

# King Henry II and his Legal Reforms

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## II

### King Henry II and his Legal Reforms

By Michael Nicholas '07



The legal reforms implemented under Henry II produced a body of law and custom that formed the basis of the English Common Law. Institutions seen as the foundation for legal administration and procedural due process owe their existence to these assizes and ordinances instituted during the twelfth century. Despite their significance, however, their origins were neither intended to revolutionize the administration of royal justice throughout England nor were these reforms issued in deliberate or comprehensive fashion. Rather, they were instituted in different decrees, each one addressing a particular administrative need. Thus while Henry II's greatest legacy is the establishment of the English Common Law, his intent was simply that of every ruler, to consolidate seigniorial power and increase efficiency in royal administration. Henry's choice of vehicle for this task was reformation of the legal process, and what emerged due to his efforts were significant changes in the body of civil, criminal and ecclesiastical law.

With the Treaty of Westminster Henry II ascended to the throne of England in 1154 following a tumultuous and contentious period following the death of Stephen. Almost immediately, Henry began taking steps to consolidate royal authority and administrative control.<sup>1</sup> The quick action in relation to his ascension can best be analyzed through a brief examination of the period immediately preceding Henry's reign.

The reign of Stephen was a disaster, largely due to both his own incompetence as a ruler as well as baronial resentment from the policies of Henry I, whom Henry II held as the archetype for seigniorial authority.<sup>2</sup> Henry I had established almost absolute control over the legal administration of England. His jurisdiction and authority overruled those of the barons and the local manorial administrators. The sheriffs of each county were subject to the direct wishes of the sovereign and had neither the inclination (in most cases) nor the authority to obey a local lord over that of the King. Due to this, Henry II believed Henry I's reign to be one of peace, justice, order, and general contentedness.

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<sup>1</sup> Joseph Biancala. "For Want of Justice: Legal Reforms of Henry II" *Columbia Law Review* (Apr. 1988): 434

<sup>2</sup> John Hudson. *The Formation of the English Common Law* (London: Longman, 1996.):144

Furthermore, Henry II associated such a condition with strength and robustness, particularly when examining the fitness of the ruler. Thus Henry II's own professed desire was to return to the days of the "Lion of Justice," Henry I.<sup>3</sup>

Evidence of this intent is seen clearly in his coronation oath, where the usual recitations promising protection of Church property and his subjects', and a tireless effort against unlawfulness and disorder were complemented with Henry II's own twist, a promise to protect the rights of the Crown and the jurisdiction implicit therein as sovereign and King.<sup>4</sup> This additional clause provided an early indication of Henry's intention to consolidate royal authority.

The need for such consolidation, particularly in Henry's mind, can be traced from the "ideal" days of Henry I to the period immediately preceding his reign. Baronial discontent from the iron grip of Henry I led to Stephen's prevention of achieving the same autocratic authority. While both King and baron were dependent upon each other for the legitimacy of their own claims to power, neither recognized the state of mutual dependency and each attempted to assert superiority through the subjugation of the other.<sup>5</sup> This constant struggle led to a spiraling state of civil war and general unrest. With this degradation of order came a decentralization of legal authority and the loss of royal prominence.

Local manorial courts now had primary jurisdiction over both civil and criminal claims made by those on their property. Tenurial rights were respected at the whim of the local baron, and the law governing property and succession was based more upon local custom than it was uniformity of principle. Indeed the sheer number of jurisdictions illustrates the state of decentralization: courts of the vill and the manor, hundred courts and shire courts, borough courts, honorial courts, etc. etc.<sup>6</sup> Church courts held near absolute authority in matters of Church officials, both low (clerks) and high (bishops), and jurisdiction was removed almost entirely to their discretion when the local bishop so desired.<sup>7</sup> Thus the cornerstone of reestablishing Crown control over the administrative processes of England in the manner of Henry I was twofold: consolidate the accoutrements of administration and do so by expansion of the legal jurisdiction of the Crown.

