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The donor and the duty of warrandice: giving and granting in Scottish charters

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The language of ‘granting’ and ‘confirming’ has for several generations been standard usage in Anglophone charter-scholarship.¹ Students of medieval diplomatic or land law have conventionally grouped those charters which deal with the conveyance and tenure of land into two categories, especially when describing them in calendars and editions. One commonly says that property has been ‘granted’, or that the tenure of property has been ‘confirmed’; there have consequently arisen two general classes of transaction, namely the Grant and the Confirmation, with the latter class subdivided into various types.² Such terminology of granting and confirming is to be found, as much as anywhere else, in the modern Scottish scholarly tradition; a scholarly tradition indeed which has G. W. S. Barrow at its head.³

Before Barrow, little work had been done in the field of Scottish charter studies since 1905, when a Glasgow-born lawyer and antiquary, Sir Archibald Campbell Lawrie (1837–1914), had produced *Early Scottish Charters prior to A.D. 1153*.⁴ Barrow re-

¹ Especial gratitude is due to Professor Richard Sharpe for allowing me to see and quote from an unpublished paper, ‘Giving and Granting in Documents from Anglo-Norman England’, whose arguments in respect of the fundamentally similar Anglo-Norman material underlie the first part of this chapter. I am also indebted to Professor Dauvit Broun, who acted as catalyst, especially in respect of ideas about the relation of *dare* to the obligation of warrandice. I also thank Dr Alice Taylor and Mr Andrew Smith for advice on certain points, and Dr Stephen Marritt for information on the Ryedales.

² This terminology persists in J. M. Kaye, [*Medieval English*] *Conveyances* (Cambridge, 2009), *passim*.

³ G. W. S. Barrow (b. 1924) was Professor of Medieval History, University of Newcastle-upon-Tyne, 1961–1974; Professor of Scottish History, University of St Andrews, 1974–1979; and Sir William Fraser Professor of Scottish History and Palaeography, University of Edinburgh, 1979–1992.

⁴ Archibald C. Lawrie, *Early Scottish Charters prior to A.D. 1153* (Glasgow, 1905). Lawrie was a friend and collaborator of the prolific antiquary Cosmo Innes, and of

established the subject in the 1960s and led the field for the next four decades. Barrow's editions of the charters of David I, Earl Henry, Malcolm IV, and William I, have moreover provided the robust foundations for *The Paradox of Medieval Scotland, 1093–1286* (fondly known by the acronym PoMS), the prosopographical project out of which this present book has sprung.⁵

Barrow's analysis of the acts of William I identified five categories embodied in charters to which the terminology of granting and confirming applied as follows.⁶ (1) Charters recording an original grant of property by the king. The dispositive clause for this class consisted of the formula *do* (or *reddo*), *concedo et confirmo*, usually in the perfect infinitive in an accusative and infinitive construction. (2) Charters confirming original grants by one or more of the king's predecessors. (3) Charters confirming original grants or other transactions by the king's lieges. These form a very large class. The dispositive formula for these two classes was *concedo et confirmo*, again usually in the perfect infinitive. (4) Charters, understandably commonest at the start of the reign, and typically issued in favour of well-endowed religious houses, in which the king combines the elements of (1), (2), and (3). (5) Charters of the same general character as class (1), which specifically record decisions of the *curia regis*, usually in favour of the party in whose archives the document has been preserved.

James Maitland Thomson, to whom his second major work, *Annals of the Reigns of Malcolm and William, Kings of Scotland, A.D. 1153–1214* (Glasgow, 1910), was dedicated. See Gordon F. Millar, 'Lawrie, Sir Archibald Campbell (1837–1914)', *ODNB*.

⁵The principal outcome of the project is a web-based prosopographical database, freely available online at www.poms.ac.uk. G. W. S. Barrow's principal works in this field are *The Acts of Malcolm IV, King of Scots 1153–1165*, *Regesta regum Scottorum 1153–1424* 1 (Edinburgh, 1960); (with W. W. Scott) *The Acts of William I, King of Scots, 1165–1214*, *Regesta regum Scottorum 1153–1242* 2 (Edinburgh, 1971); and *The Charters of King David I: the written acts of David I King of Scots, 1124–53 and of his son Henry Earl of Northumberland, 1139–52* (Woodbridge, 1999). The achievement of A. A. M. Duncan (b. 1926), Barrow's contemporary counterpart as Professor of Scottish History and Literature in the University of Glasgow (1962–1993), in the field of Scottish charter scholarship is not to be underestimated; his most substantial work, however, lies outside the period under consideration.

⁶Barrow, *Acts of William I*, 69–70.

A few weeks' work in the course of the PoMS project, attempting to categorise the charters of the kings of Scots, revealed however that the terms Grant and Confirmation, the standard vocabulary of charter scholarship, did not adequately express what was being described in the sources. The question arose how *dare*, 'to give', could be the defining verb in a charter designated as a 'grant'; and how *concedere*, 'to grant', could be used in some original 'grants', yet in other circumstances might be the defining verb of a 'confirmation'. John Hudson, for example, has already summed up the confusion in a comment that 'the absence of *dare* [in some Scottish charters] is the main evidence that the grants recorded were not new gifts'.⁷

The way out of this problem began by translating the three principal dispositive verbs in our charters in a more literal manner. So *dare* should most naturally be rendered as 'give', *concedere* as 'grant' (in the sense of 'allow' or 'concede'), and *confirmare* as 'confirm', 'make firm', or 'establish'. Other verbs occur, especially in earlier charters, but their use quickly dies out. The most common other verb is *donare*, 'give as a gift, present, bestow'; it carried the same meaning as *dare* in this context and identified the subject as the donor.

The most significant work on this question has recently been done by Richard Sharpe in a paper on 'Giving and granting in documents from Anglo-Norman England'.⁸ Sharpe has categorised transactions in an importantly but subtly different way from previous scholarship. Like Barrow for Scotland, Sharpe has retained in the Anglo-Norman context five types of transaction, but expressed in the following way. (1) The gift of land. (2) The gift of rights or the licensing of another action. (3) The licensing by a lord

⁷John Hudson, 'Legal aspects of Scottish charter diplomatic', *Anglo-Norman Studies* 25 (2003) 121–138 (at p. 124, note 26), referring to Barrow, *David I*, nos. 181, 213, and id., *Acts of Malcolm IV*, no. 251.

⁸At the time of writing, Sharpe's paper has not been published (see n. 1, above). Kaye (*Conveyances*, 65–6) provides the most recent published discussion of dispositive or 'donative' verbs, maintaining the line that '*dare et concedere* was merely a stock phrase', but he does admit that 'there is a little evidence that this had not always been the case'.

of a gift of land made by a tenant. (4) The reaffirmation to a tenant of his holding land as under the lord's predecessor. (5) The gift to a tenant's heir, by his lord, of succession to land as held by the *antecessor*.

Sharpe's most important insight has been that *concedere* is to be translated as 'to grant', in the sense of 'to concede', 'to allow', or 'to license'. Thus *dare* signifies that the giver desires that the thing given should become the property of the recipient, and *concedere* can be understood on the basis that the subject has shown his consent. Sharpe has gone on to identify the principal distinctions between *dare* and *concedere*. The most important difference is between *dare* 'to give, to hand over' (1) and *concedere* 'to consent to, to grant (a gift)' (3). A second distinction is between the gift of real property (1) and the grant of incorporeal rights (2).

