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# Warranty Obligations in Western France, 1040–1270

## Law, Custom, and Lordship

M. W. McHaffie

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*For Tegan*

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# Contents

# Abbreviations

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|---|---|
| ADML | Archives départementales de Maine-et-Loire |
| *AMDC* | *Archives de la Maison-Dieu de Châteaudun*, ed. A. de Belfort and L. Merlet |
| *Angers* | 'Formulae Andecavenses', ed. Zeumer |
| Artem | *Chartes originales antérieures à 1121 conservées en France* |
| Assé | 'Cartulaire d'Assé-le-Riboul', ed. B. de Broussillon |
| BB | *Coutumes et institutions de l'Anjou et du Maine antérieures au XVIe siècle*, 8 vols., ed. C.-J. Beautemps-Beaupré |
| *Beaum.* | *Cartulaire des Bénédictines de Beaumont-lès-Tours*, ed. A. Fleuret |
| Beaumanoir | Philippe de Beaumanoir, *Coutumes de Beauvaisis*, ed. A. Salmon |
| *BEC* | *Bibliothèque de l'École des Chartes* |
| *CLMC* | *Cartulaire de l'abbaye de la Madeleine de Châteaudun*, ed. L. Merlet and L. Jarry |
| *CN* | *Cartulaire noir de la cathédrale d'Angers*, ed. C. Urseau |
| *Cormery* | *Cartulaire de Cormery*, ed. J.-J. Bourassé |
| *Cout.AM* | *Coutumes d'Anjou et du Maine*, ed. C.-J. Beautemps-Beaupré |
| *Cout.TA* | *Coutume de Touraine-Anjou*, ed. P. Viollet |
| DEAF | *Dictionnaire étymologique de l'ancien français* |
| *DHJF* | *Dictionnaire historique des juristes français* |
| *DMLBS* | *Dictionary of Medieval Latin from British Sources* |
| Étab. | Les Établissements de Saint Louis, ed. P. Viollet |
| *FD* | Cartulaire *de l'abbaye cistercienne de Fontaine-Daniel*, ed. A. Grosse-Duperon and E. Gouvrion |
| *FON* | *Grand cartulaire de Fontevraud*, ed. J.-M. Bienvenu, R. Favreau, and G. Pons |
| *La Couture* | *Cartulaire des abbayes de Saint-Pierre de la Couture et de Saint-Pierre de Solesmes*, ed. les Bénédictines de Solesmes |

| | |
|---|---|
| *La Haye* | 'Cartulaire de la Haye-aux-Bonshommes', ed. M.P. de Farcy |
| 'La Roë' | Cartulaire de l'Abbaye de Notre Dame de la Roë |
| *Lib. Alb.* | *Chartularium insignis ecclesiae Cenomanensis quod dicitur Liber Albus capituli*, ed. R.-J.-F. Lottin |
| 'Livre blanc' | Livre blanc de Saint-Florent de Saumur |
| 'Livre noir' | Livre noir de Saint-Florent de Saumur |
| *LSM* | *Le livre des serfs de Marmoutier*, ed. Ch. de Grandmaison |
| *M. Manc.* | *Cartulaire Manceau de Marmoutier*, ed. E. Laurain |
| *Marculf* | 'Marculfi formulae', ed. Zeumer |
| *MB* | *Marmoutier. Cartulaire blésois*, ed. C. Métais |
| *MD* | *Cartulaire de Marmoutier pour le Dunois*, ed. É. Mabille |
| *MMA* | 'Cartae de rebus abbatiae majoris monasterii in Andegavia', ed. P. Marchegay |
| *MP* | *Cartulaire de Marmoutier pour le Perche*, ed. P. Barret |
| *MSDHB* | *Mémoires de la Société pour l'histoire du droit et des institutions des anciens pays bourguignons, comtois et romands* |
| *MV* | *Cartulaire de Marmoutier pour le Vendômois*, ed. C. A. de Trémault |
| Niermeyer | *Mediae Latinitatis Lexicon Minus*, ed. J. F. Niermeyer and C. van de Kieft |
| *Noyers* | *Cartulaire de l'abbaye de Noyers*, ed. C. Chevalier |
| OED | *Oxford English Dictionary* |
| *Olim* | *Les Olim, ou registres des arrêts rendus par la cour du roi*, vol. 1, ed. A. Beugnot |
| *P&P* | *Past and Present* |
| *RA* | 'Cartularium monasterii Beatae Mariae Andegavensis', ed. P. Marchegay |
| *RHDFE* | *Revue historique du droit français et étranger* |
| *SAA* | *Cartulaire de l'abbaye de Saint-Aubin d'Angers*, ed. B. de Broussillon |
| *SJH* | *Cartulaire de l'hôpital Saint-Jean d'Angers*, ed. C. Port |
| *SJT* | *Chartes de Saint-Julien de Tours*, ed. L.-J. Denis |
| *SL* | *Cartulaire du chapitre Saint-Laud d'Angers*, ed. A. Planchenault |
| *SPC* | *Cartulaire du chapitre royal de Saint-Pierre-de-la-Cour du Mans*, ed. M. d'Elbenne and L.-J. Denis |
| *SSE* | *Premier et Second livres des Cartulaires de l'abbaye Saint-Serge et Saint-Bach d'Angers*, ed. Y. Chauvin |
| *SVM* | *Cartulaire de l'abbaye de Saint-Vincent du Mans*, ed. R. Charles and M. d'Elbenne |
| *Tiron* | *Cartulaire de l'abbaye de la Sainte-Trinité de Tiron*, ed. L. Merlet |
| *Tours* | 'Formulae Turonenses', ed. Zeumer |

| | |
|---|---|
| *TV* | *Cartulaire de l'abbaye cardinale de la Trinité de Vendôme*, ed. C. Métais |
| *Villeloin* | *Cartulaire de l'abbaye de Saint-Sauveur de Villeloin*, ed. L.-J. Denis |
| *Vivoin* | *Cartulaire du prieuré de Saint-Hippolyte de Vivoin et de ses annexes*, ed. L.-J. Denis |
| Zeumer | *Formulae Merowingici et Karolini aevi*, ed. K. Zeumer |

CHAPTER 1

# Introduction

**Abstract** The introduction makes three points to frame this study. First, French legal-historical scholarship views warranty in terms of the *garantie d'éviction*, a contractual obligation that remains deeply indebted to terms and concepts drawn from Roman law. Second, warranty has also viewed largely as a thirteenth-century development, thought to reflect the emergence of the individual's right to alienate property with relative freedom from restrictions imposed by kin and/or lords. Third, the role of lordship in giving shape to warranty has been severely neglected in French legal-historical scholarship, which differs sharply from how scholarship examining warranty in the Anglo-Norman realm has approached the subject. I lay out therefore the basic questions that run throughout the study, which ultimately concern how we understand the causality of legal change in the central Middle Ages.

**Keywords** Custom • law • warranty of land • *garanties d'éviction* • Common Law • Roman law • lordship • France • Anjou

This book examines the nature of warranty obligations in western France during the central Middle Ages, and uses them as a case-study to consider larger questions about custom, lordship, and legal change. Warranty refers to the commitments undertaken by an individual when alienating property to support the alienee against challenges to the transferred property.



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Evidence for such commitments first appears in western French charters from the 1040s and 1050s. Whilst the frequency with which warranty obligations were explicitly promised in the charters should not be overstated, we nevertheless have from the mid-eleventh century a more or less continuous documentary tradition that continues well into the thirteenth century and beyond. Added to this is an abundant corpus of case material, also surviving primarily in charters (and with a particular density for the period *c.*1050–*c.*1150), which shows how warranty could work in practice. Further case evidence is found in the records of the French royal court, the *Parlement*, which start from 1254 and help flesh out our view of thirteenth-century warranty. Finally, western France also supplies an early *coutumier*, the anonymous 1246 *Coutumes d'Anjou et Maine*, which stands at the head of a long tradition of producing vernacular legal literature of customary law in the region. Warranty unsurprisingly features in this literary tradition, thus rounding out our understanding of warranty obligations in western France.

Despite a wealth of evidence, the history of warranty in western France from the 1040s through to the 1270s has yet to be written. The immediate goal of the present study, therefore, is to provide an in-depth study of a neglected but important component of legal culture. In so doing, we shall reconsider some of the key themes of the legal history of France during the central Middle Ages. Chief among these are the nature of custom in this period, the relationship between political structures and legal culture, and the role played by Roman law as a key driver of legal change. The central contention of this book is that approaching warranty obligations from the *idées reçues* about custom, political structures, and the importance of Roman law have led to a fundamental misunderstanding of warranty, both in definitional terms and in terms of how we explain developments in the practice of warranty. In the argument that will unfold, we shall see that the history of warranty obligations, in western France at least, is inseparable from that of lordship, of the *seigneurie*. Teasing out how these two histories are intertwined, and reflecting on what this can tell us about law and custom during this period, constitute the main themes of this study.

* * *

Known in modern scholarship as *garanties contre l'éviction*, warranty in France has received only limited scholarly attention. Usually discussed in

the context of sales, warranty has been approached as an obligation incurred by a vendor to protect his or her purchasers against lawful eviction by third parties.[1] Much of the commentary given to the subject remains descriptive, seeking to reconstruct the scope of warranty on the basis of the diplomatic formulas found in charters and which express such commitments—primarily those surviving from the thirteenth century onwards.[2] Far less comment has been directed towards interpretative questions about warranty's origins or how it changed over time. Despite this, two larger narratives have nevertheless shaped historians' understanding of warranty: (1) the influence of Roman law and (2) the growth of individual proprietary rights of alienation.

The terms and categories of Roman law have provided the basic analytical framework through which scholars have approached warranty. The foundations here centre on three terms: eviction (*evictio*), that is, when a third party claims and establishes in court ownership of something from a purchaser; stipulations (*stipulationes*), verbal commitments given by the vendor to protect the purchaser against eviction; and the actions and remedies available to the purchaser against the vendor (known in such circumstances as the *auctor*) in the case of eviction.[3] Of the stipulations that sellers might make, these included, among others, the simple agreements to ensure the buyer's peaceful enjoyment of the thing that had been sold (the *stipulatio evictionis*) or the agreement to repay double the payment price to the evicted purchasers (the *stipulatio duplae*). More broadly,

[1] Paul Ourliac and Jehan de Malafosse, *Histoire du droit privé*, vol. 1, 2nd ed. (Paris, 1969 [orig. 1957]), p. 286 note that *garanties* affect all transfers of property, but most commentary has focused on sales.

[2] See, for example, Robert Floren, *La vente immobilière en Provence au Moyen-Âge et sous l'ancien régime* (Aix-en-Provence, 1956), pp. 71–3; François Pontenay de Fontette, *Recherches sur la pratique de la vente immobilière dans la région parisienne au moyen âge (fin Xe–début XIVe siècle)* (Paris, 1957), pp. 91–101; Mireille Castaing-Sicard, *Les contrats dans le très ancien droit toulousain (Xe–XIIIe siècle)* (Toulouse, 1959), esp. pp. 87–92; François Gilliard, 'La garantie du chef d'éviction dans le pays de Vaud (du IXe au XVe siècle)', *MSHDB*, 21 (1960), pp. 7–23; Jean Gay, 'Remarques sur l'évolution de la pratique contractuelle en Champagne méridionale (XIIe–XIVe siècle)', *MSHDB*, 54 (1997), esp. pp. 30–43.

[3] Adolf Berger, *Encylopedic Dictionary of Roman Law* (Philadelphia, 1953), s.vv. 'auctor', 'evictio', 'stipulatio'. For useful overviews of the Roman law of contract (and sale, in particular), see, *inter alia*, Alan Watson, *Roman Law and Comparative Law* (Athens, GA, 1991), pp. 53–68; Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford, 1996 [orig. 1990]), pp. 293–300; George Mousourakis, *Roman Law and the Origins of the Civil Law Tradition* (Cham, 2015), pp. 131–8; and Paul du Plessis, *Borkowski's Textbook on Roman Law*, 6th edn. (Oxford, 2020), pp. 253–320.

based on the organisational schema of Roman law offered by the *Corpus* of Justinian, *stipulationes* are placed amidst discussion of obligations, which naturally includes contractual obligations linked to sale (*emptio-venditio*) and the risk of *evictio*. Warranty/*garantie* has, accordingly, been viewed through the above terms and categories, even though the word 'warranty' has no basis in the texts of Roman law. Even so, numerous jurists since at least the sixteenth century have assimilated *garantie* into this Romanist framework. In the influential *Glossaire de droit français* (1704), for example, Eusèbe de Laurière's edition of François Ragueau's 1583 *Indice des droits royaux et seigneuriaux*, the words for warranty were explicitly framed in terms from Roman law.[4] *Le garent* (warrantor) was defined as the Roman law *auctor*; and under the entry for *garantir* (to warrant), the *Glossaire* quotes Jacques Cujas (Ragueau was Cujas' student and succeeded him as professor of law at Bourges): 'this ancient Germanic word, *guarent*, signifies the *auctor* who is liable against eviction, and who indemnifies the eviction'.[5] The modern *garantie d'éviction* is itself a juristic portmanteau, the by-product of efforts at integrating warranty into the framework of Roman law.

Approaching warranty/*garantie* through a Romanist lens has had practical consequences for how many scholars have dealt with medieval evidence of warranty commitments. In methodological terms, discussion has largely focused on the degree of convergence or divergence with Roman law by tracing the use of terms like *auctor*, *evictio*, or *stipulatio*. For example, the phrase *stipulatio subnixa*, found in the formularies from the early Middle Ages, such as the *Formulary of Angers*, *Formulary of Marculf*, and the *Formulary of Tours*, as well as in charters from France (and elsewhere) until (roughly) the late tenth century, has been taken by some as

[4] On de Laurière, an enterprising editor of texts, see Jean-Louis Thireau, 'Un historien du droit au grand siècle: Eusèbe-Jacob de Laurière', in J. Poumarède (ed.), *Histoire de l'histoire du droit* (Toulouse, 2006), pp. 47–59.

[5] François Ragueau, *Glossaire du droit français*, ed. E. de Laurière (Geneva, 1969 [orig. 1704]), s.vv. 'garent', 'garentir'; note also Claude-Joseph de Ferrière, *Dictionnaire de droit et de pratique*…, vol. 1, new edn (Paris, 1771), pp. 685–93, which discusses *garant* and *garantie* largely (though not exclusively) in connection with sales and evictions. De Ferrière's *Dictionnaire* was an edited and retitled version of the *Introduction à la pratique*, written by his father (Claude de Ferrière) in 1674. On both figures, see Jacqueline Moreau-David, 'Claude de Ferrière' and 'Claude-Joseph de Ferrière', in *DHJF*, pp. 423–5. For a brief discussion of the genre of legal dictionaries, see Jean-Marie Carbasse, '*De verborum significatione*. Quelques jalons pour une histoire des vocabulaires juridiques', *Droits*, 39, no. 1 (2004), pp. 3–16.

important evidence for the survival of Roman law *stipulationes* which sought to protect purchasers against eviction.[6] Likewise, the resurgence of similar terminology in thirteenth-century documents has, unsurprisingly, been tied to the renewed influence of Roman law on legal culture, though opinions have differed over whether thirteenth-century *stipulationes* reflect genuine legal change in how obligations were conceptualised, or if such linguistic changes were mainly cosmetic.[7] Roman law, and the *garantie d'éviction* that early modern and later jurists fabricated out of it, has nevertheless supplied the benchmark when assessing medieval evidence for warranty.[8] One of the principal interpretative questions has centred on the extent of Roman law's influence, or 'penetration', upon the ideas and practices of warranty during the central Middle Ages, an approach that often presupposes a sharp disjuncture between contract in customary law

[6] For the formularies, see, *inter alia*: *Angers*, nos. 27 and 56; *Marculf*, II, nos. 1, 3, 4, 6, 19, 22, et al.; *Tours*, nos. 1b, 4, 7, 12, 14, et al. Note also the references in the formularies to the *stipulatio duplae*, the penalty to pay double the payment price if the warrantor fails to defend the purchaser's title: *Angers*, nos. 38, 45, 60; *Marculf*, II, no. 20; *Tours*, no. 13. The essential starting point on the formularies is now Alice Rio, *Legal Practice and the Written Word in the Early Middle Ages: Frankish Formulae, c. 500–1000* (Cambridge, 2009). For the *stipulationes* in charters, see, from varying perspectives, Jean-Marie Pardessus, 'De la formule *Cum stipulatione subnexa*, qui se trouve dans un grand nombre de chartes', *BEC*, 2 (1841), pp. 425–36; Jacques Flach, 'Le droit romain dans le chartes du IXe au XIe siècle', *Mélanges Fitting*, vol. I (1907), 3–39; Jean Gaudemet, 'Le droit romain dans le pratique et chez les docteurs aux XIe et XIIe siècles', *Cahiers de civilisation médiévale* 31–32 (1965), pp. 365–80; idem, 'Survivances romaines dans le droit de la monarchie franque du Vème au Xème siècle', *Tijdschrift voor Rechtsgeschiedenis*, 23, no. 2 (1955), pp. 149–206; Paul Ourliac, 'La tradition romaine dans les actes toulousains des Xe et XIe siècles', *RHDFE*, fourth ser., 60, no. 4 (1982), pp. 577–88; and Maurizio Lupoi, *The Origins of the European Legal Order*, trans. Adrian Belton (Cambridge, 2000), pp. 486–93. Note also Osamu Kano, 'Procès fictif, droit romain et valeur de l'acte royal à l'époque mérovingienne', *BEC*, 165, no. 2 (2007), pp. 329–53, for the argument that Merovingian fictive trials represented attempts on the part of transferees to get their *auctor* (i.e., warrantor) into court to acknowledge a transfer.

[7] Gilliard, 'La garantie du chef d'éviction', esp. pp. 19–20 and Gay, 'Remarques sur l'évolution de la pratique contactuelle', p. 31 are cautious on this point; cf. Bernard Vigneron, 'La vente dans le mâconnais du IXe au XIIIe siècle', *RHDFE*, fourth ser., 36 (1959), esp. p. 47, for whom the 'résurrection du droit romain' is vital.

[8] Note Guy Chevrier, 'Les étapes de la pénétration du droit romain dans le comté de Bourgogne', *MSDHB*, 19 (1957), pp. 38, 41 for comments that the appearance of terms like *garantia* and *garentire* in earlier thirteenth-century Burgundian charters signalled only an approximation of the 'Roman mechanism of the *garantie contre l'éviction*' (p. 39), as if the language of warranty/*garantie* itself was a Roman institution; Chevrier further notes that by 1290, 'la garantie en matière de vente est appelée *correctement* garantie d'éviction' (p. 43, emphasis added).

versus Roman contract law.[9] In this respect, *garanties d'éviction* represent a microcosm of much larger (and acrimonious) debates over the relationship between Roman law and so-called *ancien droit français* or *droit coutumier*.[10]

Warranty has also been linked to another grand narrative, this one about the emergence of individual proprietary rights of alienation. Put simply, this narrative centres on the gradual liberation of the individual from restrictions upon the alienation of property imposed by kin and/or lords.[11] To take kin-based restrictions on alienation: familial interests in property required the individual to obtain the consent of his or her family members whenever making an alienation, a practice known as the *laudatio parentum*. The *laudatio*, so the argument goes, effectively retarded the development of warranty because alienors could not effectively warrant transfers of property against the rights of family members, particularly

[9] For example, Henri Beaune, *Droit coutumier français. Les contrats* (Paris and Lyon, 1889), pp. 187–8 made a substantive distinction between the *garanties* of the 'la période féodale', that is, the 'simple exception' in cases where an individual was accused of stealing moveables, on the one hand, and the *garantie du vendeur*, that is, 'ce que le Romains appelaient l'*auctor*, *qui de evictione tenetur*', on the other. The former, according to Beaune, 'ne rentre pas précisément dans notre sujet [of *garantie d'éviction*]'. The differentiation between contract in customary law versus Roman law has remained a theme in much scholarship from Beaune and Adhémar Esmein onwards: see, for example, Adhémar Esmein, *Études sur les contrats dans le très-ancien droit français* (Paris, 1883); Gabriel Lepointe and Robert Monier, *Les obligations en droit romain et dans l'ancien droit français* (Paris, 1954); and A.E.V. Giffard and Robert Villers, *Droit romain et ancien droit français: les obligations*, 4th edn. (Paris, 1976).

[10] See here, with extensive references, André Castaldo, 'Pouvoir royal, droit savant et droit commun coutumier dans la France du moyen âge. À propos de vues nouvelles I: Le roi est-il le maître du droit privé, via le droit romain?', *Droits*, 46, no. 2 (2007), 117–58 and idem, 'Pouvoir royal, droit savant et droit commun coutumier dans la France du moyen âge. À propos de vues nouvelles II: Le droit romain est-il le droit commun', *Droits*, 47, no. 1 (2008), 173–248; see the recent review of this debate in Nicolas Warembourg, 'La notion de "droit commun" dans l'Ancienne France coutumière: Point d'étape', *Glossae. European Journal of Legal History*, 13 (2016), 670–84.

[11] Note François Olivier-Martin's comment on the emergence of thirteenth-century warranties made 'according to the usages and customs of France' in the Paris region: 'La pratique de début du XIIIe siècle, qui vient en somme d'obtenir la liberté des aliénations, aussi bien à l'encontre des seigneurs que de la famille, s'empresse de consacrer cette liberté par une formule de garantie qui émerge ainsi tout naturellement la première, comme coutume générale, et que l'on répète à satiété', in his *Histoire de la coutume de la prévôté et vicomté de Paris*, vol. 1 (Paris, 1922), pp. 27–8. Philippe Godding, *Le droit privé dans les Pays-Bas méridionaux du XIIe au XVIIIe siècle* (Brussels, 1987), p. 456 viewed warranty of sales primarily as a protection against claims from the vendor's kin.

against their living and/or unborn heirs. The ambiguities surrounding questions of when and by whom was familial consent necessary at the occasion of property transfers meant that the rights of kin in practice often outweighed the capacity of the individual to undertake binding commitments to protect an alienee against such rights. Only with the apparent decline of the *laudatio* did people acquire the ability to impose binding obligations on their heirs that were henceforth enforceable in court. Growing out of the *laudatio*, moreover, were supposedly new legal rules designed to protect familial interests, providing greater clarity regarding the rights of individuals vis-à-vis their kin: the *retrait lignager*, or the right of family members to buy back (redeem) property alienated out of the patrimony; and the *réserve coutumière*, a set amount (*quotité*) of the patrimony destined for heirs and treated as inalienable.[12] Seigneurial restrictions on alienation, although far less studied, have been thought to follow a similar trajectory. Initially, property held from a lord could only be alienated with the lord's express permission; over the twelfth and thirteenth centuries, seigneurial consents were gradually replaced with nominal payments made to the lord upon the act alienation (the *quint denier* and the *lods et ventes*), with explicit consent only required for certain types of

[12] The points of departure for this larger narrative are: Louis Falletti, *Le retrait lignager en droit coutumier français* (Paris, 1923) and Jean de Laplanche, *La réserve coutumière dans l'ancien droit français* (Paris, 1925). The essential study on the *laudatio parentum* is Stephen D. White, *Custom, Kinship, and Gifts to Saints: The* Laudatio parentum *in Western France, 1050-1150* (Chapel Hill, 1988), who critiques much earlier writing on the purposes and significance of the *laudatio*, but who largely follows these authors in viewing warranty as a thirteenth-century development: see ibid., pp. 202–3; and see too Charles Donahue Jr., 'What Causes Fundamental Legal Ideas? Marital Property in England and France in the Thirteenth Century', *Michigan Law Review*, 78, no. 1 (1979), pp. 59–88, esp. pp. 75–8. For a convincing recent critique of Falletti and Laplanche, see Jean-Louis Thireau, 'Faculté de disposer et protection de la famille dans le très ancien droit coutumier français (Xe–XIIIe siècles)', *RHDFE*, 87, no. 3 (2009), pp. 337–63. Thireau's critique effectively demolishes the evolutionary schema whereby the *laudatio* is treated as the *fons* and *origo* of the *retrait* and *réserve*: there is evidence for all three practices co-existing from as early as the eleventh century, and the *laudatio* continued to be practised well into the thirteenth century. See also Jean-Louis Thireau, 'Les origines de la réserve héréditaire dans les coutumes du groupe angevin', *RHDFE*, 64, no. 3 (1986), pp. 351–88, and, for important comparative evidence, Paul Ourliac, 'Le retrait lignager dans le Sud-Ouest de la France', *RHDFE*, 30 (1952), pp. 328–55.

alienation to ecclesiastical institutions.[13] The development of warranty, for some scholars at least, thus signals the relaxation of earlier restrictions on alienation, with the turning point falling in the thirteenth century.

The interpretative frameworks just outlined, it must be stressed, do have foundations in the evidence. For a start, in quantitative terms, warranty clauses were included more regularly in thirteenth-century charters compared to earlier documents. Numbers alone can thus give the impression that the early decades of the thirteenth century constituted a watershed moment in warranty's history, even though the relationship between earlier warranty clauses and their post-1200 counterparts remains largely unexplored.[14] Likewise, it is from the mid-thirteenth century that the *coutumiers* start to survive, presenting an overview of property law within the so-called *pays de droit coutumier* against which the charter evidence can be evaluated and interpreted. The *coutumiers* do clarify what the individual can and cannot alienate, identifying the *quotité* and providing the rules to theoretically govern redemptions—the *retrait lignager* and the *retrait féodal*. Such texts reveal a delicate balance between individual alienatory rights and protections for the interests of others, whether family or lords. And of course the revival of Roman law and its importance in stimulating the emergence of the *ius commune* needs little comment nowadays: the influence of Roman law is conspicuous in thirteenth-century charters and *coutumiers* (even if the significance of this influence is less obvious), to say nothing of the juristic and exegetical works produced out of Paris and Orléans.

* * *

And yet, much remains left out of our current frameworks for understanding warranty in France, chief of which concerns the contribution made by the structures and practices of lordship to the subject's history. In this respect, the history of *garanties* diverges sharply from the approach to warranty that has developed within the historiography of the early English

[13] For the *quint denier*, traditionally seen as payable to the lord upon the sale of a fief, see François Olivier-Martin, *Histoire du droit français des origines à la Révolution* (Paris, 1948), p. 265; for the *lods et ventes*, payable to the lord upon the sale of *censive* (i.e., a tenement owing rent (the *cens*), but not a fief), see ibid., p. 267.

[14] White, *Custom, Kinship, and Gifts to Saints*, pp. 53, 203 and Thireau, 'Faculté de disposer', p. 358 have both acknowledged this earlier evidence, though have not explored its relationship to later warranty clauses.

Common Law. Here, warranty has been treated as an integral component of lordship, describing the relationship between lord and tenant from the tenant's perspective.[15] In return for the performance of services, a lord 'seised' the tenant, that is, put him in seisin with respect to the tenement concerned. The tenant duly seised thus enjoyed his lord's warranty, which amounted to the lord's promise to protect the tenant's seisin from any outside challenge. If the lord's protection failed, then the tenant acquired a claim to receive an exchange (the *excambium*) from the lord in compensation for lost tenement. The chronology whereby warranty and lordship had become so closely integrated remains tricky, not least because ideas and practices almost certainly antedate the appearance of those ideas in our evidence.[16] The uncertainties of Stephen's reign in England probably stimulated the writing down of more warranty clauses in charters, but the process of the coming together of lordship and warranty seems to harken back to the changes effected by the Norman Conquest and settlement.[17] At any rate, by the end of the twelfth century, warranty had become the standard method for portraying tenant right. Much of the interest within English legal history has been on how to characterise the nature of such 'rights' and how to understand the transformations effected upon them by the increasing centralisation of royal justice, especially from the 1160s onwards. The debates surrounding these issues are very complex and of less immediate concern here; what matters is the close link between lordship and warranty of land within the English legal historiographical tradition.

The English approach to 'warranty of land' thus foregrounds the realities of lordship, and in this respect it diverges from the French *garantie*

[15] The seigneurial dimension of warranty was central to S.F.C. Milsom, *The Legal Framework of English Feudalism* (Cambridge, 1976), esp. pp. 42–4, 126–32; the seminal discussion remains Paul Hyams, 'Warranty and Good Lordship in Twelfth-Century England', *Law and History Review*, 5, no. 2 (1987), pp. 437–503; see also John Hudson, *Land, Law, and Lordship in Anglo-Norman England* (Oxford, 1994), pp. 51–8; idem, *The Oxford History of the Laws of England, Volume II: 871–1216* (Oxford, 2012), pp. 594–8; and Jonathan Rose, *Maintenance in Medieval England* (Cambridge, 2017), esp. pp. 13–29. The diplomatic of later English warranty clauses in the twelfth and thirteenth centuries is covered in J.M. Kaye, *Medieval English Conveyances* (Cambridge, 2009), pp. 46–58.

[16] Hyams, 'Warranty and Good Lordship', p. 445 emphasises that warranty was not born out of seigneurial relationships, and its origins may lie in chattel markets.

[17] On the potential impetus provided by Stephen's reign, see Hudson, *Land, Law, and Lordship*, p. 55; and David Postles, 'Gifts in Frankalmoign, Warranty of Land, and Feudal Society', *The Cambridge Law Journal*, 50, no. 2 (1991), 330–46.

*d'éviction*, a concept indebted to Roman law, as we have seen. We should not, of course, exaggerate the differences. Warranty/*garantie* both represent protections given to someone from outside challenge, and both may entail some form of compensatory element. That said, the role of lordship in the history of warranty/*garantie* marks a serious point of contrast, and shapes how each historiographical tradition has dealt with matters of definition, chronology, and change. Warranty and *garantie* have each been approached with an eye to looking at very different types of social relationship: that between lord-tenant on the one hand, and vendor-purchaser on the other. Where the former imagines a world of personal relations of domination and subordination, the latter envisions the social interactions appropriate to the marketplace. Each type of relationship envisages varying degrees of intensity, of emotional value, and of duration, all of which come into play when assessing *what* exactly warranty was. Even though each tradition sets out to explain an ostensibly similar legal phenomenon sharing the common language of warranty, the end results are strikingly different: based on their historiographies, warranty of land and *garanties d'éviction* have very little in common.

This brief historiographical comparison can help us identify some of the underlying assumptions that have framed different approaches to a subject like warranty, and in so doing, help us explore new interpretative paths when looking at warranty in western France. These new paths, it must be stressed, complement and intersect with existing ones: they do not replace them. As noted, the ways in which the history of *garanties d'éviction* has been told have foundations in the evidence. Similarly, the type of seigneurial relationships described by Milsom (and others) has been subject to severe criticism, and we cannot apply such models unreservedly to our evidence.[18] But we need not look for monocausal or unilinear explanations for the development of legal phenomena. Precisely because it stands at the intersection of two divergent legal-historiographical traditions, each

[18] On a European scale, see Susan Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted* (Oxford, 1994); for critiques of Milsom's view of lordship in particular, see John Hudson, 'Milsom's Legal Structure: Interpreting Twelfth-Century Law', *Legal History Review*, 59 (1991), pp. 47–66 and idem, *Land, Law, and Lordship*. For discussion of Milsom's approach in the context of western France, see Stephen D. White, 'Inheritances and Legal Arguments in Western France, 1050-1150', *Traditio*, vol. 43 (1987), pp. 55–103.

resting on its own presuppositions, warranty represents an ideal case-study when examining the multiple causalities driving legal change in the central Middle Ages. Approaching warranty in search of either the *garanties d'éviction* of the Romanist tradition or warranty of land in the Common Law tradition risks sacrificing significant features of the evidence in service of the definition itself.[19] In attempting to recapture something of what has been left out of the history of warranty in western France, at least, we can build a more composite, nuanced, and pluralistic account of legal development—at least for one specific topic. And underlying such a task will be a return to the simple but fundamental questions of *what* warranty is, *how* it develops, and *why* it develops the way it does.

This book therefore reconsiders our stories of legal change during the central Middle Ages by using warranty as a case-study. Our story begins in the 1040s, with the first appearance of warranty clauses in the charters from western France; we shall follow this storyline into the 1270s, with the redaction of the immensely popular *Établissements de Saint Louis*, which included a version of the earlier 1246 *Coutumes d'Anjou et Maine*. This chronology lets us transcend the boundaries of traditional periodisation and encourages us to search for a narrative—or narratives—that can take us from the 1040s into the later thirteenth century. In so doing, we shall need to evaluate the capacity of existing interpretations to make sense of our evidence. Of particular interest will be the influence of Roman law and whether the framework of *garanties d'éviction*, and its Romanist roots, remains the most appropriate one when studying warranty. Equally, we shall question how far the development of warranty can or should be associated with the emergence of individual alienatory powers, especially those thought to develop out of changes in family structure. By reconsidering our current explanatory frameworks, this book will emphasise the structures and practices of lordship: within the history of warranty, questions of definition and causality are inseparable from those of lordship. Notoriously difficult to define, I shall take lordship in a broad sense, meaning relations of domination and subordination, along with the practices to which such

[19] Note here the apposite comments in David Deroussin, 'Penser l'ancien droit des contrats', in Xavier Prévost and Nicolas Laurent-Bonne (eds.), *Penser l'ancien droit privé. Regards croisés sur les méthodes des juristes (II)* (Paris, 2018), pp. 133–56.

relations gave rise.[20] Such an approach emphasises the multivalence of lordship, reflecting the fact that it meant different things to different people at different times. A large part of our story will address this multivalence and its role in legal change. Equally, it is only through embracing a wide perspective that looks at lordship in its manifold guises that we can start to unpick historiographical assumptions and identify a set of practices and vocabulary that speak to the coherence of warranty as concept. Whether the grand political stage of a count or duke attempting to warrant gifts made to his followers, or the small-scale landholder attempting to secure the permanence of his or her alienations, the range of practices around warranty all reflect a fundamental legal idea whose evolution owes much to the sheer breadth of social contexts in which it was applied.

