

ROBERT C. PALMER

# The Whilton Dispute, 1264-1380

*A Social-Legal Study of Dispute  
Settlement in Medieval England*



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THE WHILTON  
DISPUTE, 1264-1380

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*A Social-Legal Study of Dispute  
Settlement in Medieval  
England*



Robert C. Palmer

PRINCETON UNIVERSITY PRESS

*Princeton, New Jersey*

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Published by Princeton University Press, 41 William Street,  
Princeton, New Jersey 08540

In the United Kingdom: Princeton University Press,  
Guildford, Surrey

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Library of Congress Cataloging in Publication Data will be  
found on the last printed page of this book

ISBN 0-691-05404-5

Publication of this book has been aided by a grant from  
The Whitney Darrow Fund

This book has been composed in Linotron Bembo type

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Printed in the United States of America by Princeton  
University Press, Princeton, New Jersey

TO MY WIFE

Patricia Rochford Palmer



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## *Preface*



THIS BOOK is designed to serve as a teaching tool, as a researcher's guide, and as a scholarly investigation. The latter two purposes need little explanation. The book takes the form of a case study that puts litigation into a familial, social, and societal context. The material on which it is based is perhaps uniquely suited for such a task in this area. As a guide, the book will enable researchers to hypothesize better the kind of material that might be found to supplement nonlegal material or to fill out an isolated entry in a plea roll, as well as to piece together the kind of social reality that lies behind the often seemingly sterile record of a single lawsuit.

The book's intended use as a teaching tool, however, has shaped the format. There is little written in legal history that is accessible to nonspecialists, and nothing that discusses the law of property in a properly social instead of a doctrinal framework. The discussion here thus begins at a very basic level. Moreover, numerous documents have been provided in translation, many incorporated into the text and others in the appendixes. The placement of documents in the text is the result of my belief that familiarity with the documents themselves is necessary for an understanding of the subject. The text provides a general overview, but it also assumes that the reader will undertake a close analysis of the documents, for each one raises fundamental legal issues that will demand and repay close consideration and discussion. Furthermore, enough statutory material has been provided in Appendix 2 both to support problems raised in the text and to illustrate the difficulties of statutory interpretation. Notes have been kept to an absolute minimum and have not been used for bibliographic purposes. For such purposes recourse may be

## Preface

had to S.F.C. Milsom, *Historical Foundations of the Common Law*, 2nd ed. (London, 1981), and John Baker, *An Introduction to English Legal History*, 2nd ed. (London, 1979).

Certain aids have been incorporated into this book for students. The extensive chronology of the dispute should help the reader to retain an overall view of events. There is likewise a simplified genealogical chart and a glossary of legal terms. The few notes are of two varieties. Those without asterisks are simply references. Those with asterisks are references further to documents in the appendixes. It should be noted that some of those documents are very interesting and were excluded from the text merely because they would have been somewhat tangential to the material.

I have been working on this book for several years in combination with other projects. The American Bar Foundation supported part of my time in London in 1976-1977. I am also indebted to the Izaak Walton Killam Scholarship Fund for a postdoctoral fellowship at the University of Alberta, where I began writing up this material in 1978-1979, and to the Michigan Society of Fellows and the University of Michigan Law School for the postdoctoral fellowship during which I completed work on this project from 1979 to 1981. I am further indebted to Dr. Paul A. Brand of University College, Dublin, for transcripts of two documents I had overlooked while in England.

