king's court. *Fitz Robert v. Stutevill* is an instance in which the lord was acting for his underage claimant. The lord was apparently unable or unwilling to take action in his own court, so he initiated the litigation by procuring an assize recognition with entry words, a recognition similar to entry by intrusion.⁷⁵ The process Milsom envisages could thus be telescoped into what was called an assize, and the assize would be the forerunner of a writ of entry.

While the process of identifying original writs — whether it was a writ of entry or a writ of right — is at times more simple than Milsom maintains, it is at times even more difficult. *Pirun v. Pirun*⁷⁶ was

73. As the right (of the claimant), in which they do not have entry unless by Elias the late husband of the same Alice (a tenant), father of the abovesaid Matilda and Roesia, who had that land in custody . . . (And they say) that one of them is underage and she seeks her age. And Adam (claimant) says that he ought not await her age, because they did not have entry unless by custody as has been said . . . Judgment: let not her age be awaited but let there be a jury whether the father of the abovesaid had other entry into that land than as has been said above and if the three tenants had other entry than by the same father.

1 CURIA REGIS ROLLS, *supra* note 54, at 419. For earlier process (which, however, is after the payment of 1200) see 1 PLEAS BEFORE THE KING OR HIS JUSTICES, 1198-1202, at 331, 345 (D. Stenton ed. 1953) (Selden Socy. Pub. No. 67) (Plea Nos. 3325, 3439).

74. See text at notes 56-58 *supra*.

75. See ROTULI DE OBLATIS, *supra* note 27, at 61; THE GREAT ROLL OF THE PIPE FOR THE FIRST YEAR OF THE REIGN OF KING JOHN, MICHAELMAS 1199 (PIPE ROLL 45), at 252 (D. Stenton ed. 1933) (Pipe Roll Socy. Pub. No. 48, new series vol. 10) (payment for a recognition with entry words); 1 CURIA REGIS ROLLS, *supra* note 54, at 288 (enrollment beginning "The jury comes to recognize whether (tenants) had other entry"); *id.* at 335 (the plea is called simply an assize of land).

76. Cecilia daughter of Isabel gives the lord king 24 marks of silver for having right against Hamo Pirun and Peter Pirun concerning a knight's fee with appurtenances in Saunderton. And it was ordered to the sheriff of Buckinghamshire that he order the abovesaid Hamo and Peter that justly and without delay they return to the abovesaid Cecilia the abovesaid fee, whereof Henry Pirun father of the abovesaid Hamo . . . who holds that land did not have that land if not in custody after the death of the abovesaid Isabel his wife whose heir she (is) as she says, and unless they do and if she make the sheriff secure concerning prosecuting her claim, then let him summon them that they be at Westminster on the quindene of Easter to show why they do not. And she will pay the abovesaid 24 marks when she shall have had right concerning the abovesaid fee.

certainly begun by a *precipe* with entry words, essentially a writ of entry by intrusion after a tenant in curtesy. The payment for the writ might at first have led one to think it was a writ of right (“*pro habendo recto*”). And the claimant actually referred to it as a *breve de recto* in comparing it to a writ of mort d’ancestor. Similarly, the clerk who entered the payment in *Amundevill v. Amundevill*⁷⁷ did not at first shrink from talking about a writ of right with entry words; perhaps it was his supervisor who made him revise his enrollment. Perhaps, then, we must even doubt marginations which say “*per breve de recto*.” This conclusion, however, is only cautionary; it seems that it would be incorrect to conclude that Milsom’s arguments from such marginations are therefore wrong.

There are thus some flaws in Milsom’s treatment of the writs of entry. He did not relate them to *Glanvill*, nor did he use the *Rotuli de Oblatis* and the pipe rolls. Had he done so, he would have been forced to conclude that the writs of entry developed earlier than he implied and that they were related as much to assize recognitions as to writs of right patent. The major problem with Milsom’s analysis, however, is that the writs of entry could be either upward-looking or downward-looking. Had they been only downward-looking, their

ROTULI DE OBLATIS, *supra* note 27, at 48 (reviewer’s translation).

Cecilia de Pirun owes 24 marks (for having) an inquisition concerning a knight’s fee in Saunderton and concerning 40 shillings worth of land in Wallingford: whether Henry father of the same Cecilia had other right or other entry [reading “*ingressum*” instead of “*transgressum*”] in that land than by Isabel mother of that Cecilia whose inheritance that land was and whose heir the same Cecilia is.

