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ORIGINAL ARTICLE

Legacies and Legalities: Bequests of Land to Ecclesiastical Institutions in England c. 1180–1300

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Abstract

In English testamentary history, there is a clear divide between Anglo-Saxon and Anglo-Norman testamentary practice, with the primary difference being that in the latter case, heritable land could not be bequeathed. Once the transfer of land required the livery of seisin, a practice introduced during the reign of Henry II (1154–89), it was not possible for a gift of land to take effect upon the death of the owner, and the royal courts did not consider the intention to dispose of a tenement, as expressed in a will, sufficient in itself to complete the transfer. Nonetheless, an examination of extant wills from the period 1180–1300 demonstrates that some testators (or indeed beneficiaries) may have thought that bequests of land were possible or even enforceable. How do these wills fit into the legal framework of the time? If a bequest could not be enforced in the royal courts, what reasons might someone have for attempting to make one, and how might they try to ensure that the bequest held?

In English testamentary history, there is a clear divide between Anglo-Saxon and Anglo-Norman testamentary practice, with the primary difference being that in the latter case, heritable land could not be bequeathed. Once the transfer of land required the livery of seisin (a formal legal conveyancing ceremony wherein the transferor gave the transferee a physical piece of the ground itself), a practice introduced during the reign of Henry II (1154–89), it was not possible for a gift of land to take effect upon the death of the owner. The royal courts did not consider the intention to dispose of a tenement, as expressed in a will, sufficient in itself to complete the transfer.[1] Nonetheless,

[1] See, in general, "English Feudalism and Estates in Land" and "Livery of Seisin" in Samuel E. Thorne, *Essays in English Legal History* (London: Hambledon, 1985), 13–30, 31–50; John M. Kaye, *Medieval English Conveyances* (Cambridge: Cambridge University Press, 2009), especially Ch. 2. See also Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I* (Cambridge: Cambridge University Press, 1968), II, 329–72.

an examination of extant wills from 1180 to 1300 demonstrates that some testators (or indeed beneficiaries) may have thought that bequests of land were possible or even enforceable.[2] How do these wills fit into the legal framework of the time? If a bequest of land could not be enforced in the royal courts, why might someone make one, and how might they try to ensure that the bequest held?[3] Drawing on an extensive collection of wills from the twelfth and thirteenth centuries, the present article considers whether there could be flexibility in the law regarding the disposition of land and the ways in which people understood and used these documents in a period of substantial legal change, providing a fresh perspective on autonomy in testamentary history.

There is uncertainty about whether some early documents (certainly pre-1180, but even some in the 1220s) should be classed as wills, charters, or correspondence.[4] In general, this article denotes as "wills" documents that adhere to the following diplomatic conventions:

(1) The document refers to itself as a *testamentum* (although the differentiation between the act and the document is not always clear in the earliest cases) or *ultima voluntas*.
(2) The document begins with some variation on an invocation of the Trinity, the name of the testator, and a statement that this is his or her will ("*hoc est testamentum*" or similar).
(3) Bequests are indicated using the verb *lego* or *legat* or very often *do et lego*.

[2] A note on vocabulary: today we distinguish between wills and testaments in that wills bequeath land and testaments bequeath chattels, but, as in the Middle Ages, there is considerable confusion of the two terms. Given this confusion, this article will refer to these documents as wills rather than testaments (except in cases where a direct translation of the Latin *testamentum* appears) and the law as testamentary law. For a discussion of these terms, see Richard H. Helmholz, *The Oxford History of the Laws of England. Volume I: The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (Oxford: Oxford University Press, 2004), 399.

[3] When it comes to English wills before the year 1300, Fr Michael Sheehan's work is definitive, and very little has been done to add to it since his time. See Michael M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, Pontifical Institute of Mediaeval Studies, Studies and Texts 6 (Toronto: Pontifical Institute of Mediaeval Studies, 1963). The full corpus of wills Sheehan used is being published in *The Wills of Medieval England, 1066–1300*. Timothy S. Haskett and Sarah B. White, *The Wills of Medieval England, 1066–1300* (Toronto: Pontifical Institute of Mediaeval Studies Press, forthcoming). For other recent work on pre-1300 wills, see Alison J. Spedding, "Hoc Est Testamentum: The Structure and Development of Introductory Clauses in Latin Testamentary Writing," *Viator* 45, no. 1 (January 1, 2014): 281–309. Much of the extant work on wills addresses later periods.

[4] See the wills of Fritheric in Reginald R. Darlington, ed., *The Cartulary of Worcester Cathedral Priory (Register I)*, The Publications of the Pipe Roll Society 76 (London: Printed for the Pipe Roll Society by J.W. Ruddock, 1968), 32–33; Nigel d'Aubigny in Diana E. Greenway, *Charters of the Honour of Mowbray, 1107–1191*, Records of Social and Economic History, 1 (London: Oxford University Press, 1972), 7–10; John G. H. Hudson, *Land, Law, and Lordship in Anglo-Norman England*, Oxford Historical Monographs (Oxford: Oxford University Press, 1994), 62. See also the will of Grenta in William Hunt, *An Account of the Priory of St. Peter and St. Paul, Bath* (London: Harrison, 1893), 50; Hudson, *Land, Law, and Lordship*, 133–34.

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(4) The concluding section names executors and, after the mid-thirteenth century, witnesses.[5]

It is worth briefly noting here that the use of the word "*legare*" does not in itself indicate that the grant or gift being made would only take effect on the death of the testator—this is simply the word used most frequently (indeed almost invariably) in the wills to indicate the action of bequeathing. While there are other elements that are likewise part of the diplomatic of the wills, such as the inclusion of burial arrangements, these too are indicative merely that the document is intended to be a will. While many of the bequests would only take effect after the testator's death, we have evidence (discussed later) that some were effected during the testator's life and confirmed in their will. The key point is that the presence of this diplomatic suggests that the person making the arrangements was thinking in terms of a will rather than, say, a charter, and this has implications for how we understand their intention and the legal context they had in mind.

This article draws on a forthcoming collection titled *The Wills of Medieval England, 1066–1300* (details in n. 3). There is a total of 198 wills contained in the volume, but this article only uses wills that date from the period after c. 1180, as the earlier wills are very clearly connected to the Anglo-Saxon tradition of will-making and suggest a rather different understanding of bequests of land, or are closer to grants than wills and do not adhere to the diplomatic described earlier (and therefore may not be evidence of the same kind of legal thinking). Of the 180 wills dating from c. 1180 to 1300, fifty-nine contain grants of land. This number does not include bequests of annual rents or incomes deriving from land, but only bequests of measured arable land (*terra*), tenements (*tenementa*), messuages (*mesuagia*), manors (*maneria*), or other similar holdings.[6] Of these fifty-nine wills, thirty concern what appears to be burgage tenure or at least holdings within the limits of a town or city. Twenty-three of the fifty-nine wills contain bequests made to wives, at least six of which explicitly confirm dower arrangements. Nineteen wills contain bequests of land to eldest sons, and there are likewise nineteen instances of land being bequeathed to other children of the testator.[7] Since these bequests primarily confirm arrangements within families for the distributions of houses and incomes, and many confirm the receipt of dower or inheritance, these will only be mentioned when they seem to be either abnormal or controversial bequests or as points of comparison.[8]

[5] Sheehan, *The Will in Medieval England*, 193–95.

[6] On annuities and their transfer, see Pollock and Maitland, *The History of English Law*, II, 139–40.

[7] An attentive reader will notice that these numbers do not add up to fifty-nine. This is because some of the wills contain grants to both wives and sons, or other combinations of this sort.