While the second point appears predicated upon the first, it is in and of itself an independent action. The drive for consolidation was Henry's motivating force, using legal jurisdiction was merely a vehicle to achieve that goal. Henry was not viewed as a legal genius per se, but rather as "one of the greatest politicians of his time...and by consent of historians of his time, first and foremost a legislator and administrator."<sup>8</sup> Thus while colloquially his constitutions and assizes are referred to collectively as his "reforms," there was not, in Henry's mind, a conscious "plan of reform."<sup>9</sup> Henry's decisions were based upon the need and the desire to consolidate royal authority and establish seigniorial power as preeminent through England, and to further subjugate the barons' ability to challenge his reign by seizing control of the legal apparatus. In

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<sup>3</sup> IBID

<sup>4</sup> Hudson, 145

<sup>5</sup> Biancala, 435

<sup>6</sup> W.L. Warren. *Henry II* (London: Eyre Methuen, 1973). 317

<sup>7</sup> Hudson, 145

<sup>8</sup> Theodore Plucknett, *A Concise History of the Common Law* (London: Butterworth and Co. Ltd, 1956). 19

<sup>9</sup> Warren, 317

recognition of the controversy surrounding his ascension and the condition under which he inherited the throne from Stephen, Henry did not simply “take” control away from the barons (such an action would have inevitably led to further war), rather he used a piecemeal system of give and take, sometimes bowing to baronial jurisdiction while at other times claiming his own, thus slowly building his influence instead of attempting to seize it at once.<sup>10</sup>

This motivation is important in terms of placing the actual reforms of Henry II in the proper context. The genius of Henry II was in his need for and natural acuity towards organization, not necessarily legal initiative.<sup>11</sup> The institutions of law that are credited to Henry II (jury system, land reforms, process of writs) were in fact not his original conceptions. In fact under Henry’s reign no particular process was itself established. Rather, Henry fused together selected precedents and issued new rationalization for old customs to achieve his particular end.<sup>12</sup> What resulted from this transmutation was the foundation for English Common Law, but no single development was itself an original idea, but rather the result of “the practical decisions of busy men responding intelligently to practical problems that were nothing new in themselves, but which had never before encountered an authority that made a habit of asking not simply what needed to be done, but how it could be done better.”<sup>13</sup>

Thus while Henry’s motivation was born out of a need for royal administration, his vessel for such reform lay in the law. Specifically, Henry sought to consolidate royal jurisdiction as having primacy over local courts. In the area of lord and tenant relationships, Henry specifically sought to give royal justices authority to hear cases where discretion was abused by a local baron and a decision skewed in his favor. Thus he issued the Writ of Right, which according to Glanville (circa 1188-90) held that a lord was to “do full right” to a plaintiff who claimed (and proved) that he was being forced off of his property.<sup>14</sup> Viewed narrowly this measure was simply administrative, for it commanded the local lords to perform their function and execute their power appropriately. It neither diminished nor expanded the authority of the presiding baron any more than he in theory already possessed. Rather, it compelled defendants to answer to royal authority and it charged lords with dispensing appropriate justice, ideally the justice of the King.

The imposition of this writ (or royal order) brought with it several important administrative and legal consequences. Firstly, the number of writs issued increased dramatically as defendants now felt compelled to answer only in the presence of a royal writ. Secondly, it saddled Henry with the problem of plaintiffs now seeking relief where none ought to be granted; thirdly it meant that with a large influx of writs issued, a procedure would have to be implemented for the adjudication of such cases.<sup>15</sup>

It was in the establishment of this procedure that Henry acted with almost absolute authority. Henry successfully coupled procedure for executing various writs (including the Writ of Right) with procedure for collecting taxes, record keeping, the

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<sup>10</sup> Hudson, 146

<sup>11</sup> L.F. Salzman, *Henry II* (New York: Russell & Russell, 1914). 175

<sup>12</sup> Warren, 317

<sup>13</sup> IBID

<sup>14</sup> Biancala, 442

<sup>15</sup> Warren, 334

raising of military forces and the training of royal administrators and justices. In terms of technical legal jurisdiction, Henry parlayed with baronial influence to achieve his desired ends, but once those measures were enacted, he was able to institute procedures for their enforcement nearly at whim.<sup>16</sup>