THE GREAT ROLL OF THE PIPE FOR THE SECOND YEAR OF THE REIGN OF KING JOHN, MICHELMAS 1200 at 265 (reviewer’s translation). See also 1 CURIA REGIS ROLLS, *supra* note 54, at 173, 225.

The case is probably unrelated to the former plea of THREE ROLLS OF THE KING’S COURT, *supra* note 64, at 9, a previous plea between the same parties for the same land, based on a claim to reverse the result of a (feudal?) felony in Stephen’s reign: an excellent example of the working of the compromise of 1153. Following his line of argument on p. 70, Milsom might argue that the *precipe* here is functioning like a *pone*, but I am unconvinced by his references that that was even an acceptable, let alone normal, use of the *precipe*.

77. Alice de Amundevill gives to the lord king 20 marks of silver for having a writ of right concerning a fee of a half knight with appurtenances in Wimuthorp or let him have escambium to the value, in which fee Jollanus did not have entry except by the same Alice, so that the plea be before justices at Westminster at three weeks Easter.

ROTULI DE OBLATIS, *supra* note 27, at 55 (cancelled).

Alice daughter of Elias de Amundevill gives the lord king 20 marks for having a recognition whether Elias her father gave to her the vill of Winterton [*sic*] to marry herself so that she was seised thereof while her father lived and after the death of her father until Jollanus the brother of the same Alice disseised her thereof while she was in his custody.

Id. at 63 (reviewer’s translation). See also 1 CURIA REGIS ROLLS, *supra* note 54, at 309, 317.

These are two enrollments of the same appearance, one with entry words seemingly in the writ or count, one with entry words only in the issue. Since the issue was already foreseen in the proffer prior to pleading, however, it makes little difference whether the word “entry” was in the writ; the incorporation of the special issue into the writ would be a transfer from a record of a statement usually made at the purchase of the writ and entered in the rolls into the writ itself.

form would have greatly reinforced Milsom's argument that England around 1200 was still very feudal indeed and did not yet have a conception of property right. The emergence of the word "entry" in the plea rolls around 1200 would thus have indicated that lords for the first time had to resort to the king's court in making downward claims: prior to that, they had had absolute control. But we have seen that lords had to resort to the king before 1200.⁷⁸ Since writs of entry could also be upward-looking, and since the earliest growth was with entry *ad terminum qui preterit* and entry after a guardian's feoffment — writs difficult to fit into Milsom's theory — a better explanation is required. The word "entry," while it did have some seignorial overtones, embodied a new idea of property right which had been growing ever since the compromise of 1153 necessitated the protection of both seisin and the expectancy which was right.

V

The final major line of argument which supports Milsom's contention that England in 1200 was still very feudal is that related to warranty. He maintains that in a lord's court the obligation of warranty would necessitate an automatic default so that any dispute between an outside claimant and an accepted tenant would always come before the county court by tolt. In the king's court, an action for warranty would thus naturally result in an order to the lord's court to default, since that default was part of the customary order of things and thus a tenant's right and a lord's duty. The lord's court was immovably biased, and the king's court would keep it that way. After reading Milsom's argument, no one is going to maintain that lords' courts were impartial tribunals of justice. Nevertheless, if there was an idea of property right earlier than he suggests, his vision of the consequences of warranty is rather strange.

In the realm of feudal theory, the lord might indeed entertain a plea from an outside claimant, either gratuitously from a sense of moral obligation or reluctantly after some outside influence. Many lords would have vacant positions. Instead of rejecting one who had some claim against him and thus appearing an unfaithful lord, he might well find it preferable to submit the matter to his court. If by judgment he found himself obligated to two persons, the one with more right would receive the land; the other would receive compen-

78. See text at notes 28 & 32 *supra*.

sation — escambium — perhaps in the form of an heiress. No feudal logic absolutely required the rejection of a claimant.

There are only two pieces of evidence to support the contention that a lord might indeed entertain such a plea. I am unable to produce a case in which there was a proprietary inter-party suit in a lord's court; but, then, records are scarce. The form of the writ patent, however, mentions a deforciant, and if no one thought the lord could hold right to the claimant, the writ was only a fiction — a notification that there was a claim against him. A better way could easily have been found to notify the lord. Likewise, *Glanvill* contains a writ of peace for prohibiting a lord from continuing further in a case between a claimant and a tenant. It assumes there has already been a count and that the tenant has made his mise to the grand assize properly in the lord's court. It is also conditioned by the possibility that the lord had already put the matter to trial by battle.⁷⁹ Milsom does not consider that writ. But if he is right, such a writ would never have been used. A lord's court thus must have heard an outside claimant's plea, at least at times.