[8] For a discussion of these inter-familial arrangements, see David Crouch, "Testament and Inheritance: The Lessons of the Brief Widowhood of Isabel, Countess of Pembroke," in *Law and Society in Later Medieval England and Ireland: Essays in Honour of Paul Brand*, ed. Travis R. Baker (London: Routledge, 2017), 24–50. There is surely work to be done on these wills and connections to legitim and uses, but that is a subject for another article. See also Richard H. Helmholz, "Legitim in English Legal History A Symposium in Legal History: English Common Law: Studies in the

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Twenty-six of the fifty-nine wills contain bequests of land to ecclesiastical persons or institutions, and these wills are the main subject of this article. Primary concerns are (1) whether the grant made in the will is of heritable or acquired land, (2) whether the will is a confirmation of or confirmed by a charter, and (3) whether there is a statement concerning the intended use of the land. The article also considers whether the bequest was made in a way that could be enforced in the royal courts. Rather than focusing exclusively on the anomalies, the article examines both wills that conform to contemporary rules regarding testamentary devise and those that do not. This provides a fairer representation of the collection and highlights the variation in the records. As ever, the caveat that these documents were most often written by scribes and not by the testators must be taken into account, as much as can be done. This does not, of course, mean that they are always legally perfect instruments, but they tend to adhere to standard formats.

The dates and testators for these wills are as follows (Table 1).[9]

As ever with a small sample from a small collection, there are limitations to the broader conclusions that can be drawn. There are too few documents to determine how common it was for testators to push the limits of testamentary law. That said, it is worth noting that wills containing bequests of land make up 37% of the total number of wills we have from this period. This is a higher percentage than one might anticipate, given the limited enforceability of bequests of land in the king's courts, although, as noted, many of the wills appear to confirm earlier arrangements rather than being the sole expression of the grant. In general, it seems that testators tried to align their wills with current practice, which would help ensure that their bequests were fulfilled. However, some did experiment with the options available to them for the distribution of land. These latter instances are of the most interest, as they indicate a degree of flexibility in drafting these documents that has hitherto been underestimated.

If a testator wished to use his land until his death and then pass it on to someone other than his heir, he could hypothetically achieve this in four ways: via a deathbed gift, a *post obit* gift (a gift that was fulfilled after the giver's death), an *inter vivos* gift (a gift granted during the lifetime of the giver) with a life interest reserved for the grantor, or a canonical will.[10] There was a substantial procedural issue with all these types of grant. By the time these wills were

Sources," *University of Illinois Law Review* 1984, no. 3 (1984): 659–74; Richard H. Helmholz, "The Early Enforcement of Uses," *Columbia Law Review* 79, no. 8 (1979): 1503–13.

[9] The dates for the wills follow those used in the forthcoming volume of wills by Haskett and White. As the volume is not yet available, I have provided reference information for previous print editions and translations, where they exist, or manuscript references where they do not. The wills listed here will be numbered in the forthcoming volume as follows (listed chronologically): 14, 16, 18, 22, 23, 24, 26, 27, 42, 44, 47, 49, 51, 54, 55, 58, 63, 68, 69, 89, 91, 92, 101, 165, 168, and 175. At the time of writing this article, the authors have just discovered what looks to be an additional will from c. 1260, so the last seven numbers listed here may be off by one.

[10] Paul Brand has pointed out to me that another reason for making some of these choices was the ability to change one's mind about the possible beneficiary after an initial decision not to leave it to the heir (which was not possible with an *inter vivos* gift but was possible with the others).

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Table 1. Table of Testators and Dates

Date	Testator	Date	Testator
c. 1180 × 1186	Amalric, son of Ralph	1247	William Skelmersherk
1181 × 1203 or 1204	Gregory, son of Gilbert	1248	John Bonde
Post-October 1192	Robert de Mara	1250 × 1279	Reginald de Abingdon
1207 × 1208	Sir Bartholomew de Leigh	1256 × 1266	John Hamond
1210 × 1219	Gilbert, son of Fulk	March 30, 1258	Walter, son of Nicholas Gervase
November 13, 1212 and 1233	Hugh of Wells, bishop of Lincoln	September 5, 1258	Nicholas Bat
1217 × May 1221	Richard Morin	October 25, 1267	John de Doulys
1219 × 1227	Robert, son of Alan de Fordham	November 26, 1268	Peter d'Aigueblanche, bishop of Hereford
1231	John de St John	January 7, 1269	William de Beauchamp
c. 1235	Hengerom de Budlecs	December 13, 1272	William de Dunwich
c. 1240	Ivo le Moyne	June 11, 1295	William de Arundel
c. 1241	John, son of John Cook	November 25, 1295	Rosemund Kymmyng
January 1243 × January 1244	Ralph Nevill, bishop of Chichester	October 8, 1296	Henry de Berbilond

being written (the late twelfth to mid-thirteenth centuries), land was conveyed via a very simple and strictly applied ritual: the livery of seisin.[11] The transfer was void if this was not done, and the heir could reclaim the land. In the case of the *post obit* gift, if the donor died seised of the land, the nearest heir could easily thwart the transfer through the use of the action of *mort d'ancestor*, which allowed him to claim seisin of the tenement, provided the ancestor was seised in demesne and as of fee (in direct possession of a heritable tenement, possibly with unfree tenants) on the day that he died. The canonical will encountered the same problem as the *post obit* gift: it only took effect once it was proved and after executors had been appointed following the testator's death (sometimes a delayed process that made it even easier for the heir

[11] In general, see "Livery of Seisin" in Thorne, *Essays in English Legal History*, 31–50; Kaye, *Medieval English Conveyances*.

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to take possession of what he would have inherited).[12] Thus, bequests of land were in opposition to conveyance as enforced in the royal courts, and wills were deemed unable to control the devolution of land.[13] This difficulty could be circumvented through an *inter vivos* grant that transferred the land through the livery of seisin but reserved a life interest for the donor, which achieved, in substance, the same end as a *post obit* gift and would be recognized by the royal courts. The key issue was not the form of the document but rather the completion of the appropriate procedures.[14]

The author of the Common law treatise known as *Glanvill* (c. 1188–90) objected to deathbed gifts due to the presumed lack of reason and spiritual concerns of dying men.[15] The text states that any reasonable gift completed by the transfer of seisin during the donor's lifetime would be valid, but this same freedom was not allowed on the deathbed.[16] There follows a sentence explaining that this is because "there might be an extravagant distribution of the inheritance if it were permitted to one who loses both memory and reason in the turmoil of his present suffering, a common enough happening ... this would be presumed to result rather from the turmoil of the spirit than from the deliberation of the mind."[17] This idea is not restricted to *Glanvill*. Indeed, John Hudson has highlighted a passage from the *Book of the Foundation of the Monastery of Walden*, which explained that in the 1190s, some men claimed there was a recent law that "no-one, however great, who had taken to his bed because of illness, is to be permitted in his final will to bequeath to anyone anything from lands or tenements that he had possessed up until then, nor even be able to confer them on monks, who are beloved beyond others."[18] This is one of the few normative statements that we have regarding bequests of land for this period, and it suggests that the concerns in *Glanvill* were widely

[12] There is an example of a *post obit* gift being challenged by the heir in an 1194 case between Henry son of Fulk and the prioress of Eaton. Henry claimed 30 s. rent against the prioress on the death of his father. The prioress admitted that Fulk had died seised of the rent but said that he had made a charter that stated that after his death the rent was to be held by the nuns quit of any claim from his heirs. She argued that Henry ought to warrant the charter, but Henry continued to seek seisin. The case was eventually settled, suggesting that even *post obit* grants were sometimes unenforceable, although they may have had a certain moral force. For more on this case, see Joseph Biancalana, "For Want of Justice: Legal Reforms of Henry II," *Columbia Law Review* 88, no. 3 (1988): 513.

[13] Sheehan, *The Will in Medieval England*, 273. See also Hudson, *Land, Law, and Lordship*, 195–96.

[14] Sheehan has argued that the most enduring and definitive reason for the prohibition of bequests of land was procedural: it did not accord with the rules for conveyance. Sheehan, *The Will in Medieval England*, 274. Sir James Holt, however, argued convincingly that *Glanvill's* objections to deathbed bequests are still best read as reflecting a concern about ecclesiastical greed. James C. Holt, "Feudal Society and the Family in Early Medieval England: I. The Revolution of 1066," *Transactions of the Royal Historical Society* 32 (1982): 198, n. 17.

[15] Sheehan, *The Will in Medieval England*, 270–72; George D. G. Hall, ed., *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill*, Reissued with a guide to further reading by M.T. Clanchy, Oxford Medieval Texts (Oxford: Oxford University Press, 1993), VII, 1, 69–71.