Sharpe's insights may be applied to the Scottish material with profit, and they go some way to solving the dilemma over terminology.

GIVING AND GRANTING IN SCOTTISH ROYAL ACTA

In what follows I have set out a number of charters in order to illustrate how the pattern of giving and granting identified by Sharpe in Anglo-Norman charters may also be seen in charters from the kingdom of Scots. At the head of each charter I have given, where pertinent, the description of the document provided by modern editors in order to illustrate how the traditional terms can often be misleading.

1. *Durham Cathedral Muniments, Misc. Ch. 554. Contemporary authentic duplicate.*⁹

1094 Ego Dunecanus filius regis Malcolumb constans hereditarię rex Scotię, **dedi** in elemosinam sancto Cuthberto et suis seruatoribus Tiningeham ('I Duncan, son of King Malcolm, by inheritance undoubted king of Scotland, **have given** Tynninghame in alms to Saint Cuthbert and his servants').

⁹A. A. M. Duncan, 'The earliest Scottish charters', *Scottish Historical Review* 37 (1958), 103–35 (at p. 119); Lawrie, *Early Scottish Charters*, 10 (no. 12).

The endowment is described as *donum*, a gift:

Et quoniam uolui quod istud **donum** stabile esset sancto Cuthberto, feci quod fratres mei **concesserunt** ('And since I also wished that this **gift** should permanently belong to Saint Cuthbert, I have done what my brothers have **allowed**').

In this the earliest charter for which we have a full text and, as it happens, an authentic contemporary document, the verb employed to bestow a permanent endowment is *dare*, to give. This charter also uses the language of confirmation and granting. Whereas the giving is done by King Duncan, who is parting with something that belongs to him, his brothers have granted or allowed this gift because, as heirs, they have an interest in the property. The purpose of this act is not only to hand over the properties to Durham, but also to make the gift permanent, and so those with an interest in the properties have given their permission in order that they and their successors should be bound by this gift.

2. *Durham Cathedral Muniments, Misc. Ch. 555. Original.*

'Grant by King Edgar to the Monks of St. Cuthbert of Coldingham and other lands.'¹⁰

1097 × 1107¹¹ Eadgarus rex scottorum omnibus suis hominibus scottis et anglis salutem. Sciatis quod ego **do** in elemosinam, Deo omnipotenti et sancto Cuthberto domino meo et ecclesie dunelmensi et monachis in eadem ecclesia Deo seruientibus, et in perpetuum seruituris, pro animabus patris mei et matris mee et pro salute corporis mei et anime mee et fratrum meorum et sororum mearum et pro omnibus antecessoribus et successoribus meis, mansionem de Goldingaham, et cum ista mansione has subscriptas mansiones scilicet, Aldcambus, Lummesdene, Regnintun, Ristun, Swinewde, Farndun, Eitun, aliam Eitun, Prenegest, Cramesmudhe. Has suprascriptas mansiones **concedo** Deo et sancto predicto et monachis eius, cum omnibus terris siluis et aquis et teloneis et fracturis nauium et omnibus consuetudinibus que pertinent ad predictas mansiones et quas pater meus habuit, quietas et solidas, secundum uoluntatem illorum in perpetuum libere disponendas ('Edgar king of Scots to all his

¹⁰Lawrie, *Early Scottish Charters*, 16–17 (no. 19).

¹¹Probably in or soon after 1097.

men Gaelic and English greeting. Know that I **give** in alms to Almighty God, Saint Cuthbert my lord, to the church of Durham, and the monks serving God in that same church now and for ever, for the souls of my father and my mother, and for the health of my body and soul, and that of my brothers and sisters, and for all my ancestors and successors, the *mansio* of Coldingham, and with that *mansio* these *mansiones* written below, to wit, Old Cambus, Lumsdaine, Renton, Reston, Swinwood, *Farndun*, Ayton, the other Ayton, Prendergust, Burnmouth. These *mansiones* written above I **grant** to God and to the aforesaid saint and his monks with all lands, woods and waters, tolls and wrecked ships, and all the customs which belong to the aforesaid *mansiones*, and which my father had, quit and entire, freely to be disposed according to their will in perpetuity).

Edgar's charter uses *dare* to convey the physical properties, the *mansiones* of Coldingham, Old Cambus, Lumsdaine, Renton and so on. In a separate clause *concedere* is employed to grant the terms in which the gift is to be held and the incorporeal rights that come with it, that is, 'all lands, woods and waters, tolls and wrecked ships, and all the customs which belong to the aforesaid *mansiones* ... quit and entire, freely to be disposed in perpetuity ...'.

3. Durham Cathedral Muniments, Misc. Ch. 562. Original.

'Confirmation by King Alexander I to the Monks of St. Cuthbert'¹²

1107 × 1124 Sciatis quod ego **dono** et **concedo** ex mea parte Deo et sancto Cuthberto et uobis suis monachis, Swintunam totam liberam et quietam tenendam et omnino habendam sicut breue fratris mei Eadgari regis uobis testatur ('Know that I **bestow** and **grant** on my part to God and Saint Cuthbert and to you his monks the whole of Swinton to be held free and quit and to be had entire, just as the charter of my brother King Edgar to you bears witness').

King Alexander's charter uses *donare* (to bestow, or give as a gift) plus *concedere* to re-affirm the holding of land as under his predecessor. The same wording is used in Earl David's charter in 1114 × 1118 when he 'bestows' and 'grants' this same property.¹³ We shall return to this kind of transaction later on.

¹²Lawrie, *Early Scottish Charters*, 21 (no. 26).

¹³Barrow, *David I*, 56 (no. 9).

And so we can see how confusing it is to call the bestowal of property a ‘grant’ when the principal verb is ‘to give’; and likewise how the waters can be muddied when an act is described as a ‘confirmation’ when the process does not depend on *confirmare*.

CONFIRMING IN SCOTTISH CHARTERS

Scholarly discourse, then, has tended to use the term ‘confirmation’ (from Latin *confirmatio*) to refer to several different procedures. Transactions that have traditionally been described as ‘confirmations’ fall into Sharpe’s categories 3, 4 and 5, and so represent, first (as we have already seen), the licensing by an interested party (a lord or heir) of a gift of property made by another; secondly, the reaffirmation to a tenant of his holding land as under a predecessor; and thirdly, the gift by a lord of succession to land held by a tenant’s *antecessor*.¹⁴ In the settled practice of the late twelfth century onwards, however, where *confirmare*—the verb most naturally translated as ‘to confirm’ or ‘make firm’—is used, it is really expressing what the document itself does in respect of the transaction. The standard formulation is *hac presenti carta mea confirmasse*, ‘[I] have made firm by this my present charter’: the document is the means of ‘establishing’, ‘strengthening’, ‘confirming’ the action, and is to be found in all categories of transaction. Yet royal clerks did not always employ *confirmare* in this way in earlier practice.