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## Abbreviations



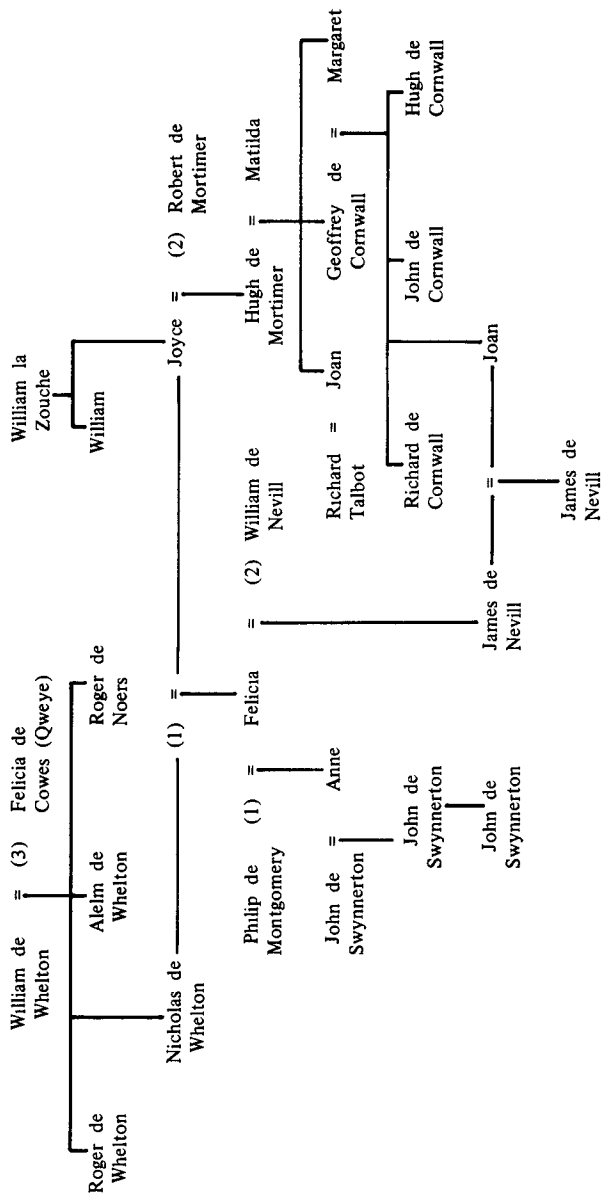
### MANUSCRIPT SOURCES

- C 133 Public Record Office, London, England, Inquisitions *Post Mortem*
- CP 40 Public Record Office, London, England, Plea Rolls of the Court of Common Pleas
- E 13 Public Record Office, London, England, Plea Rolls of the Exchequer
- JUST 1 Public Record Office, London, England, Plea Rolls of the Justices Itinerant
- KB 26 Public Record Office, London, England, *Curia Regis Rolls*

### PRINTED SOURCES

- CCR *Calendar of Close Rolls*, prepared under the superintendence of the Deputy Keeper of the Records (London)
- CFR *Calendar of Fine Rolls*, prepared under the superintendence of the Deputy Keeper of the Records (London)
- CIPM *Calendar of Inquisitions Post Mortem*, prepared under the superintendence of the Deputy Keeper of the Records (London)
- CPR *Calendar of Patent Rolls*, prepared under the superintendence of the Deputy Keeper of the Records (London)
- CR *Close Rolls: Henry III*, prepared under the superintendence of the Deputy Keeper of the Records (London)

*A Simplified Whelton Genealogy*



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## A Whilton Dispute Chronology



### THE REIGN OF KING HENRY III

1264	?	Grant and regrant between William de Whelton and Nicholas de Whelton
	5 April	The Battle of Northampton
1266	25 February	William de Whelton receives a safe conduct
	?	Death of Nicholas de Whelton
	?	Birth of Felicia de Whelton, daughter of Nicholas
	31 October	Dictum of Kenilworth
1267	?	Death of William de Whelton
	4 March	The Zouche-Roger de Whelton compromise
	18 November	The Statute of Marlborough
1268	January	The Whelton claims for redemption
	May-June	Certification to King's Bench
	24 August	Columners surrenders Wymington to Roger de Noers
	October	Vouching to warranty: <i>Savage v Whelton</i> in plea of dower <i>Qweye v Savage</i> for Wymington
	October	<i>Whelton v Noers &amp; Qweye</i> for Wymington
1269	?	Jury on the feoffment and quitclaim
	?	The determination of William de Whelton's guilt
1270	20 October	A final concord: <i>Zouche v Whelton</i>
1271	June-July	Noers and Qweye win in <i>Whelton v Noers &amp; Qweye</i> for Wymington
1272	16 November	The death of King Henry III