[16] *Glanvill*, VII, 1 (Hall ed. 69–74).

[17] *Glanvill*, VII, 1 (Hall ed. 69–71).

[18] John Hudson, *The Oxford History of the Laws of England, Volume II: 817–1216* (Oxford: Oxford University Press, 2012), 657.

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held. Yet, by the first few decades of the thirteenth century, it had become common for wills to be made well before the prospect of death threatened as a form of security for the testator's wishes, so this concern may have ceased to be quite so relevant.

On one reading of *Glanvill*, it initially seems that a gift of land in a last will could be made with the consent of the testator's heir, as the author notes that "a gift of this kind made to another in a last will can hold good if made and confirmed with the heir's consent."[19] Yet, after discussing the testamentary bequest of chattels, *Glanvill* concludes that a man "can dispose of nothing from the inheritance [i.e., real property rather than chattels] in a last will, as said earlier."[20] Here, he is presumably referring back to his discussion of deathbed gifts. Despite the reference to the "inheritance," however, this does not necessarily indicate that the man's acquired lands could be bequeathed; rather, "the inheritance" may mean the land remaining in the dying man's seisin, which would pass to the heir. If the dying man could not perform the livery of seisin in his final moments, and if no transfer was made before his death, he died seised.[21] The issue of conveyance remained, and the development of the action of *mort d'ancestor* significantly affected the enforceability of grants to parties other than an heir.[22]

Borough custom may be one exception, as it potentially included the freedom to devise. There is some uncertainty in *Glanvill* and *Bracton* about this kind of tenure. *Glanvill* states that the action of *mort d'ancestor* could not proceed concerning burgage tenure (*ratione burgagii*) because there was another assize that dealt with such claims, but *Bracton* is less absolute, stating that this practice was generally applied in cities, boroughs, and vills to lands and tenements that were acquisitions but not to those that descend hereditarily; but an addition was made to the text of *Bracton* saying that the barons of London and burgesses of Oxford had determined that both inherited and acquired land could be bequeathed.[23] Although this suggests that burgage tenure could be bequeathed "as chattels," this may have only been true in specific places, as we know that *mort d'ancestor* actions prevailed in other towns.[24] Yet,

[19] *Glanvill*, VII, 1 (Hall ed. 70).

[20] *Glanvill*, VII, 5 (Hall ed. 80).

[21] Hudson, *The Oxford History of the Laws of England*, 660.

[22] Bequests such as these might be retrospectively challenged even after they had also passed by livery of seisin, e.g., by an heir after the testator's death, on the grounds that the disposals in the first instance were improper in that they lacked livery of seisin. The issue of improper transfers was not restricted to bequests—this complaint could potentially be raised regarding any form of transfer.

[23] Henry de Bracton, *De Legibus et Consuetudinibus Angliae*, ed. George E. Woodbine, trans. Samuel Edmund Thorne (Cambridge, MA: Published in association with the Selden Society by the Belknap Press of Harvard University Press, 1968–1977), III, 295.

[24] See *Glanvill*, XIII, 11 (Hall ed. 155) and *Bracton*, III, 295. For a full discussion, see Pollock and Maitland, *The History of English Law*, II, 645; Sheehan, *The Will in Medieval England*, 274–78; Alfred W. B. Simpson, *History of the Land Law* (Oxford: Oxford University Press, 1986), 14; Hudson, *The Oxford History of the Laws of England*, 830. William Eves has suggested that "*ratione burgagii*" might refer not to burgage tenure but to a borough liberty or privilege; thus, bequests of burgage tenure may have been more restricted than has been thought. William Eves, "The Assize of Mort

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if this practice was acceptable in at least some of the boroughs, it is possible that some testators thought it would also be acceptable elsewhere. A similar practice can also be found in royal and ancient demesne. This rarely appears in the early thirteenth century, but by 1294, the practice seems to have become common. There is also the mention of the bequest of land from other manors during the time of Henry III, indicating that custom allowed this, and by the end of the fourteenth century, this right was at least partially established.[25]

A possible approach to bequests of land in wills is that suggested by Paul Hyams regarding charters, which he argued could be seen as a form of "preventative law," representing "the all-important effort to arrange matters in advance in order, above all, to avoid future dispute."[26] The same could perhaps be argued of wills, which might record a private agreement among willing participants. A good bequest pre-empted future litigation, and there were a few measures a testator or grantor could take to achieve this end. The first was to obtain promises of support and consent from those who might challenge the bequest, such as lords, heirs, and, in some cases, even the king. This could be expressed in consent clauses, warranty clauses, and the lists of witnesses to the documents, which involved the donor's relatives and associates in maintaining the bequest.[27] This could also have involved the swearing of oaths, which brought with them the threat of ecclesiastical censure if they were broken.[28] The emphasis on consent in some of these wills, and certainly in charters, may also indicate the settlement of a preceding dispute, the resolution of which was recorded in the document.[29] That being said, neither charters nor wills were consistent in including these assurances of consent, and they were not required.[30]

The strategies mentioned here relied on private agreements and the continued favor of the participants, who might need to be reminded of their promises should the bequest be challenged. Thus, it was prudent to preserve a record of these promises. It was also wise to publicize the arrangements since the more well-known a bequest was, the better its chances of remaining in force.[31] The community might then obligate the disputants to uphold the agreement.[32] Yet,

d'Ancestor in the Late Twelfth and Early Thirteenth Centuries" (Unpublished, St Andrews, UK: University of St Andrews, 2016).

[25] Sheehan, *The Will in Medieval England*, 279.

[26] Paul R. Hyams, "The Charter as a Source for the Early Common Law," *Journal of Legal History* 12, no. 3 (1991): 173. It should be pointed out that wills were not "private" documents, in that they were usually made by a scribe or later, a notary, and were considered "public" documents by the standards for documentary proof in the ecclesiastical courts.

[27] Hudson, *Land, Law, and Lordship*, Chs. 6 and 7.

[28] Hyams, "The Charter as a Source," 177.

[29] Hyams, "The Charter as a Source," 174.

[30] Kaye, *Medieval English Conveyances*, 71–73 and Hudson, *Land, Law, and Lordship*, 184. Some similarities might be drawn between these instances of consent and the phenomenon of family approval for gifts to saints described in Stephen D. White, *Custom, Kinship and Gifts to Saints: The Laudatio Parentum in Western France, 1050–1150*, Studies in Legal History (Chapel Hill: University of North Carolina Press, 1988), Ch. 4.

[31] Hudson, *Land, Law, and Lordship*, 159.

[32] Hyams, "The Charter as a Source," 177–78.

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unlike charters, which might be read out (as indicated by the opening line "To all those who see and hear the present, etc."), wills could be more personal documents, intended not for the general public but for heirs and executors.[33] Concerns about this may be evident in the wills that state that the bequests were confirmed by a charter, indicating that charters and their associated safeguards were seen to be more sure. And while a will or charter might have served to support a grant in the local context, it is highly unlikely that the document (and certainly not the document alone) would be sufficient proof of the event from the perspective of the royal courts, given their insistence on notorious delivery of possession (demonstrated through livery of seisin).[34]

In this context, testators may have turned to another forum to ensure their wishes were fulfilled. The church had at least three reasons it might support bequests of land in wills: its jurisdiction over last wills, its jurisdiction over breach of faith, and its interest in protecting its own rights. The ecclesiastical courts may thus have come to the aid of those who attempted to bequeath land in their wills. If the testator noted in a will or a confirming charter that the bequest had been made with the consent of their heirs, it might be possible to bring case of breach of faith if the bequest was challenged. By this period, canonists had articulated the principle of *pacta sunt servanda*, which demanded that promises be observed on the basis of moral obligation, regardless of whether they complied with the formalities of secular law. It was a sin to break one's promise.[35]

Recognizing that not all promises were actionable in the secular courts, the canonists adopted the Roman law concept of *causa* to delineate which promises created obligations. If a promise was "clothed" with a suitable *causa*, that is, with a serious purpose, it was valid. Although civil lawyers emphasized that "*ex nudo pacto actio non oritur*" and held that there was a limit to the number of purely consensual contracts that could be enforced, canonists argued for the unilaterally binding nature of consent, which imposed a duty in good faith.[36] Thus, for example, a promise of something to an ecclesiastical foundation for reasons of piety could be binding on account of that piety. Although this canonical idea of contract was not fully expressed until later in the Middle Ages, the church courts certainly had jurisdiction over breaches of faith in our period. It is perhaps another matter whether the consent of the heirs mentioned in bequests implied an oath or binding agreement (and therefore a breach if they did not adhere to this), but the language of consent might well have provided the ecclesiastical courts with sufficient reason to involve themselves in these matters. It is also worth noting that even if an ecclesiastical court were to impose a penalty for breach of faith, this would not result in the return of property *in rem* but in ecclesiastical censure. Yet litigants who had no remedy in the royal courts might still have turned to the church courts,

[33] Note that this is only one set form of opening for a charter and may not be an indication that charters were consistently being read out.