4. *London, British Library, MS Cotton Charters XVIII. 41. Original*.¹⁵
David I ‘Confirms to St Andrew’s Priory, Northampton’.¹⁶

1124 × 1131 Sciatis me **concessisse** et **confirmasse** monachis ecclesie sancti Andree de Norh’t [ut ubicumque habent decimas] domini [mei plenarie] eas habeant [. . .] **Confirmo** etiam eis quicquid habent in uilla de Scaldeford [. . .] **Concedo** etiam eis ut apud Extonam terram illam que [uocatur Wiliges frangent et seminent et nullus eos inde inque]tare

¹⁴Compare Kaye, *Conveyances*, 209–35.

¹⁵Original charter damaged; readings in [square brackets] supplied from cartulary copies.

¹⁶Barrow, *David I*, 65 (no. 24).

presumat ('Know that I have **granted** and **confirmed** to the monks of the church of Saint Andrew at Northampton that wherever they have teinds of my demesne they should fully have them . . . I also **confirm** to them whatever they have in the *uilla* of Scalford . . . I also **grant** to them that at Eaton they may plough and sow the land which is called *Wiliges* and no one should presume to disturb them thereupon').

In this act of David I, the king has granted (*concessisse*) and made firm (*confirmasse*) something already held: one may interpret this to mean that wherever the monks have teinds of the king's demesne, he has established or made them firm, and has granted that they should have them fully. He also makes firm whatever they have in the *uilla* of Scalford. The king then goes on to grant (*concedo*) that the monks may cultivate a particular area of land; in other words he gives them permission to do something. So in a particular case where something already belongs to the monks—teinds of the king's demesne and property in the *uilla* of Scalford—*confirmare* is used; but where a right needs to be re-asserted or granted—that the teinds which already belong to the monks should fully be had, together with the right to plough certain land—*concedere* is used. This is an example of how *confirmare* could be used in a different way from that in which it is used in later charters.

5. *Edinburgh, NAS, MS GD 55/151. Original.*

William I 'Confirms to Melrose Abbey the land of Ringwood granted by Osulf son of Uhtred and his son Uhtred'.¹⁷

1165 × 1168 Sciant tam posterī quam presentes, me **concessisse** et hac mea carta **confirmasse** ecclesie sancte Marie de Mailros et monachis ibidem Deo seruientibus donationem quam Osulfus filius Uctredi et Uctredus filius eius **contulerunt** eidem ecclesie de terra Ringwde [. . .] sicut liberius et quietius cartae eorum eis testantur, et carta regis Malcolmi fratris mei **concedit** et **affirmat** ('Both those that are to come and those present should know that I have **granted** and **made firm** by this my charter to the church of St Mary at Melrose and to the monks serving God there the donation which Osulf, Uhtred's son, and Uhtred, his son, **conferred** to that church in respect of the land of Ringwood . . . just as

¹⁷Barrow, *Acts of William I*, 180 (no. 82).

freely and quietly as their charter to them bears witness, and the charter of King Malcolm, my brother, **granted** and **affirms**’).

Barrow’s heading tells us that this act ‘confirms ... the land of Ringwood’: this is not quite right. King William has more exactly authorised a donation made by two men called Osulf and Uhtred; the donation that Osulf and Uhtred made was of the land of Ringwood. The last clause is also significant for it says that a previous charter of King Malcolm ‘granted’ (perfect tense) and ‘affirms’ (present tense) this gift.¹⁸ So the charter did the granting (which is interesting in itself), but it also continues to corroborate that action; and this explains more clearly what the dispositive clause has already said, ‘and have made firm by this my charter’. In other words it is the charter as a physical object which provides affirmation, confirmation, or corroboration that a transaction has taken place. This confirmatory nature of the physical document is emphasised in the next example which, though unusual, is nevertheless instructive.

6. *London, TNA, MS C 53/93, rot. 13 (Charter Roll 35 Edward I). 13th-century copy.*

William I ‘Grants to May Priory liberty to sell and buy’.¹⁹

1165 × 1171 Sciatis me **dedisse** et sigillo meo **confirmasse** priori de Mai et monachis ibidem seruientibus Deo licenciam et liberam potestatem uendendi et emendi (‘Know that I have **given** and **made firm** by my seal to the prior of May and the monks serving God there permission and free authority to sell and buy’).

There are a two peculiarities in this text. First, the king has ‘given’ a privilege. Here perhaps we can see the non-technical use of dispositive language. He is in fact ‘giving *licentia*’, or ‘giving permission’; the language is perhaps more natural than technical.²⁰

¹⁸See Barrow, *Acts of Malcolm IV*, 175 (no. 105), for this act.

¹⁹Barrow, *Acts of William I*, 187 (no. 94).

²⁰In fact, exactly the same formulation is used at the beginning of the reign of King Alexander III, when the king gives permission to Paisley Abbey to rebuild its fishery in the river Leven near Dumbarton.

So although Barrow's description calls William's charter a 'grant', it is not clear what is meant by that term.

The second peculiarity in King William's charter to May Priory is the phrase, *et sigillo meo confirmasse*, which is to be compared with the usual refrain, *et hac mea carta confirmasse*. This switching from charter to seal is an important commentary on the verb *confirmare* in these contexts, for it shows that the confirming in question is being done by the physical object and does not directly relate to the dispositive action. The point of this phrase surely relates to that other formula found in the licensing or re-affirmation of gifts, *sicut carta [talīs] testatur*, 'just as the charter of [so-and-so] bears witness'.

Further light is shed on the meaning of the confirming formula by a charter of William de Somerville (son of William de Somerville), whose text is preserved in the late-thirteenth-century *Registrum vetus* of Glasgow.

7. *Glasgow*, *Registrum vetus*.²¹

1180 × 1185 Sciatis me consilio Willelmi patris mei, et aliorum amicorum meorum **dedisse** et **concessisse** deo et ecclesie de Glasgu, et Engeramo eiusdem loci episcopo, et hac carta mea **confirmasse** Jocelino episcopo Glasguensi successori suo eorumque successoribus ecclesiam de Karnewid ('Know that with the advice of William my father and of others of my friends I have **given** and **granted** to God and to the church of Glasgow, and to Ingram, bishop of the same place, and have **made firm** by this my charter to Jocelin bishop of Glasgow his successor, and to his successors, the church of Carnwath?').

(note 20 continued)

1250 Sciatis nos de consilio magnatum nostrorum dedisse abbati et conuentui de Passelet dilectis et fidelibus nostris, licenciam et plenariam potestatem reficiendi et reparandi stagnum piscarie sue quam habere solebant super aquam de Leuen iuxta Dumbertan ('Know that, on the advice of our magnates, we have given to the abbot and religious community of Paisley, our esteemed and sworn men, permission and full authority to rebuild and repair their own fishpond which they customarily had on the River Leven near Dumbarton').

Edinburgh, NLS, MS Adv. 34.4.14 (Paisley Cartulary), fo. 131; printed by Cosmo Innes, *Registrum Monasterii de Passelet* (Edinburgh, 1832), 215.

²¹Cosmo Innes, *Registrum Episcopatus Glasguensis: munimenta ecclesie metropolitane Glasguensis a sede restaurata seculo ineunte XII ad reformatam religionem*, 2 vols (Edinburgh, 1843), i. 45 (no. 52).

William de Somerville had conveyed the church of Carnwath to Bishop Ingram; but between the conveyance of the property and the drawing up of the charter, Bishop Ingram had died; the confirmatory action of the charter was therefore to Bishop Ingram's successor Jocelin.