With the Writ of Right, Henry instituted the following procedure: where a plaintiff felt that he had been wrongfully deforced of property he obtained a royal writ commanding that the local lord “do full right” in adjudication of the case and implementation of the appropriate remedy. In this respect the writ was an upward claim from tenant to his lord’s court. Contained in the Writ of Right was a *nisi feceris* clause, a threat that in the event of disobedience, the sheriff would execute the “right” as opposed to the lord. If the plaintiff felt that the lord failed to “do full right,” he would by the process known as *tolt* present the original writ to the sheriff, who would dispatch a sergeant and four knights to bear witness to the case being removed to county court. The plaintiff’s final remedy was by the process of *pone*, whereby adjudication would be brought before the royal justices for a final decision.<sup>17</sup>

The Writ of Right was significant in several respects. First, it held that the lord’s decision could be overridden by the county court or the royal court if in fact the decision was against local principle or custom. Furthermore, it sought, at least on its face, to remove local abuses of authority by compelling lord’s to act in the manner of the King. In this respect the deeper legal significance of the Writ of Right lie not in the procedure, but in the fact that seigniorial courts now had jurisdiction over land claims (and the fees associated therein). Local authority was maintained as matter of procedure, but not as a matter of legal interpretation without subjective review by a higher (royal) court. Finally, Henry did not restrict the Writ of Right to upward claims. Downward claims from lord to tenant could also be made, and the *nisi feceris* clause of each writ could be altered to threaten the imposition of appropriate action by the sheriff against the tenant should the tenant be at fault.<sup>18</sup>

Thus the Writ of Right served as a compromise with local authority, for while it gave the King ultimate control over the legal precedent involved, it gave primary procedural command, that is the right of first action and of first resort, to the local barons and their courts, thus allowing for local control at the first stage of the process. This compromise and reform were further promulgated with the *assisa novae disseisinae* (Assize of Novel Disseisin) in 1166.<sup>19</sup> The assize itself was both an ordinance and a procedure, and analyses of both reveal the desire for administrative reform as well as the transmutation of legal precedents acting congruently. By the ordinance, no person could be disseised (dispossessed) of his land (assuming such land was a free tenement) unjustly or without a judgment in court. The procedure was the impaneling of a jury to hear the case and decide on the merits thereof.<sup>20</sup>

In terms of the actual ordinance no further detail is required; the principle elucidated was simple and uncontroversial, and was not an original conception at the

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<sup>16</sup> Arthur R. Hogue, *Origins of the Common Law* (Bloomington: Indiana University Press, 1966) 31

<sup>17</sup> Biancala, 443

<sup>18</sup> Biancala, 447

<sup>19</sup> Frederick Pollock and F.W. Maitland *The History of English Law* (Cambridge: Cambridge University Press, 1895). 124

<sup>20</sup> Biancala, 467

time. What was controversial and in that respect significant was the procedure for remedy, specifically the granting of royal jurisdiction as the appropriate dispenser of remedy and by extension, of justice and the legal apparatus there attached. Upon application by a plaintiff and execution of a writ, the sheriff would impanel a jury of twelve recognitors, all of whom were required to be free men, to sit in the presence of the royal justices and answer a simple question: was the seisin of land by the defendant just given the facts of the case in accordance with local custom and applicable royal decrees? The legal questions were addressed by the sitting justices, and the facts were determined by the jury of recognitors. An answer in the affirmative would grant a dismissal of the case and the upholding of the seisin. An answer in the negative would immediately restore the right of the disseised tenant to his land.<sup>21</sup>

The impact of the establishment of such procedure was distinct in two ways. First, it established a distinction between possession of land (seisin) and ownership of land. One could possess land in the form of a tenancy while ownership was retained with a higher authority (such as the king). This procedure governed seisin specifically and granted a quick and uniform remedy to questions pertaining to that seisin. Secondly and more far reaching, free tenements and the seisin thereof are thus by the Writ of Novel Disseisin protected by and beholden to the King, irrespective of the locality or jurisdiction of the regional lord.<sup>22</sup> This established the King as the protector of tenements and by extension gave the King a hand in the administration of said lands. Thus Henry was able to both respect the ownership of the manorial lords while at the same time ensuring that such actions in terms of transfer of property were done under the auspices of his royal justices, and thus by and under his design.