### THE REIGN OF KING EDWARD I

1273	?	Joyce marries Robert de Mortimer
	?	William la Zouche dies

### *A Whilton Dispute Chronology*

	?	Felicia's possession of Whilton by guardian; ejection by the Mortimers
	?	First assize of novel disseisin: <i>Whelton v Mortimer</i>
1274	8 January	Death of Gilbert de Preston, justice in <i>Whelton v Mortimer</i>
	October	The assize <i>Whelton v Mortimer</i> summoned into the Court of King's Bench; the Mortimers sent without day by Ralph de Hengham
	?	Hugh de Mortimer is born
	25 December	Robert de Mortimer inherits from his father
1275	3 February	Second assize of novel disseisin: <i>Whelton v Mortimer</i>
	9 April	Statute of Westminster I
	22 April	Continuation of the second assize
	25 June	Felicia wins in the assize <i>Whelton v Mortimer</i>
	7 October	The attaint <i>Mortimer v Whelton</i>
	mid-October	The Mortimers win in <i>Mortimer v Whelton</i>
1276	April	Death of Joan de Stuteville
1277	21 January	First action of entry: <i>Whelton v Mortimer</i>
1280	?	Felicia attains majority
	June	Process in execution of attaint judgment
1285	25 March	Statute of Westminster II (c. 1: <i>De Donis</i> )
	6 October	Second action of entry: <i>Whelton v Mortimer</i>
	15 November	Felicia wins the second action of entry
	?	Marriage of Felicia to Philip de Montgomery
1286	February	<i>Certiorari</i> in <i>Whelton v Mortimer</i>
	June	Action of entry: <i>Montgomery v Mortimer</i>
1287	January	Montgomerys win in <i>Montgomery v Mortimer</i>
	January	Action of besaiele: <i>Montgomery v Tywe</i>
	February-March	Death of Robert de Mortimer
	July-October	Philip de Montgomery fighting in Wales
	October	Joyce regains Norton
	November	Montgomery withdraws from prosecution in <i>Montgomery v Tywe</i>

*A Whilton Dispute Chronology*

	12 November	Joyce receives part of her dower
1288	January	Joyce receives further dower
1289	April-May	Philip de Montgomery fighting in Gascony
	25 June	Philip de Montgomery makes debt recognition of £20 to Robert Burnel
1290	?	Thomas son of Philip de Montgomery killed
	13 March	Joyce dies
	17 April	Vouching to warranty: <i>Lee v Mortimer in Montgomery v Lee</i>
	5 June	A final concord: <i>Burnel v Montgomery</i>
	8 July	Statute <i>Quia Emptores</i>
1291	?	Anne de Montgomery is born
	?	Felicia de Qweye surrenders her life estate to Felicia
	24 November	Joan, daughter of Hugh de Mortimer, is born
1292	June	Philip de Montgomery distrains the prior of Daventry
	October	Robert Burnel dies
1293	October-November	Action of replevin: <i>Prior of Daventry v Montgomery</i>
1294	?	An assize of novel disseisin: <i>Lee v Montgomery</i>
	?	Margaret, second daughter of Hugh de Mortimer, is born
1295	May	Philip de Montgomery dies
	June	Action of entry by intrusion: <i>Mortimer v Montgomery</i>
	September	Hugh de Mortimer purchases writ of right <i>precipe</i> against Felicia
	December	Hugh de Mortimer comes of age
1296	?	Felicia de Qweye dies
	12 November	Pleading in actions of right and entry: <i>Mortimer v Montgomery</i>
1298	?	Felicia marries William de Nevill
1299	11 May	Actions of right and entry <i>Mortimer v Montgomery</i> stayed by royal intervention
	?	Action of debt: <i>Montgomery v Nevill et al.</i>

### *A Whilton Dispute Chronology*

1300		Hugh de Mortimer participates in the seige of Caerlaverock
1301	January	William de Nevill makes a debt recognition to his lawyer, Adam de Harwedon
1302	1 May	Sale of marriage of Anne de Montgomery to John de Haldenby <i>Scire Facias in Harwedon v Nevill</i>
1303	June	Action of neifty: <i>Nevill v Richard</i>
1304	5 August	Hugh de Mortimer dies of poisoning by Matilda, his wife
	16 September	Matilda pardoned of Hugh de Mortimer's death
	?	Guardians of Anne summoned to give dower to Alice, wife of William Passelawe
1305	20 October	Anne de Montgomery attains majority
1306	June-July	Anne married to John de Swynnerton; stewardship of Cannock Forest delivered to Swynnerton; the Nevills sue for dower
1307	7 July	Death of King Edward I

#### THE REIGN OF KING EDWARD II

1308	?	Matilda, widow of Hugh de Mortimer, dies
1309	?	Margaret de Mortimer marries Geoffrey de Cornwall
	?	John de Swynnerton, son of Anne, is born
1310	25 May	John de Swynnerton pardoned for the rape and detention of Joan, late wife of Peter de Greseleye
1311	?	Felicia, wife of William de Nevill, dies
1312	January	Action of trespass: <i>Nevill v Nevill &amp; Whelton</i>
	January	Actions of debt and detinue: <i>Nevill v Nevill &amp; Whelton</i>
1314	?	William de Nevill marries Constance
		Action of debt: <i>Nevill v Nevill</i>
1315		Death of Edward Burnel