8. *Cartulary of Dunfermline Abbey.*

Alexander II for Dunfermline Abbey.²²

1227 et xx^{ti} acras terre et unum toftum in Dunfermelin quas Walterus dapifer **dedit concessione** patris mei die sepulture predicti Regis Malcolmi ('and 20 acres of land and a toft in Dunfermline, which Walter the Steward **gave** by the **grant** of my father [King William] on the day of the burial of King Malcolm').

By the reign of Alexander II usage had become stable. In this charter King Alexander has licensed or granted what has previously been given by one of his father's men, Walter Stewart; the same action in relation to Walter Stewart's gift, performed previously by King William on the day of King Malcolm's burial, is described as *concessio*, a 'grant', and not *confirmatio*, a 'confirmation'.²³

9. *Cartulary of Lindores Abbey.*

King Alexander III for Lindores Abbey.²⁴

Late 1240s Sciant nos **concessisse** et hac carta nostra **confirmasse** [. . .] **concessionem** illam quam [. . .] pater noster fecit eisdem, uidelicet, ut habeant et teneant, in liberam, puram et perpetuam elemosinam, omnes terras suas quas habuerant et tenuerant a prima fundacione domus sue de Lindores ('Know that we have **granted** and **made firm** by this our charter . . . the **grant** that . . . our father made to them, namely, that they should have and hold in free, pure, and perpetual alms all their lands that they had had and held from the original foundation of their house at Lindores').

²²Cosmo Innes, *Registrum de Dunfermlyn* (Edinburgh, 1842), 42 (no. 74).

²³Exactly similar language is used in Alexander III's equivalent charter of 10 March 1277: *Registrum de Dunfermlyn*, 48 (no. 81).

²⁴J. Dowden, *Chartulary of the Abbey of Lindores* (Edinburgh, 1903), 151 (no. 121).

King Alexander III licenses a 'grant' (*concessio*) made by his father. As with the previous example, this is evidence that what has traditionally been termed a 'confirmation' was thought of by the king's clerks as a 'grant'.

10. *Cartulary of Melrose Abbey.*

Alexander III for Melrose Abbey.²⁵

1266 Sciatis nos **concessisse** et hac carta nostra **confirmasse concessionem** et **confirmacionem** illam quam Alexander senescallus Scocie fecit Deo et ecclesie sancte Marie de Melros ... super **donacione** illa quam Ricardus le Waleys tenens ipsius Alexandri fecit eisdem monachis ('Know that we have **granted** and **made firm** by this our charter the **grant** and **confirmation** that Alexander, Steward of Scotland, made to God and the church of Saint Mary at Melrose ... concerning the **donation** that Richard Wallace, Alexander's own tenant, made to the same monks').

This charter contains an exposition of the full hierarchy of lordship and terminology of giving and granting. One might go so far as to say that it is a glimpse of feudalism in action. The king, as chief lord, has allowed the 'grant and confirmation' made by Alexander Stewart; Alexander Stewart in turn has 'granted' or allowed the donation of the land of Barmuir (Farbolton, Ayrshire) and *Godenech* that has been made by Richard Wallace, who is explicitly described as Alexander Stewart's tenant. We also witness the use of *confirmatio* ('confirmation') to describe Alexander Stewart's action in relation to Richard Wallace's gift: the conjunction of the term *confirmatio* with *concessio* suggests that the *confirmatio* is the embodiment of the *concessio* in a charter.

The examples set out above show how the rather general use of the term 'confirmation' in modern scholarship can distort our understanding of the procedure being described in the charter. We need also to recognise that the use of *confirmare* can, but usually does not correspond with the concept of *confirmatio*; and that the clerks who drafted charters more usually referred to what modern scholarship has termed a 'confirmation' as *concessio*, a 'grant'.

²⁵Cosmo Innes, *Liber S. Marie de Melros*, 2 vols. (Edinburgh, 1837), i. 288 (no. 326).

GIVING, GRANTING, AND WARRANDICE

In the foregoing section of this chapter I have sought to explain how the use of the Latin verbs for giving and granting in charters relates to the mechanics of the transactions they record. But some questions still remain about the consistency of usage in Scottish as well as English charters. The most important issues relate to Sharpe's three last types of transaction: the licensing of a gift of land made by a tenant, the reaffirmation to a tenant of his holding land as under a predecessor, and the gift of succession to land held by an *antecessor*—the types usually referred to as 'confirmations'.

John Hudson in his essay on 'Legal aspects of Scottish charter diplomatic' was aware of apparently inconsistent usage of *dare* in 'confirmations'.²⁶ Keith Stringer has suggested an explanation.²⁷ For Stringer, the strength of a lord in his own court could be demonstrated by his ability to expedite charters 'in the form proper to new gifts' rather than 'charters of confirmation' when earlier gifts were being honoured; so when a lord such as Earl David of Huntingdon was issuing a charter affirming a tenant's right to succeed to land held by an *antecessor*, the lord's use of *dare* as well as *concedere* was a demonstration of his 'discretionary power'. Stringer has therefore concluded that Earl David could demonstrate his authority by 'granting' (i.e. giving with *dare*) rather than 'confirming' (*concedere*) earlier gifts, 'the use of *dedisse* indicating a strong control over the drafting and thus the involvement of household clerks'.²⁸ In this way Stringer has put the use of *dare* in 'confirmations' down to 'strong control over the drafting' of such charters, and a kind of discretionary assertion of the strength of his lordship on the part of the grantor. I propose a different explanation.

In his Maitland Lectures of 1972, S. F. C. Milsom recognised that the verb *concedere* fails in charters of the thirteenth century to

²⁶See p. 122, and n. 7, above; Hudson, 'Legal aspects', 124 and nn. 26–28.

²⁷K. J. Stringer, 'The charters of David, earl of Huntingdon and lord of Garioch: a study in Anglo-Scottish diplomatic', in *Essays on the Nobility of Medieval Scotland*, ed. K. J. Stringer (Edinburgh, 1985), 72–101, at 76.

²⁸Ib.

carry warranty.²⁹ This position is borne out in plea roll cases about *dare* and *concedere* cited by Milsom.³⁰ Students of medieval English law, on encountering the concept of warranty, are still pointed in the direction of the exposition made by S. J. Bailey in a series of articles published in the *Cambridge Law Journal* in the 1940s.³¹ ‘Warranty’, in Bailey’s concise definition,³²

was an obligation, owed to the tenant of certain land, to defend him in his possession of that land against all men. This obligation to warrant was primarily, therefore, an obligation to come into Court, if called upon (‘vouched’) by the tenant, in order to defend some action brought against him for the possession of that land.

Obligation to warranty—called warrantice in the Scottish context—could be stated explicitly in an express clause of warranty, as it usually came to be in English documents of the thirteenth century; or it could come about by implication. Such implicit duty of warranty is a concept which might come to our aid in explaining the apparent inconsistencies in the employment of dispositive verbs in Scottish charters of the twelfth century in particular.

The concept of implied warrantice in Scottish charters was, in fact, understood by Barrow, who noticed that it was uncommon for the king to state explicitly that he had granted his warrantice to a beneficiary.³³ Stringer too recognized the idea of implied

²⁹S. F. C. Milsom, *The Legal Framework of English Feudalism*. The Maitland Lectures given in 1972 (Oxford, 1976), 137.