The regional focus of this study falls on western France, with particular attention given to the counties of Anjou, Maine, Touraine, and the Vendômois, along with occasional ventures into the Chartrain, the Dunois,

[20] Approaches to lordship, especially in the eleventh century, have often been tied into larger, highly polarised debates about a so-called feudal transformation or *mutation féodale*, a period of supposedly rapid and violent social change in the decades around the year 1000. The literature is vast, but for recent contributions, all partisan of course, see: Dominique Barthélemy, *La mutation féodale de l'an mil a-t-elle eu lieu? Servage et chevalerie dans la France des Xe et XIe siècles* (Paris, 1997); Thomas N. Bisson, *The Crisis of the Twelfth Century: Power, Lordship, and the Origins of European Government* (Princeton, 2009), which expands on this same author's earlier article, 'The "Feudal Revolution"', *P&P*, 142, no. 1 (1994), pp. 6–42; Charles West, *Reframing the Feudal Revolution: Political and Social Transformation between Marne and Moselle, c.800–c.1100* (Cambridge, 2013); Alessio Fiore, *The Seigneurial Transformation: Power Structures and Political Communication in the Countryside of Central and Northern Italy, 1080–1130*, trans. Sergio Knipe (Oxford, 2020); Laura Viaut, *Quand le vent se lève. Essai sur la crise institutionnelle et juridique de l'an mille* (Dijon, 2021). As with any such debate, both sides have merit. Equally important when thinking about lordship, both as a set of practices and within different national historiographical traditions, are the essays collected in Monique Bourin and Pascual Martínez Sopena (eds.), *Pour une anthropologie du prélèvement seigneurial dans les campagnes médiévales (XIe–XIVe siècles). Réalités et représentations paysannes* (Paris, 2004). Particularly helpful for my own thinking on the subject are: the essays collected in Stephen D. White, *Re-Thinking Kinship and Feudalism in Early Medieval Europe* (Aldershot, 2005); Simon Teuscher, *Lord's Rights and Peasant Stories: Writing and the Formation of Tradition in the Later Middle Ages*, trans. Philip Grace (Philadelphia, 2012 [orig. 2007]); Otto Brunner, *Land and Lordship: Structures of Governance in Medieval Austria*, trans. from 4th ed. by Howard Kaminsky and James Van Horn Melton (Philadelphia, 1992); and from a different disciplinary perspective, James C. Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (New Haven and London, 1985) and idem, *Domination and the Arts of Resistance: Hidden Transcripts* (New Haven, 1990).

the Perche, and the Thouarsais.[21] A wide geographical scope is justified in part by the need to gather a sufficient quantity of evidence with which to study warranty. But it is further justified by the fact that many of the major landholders and religious houses appearing throughout this study had proprietary interests and personal and/or familial relationships that paid little respect for the precise geographical boundaries of individual counties. Furthermore, the region of western France is served by an immensely rich source base. Part of this evidentiary base comprises the thousands of charters produced largely by ecclesiastics, many of which record conflicts and court cases and have, accordingly, been well studied by scholars interested in the formal and informal aspects of disputing.[22] Moreover, western France in general, and Anjou in particular, are thought to have developed a relatively precocious shared legal identity from at least the mid-eleventh century that was centred on regional customs.[23] By the mid-thirteenth century, authors from this region were producing some of the earliest

[21] A good, recent starting point for the history of the region can be found in Jean-Michel Matz and Noël-Yves Tonnerre, *L'Anjou des princes, fin IXe–fin XVe siècle* (Paris, 2017), with further references; Olivier Guillot, *Le comte d'Anjou et son entourage au XIe siècle*, 2 vols. (Paris, 1972) remains essential for the early period.

[22] For studies looking at disputing in western France specifically, see Stephen D. White, *Feuding and Peace-Making in Eleventh-Century France* (Aldershot, 2005), which collects many of White's pioneering essays in this field; Dominique Barthélemy, *La société dans le comté de Vendôme de l'an mil au XIVe siècle* (Paris, 1993), pp. 652–80; Richard E. Barton, *Lordship in the County of Maine, c.890–1160* (Woodbridge, 2004), pp. 175–96; Henk Teunis, *The Appeal to the Original Status: Social Justice in Anjou in the Eleventh Century* (Hilversum, 2006). Bruno Lemesle, *Conflits et justice au Moyen Âge. Normes, loi et résolution des conflits en Anjou aux XIe et XIIe siècles* (Paris, 2008) provides an important and balanced interpretation of disputing in the region.

[23] See, for example, Jean Yver, 'Les caractères originaux du groupe de coutumes de l'ouest de la France', *RHDFE*, 29 (1952), pp. 18–79; Olivier Guillot, 'Sur la naissance de la coutume en Anjou au XIe siècle', in *Droit romain,* jus civile, *et droit français*, ed. Jacques Krynen (Toulouse, 1999), pp. 273–96; note too Jean-Louis Thireau, 'La territorialité des coutumes au Moyen Âge', in *Auctoritas. Mélanges offerts au Pr. Olivier Guillot* (Paris, 2006), pp. 453–65, who suggests (less convincingly, in my view) that the formation of regional custom may have occurred in western France even earlier than the eleventh century. One of the key questions here centres on how far the formation of regional customs depends on more or less strong structures of central political authority (like the counts of Anjou, dukes of Normandy, etc.). For an excellent, recent exploration of such issues in the context of the vicomtes of Thouars, see Luc Guéraud, *Contribution à l'étude du processus coutumier au Moyen Âge: le viage en Poitou* (Clermont-Ferrand, 2008).

surviving vernacular law books (the *coutumiers*). The *Coutumes d'Anjou et Maine* can be traced from its first redaction in *c.*1246 through to its many subsequent modifications and commentaries well into the fifteenth century.[24] The richness of this evidence makes it possible to reconstruct a more or less continuous history of warranty that transcends traditional historiographical barriers of periodisation and of different genres of source.

From this evidence, warranty will emerge as a broad constellation of practices that orbit a fundamental concept based on protection and the consequences for when protection fails. We shall encounter warranty as a series of promises and verbal commitments individuals made; equally, we shall see warranty in the guise of a series of legal rules. Warranty sometimes concerns procedure, and might form the basis of arguments deployed by disputants in legal conflict aimed at putting additional pressure on an adversary. Alternatively, warranty might form part of the language through which an individual makes a claim for compensation if he or she is the victim of some wrong, often though not exclusively concerning property. The breadth of warranty as it emerges from the evidence remains impressive, and its practices cut across divisions of class and gender. Yet underpinning—and indeed unifying—this breadth is the fundamental idea of protection. And as such, warranty provides an especially clear lens through which to examine some of our core assumptions about law, legal change, and society during the central Middle Ages.

The organisation of this book is as follows: Chaps. 2 and 3 provide an overview of the general shape of our evidence, looking at the *coutumiers* and charters respectively. Chapter 4 then examines the practices associated with the actual promising and giving of warranty. We next look in Chap. 5 at how warranty worked in the context of litigation, as well as what happened if a warrantor failed to discharge his or her obligations successfully. Chapter 6 proceeds towards an examination of the targets against whom warranty was ordinarily directed, and for how long an alienor's warranty was typically valid. A final and brief Chap. 7 will summarise the main findings of this study, and serve as its conclusion.

[24] See the brief overview in Xavier Martin, 'Note sur la "littérature" coutumière angevine au Moyen Âge', in *La littérature angevine médiévale. Actes du colloque du samedi 22 mars 1980* (Angers, 1981), pp. 41–9.

CHAPTER 2

# Warranty in the *Coutumes d'Anjou et Maine*

**Abstract** This chapter provides an overview of how warranty is treated in the 1246 vernacular lawbook, the *Coutumes d'Anjou et Maine*, which was later incorporated into the 1272/3 *Établissement de Saint Louis*. The methodology examines usage of the vernacular terms *guarant* and *guarantir* within the *coutumiers*. The main argument of this chapter is that usage of warranty language in the coutumiers is difficult to associate with either of the main narratives historians have used to explain warranty's development. The most detailed provisions on warranty concern the procedural aspects of summoning a warrantor when accused of the theft of movables. Numerous provisions in the *coutumiers* also associate warranty with the protection of others from whatever claims for services a lord might make.

**Keywords** Custom • Chattel warranty • *coutumier* • *parage* • Services • Lordship

The earliest *coutumier* from western France is the *Coutumes d'Anjou et Maine*. This anonymous text was written in 1246, and it was later included, with minor modifications and under the new title of the *Coutume de Touraine-Anjou*, in the text known as the *Établissements de Saint Louis*,



M. W. McHaffie, *Warranty Obligations in Western France, 1040–1270*, https://doi.org/10.1007/978-3-031-14517-9_2

compiled in 1272/3.[1] Though warranty itself is seldom discussed at length in the 1246 *coutumier*, the language of warranty nevertheless recurs throughout its various provisions. The most detailed concern chattel warranty and accusations of theft. Following such an accusation, the accused can vouch a warrantor (*gariseors*) to come to a later court date.[2] At the subsequent term, the warrantor should then ask to see the object he was asked to warrant, otherwise the warranty would be invalid.[3] If, following the viewing, the warrantor agreed to warrant the object, then the original accused was dismissed from the suit and the warrantor became solely responsible (and liable) for the case. A warrantor may in turn vouch a warrantor of his own, up to the seventh warrantor. Once the warrantor agrees to warrant, the judge of the case can order a judicial battle between the warrantor and accuser (or their proxies), with the defendant also swearing an oath prior to the duel. If the warrantor should be defeated, he should not lose life or limb because, as the *Coutumes* explains, he was not accused directly (*en chief*) of theft (*larrecin*).[4] Whichever party lost, though, must pay the costs of the battle, the lawyers' costs from the day of battle, and a 60s. fine to the court-holder, but nothing else. Crucial in these provisions is that the warrantor takes the place of the original defendant: this type of warranty would come to be identified by the seventeenth century at the latest, in the language of the 1667 *Ordonnance civil*, as 'formal warranty', thereby distinguished from 'simple warranty' where the warrantor merely

[1] For stimulating reflections on the fluid regional identity of the much of the *coutumier* literature, of which the re-titling of the 1246 *Coutumes d'Anjou et Maine* into the *Coutume de Touraine-Anjou* provides an example, see Ada-Maria Kuskowski, 'Inventing Legal Space: From Regional Custom to Common Law in the *Coutumiers* of Medieval France', in *Space in the Medieval West: Places, Territories, and Imagined Geographies*, ed. Meredith Cohen and Fanny Madeline (Farnham, 2014), pp. 133–55.

[2] *Cout.AM*, § 100 (= *Cout.TA*, § 84); the chapter appears in the Étab., I, § 95 with the rubric 'De chose emblée'.

[3] *Cout.AM*, § 100 (= *Cout.TA*, § 84): 'cil doit demander la chose à voir, et cil la doit monstrer. Et s'il ne la demande à voir, le garantage ne vault riens'.

[4] Note Étab., I, § 95 includes 'treason' (*traïson*) and 'murder' (*murtre*) in this passage.

supported the defendant's case with testimony.[5] Yet efforts to protect a warrantor from corporeal punishments already evident in the *Coutumes d'Anjou et Maine* speak to early attention directed towards the logical procedural consequences of warranty in what we would identify as criminal cases. Perceptions of possible differences between 'criminal' and 'civil' cases may indeed have stimulated sharper conceptual differentiation between 'formal' and 'simple' warranty—though such is only a hypothesis requiring further research.

Other passages in 1246 text mention warranty in connection with *parage*, which was a method of preserving the indivisibility of a fief or *honor* whereby younger siblings held their share of the family property (i.e., the fief) from the eldest sibling, who alone did homage to the overlord of the property and undertook the services that the fief owed.[6] There were regional variations in the workings of *parage*. In some regions, younger siblings did homage themselves to their eldest sibling, but in Anjou and Touraine there was not normally any homage between family members: the only homage arising from *parage* in these regions was that owed to the overlord by the eldest sibling. In the rather oblique passages mentioning warranty in association with *parage*, the eldest 'warrants' his or her siblings. To take an example: 'If a nobleman has only daughters, each will take as much [from the inheritance] as the others, but the eldest will have the dwelling in addition, along with the vassal (*home de foy*) if there is one, or, if not, 5*s.* in rent; and [the eldest] will warrant (*garra*) the others in

[5] See *Ordonnance de Louis XIV roy de France et de Navarre. Donnée à Saint Germain en Laye au mois d'Avril 1667* (Associez choisis par ordre de sa Maiesté pour l'impression de ses nouvelles Ordonnances, Paris, 1667), title VIII, article IX (p. 30): 'En garantie formelle, les garants pourront prendre le fait & cause pour le garanti, lequel sera mis hors de cause…'; and title VIII, article XII (p. 31): 'En garantie simple, les garants ne pourront prendre le fait & cause; mais seulement intervenir, si bon leur semble'. See Jean Brissaud, *Manuel d'histoire du droit privé* (Paris, 1908), pp. 504–5. The terminological distinction between formal and simple warranty almost certainly antedates the 1667 *Ordonnance*: I refer to this text simply because of its importance.

[6] On parage in western France, see Henri Legohérel, 'Le parage en Touraine-Anjou au Moyen Âge', *RHDFE*, 43 (1965), pp. 222–46 and the classic Robert Génestal, *Le parage normand* (Caen, 1911); more widely, see now Hélène Débax, *La seigneurie collective. Pairs, pariers, paratge: les coseigneurs du XIe au XIIIe siècle* (Rennes, 2012), esp. pp. 94–109.

*parage*'.[7] The implication here is that the eldest provides the services to the overlord, and the younger siblings will be exempt from any disciplinary action that the lord might take should there be a dispute over those services.[8] A 1254 case brought before the *Parlement*, concerning Normandy, draws out the relationship between *parage* and services explicitly. Louis IX (r. 1226–1270) seized land belonging to a man (*homo*) of the Valliscaulian church of Saint-Michel de Béthencourt, who had absconded to England without royal licence, which raised the question of how the monks were to obtain the services that their man owed. The man's younger siblings, 'whom that knight ought to warrant against the church with respect to the services', refused to do the services 'which they owed the knight' to the church instead; this led to the ruling in the *Parlement* that, 'according to common usage of Normandy', the king would see that the services were done (*faciet fieri*). The important point for our present purposes is the recognition that the monks' man ought to warrant his siblings specifically with respect to the services: and this presumably served as the basis for those siblings' refusal to deal directly with the church.[9]

Additional uses of warranty in the *Coutumes* fall into one of two categories. The first centres on fiscal liabilities. A lord may, for example, 'warrant' his sergeant or man from various tolls or services, with warranty here meaning something akin to 'acquit' or to 'exempt' the individual

[7] *Cout.AM*, § 4: 'Si gentil home n'a que filles, autant prent l'une comme l'autre: mes la esgnée aura le herbergement en avantage, et I home de foy este si il y est: et s'il n'y est, V soulz de rente; et garra aus autres en parage'. Compare *Cout.TA*, § 3, in Viollet's edition of the same *Coutumes*, which reads 'et I chesé s'il i est', instead of the 'home de foy', and this reading was adopted by the author of the *Établissements de Saint Louis*. The *chesé* (or *chezé*) seems to refer to a plot of land attached specifically to the principal dwelling of a fief (see DEAF, s.v. 'chezé'; *Dictionnaire du Moyen Français*, s.v. 'chezé', both of which cite the *Établissements*). The word seems to be related etymologically to the Latin *casamentum*, which tended in this region to be more or less synonymous with 'fief'. The idea shared across both readings is that the eldest daughter obtains additional units of property that signify that she is, from the lord's perspective, the fief-holder. Note also *Cout.AM*, § 69 which states that a noblewoman (*nulle dame*) need not provide military service in person to the king (if she holds from the king), but ought to provide as many knights (*chevaliers*) as her fief owes. This may help explain the 'home de foy' of the earlier passage, which would represent an oblique way of saying that the eldest daughter has whatever a knight would have had if the fief in question owes such service.

[8] See further *Cout.AM*, § 1, 17, 124, 153.

[9] *Olim*, pp. 430–1: *Postnati ejusdem militis quos garandire debebat ipse miles versus ecclesiam de serviciis, illi postnati, dicte ecclesie illa servicia quo dicto militi debebant, facere recusabant.*

concerned from any obligation to render such tolls or services.[10] Conversely, lords were prohibited from 'warranting' a man from royal obligations of the host or *chevauchée*, or from payment of a 60s. fine if his man defaulted from the host. Here again warranty has the sense of 'acquittal' or 'exemption', but in these instances the lord could not protect such an individual from the liabilities concerned.[11] The second category involves situations in which a person is required to warrant what he had earlier said or that he had earlier done something, such as deliver a summons.[12] Warranty in such usage amounts to the affirmation of some previous statement or action.

With the exception of its provisions on theft, the 1246 *Coutumes* does not describe the procedure surrounding warranty, nor does it provide an abstract normative statement as to the scope or content of warranty obligations. Warranty instead—at least based on the usage of warranty language—looks like a rather protean concept, oscillating in meaning between something like protection or 'backing' on the one hand, and something broadly like witnessing on the other. In part, this reflects the etymological roots of 'warranty'. The word, both as verb and noun, comes from Old French (= OF) *ǧ(u)arantir* and *ǧ(u)arant*, meaning 'to protect' and/or 'to guarantee the truth of something'.[13] Warranty has then a double sense, referring to notions of defence and protection, as well as to those of

[10] See, for example, *Cout.AM*, § 64: 'Gentis homes garantissent lor serjanz de ventes et de paages, et de bestes, et de lor norretures de bestes qui norries sunt en lor norretures de la chastellerie, et de lor blez et vens qui croissent en la chastelerie'. Note also *Cout.AM*, § 65 for a similar usage of *garantir*.

[11] See *Cout.AM*, § 69, which states that if, following a summons to the royal host, the king's men (*les genz le Roi*) should find any *hommes coutumiers* who did not march with the host, then the royal officers can fine each such individual 60s., and 'the baron cannot warrant them' (*le ber ne les en porret pas garantir*). Note also *Cout.AM*, § 104 which prohibits a nobleman from 'warranting' a *homme coutumier* from royal tallage due from houses that owe tallage.

[12] *Cout.AM*, § 76, 88, 101. Note too, ibid., § 161, where no one may accuse another of slander without providing details as to the time and place of the offence, and without naming a *garanz* who had witnessed the offence.

[13] See *OED*, s.v. *warrant*.

affirming the truth.[14] The word's semantic breadth gives the language of warranty a flexibility that made it easily adaptable to different concrete situations. This breadth is paralleled in other sources too. For example, warranty language was sometimes used in charters in the sense of affirming something to be true.[15] And in a case heard before the *Parlement* in 1265, the bishop of Beauvais offered to 'warrant' a number of men who had ridden in his cavalcade after those who had suffered losses from the said cavalcade sought restitution from the culprits.[16]

There is an underlying root that deserves emphasis from the 1246 *Coutumes*' treatment of warranty, however, and that is the association between warranty and practices of lordship. This is particularly apparent when thinking about *parage*. But equally, the capacity of a lord to exempt certain of his followers from tolls and payments forms part of the same broad nexus of seigneurial relations. From this branches another common root in the *Coutumes*: warranty was connected to situations in which an individual could incur liabilities for acts of wrong-doing. The point is most obvious in the act of naming and summoning a warrantor (i.e., 'to vouch a warrantor') when faced with an accusation of theft. Yet even in situations of *parage*, for example, liabilities for the potential non-performance of services were concentrated in the person of the eldest who incurred said liabilities on behalf of his siblings. Exemptions from tolls similarly carried an implicit protection from any liabilities arising from a failure to deliver those tolls in the first place. And the fact that lords could *not* warrant their *hommes coutumiers* from royal fines of 60s. for the failure to march in the

[14] There has been some speculation that the OF *g(u)arant* had two different etymological roots that only later become confused: one was the Germanic WARJAN meaning 'to resist', while the other was Old Frankish WĀRJAN, meaning 'to guarantee the truth of something'. See DEAF, s.vv. 'garant' and 'garantir'; and Wolfgang van Emden, '"E cil de France le cleiment a guarant": Roland, Vivien et le thème du guarant', *Olifant* 1, no. 4 (1974), pp. 21–47 at pp. 37–8 for discussion. Note the salient comments in Stephen D. White, 'Protection, Warranty, and Revenge in *La Chanson de Roland*', in *Peace and Protection in the Middle Ages*, ed. T. B. Lambert and David Rollason (Durham, 2009), pp. 155–67 at pp. 159–60 that concerning warranty of land, at least, 'warranting the truth of a claim is tantamount to defending it against a challenge'.

[15] See François Comte, *L'abbaye Toussaint d'Angers des origines à 1330. Étude historique et cartulaire* (Angers, 1985), no. 20 (1230) in which a charter was read out in 'the full assises' at Angers, and the charter is described as having 'warranted and affirmed' (*garantigaverit et affirmavit*) the testimony of the canons of Toussaint; see also *SJH*, no. 68 (1210 × 1215) for a comparable example. Note, as well, *RA*, no. 296 (*c.*1160) in which the act of witnessing was described with the verb *garentare*.

[16] *Olim*, p. 621.

royal host speaks equally to a connection between warranty and wrongdoing. How we characterise the various liabilities against which a warrantor sought to protect those under his/her warranty is a delicate task: there is a clear delictual element to some of them, but more broadly, these all look like situations in which an individual could be subject to disciplinary action but for which modern labels of delict or crime seem inappropriate.

The final point to mention about the 1246 *Coutumes* is what it does *not* say about warranty. We do not find warranty discussed specifically in connection with sales or the alienatory powers of the individual vis-à-vis his or her kin. After the 1246 *Coutumes* had been incorporated into the *Établissements de Saint Louis* in 1272/3, during which it was embellished with various allusions and references to 'written law' (i.e., Roman law), it is equally telling that we do not find any such allusions in those passages where warranty refers to either a relationship (as in *parage*) or an obligation (as in chattel warranty). The association between warranty/*garantie* and concepts found in Roman law had yet to be made in this particular corpus of vernacular legal literature. Even by the time of the 1437 *Coutumes d'Anjou et Maine selon les rubriques du Code*, the integration of warranty into the framework of Roman law still seems rather tenuous. Although the lengthy provision on theft and chattel warranty from the 1246 *Coutumes* was placed some two centuries later in 1437 under the rubric 'De evictions', the only Romanist elements of the ensuing discussion spread over sixteen chapters are the rubric itself and the first chapter of the section which provides a definition of 'eviction'.[17] In short, the evidence of Angevin *coutumiers* raises questions about wider explanations for both the meaning and development of warranty as found in the historiography. As we move now to the charters, we shall have further occasion to raise similar questions.

[17] 'Coutumes d'Anjou et Maine selon les rubriques du Code', in BB, vol. 2, part VIII, cap. 12, § 1180–96.

CHAPTER 3

# Warranty in the Charters

**Abstract** This chapter offers an overview of how warranty clauses appear in charters. It draws on Dominique Barthélemy's influential model to outline the major documentary changes of the period covered in the study, the first occurring around the mid-eleventh century and the second in the early decades of the thirteenth. It discusses the language of warranty obligations throughout this period, and some of the ways it changed. It also considers the influence of Roman law upon the composition of thirteenth-century warranty clauses. Overall, it suggests that the influence of Roman law was minimal.

**Keywords** Charters • diplomatic • Roman law • *officialités* • documentary change • formulas

Let us turn now to charters and the warranty clauses they sometimes include that outline the commitments that an alienor (or others on the alienor's behalf) made towards an alienee. Such clauses show us that the ideal-typical warranty of land was comprised of two fundamental commitments, and a possible third: (1) to defend an alienee from outside challenge; (2) to provide material redress if the warrantor should fail in his or her defence; and, possibly, (3) to not take back the alienated property. The first two commitments represent 'positive' obligations, whilst the last



M. W. McHaffie, *Warranty Obligations in Western France, 1040–1270*, https://doi.org/10.1007/978-3-031-14517-9_3

amounts to a 'negative' one.[1] The principles underlying each commitment are straightforward, although there was naturally scope for debate over the practical circumstances in which each might apply. Further, not all such commitments appeared in charters together, nor in equal measure. Commitments of defence thus appeared more frequently than those of redress, and both defence and redress featured more regularly than commitments of non-contravention—at least until *c.*1200 when clauses of non-contravention where an individual promised 'not to come against' (*non veniret*) his or her alienation became more common.[2] Whether this 'negative' aspect should be considered a part of warranty is less certain. It may be that the association between 'positive' promises of warranty and the 'negative' commitments of non-contravention that became marked after 1200 was the result of a serendipitous diplomatic relationship, rather than having any conceptual foundation within warranty ideas themselves. It is surely significant that early promises of non-contravention tend to survive in quitclaims, where securing an explicit promise that the quitclaimant would not act against an agreement that had just been hammered out makes practical sense.[3]

Warranty commitments were included in charters recording a wide range of transactions. Donations, sales, quitclaims, exchanges, confirmations, mortgages, enfeoffments: all could be and were warranted, though the ecclesiastical (primarily monastic) provenance of the charters during much of this period skews the evidence towards a high proportion of transactions recorded in the terms of donation. That churchmen preferred

[1] Note Hyams, 'Warranty and Good Lordship', p. 440 for the nomenclature of 'positive' and 'negative' commitments; Hyams suggested that in England, the 'negative' commitment was a feature of 'developed warranty'; Hudson, *Land, Law, and Lordship*, p. 57 suggests that the link between the 'positive' and 'negative' aspects of warranty only became 'tight' in the later twelfth century, which would provide an interesting parallel for the western French evidence.

[2] A typical promise of non-contravention saw an alienor agree not to act against nor bring any subsequent challenges against his/her alienation, but instead warrant it, thereby juxtaposing the non-contravention with the promise of warranty. See, for example, *CLMC*, no. 107 (1237): *promittens quod contra quitacionem istam per se vel per alium de cetero non veniret, immo dictum modium terre pro medietate dicte abbatie contra omnes garandiret et dictam abbatiam super hoc conservaret indempnem.*

[3] See, for example, 'Livre noir', fo. 25r–v (1010) for a quitclaimant who made the following promise to the monks of Saint-Florent: *et sponsionem super hoc fecit ne amplius repeteret ipse vel aliquis successorum ejus quod ipse per vim injuste invaserat*; for similar examples, see *SAA*, nos. 669 (1100) and 896 (1120 × 27); *SSE*, II, [24] no. 316 (1056 × 82).

to register property exchanges in the languages of the gift should not however be taken to mean that individuals during this period were unfamiliar with other types of exchange. Similarly, alienors warranted a wide range of different types of property, including arable, vineyards, woodland, waterways, rents and/or customs (*consuetudines*), or serfs.[4] Equally important, because warranty commitments were given in connection with any form of property transfer imaginable, their history should not be tied to the history of any one type of alienation: rather, the ideal-typical warranty may represent one of Professor Milsom's 'elementary legal ideas', as opposed to any specific legal rule.[5] Warranty may thus represent something that is foundational within any legal order, and which concerns the commitments arising between two or more parties during and after the exchange of goods, whether chattels or landed resources, and regardless of whatever juridical form that the transfer of goods might take.[6]

Elementary though they may be, warranty concepts in western France were of course historically contingent, and among the more immediate contingencies were the circumstances of documentary production that gave rise to our charters and the warranty clauses that they recorded. The diplomatic history of the period under consideration in this study can be characterised by two large-scale documentary transformations, or *mutations documentaires* in the words of Dominique Barthélemy's influential analysis.[7] The first of these occurred around the middle decades of the eleventh century, when monastic *scriptoria* became the principal centres of documentary production and archival preservation. The monastic writing takeover marked a rupture with older documentary forms—the main consequence of this rupture was the appearance of a relatively fluid diplomatic structure punctuated with detailed narrative descriptions of social

[4] For alienors warranting transfers of serfs, see, for example, *LSM*, nos. 5 (1064 × 84), 28 (1032 × 64), 113 (1092), 116 (1064 × 1100).

[5] See, for the phrase, Milsom, *Legal Framework*, p. 37.

[6] Note also the comments in Hyams, 'Warranty and Good Lordship', p. 456 on the wide applicability of the 'single institution' of warranty.

[7] Barthélemy, *La société*, pp. 19–83. An excellent recent collection of essays exploring various facets of monastic documentary production in the Loire valley in the eleventh and twelfth centuries is now provided by Chantal Senséby (ed.), *L'écrit monastique dans l'espace ligérien (Xe–XIIIe siècle). Singularités, interférences et transferts documentaires* (Rennes, 2018).

practices.[8] As we shall see in the following chapter, the development of warranty clauses is closely associated with descriptions of social practices like the oaths and verbal engagements alienors undertook as part of property transactions. It is highly improbable that such commitments—and the practice of making them verbally or securing them by oath—were new in the 1040s, suddenly emerging fully formed like Pallas Athene.[9] Rather, the significance of this first *mutation documentaire* consists in the fact that the *recording* of such engagements in writing, sometimes even employing warranty terminology lifted directly from the vernacular (i.e., Latinised cognates of *garant/garantir*), was a new development from about the 1040s. The reasons for why scribes chose at this point to record warranty clauses will need to be understood, at least in part, in light of monastic documentary practices and the goals that monasteries sought to achieve through their archival practices.

More broadly, the heterogeneous contexts of eleventh- and earlier twelfth-century documentary production are important insofar as they go a long way towards accounting for the seemingly wide variety in the composition of warranty clauses and in the language that they used, which raises obvious questions as to whether all such phrases necessarily refer to warranty. An admittedly crude index of this compositional diversity lies in

[8] See here, in particular, Olivier Guyotjeannin, '"*Penuria scriptorum*": le mythe de l'anarchie documentaire dans la France du Nord (Xe–première moitié du XIe siècle)', *BEC*, 155 (1997), pp. 11–44 (and other articles in this issue of the *BEC*); and the overview in Nicolas Ruffini-Ronzani and Jean-François Nieus, 'Société seigneuriale, réformes ecclésiales: les enjeux documentaires d'une révision historiographique', in Ecclesia in medio nationis: *Reflections on the Study on Monasticism in the Central Middle Ages/Réflexions sur l'étude du monachisme au Moyen Âge central*, ed. Steven Vanderputten and Brigitte Meijns (Leuven, 2011), pp. 77–100; note too the stimulating, though controversial arguments in Patrick J. Geary, *Phantoms of Remembrance: Memory and Oblivion at the End of the First Millennium* (Princeton, 1994). The nature of eleventh-century documentary change feeds into larger debates about the *mutation fëodale* (see the literature cited above, Chap. 1, n. 20); on the relationship between documentary change and social change, see the nuanced discussions in Adam J. Kosto, *Making Agreements in Medieval Catalonia: Power, Order, and the Written Word, 1000–1200* (Cambridge, 2001) and Pierre Chastang, *Lire, écrire, transcrire. Le travail des rédacteurs de cartulaires en Bas-Languedoc (XIe–XIIIe siècles)* (Paris, 2001).

[9] See Georges Declerq, 'Between Legal Action and Performance: The *firmatio* of Charters in the Early Middle Ages', in *Medieval Legal Process: Physical, Spoken and Written Performance in the Middle Ages*, ed. Marco Mostert and P.S. Barnwell (Turnhout, 2011), pp. 55–73 for suggestions that the alienors, in touching charters at the occasion of property transactions in the early Middle Ages, may ordinarily have made various verbal commitments as well to protect their alienations.

the number of different verbs used to convey these obligations.[10] To take just a selection from some of the more frequent of these: warranty obligations could be expressed as 'to acquit' (*adquietare*),[11] 'to make quit' (*facere quietum*) or 'to give back, quit' (*reddere quietum*) or minor variants,[12] 'to defend' (*defendere* or *defensare*),[13] 'to protect' (*protegere* or *tueri*),[14] 'to keep safe' (*tutari*),[15] 'to guard' (*custodire*),[16] or 'to aid' (*auxiliari* or (*ad*)*juvare*).[17] This is not to say that Latinised vernacular cognates for warranty (*garant/garantir*) are lacking in the charters, but they nevertheless remained less common than the terms just listed prior to *c.*1200.[18]

Quite what significance should be attached to this fact, as well as to the range of different possible verbs used to express warranty or warranty-like commitments, is less clear, however. The novelty of recording warranty

[10] This point summarises discussion in Matthew McHaffie, 'Sources of Legal Language: The Development of Warranty Clauses in Western France, *ca.*1030–*ca.*1240', in *Law and Language in the Middle Ages*, ed. Jenny Benham, Matthew McHaffie, and Helle Vogt (Brill, 2018), pp. 214–16.

[11] See, *inter alia*: *Cormery*, nos. 45 (1070 × 1110), 58 (*c.*1123), and 93 (1253); *MB*, nos. 45 (1067) and 66 (1093 × 94); *MD*, nos. 60 (1092) and 105 (*c.*1042); *MMA*, p. 29 (1063); *Noyers*, no. 405 (*c.*1115); *RA*, nos. 197 (1112) and 375 (*c.*1100); *SAA*, nos. 276 (1080) and 783 (*c.*1110); *SL*, no. 44 (1103); *TV*, no. 261 (1077).

[12] For example, *FON*, no. 163 (1115); 'Livre noir', fo. 55r–v (1060 × 70); *MB*, no. 159 (1139); *Noyers*, no. 19 (*c.*1060); *RA*, no. 327 (*c.*1110); *SSE*, I, no. 145 (1076); *TV*, no. 126 (1059).

[13] See, *inter alia*: *FD*, no. 99 (1219); *La Couture*, no. 316 (1233); *La Haye*, nos. 9 (1210) and 17 (1224); 'La Roë', fos. 67r (1141 × 56), 71r–v (1149 × 70) and 78v–79r (1168 × 78); *MMA*, p. 21 (before 1118); *Noyers*, nos. 556 (*c.*1146) and 589 (*c.*1161); *SAA*, nos. 121 (1121 × 27) and 288 (1060 × 81); *SJT*, nos. 139 (1153) and 183 (1222); *TV*, nos. 450 (1126) and 517 (1147).

[14] For example, *FD*, no. 101 (1220); *MD*, no. 185 (1175 × 84); *M. Manc.*, I, pp. 354–5 (1090); *SL*, no. 44 (1103); *SSE*, I, no. 243 (1093 × 1102); *SSE*, II, [13] no. 24 (1100 × 1110); *Tiron*, no. 160 (1131 × 45); *TV*, no. 330 (1087).

[15] See, for example, 'La Roë', fo. 15r (1129 × 51); *Noyers*, no. 439 (1121); *SAA*, no. 430 (1113); *SSE*, I, nos. 244 (1095 × 1100) and 323 (1096).

[16] See, *inter alia*: *Cormery*, no. 82 (1228); 'La Roë', fos. 78v–79r (1149 × 70); 'Livre noir', fo. 90v (*c.*1072); *MD*, no. 163 (1123); *MMA*, p. 36 (*c.*1070); *M. Manc.*, II, p. 145 (1068); *Noyers*, no. 259 (*c.*1098); *SAA*, no. 664 (1167); *SSE*, II, [101] no. 216 (1113 × 33); *TV*, no. 299 (1080).