The genius of the Assize of Novel Disseisin was in the compromise that it struck. Seigniorial authority was codified and took precedence, but the actual adjudicating body remained the lord's court. Thus both King and baron had influence, and while the King's authority may be supreme in terms of legality, the deftness of Henry's administration led to the belief and acceptance that it was the decision of the baron acting under the guidance of the King, and not under his direction, that governed such land disputes. Thus Henry avoided baronial revolt while at the same time solidifying uniform control over legal procedure.<sup>23</sup>

In the furtherance of consolidation of royal authority, specifically as to the governance of land and possession, Henry II promulgated *assisa de morte antecessoris* (the Assize of Mort d'Ancestor) at the council of Northampton in 1176. In sum, the Assize held that whenever a man died in seisin, or in possession of a tenement, the first claim to inheritance was with the next of kin. The next of kin could not have the land disseised from him by action of another holding a valid (but lesser claim), presumably the lord under which the tenement was held.<sup>24</sup> Where Novel Disseisin prevented an individual from usurping the land of another without just cause, Mort d'Ancestor prevented the same from occurring following the death of the person who legally could claim seisin to the land. The procedure for proving such a claim was similar to that of

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<sup>21</sup> Pollock, 125

<sup>22</sup> IBID

<sup>23</sup> Biancala, 467

<sup>24</sup> Pollock, 127

Novel Disseisin, a jury of twelve recognitors was to be convened and would decide the case, albeit with different questions presented.<sup>25</sup>

The jury in this case was asked to decide three pertinent questions. First, did the decedent die seised in demesne and fee, that is was the decedent in possession of the tenement in question with all of the incumbent obligations thereof? Second, did the decedent die within the appropriate limitations on time and other factors (which varied from locality)? Third, was the plaintiff in the case the closest heir, and thus entitled to the seised land? In principle, if the plaintiff could establish an affirmative answer to all three of the questions, then he was entitled to a presumption of inheritance of the land, as well as the obligations of such tenancy. Concomitantly established with the Writ of Mort d'Ancestor was the Writ of Homage governing the tenurial relationship between lord and tenant. Previous to Northampton a lord might have refused to recognize the inheritance of a decedent's next of kin. Now the legitimate heir possessed a royal writ compelling the lord to enter into a tenurial relationship, and vis-à-vis that relationship, compelled the heir to pay relief and do "the other things they ought to do" with respect to their lord.<sup>26</sup>

Therefore Henry, through the writ of Mort d'Ancestor, transmuted customs of inheritance with homage and formulated a procedure by which land could be inherited through the generations. The impact of this effort was twofold. First, Henry unified differing conceptions of inheritance (and with that differing codes and ordinances) into the succinct (sometimes deceptively so) principle that a man who died in seisin could pass his land to his family, thus strengthening familial bonds and providing a semblance of order in the social structure. Second, this was done so through royal intervention, which served to be another blow to the previous feudal system whereby the manorial lord had almost complete control. Thus Henry, through a process of legal administration, allowed for royal intervention in land disputes between lord and tenant. As in the Assizes before it, royal authority and precedent reigned, but actual administration was conducted in the jurisdiction of the lord's manor, albeit before royal justices.<sup>27</sup>

The Writs of Right, Novel Disseisin and Mort d'Ancestor slowly consolidated royal authority through legal jurisdiction and culminated with the promulgation of the Grand Assize of 1179, whereby any case commenced before a manorial court could, but appropriate writ, be removed to a royal court for final adjudication. Thus Henry successfully extended royal jurisdiction to nearly all facets of legal procedure and administration with respect to adversarial processes deciding questions of ownership and seisin of land.<sup>28</sup> Prior to this Assize, a dispute of land ownership was to be decided under the custom of trial by combat, whereby the plaintiff would challenge the defendant to combat before the local court, with the winner obviously having the case decided in his favor.<sup>29</sup>