³⁰Ib. 132, n. 1; Hyams (‘Warranty’, 481) and Kaye (*Conveyances*, 50, 66) have not made any developed treatment of this aspect of implied warranty in the English context.

³¹‘Warranties of land in the thirteenth century’, *Cambridge Law Journal* 8 (1942–4), 274–99, and 9 (1945–7), 82–106; ‘Warranties of land in the reign of Richard I’, *Cambridge Law Journal* 9 (1945–7), 192–209. A more recent attempt to trace and explain the rise and development of express warranty clauses in English private documents of the twelfth century has been made by Paul R. Hyams, ‘Warranty and good lordship in twelfth century England’, *Law and History Review* 5 (1987), 437–503; Hyams was not, however, so concerned with implicit warranty and the significance of dispositive verbs.

³²‘Warranties of land [part I]’, 274.

³³Barrow, *Acts of William I*, 73.

warrantice, and tied it (quite rightly) to an understanding of good lordship:³⁴

a good lord was one who automatically maintained his men in their sasine and compensated them when need arose. It may well be that the continued strength of the lord-man ties played a part in ensuring that for Scottish freeholders implied warrantice often sufficed in itself, and that this contributed in its turn to the seeming infrequency of express covenants in private charters by comparison with those of England.

Neither Barrow nor Stringer, however, has sought to make a link between implied warrantice and dispositive verbs.

Bailey set out a number of cases in England where the obligation to warranty could be implied in a charter, but ‘the most celebrated instance of warranties thus arising by implication ... turns upon the word *ded?*’³⁵ For *Glanvill*, the obligation to warranty fell to the lord if he were the donor.³⁶ The position was elucidated by *Bracton*:³⁷

Et notandum quod ad omnes cartas de simplici donatione competit tenenti warantizatio, et tenentur donatores et eorum heredes ad warantiam si hora congrua et modo debito cum persecutione competenti vocati fuerint ad warantum [. . .] Si vero carta fuerit de confirmatione non sequitur inde warantizatio nisi in se contineat donationem. Ut si dicatur: Do et confirmo tali et heredibus suis vel cui dare, assignare, vendere vel legare voluerit tantam terram etcetera. Et sive præcedat carta sive non de donatione talis carta sufficit ad warantiam (‘It is clear that a warranty lies for the tenant with respect to all charters of simple gift, and that donors and their heirs are bound to warrant if they are vouched at a suitable time

³⁴Stringer, ‘The charters of David’, 91.

³⁵Bailey, ‘Warranties of land [part I]’, 281; see also ib. 278–84; ‘Warranties of land in the reign of Richard I’, 194. *Bracton* concisely specified the cases of implicit warranty: ‘by homage, by fine made, and by the binding force of charters or other instruments’ (*Bracton de legibus et consuetudinibus Angliae*, ed. G. E. Woodbine [1876–1953], 4 vols. (New Haven, CT, 1915–42), iv. 194; repr. with facing transl. by S. E. Thorne [1907–1994] (New Haven, CT, 1968–77) [hereafter *Bracton*], iv. 194; also published on-line, <http://hls15.law.harvard.edu/bracton/Common/index.htm>, by the Ames Foundation at Harvard Law School,

³⁶*Tractatus de Legibus et Consuetudinibus Regni Anglie qui Glanvillia vocatur*, ed. G. D. G. Hall, with guide to further reading by M. T. Clanchy (Oxford 1993), 106.

³⁷*Bracton*, iv. 215.

and in the proper way, with appropriate procedure . . . If the charter is one of confirmation no warranty follows thereon, unless it also contains the gift, as where it is said, "I give and confirm to such a one and his heirs, or to whom he wishes to give, assign, sell or devise it, so much land etc." Such a charter suffices for warranty whether or not there was an earlier charter of gift).

But Bailey thought that *dare* and *concedere* were hardly noticeable as having any special technical significance in *Glanvill's* day, despite *Glanvill's* telling us that donors are bound to warrant their gifts to donees and their heirs.³⁸ He referred to a case brought before the shire court of Buckingham in 1193, where the vouchee had argued that he was not bound to warranty because the charter contained no more than that he had granted (*concessit*) that land, and there was no mention of his gift (*de dono suo*) nor of warranty. This problem produced a difference of opinion in the shire court, the resolution of which was never achieved on account of the intervention of the siege of Windsor.³⁹ The fact of the uncertainty, in Bailey's view, would throw doubt on the universality of the concept.

Bailey's circumspection about the recognition of *dare* as a clear diagnostic factor of implicit warranty before the thirteenth century may nevertheless be countered by the knowledge that it was indeed recognised as such by *Glanvill* and was also used as a defence. The idea that *dare* implicitly carried warrantice, although only codified by commentators on the English law in the late twelfth and thirteenth centuries, and dealt with by statute in 1276, seems to be borne out by the evidence of usage in Scottish charters, and provides a tidy explanation of the previously perceived inconsistency in the dispositive formulae of Scottish 'charters of confirmation'.⁴⁰

³⁸Bailey, 'Warranties of land in the reign of Richard I', 195.

³⁹Tb.: Geoffrey of Hurton had complained to the King's Justices that he claimed certain land by writ of right against Robert fitz Everard; Robert had vouched to warranty William of Hurton, the lord of that fee, and, by producing William's charter of grant, had proved that William had granted that land to him; William admitted the charter, but had argued that he was not bound to warranty for the reasons stated above.

⁴⁰See Kaye, *Conveyances*, 50; the statute of 1276 quoted by Kaye is *De bigamis*, 4

DE COMPOSITIONE CARTARUM

John Hudson has observed that in the explicit warrandice clauses which he looked at in Scottish charters, obligation rested on the ‘grantor’ and his heirs.⁴¹ Yet, we must ask what is meant by ‘grantor’; for as we shall see below, this was not always the case.

A treatise called *De Compositione Cartarum*, ‘The Composition of Charters’, has been transmitted with *Regiam Majestatem* (a fourteenth-century Scottish legal treatise) in eleven manuscripts, the oldest of which is of the early fifteenth century.⁴² Parts of *De Compositione Cartarum* closely follow an English manual for the guidance of notaries and clerks dated not later than 1308.⁴³ In a section on the drafting of charters (*Ad componendum cartas*) the first instruction is to identify the donor (*donator*) and the donee (*donatarius*)

ordinatur per statutum, quod si aliquis dicat dedi, per illam donacionem debet ligari cum uocatus fuerit ad waranciam [. . .] posito quod aliquis rem suam michi concesserit potest illam concessionem reuocare. Sed si rem suam michi dederit, de illa donacione, nulla debet nec potest esse reuocacio (‘it is ordained by statute that if anyone should say ‘I have given’, he by that gift is duly bound in warrandice (when and if called upon) . . . suppose that someone were to have granted his property to me he can revoke that grant. But if he were to have given his property to me there neither ought to be nor can be revocation in respect of that giving’).⁴⁴

The following examples suggest that this rule appears to have developed out of the practice applied in our period.

Edward I, cap. 6 (Edward Coke, *The Second Part of the Institutes of the Laws of England* (6th edn, London, 1681; repr. Clark, NJ, 2002), 275).