[34] Hyams, "The Charter as a Source," 180; "Livery of Seisin" in Thorne, *Essays in English Legal History*, 42; *Bracton*, II, 130–31.

[35] Anthony Jeremy, "Pacta Sunt Servanda: The Influence of Canon Law upon the Development of Contractual Obligations," *Law & Justice—The Christian Law Review* 144 (2000): 5.

[36] Jeremy, "Pacta Sunt Servanda: The Influence," 5–8.

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where the concept of breach of faith gave litigants access to spiritual sanctions to try to enforce payments, services, marriages, and perhaps even the transfer of land. In the absence of other options, they might have placed their trust in the spiritual and social ramifications a penalty would entail, even if a sentence in these courts would not reverse a lay court's decision to reject the validity of a bequest.[37] The key point in all this is that the choice to express one's wishes via a will rather than some other type of document suggests a certain legal intention—this could be strategic and well-informed, or it might be mistaken and ill-informed, but the form of the document chosen mattered. With this context in mind, let us turn to the wills themselves.

(i) Wills confirmed by charters/as charters

Most of the wills provide little to no direct information about the testator's understanding of how testamentary law worked: the information is implicit, hidden in the manner in which the bequests are made. For example, nine of the wills are confirmed by adding charters or chirographs, indicating that the testators thought these documents would help enforce the grant.[38] The presence of a charter may also indicate that livery of seisin had taken place; otherwise, it would fall into *Glanvill's* category of a "naked promise" (although,

[37] Jeremy, "Pacta Sunt Servanda: The Influence," 13. Whether or not this tactic would be successful is another matter. There was a mechanism for the king's courts stopping such proceedings, the action of prohibition, which prevented a litigant bringing an action relating to lay fee in the church courts and also preventing ecclesiastical judges hearing such cases. See Norma Adams, "The Writ of Prohibition to Court Christian," *Minnesota Law Review* 20, no. 3 (1936): 272–93; George B. Flahiff, "The Use of Prohibitions by Clerics against Ecclesiastical Courts in England," *Mediaeval Studies* 3, no. 1 (January 1, 1941): 101; George B. Flahiff, "The Writ of Prohibition to Court Christian in the Thirteenth Century," *Mediaeval Studies* 6, no. 1 (January 1, 1944): 261; George B. Flahiff, "The Writ of Prohibition to Court Christian in the Thirteenth Century. Part II," *Mediaeval Studies* 7, no. 1 (January 1, 1945): 229; Richard H. Helmholz, "Writs of Prohibition and Ecclesiastical Sanctions in the English Courts Christian," *Minnesota Law Review* 60, no. 5 (1976): 1011–33; Richard H. Helmholz, "The Writ of Prohibition to Court Christian before 1500," *Medieval Studies*, no. 43 (1981): 297–314.

[38] Amalric, son of Ralph, Robert de Mara, Gilbert, son of Fulk, Hugh of Wells, Richard Morin, John de St John, William de Skelmersherk, Nicholas Bat, and William de Dunwich. For Amalric, see London BL. MS. Egerton 3031 (Cartulary of Reading Abbey), f. 38r–v (with the acknowledgment of the British Library). For Robert, see Una Rees and Shropshire Archaeological Society, eds., *The Cartulary of Haughmond Abbey* (Cardiff: Shropshire Archaeological Society and University of Wales Press, 1985), 224, no. 1228. For Gilbert, see Kew. National Archives. E.40/11559a (with the acknowledgment of the National Archives). For Hugh, see David M. Smith, ed., *The Acta of Hugh of Wells: Bishop of Lincoln 1209–1235*, Publications of the Lincoln Record Society, v. 88 (Woodbridge: A Lincoln Record Society Publication published by the Boydell Press, 2000), 3–5, no. 2. For Richard, see Albert Way, "Original Documents, Being Contributions towards the History of Reading Abbey," *Archaeological Journal* 20, no. 1 (1863): 151–61; Brian R. Kemp, ed., *Reading Abbey Cartularies*, Vol. 1, Camden Fourth Series, v. 31 (London: Royal Historical Society, 1986), 382. For John, see Oxford. Bodleian Library. MS. DD. ChCh. C9 (O.92) (by kind permission of the Bodleian Libraries). For William de Skelmersherk, see John C. Atkinson, ed., *The Coucher Book of Furness Abbey* (Manchester: Chetham Society, 1887), 411. For Nicholas, see London. St Bartholomew's Hospital Archives. SBHB/HC/2/1/1: "Cok's Cartulary" of St Bartholomew's Hospital—Volume I, ff. 354r–v (All Hallows the Less) (courtesy of Barts Health NHS Trust Archives). For William de Dunwich, see William Hudson and John Cottingham Tingey, *The Records of the City of Norwich* (Norwich: Jarrold, 1988), 2:360–62, no. CCCCXLVI.

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as mentioned earlier, charters were no guarantee of seisin).[39] For example, Amalric, son of Ralph (c. 1180 × 1186),[40] bequeathed the land of Jacob de Berchfeld, with appurtenances, and land in the vill of Carswell [Berks.] to the monastery at Reading, and had the grant confirmed by a charter of Henry II.[41] Amalric also confirmed the gift in free alms to the church in a charter of his own, "*liberam et quietam de me et heredibus meis ab omni servitio terreno*."[42] Thus, the bequest was confirmed both by the testator and by others, indicating that the will on its own was not considered sufficient to make the grant.

In the near-contemporary will of Robert de Mara (post-October 1192), we seem to have a different understanding of the enforceability of a bequest.[43] "By lawful testament, in the presence of many men," Robert bequeathed (*lego*) to the abbey of St John Evangelist [Haughmond, Shrops.] the manor of Uffington [Shrops.] with all its appurtenances, namely the land, waters, meadows, and woods, to be possessed in perpetual peace. Further, he invested Alan de Mara, a knight and his kinsman, with these things in the name of the church (more on this later). Lastly, to confirm his donation, he verified "the present charter" with his seal and the subscription of witnesses. There are two especially interesting features of this will. The first is the making of the donation "by lawful testament (*legitimo testamento*)," and the second is the reference to the document as both a will (*hoc est testamentum*) and a charter (*presentem cartam*). Although Robert sees the need to confirm his grant by a charter, he also seems sure that he can make a donation of this sort with a will. The line between charter and will is blurred, perhaps. In Robert's case, it seems possible that he also carried out livery of seisin when making his bequest in the presence of others. Given that he notes that he invested Alan on behalf of the church (*nomine ecclesie*), this could be an early example of a general trust, or a use, in which land was granted to an individual for the use of a third party, usually a religious institution, to whom the grant could not normally be made.[44] In case of restrictions on alienation, uses allowed land conveyance outside the family line.[45] That being said, the language used in the will does not carry the implications of binding in conscience or other language of uses (no presence of *ad usum* or *ad opus*, etc.), and the arrangement is

[39] *Glanvill*, VII, 1 (Hall ed. 70).

[40] Brian R. Kemp, ed., *Reading Abbey Cartularies*, Vol. 2, Camden Fourth Series, v. 33 (London: Royal Historical Society, 1987), 38–39.

[41] Kemp, *Reading Abbey Cartularies*, 1:59–61. Amalric also granted a mill to Reading Abbey—Kemp, 1:372.

[42] Kemp, *Reading Abbey Cartularies*, 2:71.