### *A Whilton Dispute Chronology*

1318	May-November	William de Nevill acting as sheriff of Warwickshire and Leicestershire
1319	December	A levy of money: <i>Ernefast v Nevill</i> William de Nevill appointed sheriff of Warwickshire and Leicestershire (term ended October 1321)
1321	28 January	An action of entry: <i>Talbot &amp; Cornwall v Nevill</i>
1322	11 July	John de Swynnerton makes fine to save life and lands
1327	20 January	Death of King Edward II

#### THE REIGN OF KING EDWARD III

1330	February-March	An action of aiele: <i>Spenser v Neville</i>
	12 March	An action of entry by intrusion: <i>Talbot v Nevill</i>
	27 April	Geoffrey de Cornwall makes debt recognizance to Hunte
	10 May	William de Nevill dies
	?	James de Nevill marries Joan de Cornwall
	23 May	A final concord: <i>Nevill v Cornwall</i>
	15 June	Cornwall and Nevill make joint debt recognizance to Staunforde
	?	James de Nevill, son of James and Joan, is born
1340		John de Swynnerton, husband of Anne, dies
After 1347		Anne dies
1362	28 June	Commission of <i>oyer and terminer</i> in <i>Syer v Nevill</i>
	?	James de Nevill, son of James and Joan, dies
1375	?	James de Nevill dies Joan, widow of James, sells Whilton to John Holt and John parson of Whilton
1376		An action of formedon: <i>Swynnerton v Latymer et al.</i>
1377	21 June	Death of King Edward III

## *A Whilton Dispute Chronology*

### THE REIGN OF KING RICHARD II

1379		John de Swynnerton (II) dies
1380	April-May	An action of formedon: <i>Swynnerton v Latymer et al.</i>
	May?	John de Swynnerton (III) grants Whilton to Holt
1383		John Holt appointed justice of the Court of Common Pleas
1388		Holt condemned by Merciless Parliament and exiled; Whilton forfeited for his life

*The Whilton Dispute, 1264-1380*



## *Introduction*



THIS BOOK is concerned with the social history of the English state, particularly with English law in the thirteenth and fourteenth centuries. A few words are therefore necessary to explain the nature of the social history of the state and the particular relation of legal history to social history.

Social historians will not immediately consider the state to be within their proper purview. There is no precise determination of the nature of social history, but the standard areas of demography, wealth distribution, family structures, and social mores will seem quite distant from the traditional investigation of the growth of the state. That task has generally fallen to those who regard themselves as constitutional, institutional, or intellectual historians and who claim as their territory the analysis of the distribution of power and the protection of rights, the elaboration of governmental institutions, and the conceptualizations of state power, authority, and devotion. If it were possible thus to shear off an organization as important as the state from the study of society and constrict historical inquiry into set channels, the sometimes passionately maintained boundaries between social history and other kinds of history would make any attempt to contribute a social history of the state futile from the beginning.

The growth of the state, however, was not primarily a constitutional, administrative, or intellectual phenomenon: it was a social development. In one direction, this assertion coincides with the well-worn maxim that one should not reify the state, should avoid thinking of the state as an organism that acts monolithically, that has thoughts, that in some personal sense wages war—that it is a thing. That maxim is true

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enough. Any state is only composed of individuals: battlefield dead are dead individuals, not merely an injured part of a continuing whole. The concern here is not with that maxim but with the similarly obvious fact that it can so easily obscure: individuals do act as if the state were a thing. The state, after all, is highly coordinated power that can be brought to bear with crushing effect on innumerable aspects of an individual's life. Whether or not one is at any given moment the subject of such attention, the awareness of the presence of that power remains. People take it into account in their everyday lives: it conditions actions and expectations so continuously that some reflection is necessary to realize its subtle influence. In our own society, one need only consider the pervasive awareness of the state activities of revenue collection, policing, and adjudication of disputes to note also the consequent modifications of behavior either to conform to requirements or to avoid certain unwanted consequences. Although the impact of the state on the individual is incalculably greater today, of course, than it was in the thirteenth and fourteenth centuries, the investigation of such behaviors, thus modified by the awareness of state institutions, cannot but be properly within the scope of social historical studies.