If a lord could hear such a plea, the action of warranty could not result in an order to a lord's court to default. Milsom's evidence for such orders is not convincing.⁸⁰ Until better evidence is presented — and Milsom himself was somewhat hesitant on this assertion — it is better to believe that a lord would be allowed to hold right to a claimant even against a sitting tenant, as long as the lord then fulfilled his obligations to that tenant. A lord's court may not in fact often have been impartial, but it would not be denied the opportunity to be so.

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

GLANVILL, *supra* note 6, at 29 (Writ No. II, 8). This writ shows that this does indeed concern a lord's court and not something like a court of the king's demesne. It was proper for the tenant to put himself on the grand assize in the lower court and for the lower court to judge concerning its form; only then would the writ of peace be issued.

80. See pp. 63-64 nn. 1-2. Milsom relies on two cases. The first, the 1221 case, did result in an order to the lord's court not to hear the plea. But the situation may well have been that the tenant had not yet been accepted by the lord. Since he had a deed — perhaps made out to his ancestor — he chose to make the lord abide by the deed by action of warranty before being made to answer to an outside claimant by writ of right. The prohibition merely prohibited these two suits from being held simultaneously. The second, the 1207 case, mentioned merely as a possibility in a footnote, seems to have been a similar situation. The king's court could rightly worry about simultaneous pleas. Issues should be determined in their proper order, and the court in which a plea is first initiated could well have claimed priority in resolving the matter.

VI

The hypothesis here suggested is based on Milsom's conceptions, but it supposes both a different world around 1200 and different forces which produced the common law. Prior to 1153 any intervention to break a bond between lord and man must have been very exceptional; intervention would have been intended to restore or initiate such a relationship when there was no impediment. The compromise of 1153, which here takes on crucial significance, was framed according to that kind of morality. Simple transgressors were of course to be put out; disinherited tenants were to be restored when there was no impediment. When there was an impeding accepted tenant, however, he had to be maintained until he died, with the hereditary claimant, not the tenant's heir, succeeding. Lords put in such a situation would have wanted a manifestation of outside intervention — a writ — to warrant the refusal of the tenant's heir. The compromise originated, in this way, the distinction between seisin and right. The current tenant had seisin, the physical embodiment of the lord's acceptance and all the title a really feudal world knew. The hereditary claimant had right, a royally instituted and protected expectancy. Both had to be protected; the one by the early processes of novel disseisin, the other by the writs of right.

Over the next half century the royal assurance evolved into a genuine property right. Novel disseisin would surely soon have been used to protect also one who had successfully asserted his right. And seisin and right came to be seen not as conflicting but as related rights. *Glanvill* tried to fit the writs into a scheme of possessory and proprietary remedies. Before 1176, then, seignorial discretion had already been limited. The greater judicial activity in and after 1176 then struck far deeper into the social fabric. That undertaking created rules of law that slowly eliminated seignorial discretion through the regularized availability of remedies not wholly conceived on a feudal model. This wider application of the law furthered the rights of tenants; their property right found some conceptualization, still mixed with feudal notions, in the writs of entry. At least part of the explanation of John's reign lies in the preservation of seignorial discretion at the highest level, but now having to be defined and protected against growing notions of ownership. Finally, Magna Carta sought to end that survival of royal discretion, by making the king "treat his own men as his law already [made] them treat theirs" (p. 25).

This Review has been extraordinarily long, because it seeks to put into discussion the pioneering ideas which Milsom has

presented. He has assuredly accomplished one of his goals: showing that his questions have a legitimate place. But he has done much more. Much of what he says must be accepted. Moreover, his understanding of the workings of early law, even if — as maintained here — parts of his argument are faulty, must be the starting point for further research on the twelfth and thirteenth centuries. Maitland's framework will no longer suffice; the answers do lie in the direction Milsom suggests. A Review like this necessarily focuses on criticism, but that will not take the measure of the book. The importance of *Legal Framework* is not that it is definitive. It is not. It is, rather, a seminal work of the highest order for those concerned with the legal and social origins of Anglo-American law.