⁴¹Hudson, ‘Legal aspects’, 125, n. 36.

⁴²J. J. Robertson, ‘De Compositione Cartarum’, in *Miscellany One*, The Stair Society (Edinburgh, 1971), 78–93.

⁴³Ib. 82; the English manual in question is BL, MS Add. 41201 (printed ib. 92, Appendix I).

⁴⁴‘De Compositione Cartarum’, 86–7.

11. *Cartulary of Kelso Abbey.*

King David I 'Confirms to Kelso Abbey ... the toun of Whitmuir'.⁴⁵

1150 × 1153 Sciatis omnes me **concessisse** ecclesie sancte Marie et sancti Johannis de Chalchehoh et abbati ac monachis ibidem Deo seruiantibus uillam Vithemer nomine per suas rectas diuisas, liberam et quietam ab omni seruicio et consuetudine seculari, in liberam et perpetuam elemosinam, sicut aliqua abbacia in tota terra mea elemosinas suas liberius, melius et quiecuis tenet et possidet ('Everyone should know that I have **granted** to the church of Saint Mary and Saint John at Kelso and to the abbot and monks serving God there the *uilla* named Whitmuir by its right bounds, free and quit from all secular service and custom, in free and perpetual alms, just as any abbey in the whole of my land the more freely, well, and quietly holds and possesses its alms').

Barrow could offer 'no explanation ... of why this act is in the form of a confirmation rather than an original grant. The property is not included in no. 183 [King David's general confirmation of Kelso's properties]'.⁴⁶ The perplexity about the lack of *dare* in what otherwise appears to be 'an original grant' may perhaps be explained by the unwillingness of the beneficiaries for the king to be identified as donor, and thus as lord. We may imagine a situation in which the abbot and monks of Kelso had already received sasine of the *uilla* of Whitmuir; this charter lays out the terms of tenure and possession which the king has granted, and limits any claim on the land which he might make himself. The nature of the tenure, 'free and quit from all secular service and custom, in free and perpetual alms', seems to rule out any obligations of lord and tenant on both sides. We cannot be sure how this may have affected the king's obligation to give warrandice in practice.

12. *Durham Cathedral Muniments, Misc. Ch. 561. Original.*

'Confirmation by King Alexander I to the monks of St Cuthbert'.⁴⁷

1107 Alexander Dei gratia Rex Scottorum omnibus per regnum suum scottis et anglis salutem. Sciatis quod ego **dono** Deo et sancto Cuthberto

⁴⁵Barrow, *David I*, 142 (no. 181).

⁴⁶Barrow, *David I*, 142.

⁴⁷Lawrie, *Early Scottish Charters*, 24 (no. 31). For the date, see above, p. 68, n. 165.

domino meo et monachis eius, omnia que habebant tam in terris quam in aquis die qua frater meus rex Eadgarus uiuus et mortuus fuit, ita libera et quieta cum omnibus consuetudinibus sicut monachi predicti illo eodem die melius et quietius habuerunt illam eandem terram et nominatim illam terram que iacet inter Horeuoredane et Cnapedane sicut breue fratris mei Eadgari eis testatur ('Alexander by God's grace king of Scots to all throughout his realm Gaelic and English greeting. Know that I **bestow** to God and to Saint Cuthbert my lord and to his monks everything that they had [*or used to have*] as well in lands as in waters on the day that my brother King Edgar was alive and dead, so free and quit with all customs as the aforesaid monks the better and more quietly had the same land on the same day, and specifically the land which lies between Horndean and Knapdene, just as the charter of my brother bears witness').

Here we may understand King Alexander to be taking on the relationship and obligation of donor in respect of the monks of Durham Cathedral Priory, thereby re-affirming the terms of his immediate predecessor's charter, to which this charter makes reference.⁴⁸ The specific mention of the land between Horndean and Knapdene (identified by name as Fishwick in Berwickshire in Edgar's original charter) may suggest that there has been a break in tenure; but would that explain the more general terms of the first half of the charter? A charter of Earl David shows him exercising jurisdiction in this specific part of Tweeddale during the reign of King Alexander I.⁴⁹ There had been a dispute between the monks of Durham and the earl's drengs of Horndean over the land of Horndean; by reference to the charter of Edgar, which is described as *donum*, a gift, Earl David 'wishes and grants' (*uolo et concedo*) that the monks 'should have' (*habeant*) the land. When David had become king a charter was executed in his name which included Fishwick among a list of lands 'granted and given in alms' to God, St Cuthbert, and his monks. Barrow was in two minds whether this *actum* was authentic; whatever the case, the language helps us to understand the needs of the beneficiary.⁵⁰ In the first of two

⁴⁸Lawrie, *Early Scottish Charters*, 18 (no. 22).

⁴⁹Durham Cathedral Muniments, Misc. Ch. 759; ed. by Barrow, *David I*, 57 (no. 11).

⁵⁰Durham Cathedral Muniments, Misc. Ch. 567, 568; ed. by Barrow, *David I*, 69–

dispositive clauses King David is said to have ‘granted and given’ (*concessisse et dedisse*) various lands, including *Fiswic* (Fishwick); having done this, he then, in the indicative present tense, ‘gives and grants’ (*do et concedo*) the lands just enumerated ‘with sake and soke, toll and team, and infangthief’; the charter then refers to itself (or to the transaction) as ‘this donation’ (*donatio*). By the end, we are quite clear that this is a charter of gift with King David identified as the donor. Some time before 1141 × 1144 Fishwick had passed into the control of Durham’s daughter house at Coldingham and had in turn been conveyed to a priest called Swain; in due course Swain quitclaimed and ‘gave back’ (*reddidisse*) Fishwick to the monks of Coldingham; the details of this last transaction we pick up from an original charter of Earl Henry that gives notice that it occurred in his presence.⁵¹ In 1165 × 1174 King William ‘granted’ (*concessisse*) Fishwick to Coldingham, which Swain the priest ‘in the presence of Earl Henry’ had ‘given back to them and quitclaimed’; the king therefore granted, ‘and made firm by [his] charter’ (*carta mea confirmasse*), land which someone else had given (or in this case, given back); in other words the king put his authority behind, and provided written confirmation for, a transaction in which someone else had done the giving.⁵² By ‘granting’ the transaction, the king was being looked to for his authority as lord, but he no longer had the role of donor because the property in question had been definitively alienated to the monks of St Cuthbert. The king’s charter was a means of reinforcing the quitclaim and return of lands by Swain.

70 (no. 31, 32). Barrow had doubts over the authenticity of the witness lists in the two almost identical charters; yet ‘it is hard to explain the apparent fact that authentic seals of David I are attached to both’ (ib. 70); Sharpe thinks that the seals are not authentic (p. 79, above, n. 196).

⁵¹Durham Cathedral Muniments, Misc. Ch. 754 (Original); ed. by Barrow, *David I*, 113 (no. 122).

⁵²Durham Cathedral Muniments, Misc. Ch. 597 (Original); ed. by Barrow, *Acts of William I*, 173–4 (no. 73).