From this perspective, legal history is of paramount importance to the early history of the growth of the state. In the most simple form, it speaks of the ways in which and the degree to which people made use of a certain set of state institutions to settle disputes. For England, it also speaks of an inflexible set of legal remedies and rules of law that set limits to what could be protected or remedied without recourse to violence. Thus these rules set obstacles in the way of the desired actions of a multitude of individuals, obstacles that invited circumvention. Furthermore, the interplay between, on the one hand, legal remedies and rules of law and, on the other hand, the ingenuity exercised in circumventing the law and using it for untoward purposes is extremely complex. The nature of that interplay changed gradually and repeatedly from the twelfth to the sixteenth century, but always

## *Introduction*

in the direction of a law whose substance was more internally unified and less directly related to commonly held ideas of what was morally just. This is not at all to say that common morality (moralities?) did not affect the law. It did. And it did so just as much as the law affected common morality, so that neither the law nor common morality can be a stable reference point: the workings of each presuppose the other. But their interplay became characteristically more convoluted, less predictable, and with roots less easily recognized. This is a theme quite fertile for the historical understanding of society, but one, I hope, more easily understood at the conclusion of this work than in the introduction. Some detailed examples in this matter are truly worth much more than reams of theory.

The method of this book is precisely that: example. It examines an archetypal dispute to illustrate the ways in which some individuals used the law. The Wheltons, the Mortimers, and their descendants, though far from insignificant, were not the individuals who were shaping the destiny of England in the thirteenth and fourteenth centuries. Were this book really about them, it would merit only specialist interest. It happens, however, that the ways in which they acted show patterns of activity and of expectation that were broadly typical of those members of English society who had access to the king's court and the common law. From those patterns we shall eventually derive a comparison to show how the world in which the English lived changed drastically from 1160 to 1264, from 1264 to 1378, and from 1378 to 1540. The dates are not of particular importance; the changes are.

The degree to which a discussion of patterns of litigation will illuminate the social structures of medieval England depends of course on the degree to which the law was used. An accurate assessment of court utilization is not yet available. We do know, however, that in the two-year period 1327-1328 there were 13,031 cases brought in the Court of Common Pleas, the busiest branch of the king's court. Not all of these cases were determined by judgment, but that fact is

## *Introduction*

irrelevant here. The initiation of litigation will force the opponent to examine one's claim more thoughtfully and to examine his own chances in relation, among other things, to the law. That examination, even in our society, usually results in some kind of settlement. And such a settlement demonstrates the potency of the law. Thus the number of cases initiated is satisfactory for our purposes, and a figure of 6,500 cases a year is impressive. But even that figure is certainly low, perhaps a result of political uncertainty in 1327-1328 while Roger Mortimer and Isabella were still controlling Edward III. The court records for 1327 at least are unusually short. As a counterweight, I have catalogued the litigation from only two counties in the king's court between 1331 and 1334. Those figures would argue a caseload 34 or 40 percent higher than in 1327-1328. A conservative estimate of a normal caseload only 33 percent greater than in 1327-1328 results in more than 8,500 cases a year in the Court of Common Pleas. No cases came from London, Cheshire, or Durham, of course. Thus, for the thirty-seven counties with regular access to the court, one must think of an average of 230 cases a year from each county, but with enormous variations between large, populous, or wealthy counties and small, sparsely populated, or poor counties. The actual and projected figures are presented in Table 1.

The number of people involved is more important than the number of cases. Some individuals, as is well known, were very litigious. In 1331-1334, counting all the litigation from the two counties of Bedfordshire and Cornwall in the two main branches of the king's court (the Court of Common Pleas and the Court of King's Bench), there was a total of 1,266 cases. The 636 cases from Cornwall involved 1,273 different persons as plaintiffs or defendants; of those litigants, only 10 percent were involved in more than two cases over the four years. The 630 cases from Bedfordshire involved 1,379 different individuals; once again, only 10 percent were multiple litigants. (In this calculation, for legal reasons, women appearing with their husbands were not counted as separate