Following the issue of the Grand Assize, a tenant could resolve the land dispute by "putting himself upon the Assize" and refuse to consent to his land being disseised from him. The plaintiff could then sue for a writ in royal court commanding that four knights be selected by royal justices to appoint a jury of twelve county gentleman located

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<sup>25</sup> IBID

<sup>26</sup> Biancala, 485

<sup>27</sup> Biancala, 487

<sup>28</sup> Salzman, 180

<sup>29</sup> Pollock, 126

within the district to be empanelled to decide the case. The jury would rely on their own knowledge and information to decide who had the more legitimate claim to the land. If all twelve could not agree, the four knights would continually reconstitute the jury until a unanimous verdict could be reached. All of this was done under the direction and authority of the King.<sup>30</sup>

The significance of the Grand Assize took two distinct forms. First, an appearance of order and precedence was established based upon accepted custom and law, as opposed to the sloppy and Darwinian ordeal of battle. The winner in these disputes now (theoretically) was legally entitled to the land in question instead of simply being the superior fighter. Second, royal jurisdiction was now extended to the most basic of legal disputes: who owns or is in seisin of a particular piece of land. The influence of the King's court was now extended into the very heart of the feudal lord's realm, and when taken together with the writs of Right, Novel Disseisin and Mort d'Ancestor, Henry II through the Grand Assize successfully established seigniorial rule over the civil administration of his kingdom.<sup>31</sup>

The analyses thus far have been restricted to civil (that is, secular) affairs. Henry did not limit his efforts (particularly in land disputes) to civil affairs alone. The Assize of Darrein Presentment established a procedure by which Church lands would be adjudicated in temporal or royal court. Where Church lands stood vacant a plaintiff could apply for a Writ of Right of Advowson and a temporal court would decide ownership on the principle that "he who presented last time, let him present this time also; but this without prejudice to any question of right."<sup>32</sup> In colloquial terms, if two persons quarrel over ownership of Church property, each with equal claim, then a jury would be impaneled (called in inquest by neighbors) to decide who presented first, and thus who was entitled. Henry sought for this assize to take precedence after the Lateran Council of 1179 decreed that the local bishop would assume control of the land if it should be vacant for a period of three months. Henry's assize asserted royal, as opposed to ecclesiastical jurisdiction to decide the question.<sup>33</sup>

Finally, in 1164 Henry, through the *assisa utrum* (the Assize Utrum) sought to extend royal jurisdiction over lands owned by the Church in relation to peasants' obligations therein. Specifically, the question permeating the countryside was whether it was the obligation of citizens to "lay fee or alms," that is to whether the land was owed a fee to the King and his designee, or whether alms should be paid to the Church. The Assize Utrum decreed that a jury of twelve recognitors would decide the question.<sup>34</sup> This development was significant not in the question presented, but in the jurisdiction where the question was answered. Prior to the Assize Utrum, the local bishop, presiding in ecclesiastical court, could (and would) decide the issue (most often in favor of the Church), and any appeal from this decision would end up in Rome, completely outside the realm of seigniorial justice. Henry sought through this Assize to extend secular jurisdiction to disputes between the temporal and spiritual authority within his realm. Taken together, the Assize Utrum, Novel Disseisin, Mort d' Ancestor and Darrein

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<sup>30</sup> Salzman, 181

<sup>31</sup> Salzman, 180-182

<sup>32</sup> Pollock, 128

<sup>33</sup> IBID

<sup>34</sup> Pollock, 124

Presentment became known as the “four petty assizes” and constitute the bulwark of civil reform under Henry II.<sup>35</sup>

Henry’s reforms and institutions of uniform procedural codes did not end with civil affairs. Prior to Henry, most criminal cases were decided by ordeal, that is the accused would be put through one or more series of tortures, be it burned alive, drowned, combat, etc. to determine if “by God” he was guilty. Such a procedure greatly varied depending upon the jurisdiction and had the adverse effect of not being uniform. Therefore degrees in standards for proof permeated throughout the realm depending on which ordeal was used for which crime. The punishment was either death upon conviction or banishment upon acquittal, and accusations could be made by any local official against any peasant.<sup>36</sup> Furthermore, individual accusations of a crime could be made by an individual (through the Appeal of Felony), provided however that the accuser offers battle to the accused. Such a process sought to protect against frivolous prosecution, but also favored those who could do battle over those who could not. Depending upon the individual accuser and accused, this almost certainly produced an unequal adversarial process. Thus accusations could be made by official or individual, and determination of guilt was made by ordeal, or the resolution of dispute made by battle. While fines and other forms of punishments were technically employed and used, prior to the Constitution of Clarendon the most serious crimes were resolved by one of the aforementioned methods.<sup>37</sup>