13. *Durham Cathedral Muniments, Misc. Ch. 756. Original.*

'Henry son of the king of Scotland grants to the monks of St Cuthbert Swinton, Berwickshire'.⁵³

1136 × 1141 Sciatis me **dedisse** et **concessisse** monachis sancti Cuthberti Swintun imperpetuum possidendam, et libere disponendam in dominicum seruitium suum, sicut carta bone memorie Ædgarī regis auunculi mei testatur, et sicut pater meus eis **concessit** et **reddidit**. Et uolo et precipio ne aliquis de hoc molestiam uel calumpniam eis faciat, quia hoc eis **concessi** imperpetuam elemosinam, pro salute anime mee, et parentum meorum scilicet Malcolmi regis, et Margarete regine et filiorum ac filiarum ipsorum ('Know that I have **given** and **granted** Swinton to the monks of Saint Cuthbert to be possessed for ever, and to be dealt with freely as their demesne service, just as the charter of my uncle King Edgar of good memory bears witness and as my father **granted** and **restored** to them. And I will and instruct that no one should disturb them or make claims in respect of this, since I have **granted** it in perpetual alms, for the health of my soul, and of my parents' [souls], namely King Malcolm and Queen Margaret, and of their sons' and daughters' [souls]').

The original charter of King Edgar's gift of Swinton to the monks of St Cuthbert, referred to in this charter of Earl Henry, is extant. King Edgar offered Swinton as an endowment (*obtuli in dotem*) on the altar of St Mary's church, Coldingham, and bestowed (*donauit*) the whole *uilla*.⁵⁴ We learn from King Edgar's charter that a certain Liulf had had the same *uilla*, for the church of Coldingham was to have it by the same bounds that Liulf had it; and the land had probably been waste, for twenty-four oxen are also given to restore it to cultivation.⁵⁵ The *uilla* was also to be had free and quit for ever from all claim and to be dealt with as the monks of St Cuthbert wished.

About a decade after King Edgar's original endowment, King Alexander I 'gives and grants' (*dono et concedo*) Swinton under the

⁵³Barrow, *David I*, 84 (no. 65).

⁵⁴Durham Cathedral Muniments, Misc. Ch. 556 (Original); ed. by Lawrie, *Early Scottish Charters*, 17–18 (no. 20). Hudson ('Legals Aspects', 136–7) discusses this and the subsequent charters relating to Swinton.

⁵⁵Lawrie (*Early Scottish Charters*, 256) provided some remarks on this.

same terms to which the charter of King Edgar bears witness.⁵⁶ In this case, however, the king also instructs and forbids the monks to bring or defend any action in respect of Swinton, unless he himself has instructed them orally or in writing, since he and his brother David have acquieted (*acquietabimus*) the alms of their brother and their own to Saint Cuthbert and the monks.⁵⁷ This last clause represents a kind of early explicit warrantice: the king is, in effect, stating that the land has been made quiet, rid from suits, etc., by recovering it from someone who has usurped it.⁵⁸ *Acquietare* is one of the standard verbs, along with *warrantizare* and *defendere*, which appear in the fully developed warrantice clause.⁵⁹

In a further brieve, King Alexander commands Prior Algar not to enter any plea or deraignment (*diratiocinatio*, the action of vindicating or maintaining one's right) in respect of Swinton before he has come to him, informing him that he has many things to say to him in private.⁶⁰

David, as earl (probably 1116 × 1118), in two brieve-charters, one to Prior Algar and the brethren of Durham, the other to Bishop John of Glasgow, the brothers Gospatric, Colban and Robert, and all his faithful thanes and drengs of Lothian and Teviotdale, 'bestows and grants' (*dono et concedo*) Swinton to the monks of St Cuthbert in the same terms as Edgar's charter, quoting

⁵⁶Durham Cathedral Muniments, Misc. Ch. 562 (Original); ed. by Lawrie, *Early Scottish Charters*, 21 (no. 26). This charter has already been mentioned: see no. 3, p. 125, above.

⁵⁷'Acquiet' is a Scots term, meaning to 'secure in quiet' and best translates the Latin verb *acquietare*, which means to render quiet and secure. See 'Acquiet' in J. Jamieson, *Etymological Dictionary of the Scottish Language: Supplement*, 2 vols (Edinburgh, 1825), i. 6; 'Acquiet', *Dictionary of the Scots Language* (available online at <http://www.dsl.ac.uk/>).

⁵⁸See Jamieson, *Etymological Dictionary*, i. 6; Kaye (*Conveyances*, 43–5) has some discussion of such injunctions in relation to the early development of explicit warranty in England.

⁵⁹See for example, Barrow, *Acts of William I*, 216 (no. 143), a gift of a third of the *villa* of Haughton to Reginald Prath: *warrantizabunt, acquietabunt, et defendent in perpetuum*.

⁶⁰Durham Cathedral Muniments, Misc. Ch. 563 (Original); ed. by Lawrie, *Early Scottish Charters*, 22 (no. 27).

its dispositive language.⁶¹ At the end of each charter is a clause forbidding anyone from inflicting injury or disturbance in their possession of this property. Again, these clauses appear to be acting as a kind of guarantee.

About twenty years later, David, as king, together with his son, Henry, then 'gave and granted' (*dedi et concessi*) Swinton to one of his knights, Ernulf of Morwick, to be held by him and his heir in feu, as freely and honourably as any of the king's barons holds, and to hold of St Cuthbert and the king, rendering 40s. to the monks of Durham.⁶²

14. *Durham Cathedral Muniments, Misc. Ch. 564. Original.*

David I 'grants jointly with his son Henry, to his knight Hernulf (Ernulf of Morwick), in fee, Swinton, Berwickshire'.⁶³

1136 × 1137 D Rex Scot', et H suus filius, omnibus uicecomitibus suis cunctisque baronibus Francis et anglicis, salutem. Sciatis quod dedi et concessi huic meo militi Hernulfo, Swintun, in feudam sibi et heredi suo cum omnibus hominibus suisque pecuniis tenere bene et libere et honorifice, sicut ullus ex meis baronibus melius ac liberius tenet, et quicquid ad eam pertinet, per easdem consuetudines per quas Liulfus filius Edulfi, et Udardus filius suus tenuerunt, tenere de sancto Cuthberto et de me .xl. solidos reddente monachis de Dunelmia sine omnibus aliis seruiciis ('D[avid] king of Scots, and H[enry] his son, to all his sheriffs and each of his barons, French and English, greeting. Know that I have given and granted to this my knight Ernulf, Swinton, in feu to him and his heir with all the men and their property to hold well and freely and honourably, just as any of my barons the better and the more freely hold, and whatever pertains to it, by the same customs by which Liulf son of Edulf, and Udard his son held, to hold of Saint Cuthbert and of me, rendering 40 shillings to the monks of Durham without any other service').

⁶¹Durham Cathedral Muniments, Misc. Ch. 762 (Original), ed. by Barrow, *David I*, 56 (no. 9); Durham Cathedral Muniments, Misc. Ch. 760 (Original), ed. by Barrow, *David I*, 56–7 (no. 10).

⁶²Durham Cathedral Muniments, Misc. Ch. 564 (Original); ed. by Barrow, *David I*, 79 (no. 53).

⁶³Ib.