[17] See, for example, 'Livre noir', fos. 111v–112r (1058 × 70); *MB*, no. 112 (1100); *RA*, no. 414 (*c.*1100); *SAA*, no. 318 (1099); *TV*, no. 22 (1040).

[18] For pre-1200 examples, see, for example, Artem, no. 3644 (1122); 'Livre blanc', fos. 31v–32r (1088), fo. 76r (*c.*1080), 77r (1070 × 1118), 77v (*c.*1080), 80r–v (*c.*1086), 86v (1086), 88v–89r (1087), and 89r (1086); *Noyers*, no. 612 (*c.*1178); *RA*, nos. 306 (*c.*1120) and 376 (1100 × *c.*1110); *SVM*, no. 17 (*c.*1070); *Tiron*, no. 280 (*c.*1145).

clauses from the *c.*1040s must have presented a challenge for scribes who were tasked with writing down such clauses in an appropriate form.[19] Scribes likely searched for models on which they could base their warranty clauses. The sanction clauses found in charters offered one such exemplar.[20] Further, verbs of defence and protection suggest that the composition of warranty clauses may have sometimes borrowed from the language of commendation and oaths of fidelity. For example, in 1140, Philip de Gouet issued a charter detailing the resolution of a dispute between himself and the men of Lavalé, who were under his protection (*custodia*), and which opened with the following statement: 'I [Philip] have to guard (*custodire*) and warrant (*garentire*) the men of Lavalé, and to defend them everywhere and from everything to the best of my ability, as if they were my own men; in return for my protection, they pay me 40*s. angevins* each year at the feast of St Nicolas'.[21] Likewise, some charters explicitly tell us that an alienor's promise of warranty took the form of an oath of fidelity. In 1059, for instance, Hugh son of Theodolin sold a church to the monks of La Trinité de Vendôme for 27*li.*, and agreed that he would 'drive back' any subsequent challenge; then, however, Hugh became the man (*homo*) of Abbot Oderic and swore 'by the true purity of fidelity' that he would free this church from any challenge, 'just as he had promised' he would.[22]

While a complete diplomatic analysis is unfortunately beyond the scope of this study, it remains important to stress that scribes needed to create a diplomatic of warranty in the first place. That this proceeded in an apparently haphazard manner should not surprise us, because much of the

[19] Note here the wider comments in Michel Parisse, '*Quod vulgo dicitur*: la latinisation des noms communs dans les chartes', *Médiévales* 42 (2002), pp. 45–53.

[20] See here McHaffie, 'Sources of Legal Language', pp. 218–20. The most obvious indications of compositional borrowing are the use of *si quis* formulas to introduce both sanction and warranty clauses, as well as the occasional statement of *quod absit* ('God forbid') or a similar sentiment, which was characteristic of sanction clauses, and appears in some warranty clauses as well.

[21] *La Couture*, no. 52: *notifico quatinus homines de Lavareio custodire et garentire habeo, et quasi meos proprios homines ubique et ab omnibus pro posse meo eos habeo defendere, unde pro custodia mea, singulis annis in festo beati Nicholai, XL solidos Andegavenses michi reddunt.* Philip allowed the canons of the church of Saint-Nicolas the right to collect this payment. For similar examples of commendation that utilised the language of defence and/or custody, see, for example, *SAA*, no. 1 (1037); *TV*, no. 11 (before 1037).

[22] *TV*, no. 125: *interea sciendum est quod idem Hugo devenit homo abbati Odrico … ut per veram fidelitatis puritatem ecclesiam illam ab omni calumnia sicut promiserat deliberaret atque habendam monachis in perpetuum quietam obtinere faceret.*

linguistic diversity we see in the warranty clauses no doubt reflects genuine scribal experimentation. There are occasional chance survivals in which the same transaction and its warranty commitments were recorded in separate charters, in which one version used actual warranty language, whereas another version did not.[23] Added to such examples are questions concerning the locus of production for any individual charter, and whether a document was produced at an abbey's dependent priory or within the *scriptorium* of the mother house. Possible differences between local and central documentary production may account for the usage or not of specific words and phrases. Related to this, if warranty clauses are approached on the basis of individual religious houses—that is, *scriptorium* by *scriptorium*—there may be far more internal consistency than a holistic snapshot implies. The abbey of Marmoutier, for example, is thought to have used formularies from the mid-eleventh century, and it is probable that other houses did too.[24] Teasing out the relationship between these possible in-house formularies and the warranty clauses of different ecclesiastical *scriptoria* would be a delicate task, but one that may reveal preferences for particular verbs and phrases that varied from house to house. And for comparative purposes, a similar linguistic diversity in the composition of warranty clauses also characterises charters produced in the Anglo-Norman realm during the eleventh and twelfth centuries.[25]

More consistent linguistic usage and more clearly standardised diplomatic forms, both of which contribute to an image of greater conceptual

[23] Consider here the following example from the archives of the abbey of Tiron. The first version (= *Tiron*, no. 109 (1129)) reads as follows: *Et hec commutatio terrarum facta est hoc modo ut Paganus vel heredes ejus tres carrucatas terre predictas monachis im perpetuum ab omnibus calumpniis defenderent atque tutarent.* But in the second version (= *Tiron*, no. 117), the agreed-upon warranty reads differently: *libere fideliterque defensurus contra omnes invasores, fidejussore Ursone de Fractavalla ut, si Paganus mortuus fuerit, pueri ejus, id est heredes, ejus garantabunt terram contra omnes calumpniatores, atque omnia dampna restauranda promittente.*

[24] Claire Lamy, 'L'abbaye de Marmoutier et sa production écrite (1040–1150): formules en usage au scriptorium monastique et dans les dépendances', in *La formule au Moyen Âge II. Actes du colloque international de Nancy et Metz, 7–9 July 2012*, ed. Isabelle Draelants and Christelle Balouzat-Loubet (Turnhout, 2015), pp. 75–90.

[25] Emily Z. Tabuteau, *Transfers of Property in Eleventh-Century Norman Law* (Chapel Hill, 1988), esp. p. 196, who notes that in eleventh-century Norman charters, warranty terms derived from the vernacular appeared in only four of the seventy documents that 'testify that the concept of warranty was known'. For some of the diversity of early English evidence, see David Postles, 'Seeking the Language of Warranty of Land in Twelfth-Century England', *Journal of the Society of Archivists* 20, no. 2 (1999), pp. 209–22.

cohesiveness, nevertheless become especially marked following the second documentary transformation, which took place in the decades on either side of 1200.[26] One of its essential characteristics was the 'advent of the learned style': that is, evidence for the influence of new forms of Roman legal learning and expertise upon the composition of western French charters (as opposed to the wider spread of such learning which antedates the demonstrable influence that such learning had upon charter composition).[27] As with the first transformation, this second one too was associated with a change in the principal forums of documentary production. Thus the changes around 1200 remain closely tied to the emergence of the so-called *juridictions gracieuses*: that is, the forums of non-contentious jurisdiction by whose 'public' authority an individual's property transaction might be ratified.[28] Chief here was the *officialité*, an ecclesiastical institution staffed by an *officialis curiae* of a bishop or archdeacon and to which was delegated much ecclesiastical business, including the production of charters recording property transactions.[29] Documents produced in the *officialités* often took the following form: *N.* appeared in the presence of the *officialis* and confessed or recognised (the *confessio in jure*) that she/he had made such-and-such a sale, or donation, etc. These documents were fairly consistent in their broad outlines: this partly reflects the use of formularies within the *officialités*, and partly reflects the officials' roughly shared pedagogical formation that could exercise a standardising influence on charter formulas. A background of expertise and learning helps account

[26] Barthélemy, *La société*, pp. 73–80; note, more widely, Paul Bertrand, 'À propos de la révolution de l'écrit (Xe–XIIIe siècle). Considérations inactuelles', *Médiévales* 56 (2009), pp. 75–92, and idem, *Les écritures ordinaires. Sociologie d'un temps de révolution documentaire (entre royaume de France et Empire, 1250–1350)* (Paris, 2015).

[27] Note Barthélemy, *La société*, p. 73 for 'l'avènement du style savant'.

[28] See here Robert-Henri Bautier, 'L'authentification des actes privés dans la France médiévale. Notariat public et juridiction gracieuse', in *Notariado público y documento privado: de los orígenes al sigle XIV*, ed. José Trenchs (Valencia, 1986), pp. 701–72 for a magisterial overview from a diplomatic standpoint.

[29] The classic study on the *officialités* in France remains Paul Fournier, *Les officialités au Moyen Âge. Étude sur l'organisation, la compétence et la procédure des tribunaux ecclésiastiques ordinaires en France, de 1180 à 1328* (Paris, 1880), which includes an appendix on the diplomatic of the *officialités*, which was also published separately as idem, 'Étude diplomatique sur les actes passés devant les officialités au XIIIe siècle', *BEC*, 40 (1879), pp. 296–331; for new perspectives, see Véronique Beaulande-Barraud and Martine Charageat (eds.), *Les officialités dans l'Europe médiévale et moderne. Des tribunaux pour une société chrétienne* (Turnhout, 2014).

for the increasing standardisation of documentary forms produced by lay chanceries as well. While the documentary authority of lay figures—and to a degree the *officialités* of the northern and western France—resided primarily in the seals attached to charters (as opposed to the public notaries of southern France), the consolidation of lay *juridictions gracieuses* nevertheless also exerted a standardising influence on documentary forms.

The key development for warranty flowing from this second documentary transformation was the integration of warranty clauses into formulas and clauses increasingly reflective of the influence of legal learning and the nascent *ius commune*. Roman law's effect upon the composition of warranty clauses can be traced in part through new vocabulary.[30] From the 1240s, for example, we find the first mentions whereby the alienor guaranteed the alienee against eviction (*evincere*); though extremely rare, the choice of the language of 'eviction' framed warranty in the terms of the *Code*, 8, 44 (*De evictionibus*).[31] It is also from the 1250s that we find a warranty clause introduced with the Romanist phrase 'by lawful stipulation' (*per stipulationem legitimam*),[32] while a charter from 1239/40 refers to the 'penalty of double' (i.e., double the payment price) in connection

[30] Note here the rather ebullient remarks in Gustave d'Espinay, *Les cartulaires angevins. Étude sur le droit de l'Anjou au Moyen Âge* (Angers, 1864), p. 279: 'Certaines chartes du XIIIe siècle imposent la garantie contre l'éviction avec un grand luxe d'expressions juridiques, parce que les practiciens affectaient alors de connaître le droit romain'.

[31] See *CLMC*, no. 164 (1251), *MD*, no. 273 (1271), and *TV*, no. 702 (1240), for *evincere*; *Lib. Alb.*, no. 373 (1274/5) and *Villeloin*, no. 45 (1242) both use *evicta*. For the uncommonness of *evincere*, for example, consider that within the *Liber Albus* of Saint-Julien du Mans, the word appears in only one of approximately ninety-nine thirteenth-century warranty clauses. The infrequency of these learned terms of art also applies to those terms mentioned in the following two notes. There is, further, no immediately apparent reason why such language is used in these particular charters, and not others. In the case of *evincere*, it is also worth mentioning that use of this word may not reflect a learned influence at all.

[32] *Lib. Alb.*, no. 702 (1256): *promiserunt … per stipulationem legitimam se garantizare et defendere contra omnes.* See also *M. Manc.*, I, pp. 148–50 (1241) for a promise made *per stipulationem*, but which did not concern warranty. Compare the 'Cartulaire de l'abbaye de Notre-Dame de la Merci-Dieu autrement dite de Bécheron', ed. Étienne Clouzot, in *Archives historiques du Poitou* 34 (Poitiers, 1905), nos. 178 (1269), 232 (1274), and 290 (1273) for references to *per veram (et sollempnem) stipulationem* in clauses whereby an alienor promises not to reclaim the objects of his/her alienation.

with a warranty clause, an allusion to the *stipulatio duplae* of Roman law.[33] Clauses after *c.*1200, moreover, tended increasingly to frame provisions for the alienee's material redress through Roman-inspired ideas of hypothecation, whereby a debtor committed his entire substance—but retained control over it—as a real surety to cover a creditor's potential loss. Within warranty clauses, such ideas came in the form of the *obligatio bonorum*.[34] In an example from 1255, Oliver de *Rivarennes* obligated himself and 'all his goods wherever they may be' to the monks of Saint-Julien as a commitment to hold fast to his agreement.[35] These clauses typically obligated the alienor, the alienor's heirs, and all their movables and immovables (*mobilia et immobilia*), sometimes explicitly given in *contraplegium*. While such language implicitly framed the warrantor-alienee relationship as one of debtor-creditor, the degree to which this language entailed any fundamental shift in how contemporaries understood warranty is less certain.

The influence of Roman legal language and ideas is especially apparent in an additional type of clause in thirteenth-century charters that became common after 1250, to which an alienor's warranty was sometimes attached: the renunciation clause.[36] Let us take an example. In 1263/4, Bernard de la Ferté and his wife Joanna made a gift to the abbey of Tiron which they warranted, included the *obligatio bonorum*, and then made the following renunciation: 'we renounce for ourselves and our heirs in this act any exception and deception, any usage and custom, and any aid both in deed and law, canon or civil, and any statute already made or to be

[33] *Lib. Alb.*, no. 677. I leave aside the debates over whether the early medieval charters (up to *c.*1000), with their references to the *stipulatio subnixa*, reflect the survival of Roman law stipulations through the Late Antique and early medieval periods. See on this problem, Lupoi, *Origins of the European Legal Order*, pp. 486–93, and further literature cited above, Chap. 1, n. 6.

[34] On the *obligatio bonorum*, see Jean Gay, 'Aux origines de l'*obligatio omnium bonorum* dans le comté de Bourgogne', in *Droit privé et institutions régionales. Études historiques offertes à Jean Yver* (Paris, 1976), pp. 285–303.

[35] *SJT*, no. 276: *Et super hoc obligo predictis abbati et conventui et priori predicto me et omnia bona mea ubicumque sint necnon et heredes meos specialiter et expresse.*

[36] Edmond Meynial, 'Des renonciations au Moyen Âge et dans notre ancien droit', *Nouvelle revue de droit français et étranger* 24 (1900), pp. 108–42; vol. 25 (1901), pp. 241–77 and pp. 657–97; vol. 26 (1902), pp. 49–78 and pp. 649–710; vol. 28 (1904), pp. 698–746 remains essential. Note the comments in Pierre Duparc, 'La pénétration du droit romain en savoie (première moitié du XIIIe siècle)', *RDHFE*, fourth ser., 43 (1965), pp. 52–3 about renunciations constituting 'une des manifestations les plus apparentes de l'influence, sinon de la renaissance, du droit romain …'.

made, any privilege of the cross already granted or to be granted, and generally all forms of support or benefit pertinent to us or our heirs, now or in the future, by which we or our heirs might contravene the aforesaid, in whole or in part'.[37] Renunciation clauses varied in length and detail. Some mention that an alienor renounced specific exceptions by which she/he might at some later date try to nullify whatever the transaction in question, the most common of which was the *exceptio pecuniae non numeratae*.[38] The *exceptio pecuniae non numeratae* referred to the argument that a vendor could extricate himself or herself from a sale on the grounds that the payment price had yet to be delivered; this *exceptio* came, it seems, from the *Code*, 4, 30 (*De non numerata pecunia*). Other renunciations were more general, cataloguing any source of law by which a transaction might be undone, whether that be canon or civil law, statute or privilege (papal, royal, princely), or the usage and custom of lay courts.[39] And although renunciation clauses were more common than warranty clauses—many charters include renunciations, but no warranties, for example—the association between renunciation and warranty found in some charters provides a tantalising glimpse of the legal world in which thirteenth-century warrantors found themselves. Renouncing the benefits of any jurisdiction and law points towards the threats posed by legal professionals in helping clients wangle out of their agreements. The shift we

[37] *Tiron*, no. 387: *renunciantes pro nobis et heredibus nostris in hoc facto omni exceptioni et deceptioni, omni usui et consuetudini et omni auxilio tam facti quam juris canonici vel civilis, omni statuto facto vel faciendo, privilegio cruce signatis concesso vel concedendo, et generaliter omnibus suffragiis et beneficiis nobis vel heredibus competentibus vel competituris, per que nos vel heredes nostri possemus venire contra premissa vel aliquod de premissis.* The renunciation clause carries on, protecting the 'form, substance, and tenor' of the charter recording Bernard's and Joanna's gift.

[38] See, for example, *Beaum.*, pp. 37–8 (1270), pp. 38–40 (1271); *M. Manc.*, II, pp. 181–2 (1252); *SJT*, no. 280 (1258); *Tiron*, no. 390 (1265/6). See also Meynial, 'Des renonciations', in *Nouvelle revue de droit français et étranger*, vol. 24, pp. 128–42. Other frequently recurring specific renunciations were the *Epistola divi Hadriani* and the *Nova constitutio de duobus reis*, examples of which can be found in: *CLMC*, no. 216 (1239); *Lib. Alb.*, nos. 289 (1236/7), 335 (1275), 375 (1277), and 401 (1270).

[39] These phrases in different combinations can be found in, for example: *Lib. Alb.*, nos. 337 (1276), 485 (1272), and 500 (1267); *MP*, no. 161 (1271); *SJT*, no. 280 (1258); *Tiron*, no. 390 (1265/6). For references to the 'usage and custom' of lay courts in particular, see *Lib. Alb.*, no. 500 (1267) which records *et omni consuetudini curie laicalis*; note also *Lib. Alb.*, no. 617 (1285) for a renunciation of *omni consuetudini patrie, statuto principum, et prelatorum*.

witness here concerns the dangers to which warranty was orientated, rather than a shift in the substantive ideas of warranty.

Indeed, amidst the background of legal learning and Roman law, it is important to underline that the core of thirteenth-century warranty clauses centred on the verb *garantizare* (and its orthographical variants), which was patently not a Roman legal term or concept. Although warranty terminology derived from the vernacular is found in charters from the eleventh and twelfth centuries, such terms only became common in thirteenth-century documents.[40] In the published charters of La Madeleine de Châteaudun, for instance, nearly 82% of sixty warranty clauses dating between 1200 and 1270 used *garantire*, *garantizare*, etc.; and nearly all of the clauses without vernacular-based terms of warranty were promises of non-contravention, rather than those of defence or protection.[41] Equally, within the *Liber Albus* of Saint-Julien du Mans, of the ninety clauses over the same period, vernacular-based warranty language appears in a staggering 95.5% of them.[42] Amidst, therefore, a background of scribal professionalisation and increasing erudition, the conceptual nucleus of warranty was not translated into the language of Roman law: warranty itself continued to be expressed in the Latinised language of vernacular law. Whether this implies that OF *g(u)arantir* and its Latin equivalent of *garantizare* were in a sense untranslatable into the language of Roman law is difficult to know. What does seem clear is that the semantic breadth of OF *g(u)arantir* best suited thirteenth-century scribes' efforts at expressing warranty obligations.

One final point needs to be made on the diplomatic contexts of warranty clauses. Such clauses sometimes included phrases that pointed towards regional customs. From the 1230s, for example, alienors sometimes warranted their transactions 'according to the general custom' (*secundum consuetudinem patrie generalem*) or 'according to the usages and customs' (*ad usus et consuetudines*) of such-and-such a territory. Often

[40] For eleventh- and twelfth-century usage of such language, see the examples cited above, n. 18.

[41] These are: *CLMC*, nos. 86 (1228), 89 (1230), 105 (1236), 122 (1240), 137 (1246), 149 (1248), 166 (1252), 182 (1260), 188 (1262), and 197 (1264); cf. no. 140 (1247) which exclusively outlines provisions for redress, and similarly does not make use of actual warranty language.

[42] The exceptions are: *Lib. Alb.*, nos. 32 (1220), 78 (1213), 160 (1218/9), and 417 (1213), all of which use *defendere* on its own; and ibid., nos. 164 (1217) for a promise of *defensio* and *auxilium*, and 258 (*c.*1250) for a commitment to provide material redress.

the envisaged territory was described simply with the generic term *patria*, a difficult word to translate but which, in the present contexts, probably meant little more than 'region'.[43] Sometimes the references to regional customs were far more specific. Thus we find warranty clauses given according to the usages and customs of Anjou in the 1280s, of Bellême in the 1260s and 1270s, of Châteaudun in the late 1240s and 1250s, and of Normandy in the early 1240s.[44] References to regional customs in charters were of course not limited to warranty clauses.[45] Formulas such as *consuetudo patrie* or *ad usus et consuetudines* developed within France from the later twelfth century onwards, particularly during the reign of Philip Augustus (r. 1180–1223).[46] Such phrases are thought to reflect the symbiotic combination of the growth of territorial principalities, including that of the kingdom of France, on the one hand, and the developing awareness of distinctive regional customary identities appropriate to each

[43] See *Beaum.*, pp. 29–30 (1259) and 38–40 (1271); *CLMC*, nos. 119 (1239), 171 (1258), and 175 (1258); *Cormery*, no. 108 (1288); *Lib. Alb.*, nos. 259 (1230), 262 (1232), 384 (1235/6), and 679 (1249); *La Cout.*, no. 343 (1251); *MD*, no. 275 (1271); *MP*, no. 148 (1258); *SJT*, no. 280 (1258); *Villeloin*, no. 1 (1256). Note *Lib. Alb.*, no. 241 (1236) for *regio*, instead of *patria*. Finally, *CLMC*, no. 206 (1272), provides a vernacular example of warranty given *as us et as costumes dou pais.*

[44] Anjou: *SJH*, nos. 164 and 165 (both 1287), and 166 (1288), all in the vernacular; Bellême: *MP*, nos. 79 (1264), 82 (1266), 86 (1272), 94 (1276), and 274 (1271); Châteaudun: *CLMC*, nos. 155 (1248) and 178 (1259); Normandy: *Tiron*, nos. 371 and 372 (both 1241).

[45] See, for example, *SJH*, nos. 59 and 60 (both 1211), 104 (1234), and 140 (1250), all referring to Anjou; for the earliest references to the customs (in the plural) of Anjou, dating to the reign of Count Geoffrey Martel (1040–60), see Olivier Guillot, 'Sur la naissance de la coutume en Anjou au XIe siècle', in *Droit romain,* jus civile, *et droit français*, ed. Jacques Krynen. Études d'histoire du droit et des idées politiques no. 3 (Toulouse, 1999), pp. 273–96.

[46] Note Daniel Power, *The Norman Frontier in the Twelfth and Early Thirteenth Centuries* (Cambridge, 2004), pp. 143–95, esp. 154–6 for the argument (with reference primarily to Normandy) that although references to regional customs antedate the major territorial gains by Philip Augustus in 1204, the Capetian conquests of Normandy and western France greatly accelerated the frequency of appeals to regional custom. Early examples of the phrase (not connected to warranty clauses) can be found, for example, in *Layettes du trésor des chartes*, ed. Alexandre Teulet, vol. 1 (Paris, 1863), nos. 441 (1195/6), 811 (1206), 1182 (1216), and many others.

political unit on the other.[47] Yet as Olivier-Martin had long ago noted in his study on the custom of Paris, the formula *ad usus et consuetudines* appeared with particular frequency in warranty clauses.[48] The point applies equally to western France. Consider, for example, the published charters of La Maison-Dieu of Châteaudun: out of all instances of the phrase *ad usus et consuetudines* found in thirteenth-century charters, a staggering 94% of them are found in connection with warranty clauses specifically.[49] Moreover, the formula finds occasional echoes in the *coutumiers* specifically in the context of warranty. Pierre de Fontaines, for example, in his 1253 *Conseil à un ami*, imagined a situation whereby *N.* sold his inheritance (*éritage*) and agreed to warrant the purchasers *selonc les us et les costumes du païs*.[50]

Interpreting the phrase *ad usus et consuetudines* is far from straightforward, however. It may indeed refer to differences in how separate jurisdictions dealt with the procedural and, perhaps, the substantive rules around warranty. To take an obvious example, one may think of different provisions for the chain of warranty: within Anjou-Maine, for instance, warrantors could vouch subsequent warrantors up to a seventh individual; in Normandy, in contrast, the chain of warranty was extended only to the third individual.[51] Yet the phrase *ad usus et consuetudines* may also have acquired meaning in the context of growing legal professionalisation, whose influence upon the drafting of thirteenth-century charters we have already hinted at. Since warranty remained a concept deeply embedded,

[47] See, for example, Olivier Guillot and Yves Sassier, *Pouvoirs et institutions dans la France médiévale. Des origines à l'époque féodale*, 3rd ed. (Paris, 2014), pp. 292, 299–303; Paul Ourliac, 'Législation, coutumes et coutumiers au temps de Philippe Auguste', in *La France de Philippe Auguste. Le temps des mutations* (Paris, 1982), pp. 471–88; André Castaldo, 'Pouvoir royal, droit savant et droit commun coutumier dans la France du Moyen Âge. À propos de vues nouvelles II: Le droit romain est-il le droit commun?', *Droits* 47 (2008), pp. 173–247 at pp. 242–3.

[48] Olivier-Martin, *Histoire de la coutume*, vol. 1, pp. 27–8; note also de Fontette, *Recherches sur la pratique de la vente immobilière*, pp. 91–4.

[49] This figure is based on forty-five out of forty-eight charters in which the phrase *ad usus et consuetudines* appears within a warranty clause. The earliest usage of such a phrase in a warranty clause at La Maison-Dieu is 1235 (*AMDC*, no. 171), and the association between warranty and the *ad usus* formula continues into the 1290s.

[50] *Le conseil de Pierre de Fontaines, ou traité de l'ancienne jurisprudence française*, ed. M. A. J. Marnier (Paris, 1846), cap. 15, § 10 (p. 113).

[51] *Le Grand Coutumier de Normandie: The Laws and Customs by which the Duchy of Normandy is Ruled*, trans. Judith Ann Everard (St Helier, 2009), part I, cap. 50.

linguistically at least, in the world of vernacular customary law, anchoring warranty concepts to the 'usages and customs' of such-and-such a region may have been a way of explaining and identifying the provenance of this particular rule and its associated ideas. The phrase may be compared to statements found in some renunciation clauses that so-and-so renounced any recourse to civil and canon law on the one hand, and any recourse to the usage or custom of lay courts on the other. *Ad usus et consuetudines*, following this line of reasoning, may refer less to regional variations in procedural or substantive rules, and refer instead to the legal foundations of a particular concept that was not located easily in the texts of civil law, but which could be identified as a customary legal rule—taking 'custom' as defined within Roman law and the *ius commune*—and thus brought into an integrated vision of legal order. Put differently, the phrase can perhaps be taken in a more literal sense: warranty forms a set of rules and practices whose normative foundations are found in the custom of lay courts specifically, rather than in the texts of written law.

* * *

Reconstructing the history of warranty in western France largely relies on the evidence provided by charters. Any interpretation of that evidence necessarily requires a solid understanding of the documentary contexts in which charters were produced, and how such contexts shape the interpretative possibilities allowed by the evidence. Towards the start of our period when warranty clauses begin to survive, the 1030s and 1040s, charter production in western France had become firmly embedded in the monastic *scriptorium*. We thus see warranty through the varied eyes of the beneficiaries of property transactions and the warranty promises sometimes made to accompany them. Although we find commonalities in their expression, there was no set diplomatic of warranty clauses; instead, the written expressions of warranty reflect the local circumstances of charter production, with all the variability such a statement implies. Only in the decades around 1200 with the emergence of increasingly professional secretariats—the *officialités* of ecclesiastical jurisdictions and their lay equivalents—do we begin to see the development of a standardised diplomatic of warranty clauses. This diplomatic displays obvious signs of the influence of learned law in the composition of warranty clauses, but it remains vital to emphasise that diplomatic standardisation also witnessed the triumph of the vernacular-derived *garantizare* as the primary and often exclusive verb

of warranty. Coupled with the increasing prominence of references to regional customs, the charter context of thirteenth-century warranty may well demonstrate the maturation of warranty as a distinctive set of concepts and practices of 'customary' law, as this latter became more and more sharply differentiated from the frameworks of Roman (and canon) law.




CHAPTER 4

# Giving Warranty: Acts and Actors

**Abstract** This chapter address questions of what was involved in the actual giving of warranty, and who typically made warranty commitments. It starts from the observation that warranty clauses in charters record verbal agreements and promises, and then looks at the various performative acts that accompanied warranty. It argues that these performative acts represent a significant line of continuity from the 1040s into the 1270s, thereby challenging conventional ideas that view warranty as a thirteenth-century phenomenon. The chapter then looks at the types of people who warranted. It demonstrates that warranty was often given by a range of people, including the family members and lord(s) of an alienor. It also discusses when warrantors also sometimes supplied named personal sureties (i.e. people who would share in liabilities). From this I conclude that it is difficult to associate warranty with the development of individual alienatory powers, since warranty was so seldom an individual affair.

**Keywords** Oaths • promises • rituals • sureties • *fidejussores* • practice • lords/lordship



M. W. McHaffie, *Warranty Obligations in Western France, 1040–1270*, https://doi.org/10.1007/978-3-031-14517-9_4

Warranty clauses represented scribal efforts to capture in writing a host of verbal engagements and physical gestures given at the occasion of a property transfer. Following the first *mutation documentaire* of the 1040s, charters open a window that had hitherto been closed on these practices, thereby allowing us to reconstruct in some detail what the actual process of making warranty commitments looked and sounded like. Here we shall look at the role played by oaths and speeches when undertaking warranty commitments, and consider the question of who, exactly, warranted property transfers.

Questions of practice and the types of people involved in it will reveal significant continuities in practice that traverse supposed differences between pre- and post-*c.*1200 warranty. Because warranty has been associated primarily with thirteenth-century developments, especially the Roman law of contract, earlier evidence has been difficult to incorporate into narratives centred on the juristic renaissance. One solution to this interpretative difficulty has been to suggest that eleventh- and twelfth-century warranty clauses reflect only voluntary commitments, whereas thirteenth-century clauses provide evidence of genuine legal obligations.[1] Features of earlier warranty practices, such as oaths, the pledging of faith (*fides*), and other ritualised behaviours were thought to indicate the voluntary nature of warranty, where the normative force attached to such commitments rested entirely on a sense of moral duty and social pressure. By the thirteenth century, however, jurists had found in the Justinianic *Corpus* (along with texts from canon law) the means through which to articulate the principle whereby an obligation—*obligatio*—could arise by the nature of an agreement itself that had been consented to by both parties, such as a sale. Sometimes described as a shift from 'formalism' to 'consensualism', the underlying point was that the existence of an obligation did not depend on a ritualised act (in theory, at least) as had been the case earlier.[2]

[1] See, for example, Vigneron, 'La vente dans le mâconnais', pp. 32, 47; Mireille Castaing-Sicard, 'Donations toulousaines du Xe au XIIIe siècle', *Annales du Midi*, 70, no. 41 (1958), pp. 56–7.

[2] Note the pertinent comments of David Deroussin and Olivier Descamps, 'L'Histoire du droit des obligations aujourd'hui, bilan et perspectives', in *L'Histoire du droit en France. Nouvelles tendances, nouveaux territoires*, ed. Jacques Krynen and Bernard d'Alteroche (Paris, 2014), pp. 365–76, esp. pp. 371–2; and for brief historical overview, see David Deroussin, *Histoire du droit privé*, 2nd edn. (Paris, 2018), pp. 353–5. See too David Ibbetson, 'From Property to Contract: The Transformation of Sale in the Middle Ages', *The Journal of Legal History* 13 (1992), pp. 1–22.

The distinction between the formal and consensual nature of obligations has remained implicit in much of the brief comment devoted to warranty. The often unstated assumption seems to be that warranty required express formulation, secured through gestures, prior to *c.*1200 and the absence of such gestures necessarily meant an absence of warranty commitments. Conversely, warranty obligations arose automatically once they were conceptualised in terms of an *obligatio* that was inherent to the contract or agreement itself. With this in mind, it is time therefore to turn towards questions of practice and to rethink the relationship between pre- and post-*c.*1200 warranty commitments.

* * *

Warranty clauses in charters record the verbal engagements and promises that alienors and/or others on their behalf made when alienating property. The essentially verbal nature of warranty commitments is readily apparent from the earliest surviving clauses, and remains little changed throughout our period. Warrantors were frequently described in the charters as 'promising' or 'swearing' to warrant their alienations.[3] Spoken commitments are clearly envisaged when scribes used words such as *promittere* or *jurare* to describe how the warrantor gave his or her commitments, and a number of clauses gloss for us what might ordinarily have underlain more generic statements.[4] Thus, in 1110 Osanna de Lavazé 'proclaimed … with a clear voice' that she would warrant her gift to the monks of Saint-Aubin; or, between 1070 and 1082, Aubrey de Laigné 'promised by lawful statement' that he would warrant his sale to the monks of Saint-Serge.[5] Quite how formal such statements were is difficult to know, however. On occasion, a warrantor might make his or her

[3] This paragraph covers points made in McHaffie, 'Sources of Legal Language', pp. 204–8.

[4] For *promittere*, see, *inter alia*: *FON*, nos. 180 (1119 × 25), 308 (1115 × 49), and 660 (1147 × 53); *MD*, no. 72 (1107/8); *Noyers*, no. 591 (1162); *RA*, nos. 102 (*c.*1120) and 351 (*c.*1115); *SAA*, nos. 267 (1100s?) and 632 (1107); *TV*, nos. 330 (1087), 463 (1130), and 513 (1146); note also clauses that use *polliceri*, such as *MD*, no. 25 (*c.*1064) and *Noyers*, no. 593 (*c.*1163), as well as verbs utilising *spondere*: *MB*, nos. 45 (1067) and 112 (1100); *Noyers*, no. 524 (*c.*1140); *SL*, no. 44 (1103); *TV*, no. 328 (1086). For *jurare* (or *juramentum*), see, *inter alia*: *MB*, no. 176 (1178); *TV*, nos. 444 (1123) and 485 (1139), and note clauses that use the gerund *jurejurandum*: *Noyers*, nos. 259 (*c.*1098) and 494 (1136).