With the promulgation of the Constitution of Clarendon in 1166, Henry sought to streamline the process by which accusations could be made against persons. The Assize specifically held that

inquiry shall be made in every county and every hundred through 12 of the more lawful abiding men of each hundred and through four of the more law-abiding men of each vill, put on oath to tell the truth, whether there is in their hundred or vill any man accused or publicly suspected as robber or murderer or thief or anyone who has harboured them since the lord king became king.”<sup>38</sup>

Thus an accusation could now only be made against a person by the testimony under oath of a jury of twelve of his neighbors. Henry further held that “no one shall have jurisdiction or judgment or forfeiture except the lord king in the royal court.”<sup>39</sup> Thus two important reforms were instituted under Henry. First, accusations must be made by a presentment jury, that is the jury would declare only if a crime had been committed, and whom they thought responsible for that crime (the modern day conception is the grand jury). Once accused, the sheriff would be authorized to hold the person in custody until trial. A presentment was not a finding of guilt but rather a formal accusation. This took away the ability and the need for individuals to accuse each other; it gave communal voice to accusation.<sup>40</sup>

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<sup>35</sup> IBID

<sup>36</sup> F.W. Maitland and Francis C. Montague *A Sketch of English Legal History* (New York: G.P. Putnam’s Sons, 1915). 66

<sup>37</sup> Mike Macnair “Law, Politics and the Jury” *Law and History Review* Vol. 17 No. 3 (Autumn 1999): 605

<sup>38</sup> W.L. Warren *The Governance of Norman and Angevin England* (Stanford: Stanford University Press, 1987). 108

<sup>39</sup> W.L. Warren, 109

<sup>40</sup> W.L. Warren, 110

In regards to serious criminal offenses, under the second reform of Henry, royal authority (as constituted in the Assize) overrode any competing local customs, and thus upon presentment the case could be remanded to royal court for adjudication. While in practice the jury system allowed for communities to be self governing, at least in terms of the beginning point of criminal prosecutions, the Constitution of Clarendon was not as generous as it would be perceived. A presentment jury could be constituted only of free men, and the vast majority of the population was not free or was in some way indentured. Peasants were often accused but could not sit on the accusing body.<sup>41</sup> Still, Henry had now extended royal jurisdiction to criminal matters beyond the control of local lords, and had further taken accusatory powers away from individual authorities, although in practice they still retained significant (if not total) influence.

The actual operation of the presentment jury was that of a fact-finding body. For purposes of reference, if a crime had been committed within a district, a presentment jury would be convened to ascertain the details of said crime, the victim, methodology, motivation, impact, etc. would all be ascertained by the presentment jury. Finally, any individuals suspected of that crime would be considered by the jury and a formal accusation could be forthcoming if a trial was warranted as determined by the recognitors.<sup>42</sup> While Henry removed the trial by ordeal at the accusation stage, it was still very much prevalent in the actual trial following presentment. The Constitution of Clarendon and its relevant supplement in the Constitution of Northampton (1176) held that upon presentation of a formal accusation, the accused could (depending on the crime) still enter the ordeal and either be killed or exiled, depending upon the result.<sup>43</sup>

While the actual procedure of the presentment jury seemed to shift accusatory authority, the significance of the Constitutions of Clarendon and Northampton rested with the expansion of royal jurisdiction. Prior to the aforementioned promulgations, the King's court had jurisdiction only in a limited number of cases and in specific instances. All other cases that did not fall under these specified rules were reserved strictly for the manorial or county courts. However, Henry expanded the interpretation of the two chief pleas to the Crown: breach of the peace and felony. Henry went as far as to posit that any breach of the peace now constituted a breach "of the peace of our lord King" and that any felonious act was a felony against the king, thus granting royal courts primary and final jurisdiction.<sup>44</sup>