*Introduction*

TABLE I  
Litigation in the Court of Common Pleas  
in the Fourteenth Century

<i>County</i>	<i>1327-1328</i>			<i>1331-1334</i>	
	<i>No. of Cases</i>	<i>% of Total</i>	<i>Per Year</i>	<i>Actual No. of Cases Per Year</i>	<i>Projected No. of Cases Per Year</i>
Norfolk	1,539	11.8%	768		1,024
Yorkshire	1,510	11.6	755		1,007
Lincolnshire	1,215	9.3	608		811
Suffolk	725	5.6	362		583
Essex	531	4.0	266		355
Northamptonshire	497	3.8	249		332
Kent	402	3.0	201		268
Devon	391	2.9	196		261
Hampshire	391	2.9	196		261
Somerset	378	2.9	189		252
Cambridgeshire	342	2.6	171		228
Warwickshire	326	2.5	163		217
Nottinghamshire	294	2.2	147		196
Middlesex	291	2.2	146		196
Sussex	284	2.2	142		189
Leicestershire	276	2.1	138		184
Wiltshire	271	2.1	136		181
Staffordshire	229	1.8	115		153
Surrey	226	1.7	113		151
Oxfordshire	224	1.7	112		149
Gloucestershire	214	1.6	107		143
Buckinghamshire	211	1.6	106		141
Hertfordshire	210	1.6	105		140
Cornwall	201	1.5	101	141	(135)
Derbyshire	200	1.5	100		133
Berkshire	198	1.5	99		132
Dorset	193	1.5	97		129
Bedfordshire	168	1.3	84	114	(112)
Shropshire	163	1.2	82		109
Lancashire	161	1.2	81		108
Worcestershire	150	1.2	75		100
Huntingdonshire	122	.9	61		81
Herefordshire	117	.9	59		79
Northumberland	116	.9	58		77
Cumberland	65	.5	33		44
Rutland	54	.4	27		36

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TABLE I (cont.)

County	1327-1328			1331-1334	
	No. of Cases	% of Total	Per Year	Actual No. of Cases Per Year	Projected No. of Cases Per Year
Westmorland	41	.3	22		29
Divers and uncertain county designations	105	.8	56		75
All Counties	13,031	100.0%	6,516		8,688

NOTE: Figures for 1327-1328 are taken from Public Record Office, *Index of Placita de Banco, A.D. 1327-1328* (Dublin, 1909), pp. 1-837. The figures for Cornwall and Bedfordshire in 1331-1334 are taken from CP 40/284-CP 40/300. My impression is that these figures would not be terribly misleading for the early fourteenth century; they would be much too high if applied before 1300. I can likewise make no estimate yet of the effect of the Black Death after mid-century.

individuals.) These figures allow us to ignore the discounting process necessary to accommodate the very litigious and the multiplication required to allow for multiple plaintiffs or defendants in the individual case. The two factors balance each other out, and one can calculate the total number of persons involved as twice the number of cases brought. Some further allowance must be made for people who brought suits from more than one county. My best estimate here is nothing better than a prudent guess: 10 percent. The end result of these calculations and hypotheses is that nearly 15,300 different persons can be considered as caught up in the processes of the Court of Common Pleas as litigants each year. I hope someday to produce better figures, but for now we must be satisfied with concluding that something in the neighborhood of 0.5 percent of the total population of England were litigants in the Court of Common Pleas every year. Since the figures were based on a catalogue of individuals over a four-year period, expanding that figure to 2 percent of the population every four years would be justified. That is an extraordinarily high level of court involvement with the country.<sup>1</sup>

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Such a percentage, of course, underestimates the actual importance of the court, since it compares litigants with total population. Several corrections should be made to arrive at a better estimate. Married women should be excluded from the population figures because they were not able to sue on their own in the king's court. In the same way and for the same reason, monks and other members of religious houses—except for the abbot, prior, master, or other head of the house—should be excluded. Minors had only very limited access to the Court of Common Pleas and the Court of King's Bench; they should also be almost totally excluded from the population figures. Finally, some allowance should be made for London, the more important boroughs, Cheshire, Durham, and other great liberties that by and large precluded their inhabitants from litigating in the king's court concerning matters within their precincts. Our figures, however, are merely meant to fortify our assertions. The uncertainties involved in calculations to correct figures that are only guidelines boggle the imagination, and little would be gained for our present purposes. Yet it is clear the ratio of actual to total potential litigants was substantially higher than 0.5 percent annually or 2 percent over four years.

Even with such a hypothetical figure, many times corrected, one could not rest secure. Litigation affected many persons other than the litigants and their immediate families or houses. Neighbors and friends of litigants would have had some knowledge of the course of events and the problems encountered in the litigation. Likewise, the jurors from the county would have been directly involved in the trial and would gain firsthand knowledge of the law. Persons who felt wronged could themselves consult one of the band of saddle-sore attorneys who frequently traveled the roads between a county base and the courts at Westminster, even if, in the end, they decided not to sue. However one might arrive at a multiplier to yield an accurate assessment of the familiarity of Englishmen with the king's court and the degree to which it could and did affect their lives, there can be no real doubt