[5] *SAA*, no. 784: *et clara voce eamdem terram ab omni calumnia se adquietaturam coram omnibus protestans*; *SSE*, I, no. 145: *promisit etiam et legali assertione confirmavit ut si in hac ventione calumnia excrevit solidam et quietam ab omnibus hominibus et calumniis faciat.*

commitments 'in simple words' (i.e., without an oath or without giving faith), as Fulk de Matheflon did when he promised to defend his quitclaim to the nuns of Le Ronceray between 1110 and 1115.[6] Yet on other occasions, undertaking warranty commitments was a solemn affair, involving oaths sworn upon the gospels, an altar, or an abbey's relics.[7] When he sold part of his mill to the abbey of Saint-Aubin between 1060 and 1081, Oilerius swore 'upon the holy relics' that he would warrant the monks; similarly, in 1096, after selling his fief to the monks of Saint-Vincent du Mans, Guy and his kin warranted the monks by swearing an oath 'on the text of the holy Gospel'.[8] Between 'plain words' and oaths sworn on holy objects were differences in formality and in the proximity to the sacred; but both ends of the spectrum affirm the association between warranty and speaking.

Whatever their formality, the weight that could be attached to a warrantor's verbal commitments can be appreciated by the fact that scribes sometimes chose to record them in stylised 'direct speech'.[9] In 1111, for example, Aimery warranted his quitclaim to the abbey of Cormery in the following terms: 'If anyone further, however, should arise and make a challenge against you concerning the aforesaid things, I am prepared to

[6] *RA*, no. 130: *planoque predicavit … ut terram S. Marie contra homines omnes nulla accepta consuetudine pro posse defenderet*. On the implicit distinction between *planoque predicavit* and promises given with a pledge of faith or an oath, see *RA*, no. 335 (1120) which makes the distinction explicit: some people made themselves the pledges of an individual's commitments 'not by faith, but by simple words' (*non per fidem sed plano verbo*). See also Artem, no. 3579 (1118) for a ruling by Renaud de Martigné, bishop of Angers, in a question over the forms of proof to be undertaken by different parties in support of the monks of Marmoutier: the bishop decided that the two witnesses of priestly rank (*presbiteri*) would give simple testimony (*plano sermone*), a deacon would swear an oath upon the gospels, and the lay witnesses would swear an oath upon the psalter.

[7] Note here similar points regarding oaths of fidelity in the Languedoc, in Hélène Débax, *La féodalité languedocienne, XIe–XIIe siècles. Serments, hommages et fiefs dans le Languedoc des Trencavel* (Toulouse, 2003), pp. 131–41.

[8] *SAA*, no. 361: *et juravit supra sanctas reliquias, ut nullo modo querat qualiter perdamus quae nobis vendidit et si calumpnia insurrexerit ut ipse adquietet nobis*; *SVM*, no. 317: *et super textum sancte Evangelii sacramento firmaverunt quod nullus eorum nec vir nec mulier ullo unquam tempore vel ullo ingenio ibi calumpniam mitterent. Si vero aliquis presumeret ipsi omni nisu omni instantia absque ullo malo ingenio laborarent ut easdem res quietas redderent.*

[9] On the phenomenon of 'direct speech' in western French (including Normandy) charters, see Tabuteau, *Transfers of Property*, esp. pp. 135–40; Richard E. Barton, 'Giving and Receiving Counsel: Forging Political Culture in Western French and Anglo-Norman Assemblies', *History* 102, no. 353 (2017), pp. 787–807.

resist whomsoever is challenging by whatever means, in both secular and ecclesiastical judgment. If I am unable to do so, though, then I and my [family] will lose everything that we have to date from our benefice'.[10] Similarly, when William *Gorrum* made a gift of rents to the abbey of Noyers in preparation for his departure to Jerusalem in *c.*1146, he instructed his son in no uncertain terms to warrant his gift: 'I am making this gift to the monks so that you will defend and guard it for them for your entire life; and if you are unwilling to do this, if in a dispute for some of your land you want to wage a war, then may you be brought down to size, and may you not succeed in your dispute'.[11] Each example just quoted speaks to something of the varied form that a warrantor's verbal commitments might take, and cautions against the view that there was a standard oath or set of words spoken when giving warranty promises. Such a conclusion further helps to account for the linguistic and syntactical range that is evident in the surviving clauses. Scribes' efforts to capture in writing the spoken promises given at the occasion of a property transaction probably reflects therefore something of the diversity in how those promises were made.

When a warrantor gave his or her word, it was meant to be given without deception and in good faith. Warrantors during the second half of the eleventh century sometimes made their promises 'without wicked intent' (*sine/absque malo ingenio*), while statements that promises were made 'in good faith' only become common from around 1200, with a couple of earlier exceptions.[12] The alienee's interest in the sincerity of a warrantor's engagements simply made good pragmatic sense. Of particular concern

[10] *Cormery*, no. 54: *Si autem ulterius quisquam surrexerit et de supradictis rebus vobis calumpniam fecerit, paratus ero et saeculari et ecclesiastico judicio omnimodis resistere cuilibet calumpnioso. Si autem non potuero perdamus, ego et mei, omnia quae hactenus habuerimus ex nostro beneficio.*

[11] *Noyers*, no. 556: *Facio hoc donum monachis ut illud omni tempore vitae tuae eis defendas et custodias, et si hoc agere nolueris, si pro alicujus negotio alicujus terrae tuae bellum agere volueris ab eo cadas, nec in aliquo negotio proficias.*

[12] For 'without wicked intent', see: 'Livre blanc', fo. 97v (1118); *MV*, no. 27 (1070); *SSE*, I, nos. 6 (1082 × 93) and 146 (1074); *SSE*, II, [24] no. 316 (1056 × 82); *SVM*, nos. 65 (1093 × 1103), 182 (1076), and 317 (1096), which is quoted above, n. 8. References to the warrantor's 'good faith' (*bona fides*) can be found in: *CLMC*, nos. 120 (1240), 142 (1247), 143 (1248), 158 (1250) and 175 (1258); *Cormery*, no. 93 (1253); *FD*, no. 101 (1220); *Lib. Alb.*, no. 25 (1191 × 1202); *MB*, nos. 238 (1236) and 306 (1265); *MV*, appendix, no. 49 (1267); *SJT*, nos. 180 (1220) and 280 (1258); *Tiron*, nos. 347 (1206) and 390 (1265/6); *TV*, nos. 420 (1108), 450 (1126), and 656 (1214).

was whether the alienor was withholding any important information that might otherwise jeopardise the alienation. For example, sometime around 1103, after Fromond Bevin had made a gift of land to the abbey of Saint-Serge, which the monks had turned into arable, a *miles* of Fromond claimed part of that land as the 'rightful heir' (*rectum heredem*); the monks were understandably annoyed by this, and they denounced Fromond as a 'deceiver' (*frustrator*), whereupon Fromond took counsel and offered the monks a hillock in recompense.[13] In a possible interpretation of this case, one might suggest that Fromond and his *miles* acted in concert: the lord made a gift of land to which he knew that his follower had a claim so that the monks would undertake the labour to transform it into arable, after which the *miles* might then surface to make a claim upon his inheritance. Regardless of the specifics, the tale of Fromond 'the deceiver' offers a useful vignette about the role of trust in alienations, and why individuals might wish to record that the promises they received and oaths given to them by their alienors had been made in good faith.[14]

If the language of 'good faith' was primarily a thirteenth-century development, charters during our entire period described a particular set of actions that warrantors regularly performed when making their verbal commitments: the pledging or giving of faith, that is, of the alienor's *fides*.[15] Pledging or giving faith was done with some frequency. In the 'Livre blanc' of Saint-Florent de Saumur, for instance, nearly 23% of recorded warranty clauses ranging from the 1050s to 1170s explicitly mention *fides*, whilst in the published charters of La Madeleine de

[13] *SSE*, II, [109] no. 275. Fromond also received 2000 masses from the monks.

[14] Compare 'Cartulaire de Saint-Maur de Glanfeuil', ed. Paul Marchegay, in *Archives d'Anjou*, vol. 1 (Angers, 1843), no. 57 (*c.*1140) in which the monks of Saint-Maur searched out a donor's relative to seek assurances from them, as well, because the principal donor seldom kept his word (*sed quia vagus erat et in verbis non permanebat*), again pointing towards issues of trust.

[15] The typical way in which charters describe this act is for the alienor to 'give' his or her faith (*dare fidem*). See, e.g., *La Couture*, no. 316 (1233); *FON*, no. 308 (1115 × 49); 'La Roë', fo. 53v (1149 × 70) and 78v–79r (1168 × 78); *MD*, no. 165 (1110 × 1111); *Noyers*, nos. 260 (*c.*1098) and 519 (*c.*1140); *RA*, no. 376 (*c.*1100); *SAA*, no. 122 (1117); *SSE*, II, [9] no. 73 (1093 × 1100) and [13] no. 4 (1100 × 1110). Other verbs or phrases likely referred to the giving of faith as well. See, for example, clauses using the verb *affidare*: 'Livre noir', fo. 91r (1070); *SAA*, no. 840 (1154 × 89); and note *TV*, no. 552 (1144 × 59) for the phrase *per fidem adfiduciaverunt*, and *Noyers*, no. 438 (*c.*1120) for a warrantor giving his *fiducia*. For clauses using *plegiare* or *pleviare*, see: *FON*, no. 166 (1109 × 15); *RA*, no. 306 (*c.*1120); *TV*, nos. 603 (1190) and 679 (1230).

Châteaudun from between the 1190s and 1270s, roughly 24% of all warranty clauses refer to one's faith or *fides*.[16] One's *fides* was often accompanied by certain physical acts, like in 1233, when Gervaise Crispin gave his faith in the hand of the *officialis* of Le Mans that he would bring no challenges against a sale he had made to the monks of La Couture and would instead warrant it for them.[17] Typically, as in the preceding example, the warrantor's faith would be secured by the clasping of hands (i.e., a handfast), with a wide cast of potential characters holding the warrantor's hand including abbots, priors, lords, and family members. But other gestures might also be employed, and thus do we find occasional examples of a kiss done 'in the name of *fides*'.[18] There may have been concern, at least amongst some monks, that to accept handfasts from laymen did not constitute real *fides*, which may account for some of the variation in physical acts used to secure one's *fides*. A Saint-Florent charter from 1095 concerning possessions near Saint-Gondon certainly makes the point explicit: Gilo de Sully-sur-Loire gave his *fides*, 'not by his hand, where there is no *fides*, but by his words and spirit [*animo*] where *fides* resides', and 'kissed the monks in *fides* and *societas*' because, as the monastic scribe glossed, 'it is not the custom of monks to accept the *fides* of anyone by the hand'.[19]

The 1095 Saint-Florent charter just quoted speaks to an apparent concern over whether the *fides* refers to a series of physical gestures or describes instead a state of mind, where *fides* serves almost as a matter of conscience. Here we have an unusually early and fascinating example of the tension between 'formalist' modes of contract formation and their 'consensualist' counterparts, a distinction that has been central to discussions of French

[16] For Saint-Florent, the figure is based on six clauses out of twenty-six; for La Madeleine, it is fifteen clauses out of sixty-two.

[17] *La Couture*, no. 316: *Et dedit fidem in manu nostra predictus Gervasius quod in rebus predictis aliquo titulo modo sibi competenti nichil de cetero reclamabit. Et obligavit idem Gervasius et omnia bona sua pro se et heredibus suis de guarantizando et defendendo dictis priori et conventui de Cultura res predictas contra omnes.*

[18] For a kiss exchanged *in nomine fidei*, see 'Livre noir', fo. 90v (*c.*1072); for other osculatory exchanges, see: 'Livre noir', fo. 107r–v (1064 × 67); *MD*, nos. 25 (*c.*1064) and 165 (1110/11); *MMA*, p. 36 (*c.*1070); *M. Manc.*, I, pp. 340–1 (1062); *MV*, no. 11 (1072); and *SAA* 743 (1118).

[19] Artem, no. 3398: *Promisitque eis Gilo fidem suam, non manu ubi non est fides, sed verbis et animo ubi est fides, qualem decet christianum erga christianum observare, non enim est mos monachorum ex manu alicujus fidem accipere, promisit utique se in hac conventione permansurum et contra omnem hominem volentem eam destruere, et eis auferre, sine suo tamen dando, garentaturum. Et ut firmiter hoc se tenere ostenderet, in fide et societate osculatus est monacos.*

contract law as mentioned earlier. While there is certainly more to be said about the relationship between warranty on the one hand, and oaths and *fides* on the other, for our present purposes the following two points merit emphasis. First, despite the diplomatic transformation in warranty clauses in the decades following *c.*1200, the practices associated with the actual giving of warranty show a remarkable and important continuity. Some thirteenth-century alienors still seem to have sworn oaths upon the gospels when warranting their transactions; post-1200 clauses continued to be introduced by a verb of spoken engagement, such as so-and-so 'promised that…'; and I have already noted that pledging one's *fides* continued into the thirteenth century.[20] The only significant change in the recording of such acts in thirteenth-century charters is that scribes increasingly made reference to a warrantor's 'bodily pledge' (*corporalis fides*) or 'bodily oath' (*corporale juramentum*).[21] The phrase has caused some confusion, but need be little more than an extension of the *fides in manu* of the eleventh and twelfth centuries. At any rate, this leads to the second point I want to emphasise: the continued relevance of oaths and physical acts that accompanied the giving of warranty suggests that the distinction between 'formalist' and 'consensualist' modes of contract formation may not be that relevant, at least for western France. Regardless of the theories about when an obligation was created, and if an individual's word alone sufficed to impose a binding obligation, the juristic distinction may have carried little import in situations of actual practice, whether transactional or litigious. Warranty obligations from the eleventh through to the thirteenth century had ultimately to be proven in court if the warrantor denied owing them; and here the probative value of oaths, *fides*, handfasts, and even the

[20] For oaths taken on the gospels, see: *MP*, nos. 79 (1264), 82 (1266), 86 (1272), 159 (1254), and 274 (1271); *Tiron*, no. 387 (1263/4); and note *TV*, no. 656 (1214) for an oath sworn on the relics. Other charters state simply that so-and-so 'swore', but use the verb *jurare*, which implies an oath: *FD*, no. 101 (1220) and *TV*, no. 679 (1230). For later references to warrantor's 'promising', see, *inter alia*: *Lib. Alb.*, nos. 164 (1217), 373 (1274/5), 402 (1270), 477 (1266), and 708 (1266); *MV*, appendix, nos. 46 (1250), 49 (1267), and 51 (1268); *Tiron*, no. 348 (1206). For thirteenth-century examples of the *fides*, see above, p. 46.

[21] See, *inter alia*: *Beaum.*, pp. 29–30 (1259), 35–7 (1261), and 38–40 (1271); *CLMC*, nos. 119 (1239), 120 (1240), 122 (1240), 129 (1243), 146 (1248), 154 (1248), et al.; *Cormery*, nos. 85 (1232) for *corporali … juramento praestito* and 102 (1275); *FD*, no. 176 (1243); *Lib. Alb.*, nos. 259 (1230) for *per fidem corporalem*, no. 627 (1240) for *fide prestita corporali*; *SJH*, no. 135 (1248) for *corporale juramentum*; *SJT*, no. 276 (1255).

occasional kiss would have come into their own.[22] This is not to say that in the absence of such acts there was no obligation to warrant: rather, the practical concerns of establishing warranty obligations in court, and of registering publicity more broadly, probably minimises any sharp contrast between 'formalist' and 'consensualist' when thinking about the establishment of warranty obligations.

Finally, we should address the subject of payments in return for the promise of future warranty, which can be dealt with briefly. Sometimes, charters explicitly associated the payment of monetary counter-gifts with the securing of warranty commitments, though in the clearest surviving examples, such payments often went to the kin or the lord of the principal alienor. The monks of Marmoutier, for instance, during the abbacy of Albert (r. 1032/7–1064), offered a quitclaimant, along with his mother and sister, 20s. 'through such an agreement that' they would henceforth and legally serve the abbey as their 'most faithful defenders against everyone if there should be, by chance, any further challengers of their properties'.[23] These same monks, around 1060, gave 12*d*. to a vendor's sister-in-law and his own sons (apparently to be shared between them) 'on the agreement that' they would warrant the principal's sale of a mill should a challenge surface after his death; importantly in this case, the 12*d*. payment in return for a promise of future warranty was differentiated from the 3*li*. sale price given to the vendor.[24] Similarly, in 1096, an individual who restored a cemetery to Saint-Florent de Saumur, following his excommunication, requested that the monks give something to him 'because he was poor'; the monks took the counsel of Bishop Sylvester de Rennes, and gave him 30s. 'on the agreement that' he serve as the monks' aider and

[22] Adhémar Esmein, 'Études sur les contrats dans le très ancien droit français', *Nouvelle revue historique de droit français et étranger* 4 (1880), pp. 655–99 at p. 662 had long ago made a similar point.

[23] *MV*, no. 3: *et XXti solidos denariorum per talem convenientiam ut contra omnes si forte amplius fuerint harum rerum calumniatores ipsi sint nobis legaliter fidelissimi defensores.* Though the circumstances of a quitclaim, as opposed to a donation, for example, means that the logic at play in such a promise may be comparable to that at work in a sale, where the concern on the part of the purchaser centred on the sale price if the vendor were unable to acquit the sale from outside challenge.

[24] *MV*, appendix, no. 21: *Unde dati sunt duodecim denarii … ea convenientia ut si post mortem patris eorum calumnia insurrexerit ipsi adquietent molendinum ab omni calumnia.* This mill was, in fact, later challenged by a *miles* named Thomas de Geneste, but in the settlement reached between Thomas and the monks of Marmoutier, the people who had promised warranty earlier do not seem to have played any part.

defender 'wherever right will be judged'.[25] Statements that a payment was provided 'on the agreement' that an individual warrant are also found in the context of donations, like when the lord (*senior*) of a donor consented to his man's (*homo*) gift of a tithe to Saint-Serge d'Angers, and accepted 30s. 'in charity' from the monks so that he would 'protect them from any challenge'.[26] And in one charter from 1239, William Manoury promised to warrant a sale made to the canons of La Madeleine de Châteaudun by the widow of Geoffrey de Vallières, but only until (*donec*) he returns the 60s. payment he had accepted as the lord of the fief.[27] It is unclear why William Manoury's promise of warranty to the canons of La Madeleine was conditional (insofar as it only lasted for as long as he was the canons' debtor for the 60s. payment that he had received).[28] If nothing else, the example shows that warranty commitments were in some cases time-limited—a point to which we shall return later.[29]

Each of the above examples has the appearance of quid pro quo payments made by an alienee to a third party in return for an explicit engagement by that third party to undertake warranty commitments. How commonly third-party warrantors expected payments for their promises is difficult to know, not least because we rely here on explicit formulations recorded within charters that a pecuniary counter-gift was given 'so that'

[25] 'Livre blanc', fo. 59r–v: *dederunt mihi tali convenientia XXX sol. ut contra calumpniatores ubicumque rectum iudicatum fuerit adiutor et defensor fuissem*. The alienor also gave eight personal sureties stating that he would restore the 30s. should he prove unable to defend the monks successfully.

[26] *SSE*, II, [69], no. 120 (1056 × 82): *per auctoritatem Adelelmi senioris sui qui XXX solidos a monachis tali ratione accepit in caritatem, ut perpetualiter solidam et quietam predictam decimam ab omnibus calumpniis sua defensione et juvamine Sancto Sergio tueretur*. See also *SSE*, II, [17] no. 41 (1056 × 82) for another example of a counter-gift being used to secure the warranty of a donation.

[27] *CLMC*, no. 118: *ego bona fide abbati et conventui … omnia illa que a relicta … emerunt, manucepi garantire et ipsos super hiis indempnes penitus observare donec super sexaginta solidos dunensium quos ab ipsis accepi supradictis canonicis a me fuerunt plenarie satisfacti.*

[28] A possibility would be that William Manoury intended only to warrant the canons up to the value of 60s. That is, were his warranty required, he agreed to spend a maximum of 60s. in supporting the canons. Such agreements have parallels in the Midi, for example, where in sales, the vendor's warranty might be limited to the amount (*usque ad*) of the sale price: see Castaing-Sicard, *Les contrats*, p. 90. Whether the *donec* of the La Madeleine example conveyed the same sense as *usque ad* in Castaing-Sicard's evidence is debatable, however.

[29] Below, Chap. 6.

or 'on the agreement that'. But such examples nonetheless point towards the wider association between payments and promises of warranty. Occasionally, these payments might serve as indemnifications for any rights relinquished by the warrantor in his or her promise of future warranty. Promises in these contexts may be closely associated with the consents and authorisations that others might give to a principal's property transfers. Yet pecuniary counter-gifts also played an important commemorative role. The exchange of monies provided an action for witnesses to remember; if called upon in a trial to testify as to whether or not so-and-so had in fact warranted such-and-such an individual, being able to recall that the person vouched to warranty had accepted a pecuniary counter-gift no doubt strengthened the alienee's case. Whether we tease out the conclusion from this that such counter-gifts were necessary for the creation of warranty obligations in the first place is another question altogether, and one for which the evidence from our period will not give a clear answer. A cautious response would simply emphasise the important evidentiary role that counter-gifts could play, whilst acknowledging the potentially close relationship between warranty and forms of consent that individuals might give to strengthen property transactions.

* * *

While the degree to which warranty obligations were heritable, and when they became so, has been the subject of historiographical debate, from our evidence warranty seems often to have been envisioned as a trans-generational affair.[30] For a start, from the earliest surviving clauses, warrantors ordinarily expected their heirs to uphold their warranty following their deaths. As early as the mid-eleventh century, Hubert, the nephew of Isembard du Lude, explicitly included his heirs (*atque heredes sui post eum*) in his promise to the monks of Saint-Aubin d'Angers, and clauses that amounted to so-and-so 'and his/her heirs' undertook warranty

[30] See above, pp. 6–8 and the literature there cited on the significance attached to the heritability of warranty obligations.

commitments recur throughout our period.[31] The formulas to express the hypothetical heir's obligations sometimes refer to a single heir, or, like in Hubert's promise, refer to multiple heirs.[32] On occasion, the intergenerational transmission of warranty obligations might be framed in a more open-ended manner, like when Urso de Fréteval made a gift to Marmoutier and warranted, both with respect to himself, his sons, or 'whoever will be lord of Fréteval' in the future.[33] And by the time warranty clauses included the *obligatio bonorum* in the thirteenth century, it was common that this *obligatio* bound both the principal alienor(s) and the heirs. It would of course be naïve to assume that the inclusion of an alienor's heirs within the charter diplomatic of warranty clauses necessarily meant that if called upon to do so in the future, those heirs would, without fuss, warrant their predecessor's alienations. Yet the charter diplomatic remains an important measure of general expectations, and from it we see that alienors and alienees alike often expected the alienors' heirs to warrant after them, and held this expectation from an early date.

Numerous charters, moreover, allow us to contextualise more fully the participation of heirs in the promises to warrant the alienations of their kin, as well as in actual warranty practices. Alienors did not always undertake his or her warranty commitments alone: we find an alienor's family members warranting either alongside them, or sometimes in their stead

[31] *SAA*, no. 104 (1038 × 55).

[32] For phrases that an alienor 'or his heir' (*aut heres*), or some such formula, would also undertake the commitments promised by the alienor, see: *FON*, no. 735 (1115 × 29); 'Livre noir', fo. 134r (*c.*1050); *MB*, no. 67 (1094); *Noyers*, nos. 10 (*c.*1037), 520 (*c.*1140), and 575 (*c.*1156); *SAA*, no. 269 (1060 × 67); *SSE*, II, [58] no. 92 (1156 × 62). For the plural 'heirs' (*heredes*), see: *Cormery*, nos. 82 (1228) and 93 (1253); *FON*, nos. 500 (1145 × 49) and 695 (1144); *MB*, no. 156 (1134); *SAA* 318 (1099); *SJH*, no. 107 (1236); *SJT*, no. 180 (1222); *SSE*, II, [14] nos. 4 (1100 × 1110) and [57] 62 (1090); *Tiron*, no. 195 (*c.*1135); *TV*, no. 699 (1236). Note also *Noyers*, no. 438 (*c.*1120) for the principal to a confirmation warranting for himself *et heredes aut proheredes.*

[33] *MB*, no. 159 (1139): *Quod si aliquis contra hanc concessionem meam agere conatus fuerit, et infra suprascriptos aque terminos, molendinos aut sclusam, vel aliud quod molendinis noceat, edificare temptaverit, ego quamdiu vixero, et post me filii mei, vel quicumque fuerit dominus Fractevallis, conatus eius irritos faciemus, et monachis advocati ac defensores erimus, et ab omnibus omnino hominibus, aquam illis iamdictam adquietabimus.*

altogether. Husbands and wives, perhaps unsurprisingly, often warranted together—though equally, we have evidence for joint alienations made by a husband and wife in which only the husband warranted.[34] Nevertheless, a wife's warranty, sometimes given specifically in the form of a promise of non-contravention, might have been particularly desirable if the alienated property came from her dowry, dower, or inheritance.[35] But the composition of warranting kin-groups could vary widely, moving well past husbands and wives. A mother might warrant together with her sons; fathers and sons warranted together; brothers might jointly warrant; or an alienor's daughter occasionally joined in on the warranty.[36] And in some instances, warranty could be given by a complex alienatory group composed both of blood and of affinal kin. In 1251, for example, Alaïs, a widow, made a sale to the abbey of La Couture, along with her three sons, her son-in-law, her daughter, and two of her daughters-in-law: all of these proceeded to warrant the sale, with the exception of the two daughters-in-law.[37] That each separate alienor would be expected also to warrant has a certain logic to it—even if the exclusion of the daughters-in-law in Alaïs' gift suggests that the relationship between alienation and warranting was

[34] See, *inter alia*: *Beaum.*, pp. 29–30 (1259), 37–8 (1270), and 38–40 (1271); *Cormery*, no. 102 (1275); *FD*, no. 176 (1243); *FON*, nos. 265 and 366 (both 1115 × 49); *MB*, no. 206 (1208); *MMA*, p. 29 (1063); *SAA*, no. 121 (1121 × 27); *SJT*, no. 280 (1258); *SSE*, II, [17] nos. 41 (1056 × 82) and [65] 113 (late eleventh century). Compare examples in which the wife did not warrant: *La Haye*, no. 5 (*c.*1200?), 'La Roë', fos. 36r–v and 47r–v (both undated, though no later than 1170); *Tiron*, no. 97 (*c.*1128).

[35] See, e.g., *CMLC*, no. 89 (1230): *et quia dicta Juliana in dicta domo dotalicium reclamabat, in manu nostra fidem pretitit corporalem spontanee non coacte quod in dicta domo occasione dotalicii nichil de cetero reclamabit.*

[36] For mothers and sons, see: *FON*, no. 726 (1148 × 50), where a mother warrants with her sons, and her own brothers and sisters; *MD*, no. 38 (1084 × 1100); *MV*, no. 3 (1032 × 64); *Noyers*, nos. 472 (*c.*1131) and 612 (*c.*1178); *RA*, no. 197 (*c.*1112); *SAA*, no. 128 (1060 × 81). For fathers and sons warranting together, see for example: *MB*, no. 62 (1092); *MD*, no. 163 (1123); *Noyers*, no. 524 (*c.*1140); *RA*, no. 375 (*c.*1100); *SAA*, no. 269 (1060 × 67); *SJH*, no. 70 (1215); *SSE*, II, [15] nos. 37 (1062 × 82) and [24] 316 (1056 × 82). Brothers warranted together in: *FON*, nos. 514 (1108 × 16) and 713 (1125 × 49); *MB*, nos. 112 (1100), 156 (1134) and 176 (1178); *Noyers*, no. 259 (*c.*1098); *SAA*, no. 664 (1167). For the inclusion of daughters in warranty promises, see: *FON*, no. 735 (1115 × 29); *SAA*, no. 669 (1100).

[37] *La Couture*, no. 343.

not quite so direct. Yet there are also transactions in which an individual or pair of alienors saw their transaction warranted by a larger group of people. Two sisters, between 1149 and 1170 for instance, made a gift to La Roë, which was then warranted not by them, but by seven other individuals, including the sisters' father and mother.[38]

Like so much involved in the alienation of property, seldom was the promise to warrant a solitary affair, and the principal alienor's kin were often described as also giving their promises and/or pledging their faith that they would 'warrant', 'acquit', 'defend', etc. the principal's transaction.[39] Though the composition of warranting kin-groups varied, the common theme uniting such examples is that the individual and the family frequently warranted together, which suggests that explaining the development of warranty by appealing to an argument of greater individual alienatory powers at the expense of kin perhaps needs to be nuanced. This is not to posit that property relations were characterised by some irenic family harmony: the inclusion of kin in the actual giving of warranty promises need not preclude future conflict if some of those individuals later sought to extricate themselves from earlier promises. Nor does it dismiss the tensions that underpinned the wishes of some to make *inter vivos* alienations on the one hand, with others' desire to preserve the family patrimony on the other. Rather, the point is simply this: it is less clear how immediately relevant such tensions are specifically in the context of understanding warranty obligations and their development, at least based on the evidence which survives from western France. The general orientation of warranty ideas in this region and during this period may have owed less to the changing structures of family property than has sometimes been assumed.

In addition to kin, an alienor's lord might also warrant the alienee. Lords would sometimes warrant when their follower was not long for this

[38] 'La Roë', fo. 69r–v.

[39] On aspects of the wide involvement of an alienor's kin in property transactions—particularly donations—in western France during this period, see White, *Custom, Kinship, and Gifts to Saints*, passim.

world. Thus, between 1082 and 1093, for instance, Hamelin de Méral lay on his deathbed and summoned his lords Guy [II] de Laval and Renaud de Craon to his side; he then commended his daughters and his *honor* to them, and asked them 'with groans and tears' to confirm his gift to Saint-Serge d'Angers, and for each of them to warrant.[40] Similarly, Geoffrey de Saumur was gravely wounded during a campaign against the count of Angoulême with Henry the Young King (†1183), and he therefore summoned Robert de Blou as the 'chief and major lord of his fief' to his side and asked him to be the *custos* and *defensor* of his eleemosynary gift to Fontevraud.[41] But a lord's warranty was not limited to situations of the alienor's imminent demise. When Berard *Buxum* gave the canons of La Roë a chapel so that he could become a canon there (at a later date), he also had his lord, William de la Guerche, warrant his gift; at some point in the 1070s, Cadilon, the vicomte of Aulnay, warranted a gift to Saint-Florent de Saumur made by his follower Haimo; in 1122, Hugh, the vicomte of Châteaudun, promised his future warranty (*garandabo*) 'according to right' for land given to Fontevraud and which came from his fief; and in the second half of the twelfth century, an alienor obtained a

[40] *SSE*, I, no. 55: *ac insuper rogavit cum gemitus et lacrimis ut elemosinam quam monachis Sancti Sergii dederat concederet quietam et tuerentur unusquisque in honore suo silicet* [sic] … *cujus petitioni libenter annuerunt et in manu domni Achardi abbatis qui praesens aderat coram baronibus suis firmaverunt et quietam ab omnibus consuetudinibus et infestationibus se servaturos.* Hamelin's gift would later be challenged, sometime after 1102, whereupon Guy [II] de Laval, remembering his promise to Hamelin, acquitted the monks by the judgment of his barons, in his court (*in curia sua judicio baronum suorum monachos adquietavit*).

[41] *FON*, no. 838 (1170 × 80): *eumque sictu capitalem et majorem illius feodi dominum in quo decima colligebatur doni sui et elemosine custodem et defensorem constituit et rogavit.* Geoffrey's gift would later be challenged by his direct lord, Aimery de Joireau (*de cujus feodo tota decima sub domino Roberto de Blodio erat*); the nuns of Fontevraud thus went to Robert who convinced Aimery to abandon his challenges in return for 20s.

promise to warrant his transactions by his 'liege lords … who ought to be [his] warrantors and defenders'.[42]

The evidence for lords explicitly warranting the transactions of their men and/or tenants becomes especially marked from 1200 onwards. Seigneurial warranties might appear in several different diplomatic contexts, ranging from a charter issued by that lord authorising or confirming the alienation of his or her tenant and/or man and which included an additional explicit promise of warranty, to charters issued by an *officialis* in which the principal recognised his or her transaction before the *officialis* and then the lord, 'at the petition' (*ad petitionem*) of the principal, agreed to undertake the warranty commitments for that transaction. Whatever their diplomatic form, seigneurial warranties are very prevalent in the thirteenth century. From the published charters of Marmoutier, for example, roughly 41% of the warranty clauses recorded between 1200 and *c.*1270 were promises made by the alienor's lord.[43] While other archives do not yield quite so high a figure as Marmoutier, we nevertheless find a similar prominence of seigneurial warranties elsewhere. The thirteenth-century charters of La Madeleine de Châteaudun, for instance, produce a figure of

[42] 'La Roë', fo. 67r (1141 × 56): *hanc elemosinam suprascriptam dedit Bernardus tam pro Guillelmo de Guircheia domino et suis antecessoribus et heredibus quam pro se et suis. Guillelmus vero fide et jurejurando concessit et promisit eam aecclesiae et canonicis servandam et defendendam*; this chapel had been made within the castle of La Guerche, and the canons were henceforth to hold it from William, just as Bernard had done before. 'Livre noir', fo. 91r (1072 × 80): *vicecomes affidavit eum legaliter re cum injuriose duceret et ab omnibus a quibuscumque defendere posset defenderet*. Although Aulnay itself lies in the south-west of France, the vicomtes had possessions in northern Poitou, of which Saint-Florent de Saumur was sometimes the beneficiary: on the vicomtes, see Jan Hendrik Prell, *Comtes, vicomtes et noblesse au Nord de l'Aquitaine aux Xe–XIe siècles. Études prosopographiques, historiques et constitutionnelles sur le Poitou, l'Aunis et la Saintonge* (Oxford, 2012 [orig. 1992]), pp. 87–91; Artem, no. 3644: *de cujus feodo est terra … istud donum concedo et pro posse meo secundum rectitudinem garandabo*; *FON*, no. 939: *domini sui lige … qui debent esse garitores et defensores*. For further eleventh- and twelfth-century examples of lords warranting an alienor's transactions, see: *FON*, no. 726 (1148 × 50); 'La Roë', fo. 56v–57r (1149 × 70); *MB*, no. 70 (1096 × 1104); *MD*, no. 72 (1107/8); *Noyers*, nos. 519 (*c.*1140) and 622 (*c.*1183); *SAA*, nos. 361 (1060 × 81), 571 (1191 × 1220) and 667 (1082 × 1106); *SSE*, II, [13] nos. 15 (1100) and [15] 37 (1062 × 82); *SVM*, nos. 626 (1095) and 802 (1090 × 1102).

