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.