[43] Una Rees and Shropshire Archaeological Society, *The Cartulary of Haughmond Abbey*, 224, no. 1228.

[44] On the early history of uses, see Pollock and Maitland, *The History of English Law*, II, 238–42; John L. Barton, "The Medieval Use," *Law Quarterly Review* 81 (1965): 562–77; John M. W. Bean, *The Decline of English Feudalism, 1215–1540* (Manchester: Manchester University Press, 1968), Ch. 3; Joseph Biancalana, "Medieval Uses," in *Itinera Fiduciae: Trust and Treuhand in Historical Perspective*, eds. Richard H. Helmholz and Reinhard Zimmermann, Comparative Studies in Continental and Anglo-American Legal History 19 (Berlin: Duncker & Humblot, 1998), 111–52; Joseph Biancalana, "Thirteenth-Century Custodia," *Journal of Legal History* 22, no. 2 (2001): 14–44.

[45] Helmholz, "The Early Enforcement of Uses."

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conditional, which had to be avoided in uses. Alternately, he may have been giving his kinsman a life or short-term interest. Robert at least avoided the problem of the absence of livery of seisin, as the land had been delivered to Alan. The issue of enforceability, in this case, was whether Alan could be compelled to pass the land on to the church—perhaps Robert arranged some enforcement mechanism elsewhere for this part of the agreement.

A few testators also note that their distributions were made with the consent of their heirs or their lords.[46] The document of Richard Morin (1219 × 1221), which seems to be both will and charter at once (Brian Kemp identifies it as a charter),[47] suggests that consent of one's heir could also assist in ensuring that the grant held.[48] We have quite a few other documents regarding Richard and his land, which allow us to place the will in the context of several other grants made to Reading Abbey by Richard and his family. We know that Richard entered a monastery, presumably Reading, before May 25, 1221, and it seems likely that his grant to the abbey was made at the main session of the eyre in Reading since three of his witnesses, including Richard Poore, bishop of Salisbury, were justices-in-eyre in 1219, and topics covered in the session also concerned the water of the Thames—a topic of concern in Richard's will.[49] Richard says that he gave (*dedi*) his land with the consent of his heirs and that he and his heir would warrant the bequests, which indeed he did.[50] Richard's chief concern is the first gift, the land that Richard Bertram held from the testator, which may have been heritable. Richard acquired permission from his heir before making the grant to the monks of Reading and confirmed the grant with this charter, presumably with the implication that the original will could not be disputed on the grounds of whether livery of seisin had taken place (although there was no guarantee that this had happened, even with a charter). That being said, we also have the quitclaim of the water of the Thames that Richard mentions in the will, which is likely contemporary, and a confirmation from his son, William, of the entire bequest.[51] William also gave a considerable amount of land from his demesne to the abbey in free alms, in return for which the abbot and monks had given him ten and a half marks silver for his journey to the Holy Land.[52] Richard's wife, Felicity, also quitclaimed her dower right in the tenements of her late husband to the

[46] Richard Morin (n. 35) and Peter d'Aigueblanche. For Peter, see Julia Barrow, ed., *English Episcopal Acta 35: Hereford 1234–1275* (Oxford: Oxford University Press, 2009), nos. 123–25.

[47] Kemp, *Reading Abbey Cartularies*, 1:383.

[48] See also the will of Peter d'Aigueblanche in Julia Barrow, *English Episcopal Acta*, nos. 123–25.

[49] Kemp, *Reading Abbey Cartularies*, 1:383; Michael T. Clanchy, *The Roll and Writ File of the Berkshire Eyre of 1248*, Vol. 90, Publications of the Selden Society (London: Selden Society, 1973), xciii, cf. no. 779.

[50] Way, "Original Documents, Being Contributions"; Kemp, *Reading Abbey Cartularies*, 1:382.

[51] Kemp, *Reading Abbey Cartularies*, 1:383–84. William was Richard's younger son and seems to have died by 1222, perhaps on pilgrimage to the Holy Land, and likely without heirs. His elder brother, Geoffrey, predeceased him. After William's death, his remaining land passed to Geoffrey's son, Richard Morin the younger, "*tanquam filio primogeniti filii Richardi Morin avi sui.*" Kemp, *Reading Abbey Cartularies*, 1:387.

[52] Kemp, *Reading Abbey Cartularies*, 1:384–85.

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abbey.[53] Given the close connection between Richard's family and the abbey, it seems unlikely that this grant would be challenged.

(ii) Acquired land

Some testators, like Richard, specify that the land bequeathed is acquired, perhaps knowing that acquired land could be treated more like chattels and therefore bequeathed.[54] The land that had previously belonged to Roger Prudhume was likely acquired land. It may be that the sixty acres that Richard granted "from his demesne" was also acquired, not heritable, land and that Richard was entirely able to bequeath it. This document is also a very good example of the type of charter suggested by Hyams, which confirmed the settlement of prior disagreements, in this case, explicitly. Richard makes very specific arrangements concerning fishing rights in some of the lands to forestall any dispute between the monks and his heir following his death. In doing so, he appears to have made the best arrangements for someone who wanted to make a sizeable donation to the church, ensuring that there would be no uncertainty concerning the parameters of the grant or the rights associated with it.

Testators may also have thought they could bequeath burgage tenure with little or no difficulty.[55] Gilbert, son of Fulk (1210 × 1219), made his will before leaving for the Holy Land on crusade.[56] He bequeathed to the church of Holy Trinity [Aldgate] in London in alms his entire chief messuage with all its

[53] Kemp, *Reading Abbey Cartularies*, 1:385.

[54] Amalric, son of Ralph (n. 44), Bartholomew de Leigh, Gilbert, son of Fulk, Ralph Nevill, Reginald de Abingdon, John Hamond (n. 58), John de Doulys, William de Beauchamp, William de Dunwich, and William de Arundel. For Bartholomew, see National Archives E.315/42/246 (with the acknowledgment of the National Archives). For Reginald, see Spencer Robert Wigram, ed., *The Cartulary of the Monastery of St. Frideswide at Oxford*, Oxford Historical Society, v. 28, 31 (Oxford: Clarendon Press, 1895), 1:275–76, no. 362. For Ralph, see Philippa M. Hoskin, ed., *English Episcopal Acta 22: Chichester, 1215–1253* (Oxford: Oxford University Press, 2001), no. 106. For John de Doulys, see British Library Ch. Add. 28493 (with the acknowledgment of the British Library). For William de Beauchamp, see William Dugdale, *The Antiquities of Warwickshire* (Coventry: John Jones, 1765), 389. For William de Arundel, see Thomas Madox, *Formulare Anglicanum: Or, A Collection of Ancient Charters and Instruments of Divers Kinds, taken from the Originals Placed under Several Heads, and Deduced (in a Series According to the Order of Time) from the Norman Conquest to the End of the Reign of King Henry the VIII* (London: Tonson, 1702), 425, no. 771.

[55] Gregory, son of Gilbert, Gilbert, son of Fulk, John de St John (n. 45), Hengerom de Budlecs, John Bonde, Reginald de Abingdon (n. 69), Walter, son of Nicholas Gervase, Nicholas Bat (n. 44), William de Arundel (n. 68), Rosemund Kymmyng, and Henry de Berbilond. For Gregory, see London Guildhall Library MS. 25271/21 (St Paul's Cathedral Library A/66/21) (by kind permission of the chapter of St Paul's Cathedral/London Metropolitan Archives). For Hengerom, see Madox, *Formulare Anglicanum*, 424, no. 769. For John Bonde, see Hudson and Tingey, *The Records of the City of Norwich*, 2:358–59, no. CCCCXLV. For Walter, see John Hooker, *The Description of the Citie of Excester*, eds. Walter J. Harte, Jacob W. Schopp, and Harry Tapley-Soper (Cambridge: Chadwyck-Healey, 1976), 598–603. For Rosemund, see Olivia F. Robinson, ed., *The Register of Walter Bronescombe, Bishop of Exeter, 1258–1280*, Canterbury & York Society, v. 94 (Woodbridge: Boydell, 2003), 443–45. For Henry, see Nicholas Orme, "Henry de Berbilond, d. 1296, a Vicar Choral of Exeter Cathedral," *Devon and Cornwall Notes and Queries* 37 (1992): 1–7.