[43] That is, eighteen out of forty-four clauses; see: *MB*, nos. 201 (1201), 224 (1222), 234 (1233?), 278 (1252), 286 (1256), and 306 (1265); *MD*, nos. 206 (1200), 212 (1202), 218 (1208), 220 (1210), 239 (1224), 246 (1232), and 250 (1244); *MP*, nos. 148 (1252), 159 (1254), and 270 (1266); *MV*, appendix, nos. 46 (1250) and 49 (1267).

approximately 23% for seigneurial warranties.[44] These seigneurial warranties were often accompanied by specific formulas: in eleventh- and twelfth-century charters, the lord might be identified as the figure 'from whose fief' (*de cujus feodo* or variant) the alienated property came; in thirteenth-century charters, lords stated that they were bound (*teneor*, e.g.) to warrant, should the need ever arise in the future for them to do so, in their capacity 'as the lord of the fief' or 'feudal lord' (*tamquam* or *ut dominus feodi*; or *dominus feodalis*).[45]

Whether the warranties given by a lord differed from those given by an alienor is difficult to know. For our present purposes, however, the following observations are merited. First, obtaining the warranty of a powerful lord presented obvious advantages for both the alienor and the alienee.[46] As we shall later see, warrantors might be expected to use force or wage war (a *guerra*) on behalf of the warrantee, and alienors might well have turned to their lords as warrantors, not least because their lords were politically important figures able to command greater military and economic resources than they could themselves. The support and warranting of a follower's transactions, especially those made to churches in the hopes of obtaining favour at the heavenly court, provided the lord with an opportunity to display 'good lordship' and reward his follower's past services. Second, and to be discussed in greater detail later, the warranty given by a lord may often have been connected to the customs and services owed for the property given. Seigneurial warranties were in this respect tantamount to the waiver of services in some situations, or amounted to the confirmation of predetermined or long-established arrangements for services and customs. And finally, the practice of seigneurial warranties may also be understood in light of the growth of *juridictions gracieuses*, representing here something of a corollary to the *officialités* discussed above. This

[44] That is, fourteen out of sixty clauses (up to 1270); see: *CMLC*, nos. 43 (1200), 44 (1201), 56 (1208), 59 (1209), 64 (1210), 65 (1211), 74 (1214), 84 (1224), 102 (1235), 106 (1236), 118 (1239), 119 (1239), 129 (1243), and 158 (1250).

[45] In addition to the charters cited in the preceding two notes, see: *Lib. Alb.*, nos. 622 (1234) for *et teneor illam garantizare … tanquam dominus feodalis*, and 665 (1229) for *dominus principalis illius feodi … teneor … sicut dominus feodalis garantizare*; *TV*, nos. 638 (1202) for a lord's warranty given concerning a gift of goods *de feodo nostro*.

[46] Compare here Maitland's classic statement: 'Happy then was the tenant who could say to an adverse claimant:—"Sue me if you will, but remember that behind me you will the find the earl or the abbot." Such an answer would often be final': Sir Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I*, 2 vols., 2nd ed. (Cambridge, 1968 [orig. 1898]), I, p. 306.

suggestion makes particular sense of the thirteenth-century seigneurial warranties and the use of phrases such as *ut dominus feodi*. But earlier promises in which a lord's warranty included a commitment to provide justice in his own court, or the case material that demonstrates such promises in action, have a marked jurisdictional edge to them. While it would be anachronistic to describe Guy [II] de Laval's warranty mentioned above as the operation of a *juridiction gracieuse*—that is, as the work of an established public figure by whose authority people had their transactions ratified—it is equally important to recognise that his promise to Hamelin de Méral has obvious resonances with the seigneurial warranties of the thirteenth century.

A final observation needs to be made on the subject of the people most likely to warrant a transaction. A promise of warranty was sometimes accompanied by the alienor naming and giving personal sureties.[47] These figures were often identified as *fidejussores*, though sometimes scribes would describe them as *plegii* or as *obsides*.[48] In some instances, the alienor would promise his/her defence or acquittal of a transaction, and then provide sureties as a supplement to his or her original promise. Yet, in other examples, the alienor does not seem to have undertaken warranty obligations personally, but rather, to have identified a number of sureties who would acquit, defend, or warrant the transaction on the alienor's behalf. It can therefore be very difficult to draw clear boundaries between warranty and personal suretyship. From an analytical perspective, personal

[47] Hyams, 'Warranty and Good Lordship', p. 445, n. 26 noted, but did not explore, this relationship. On personal suretyship, see the overview in Jean Gilissen, 'Esquisse d'une histoire comparée des sûretés personnelles. Essai de synthèse général', in *Les sûretés personnelles*, 1st part, Recueils de la Société Jean Bodin pour l'histoire comprative des institutions (Brussels, 1974), pp. 5–127. Wendy Davies, 'Suretyship in the Cartulaire de Redon', in *Lawyers and Laymen: Studies in the History of Law Presented to Professor Dafydd Jenkins on his 75th Birthday Gwyl Ddewi*, ed. Thomas Charles-Edwards, M. E. Owen, and D. B. Walters (Cardiff, 1986), pp. 72–91, and eadem, 'On Suretyship in Tenth-Century Northern Iberia', in *Scale and Change in the Early Middle Ages: Exploring Landscape, Local Society, and the World Beyond*, ed. Julio Escalona and Andrew Reynolds (Turnhout, 2011), pp. 133–52 provide two excellent studies in local contexts.

[48] For examples of *fidejussor* or *fidejussores*, see, *inter alia*: *MD*, no. 151 (1096); *MP*, no. 11 (*c.*1067); *MV*, no. 53 (1070); *SAA*, nos. 83 (1082 × 1106) and 940 (1038 × 55); *SSE*, II, [13] no. 4 (1100 × 1110), [50] no. 345 (1056 × 82), and [72] no. 125 (*c.*1100 × 33); *Tiron*, nos. 109 (1129) and 229 (*c.*1140). For *plegius* or *plegii*, see: *CLMC*, no. 175 (1258); 'Livre blanc', fos. 76v (*c.*1080) and 77r (*c.*1080); *M.Manc.*, II, pp. 44–7 (end of eleventh century); *RA*, no. 197 (*c.*1112); *SAA*, nos. 60 (1082 × 1106), 96 (*c.*1100), 122 (1117), and 276 (*c.*1080). *Obses* or *obsides* can be found in *TV*, nos. 174 (1060 × 64) and 417 (1107).

sureties might typically be expected to apply pressure on the principal alienor himself/herself to ensure that the alienor in fact discharges whatever obligations he/she had undertaken.[49] But when an individual sometimes came forward to stand as a 'surety of tranquillity', it is unclear in what ways, if any, such a promise would have differed from that of warranty, especially if no separate warranty clause was recorded for the transaction.[50] The other main role of sureties seems to have been to share in the financial liabilities potentially arising from warranty obligations, especially the provision for compensation.[51] We thus find individuals who promised to warrant a sale, for instance, and then named sureties who would help them repay the payment price. When Acharias de Marmande confirmed Noyers' acquisition of a mill, for example, he promised to pay the monks 1000s. if he failed to repel any challenge that might be brought upon it: Acharias then gave eleven named sureties, nine of whom were liable for 100s. each, and the further two liable for 50s. each.[52] In this respect, sureties became participants in any liabilities for debt connected with the act of warranting that the alienor might incur. Quite how (or even if) the

[49] *MMA*, p. 21 (before 1118) records a gift of tithes given to Marmoutier by Matthew, a knight (*miles*), who provided the monks with several named sureties (*fidejussores*) to defend Marmoutier 'against Matthew' should he ever 'scheme to violently seize those tithes from the monks' (*decimam monachis violenter auferre machinaretur*).

[50] For the 'surety of tranquillity' (*fidejussor tranquillitatis*), see *Tiron*, no. 53 (*c.*1122), which also records a promise of defence, and ibid., no. 199 (*c.*1135), for which no separate promise of warranty survives; the first of these charters is mentioned in Thireau, 'Faculté de disposer', p. 358 as an example of a 'garant de toute éviction'.

[51] See here *SSE*, II, [56] no. 369 (*c.*1090), in which a donor promised an equivalent plot of land in exchange for what he was given should his original gift be challenged: the donor also gave two personal sureties with regard to the exchange, to put the monks' minds to rest about any possible challenge (*et ne alicujus calumpniam timerent, dedit eis de mutatione fidejussores*).

[52] *Noyers*, no. 246 (*c.*1096). For comparable, though less detailed examples, see *MD*, no. 150 (1095 × 1100); *MP*, no. 16 (1092 × 1100); and *SAA*, no. 155 (*c.*1160), where in this latter, the donor named one Artaud, a *miles* of Montreuil-Bellay, as the *fidejussor* and *obses* that if neither the donor nor the donor's son could drive back a potential challenge, then the monks' exchange would come from Artaud's 'own land' (*propria terra*).

relationship between warranty and suretyship evolved over our period, however, remains a question that requires further research.[53]

* * *

We have seen, therefore, that in its practice and in the types of people who gave it, warranty displays marked continuities from the 1040s into the 1270s. Throughout our period, warranty continued to reflect its oral roots, with clauses often introduced by verbs denoting some form of verbal engagement. Pledging or giving one's *fides* remained common, and commitments were sometimes secured with oaths. Changes in practice, at least as we see them in the charters, involve the places where and before whom such verbal commitments were made. The *confessio in jure* sworn in the presence of the *officialités* may imply a departure from earlier practices of swearing oaths at the site of the transferred property or before a large body of witnesses; but even so, it is important to underline the significant changes in *what* thirteenth-century charters do and more importantly do *not* show us. As ever, it is difficult to know how far a charter issued by an *officialis* comprised the entirety of actions accompanying a transfer of property: common sense alone, however, would suggest that much was left out of these documents. This means that we should exercise caution in using our heterogeneous charter evidence to argue for a substantive change in the decades around 1200 whereby warranty ceased to be only a voluntary commitment and instead became a legal obligation. The distinction, based on the evidence we have, makes little sense.

We have also seen that warranty often remained a collective or collaborative affair. Individuals regularly sought the assistance of additional parties, either kin and/or lords, to supplement their own commitments, or to undertake warranty commitments on their behalf. The frequency of seigneurial warranties in the thirteenth century stands out as a particularly arresting phenomenon, and specific diplomatic formulas developed around the practice of seigneurial warranty. Further, as we have seen, warrantors

[53] One line of inquiry would be to look at the use of personal sureties relative to that of real sureties when alienors provided additional guarantees to secure their warranty commitments. The development of the *obligatio bonorum* in the thirteenth century, for example, may indicate a general (though not absolute) shift away from situations of quasi-collective liability as seen in personal suretyship, and towards situations of individual liability concentrated upon the alienor's real property (and chattels). See here the outline provided by Jean Bart, *Histoire du droit privé de la chute de l'Empire romain au XIXe siècle* (Paris, 1998), pp. 421–33.

continued to supply personal sureties (*fidejussores*) throughout our period, further reinforcing the collective dimensions of warranty commitments. Crucially, an alienor's heirs, it seems, were expected to warrant their predecessors' transactions from an early date, at least based on the diplomatic. Whether they actually did is another matter altogether, one we shall address in the following chapter. Regardless, the diplomatic of warranty clauses does not support the argument that warranty commitments only became binding on heirs from the thirteenth century. The continuities in warranty practices thus described therefore invite us to question the extent to which the growth of warranty should be tied to a narrative centred on the rise of individual alienatory powers. We may therefore need to look elsewhere when explaining the development of warranty.




CHAPTER 5

# Warranty, Litigation, and Compensation

**Abstract** This chapter examines warranty in practice. It presents an overview of what alienees expected their warrantors to do for them in the event of an outside challenge, discussing warranty commitments both within court and outside of court. The chapter presents the rich case material from the region to provide a composite picture of expectations and areas of debate about warranty. The chapter then discusses what happens when a warrantor failed to discharge his or her commitments. Here I examine the various claims to compensation that an alienee might make, and likewise present the case material that illustrates how such claims worked in practice. I draw particular attention to cases in which one party sought redress from a warrantor for properties seized or lost in warfare. The overall conclusion of the chapter is that warranty throughout our period was a recognised feature of court practice, and the ability to summon a warrantor to one's defence amounted to a sort of procedural right available to defendants during our period.

**Keywords** Lawsuits • disputes • warfare • *guerra* • compensation • exchanges • excambium • procedure



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Thus far, we have examined the diplomatic of warranty clauses and what charters reveal about the practices associated with the giving of warranty. While diplomatic formulas and the circumstantial details recorded in charters gives us good reason to identify major continuities in warranty's history, the diplomatic nevertheless represents only an ideal: what alienors, alienees, and the scribes who wrote their charters thought the world *ought* to be. If diplomatic formulas provide a good impression of expectations, it is necessary to see how such expectations translated into practice, both in and out of formal court settings, in order to fully understand how warranty worked during the central Middle Ages. In this chapter, we shall look at what happened when an individual sought to make good the commitments a warrantor had made, and what happened if the warrantor could not successfully discharge his or her obligations to the alienee.

* * *

Promises of warranty typically stated that would-be warrantors would discharge their duties 'to the best of their ability' (*pro posse suo*), a characteristically expansive yet ambiguous phrase whose precise meaning no doubt generated much debate between alienors and alienees.[1] Fortunately, much of our evidence allows us to get below the level of generalities. Thus, alienees seem ordinarily to have expected that their warrantors would support them in court. From the earliest surviving clauses, the association between warranty obligations and formal legal settings is clear. Consider two early clauses, both dating from between 1038 and 1055: in the first, an alienor told the monks of Saint-Aubin that 'should anyone arise to challenge the things which he abandoned', then 'he will warrant them and undergo proof [for them] in court [*curte*]'; in the second, another warrantor

[1] For examples, see: *FON*, no. 892 (1150 × 99); 'Livre blanc', fos. 37r–37rbis (1100 × 1110); 'La Roë', fos. 60r–v (1149 × 53/4) and 81r–v (1149 × 70); *RA*, no. 130 (1110 × 1115); *SJT*, nos. 139 (1207) and 183 (1222); *TV*, nos. 174 (1060 × 64), 603 (1190), and 638 (1202). The phrase also appears in eleventh-century Norman warranty clauses, for which see Tabuteau, *Transfers of Property*, p. 196. Equally, alienors might commit themselves to the support of their alienation 'in as much as they were able' (*in quantum potuerit*, or variant): see here, Assé, no. 9 (1125); *MMA*, p. 36 (*c.*1070); *MV*, no. 118 (1060 × 66); *Noyers*, no. 409 (*c.*1115); *SAA*, nos. 288 (1060 × 87), 632 (1107), and 655 (1097); *SVM*, no. 65 (1093 × 1103).

committed himself to defend the same monks *in curia*.[2] Similar promises of defence or warranty specifically in court recur throughout the period covered. Raoul de Beaugency, in 1092, thus promised to acquit his gift to Marmoutier 'in any court, according to justice'; in 1111, a quitclaimant to Cormery affirmed that he would resist any claimant against the monks 'in both secular and ecclesiastical judgment'; between 1156 and 1162, Maurice de Craon warranted the canons of La Roë, offering his aid and defence either in his own court, or that of the bishop of Angers; or in 1226, Guillaume *Ropenon* warranted the monks of La Trinité de Vendôme 'both within judgment and outwith judgment'.[3] The curial orientation of warranty, while unsurprising, is important because it loosely structured how contemporaries understood the scope as well as the limits of what warranty entailed. As we shall later see, however, there was sometimes debate between alienors and alienees about where precisely such boundaries lay.

Warranty procedures ordinarily began with the summoning or vouching of a warrantor. A charter from 1099, for instance, records an adjournment to a dispute between Gaudin de Malicorne and the canons of Saint-Laud d'Angers because the judges had decided that Gaudin 'ought to have as his witness and defender' Robert the Burgundian, from whom he said that he had the contested property in fief (*in feodo*).[4] This charter opens a rare window onto proceedings *in medias res*, as opposed to the more usual retrospective accounts supplied by such documents, and it suggests that summoning a warrantor was a basic procedural right for a defendant. Some cases, moreover, make clear that the warrantor was *not* already present during the legal proceedings to which he was summoned, meaning that, like the Saint-Laud charter, warranty procedures must often

[2] *SAA*, no. 104: *si quis surrexerit ad calumpniandum ea quae guirpivit… ipse guarendet et probet in curte, at que heredes sui post eum*; and *SAA*, no. 940: *ipse defenderet in curia contra omnes homines.*

[3] *MD*, no. 60: *promittens se illa nobis adquietaturum ab omnibus hominibus in omni curia, secundum justiciam*; *Cormery*, no. 54: *paratus ero et saeculari et ecclesiastico judicio omnimodis resistere cuilibet calumpnioso*; 'La Roë', fo. 82v–83r: *hoc eis concessi quod illis qui justo judicio curie meae vel curie Andegavensis episcopi aliis respondere vellent defensionem meam et auxilium preberem*; *TV*, no. 670: *et tam in judicio quam extra judicium.*

[4] *SL*, no. 20: *in quo dijudicatum est placito a supradicto comite et reliquis baronibus qui presentes aderant quod Gaudinus eum de quo dicebat se terram habere in feodo, Robertum videlicet Burgundionem, in curia comiti [sic] Andegavorum et episcopi testem et defensorem terre que Angularia dicitur deberet habere.*

have resulted in delays.[5] And there is at least one case suggesting that a defendant, when vouching a warrantor, ought to give a pledge. Thus, between 1060 and 1081, Vivien du Lude had purchased vineyards from a serf (*servus*) of Saint-Aubin without the abbey's consent, whereupon the monks promptly reclaimed them: Vivien pledged (*guagiavit*) his warrantor at a fixed court-date (*ad terminum*), though the warrantor defaulted when the term arrived.[6] Given that Vivien's act of pledging was expressed with the same verb used when individuals gave pledges to pay fines, we are likely here dealing with some form of material and/or pecuniary pledge whereby a defendant secured an adjournment.[7] Yet the charters on the whole provide scant detail concerning the practicalities of summoning a warrantor, with basic questions such as how long an adjournment did warranty buy for the defendant left unanswered.[8]

Several cases demonstrate someone who had been vouched to warrant arriving at a *curia* or *placitum* only to deny any such obligation. Thus, between 1096 and 1110, for example, one Maffredus claimed a *prévôté* from Saint-Pierre de la Cour, alleging that Norman Riboul had given it to him as his inheritance (*ut hereditatem*); in the *curia* of Élias, count of Maine, Maffredus 'vouched' Norman to come to his defence, who then 'wholly denied that he had given that fief and inheritance to Maffredus'.[9]

[5] See, for example, *SPC*, no. 13 (1096 × 1110) in which a defendant's warrantor was 'vouched' (*advocatus*); *SJH*, no. 33 (1205), in which the court-holder (the bishop of Angers) summoned the defendant's warrantor; or *SVM*, no. 252 (1070 × 80) in which the abbot of Saint-Vincent du Mans, after an adverse claim against his abbey's property, proceeded to lead his 'warrantor' and *auctor* from Tours to Le Mans, and won the contested property 'by the authority of that warranty' (*per guarantagii ipsius auctoritatem*).

[6] *SAA*, no. 362: *et proinde guarentum suum id est venditorem ad terminum ipse Vivianus guagiavit … termino ver adveniente, Vivianus presto non fuit nec guarentum suum habuit.*

[7] Note also *Cout.AM*, § 100 which states that the defendant should provide pledges in order to summon a warrantor.

[8] The adjournment to Gaudin de Malicorne's case, recorded in the Saint-Laud charter, was dated to 13 April, with the next session scheduled for 3 June, at the Angevin comital court in Baugé, giving a delay of fifty-two days. The question of adjournments is closely related to the periodicity of courts throughout our period, a question that is too complex to enter into discussion about here. Suffice to say, we have references to regularly meeting assises in Anjou from the 1230s at the latest; BB, part II, vol. 2, pp. 117–20 discusses the evidence. Compare *Beaumanoir*, cap. 34, § 1046, which states that an adjournment to produce a warrantor should be no longer than a year and a day, unless the individual summoned as a warrantor should live in a distant land.

[9] *SPC*, no. 13: *Normannus a Maffredo ut hereditatem ab eo sibi datam defenderet advocatus est, qui et feodum et hereditatem sibi dedisse penitus negavit.*

Although in this case nothing is said about how Norman made his denial, other cases allow us to tease out what may have been typical in such instances.[10] In 1128, for example, Hugh, the lord of Amboise, laid claim to customs in the land of Marmoutier on the grounds that he had these from the fief (*de fevo*) of the count (or countess) of Anjou.[11] Count Fulk V then said 'in a clear and glorious voice' that Hugh did not in any way have these customs from the comital fief; Hugh then lost the case since he refused to undertake proof or further argue his case.[12] The degree of formality beneath Fulk V's declaration, and whether it represented the performance of warranty obligations in court, is difficult to tease out. Hugh's reluctance to pursue his case further means that Fulk's degree of commitment to Marmoutier's defence was not really put to the test, since all that seems to have been required here was an assertion on the monks' behalf. When powerful figures such as the count of Anjou said something in a court to contradict the claims of a follower, then this must have represented a real test of resolve for that follower, many of whom, for whatever reason, may have been reluctant to launch formal proceedings against their superiors. At any rate, Hugh d'Amboise's case suggests that it ordinarily fell to the individual who vouched a warrantor to establish, perhaps by proof, the obligations of the warrantor if this latter denied them. Confirmation of this comes from a 1062 case. A lord who had authorised and promised to acquit Marmoutier's acquisition repeatedly denied having earlier promised to acquit them when the property was made the subject of a challenge by his brother-in-law; only when the monks arranged a judicial duel against their warrantor did he recognise his earlier commitments.[13]

[10] For other statements to the effect that the would-be warrantor simply 'denied' having given property to someone, see 'La Roë', fo. 76r–v (1149 × 70), where a claimant alleged to have purchased property from one Hilarius, who then denied this: *quod dicebat se emisse de Ylario Forre, Hylarius hoc negabat.*

[11] Paris, Bibliothèque nationale de France, Collection Touraine-Anjou, vol. 4, nos. 1500 and 1501, which provide variant readings of *de fevo comitis* or *de fevo comitissae*.

[12] Ibid.: *Tum comes visus aliquantulum indignari libera excelsaque voce dixit quod has consuetudines quas ut saepius dictum est in terra Beati Martini exigebat de fevo suo idem Hugo prorsus non habebat.* See also *RA*, no. 185 (*c.*1147) for another Angevin case where Nivard de Rochefort claimed rights through the count, only to be told by Count Geoffrey le Bel, 'You have no right in that wood, because I have no right in that wood' (*ergo nichil juris est tibi in bosco illo, quia nullum jus habeo in bosco illo*).

[13] *M. Manc.*, I, pp. 341–2: *Cum ergo contra istam calumniationem sepedictus monachus promissam Guillelmi exposceret adquietationem et ille se promisse negaret, bellum contra eum de hoc adhramitum est et ita quandoque quod fecerat recognovit….*

Less clear is the role charters themselves played in the establishment of a warrantor's obligations. I have found no evidence from western France in which a court inspected a charter to determine whether or not an individual summoned to warrant had earlier made such an agreement and included it in his charter.[14] Comparative evidence suggests that by the thirteenth century, at least, establishing warranty obligations by charter would not have been out of the question. There is late evidence provided from the *Parlement* in Paris that royal warranty, at least, could be established by the production of a charter. In Pentecost term at the *Parlement* in 1270, for example, Guiotus de *Lainville* asked the king (Louis IX) to warrant him when Richard *Bellenguel* claimed land from him. Guiotus alleged that King Philip (Augustus) had given this land to his predecessors on account of service, and produced a charter in support of his case; the *arrêt* continued to state that the king would warrant and would take up the lawsuit himself.[15]

Yet, consider on the other hand a 1274 charter from the *officialité* of Chartres. This records a case between one Henry de *Morgues* and the abbey of Marmoutier, in which Henry stated that he had sold the monks only (*tantummodo*) his own share of a revenue which came from his inheritance, and which he said was confirmed by another charter from this same *officialité*.[16] The monks' response was telling: they stated that 'more had been done, and less had been written in that charter', and that in addition to selling his share, Henry had also confirmed the entirety of this toll, whose other parts the monks had bought from his maternal aunt (*matertera*), promising also that he would warrant the entire revenue 'against

[14] There is one suggestive example from the 1060s in which Guy de Vaucouleurs promised in his quitclaim to the monks of Saint-Florent that he would warrant 'the things which have been named in the letters which he has and which we have' (*ea quae in litteris quas inde habet et nos habemus denominata erant*): 'Livre noir', fo. 55r–v. The example implies that warranty obligations could be linked specifically to the charter conveying them, but the Saint-Florent charter just cited is nevertheless exceptional, and it is difficult to draw conclusions about the use of charters to establish warranty obligations in court on the basis of this transactional document.

[15] *Olim*, p. 810.

[16] *MD*, no. 276: *Henricus dicebat et asserebat se vendidisse tantummodo campipartem quam ipse habebat, moventem ex hereditate sua … pro viginti libris Turonensibus, prout in quadam littera sigillo nostro sigillata super hoc confecta dicebatur contineri.*

everyone, even against his own brothers and sisters'.[17] The *officialis* then coordinated arbiters who carefully examined witnesses, under oath, over the extent of the promises that Henry had earlier made. From this, the decision was that Henry had indeed promised to warrant the monks against all, 'even against his brothers and sisters'.[18] Here we have an inquest seeking to determine the key fact of what exactly a warrantor had promised verbally, especially since, as the monks of Marmoutier put it, more was done than had been written in the initial charter recording the sale. Although much remains unclear concerning this particular case, its wider lesson for our present purposes emerges forcefully: whatever probative value the charter might have had in establishing so-and-so's warranty commitments, there was still considerable scope for debate as to the extent of those commitments for which alternative, non-written evidence might be required. Not only does this story encapsulate the difficulties of capturing in writing all of the potential nuances of the verbal commitments underlying warranty, but it also highlights the continued relevance of the oaths, *fides*, and other physical and spoken acts discussed in the preceding sections, because the establishment of a reluctant warrantor's obligations might rest on whether or not individuals could remember the content of these earlier acts.

Once they accepted their commitments, whether willingly or after proof, warrantors were typically expected to provide an account and response to a *calumnia* on behalf of their alienees should their transactions be challenged by a third party. Numerous warranty clauses thus express the warrantor's commitments in verbs meaning 'to plead' (*placitare*), 'to deraign' (*disrationare* or *rationare*), 'to provide an account' (*denarrare*),

[17] Ibid.: *quod in dicta venditione plus fuerat actum et in dicta littera minus scriptum, quia dicti religiosi dicebant et asserebant quod cum ipsi emissent a matertera dicti Henrici et Guerino de Tellau armigero et Huelvisa, ejus sorore, illud quod ipsi habebant in quadam campiparte … dictus Henricus asserens ad se pertinere totum residuum dictae campipartis, eisdem religiosis vendiderat totum residuum dictae campipartis, et totum illius residuum promiserat se garandizaturum et defensurum dictis religiosis contra omnes, ac etiam fratres et sorores ejusdem Henrici.*

[18] Ibid.: *dicti arbitri dixerint in hunc modum videlicet quod cum ipsi de premissis inquisissent veritatem et invenissent per testes legitimos receptos juratos et ab ipsis super premissis diligenter examinaturos quod dictus Henricus totum residuum dictae campipartis dictis religiosis vendiderat et eisdem religiosis promiserat se contra omnes garantisaturum ac etiam contra fratres et sorores dicti Henrici.*

or simply 'to testify' (*testificari*).[19] Equally, the often close conceptual relationship between warranty and witnessing further reinforces the emphasis on testimony.[20] In 1107/8, for instance, Païen de Mondoubleau promised the monks of Marmoutier that he would be their *auctor*, *defensor*, and *legalis testis*.[21] Our extant case material, not unexpectedly, furnishes some good examples of warrantors turning up to court to give an account or respond to a challenge on behalf of their alienee. A case from *c.*1105 between one Raoul and the monks of Noyers over a mill that had been given to the abbey by Rannulf Berard, for instance, saw the monks bring their 'witness' and 'defender' to a *placitum*: there, Rannulf explained (*narravit*) that he had given the contested mill to Noyers, and that his lord from whom he held the mill, and who was also present at the *placitum*, would confirm his account.[22] Or, in a case that gathered before the *curia* of Fulk V, count of Anjou (r. 1109–1129/31), between Thibaud de Rillé and the abbey of Fontevraud, the nuns produced Jean de Blaison, the original donor of the contested property, who provided a 'response' (*responsum*) to Thibaud's claim (*clamor*). On the basis of Jean's response, Fulk V's barons judged in favour of Fontevraud.[23]

Sometimes warrantors would go beyond the provision of testimony, and agree to undertake additional judicial proofs. Arnoul de *Brisco*, for example, promised the monks of Saint-Florent de Saumur in *c.*1058 that

[19] See: *SVM*, no. 19 (*c.*1090) for *placitare*; *SL*, no. 49 (1150) and *SVM*, no. 576 (1098) for *disrationare* and *rationare*; *SAA*, no. 96 (*c.*1100) for *denarrare*; and *Tiron*, no. 289 (*c.*1146) for *testificari*. Such language is mirrored in the case material: see *MMA*, p. 55 (1108) for a warrantor who warranted the monks of Marmoutier in the following terms: *praesente eam nobis diratiocinari paratus esset*.

[20] Recall here one of the etymological senses underlying OF *g(u)arantir*: namely 'to affirm the truth of something'; see above, p. 21.

[21] *MD*, no. 72, and note the use of the term *auctor*; see also *TV*, no. 603 (1190) where two brothers agreed to be *defensores* and *testes* for the monks of La Trinité de Vendôme; and *Tiron*, no. 195 (*c.*1135) for a warrantor committing himself and his successors to be *legales testes* and *veraces defensores* for the monks of Tiron.

[22] *Noyers*, no. 329 (*c.*1105): *abbas et monachi adhibuerunt testem et defensorem Rannulfum Berardum qui in eodem placito ita se molendinum donasse narravit*. The charter continues to recount Rannulf's testimony in stylised 'direct speech'. For a similar example of a warrantor's testimony in 'direct speech', see also *SAA*, no. 364 (1067 × 91) and discussion of this case in Stephen D. White, 'Inheritances and Legal Arguments in Western France, 1050-1150', *Traditio* 43 (1987), pp. 55–103, esp. pp. 71–3.

[23] *FON*, no. 432 (1115 × 29): *Audito igitur clamore Theobaudi et responso Joannis diffinitum est judicio baronum ut ecclesia Fontis [Ebraudi] supradictam terram quietam in perpetuum possideret*.

he would defend his gift to them 'in any proof' (*in omni lege*); while in 1104, at *placitum* presided over by Adèle, countess of Blois, the monks of Marmoutier came with their 'warrantor' (*guarentus*), who stated that he was prepared 'to undertake whatever proof would be decided' by the court.[24] References to warrantors defending or acquitting contested alienations 'by judgment', moreover, may very well allude to judicial proof, given the polysemic quality to the word *judicium*.[25] While statements such as 'Aubrey acquitted [such-and-such a property] for us by a right judgment', or 'William warranted [contested property] by judgment' for the monks of Saint-Florent remain difficult to interpret, there is nevertheless a high probability that they refer to judicial proofs.[26] Underlying these various mentions of proof and/or judgment, contemporaries had in mind two forms of proof in particular: oaths and judicial battles. One warrantor in the later 1060s, for example, 'suppressed' a challenge to his earlier sale to Marmoutier and acquitted the monks by affirming his readiness to carry proof on the monks' behalf, 'even to undertake a battle'.[27] Similarly, Vivien Ragoth made a promise to the monks of Saint-Serge that he would

[24] 'Livre noir', fos. 103v–104r: *si quis hoc inquietare quoquomodo voluerit, defendatur ei in omni lege*; *MB*, no. 118 (1104): *paratum probare quomodocumque ibi iudicaretur … guarentus noster … quod predictum est probare paratus esset.*

[25] See here the stimulating discussion in Robert Jacob, *La grâce des juges. L'institution judiciaire et le sacré en Occident* (Paris, 2015), pp. 201–47.

[26] *SSE*, I, no. 260 (*c.*1100): *acquietavit nobis Albericus recto judicio*; and 'Livre blanc', fo. 77r (1070 × 1118) for: *…et Guillelmus per iudicium guarentavit eam Johanni contra Hugonem.*

[27] *MV*, no. 92 (1066 × 71): *quam ipse Gauscelinus repressit et acquietavit asserens terram illam juris esse sancti Martini, et ad hoc probandum etiam pugnam facere paratus.* See also *RA*, no. 310 (1060 × 67) in which one Andefroy warranted his sister's earlier gift to Le Ronceray by telling the claimant that he was prepared to wage a battle (*bellum*) against him; and in *FON*, no. 572 (1117 × 24), Bishop William I of Poitiers (r. 1117–24) decided that the abbey of Charroux should wage a duel (*duellum*) against Fontevraud's warrantor should they wish to pursue their challenges against the nuns. See also the Marmoutier example cited above, p. 65, for another reference to a duel that was not performed, and *SAA*, no. 404 (1082 × 93) for a case in which a would-be warrantor offered to submit to the unilateral ordeal of the hot iron, though this was not in the end performed. In none of the cases involving warranty examined in this study was an ordeal or duel actually carried out. Proposing an ordeal as a form of brinksmanship was a recognised legal strategy during this period, on which see Stephen D. White, 'Proposing the Ordeal and Avoiding It: Strategy and Power in Western French Litigation, 1050–1110', in *Cultures of Power: Lordship, Status, and Process in Twelfth-Century Europe*, ed. Thomas Bisson (Philadelphia, 1995), pp. 89–123. Note too the remarks in Lemesle, *Conflits et justice au Moyen Âge*, pp. 157–89.

defend them 'by swearing an oath and even, if necessary, by fighting a battle'.[28]

Yet statements that so-and-so 'even' (*etiam*) offered or promised to undertake a judicial duel on behalf of his alienee equally suggest that there was room for debate about whether a warrantor's obligations ordinarily included a commitment to wage a battle. By the time the *Coutumes* were written, a judicial battle was the standard proof that warrantors (or their proxies) would undertake in cases involving chattel warranty.[29] Yet the *Coutumes* also explicitly differentiates warranty from the waging of battle when discussing the age of majority: thus at fifteen years old, an *homme coutumier* can 'carry warranty' (*porter garantise*), but need not wage a duel until he reaches twenty-one years of age.[30] While this clause may refer to the special allowances made for youth, it may equally hint at a possible conceptual differentiation between the general ideas of warranty as responding to a claim on the one hand, and, on the other, the circumstances in which a litigant would be required to wage a judicial battle. Implicit in all of this is the distinction familiar from later French customary law between simple warranty and formal warranty mentioned earlier. In simple warranty, the warrantor's role was to support the defendant's case, often with testimony; in formal warranty the warrantor took the place of the defendant, and thus took over the case. The distinction between 'formal' and 'simple' warranty touches on the degree of personal risk undertaken by any given warrantor.