Taken together, the use of the presentment jury and the imposition of royal jurisdiction allowed Henry to dispatch justices and sheriffs loyal to him to administrate justice in any area of his realm regardless of baronial control. It is important to note the link between the two. Communal accusation given in the form of a presentment jury eliminated (for the most part) reprisals associated with individual accusation. A unanimous declaration by twelve recognitors was much less likely to face retaliation than was an agent from the king acting alone. Further, should a presentment jury find a breach of the peace, or robbery, murder, or thievery (felonies), then the accusation would be

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<sup>41</sup> Maitland and Montague, 167

<sup>42</sup> Richard Hudson "The Judicial Reforms of the Reign of Henry II" *Michigan Law Review* Vol. 9 No. 5 (Mar. 1911): 388

<sup>43</sup> Richard Hudson, 389

<sup>44</sup> Richard Hudson, 389-90

heard in royal court, thus giving Henry tacit control over the accusation process and explicit control over criminal adjudication and sanctioning.<sup>45</sup>

The underlying reform associated with the Constitutions of Clarendon and Northampton is a reform to the Appeal of Felony, that is the accusation of a crime. Henry went further than to simply place authority in the hands of a presentment jury. To any individual who would raise a question of a crime or wrong, or who would present his case before a presentment jury, or make an accusation in the hopes that it would take formal structure later, Henry required that he either post a bond of surety or swear an oath before royal justices to prosecute the claim should it be given a formal, communal voice. This served to correct previous problems of abandonment and lack of prosecution under Henry I and Stephen.<sup>46</sup> The issue was deeper than simply guarding against frivolous prosecutions or ensuring that accusations were heard in the appropriate venue. If appeals of felony never reached a court for trial, then seigniorial influence would be minimal at best. Indeed if most disputes were commenced only to be abandoned due to exterior pressures, then the King's justice would never actually be implemented.

Consequently, Henry liberally allowed his courts to impose fines for abandonment of cases, to seize the collateral or surety held by plaintiffs who failed to prosecute their claims, thus ensuring that criminal prosecutions were actually prosecuted in royal courts as opposed to languishment or abandonment as in the previous reigns. Fines were not restricted simply to cases of abandonment. Certain crimes warranted the payment of large fines, as did presenting or bearing false witness, or making a false accusation. This therefore had the dual effect of reforming the appeal of felony and adding to Henry's already growing tax authority.<sup>47</sup>

While this consolidation of jurisdiction over criminal matters extended almost comprehensively throughout the secular aspects of Henry's realm, he further sought to extend royal jurisdiction to crimes committed against the clergy, and to crimes that previously were tried exclusively in ecclesiastical courts. Chapter 13 of the Assize of Clarendon specifically provided for royal jurisdiction in all cases where a bishop suffered wrong. Beforehand, such cases had been heard in the bishop's own court. It is important to note that Henry did not seek to alter the basic premise that committing a wrong against a bishop or member of the clergy was itself a felonious act; rather he sought to have the cases heard before royal justices and members of his judiciary as opposed to Church authorities.<sup>48</sup>

Furthermore, Chapter 3 of the Assize of Clarendon detailed the specific procedure whereby a case would be handed in the event of a wrong committed against a member of the lower clergy. Henry promulgated that an accusation could be made only in a royal court, thus reserving secular authority of the accusing process. Henry did allow for the case itself to be tried before an ecclesiastical body, thus guaranteeing that the Church would have the ability to determine guilt or innocence of a particular case. However,

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<sup>45</sup> Naomi D. Hurnard "The Jury of Presentment and the Assize of Clarendon" *The English Historical Review* Vol. 56 No. 223 (July 1941): 387

<sup>46</sup> Margaret H. Kerr "Angevin Reform of the Appeal of Felony" *Law and History Review* Vol. 13 No. 2 (Autumn, 1999): 359