[56] National Archives E 40/11559 (with the permission of the National Archives). Calendar in Henry C. Maxwell Lyte, *Descriptive Catalogue of Ancient Deeds*, Vol. 5 (1906), 165–65.

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appurtenances in Lime Street [Aldgate, Langborne and Lime Street wards]; all the land and rent that belonged to Peter the chaplain with all its appurtenances in Lime Street; all the land and rent that belonged to Ailnoth the shoemaker with all its appurtenances in Lime Street; the entire garden that he held from the aforesaid canons; and all the land and rent that he bought from Peter the clerk, which was in the parish of All Saints Coleman [Aldgate ward]. His wife Elena was to hold all these things if she remained unmarried after his death, but if she remarried, then the canons were to have the entire messuage and pay Elena a rent of 5 m. (marks), which Gilbert owed her from her dowry. Gilbert does not mention any children in his will. If he lacked an heir of his body (although he may still have had a collateral heir), he might have felt it necessary to clarify his intentions for the distribution of his property after death, first to his wife, then to the church. He states that he made a charter for the canons concerning these arrangements, which he entrusted to the monks of Stratford [Essex]. There is a note on the dorse of the will in a fourteenth-century hand, saying that the tenements in the charter were indeed received by the canons, so Gilbert's wishes must have been fulfilled. Likewise, John Bonde (1248) bequeathed the entirety of his chief messuage, with appurtenances, in which he lived in the parish of St Peter, to the hospital of the lord bishop of Norwich, founded in honor of St Giles, to have and hold in free and perpetual alms, saving to his wife Mabel her residence in the messuage for the rest of her entire life, paying 2 s. in rent to the hospital every year.[57] This is a very similar arrangement to that made by Gilbert. John also does not mention children in his will—maybe he did not have any. Perhaps, for this reason, he chose to leave his messuage to the hospital following the death of his wife.

The will of Gregory, son of Gilbert (1181 × 1203 or 1204), presents a very different situation.[58] It explicitly concerns the patrimony demised or bequeathed to him as his father's heir (*de patrimonio suo quod pater eius ei dimisit sicut heredi*). From this, he bequeaths his entire chief messuage (presumably in London) with the five houses attached to it, which used to belong to his father, to the cathedral church of St Paul in London for his soul and the soul of his father. He releases all the aforesaid land for the needs of the church, saving the right of his mother's free-bench and her dowry (*salvo... franco banco suo et salva dote sua*), which was a third of the houses near the chief house pertaining in fee, for as long as she lived without a husband. The rest of the will concerns the payment of rents. No mention is made of a wife or children, and it seems that Gregory was concerned about his imminent demise, as he adds that if he should die from his sudden illness, the canons were to receive the rents of the last two houses immediately and have seisin, on the condition that they acquit him of his debt of 8 m. Lastly, he asks that if he should die, that his name be written in the martyrologium and that the lord bishop require all the chaplains of this episcopate to say a mass for his soul and all the faithful dead. This will, apparently made on Gregory's sickbed, if not his deathbed, is exactly the sort of will

[57] Hudson and Tingey, *The Records of the City of Norwich*, 2:358–59, no. CCCCXLV.

[58] London Metropolitan Archives CLC/313/P/008/MS25271/001/021 (by kind permission of the chapter of St Paul's Cathedral/London Metropolitan Archives).

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about which the author of *Glanvill* was concerned, given the almost tangible panic in the document. Yet, we can see that, for the most part, testators who made bequests of land in their wills did so in ways they thought would be enforceable should a dispute arise, either by confirming the grants with charters mentioning the consent of other parties or by bequeathing acquired land or burgage plots, both of which they clearly expected would be valid.

(iii) Difficult wills

If we allow that confirmation by charter, consent of heirs or lords, or statements that the will concerns acquired land and burgage tenure all indicate the testators' intentions to make bequests that would be enforceable by law, we are left with only three wills that could be considered more difficult: those of Robert, son of Alan Fordham (1217 × 1227),[59] Ivo le Moyne (c. 1240),[60] and John, son of John Cook (c. 1241).[61] I shall address Ivo's will last, as there is a considerable amount to say about it. Robert, son of Alan Fordham (1217 × 1227), bequeathed (*lego*) to the mother church at Fordham [Cambs.]—not the church in which he asked to be buried—all the service of Edmund son of Alexander Stutard with his homage and all his villein descendants, one messuage and four acres of land, and one rod and a half of land in the vill of Fordham.[62] The remainder of his bequests are primarily chattels, except for a strip of land "that was held by Havec," which was left to his sister at Saham Toney [Norf.]. His will is not dated, but earlier in 1227, Henry III had granted a confirmation of liberties to the Gilbertine houses, and in this document, Fordham is referred to as one of three newly founded institutions.[63] John Leland indicates that the founder of the house was Robert Fordham, knight, so the testator's initial bequest to "the mother church of Fordham" may indicate that at the time the will was drafted, the 1227 royal grant had not yet been made, but was imminent.[64] Alternatively, given the limited extent of what he bequeaths, this could be an additional gift rather than a founding one.

John, son of John Cook (c. 1241), "although infirm of body, yet sound of mind," gave and bequeathed (*do lego*) to the cathedral church of Holy Trinity in Chichester [Sussex] all the tenements that he held in the vill of Donnington [Sussex] from the lord abbot of Hyde [Winchester, Hants.], with all their services and other appurtenances. This bequest was made on the condition that the dean and chapter would make an annual payment of 1 m. silver

[59] Bodleian Library Ch. Norfolk a.6 (614) (by kind permission of the Bodleian Libraries).

[60] British Library Ch. Add. 34036 (with the acknowledgment of the British Library).

[61] Walter Divie Peckham, ed., *The Chartulary of the High Church of Chichester* (Lewes: The Society, 1946), no. 549.

[62] Bodleian Library. MS. Ch. Norfolk a.6 (614) (n. 59). The prior of the Gilbertine house at Fordham is named as one of the executors of the will, which suggests that the will refers to the parish church, not the priory.

[63] Henry C. Maxwell Lyte et al., eds., *Calendar of the Charter Rolls Preserved in the Public Record Office*, Vol. 1 (London: H.M. Stationery Office, 1903), 18.

[64] Thomas Hearne, *Joannis Lelandi Antiquarii de Rebvs Britannicis Collectanea. Cvm Thomae Hearnii Praefatione Notis et Indice Ad Editionem Primam. Accedunt de Rebvs Anglicanis Opscvla Varia e Diversis Codd. MSS. Descripta et Nunc Primum in Lucem Edita*, ed. John Leland, 2nd ed., Vol. 1 (London: Benj. White, 1774), 57.

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to the abbot of Hyde, 1 m. to perform John's anniversary, and 1 m. to purchase bread and shoes in alms on the same day.[65] These bequests are the extent of the will, and there are no other details that would clarify why John used this method to make his grant. It may simply be that because the grant was meant to ensure a payment for celebrating mass and distributing alms, a will seemed more appropriate than a charter. It may also be that the gift was made in his lifetime or that it was a substitution, in which the recipient would hold from the lord what the donor had held. That said, a post-mortem substitution might be problematic and subject to challenge by John's heir, and even problematic for Hyde Abbey (though less problematic than a subinfeudation)—an ecclesiastical tenant was always less eligible than a lay one since there were fewer incidents of tenure, and religious houses expected to acquire any land being alienated by their tenants. There may be some evidence that the abbey was concerned about this issue. In August 1241, Abbot Walter and the convent of Hyde confirmed the testator's bequest of his tenements in Donnington to the dean and chapter of Chichester, which presumably occurred after probate.[66] Maud, the testator's sister and heir, also confirmed his bequest of a tenement, which was presumably part of the bequest to Chichester; this is not dated, but placement in the cartulary indicates a date around 1241.[67] Earlier in the cartulary—again not dated but with placement indicating that it was before 1232—Maud likewise confirms her brother's general bequest to Chichester.[68] While it is not impossible that John wrote his will some 10 years before his death (in the period 1232 × 1241), it is more likely that this was done shortly before his death. Given John's assertion that he was of sound mind but infirm body when the will was made, it is probable that this was, if not a deathbed will, then certainly a will made in anticipation of death due to illness, and that he felt a need to clarify that he was *compos mentis* when the document was drawn up (perhaps an argument against the objection to deathbed wills as stated in *Glanvill*).