We have one case, dating from shortly before 1064, which casts into relief the relationship between oath-taking and other forms of proof. Guy de Laval had given the monks of Marmoutier lands near Laval in order to build a *bourg*, but the monks of Saint-Pierre de Couture claimed this land on the grounds that (1) it was the patrimony of their church of Auvers,

[28] *SSE*, I, no. 6 (1082 × 93): *jurando videlicet ac etiam si necesse esset pugnando*. See also *TV*, no. 485 (*c.*1139) in which a quitclaimant made a promise to La Trinité de Vendôme in the following terms: *juravit ergo super reliquias … nonquam se deinceps pro terra eadem calumpniam facturos sed pro posse suo contra omnes homines illam nobis expugnaturos*; the verb *expugnare* here may mean the waging of a judicial battle.

[29] *Cout.AM*, § 100: 'si doit la justice tenir la chose en sa main, et puet bien juger des II une bataille par eux II ou par II autres, si chescun se voulet changer, et si le serement à celi qui se fet garantissor'.

[30] *Cout.AM*, § 152: 'Home coustumier a aage quant il passe XV anz de avoir sa terre, et de servir ses signors, et de porter garantise: mes il n'a pas aage de soi combastre davant XXI an passé se il ne vouloit' (= *Cout.TA*, § 125).

and (2) that Guy had given the contested lands to the monk Guérin on the condition that it remain part of Auvers' patrimony.[31] At the ensuing *placitum* at Laval, Guy offered his account (*narravit*): he had indeed given the land to Guérin, but on the agreement that Guérin would construct a monastery there and serve as its abbot, and ensure that the church of Auvers, and anything else he could acquire there, would form the patrimony of that new monastery, rather than of Saint-Pierre de la Couture. The judges decided that Guy should prove his account with an oath and by unilateral ordeal. Guy thus agreed to take on each proof, and he even delivered a serf named Sevald to be secluded in preparation for the ordeal. But despite his agreement, Guy nevertheless objected that it was improper to perform an ordeal over this matter, and his oath alone should suffice.[32] These objections seem to have caused some confusion for all parties involved, and the case was repeatedly delayed and adjourned over debates about the appropriate forms of proof it required; only in 1064 did it receive a definitive sentence by William, duke of Normandy, who decided that an ordeal would be unjust, and Guy need only swear an oath.[33]

Even reduced to the highly schematic manner in which I have presented it, the case between Marmoutier and La Couture offers several clues for us. First, it illustrates well the differentiation between oath-taking and other forms of proof in the context of warranty. Although one suspects that Guy's apparent bristling at the prospect of ordeal owed much to his own status as a leading political figure in Maine, and his self-confident view that his word alone should carry sufficient weight, the case does at least point towards a likely ambiguity in how far warrantors were expected to commit to any given case. Beneath the generic statements to defend an alienation *pro posse* may very well have lain differing expectations about just how all-encompassing such a promise was. Equally, however, the Marmoutier and La Couture case also points towards what might have

[31] *M. Manc.*, I, pp. 345–8; see also Tabuteau, *Transfers of Property*, p. 201 for brief mention of this case.

[32] *M. Manc.*, I, p. 346: *asserens tamen non esse justum de hac portare judicium nisi solum fieri jusjurandam.* The issue, from Guy's perspective, seems to have been that his status as a major castellan lord meant that his word alone should have been sufficient.

[33] Ibid., pp. 347–8: *et judicavit tam ipse quam curia sua quod de hac re judicium portari justum non erat sed tantummodo jurare debebat Guido quod rem illam quae in calumnia erat numquam Guarino dederit ita ut esset acclinis ecclesie de Alvers, nec monachis de Cultura, quando dedit eis ecclesiam de Alvers, praesertim cum Guarinus ille numquam fuerit monachus Sancti Petri de Cultura, sed Sancti Karileffi.*

been a more common practice on the part of warrantors: one of their responsibilities might have been to supply a proband (for ordeals) or a champion (for battles) on behalf of the alienee. In a comparative example from Normandy, for instance, Waleran de Meulan and his son Robert helped settle a dispute between the abbey of Préaux and William de Campigny, in which Robert promised that he would be the monks' *defensor* 'through one of his knights' should William cause them any subsequent trouble.[34] The implication here would seem to be that Robert's commitment of defence foresaw that he would find a champion to wage a duel on the monks' behalf, if necessary. How common such an arrangement was remains impossible to know—although the Guy de Laval example provides a parallel—but it does at least demonstrate one way in which some warrantors could balance expansive warranty commitments whilst also minimising personal (and physical) risk.[35]

Regardless, the expectations that alienees had of their warrantors were not confined solely to the *curia* or *placitum*, just as disputing was not limited to formal legal proceedings. Some of our material thus hints at the range of extra-curial commitments that a warrantor might be expected to undertake. Occasionally, warranty clauses frame these commitments in the negative—that is, the warrantor excludes them from any potential action she/he would take. In 1072, for example, Thibaud promised the monks of Marmoutier that he would aid and acquit them howsoever he was able, 'except in the giving of money, or the waging of a *guerra*'.[36] Similarly, in 1113 a quitclaimant promised the monks of Saint-Aubin his protection and defence, 'except for the payment of money'.[37] Exemptions like these

[34] *Le cartulaire de l'abbaye bénédictine de Saint-Pierre-de-Préaux (1034–1227)*, ed. Dominique Rouet (Paris, 2005), no. B23: *si aliquo modo prefatus Willelmus de hac re contra ecclesiam Pratellensem aut heres ejus vellent aliquid mali agere, ipse Robertus per aliquem militum suorum esset defensor*. I am grateful to John Hudson for this example.

[35] Compare Artem, no. 3532 (1106) in which Raoul Achard confirms to Marmoutier their acquisition of a tithe that one of Raoul's tenants had given them, without Raoul's consent: two men whom Raoul had brought with him then promised the monks that they would 'testify' on Marmoutier's behalf should the need arise. Whilst not an example of bearing proof per se, the charter offers a possible parallel insofar as a lord ensures that two of his associates will discharge the actual performance of warranty obligations.

[36] *MV*, no. 11: *si aliunde calumnia de illis rebus nobis insurgat, ipse adjuvabit nos acquietare calumniam illam, omnibus modis quibus poterit, excepto per pecuniam dando et per guerram faciendo.*

[37] *SAA*, no. 430: *deinceps adversarios pro posse suo tutaret et defenderet excepta datione pecunie sue.*

naturally invite the question of whether the warrantor's promise ordinarily embraced such actions. Yet we also have statements from thirteenth-century clauses that so-and-so would warrant 'in trial and out of trial', or 'in judgment and out of judgment'. Such sentiments, combined as well with promises to defend a transaction as completely as possible (i.e., *pro posse*), certainly point towards an expansive notion of warranty that could include considerable extra-curial commitment.[38]

When a cautious warrantor like Thibaud, mentioned above, explicitly precluded payments from his commitments, he likely had in mind a number of possibilities. From the case material it is clear that warrantors sometimes provided payments to third-party claimants, effectively buying out an adversary's challenge on behalf of their alienee. Between 1149 and 1170, for instance, Tison de Craon warranted his early alienation to La Roë when it became the object of a challenge by giving the claimant a bushel (*setier*) of oats.[39] Though Tison's payment was in kind, rather than coin, the underlying logic that a warrantor might be expected to produce payments to outside claimants remains the same. Other types of payment warrantors might be expected to make could take the form of 'gifts' to grease the judicial wheels in an effort to expedite the movement of a case through court. And equally, the warrantor might assume responsibility for any payments or gifts made to probands or champions, especially if, as suggested earlier, one of the warrantor's commitments was to arrange for such individuals to support their alienee's case if needed. Unfortunately the evidence remains elusive and only suggestive when it comes to the diverse forms of payment a warrantor might make in fulfilling warranty obligations: nevertheless, it is not unreasonable to conclude that warrantors could be expected to bear the expenses arising from a wide panoply of the costs associated with getting justice.

The evidence for warrantors and the business of *guerra*, or warfare, in contrast, provides more detail. Against Thibaud's exclusion of waging a *guerra*, consider a promise made by Geoffrey to the canons of Saint-Julien

[38] See, for example, *Tiron*, no. 387 (1263/4) and no. 390 (1265/6); *TV*, no. 670 (1226) (also quoted above, p. 65). Such clauses, however, seem to refer as much to the warrantor's commitment to reimburse any costs or expenses the alienee might incur within or outwith court as they do to more general obligations to provide curial and extra-curial defence.

[39] 'La Roë', fo. 52v; see also *SVM*, no. 163 (end of eleventh century) for another example in which claimant receives a setier of oats, possibly at the hand of his brother who warranted the monks; though in this case the payment in kind may equally have been made by the monks.

of Le Mans between 1067 and 1070, stating that in the event of a challenge, 'he would wage as great a *guerra* as he could' on the canons' behalf.[40] That a warrantor could indeed wage what amounted to a *guerra* on an alienee's behalf is confirmed in the case material. Thus in a case that also dates from between 1067 and 1070, Renaud de Montreuil-Bellay was asked to warrant the monks of Saint-Florent de Saumur against challenges brought against them by his cousin (also named Renaud); the uncle was, however, unable to compel his nephew 'by force' (*vi*), so gave the claimant some property in exchange for the contested land.[41] The key for us is the charter's allusion to force: while much is left to the imagination as to what *vis* here involved, that some form of forceful action on the part of the warrantor was implied seems clear. A case dating from between 1082 and 1089/95 describes what such actions might entail. The recently widowed Adenor de Jarzé, for example, defended her family's patronage to the abbey of Saint-Aubin in Angers by leading a group of armed men to confront some claimants to the monk's property: this action resulted in a fracas in which several of Adenor's men were left wounded, with some even slain.[42] How frequently warrantors were drawn into violent conflict in their efforts to defend and maintain their alienations remains of course impossible to know. Yet it is important to recognise that defending alienations risked the potential for such violence.

Of particular concern in this regard, at least for alienees, seems to have been the varied forms of 'direct action' or *saisie privée*, as historians have sometimes called them, whereby property claims might be made by seizing chattels or resources directly from contested lands.[43] In pursuing a

[40] *Lib. Alb.*, no. 112: *Si quando aliqua calumnia surrexerit in eam, etsi de ea jus ab aliquo factum fuerit, ipse faciat talem guerram qualem poterit, et canonici excommunicationem.*

[41] 'Livre noir', fo. 107r–v: *Postquam ergo illum et monachos diu multumque super hoc fatigavit et injuriavit Rainaldus videns quia non poterat eum vi cogere … dedit ei in escamium de sua terra.* Exchanges will be discussed below. See also, 'Livre noir', fo. 56r (*c.*1100) for a warrantor who 'distrained' (*distrinxit*) a claimant upon the monks' property in his efforts to protect them.

[42] *SAA*, no. 270; see also below, pp. 100–101 for additional comment on this case.

[43] See Paul Collinet, *Études sur la saisie privée. Introduction, droit romain (legisactio per pignoris captionem), chartes et coutumes du nord de la France* (Paris, 1893); on this point in particular, see Stephen D. White, 'The "Feudal Revolution": Comment', *P&P*, 152 (1996), pp. 205–22; Chris Wickham, *Courts and Conflict in Twelfth-Century Tuscany* (Oxford, 2003), esp. pp. 278–9, 282–4; Geoffrey Koziol, *The Peace of God* (Leeds, 2018), p. 68; the discussion on distraint in England, found in Hudson, *Land, Law, and Lordship*, pp. 22–51, offers instructive parallels here.

claim on vineyards, one would cut grapes; in claiming arable, one would seize the harvest, and so on. Interpreting such practices—both for historians and for people in the central Middle Ages—is far from straightforward, however. In some instances, the seizure of resources must have looked a lot like the raids or razzias of 'feudal' warfare; in other instances, the *saisie privée* may have been more a form of self-help whereby a claimant sought to establish his or her seisin; and in others still, these practices may have actually been processes of distraint exercised by court-holders in order to compel attendance at court and/or the performance of services. There was no doubt considerable overlap between the preceding interpretations, and indeed, how any particular action was viewed depended as much on the status of the individual doing it, against whom it was done, and the perspective of the observer.[44] Nevertheless, charters from the eleventh and earlier twelfth centuries in particular yield abundant evidence of these practices, though they continued to be practised in the thirteenth century and later.[45] Concerns over the *saisie privée* may well account for promises in which the warrantor agreed to defend an alienee from 'violence' (*violentia*), 'disturbance' (*inquietudo*), against all 'invaders' (*invasores*), or against any harm (*injuria*).[46] While there may undoubtedly be an element of rhetorical flourish in the use of such language, it is also worth

[44] See the observations on these points, and on the attempts by eleventh- and twelfth-century courts to construct one particular interpretation, the arguments in M.W. McHaffie, 'Law and Violence in Eleventh-Century France', *P&P*, 238, no. 1 (2018), pp. 3–41.

[45] Daniel Lord Smail, *Legal Plunder: Households and Debt Collection in Late Medieval Europe* (Cambridge, MA, 2016) provides a fine study of the later uses of direct seizure from the archives of Marseille and Lucca; see also Justine Firnhaber-Baker, *Violence and the State in Languedoc, 1250–1400* (Cambridge, 2014); and note Howard Kaminsky, 'The Noble Feud in the Later Middle Ages', *P&P*, 177 (2002), pp. 55–83.

[46] Examples in which warrantors protected alienees against violence can be found in: *MD*, no. 206 (1200); *MV*, no. 5 (1050 × 66); *SAA*, no. 571 (1191 × 1220); *TV*, no. 656 (1214). Protection against 'disturbance' is found in: *MP*, no. 64 (1194), which is a warranty given lest anyone *inquietare aut molestiam sive fatigationem aliquam inferre* to Marmoutier; *MV*, nos. 8 (1037 × 70) as the verb *inquietari*, and 107 (before 1060) and 170 (1064 × 77) as *ab omni inquietudine consuetudinum*; *RA*, no. 71 (1142); *SSE*, I, no. 323 (1096). For clauses directed against all *invasores*, see, for example: *SSE*, II, [102] no. 223 (*c.*1112); *SVM*, no. 182 (1076) as *contra omnes perfides homines et malignos invasores*; *Tiron*, no. 117 (1129). And for references to harm, see: Artem, no. 3465 (before 1100); *RA*, no. 355 (1120); *SL*, no. 36 (1125). Note too *MB*, no. 159 (1139); *M. Manc.*, II, pp. 297–9 (1124); *Noyers*, no. 332 (*c.*1105); *SAA*, no. 372 (1082 × 1106), all of which protect against anyone wishing to do harm (*nocere*) against their alienees.

being mindful of the literal sense of these words.[47] Set against the *saisie privée*, an *invasio* may be little more than when someone exercised 'direct action' by physically entering an alienee's property in order to take resources from it, and against whom an alienee might well seek the protection of a warrantor. Since warranty amounted to a commitment to defend an alienation from any challenge (*calumnia*), it was equally a promise to defend that alienation from any manner by which a *calumnia* might be made. We see here, again, the obvious parallels warranty has with practices of commendation through which an individual or community offered payments or a cut of the produce of his or her (or its) property in return for a lord's protection against any who would do them harm, as noted earlier.[48] Most alienees likely shared the expectations of the monks of Tiron, who in 1203 and in return for a payment of 12*li*., obtained the warranty of their alienor's lord: his warranty was valid 'in peace and in war', though in 1203 foremost in the minds of the monks of Tiron and their warrantor, Gervais II de Châteauneuf-en-Thymerais, may have been the war between the Capetian and Angevin kings for control over much of western and northern France.[49]

* * *

Not all warrantors were successful in defending their alienations from outside challenges. A third party with a stronger claim to right—to *ius*—in a property sometimes obtained the contested property from the original alienee, despite the warrantor's best efforts to defeat the challenger's claims in court or to persuade a claimant to abandon his or her

[47] Consider here *Noyers*, no. 267 (*c*.1098). Arraud de Nouâtre seized land that Aimery de la Faye had given to the abbey; the charter described this action in the following terms: *habebat invasionem quam nos sazimentum vulgo dicimus*. The *sazimentum* here, clearly evocative of OF *saisine*, serves as a helpful reminder that charters often translate concepts from the vernacular to Latin in ways that may, unintentionally, distort the tone and meaning of particular words. Note here the warnings in Dirk Heirbaut, 'The Dangers of Using Latin Texts for the Study of Customary Law: The Example of Flemish Feudal Law during the High Middle Ages', in Benham, McHaffie, and Vogt (eds.), *Law and Language*, pp. 165–95.

[48] See above, p. 30. Note, more broadly, Pierre Duparc, 'La commendise ou commende personnelle', *BEC*, 119 (1961), pp. 50–112; and idem, 'Le tensement', *RHDFE*, 40 (1962), pp. 43–63; Hyams, 'Warranty and Good Lordship', esp. pp. 447–53.

[49] *Tiron*, no. 343: *et concessimus ita pure et absolute quod nichil nobis nec heredibus nostris reclamabimus nec reclamare poterimus, sed predictam elemosinam tam in pace quam in guerra garantizare tenebimus contra omnes pro XIIeim libris andegavensibus.*

challenges.[50] In such circumstances, however, the ousted alienee could ordinarily seek some form of compensation from his or her erstwhile warrantor. Warranty clauses from early on might include provisions outlining what compensation the alienee would be entitled to if the need were to arise. Yet the extant provisions for compensation, along with the relevant case material, illustrates some degree of variability over how the business of compensation was settled in practice. Here we can provide an outline of the main types of compensation to which alienees might have been entitled, and some of the debates to which expectations for compensation gave rise.

In general, compensation could take one of three forms—though each of these need not be viewed as mutually exclusive. The first broad category of compensation, and in many respects also the simplest, was the unsuccessful warrantor's return of any monetary payments she/he had received during the original alienation. Such provisions typically appeared in the context of sales, for which some of the earliest examples of compensatory arrangements survive. Thus in 1051, David, a priest, sold to the monks of Saint-Florent a part of his mill and promised that if he was unable to acquit that mill of challenges, then 'he would return the price that he had accepted from us [the monks] without any complaint'.[51] Yet such arrangements were not limited to sales. For instance, between 1076 and 1096, a quitclaimant was given 30s. by the monks of Saint-Florent, on the condition that he would be their '*adjutor* and *defensor* against all challengers wherever right should be judged', but he gave the monks, in turn, eight personal sureties (*fidejussores*) that he would return the 30s. to them should he be unable to acquit them from any such challenge.[52] The

[50] The documentation is frustratingly vague in such examples, which partly reflects the ecclesiastical provenance of our sources, whose authors were more interested in recording the exchange that they received than the unsuccessful actions undertaken by a warrantor.

[51] 'Livre noir', fos. 54v–55r: *ut si undecumque talis calumnia in eodem molendino contra nos insurgeret unde illum nobis liberare et absolvere non potuisset, precium a nobis acceptam absque ulla contradictione nobis restituisset.* For similar examples concerning the return of the sale price, see: 'Livre noir', fo. 134r (*c.*1050); *SSE*, I, no. 146 (1074), though this latter is a hybrid gift-sale transaction, on which see Bruno Lemesle, 'Les querelles avaient-elles une vocation sociale? Le cas des transferts fonciers en Anjou au XIe siècle', *Le Moyen Âge*, 115 (2009), pp. 337–64, at pp. 340–51.

[52] 'Livre noir', fos. 71v–72r: *dederunt mihi tali conventione triginta solidos ut contra calumniatores ubicumque rectum fuerit judicatum adjutor et defensor fuissem. Ex hac convenientia dedi octo fidejussores quatinus si de omnibus calumniis non possum acquietare triginta solidos monachis reddere.*

monetary payments given to alienors during quitclaims and donations were therefore sometimes conditional upon the warrantor successfully performing his or her obligations.[53] A similar logic might also be applied to the transfer of fiefs. Between 1140 and 1156, for example, the monks of Saint-Julien de Tours granted a fief (*feveium*) to one Giraud in return for 25s. on the condition that if they failed to defend him, then the abbot and monks would return to Giraud 'everything he gave for the concession of that fief'.[54]

The second general category of compensation was the exchange (*excambium*). Typical here were promises that the warrantor would provide a 'sufficient', 'rightful', or, most commonly, an 'equivalent' exchange.[55] For example, in 1060 one Frodo made a gift to the monks of La Trinité de Vendôme, promising them an exchange of equal value should his warranty fail; or, in 1233, William d'Audrieu promised these same monks that if he could not acquit his gift to them, then he would give an exchange matched 'value to value' from within his own fief.[56] Sometimes, would-be warrantors specified in advance the properties from which an exchange would be made, such as in 1063 when Geoffrey *Papa*

[53] For further examples, see: *CMLC*, no. 140 (1247); 'Livre blanc', fo. 59r–v (1096); *Noyers*, nos. 260 (*c.*1098), 246 (*c.*1096), 405 (*c.*1115), and 515 (*c.*1139); *RA*, no. 351 (*c.*1115); *SAA*, no. 318 (1099); *SSE*, I, no. 6 (1082 × 93); *SSE*, II, [72] no. 125 (*c.*1100 × 33); *TV*, no. 261 (1077). Note also, though, Artem, no. 1406 (1093), where a donor promised the monks of Bourgueil that he would repay a 40s. counter-gift he had accepted for as along as the donated property remained under challenge: once freed, however, the 40s. would be returned to him by the monks.

[54] *SJT*, no. 91: *Si vero aliquis in eodem feveio reclamare voluerit adversus omnes homines et mulieres abbas et monachi erunt illi ajutores et defensores et si abbas et monachi feveium superius nominatum defendere ei non potuerint abbas et monachi reddent Geraudo Rebotel omnia quecunque pro concessione ejusdem fevei dedit*. Compare here *CN*, no. 123 (n.d.), in which the canons of the chapter of Saint-Maurice in Angers granted an inheritance to a deceased tenant's bastard son in return for a 100s. relief payment, but did so on the condition that if 'a nearer heir' should turn up with better title to the property, then the bastard son will lose it and will *not* be able to reclaim his relief payment.

[55] For 'sufficient' (*sufficienter*), see *FON*, no. 265 (1115 × 49); for 'rightful' (*rectum*), see *SAA*, no. 155 (1160); and for 'equivalent' (*equevalens*, *valens*, etc.), see: *CLMC*, no. 164 (1251); *MP*, no. 11 (*c.*1067); *RA*, no. 158 (1170); *SAA*, nos. 96 (*c.*1100) and 101 (1082 × 1106); *SSE*, II, [23] no. 315 (1082 × 93); *SVM*, nos. 576 (1098) and 777 (1080 × 1102); *Tiron*, nos. 193 (1135), 365 (1236), 373 (1243), and 376 (1250); *TV*, no. 699 (1236).

[56] *TV*, no. 134: *aut ipse domnus Frodo … ut redderetur agerent, aut alterius terre tantumdem valentis commutationem nobis impertirent*; and *TV*, no. 688: *Et ego predictus Willelmus et heredes mei tenemur predictam terram predicte abbatie adquietare in omnibus rebus, vel excambiare valorem ad valorem in nostro proprio feodo.*

*Bovem* told the monks of Marmoutier that if he could not warrant his gift, then their exchange would come from his land of *Gurguenaldo*.[57] Ordinarily though not always, the commitments of the warrantor were framed in such a way that it was the ousted alienee who would receive the exchange—or at least a claim to receive the *excambium*. Some third parties might genuinely have had a greater right to the contested property than the warrantor's preferred alienee, and however firm the alienor's will in this regard, outside claimants sometimes demonstrated a superior right to title.[58] The basis of an outside claimant's greater right tends to be alluded to only obliquely within the surviving case material; typical though may have been claims that the contested property was the claimant's inheritance or that there was some impediment to the original alienation, such as the alienor was of unfree status and hence unable to alienate without his lord's consent.[59]

But, occasionally the promise to warrant was a commitment to provide the exchange to any outside claimant, thereby aiming to ensure the original alienee's security. Thus, between 1060 and 1067 Adam, son of Robert de Château-du-Loir, relinquished his claims upon a church to the monks of Saint-Aubin, and promised them that 'if anyone can demonstrate right

[57] *MMA*, p. 29: *ut si qua unquam in his calumnia surrexerit a qua nobis illos acquitare non possit, excambium eorum reddat nobis in terra de Gurguenaldo*; see also *RA*, no. 207 (1115) where the nuns of Le Ronceray were promised the land of *Sarcois* as their exchange, 'which was better by far' (*longe melior erat*); *SAA*, no. 60 (1082 × 1106) where two particularly good arpents of vineyard were singled out as the potential exchange; and *SVM*, no. 115 (1067 × 80) in which an alienor named a specific church that would be given in exchange to the monks of Saint-Vincent du Mans if he failed to warrant the church that he had given them.

[58] Similar observations, important in evaluating the degree of seigneurial control over property, have been made for England: see Hudson, *Land, Law, and Lordship*, pp. 56–7. The point here may be juxtaposed to the view found in Milsom, *Legal Framework*, wherein the wishes of the lord/alienor overrode any claim a third-party might have had. How far an alienee was ordinarily considered the alienor's tenant in western France (i.e., did alienation of property necessarily imply lordship over property) remains open to debate, however, and may mark an important point of contrast to England.

[59] See, for example, *SAA*, no. 362 (1060 × 81), in which John de Luché sold vineyards to Vivien du Lude, but the monks of Saint-Aubin challenged these because John was a *servus* of the abbey and had made this sale without the authorisation of the monks, 'from whose fief' the vineyards came (*de quorum foevo*). Vivien's warrantor defaulted at the court-day which had been arranged for the case: Vivien accepted and held a life interest in these vineyards from the monks, but eventually abandoned them completely to the monks for 14*li.* Though this latter remains a somewhat unusual case, it illustrates the impediment that an alienor's status might create to the stability of an alienation.

[*rectum*] in that church in my own *curia*, then I shall acquit [*adquietabo*] that church for the monks by giving to him [the claimant] an agreed upon exchange'.[60] Whether the particularities of transferring a church—when such transactions might involve the transfer of revenues and altar dues, the right to present a priest for appointment, the physical building, or any combination of the preceding—contributed to the explicit promise that the challenger would receive the exchange, rather than the original alienee, remains difficult to tell.[61] In any event, the extant case material provides ample evidence of warrantors providing third-party claimants, rather than their original alienees, with exchanges. To take just two examples: between 1081 and 1102, Renaud de Craon had given the canons of La Roë a tithe which was then claimed by the canons of Saint-Nicolas; to settle the dispute, Renaud thus gave Saint-Nicolas an exchange (*conmertium*), leaving the canons of La Roë in control of the originally contested tithe.[62] Or, in 1062, Eudes de Bor sold a half manse to the monks of Marmoutier for 20s., but Geoffrey, son of Crispin, challenged this property because he held it in fief from Eudes; Geoffrey was then promised an exchange for that fief, whence he abandoned his claims upon it, and the monks remained in possession of the half manse.[63]

The arresting emphasis upon equivalency of value in the treatment of exchanges raises several important questions: what was an equivalent value and how was it assessed; and what happened if the unsuccessful warrantor lacked the means to provide an equivalent exchange? Occasionally, the

[60] *SAA*, no. 328: *quod si quis ecclesiam … reclamans, in curia mea rectum in ea monstrare potuerit, scambium conveniens pro ea illi dando, ecclesiam illis adquietabo.*

[61] The particular church that was given to Saint-Aubin had, the monks alleged, been taken from them 'violently' by Fulk Nerra, count of Anjou (r. 987–1040) and given to Hamelin de Château-du-Loir, but was then restored to the abbey by Gervais de Château-du-Loir (Hamelin's son); Adam, the quitclaimant in this example, was Gervais' nephew, and had refused to authorise the restoration of this church to Saint-Aubin. For the monks, then, the desire to ensure that any subsequent challenge would not result in their loss of this specific church may partially be explained by the history behind this particular property.

[62] 'La Roë', fo. 5r–v. For similar cases, see, for example, *MD*, no. 67 (1101); *MMA*, pp. 37–8 (*c.*1080); *M. Manc.*, I, pp. 340–1 (1062); *SAA*, no. 92 (1080 × 1120). Note also 'Livre blanc', fo. 77r (1070 × 1118) in which a warrantor provided a third-party claimant with his *concambium*, while Jean, a monk of Saint-Florent, also promised the claimant 60s. in coin and in various (unspecified) items valued at 1*d.* each.

[63] *M. Manc.*, I, pp. 340–1: *Hic autem Gauffredus tenebat eam in fevum de supradicto Odone; sed promittente illo excambionem se pro ea sibi esse daturum, ita illam integre perpetuoque guerpivit.*

nature of the alienated objects would have made such questions easy to answer: thus in 1059, Guismand donated a serf (*collibertus*) to the monks of La Trinité de Vendôme, and agreed that their exchange would be 'another serf of equal strength'.[64] Likewise, when the alienation being warranted was itself an exchange of two or more properties, the failure of either party to warrant the other successfully would usually result in the nullification of the original exchange: that is, the properties reverted to their original owners.[65] Often, though, warrantors might find themselves unable to exchange like for like, and thus an *excambium* following an initial donation in vineyards, for instance, might take the form of revenues instead, as opposed to other vineyards.[66] Warrantors therefore might provide for a range of options through which their compensatory liability could be performed. In *c.*1123, for instance, Eudes sold a tithe and some land to the monks of Cormery for 55s., on the condition that if he could not warrant it, the monks could have his house with its garden, or he would pay 100s. to them.[67] By the thirteenth century, the inclusion of the *obligatio bonorum* in warranty clauses theoretically made of the entirety of the alienor's substance a creditor's feast. Behind the *obligatio* was the expectation that the alienee would effectively take assets adding up to the total value of the property that the alienor had failed to warrant.

Agricultural properties rarely lent themselves to easy comparisons, however, especially since the measure of their value rested so heavily upon their economic productivity. There was no guarantee that two arpents of vineyard here would produce the same volume of grapes as two arpents over there. Thus the *excambium* may often have followed an inspection and/or quasi-expert valuation of either the contested property and/or its proposed replacement. Between 1155 and *c.*1164, for instance, Guy de Laval gave the monks of Marmoutier an entire parish, but reserved the

[64] *TV*, no. 132: *alterum collibertum tante possibilitatis.*

[65] See, for example, *Noyers*, no. 479 (1134); *SAA*, no. 667 (1082 × 1106); *Tiron*, no. 48 (*c.*1121).

[66] See *SSE*, II, [36], no. 330 (*c.*1100) for such an example.

[67] *Cormery*, no. 58: *tali pacto ut si postea insurrexerit in nos aliqua calumnia parentelae suae, vel alicujus partis, quam acquittare non possit nobis, teneamus tamdiu domum suam et caeteras res suas, donec acquittet nobis eam, aut centum solidos reddat*; Eudes was identified as a *cliens* of Cormery, so the hypothetical seizure of his property might have been a lordly prerogative, and the payment of 100s. worked as a sort of relief to redeem his property from his lord. For instances where a warrantor would lose properties that he held in fief or in benefice from an ecclesiastical alienee if he failed to warrant successfully, see: *Cormery*, no. 54 (1111); *MB*, no. 67 (1094); and *MD*, no. 201 (1192).

future right to build a millpond in their land: in such an event, Guy would provide the monks with an exchange of as much land as he had occupied, following the 'counsel and consideration of the lawful men of the nearby *bourg*'.[68] Or consider a case dating from between 1056 and 1082: Teheld sold land to the monks of Saint-Serge, but was unable to acquit it from an ensuing challenge, whereupon 'it was judged' that he give the monks land of equal value. Since he refused to do this for some time, the matter came before the judgment of Robert de Vitré and Garnier, Teheld's own lord, who decided that the monks and Teheld set out to the land in question, with 'lawful men' (*boni homines*). There, however much value these *boni homines* saw in that land, Teheld ought to give the same to the abbey. But because Teheld was unable to provide more land, he ended up giving the monks a tithe instead.[69]

The final broad category of compensation that an alienee might expect took the form of the recompense for any losses incurred as a result of a challenge. In 1070, for example, Geoffrey de Turne promised the monks of Marmoutier that if anyone should bring a challenge (*calumniam*) or inflict loss or damage (*damnum*) upon lands that Geoffrey was quitclaiming to them, then he would acquit that challenge and make up said losses.[70] Charters, however, seldom gloss what individuals might have meant with a term like 'loss' or 'damage'. From the 1120s, evidence from the abbey of Tiron suggests that loss was comprised of any expenses an alienee might incur in driving back a challenge. One such example, admittedly somewhat atypical because the charter concerns a loan, saw the loanees promise that if the monks to whom they had given their property in pledge were required to spend anything 'in pacifying challenges', then the loanees, rather than the monks themselves, would be responsible for the

[68] *M. Manc.*, I, pp. 364–6: *in terra monachorum stagnum edificare contigerit, quantum refluxio stagni mei de terra monachorum occupaverit, tantum ad consilium et deliberationem legitimorum hominum prope burgum suum monachis excambiabo.*

[69] *SSE*, I, no. 26: *pro terram autem quam prius domnus Andreas emerat judicatum est ut tantumdem terre valentem redderet Teheldus monachis quod per longus tempus noluit facere. Tandem ad hoc ventum est per judicamentum domni Roberti de Vitriaco et Warnerii senioris Teheldi ut super terram monachi et Teheldus cum aliis bonis hominibus irent et ipsa terra quantum valeret viderent, ut tantum Teheldus redderet monachis quantum illa terra valeret. Quod cum non posset facere reddidit haec pro ipsa terra … suam partem decime.*

[70] *MV*, no. 53: *quod si quis inferat nobis calumniam aut damnum pro sua parte ipse acquietabit nobis calumniam et damnum restituet.* See also *MD*, no. 152 (1096), in which a warrantor promised to restore 'whatever loss' might befall Marmoutier if he could not warrant his quitclaim (*quicquid damni restaureret*).

payment of costs incurred in driving back challenges.[71] And from the 1240s at the latest, warrantors committed to restore 'losses' alongside the alienee's 'costs' and 'expenses'. In 1247 Herbert de la Guerche promised the canons of La Madeleine de Châteaudun to reimburse them of all 'damages and losses and costs' (*dampna, deperdita et costamenta*)—along with the 50*li.* counter-gift he had accepted for his 'gift'—that they might incur because of a challenge.[72] Thus by the mid-thirteenth century, compensation for loss seems to have entailed court costs and legal fees, any loss of revenue from the contested land, expenses to rebuild any damaged resources on the property, and so on.