<sup>47</sup> Kerr, 360-61

<sup>48</sup> Plucknett, 110

punishment was the jurisdiction of the royal court, thus checking any abuse of authority that may occur on the part of the bishop.<sup>49</sup>

This was a significant shift from the previous nearly sovereign jurisdiction held by Rome and local bishops over appeals of felony. A local bishop would have the authority to accuse, try and punish any person suspected of committing a wrong against the clergy. Appeal from a local bishop took the form of a petition to Rome, ultimately ending with the Pope. Regardless of the outcome, prior to the Assize of Clarendon, no secular court had the jurisdiction or the authority to intervene in such cases. Henry now divided the jurisdiction and reserved to himself the ability to accuse and punish those found guilty. Final appeal rested with the royal, not papal courts.<sup>50</sup>

This naturally led to disquiet between Henry, his bishops, and Rome. While Henry I and Stephen had always held that final appeal rested with the sovereign, Rome had never given its assent to this scheme.<sup>51</sup> Nor did Rome give its assent in Henry II's case either; rather Henry was able to institute the effects of the Assize of Clarendon by summoning the members of the clergy and bishops and persuading them to agree to the Assize as promulgated. This was further evidence of Henry's skill as a politician and deftness in pushing through his reforms without the discontent as under Henry I nor open rebellion as under Stephen. He was in fact able to persuade all bishops to give their assent except one: Thomas Beckett.<sup>52</sup>

The refusal of Beckett to recognize Henry's authority and to assent to royal jurisdiction would become the principal thorn in Henry's side throughout his reign. The Beckett controversy itself is well documented and noted as a critical event in English history, ultimately ending with Henry paying public homage to the tomb of Beckett following his slaughter. It is important to note that the tension between cross and crown did not end with Henry or the Beckett controversy. Rather, Henry's reforms laid the groundwork for what would ultimately result in a pitched battle between the King and the Pope for supremacy in regards to the legal apparatus (and thus the primacy in the realm) throughout the following centuries. (Henry's distant successor, Henry VIII, would ultimately break away from Rome and establish the Church of England).

The legal reforms of Henry II touched all aspects of the legal field at the time. The four petty assizes consolidated royal authority and jurisdiction over land disputes, both secular and temporal. They further served as the *coup de grace* for feudal structures which gave manorial lords and barons greater authority than the king. While the relationship between king and baron remained mutually dependent, primacy was shifted from the barons (during the reign of Stephen) to the king (under Henry II). The Writ of Novel Disseisin is regarded as the immediate predecessor of the modern day notion of a trial by jury, while the Writ of Mort d'Ancestor solidified the notion of familial inheritance.<sup>53</sup> The assizes of Utrum and Darrein presentment gave the king a claim to near unbridled jurisdiction when it came to land disputes over Church property. In sum,

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<sup>49</sup> Plucknett, 111

<sup>50</sup> IBID

<sup>51</sup> Sameul E. Thorne "The Assize 'Utrum' and Canon Law in England" *Columbia Law Review* Vol. 33 No. 3 (March 1933): 432

<sup>52</sup> IBID

<sup>53</sup> Chas T. Coleman "Origin and Development of Trial by Jury" *Virginia Law Review* Vol. 6 No. 2 (November 1919): 82

the consolidation of civil reform under Henry II centralized legal authority to the seigniorial courts.

In matters of criminal prosecution, the use of the presentment jury and the Constitution of Clarendon remains the model for the grand jury system today. While trial by petit jury would come after the reign of Henry II, it was Henry's reforms that set in motion the precedents that would form the body today known as English Common Law. The use of communal accusation and public prosecution was codified under the reign of Henry, and the process for personal prosecution was given a set of procedures by which royal influence would hold the most sway.<sup>54</sup>

While these reforms, when taken together, constitute a radical and ingenious evolution of legal instrumentation, they were not intended as such. Rather, each assize and each constitution as enacted by Henry as a means of achieving greater centralization and efficiency of administration throughout his kingdom. Control was his objective, law was his vessel, jurisdiction his instrument, and political savvy his means of attainment. Ultimately, the legal reforms of Henry II revolutionized legal administration in England and formed the basis of English Common Law.

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<sup>54</sup> IBID

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