Dated around the same time as the will of John, son of John Cook, the will of Ivo le Moyne of Little Paxton in Grafham [Hunts.] (c. 1235–1240) also seems to be attempting to forestall dispute after the testator's death. Yet it is fascinating for several other reasons as well. In the will, Ivo bequeaths (*legavit*) a substantial amount of land (possibly his entire holding in the manor of Little Paxton) to the abbey of St Mary in Sawtry. The manor of Little Paxton was held as part of a knight's fee by the Earl of Huntingdon and afterward by Robert Bruce. In 1203, Roger de Trehamton brought an action of *mort d'ancestor* against Earl David of Huntingdon, but the manor had escheated to the earl, who had granted it to Philip le Moyne, his seneschal at the time.[69] We know that Ivo held some or all of Little Paxton in 1228 because he granted half a virgate to

[65] Peckham, *The Chartulary of the High Church*, no. 549.
[66] Peckham, *The Chartulary of the High Church*, no. 550.
[67] Peckham, *The Chartulary of the High Church*, no. 556.
[68] Peckham, *The Chartulary of the High Church*, no. 540.
[69] William Page et al., eds., *The Victoria History of the County of Huntingdon*, The Victoria History of the Counties of England (London: St. Catherine Press, 1926), 332–37.

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John, son of Hugh, in this year.[70] He seems to have died by 1240 since his nephew Gilbert, who succeeded him, granted half a knight's fee (except for a half-virgate and five cottages) in Little Paxton to sub-tenants.[71] In 1243, Gilbert granted the moiety to a second Philip le Moyne, who described himself as Ivo's nephew and heir in the following year.[72]

It is clear from other grants made that there was a long-standing connection between the tenants in Grafham and Sawtry Abbey. Therefore, Ivo's grant and subsequent will may not have been too out of the ordinary. That being said, Ivo's grant to the abbey is one of the earliest of those his family made, so he may have thought he needed to strengthen it with several documents. Ivo's will is concerned only with his land grant, and it confirms an earlier will we no longer have. First, the document states that this is the last will of Sir Ivo le Moyne, then, as is usual with testamentary forms, he bequeaths his body to God and to the church of St Mary at Sawtry for burial. Along with his body (*cum corpore*), he bequeathed:

> a messuage with a small wood and his entire tenement which he held in demesne in the village of Grafham in meadows and pasturage with the homage and rent of Serle Bargan and with all the other appurtenances excepting the large wood and the half virgate of land which Richard holds and excepting the rest of the homages, or £160 legal sterling, namely so that if his heirs wish to seize the tenement violently from the church or regain it by the law of the land, they will first pay the church of Sawtry the £160 by reason of this testament and thus receive the tenement from the church free of obligation.[73]

This is the only bequest made in the will; there are no personal items, no movable goods. The remainder of the document lists the witnesses and executors, establishing the identification of this document as a will. Ivo seems to be using the will to either record or confirm an earlier grant, and it is clear from the text that Ivo anticipated the grant would be challenged by his heirs. If a dispute

[70] George James Turner, *A Calendar of the Feet of Fines Relating to the County of Huntingdon, Levied in the King's Court from the Fifth Year of Richard I. to the End of the Reign of Elizabeth 1194–1603* (Cambridge: Cambridge Antiquarian Society, 1913), Case 92, File 5, no. 67.

He also appears twice in the Close Rolls from the reign of Henry III 1234–37, once in 1235 and again in 1236. In both instances, Walter de Deneford and his wife Sarah were attorning Ivo in a matter regarding a carucate or portion of a carucate in Grafham. *Calendar of the Close Rolls Preserved in the Public Record Office* (London: HMSO, 1892), Henry III 1234–37, nos. 195, 343.

[71] Turner, *A Calendar of the Feet of Fines*, Case 92, File 7, no. 123.

[72] Turner, *A Calendar of the Feet of Fines*, Case 92, File 8, no. 150; Turner, Case 92, File 8, no. 149; Page et al., *The Victoria History of the County of Huntingdon*, 332–37.

[73] British Library Ch. Add. 34036 (n. 60). "*Legavit etiam dicte ecclesie Beate Marie de Saltre cum corpore suo mesuagium cum grava et totum tenementum suum quod habuit in villa de Grafham in dominiis in pratis et pascuis cum humagio et redditu Serle Bargan et cum omnibus aliis pertinentiis excepto magno bosco et dimidia virgata terre quam Ricardus tenet et ceteris humagiis exceptis vel centum sexaginta li. legalium sterlingorum, ita videlicet quod si heredes sui voluerint dictum tenamentum a dicta ecclesia violenter auferre aut per legem terre repetere, solvant prius dicte ecclesie de Saltre dictas centum sexaginta li. ratione istius testamenti et sic recipiant dictum tenementum a dicta ecclesia liberum.*" Translation mine.

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arose after his death, his heirs could pay the abbey a lump sum and receive that portion of the tenement back. Although £160 seems a very steep price, it may not be entirely unreasonable.[74] It could also be that the £160 was not a buy-out price but a penal amount as a disincentive and quite possibly set up by agreement. Instead of making the land grant entirely unassailable (perhaps because he thought he could not?), Ivo provided his heirs with an option if they wanted to regain the land, pre-empting any legal action between them and the abbey. The arrangement suggests Ivo was aware of the unenforceability of bequests in the king's courts but also that he thought they could perhaps be enforced via agreements made so that the agreement (rather than the will) was enforceable.

The way in which Ivo frames the possible repurchase of the grant is also telling. Not only has he set a specific price on his portion of the tenement—a good idea, in case his heirs were minded to make a bad deal with the abbey—but he also notes that this is an option "if his heirs wish to carry off the said tenement violently from the same church or regain it by the law of the land." This indicates not only that he expects the heirs to challenge the grant but also that he anticipates two ways they might proceed with this. The latter, "by the law of the land," suggests that the heirs might try to regain the land through an action such as *mort d'ancestor*, *novel disseisin*, or an action of right, although this would only be successful if Ivo died seised of the land, not if he had already made a grant to the abbey and was merely confirming it with his will. The use of *violenter* is particularly interesting since, if the heirs did indeed try to reclaim the tenement without using a writ, the abbey might well have responded by making a claim of spoliation in the church courts, stating that the grant that had been made to them in the will—another reason for the case to fall under ecclesiastical jurisdiction—had been denied them. Whether or not the heirs might consider using force to regain the land is up for speculation, but the use of *violenter* as a legal fiction could at least be used to frame the case as one of spoliation.[75] So perhaps what Ivo is doing with this phrase is trying to account for several different forms of legal proceedings. The repurchase clause also suggests that Ivo is not confident that the grant will hold if challenged (although if the bequest were invalid, perhaps the £160 payment clause would be as well). If he were entirely sure of it, he would not have tried to confirm it by a testamentary document in the first place and would not have stated a specific monetary value. Another possibility is that this will was made in preparation for collusive litigation, wherein the parties would bring an action, for example, of *mort d'ancestor*, for the purpose of conveyancing.[76]

[74] At the dissolution of Sawtry Abbey, the parish church of St Mary, with its tithes, oblations, and rents from the rectory, was worth £8 a year. Of course, this is 300 years later, so the church was very likely worth less, but £160 may at least be in the ballpark. Page et al., *The Victoria History of the County of Huntingdon*, 212.

[75] See, in general, the classic work Francesco Ruffini, *L'actio spolii: studio storico-giuridico* (Torino: Bocca, 1889), but more recently Joshua C. Tate, "Ownership and Possession in the Early Common Law," *The American Journal of Legal History* 48, no. 3 (2006): 280–313.

[76] For an excellent discussion of this, see William Eves, "Collusive Litigation in the Early Years of the English Common Law: The Use of *Mort D'Ancestor* for Conveyancing Purposes c. 1198–1230," *The Journal of Legal History* 41, no. 3 (September 1, 2020): 227–56.