While some of these various costs undoubtedly weighed more heavily upon the minds of thirteenth-century warrantors and alienees than they did upon their earlier counterparts, we should not overstate the degree of rupture that the formulas from the 1240s onwards might imply. The provisions within the *Coutumes* for chattel warranty state only that the party which lost a judicial battle owed the victor the costs incurred for the battle, the fees owed to the 'pleaders' who were present on the day of the battle, and a 60s. fine to the court-holder—all of which have earlier parallels.[73] Many thirteenth-century costs must have had in mind the fees paid by a litigant towards lawyers and advocates, and the counsel and documentation that such figures might provide—an obvious reflection of the increasing professionalisation of law. But such fees need to be set alongside

[71] *Tiron*, no. 86 (*c.*1127): *Sciendum etiam quod si de sepedictis terris aliqua calumpnia orta fuerit, pro quibus pacificandis monachis necesse fuerit aliqua expendere, nostrum erit totum eis restaurare*; see also *Tiron*, no. 117 (1129) for the following: *…garantabunt terram contra omnes calumpniatores, atque omnia dampa restauranda promittente.*

[72] *CLMC*, no. 140: *Si vero contingeret quod absit quod dicti canonici super dicta ele[mosina] ab aliquo vel ab aliquibus molestarentur et dicti canonici occasione dicte molestacionis, dampna et deperdita et costamenta inde incurr[erent, de] dampnis et deperditis et costamentis abbati … verbo simplici sine alterius honere probacionis, crederetur et dictis canonicis dampna et deperdita et costamenta et quinquaginta libras dunensis monete quas dicti canonici michi dederunt et solverunt occasione elemosine supradicte ego et heredes mei integraliter reddere teneremur.*

[73] *Cout.AM*, § 100; the 'pleaders' appear in Beautemps-Beaupré's edition as 'correors', while in Viollet's edition (= *Cout.TA*, § 84) the reading given is 'conteors', which I have preferred here. The word is related to the *conte* that litigants and/or their advocates made in a court; the 'conteors' likely have parallels in earlier Latin terms such as *placitatores* that are occasionally found in charters. For this latter term, see, for example, *MD*, no. 156 (1097/8) in which the monks of Marmoutier refer to their *placitatores* in a *curia* gathered by Adela, countess of Blois, at Châteaudun; and *Noyers*, no. 381 (*c.*1111) for the statement that the monks of Noyers will procure *placitatores* if necessary to defend a gift of land that was made to them.

the various payments made to champions and/or probands, or 'gifts' to judges and/or court-holders for which we have evidence from the eleventh century, and which may often have formed an element in alienees' general expectations of their warrantors' obligations. Likewise, damages and/or loss of revenue was as great a concern (and risk) during the earlier period as it was in the thirteenth century. Throughout the period under consideration in this study, the use of force remained a valid way of staking property claims against contested property, like when the monks of Saint-Serge sought out their warrantor because his brother broke their plough on the contested property, likely in an attempt to press his claim to property that had been alienated by his brother (i.e., the warrantor).[74] Part of what the warrantor was promising, then, was protection from such actions and, presumably, the commitment to reimburse any losses if that protection failed. Finally, the more explicit references to damages, costs, and expenses from the 1240s were focused mainly on removing the burden of proof from the alienee in establishing his/her claim to such compensation. Often, the alienee was allowed to state the monetary value 'by speech alone' or 'by oath', and, crucially, 'without any other proof'. For example, in 1263/4, one warrantor promised that 'if for default of warranty or defence they [the monks of Tiron] should suffer any losses or expenses, either within or outwith the trial, we [the donors] are held to restore to them completely on the oath of their procurator, with the oath of one monk of Tiron, without [any] other proof'.[75] The concern here was less about getting the alienee his compensation, and more about doing so without the delays caused by a formal trial.

Among the more pressing issues that must have weighed heavily upon peoples' minds were the circumstances in which one could legitimately claim compensation or an exchange: in other words, what counted as a loss for which an individual could turn towards his or her warrantor? The 1437 *coutumier* that was organised according to the rubrics of the *Code* began its discussion of warranty with a definition of the Roman term 'eviction', which referred to situations where a third-party established superior

[74] *SSE*, II, [53] no. 350 (1082 × 1102).

[75] *Tiron*, no. 387: *si pro defectu garantizationis vel defensionis dampna deperdita sustinerent vel expensas in placito vel extra placitum facerent, ad sacramentum procuratoris eorumdem, cum sacramento cujusdam monachi de Tyronio, premissa tenemur eisdem plenarie restaurare sine alia probatione*. For similar commitments, see also: *Lib. Alb.*, nos. 402 (1270), 677 (1239/40), and 696 (1242/3); *M. Manc.*, II, pp. 184–6 (*c.*1274?).

title *in court* and by a judgment.[76] Neither the earlier *coutumiers* nor the charter material were so explicit—though the general orientation towards formal legal settings that we have observed across our evidence may suggest that contemporaries generally thought that the typical form of eviction would be a judgment in court. Regardless, the requirement in the 1246 *Coutumes* in the context of chattel warranty that a person vouched to warrant a disputed object should first see that object presumably barred any subsequent claim for compensation that the original defendant might bring if this viewing did not take place.[77] Other thirteenth-century *coutumiers* note that if a defendant (in land cases) can name and vouch a warrantor, then he or she should do so and not proceed with the case himself/herself, because otherwise he/she would lose any subsequent claim for compensation or an exchange from his or her warrantor.[78] Whether a similar situation prevailed in western France during this period is uncertain on the basis of the extant evidence.

Our evidence does, however, illuminate one area that seems to have stimulated considerable debate over when and in what circumstances a lord owed compensation to a follower: the seizure of property as a consequence of territorial warfare. Consider a story found in the 1155 *Gesta Ambaziensium dominorum*, a chronicle of the lords of Amboise. Gelduin de Saumur, a *fidelis* of Odo II, the count of Blois, had been driven out of Saumur following Fulk Nerra's conquest of Saumur in 1026. Odo thus offered Gelduin properties in return for the lands that he had lost to Fulk Nerra in service to his lord, and, after much debate, Gelduin and Odo eventually agreed that the castle of Chaumont would serve as Gelduin's exchange.[79] If the *Gesta* presents a highly idealised vision of good lordship, the case material, in contrast, underscores how difficult it could be in practice for followers and/or tenants who had been ousted in conflicts

[76] 'Coustumes d'Anjou et du Maine intitullées selon les rubriches de Code', BB, part VIII, § 1180: 'Eviction est forclusion et deboutement par sentence de juge d'aucune chose achactée ou à autre juste tiltre eue et possidée à l'instance et requeste d'autruy'.

[77] *Cout.AM*, § 100; cf. above, p. 18.

[78] *Beaumanoir*, cap. 34 § 1011.

[79] *Gesta Ambaziensium dominorum*, eds. L. Halphen and R. Poupardin, in *Chroniques des comtes d'Anjou et des seigneurs d'Amboise* (Paris, 1913), p. 81: *Denique, dum Blesi moraretur, cum multa in Briam et in Campaniam pro terra sua perdita Gelduino offeret, ut animosus armisque strenuus, omnia illa que sibi offerebantur pro nihilo reputans—nolebat enim ab inicorum suorum, qui sibi terram abstulerant, vicinitate longe fieri—petivit Calvimontem, inter Blesim et Ambazie castrum situm, sibi dari.*

involving their lords to obtain their exchange. In 1061 or 1062, for instance, Geoffrey, son of Berard, reclaimed land from Saint-Florent de Saumur: his father had held this land from the abbey in return for an annual rent, but he had lost this land in 1026 in the wake of a 'great transformation of inhabitants' in the Saumurois as a part of the same events that had driven Gelduin from the city.[80] At the *placitum* presided over by Geoffrey III, count of Anjou, and Abbot Sigo de Saint-Florent, it was judged that, 'in accordance with custom', neither the count nor the abbot need answer to the son of Berard over this matter, 'because otherwise, it would be necessary to return other properties of this sort to their former possessors, which, as had been decided, could not reasonably be done'.[81] The decision stated, as a matter of custom, that men like Geoffrey, son of Berard effectively had to lump their losses (or those of their predecessors), and had no claim for compensation from their erstwhile lords.[82]

Alternatively, sometimes it was the lord who seems to have had little choice but to provide an exchange, often despite his or her reluctance. Shortly after 1046, for example, Hubert, son of Hubald, brought a claim against La Trinité de Vendôme for the church and land of Pins.[83] These properties had been held by Gautier the 'Young', a liegeman (*lidgius homo*) of Salomon de Lavardin. But during the 'first' war (*guerra*) between the Angevin Geoffrey Martel and Gervaise de Château-du-Loir (also the bishop of Le Mans), which took place in 1038/9, Gautier abandoned his lord Salomon, who was supporting Martel, and went instead to Gervaise's

[80] 'Livre noir', fos. 108v–109r: *erga ipsius loci habitatores mutatio magna facta fuit*. The narrative detailing the capture of Saumur can be followed in Louis Halphen, *Le comté d'Anjou au XIe siècle* (Paris, 1906), pp. 38–54; and Bernard Bachrach, *Fulk Nerra: the Neo-Roman Consul, 987–1040* (Berkeley, 1993), pp. 180–3.

[81] 'Livre noir', fos. 108v–109r: *Habito vero judicio, approbatum fuit, quod si comes et abbas vellent, nunquam ei de hac re secundum consuetudinem responderent. Alioquis alias res hujus modi ad priores possessores necesse esset redire, quod sancitum fuerat rationabiliter fieri non posse.*

[82] Geoffrey, son of Berard would nevertheless go on to receive a 4*li.* payment from the abbot, and the benefit of the abbey's prayers, as part of a settlement: he had further alleged that Geoffrey Martel had promised to help him reacquire these lands. A full discussion of this case can be found in M.W. McHaffie, 'Courts and Rule-Making in Eleventh-Century Western France', in *Vengeance, Violence, Emotions and Law in the Middle Ages*, ed. Kate Gilbert and Stephen D. White (Brill, 2018), pp. 103–29; note also André Gouron, 'Aurore de la coutume', in his *Droit et coutume en France aux XIIe et XIIIe siècles*. Variorum Collected Studies Series (Aldershot, 1993), no. XX, pp. 181–7 at p. 182 for brief comment on this case.

[83] *TV*, no. 64.

side.[84] For this disloyalty, his fief was 'openly forfeit' (*plane forsfactum*) and returned to Salomon. The church and land of Pins were eventually sold by Salomon's daugther and son-in-law to Agnes, Martel's wife, so that she in turn could endow La Trinité with these properties.[85] Hubert's claim upon these same properties was based upon his marriage to the daughter of Gautier the 'Young'. In bringing his claim, Hubert acknowledged that like Gautier, he had sided with Gervaise du Mans during the first *guerra* but had returned to Geoffrey Martel's side when the second *guerra* between the two rivals broke out. Hubert thus alleged that Martel, in return for his support against Gervaise, had promised to return the church and land of Pins to Hubert and his wife. At the ensuing judgment over this matter, Geoffrey Martel demonstrated 'with manifest proofs' (*apertis probationibus*) that he had made no such promise to Hubert, and instead had only promised to give Hubert other properties of the same value; crucially, these alternative lands were 'not as an exchange for these properties [i.e. Pins] in which he was unable to have any right through the gift of Gautier, who had forfeited them, but because he [Martel] wanted to summon Hubert to his aid'.[86]

The conflict between Geoffrey Martel and Gervaise de Château-du-Loir also provides the backdrop for another rich case concerning the business of exchange. After he fractured his hip, Martel made peace to conclude the first *guerra* with Gervaise, and was 'compelled' (*coactus*) to give Gervaise the fiefs (*casamenta*) of some of his men, including those of Nihard de Montoire. Although Nihard had given his assurances to Martel that he would not acquiesce to Gervaise's demands, Gervaise nevertheless had secretly promised to give Nihard an addition to his fief in return for his agreement. When the time came for Gervaise to demand Nihard's

[84] On the conflicts between Gervaise and Geoffrey Martel, see Bruno Lemesle, *La société aristocratique dans le Haut-Maine (XIe–XIIe siècles)* (Rennes, 1999), pp. 27–32; Guillot, *Le comte d'Anjou*, I, pp. 54–5, 64–7.

[85] These events are recounted in *TV*, nos. 62 and 63 (1046), which are variant accounts that differ primarily in their language. Note Barthélemy, *La société*, pp. 618–20 for comment, especially on the early reference to *ligesse*.

[86] *TV*, no. 64: *Habitum est de hoc judicamentum apud Vindocinum publice, in presentia comitis Gosfridi. Qui apertis probationibus demonstravit quod de terra illa et ecclesia nullam omnino promissionem Huberto fecisset, sed de aliis rebus suis aliquid quod tantundem valeret se ei promisisse non negavit; non pro concambio hujus rei, in qua nullum rectum habere poterat, per donum Gauterii qui eam forsfecerat, sed quia eum ad auxilium suum recovare vellet.* Barthélemy, *La société*, pp. 658, n. 59 and 666 mentions this case briefly, but does not comment on the *concambium* or exchange, and the principles upon which it rests.

land, Geoffrey Martel replied, 'It will be so, if Nihard gives his assent', apparently secure in the 'earlier promise of his *fidelis*'. But Nihard did agree, and thus abandoned Martel. When hostilities resumed between Martel and Gervaise, the Angevin count sought to bring Nihard back into his service: but the 'deceitful' Nihard complained that he had suffered loss (*damnum suum*) following the loss of his land when Martel had given it to Gervaise, whence Martel was 'compelled' (*compulsus*) to give Nihard his exchange (*concambium*).[87] While power dynamics and the relative strength of all parties concerned were undoubtedly a factor in this case (and the one before it), Nihard's exchange shows something of the seriousness attached to expectations of compensation. The *excambium* (or *concambium*) in particular looks to have been something that lords owed to their men, especially if such a man were to lose his property in the lord's service. And this obligation could prove very difficult for lords to wriggle out of, as Geoffrey Martel discovered.

Considering en masse the provisions made for compensation and material redress, one is struck by their range and diversity. Warrantors might give compensation in the form of pecuniary payments, exchanges of like for like, or the right to collect revenues that they were owed. There is even a charter from the Chartrain in which a serf, who had recently been 'restored' to his 'liberty', along with any progeny he might have, by the monks of Saint-Père de Chartres, made a gift to these same monks which he promised to defend for them, but on the condition that if he was unable to do so, he would then return to a state of servitude (*in servitutem*).[88] This diversity seems to reflect a fundamental tension between, on the one hand, the basic principle that the individual who failed to defend something that she/he had given or sold ought to provide the alienee with some form of compensation; and on the other hand, the actual capacity of

[87] *TV*, no. 68 (1047): *Mox ob comite ignaro facti benefitium Nihardi cum ceteris donis quesivit. 'Esto', inquit comes, 'si Nihardus assenserit', securus scilicet ex anteriore promissione sui fidelis. Tunc adhibitus Nihardus et interrogatus: 'Faveo', ait … Iterum post tempus per instabilitatem episcopi resumpta est inter eosdem inimitia … Sed Nihardus fallax illico conqueri damnum suum de amisione illius terre quam sibi dedisset episcopus. Intelligens comes fraudlentiam viri et suspitiosam habens perfidiam, rurus compulsus est dare ei comcambium pro ipsa terra….*

[88] *Cartulaire de l'abbaye de Saint-Père de Chartres*, vol. 2, ed. B. Guérard (Paris, 1840), no. 68 (pp. 457–8) (1130 × 50): *promittens se contra omnes homines eandem terram nobis defensurum; tali lege, ut, si eam nobis quietare non posset, in servitutem ecclesie nostre, sicut ante fuerat, ipsemet rediret.*

any individual to provide adequate compensation, which must have varied widely, depending on personal circumstances and the availability of landed or other wealth on the part of the individual concerned. The relationship between warranty obligations and the material wealth of individual warrantors requires further research. But suffice it to say, there is a world of difference between a large-scale aristocratic landholder promising his or her alienees an *excambium* equivalent in value to the alienated properties, and the land- and/or cash-strapped small-holder for whom the providing of compensation, if necessary, must have caused considerable anxiety. To what extent contemporaries viewed these disparate forms of compensation as existing along a spectrum, or if there was a trend towards preferring a particular type of compensation—such as the *excambium*—is very difficult to tell, though merits further investigation.

Whatever form that compensation might have taken, the vital question for historians—and no doubt for contemporaries too—was whether the alienee's right to redress or an *excambium* was automatically implied in the alienor's promise of acquittal, defence, or warranty. The evidence from western France, on the whole, suggests that the alienee who had received something from somebody also acquired a claim for compensation or a replacement property if someone else established superior title to the transferred property or object.[89] A charter from before 1040, for instance, records that Geoffrey Martel (before he became count of Anjou) received the church of Mazé from his father, Fulk Nerra, on the condition that he not alienate it, but rather keep it in his demesne (*dominicam*). Martel then, 'not daring to make a donation [of the church], on account of the agreement with his father', granted it (*concessit*) to a man, also named Geoffrey, who could collect the fruits from that church 'until it pleased him [Martel] to resume control of it, and without the giving of an exchange [to Geoffrey, the alienee]'.[90] But when Fulk Nerra learned of this grant, he thought that the church had been given in fief, and thus

[89] I emphasise that the alienee acquired a *claim* to receive compensation or an *excambium*, admitting that in practice the evicted alienee might have faced considerable difficulty in making good that claim. Yet the vicissitudes of lived social life need not vitiate the strength and significance of the underlying principle.

[90] *TV*, no. 44: *Ille eam Gosfredo juveni suo Malramni fratri donare non audens, propter conventionem patris, fructus ejus ad tempus illum capere concessit, donec sibi eam resumere placeret sine redditione comcambii.*

took over control himself.[91] The example, valuable because it concerns a lay-to-lay transaction, speaks to the sorts of expectations normally at play when alienating property. The alienor, in this case at least, apparently felt the need to stipulate that his grant did *not* carry with it the right to an *excambium*; since, moreover, this particular transaction was explicitly differentiated from the gift of a fief (*fevum*), it seems likely that gifts of fiefs, at the least, ordinarily *did* imply a right to an exchange if the alienee were to be ousted from that fief.

In broad brushstrokes, the alienee's claim to receive compensation or an *excambium* seems clear, and the alienee likely acquired this claim as soon as she/he received the alienated property. Situations in which monies or services were exchanged for property could only have served to strengthen the principle of compensation. It is possible, even, that some of the pecuniary counter-gifts that were offered to alienors when making donations to religious houses, for instance, helped to register a transactional dimension to the donation in which the donee *also* received a claim for compensation if they suffered any loss concerning their newly acquired property.[92] Equally, the association between promises of acquittal, defence, or warranty with the practice of naming and giving personal sureties—one of whose principal purposes, as suggested above, was to share in the liabilities that the alienor took on when making a property transaction—further suggests that the provisions for compensation and/or material redress were a common and expected feature of transferring property.[93] The clarity of these general principles of compensation should not, conversely, make us lose sight of the considerable grey areas in how such principles worked in practice. Differences in (or different perceptions of) the type of transaction, for example, had important implications for the alienee's title, and there was no doubt extensive room for debate over whether any given transfer of property amounted to a gift 'in fief', a gift 'in alms', a sale, etc.

[91] *TV*, no. 44: *ubi Fulco comes subintellexit donatam a filio in fevum putans, assumpsit eam tanquam prorsus obfrustatam convenientiam ablaturus.*

[92] Note the arguments here in Jean Yver, *Les contrats dans le très ancien droit normand (XIe–XIIIe siècles)* (Domfront, 1926), esp. 39–41; and Stephen Weinberger, 'Les contre-dons en Poitou et en Provence au XIe siècle: ce qu'il en coûte de faire des affaires', *Provence historique*, no. 210 (2002), pp. 483–96. Compare too the Italian *launegild*, on which see Chris Wickham, 'Compulsory Gift Exchange in Lombard Italy, 650–1150', in *The Languages of Gift in the Early Middle Ages* (Cambridge, 2010), ed. Wendy Davies and Paul Fouracre (Cambridge, 2010), pp. 193–216, with further references.

[93] Compare above, pp. 58–60.

Yet it does seem that the onus for restricting what rights were included in a transfer of property rested with alienors like Geoffrey Martel. The alienee, unless otherwise told so, likely received, bought, or otherwise obtained property secure in the expectation that she/he *should* receive compensation if driven out from that same property.

* * *

The main conclusion of this chapter is that warranty was a recognised feature of court practice throughout our period. Litigants summoned their warrantors to defend them, and they also pursued claims for compensation in the various *curiae* and *placita* of the region when warranty failed. Complexity entered the picture with questions about the circumstances in which an ousted alienee could claim compensation. We have seen some of the more detailed debates in the case material centre chiefly on the *excambium*. Even those cases in which an individual disavowed any obligation to warrant might have been linked to concerns over the secondary claims for an *excambium* or other form of compensation to which the alienee might then be entitled if the primary obligation were acknowledged. The establishment in court of warranty obligations—either of defence or compensation—ultimately depended on the logic of various probative procedures, whether ordeal, judicial battle, witness testimony, or charter. And here individuals could engage in all the forms of brinksmanship and social pressure they could imagine in order to weasel in and out of their commitments. But the vagaries of human behaviour as manifest in legal practice should not occlude a more fundamental observation: warranty seems to have been recognised as a basic procedural right available to litigants. As a court told Gaudin de Malicorne in 1099, he '*ought* to have his defender present'.[94]

[94] *SL*, no. 20 and above, p. 65.


CHAPTER 6

# Securing the Present and the Future: The Targets of Warranty

**Abstract** This chapter looks at the people against whom protection was sought and for how long warranty was expected to be valid. It demonstrates that warranty was typically directed 'against all people' (*contra omnes homines*), and that family members were only rarely specifically signalled out as being of particular concern. Further, the tenants and agents of lords posed an especial threat, and I suggest therefore that warranty was in part orientated towards protection against the various claims for services and customs that the lord of an alienor (or his/her deputies) might make on transferred property. The chapter then discusses the temporal duration of warranty. I suggest that people generally expected warranty to be valid for perpetuity, and that an alienor's heirs were also ordinarily expected to uphold the warranty commitments of their predecessors. In so arguing, I thus further decouple the history of warranty from existing historiographical explanations, and reinforce the associations between warranty and lordship.

**Keywords** Prescription • Services • Tenants/tenure • Charter formulas

The final subjects that require discussion concern the questions of against whom warrantors ordinarily directed their promises of protection, and for how long warrantors and/or their alienees expected the alienor's warranty to last. The targets against whom alienors directed their warranty were usually expressed in characteristically broad yet imprecise formulas. Typical here were promises that so-and-so would warrant 'against any challenge'



M. W. McHaffie, *Warranty Obligations in Western France, 1040–1270*, https://doi.org/10.1007/978-3-031-14517-9_6

(*de omni calumnia*), a formula which may equally be framed in the plural (i.e., *de omnibus calumniis*) or against challengers (*calumpniatoribus*);[1] that the warranty would come into action 'if anyone' (*si quis* or *si aliquis*) brought a challenge;[2] or simply that the alienor's warranty was valid 'against all men' (*contra omnes homines*)—sometimes glossed as all 'mortal' men (*mortales*)—or simply 'against all' (*contra omnes*).[3] There is little chronological pattern to these formulas, except that thirteenth-century diplomatic seems to have, in general, settled on the *contra omnes homines* formula.[4] This no doubt reflects the increasing diplomatic standardisation in drafting practices, a symptom of the coalescence of chanceries and *officialités*. Beyond this, however, all three principal expressions appear with the first warranty clauses from the 1040s and were henceforth used interchangeably (and sometimes in concert), along with a host minor stylistic variants.[5]

Beneath such expansive phrases, warranty clauses do nevertheless on occasion provide more details regarding the sorts of person against whom the warrantor's protection was especially desirable. In general, the three main types of threat explicitly mentioned were: (1) the alienor's kin, (2)

[1] See, *inter alia*: *Cormery*, no. 45 (1070 × 1110); *FON*, no. 163 (1115); *MB*, nos. 70 (1096 × 1104) and 156 (before 1134); *MD*, nos. 151 and 152 (both 1096); *Noyers*, nos. 19 (*c.*1060), 48 (*c.*1066), and 252 (*c.*1096); *RA*, nos. 279 (*c.*1110) and 375 (1100); *SSE*, II, [57] nos. 62 (1090), [69] 120 (1056 × 82), and [24] 316 (1056 × 82); *SVM*, no. 115 (1067 × 80).

[2] See, for example, *FON*, no. 366 (1115 × 49); 'Livre noir', fos. 103v–104r (*c.*1058); *MB*, no. 62 (1092); *RA*, no. 71 (1142); *SAA*, no. 96 (*c.*1100); *SL*, no. 22 (1160); *TV*, no. 132 (1059).

[3] For *contra omnes homines*, see, *inter alia*: *FD*, no. 101 (1220); 'Livre blanc', fos. 8v (*c.*1110) and 75r–76v (1070 × 1118); *Noyers*, no. 519 (*c.*1140); *SAA*, no. 759 (1154 × 89); *SJT*, no. 91 (1140 × 56); *SSE*, II, [13] no. 9 (*c.*1150); *SVM*, nos. 139 (1103) and 802 (1090 × 1102); *TV*, nos. 420 (1108) and 517 (1147). The formula *contra omnes (homines) mortales* was less common, but see: *MV*, no. 6 (1040 × 60); *SAA*, nos. 288 (1060 × 87) and 318 (*c.*1099); *SJT*, no. 183 (1222); *SVM*, nos. 377 (1080 × 1102), 486 (*c.*1100), and 656 (1080 × 1102); *TV*, no. 340 (1092). Finally, the addition of 'women' (*feminas*) to the formula remains unusual in western France, though see *FD*, no. 188 (1248), and *SJT*, no. 91 (1140 × 56) for a promise made against all men and *mulieres*.

[4] See also Fontette, *Recherches sur les pratiques*, p. 95, who noted that for the thirteenth-century warranties in cases of sale around Paris, 'la règle générale est, dans la quasi-totalité des cas, que la garantie est accordée *contra omnes* sans exception'.

[5] Thus, instead of 'against all' *homines*, some clauses preferred 'against all' *adversarios*; see, for example, *FON*, no. 695 (1144); *MD*, no. 72 (1107/8); *Noyers*, no. 494 (1136); *SAA*, no. 773 (1109).

the alienor's tenants, and (3) the services for which the transferred property was liable.

Let us start with family. We sometimes find warrantors securing their alienations 'from their whole kin-group [*omni parentela*]', 'against all men of his lineage [*sue progenie*]', or 'if any of their relatives [*ex parentibus*] should bring a challenge'.[6] Two clauses from *c.*1115 and 1230 respectively framed the alienor's warranty against his brothers-in-law; in 1236, one individual warranted against his brother; and a handful of clauses directed the warranty against the alienor's heirs.[7] Yet on the whole, references to warranty against the alienor's living kin remain uncommon. One early clause even saw an individual tell the monks of Saint-Aubin that he would 'defend them in court against all men', but only if 'none of his relatives made a challenge'.[8] And there are remarkably few extant cases in which a warrantor was called upon to defend an alienation against a family member. Frequently in such cases, the conflict pitted brothers against each other, or an uncle against his nephew(s), suggesting the potential for tensions between lineal and collateral inheritance strategies. But it can be unclear how serious such disputes actually were. In 1115, for example, Pierre challenged the land that his uncle, Jean Pignon, had sold to Fontevraud. When the case was heard in the *curia* of the bishop of Angers, where Jean was prepared to testify on the nuns' behalf, Pierre (and his father, Arnoul, because Pierre was too young to speak for himself) was

[6] *MD*, no. 105 (*c.*1042): *de omni parentela sua acquietare*; 'Livre blanc', fo. 88v–89r (1087): *quodque hoc ipsum contra omnes homines sue progenie eisdem monachis guarantaret*; and *Tiron*, no. 115 (*c.*1129): *Tali pacto ut si quis ex parentibus eorum calumpniam intulerit, Ricardus et supradicti liberam et immunem ab omni calumpnia faciant.* For further examples of warranty directed against generic kin, see: *Cormery*, no. 58 (*c.*1123); 'Livre noir', fo. 52v (*c.*1070); *MB*, no. 66 (1093/4); *SAA*, no. 105 (1082 × 1106); *SL*, no. 44 (1103); *TV*, no. 299 (1080). Compare. *MV*, no. 114 (1034 × 67) in which the warranty is directed against the alienor's own *progenies*, or that of a stranger (*aliena*). A few clauses target the alienor's heirs in particular: *MD*, nos. 246 (1232) and 250 (1244); *Noyers*, no. 285 (*c.*1100); and note Comte, *L'abbaye Toussaint d'Angers*, no. 29 (1213) for the following: *si forte contingueret quod aliquis dictam decimam sive jure haereditaria sive aliquo alio modo ad se retrahare vellet.*

[7] See *Noyers*, no. 405 (*c.*1115), where a quitclaimant warranted *de fratribus uxoris sue*; *MD*, no. 241 (1230) sees another quitclaimant warrant *contra omnes sororios meos et sorores meas*; and in *SJH*, no. 107 (1236), a donor warrants against Raoul, a knight and *fratrem meum.*

[8] *SAA*, no. 940 (1038 × 55): *ut si nullus ex parentibus suis calumniaretur, ipse defenderet in curia contra omnes homines.* Though cf. *Noyers*, no. 122 (1080 × 1111) in which a donor warranted his gift after being asked if he had any relatives who could challenge (*cumque ab ipso interrogaretur si quos haberet parentes unde in hac re aliqua posset insurgere calumnia, omnino nullos esse negavit adjunges se de omnibus calumniis satisfacturum*).

asked the basis for his claim; Arnoul replied that there was none, but the boy's 'family' (*familia*) had made him challenge 'foolishly' (*pueriliter*) by giving him a small white dog.[9] This rather sweet vignette speaks as much to underlying intra-familial bickering as it does to legal matters of alienability and inheritance.

Several features of the evidence make clear that an alienor's tenants posed especial problems for warrantors and/or their alienees. Consider the following two clauses, for example: between 1056 and 1082, one Lisois restored property to the monks of Marmoutier, and promised 'to warrant it against those [tenants] who hold something from it'; while nearly two centuries later, in 1232/3, Jean d'Alluyes abandoned tithes to La Trinité de Vendôme, and promised to warrant if any of his men (*hominum*) should disturb the monks.[10] Implicit in such promises is the idea that the alienee, in theory at least, acquired an exclusive proprietary interest in the transferred property. I use exclusive here in a physical sense, meaning that access to the property was limited to the alienee and those individuals allowed to enter by the alienee's licence. One clause from *c.*1090 makes the point explicit: Simon de Nouâtre gave the monks of Noyers some land, promising to offer them all aid lest that land be worked by anyone other than monks.[11] The implication that follows from such a statement is that the transfer of property during our period might involve the dispossession of current occupants. Such a suggestion is certainly supported by a provision in the 1246 *Coutumes* that if a lord wishes to take some land from his tenant in order to build upon it, then he must beforehand give the tenant an exchange (*change*)—a provision that could without much imagination have been extended to the lord's taking land for the purposes of pious benefaction.[12]

[9] *FON*, no. 160. Note also Fontette, *Recherches sur les pratiques*, pp. 100–01 who discusses this case briefly.

[10] For the former, *MV*, no. 120: *Lisoius Hamelinum dedit fidejussorem ut eam ab his qui ex ea aliquid tenent adquietet et ab omni in posterum calumnia si forte insurrexerit, expediat et liberet.* The Hamelin who was given as Lisois' surety was Hamelin de Langeais, Lisois' own lord from whom he held the property he was giving to Marmoutier. For the latter, *TV*, no. 685: *si aliquis hominum nostrorum in ista nostra donacione predictum priorem vel ejus monachos in aliquo molestare presumpserit, nos tenemus et heredes nostri omnem injuriam, vim et calumpniam removere, et dictam decimam liberam et pacificam in omnibus observare.*

[11] *Noyers*, no. 197: *et promisit eis omne auxilium praebiturum, ne terra illa excoleretur nisi per monachos.*

[12] *Cout.AM*, § 103. Note, this provision immediately follows that on what happens when a tenant breaches his lord's seisin.

The case material, in particular, showcases the problems that an alienor's tenants could pose. Between 1096 and 1102, for example, Renaud de Craon gave the then fledgling community of La Roë sylvan rights in his forests; but one day, two of his foresters seized an axe from Humbert, a hermit, who then proceeded to complain to Renaud that unless he defend his earlier gift, he would cease developing a religious community in the region, and leave it altogether.[13] Renaud replied that 'he was unable to give [*dare*] the fief of his foresters', so he instead fixed a date for them at which Renaud asked his men: 'O, you foresters—my friends—just as I need to give this alms for myself, my ancestors and my heirs, so too do you need to make [a gift of] alms from what is in your right [*jure*]', which seems to have convinced the men.[14] The story opens a window onto the sorts of cajoling that must have been fairly common in land transactions as all the parties involved worked out how best to reconfigure the various rights and easements created by the alienation. Such concerns must have been especially pronounced in the alienation of landed resources that by necessity were used by a large number of people, like woodland, waterways, or meadows. In a case from 1231, Robert de Chavernay claimed a meadow from the monks of La Trinité de Vendôme that had been given to them by Urso de Fréteval. Robert claimed to hold this from Urso's fief and therefore, Urso ought to warrant him; in the settlement arranged by Urso, Robert was allowed to hold the contested meadow from La Trinité, and Urso, in compensation to the abbey, gave them another batch of meadows, relinquishing all usage and right in them.[15]

This last case also illustrates one of the solutions to the problems posed by an alienor's tenants: to transfer lordship over them to the new alienee.[16] Yet such a strategy, known by the thirteenth century as attornment, was

[13] 'La Roë', fos. 13r–14r.

[14] 'La Roë', at fo. 13r: *O vos forestarii, amici mei, sicuti mihi necesse fuit dare hanc elemosinam pro me et antecessoribus et heredibus meis, sic necesse est vobis quod vos de vestro jure elemosinam faciatis.* On the foresters of the Craonnais, see Jean-Claude Meuret, *Peuplement, pouvoir et paysage sur la marche Anjou-Bretagne (des origines au Moyen-Âge)* (Laval, 1993), pp. 481–504.

[15] *TV*, no. 683.

[16] See, for example, 'Livre noir', fos. 68v–69r (1057) in which Hervé, son of Bouchard, made a gift to the monks of Saint-Florent, stating that if anyone who held (*tenuit*) something from his own or his father's benefice (*beneficio*) did *not* wish to give property to the monks for the benefit of his or her soul, then such individuals should 'at least' (*saltim*) hold their property from the monks and serve them.

not without risk.[17] In the early twelfth century, for example, a lord claimed a fief from the nuns of Fontevraud that his father had given them: he did so because the occupant of the fief did not want to hold his said fief from Robert d'Arbrissel, the colourfully eccentric founder of Fontevraud.[18] Another potential solution, therefore, was for warrantors to exclude certain of their men from their alienations and their warranty. Thus in 1265/6 Bernard de la Ferté and his wife sold the abbey of Tiron whatever they had at a specific village 'except for the men who have been given a fief and hold [those fiefs] from us in return for a pledge of faith (*ad fidem*)', perhaps in the hopes of convincing them at a later date to abandon their shares.[19] Finally, the practice whereby alienors handed out an exchange (*excambium*) to one or more of their tenants when making an alienation represents yet another possible strategy. Though this too entailed risks, as tenants sometimes disturbed alienees when their lords failed to deliver long-awaited exchanges. Thus between 1038 and 1055 Aimery, the *prévôt* of Thouars (not to be confused with the vicomte of the same name), claimed a toll from the monks of Saint-Aubin which Renaud Cabot had given to them: the basis of Aimery's challenge was that because Renaud had given this toll to him in fief (*in fevo*), he had been promised an exchange when Renaud made his gift to the monks, but had yet to receive it.[20] Situations where the alienor's tenants were seigneurial agents, such as Aimery the *prévôt*, and whose main income may have come from the various customs that they collected for their lord, may have presented especially tricky situations. Not only could the lord's alienation represent a material loss to the agent concerned (at least if the lord's alienation allowed his or her new alienee the right to collect said customs, instead of the agent as before), but may also have represented a diminution in social status for the agent, who could no longer tangibly display his lordship over the local inhabitants with respect to the particular property concerned.

Of particular concern for warrantors and alienees regarding tenants were the tenants' heirs. Take the following two cases. Between 1060 and 1067, Thibaud de Jarzé made a gift to the monks of Saint-Aubin of an expanse of woodland, but because Thibaud's *vicarius* held rights in the woodland 'from Thibaud himself, as his own', the monks offered the

[17] For use of the Latin *attornare*, see, for example, *Lib. Alb.*, no. 264 (1232).
[18] *FON*, no. 55.
[19] *Tiron*, no. 390: *exceptis tamen hominibus feodatis qui nobis tenentur ad fidem.*
[20] *SAA*, no. 227.

*vicarius* payments in money and kind, whereupon he relinquished his share to the abbey.[21] Some years later, however, the *vicarius*' son made a claim upon this same woodland whence the late Thibaud's widow, Adenor, confronted the claimant in her efforts to warrant the monks, and in the ensuing confrontation, several men were injured, and others slain.[22] And second: sometime before 1100 an unnamed man (*homo*) held a half arpent of vineyards from two lords at rent, but he failed to pay his rents, whence the lords took the vineyard back into their control (*proprietas*) and made a gift of it to the monks of Saint-Serge. Later, though, Goscelin *Britellus*, the son of the erstwhile tenant, reclaimed this half arpent, whereupon the monks vouched their warrantors (*warantos*), but they were unable to acquit the vineyard, and so gave the monks the rents and renders from that vineyard.[23]

The position of an alienor's tenants leads neatly into the third main type of threat warrantor's sought to protect their alienees from: burdensome or excessive services. Explicit statements that the warrantor would acquit the transferred property of all services appear from the mid-twelfth century, though concerns over the quantum of services, and who was responsible for them, antedate these express statements. For example, between 1156 and 1162, an alienor protected against 'all customs and services'; in *c.*1178, another alienor promised defence 'from any service'; while between 1191 and 1220, defence was given 'from any violence and exaction'.[24] For ecclesiastical alienees, at least, especially important here was that alienors

[21] *SAA*, no. 269: *Erat autem homo quidam … ipsius terre vicarius, qui terciam partem vicarie ab ipso Tetbaudo propriam possidebat.*

[22] *SAA,* no. 270, dated to between 1082 and 1089/95, though probably falling towards the earlier end of that spectrum, records the ensuing case. For extensive discussion on this particularly rich case, see my 'Structuring (Female) Legal Authority in Western France, *c.*1100', *Frühmittelalterliche Studien*, 55 (2021), pp. 343–67.

[23] *SSE*, II, [36] no. 330: *Monachi vero requisierunt warantos suos, qui cum non possent adquitare vineam, concesserunt censum et vinagium monachis quod suum erat.* Goscelin would in the end abandon the vineyard to Saint-Serge, accepting from the monks an emplacement for a mill in exchange. But note, the original donors here were required to provide compensation to the alienee, while Goscelin's exchange with the monks was technically a separate transaction.

[24] *SSE*, II, [58] no. 92: *ab omnibus consuetudinibus et serviciis*; *Noyers*, no. 612: *ab omni servitio*; and *SAA*, no. 571: *ab omni violentia et exactione.*

undertake the military services owed to the lord of the land.[25] Alienors could thus promise to perform such services specifically, like one alienor to La Roë who promised the canons that he and his heirs would defend them 'in perpetuity' from the 'military service', and 'if not with monies, then by horse and arms'.[26] The acquittance of services, or the defence from excessive services, was naturally directed both upwards and downwards. Alienors would commit to perform the services owed to the superior lords of such-and-such a property, or, as we have seen, alienors' warranty would extend downwards to protect the transferred property from the lord's own men. By the thirteenth century, when warranty clauses included formulas that the alienor's lord warranted *tanquam* or *ut dominus feodi*, often at the principal's request, all of the parties involved likely had in mind concerns over the services due from the land.

The issues of service are important for our understanding of warranty during this period. Negotiations between alienor and alienee over the performance of services likely accounts for the reservations that alienors sometimes made that sought to limit certain of their obligations. For example, when a husband and wife made a donation to Fontevraud of a *censive* that they had purchased from Fulk V, count of Anjou (r. 1109–1129), they wholly warranted their gift, 'except against the count and the violence [*violencia*] of the count'.[27] The oblique reference to *violentia* here likely alludes to exactions and/or customs. And some thirteenth-century clauses explicitly preclude the rights of the French king from their warranties: in 1236, a *miles* warranted against all, 'saving the right of our lord the king'; and in 1265/6, a husband and wife warranted their sale against everyone 'except for the king of France', and except for the heirs of *Pertico*.[28] Thirteenth-century diplomatic also witnessed the emergence of a new formula inserted into clauses, namely that the warranty was valid against all men, but only 'as

[25] Note here *SSE*, I, no. 190bis (1093 × 1135), in which the monks of Saint-Serge beseeched the heirs of a recently deceased lord to remit the military services that the monks owed for a particular piece of land, whence the heirs 'recognised that such service was inappropriate for the monks [to perform]' (*…et tale servitium monachis indecens esse cognoscentes*).

[26] 'La Roë', fo. 49r (1149 × 70): *concessit etiam quod ipse et heredes sui illud ecclesie et canoniciis de servitio militie in perpetuum defenderent si sine nummis cum equo et armis….*

[27] *FON*, no. 166 (1109 × 1115): *Si autem alius aliquis excepto comite et violencia comitis, de elemosina preefata monasterium de Fonte Ebraudi impugnaverit, Fulcoius et uxor ejus plegeverunt de omnibus aliis solida et quieta reddere.*

[28] *SJH*, no. 107 and *Tiron*, no. 390.

much as law dictates' (*quantum jus dictabit*).[29] Since the formula almost invariably immediately follows the *contra omnes* formula, it is plausible that it was designed to qualify the scope of the warrantor's commitments, acknowledging that there were some matters against which one simply could not warrant.

The topic of services invites us, yet again, to consider the relationship between word and concept when thinking about warranty. To what extent can the acquittance of services be included within the umbrella term of 'warranty', as opposed to a related, but nevertheless separate set of commitments? Answering such a question is never straightforward, though there are several reasons to justify the view that the concept of 'warranty' in our period ordinarily included protection from services. For a start, the acquittance of services resonates well with the association in the *Coutumes* between warranty and *parage*, where the eldest sibling's warranty obligations towards the younger siblings were explicitly with regard to the services owed to the superior lord.[30] Further, the verb *adquietare*, which as we have seen was commonly employed by scribes when recording the promises made by alienors, was widely associated with the acquittance of payments and liabilities, of which services and customs would have constituted a particularly familiar type of liability for contemporaries.[31] Most importantly, however, an early charter from 1111 explicitly used the language of warranty when discussing the matter of services due from a property

[29] See, for example, *Lib. Alb.*, nos. 71 (1228), 169 (1228/9), 236 (1234), 239 (1233), 244 (1240/1), 259 (1230), and many others; *M. Manc.*, II, pp. 181–2 (1252) and 184–6 (1274?); *Vivoin*, no. 54 (1258). Usage of the phrase comes almost exclusively from documents concerning Maine and its *officialité*. Within the *Liber Albus* of the cathedral chapter of Saint-Julien du Mans, for example, the formula *quantum jus dictabit* appears in just over 56% of its warranty clauses (fifty-six out of ninety-nine).

[30] Compare above, pp. 19–20 and the case surviving in *Les Olim* discussed there.

[31] See Niermeyer, s.v. 'acquietare'; *DMLBS*, s.v. 'acquietare'; Du Cange, s.v. 'quietus'. Note also Kaye, *Medieval English Conveyances*, pp. 57–8 who comments on *acquietare* in twelfth- and thirteenth-century English warranty clauses where this verb was often explicitly orientated towards protection from services; Bracton produced a tripartite definition of warranty whereby the verb *warrantizare* protected the alienee from claims on land, *acquietare* protected him/her from excessive services, and *defendere* offered protection from servitudes on land.

with a colourful history.[32] The monks had acquired some land so that one Giraud could receive his daily victuals from them and later become a monk. The monks were to hold this property from the lords of Marenz—Guicher and his son Philip—who, in their turn, held it from William de Vernée, the *capitalis dominus*. The charter went on to stipulate that if the lords of Marenz should default in their service to William de Vernée, then William would inform the monks' prior at Thorigné and give him a fixed court-date at which the prior 'could have his warrantor [*guarent*]' present; and if he was unable to obtain his warrantor, then the prior would henceforth pay the 7s. of service directly to lord of Vernée, instead of to the lords of Marenz.[33]

* * *

Warranty clauses seldom offer any insight as to the length of time for which one's warranty ordinarily remained valid. Typically, warrantors seem to have intended that their promises last 'in perpetuity' (*in perpetuum*) or for 'all the days of their life' (*omnibus diebus vitae*)—though most examples of both phrases fall after *c.*1100.[34] Such statements thus contributed to the notion that warranty was an absolute commitment, and may be

[32] Artem, no. 3321 (= Angers, ADML, H 1214, no. 1). The land in question was originally held by Bernard, son of Oggier through his marriage to Gosberga, from whose patrimony the property came. But Bernard returned home late one night, and 'found his wife making foolish with her body, for he found her fornicating with a priest' (*quadam nocte invenit eam facientem stultitiam de corpore suo nam cum quodam clerico invenit eam fornicantem*), whence he proceeded to blind and castrate the priest, leave his wife, and with her, forfeit the land. This property would then eventually come to Giraud, Gosberga's brother who had been a minor during these events.

[33] Artem, no. 3321: *Si vero domini de Marenz de quibus nos tenebimus defecerint de servitio Willelmi vel domini Verneie, prius dicet monacho de Torinniaco et mittet ei competentem terminum quo possit habere suum guarent, et si monachus non potuerit habere guarent ad terminum, illos VII solidos de servicio non reddet amplius monachus Marentianis, sed domino de Verneia reddet usquequo sint adcordati dominus de Verneia et ille de Marenz.*

[34] Warranty clauses given 'in perpetuity': *Beaum.*, pp. 35–7 (1261); *CLMC*, nos. 119 (1239) and 201 (1270); *La Haye*, no. 17 (1224); *M. Manc.*, I, pp. 340–1 (1062); *MP*, nos. 148 (1258), 159 (1254), 160 (1265), 215 (1249), and 257 (1219); *Noyers*, nos. 425 (*c.*1117), 568 (*c.*1152), 578 (*c.*1157); *Tiron*, nos. 109 (1129) and 193 (1135); *TV*, nos. 670 (1226) and 679 (1230). For the phrase 'all the days of my life' and variants such as 'for as long as I live', see *MB*, nos. 156 (1134) and 159 (1139); *MD*, no. 72 (1107/8); *Noyers*, nos. 48 (*c.*1066), 115 (*c.*1084), 409 (*c.*1115), 438 (*c.*1120), 521 (*c.*1140), and 556 (*c.*1146); *SAA*, nos. 83 (1082 × 1106), 288 (1060 × 67), and 430 (1113); *TV*, nos. 450 (1126) and 457 (1102 × 29). This latter phrase could encompass decades at one extreme, to mere hours at the other.

comparable to *pro posse suo* or *contra omnes* formulas. Given the practice of associating heirs and other family members with the actual warranty commitments, moreover, it is probable that the parties involved in such arrangements expected warranty to extend some distance into the future.[35] That warranty commitments possessed a sort of eternal quality when dealing with religious houses is perhaps unsurprising, not least because the principals sometimes concluded their transactions with the alienee's patron saint who was, by definition, undying and eternal. But projections of warranty obligations into the future were also likely a feature of lay warranty. Though rare, such examples also sometimes explicitly stated that the warranty covered the alienee and his/her heirs, occasionally even 'in perpetuity'.[36]

Assessing the practical importance of these grandiose expressions of warranty's temporal duration—ideally in perpetuity—poses familiar problems concerning the interpretation of diplomatic formulas. Yet a handful of clauses in which the warranty's validity was fixed to a limited period of time may offer us a way forward.[37] Several charters from the mid-thirteenth century onwards recording sales of properties or revenues from holdings located primarily in rural parishes expressly stated that the warranty would last for the time span of a year and a day.[38] While none of the western French clauses limit warranty to a fixed duration of time prior to 1250, there is fortunately some earlier comparative evidence from neighbouring regions. In 1211,

[35] Above, pp. 51–4.

[36] See *MP*, no. 86 (1272); and note *CLMC*, no. 145 (1248) where the warranty is given *in perpetuum* to the alienee and his heirs. *Tiron*, no. 379 (1252/3) records a gift to Tiron, made 'to the monks and their successors' (*dictis monachis et suis successoribus*), a phrase that may allude to drafting practices for the warranties given to laymen. Compare, finally, an exceptional early instance of lay-to-lay warranty from *c.*1065, recorded in *M. Manc.*, II, pp. 57–8, which includes no mention of the temporal duration of the warrantor's commitments.

[37] When speaking of warranty being limited to a fixed period of time, I leave to the side examples in which the warranty is limited to the term of a lease, such as *MP*, no. 161 (1271) in which warranty extends for the twenty years of an agreement.

[38] *Beaum.*, pp. 28–9 (1250), pp. 29–30 (1259), and 38–40 (1271); *Cormery*, no. 108 (1288); *SJT*, no. 280 (1258). Note also the 1437 'Coustumes d'Anjou et du Maine intitullées selon les rubriches de Code', BB, part VIII, § 1190: 'Celui qui a vendu à aucun autre certain heritaige à certain devoir et l'a garanti an et jour, et celuis achacteur est depuis enchaucié d'icelui heritaige ou d'aucun autre devoir sur icelui, d'aucune personne vers laquielle le teneur ne se peut deffendre par tenement d'an et de jour ou de plus, le vendeur ne se pourra ne devra deffendre vers l'achacteur pour la cause du garantaige dessusdit qu'il ne lui soit tenu de faire le garantaige vers celui qui demande'.

Eudes III, the duke of Burgundy, issued a charter stating that one Goscelin d'Avallon would warrant his sale to Countess Blanche of Champagne (and her heirs) 'for a year and a day, according to law'.[39] And in a particularly early example, dating between 1101 and 1124, Raoul gave a carucate (*carrucatam*) of land to the monks of Saint-Père de Chartres, whereupon his two sons and his brother promised 'by their faith' that 'if they were unable to acquit that land for the monks of Saint-Père for the next two years, then they would give an exchange of equal value in either land or money, whichever the abbot and the monks would prefer'.[40] Differing only insofar as it refers to a two-year time limit, as opposed to a year and a day,[41] the Saint-Père charter stands as important evidence from the first quarter of the twelfth century illustrating that in some circumstances, at least, warranty might be framed in terms of a fixed period of time.

Although clauses that explicitly limit the warrantor's commitment to a fixed length of time remain uncommon, the above examples nevertheless focus our attention upon the conceptual relationship between warranty on the one hand, and the lapse of time (or prescription) on the other. Recognising just such an association advances our understanding both of warranty's practical and ideational aspects. In the practical contexts of litigation, warranty thus needs to be set alongside how courts and litigants approached questions of temporality: temporality both in the sense of for how long was a warrantor's commitment valid, and for how long did someone need to hold onto property securely before it was considered to be his or hers? For instance, when their property fell under challenge, monks or

[39] See *The Cartulary of Countess Blanche of Champagne*, ed. Theodore Evergates (Toronto, 2009), no. 79: *per annum et diem secundum jus garantiam dicte comitisse et heredibus ipsius portaret*.

[40] See *Cartulaire de l'abbaye de Saint-Père de Chartres*, ed. Guérard, II, p. 426: *et per fidem suam firmaverunt quod si non possent terram illam adquietare nobis monachis Sancti Petri usque ad duos annos, tale quid ad valens commutarent quod placeret domno abbati et nobis, vel in terra alia vel in pecunia*. This charter is mentioned in d'Espinay, *Les cartulaires angevines*, p. 279 and n. 2.

[41] Two years may in this instance represent an oblique way of stating that the warranty should extend to the collection of two complete harvests. This is suggested by two observations: first, the use of the more agriculturally technical term *carrucata*, rather than the generic (and typical) *terra*, to describe the object of the gift places emphasis on the land as a discrete arable unit of productive value; second, the phrase *usque ad duos annos* implies the *completion* of two years or of two cycles that need not be understood exclusively as calendar years. A *carrucata* typically refers to how much arable a one-wheeled plough can cover in a season. See Niermeyer, s.v. *carrucata*; though the word is often associated with English agricultural terminology, Niermeyer provides some examples from north-eastern France (including Flanders).

canons during our period sometimes responded with the argument that they had held the contested property for a particular length of time, often without challenge (*sine calumnia*). The lapse of time, known as prescription, serves both as a bar to legal challenge following the passage of a set time (extinctive prescription) and as a means to acquire title in the absence of legal challenge within a set duration (acquisitive prescription). The length of prescription periods in western France during the central Middle Ages varied from anywhere between the Romano-canonical thirty- to forty-year durations—early evidence for which appears in Anjou, for example, from 1074—to twenty- or ten-year lengths.[42] Not surprisingly, we also find references to prescription periods of a year and a day (i.e., *la prescription annale*). Thus, in a case dated between *c.*1050 and *c.*1055, the nuns of Le Ronceray claimed to have held (*tenere*) a disputed mill for 'a year and a day without challenge'.[43] Regardless, beneath the different prescription periods lies a fundamental assumption on the part of those individuals or communities defending property with arguments based on prescription: the lapse of time barred any subsequent challenges upon property.[44] Indeed, in one admittedly unusual example, William de Montsoreau stated that after the lapse of the prescription period—in this instance limited to just eight days—the nuns of Fontevraud, need not respond to any future challenge.[45]

[42] For thirty- or forty-year lengths, see *RA*, nos. 181 (*c.*1104), 221 (1073 × 93), and 435 (1104); *SAA*, nos. 106 (1074) and 889 (1098) and discussion in Lemesle, *Conflits et justice au Moyen Âge*, pp. 140–3, who also provides the above references (and others besides). For twenty-year periods, see 'Livre noir', fos. 108v–109r (1061/2) and *SSE*, I, no. 371 (*c.*1150); for ten-year prescription, see *SAA*, nos. 421 (*c.*1100) and 485 (1171). See also McHaffie, 'Courts and Rule-Making', pp. 103–29 for arguments about the construction of new rules of prescription in mid-eleventh-century Anjou.

[43] *RA*, no. 240. Note also *SJH*, no. 104 (1234) which refers to prescription *infra annum et diem juxta consuetudinem Andegavie*. Compare Godding, *Le droit privé*, p. 229 who cites a thirteenth-century charter from Maastricht in which an individual promises *warandiam facere infra annum et diem*.

[44] See Emanuele Conte, 'Lapse of Time in Medieval Laws: Procedure, Prescription, and Presumptions', in *Limitation and Prescription: A Comparative Legal History*, ed. Harry Dondorp, David Ibbetson, and Eltjo J. H. Schrage (Berlin, 2019), pp. 69–89 for helpful discussion from the perspective of Roman and canon law in the twelfth and thirteenth centuries.

[45] *FON*, no. 281 (1101 × 1106). The property in question had been given to Fontevraud by Oggier, a *canonicus* of Saint-Martin de Candes, but was subsequently claimed from the nuns by Oggier's brother, Bodin, and his brother-in-law, Peter. Oggier then confirmed his gift to the nuns 'once all of the challengers had been entirely defeated'; then, leaving the abbey's chapter-house (where, it seems, the case had been discussed), William de Montsoreau told all who were present that they had only eight days to bring a challenge, should they wish.

The relationship between warranty and prescription periods adds yet another layer of complexity to our understanding of how ideas of warranty worked in practice, and how they interacted with other elementary legal ideas, such as the lapse of time. To claim property through a warrantor, based on an earlier transaction between claimant and the person identified as the warrantor, differed in its logic from claiming title on the basis of a prescription period after which the title-holder need not respond to any challenge: the two represented substantively different types of argument. When the *curia* of Chinon in the 1050s or 1060s, for example, told a claimant that he had no basis for his challenge against the monks of Saint-Florent de Saumur, 'neither by inheritance, nor by warranty', it was explicitly contrasting two separate ways of constructing a claim to proprietary right—to *ius*.[46] The normative weight of general principles of heritability must often, for laymen at least, have held a certain lustre as the first pillar of any legal argument they developed when litigating with ecclesiastical opponents; and regular recourse to the norms of heritability by laymen in their claims may have mitigated their reliance on arguments whereby they claimed property on the basis of title guaranteed by a warrantor. In this light, it is surely significant that much of the surviving case material for laymen seeking proprietary title through a *warrantor* specifically concerns men alleging that so-and-so was their lord, and had given the contested property to them in fief.[47] Equally, when churchmen constructed arguments as to their own basis of title, they may also have placed greater store in arguments based on a prescription period of thirty or forty years, as opposed to arguments based on the warranty obligations alienors owed to them.

The preceding discussion thus brings us into the orbit of prescription periods, and invites us to consider how ideas and practices of warranty related to the temporal benchmarks of prescription. On the one hand, the lapse of a prescription period would, theoretically at least, extinguish the obligation to warrant. What is not known is whether courts during our period treated arguments based on prescription and appeals to a warrantor as mutually exclusive legal strategies: certainly in the eleventh century, there is evidence that litigants might try each type of claim in succession. Regardless, whatever the normative weight of acquisitive prescription was, it needs to be balanced by the evidence discussed earlier of alienor's heirs,

[46] 'Livre noir', fo. 39r–v: *quod nulla ei pars esset in praedicta terra neque per parentela nec per guarent.*

[47] For references, see above, pp. 65–7 and the examples discussed under disavowals of warranty.

family members, and lords joining in on the act of warranting property transactions. Such evidence implies that the obligation to warrant was understood to cross generational divides. In part, there is an element of prudence to this, especially when prescription periods could be rather fluid depending upon which measure was adopted: warranting for a prescription period of thirty or forty years necessarily involved a significantly greater investment of time—one that could conceivably require at least two generations—than extending warranty for a year and a day. Yet the possible tension-point here between multi-generational warranty and limitations of prescription may also point towards two subtly different goals to which warranty obligations were orientated. Fixing warranty commitments to a prescription period ties the obligation to the defence of title, whereas multi-generational warranty might better be conceived of as defence of tenure, especially the protection from undue services and claims for customs that tended to be renegotiated fairly often within any lordship. That warranty could be orientated to one or both of these goals should not be surprising; but it sounds a clarion call to be alert to the complex ways in which property, lordship, and warranty interacted during our period.




CHAPTER 7

# Conclusions

**Abstract** The conclusions summarise the main findings of the study, noting that warranty can be understood as a relatively simple set of commitments that an alienor incurred towards an alienee as a result of property transfer: namely to protect the transferee and to provide redress if that protection failed. I further suggest that the history of warranty in western France during the central Middle Ages be viewed as a process of ever-closer orientation towards lordship. The main conclusion is that by the thirteenth century, based on the lines of continuity identified in the charters and the *coutumiers*, the conceptual and institutional structures of lordship provided the basic framework through which contemporaries thought about warranty.

**Keywords** Custom • charters • law • legal change • lordship • *seigneurie* • warranty

In looking in toto at warranty commitments in western France from *c.*1040 into the 1270s, we have seen that warranty comprised two fundamental obligations. First, the warrantor ought to defend the alienee against outside challenge. Defence was typically orientated towards court settings, with the warrantor providing testimony either in support of or in place of the alienee whose title was under challenge. This primary obligation could be undertaken by the principal alienor and by third parties, such as family



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members and lords who warranted either alongside or in lieu of the alienor. This defence was generally directed 'against all' (*contra omnes*), committed the warrantor to defend to the best of his or her ability (*pro posse suo*), and was typically conceived of as a trans-generational commitment, to be assumed by the warrantor's heir(s) when the time came. Second, the alienee acquired a claim for compensation if the warrantor's defence proved to be unsuccessful. Forms of compensation varied, though generally took one or more of three types: monetary reimbursement of any payments made at the time of the original transaction (whether sale price or counter-gifts); an *excambium* of equivalent value; or reimbursement of the costs and damages that the alienee incurred as a result of the challenge. We have found warranty commitments attached to all manner of property transfers, including sales, gifts, hybrid transactions, quitclaims, and so on. And we have seen that courts throughout our period allowed defendants the right to summon their warrantors, and heard and judged on claims about compensation and the *excambium*.

One of the aims of this study has been to demystify warranty and understand it as an 'elementary legal idea' throughout our period. Thus, warranty has emerged as a simple yet expansive concept, whose core consisted of a basic idea of protection. We have seen this protective core both in the etymology of *g(u)arant/ir*, and in scribes' usage of such verbs as *custodire*, *defendere*, *protegere*, *tueri*, or *tutari* when expressing warranty commitments in writing. Protection was necessarily abstract, and what it meant in any given situation was highly conditioned by the context in which it was sought and/or promised. The pairing of warranty and protection appears in a wide range of sources and scenarios not limited to the transfer of property. The *Chanson de Roland*, for example, contains a scene in which Roland tells his compatriots: 'French barons, I see you dying for me/I cannot protect nor warrant you'.[1] Such examples serve as useful reminders of the capaciousness of warranty ideas, and that its meaning in specific contexts was never far from this elementary sense of protection. In this regard, warranty expressed a relationship between two (or more) individuals in which one assumed responsibility for the protection of the other.

Simple as it might have been, warranty was not without ambiguity in the context of property transactions. Within such contexts, alienees expected that the alienor, or others on his/her behalf, would protect them

[1] Cited in Hudson, *Land, Law, and Lordship*, p. 54; and see discussion in White, 'Protection, Warranty, and Revenge'.

in court and sometimes out of it, and that this protection was aimed both at preserving the alienee's title against third-party challenge and protecting the alienee against any liabilities that might be incurred as a result of defective title. The ambiguities arose when attempting to determine just how far the warrantor was expected to go in defence of an alienation, and what happened if that protection was unsuccessful. As to the former, we have seen debate focus on questions of the forms of proof a warrantor would be expected to undergo, and the extent of the warrantor's extracurial commitment to the defence of a transaction—up to and including waging a *guerra* on the alienee's behalf. With the latter, questions inevitably focused on the types of loss for which the warrantor was liable to provide compensation, along with the form(s) that the said compensation would take. These sorts of question represent the grey areas of interpretation that were the natural consequence of such a basic underlying idea of warranty centred on protection. In the case of property transactions, alienors and alienees shared in the expectation that a transfer of property entailed *some* degree of protection against others and that the alienee acquired *some* sort of claim for compensation if the warranty failed.

An appreciation of warranty's elegant simplicity helps us make sense of the surviving evidence, particularly the variable diplomatic of eleventh- and twelfth-century warranty clauses. The range of words used to express warranty commitments invites the question of whether such disparate clauses reflect a common phenomenon, or if they signify different types of commitments that only slowly coalesced into the warranty clauses of the thirteenth century. In part, this is an epistemological issue; any answer will be conditioned by where one falls on a broad spectrum with universalism at one end and a sort of hyper-nominalism at the other. Yet the approach adopted in this study, which defines warranty as protection, allows us to recognise that the range of warranty expressions we find in the charters represent variations on a common theme. None of the vocabulary used to express warranty commitments was a term of art, whose definition could be tied to any specific set of juristic texts. In this regard—and unsurprisingly—warranty differed markedly from the Roman concept of *evictio* or *stipulatio*; warranty, as stated above, was a relationship centred on protection, and *how* that relationship was expressed was adaptable depending on the circumstances and needs of the parties and/or scribes responsible for a charter. What seems to have been more important to contemporaries were the basic parameters of warranty commitments when transferring property, rather than the precise form in which those commitments were

expressed. The relative standardisation of warranty clauses in the thirteenth century, accordingly, is a phenomenon that owes more to transformations in the circumstances of documentary production, instead of any substantive development in the idea of warranty itself.

The emphasis on its simplicity should not be taken to mean that warranty remained unchanged during the period covered in this study: far from it. But the lingering question has been how to identify elements of change, and how to explain the causality behind them. Running through this study has been a critique of the two major grand narratives that have traditionally been invoked to explain the development of warranty: the influence of Roman law, and the emergence of individual powers of alienation. Neither narrative appears wholly satisfactory when examining warranty. The influence of Roman law seems to have been minimal, and the range of people involved in warranting transactions makes it difficult to associate warranty's development to the growth of the individual's alienatory powers. More fundamentally, each of the grand narratives remains teleological, searching for the origins of the *garanties d'éviction* as they were articulated in early modern *droit coutumier* and later French law. To be clear, I am not saying that larger narratives about the capacity of Roman law to transform contract and the law of obligations, or a wider shift over the *longue durée* from greater to lesser restrictions on the individual's right to alienate property are wrong; rather, I question how far *warranty*, as based on the surviving evidence, should be seen as a part of these larger narratives. Our evidence, from the first appearance of warranty clauses in the 1040s until the *coutumiers* and charters of the 1270s, seems to tell a rather different story altogether.

The common thread woven into that story has been lordship, which we have encountered in numerous guises throughout the preceding pages. Perhaps most directly, we have seen lords stepping in to warrant the property transactions of others, often at the request of the alienor(s). Evidence for these seigneurial warranties appears from the mid-eleventh century, before becoming especially prevalent after *c.*1200. We have also seen individuals in court name and summon their lords as warrantors, alleging to have received contested property from their lord or to have held it in fief. Warranties, moreover, were sometimes explicitly directed against the agents and tenants of a lord—either the alienor himself/herself, or the alienor's lord. Such examples have all shone a light onto the vertical dimensions of landholding. These dimensions cannot be reduced to the model of a fief granted in return for services in the spirit of Milsom, but

neither can lordship be written out of the picture when it was a dominating force weighing on how contemporaries thought about warranty and the dangers for which it provided (in theory at least) a measure of protection. And the story of lordship continues into the *coutumiers* of the region as well. As we have seen, warranty was mentioned in the 1246 *Coutumes* in contexts of *parage*, where an elder sibling warrants the younger siblings against a lord's demands; and we have noted the curious passages where a lord was allowed to 'warrant' one of his agents against various liabilities owed to the king. Lordship thus represents a key line of continuity that takes us from the earliest warranty clauses into the *coutumiers*. By the thirteenth century, when lords warranted property transfers made within their fiefs (*tamquam dominus feodi*) and sometimes did so 'according to the usages and customs' of the region, we are witnessing the culmination of processes that go back at least to the eleventh century, and which amount to the gradual orientation of warranty ideas towards the structures and practices of the *seigneurie*.

* * *

A neglected topic like warranty thus helps us apprehend the very broad questions of what we mean by law during the central Middle Ages, and how we might understand the complexities and vagaries of its development. The core issues come back to history and narrative: what *is* legal change, and is it possible to think about processes of change without utilising the internal logics of later legal systems? Even though our period saw early attempts towards systematisation and of systemic legal thinking—the thirteenth-century development of the *ius commune* is a case in point—the systems that jurists began to articulate and that would be revised over the centuries did not encompass the entirety of legal experience, nor, crucially, the totality of legal change. Legal development was multidirectional and multifaceted: some lines of development had long lives indeed, whereas others look now like dead ends. But these dead ends are as important to our historical understanding as are the grand lines of continuity that can bring us, however indirectly, from the central Middle Ages to the present. The examination of warranty has forced us to confront questions of definition and causality simply because the narratives that have been invoked to explain *what* it was and *why* it developed seem to be so unsatisfactory when set against the evidence. This is not to sever any relationship between the evidence and existing explanatory

frameworks; my aim has been to question whether these are the most useful frameworks for getting the most of our evidence. And the answer to that question is a simple one: existing interpretative frameworks leave too much out. I have thus emphasised the structures of lordship, suggesting that the formalisation of those structures can account for much of the dynamism we see in the evidence for warranty from western France. Whether this argument holds weight is, of course, not for me to say. If nothing else, however, I hope that the argument shows something of the value in a narrow legal subject like warranty and the much larger questions that it implicitly raises. And more importantly, I hope to have shown that the questions are worth asking.



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