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The le Moyne family had previously engaged in lawsuits concerning the land in Little Paxton, so it is possible that a real dispute lay behind Ivo's will. Yet it is also possible that the oddness of the will could be because it was meant only to support a collusive action—this might also account for the fact that the land is the primary concern in the document.

The phrasing in the will may help to address this issue. Ivo seems to be indicating that he is bequeathing the land "or £160 sterling," the latter to be paid by his heirs if they should wish to have the land back. In the event that the heirs might indeed challenge it, he has given them an easy option: no lawsuits, no actions of any sort, just a simple purchase.[77] In doing so, he is attempting to guarantee the abbey at least something of the value, regardless of the outcome. Even if the heirs reclaimed the tenement, the abbey would not be left entirely without an income, and especially not with the legal fees. He has done his best to ensure his gift. Yet, if his heirs were entirely successful in their case, it still might not have been enough.

If Ivo had made an *inter vivos* grant, the heirs would not have been able to challenge it by this time.[78] Therefore, there was no danger that the abbey would lose the land. But there is no evidence that Ivo did this. It may simply be that Ivo wished to reiterate the grant as a type of security. Another option is that an *inter vivos* grant may not have allowed the heirs to purchase the land back if they wished. If this were the case, Ivo might have been using the will to provide them with the option to purchase the land, should they be unhappy with the grant. This possibility only makes sense if there was no way for the heirs to reclaim the land through legal action. Since a writ (and perhaps even the subsequent costs of litigation) would have been less expensive than the £160 required to purchase the estate from the abbey, this could be a far more cost-effective way to regain the land. But perhaps, as noted earlier, by making the money a bequest of sorts, he was trying to ensure that the abbey would receive something and attempting to bypass any legal action the heirs might take. Given that by this time, Ivo could grant his land to a third party without their consent, another option is that he may have been making the will with the interests of his heirs in mind as well by providing them with an option to regain the land if necessary. Still, his central worry seems to be that the grant would be challenged, perhaps because of an existing dispute (hence the mention of *violenter* and the potential penal clause). Yet, if

[77] This is similar to *retrait lignager*. If an owner tried to sell inherited land outside the family, it was subject to redemption or buy-back (*retrait*) by members of the family within certain degrees of kinship (the *lignage*). These family members were permitted to redeem the land for the same price offered by a potential buyer. Ivo's situation is not quite the same, as the abbey had not purchased the land from him, but it may be that he had this concept in mind. See Ch. 44 in Philippe de Beaumanoir, *The "Coutumes de Beauvaisis" of Philippe de Beaumanoir*, trans. Frank R. P. Akehurst (Philadelphia: University of Pennsylvania Press, 1992).

[78] In the thirteenth century, there was a decline in the idea that heirs had to consent to grants from their expected inheritance. By the time *Bracton* was written in c. 1235, the tenant could alienate his fee simple with no regard for the heir at all. Pollock and Maitland, *The History of English Law*, II, 311; Kaye, *Medieval English Conveyances*, 232–33; Hudson, *Land, Law, and Lordship*, 217–18.

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this was his primary concern, why did he choose a will as the means to execute his wishes?

The general conclusion that can be drawn from this body of documents (in light of the remaining corpus of surviving wills that do not concern land) is that while a large portion of testators did not try to use wills as a means to devise land, some thought that it might be possible. Of course, it made sense to conform to the legal framework provided by the royal courts since testators would presumably want their will to be uncontested and declared valid. Regardless of whether testators wished to make or confirm a grant of land, distribute chattels to specific people, or make a donation for their souls, it was in their best interest to make the will as clear and as unequivocal as possible since by the time it was put into effect, they would have no way to enforce it personally.[79]

From the evidence in the documents—a third of which contain attempts to bequeath land in some form—we can say that despite rules regarding livery of seisin, in the thirteenth century, individuals did sometimes attempt to dispose of land by will or by charters made on their deathbeds. By law, these acts had no validity, as they were imperfect transfers. Either the heir had to deliver seisin, or the donee had to be seised before the death of the donor. Nonetheless, the wills from the middle of the thirteenth century may reflect some uncertainty about the legal status of bequests of land, or even a change in attitudes. Indeed, Pollock and Maitland noted that there was a period in the middle of the thirteenth century in which there was a shift in vocabulary, which allowed donors more power to alienate land than they had enjoyed previously. The phrase making a gift "to him, his heirs, assigns and legatees," found as early as the reign of King John, apparently allowed for testamentary devise.[80] *Bracton* wavers on the topic, seemingly deciding in the end that grants of this sort were ineffectual, cutting this freedom short.[81] This power to devise by will was soon abandoned, but it was "memorable."[82] Pollock and Maitland state regarding the *forma doni* that "it is a mistake to suppose that our Common law starts with rigid, narrow rules about this matter," and suggest that in the thirteenth century, it was "elastic and liberal, loose, and vague."[83] Might it have been that testators in the thirteenth century had some belief that they could devise land by will in this period of uncertainty? If so, this might explain many of the attempts we have noted here. Alternately, even if the law itself was clear, a conveyance might achieve its aim if it went unchallenged. As Kaye notes, "From a conveyancer's point of view the most important questions to be asked, in respect of any medieval

[79] For a charming take on specters reinforcing bequests in the fourteenth century, see Tom Johnson, "Byland Revisited, or, Spectres of Inheritance," *Journal of Medieval History* 48, no. 4 (August 8, 2022): 439–56.

[80] For earlier instances of assigns, see Kaye, *Medieval English Conveyances*, 72–73 and Hudson, *Land, Law, and Lordship*, 124, 226.

[81] *Bracton*, II 69–70, II 149, and IV 282–83.

[82] Pollock and Maitland, *The History of English Law*, II, 26–27. 13 of the 27 wills in this study date to this period.

[83] Pollock and Maitland, *The History of English Law*, II, 27.

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transaction, are not only whether it was in accordance with the law, but whether it achieved its object."[84] Grants that were never challenged might still provide title, and, conversely, grants that seemed valid might fail to take effect if the correct procedures were not followed.

More broadly, these findings are indicative of how individuals sought to understand and use the legal world in which they lived—a legal world that was undergoing significant changes over the two centuries following the Conquest as the ecclesiastical and Common law worked out their jurisdictional boundaries and procedures. The interest of both legal systems in land transfers, donations, and deathbed arrangements meant that individuals had to navigate a path between the canon law's desire to protect church property, its jurisdiction over wills and breaches of faith, and its duty to care for those in their final hours, and the Common law's concerns regarding lines of inheritance, devise of land, and alienation. Planning for death meant making use of both traditions to some extent, balancing legal requirements, family interests, spiritual health, and personal wishes, all of which had to be done in a way that would remain as sound as possible when testators were no longer able to defend themselves at law. Of course, it is also possible that some testators or their scribes were simply ignorant of the law. After all, even today, it is possible for modern lawyers to advise their clients poorly or for laypeople to draw up their own wills with DIY "will writing kits." Although this is not a perfect analogy, these might seem baffling to future legal historians examining the form of the resulting wills, as they would not conform to the framework the historian expected.

These findings corroborate much of what we know about the courts at the time, that some people would try clever ways to get around rigid rules. It is possible that some bequests of land in wills are examples of individuals experimenting with legal devices to achieve the ends they wanted.[85] Alternately, it may be that these confines were more fluid than we might think and allowed for more flexibility than we might assume. The combination of testamentary devise and charters also indicates that individuals likely did not think in terms of strict jurisdictional lines between secular and ecclesiastical authority when trying to achieve their ends. What was important was attaining the desired outcome. So, why try to bequeath land by will? The most likely answer is that individuals could and would try whatever means, documents, or courts to ensure that their arrangements were carried out after death, regardless of whether or not these arrangements accorded to the letter of the law. If a bequest of land in a will was never challenged, then perhaps it would hold after all.

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[84] Kaye, *Medieval English Conveyances*, 26.

[85] John G. H. Hudson, *The Formation of the English Common Law: Law and Society in England from the Norman Conquest to Magna Carta*, Medieval World (New York: Longman, 1996), 228–29.

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