15. *Durham Cathedral Muniments, Misc. Ch. 565. Original.*

David I 'grants to his knight Arnolf (Ernulf of Morwick) in fee and heritage Swinton, Berwickshire'.⁶⁴

1136 × 1137 .D. rex scottorum, comitibus, baronibus, uicecomitibus, ministris, et omnibus fidelibus suis clericis, et laicis, totius terre sue, salutem. Sciatis me concessisse, et dedisse Arnolfo isti meo militi totam terram de Swinton' cum pecunia, et hominibus et omnibus rebus iuste ad eandem terram pertinentibus in feudo, et in hereditate, sibi et heredibus ita libere, et quiete, et honorifice tenere, et habere, sicut Vdardus uicecomes eam tenuit liberius, et quietius per illud seruitium inde faciendo monachis Dunhelic quod ipse Vdardus eis inde faciebat. Presentibus testibus [. . . etc.] ('David, king of Scots, to his earls, barons, sheriffs [*or* thanes], officials, and all his sworn men, clerics and lay, of the whole of his land, greeting. Know that I have granted and given to this Arnolf my knight the whole land of Swinton with livestock, men, and all things rightly pertaining to it, in feu and in heritage, to him and his heirs to hold and have so freely and quietly and honourably just as Udard the sheriff the more freely and quietly held it by that service to be performed thereupon to the monks of Durham which the same Udard used to perform. With witnesses present . . .').

These charters present a complicated scenario. In no. 14, Ernulf is to hold in feu both of the king and of St Cuthbert (the monks of Durham at Coldingham), making a render of 40 shillings without any other service to the monks. Why, then, is the king, with Henry his son, making the gift? There have been several suggestions. Lawrie doubtfully proposed that Edulf, Liulf, Udard, and Ernulf might all have held Swinton under the Priory of Durham, and that the foregoing charter and its counterpart (no. 15) are royal confirmations of gifts made by the church; his other proposal was that, if Ernulf held, contrary to the monks, as the heir of Udard, it would have been to the advantage of the priory to have charters from the King, nominally in Ernulf's favour, which contained a distinct obligation on him to hold under the church. 'The monks', thought Lawrie, 'must have considered these charters as confirming their right, else why were they kept at Durham?'

⁶⁴Barrow, *David I*, 79 (no. 54).

Barrow, for his part, suggested that either the monks of Durham cathedral priory obtained duplicates at the time of issue (thus explaining the presence of these charters, which would be proper to the beneficiary, in their archive), or that the charters were surrendered subsequently through failure of heirs or failure to prove title. Whereas no. 14, as Barrow pointed out, was a gift in feu to Ernulf and one heir and specified the service due to Durham as 40 shillings, no. 15, on the other hand, is a gift in feu and heritage to the beneficiary and his heirs, but without specifying the service due, except to say that it is to be the service that Udar performed.⁶⁵ Barrow thought no. 15 might be later than no. 14; I should argue that, if authentic, the more specific charter, no. 14, would have been the earlier, especially given the terms of no. 13, which is an act of Henry, who acts with his father in no. 14, but not no. 15. We might suppose that King David and Henry act as donor in no. 14 in order to warrant a gift in feu already made by Durham, but whose tenure of Swinton was still not entirely secure. Dauvit Broun, for one, thought that the monks of Coldingham had not been able to dislodge the freeholder, Liulf, and his heir, Udar.⁶⁶

Finally, Henry, the king's son, gives and grants Swinton to St Cuthbert (no. 13, above). This charter tells us some important information about the previous history of the property; it refers to his father's *actum* in terms of 'granting' (*concessit*) and 'restoring'/'re-giving' (*reddidit*), which suggests an interruption of tenure, as Broun supposed. Whatever the case, Henry has 'given and granted', even though his father, still alive, has 'given' the place before. We may suppose that the status and obligations of donor are being taken on by Henry alone. In future, if the monks of St Cuthbert at Durham need to invoke the warranty of their donor, they are to look to Henry first, rather than to King David.

⁶⁵Barrow, *David I*, 79.

⁶⁶Dauvit Broun, *The Charters of Gaelic Scotland and Ireland in the Early and Central Middle Ages*, Quiggin Pamphlets on the Sources of Mediaeval Gaelic History 2 (Cambridge, 1995), 23.

16. *Cartulary of St Albans Abbey*.⁶⁷

‘Henry, son of the king of Scotland, confirms to Tynemouth Priory everything it had on the day of King Henry I’s death’.

1139 × 1140 Sciatis me dedisse et concessisse deo et sancte Marie et sancto Oswino et monachis de Tynemutha tenere libere et quiete et honorifice omnia que tenerunt die qua Henricus rex Angl’ fuit uiuus et mortuus (‘Know that I have **given** and **granted** to God and Saint Mary and Saint Oswine and to the monks of Tynemouth to hold freely and quietly and with honour everything that they held on the day that Henry, king of the English, was alive and dead’).

Again, in this case, we can understand Henry to be taking upon himself the obligations of a donor; this perhaps in the context of acquiring the earldom of Northumberland (although he is not designated as such in the charter).

17. *Registrum vetus of Glasgow*.⁶⁸

William I ‘Confirms with the consent of his brother David, to the bishopric of Glasgow Kinclaith, Cadder and “Badermonoc” granted by King Malcolm IV’.

1166 × 1170 Sciant Clerici et laici, presentes et posterī, me **dedisse** et hac carta mea **confirmasse** Deo et sancto Kentegerno et episcopatuī Glasguensi, Conclud et Cader, et Badermonoc . . . pro animabus regis Dauīd aui mei, et comitis Henrici patris mei, et regis Malcolm fratris mei, qui easdem terras prenominato episcopatuī **dedit** et **concessit** in elemosinam perpetuam . . . Dauīd fratre meo idem ex parte sua plenarie **concedente** (‘Clergy and laity, present and to come, should know that I have **given** and **made firm** by this my charter to Saint Kentigern and the bishopric of Glasgow, Kinclaith, Cadder and *Badermonoc* . . . for the souls of King David my grandfather, Earl Henry my father, and King Malcolm my brother, who **gave** and **granted** the same lands to the afore-named bishopric in perpetual alms . . . my brother David fully **granting** the same on his part’).

⁶⁷London, BL, MS Cotton Tiberius E. VI, fo. 119r; ed. by Barrow, *David I*, 94 (no. 84).

⁶⁸Barrow, *Acts of William I*, 194 (no. 106).

William I has given property previously given by his predecessor; by himself 'giving' the properties he has taken on the obligations of a donor; his brother David fully assenting to the gift (*plenarie concedente*) has implicitly given up any claim on those properties.

18. *BL, Cotton Charters, XVIII. 13. Original.*⁶⁹

William I 'Confirms the earliest endowments of Melrose Abbey'.

1173 × 1177 Sciatis me [. . .] **concessisse** et **dedisse** Deo et ecclesie sancte Marie de Melros et monachis ibidem deo seruientibus de Rieuall in perpetuum et liberam elemosinam terra de Melros et terram de Eldune et terram de Dernewich libere et honorifice perpetuo tenore possidere. ('Know that I have **granted** and **given** to God and St Mary at Melrose and the monks from Rievaulx serving God there in perpetual and free alms the land of Melrose, the land of Eildon and the land of Darnick, to possess freely and with honour in perpetual tenure').

In the original charter King David had 'granted and given' the land of Melrose etc., but in his subsequent charter Earl Henry 'has given and made firm by this his charter': the giving is the most important element.⁷⁰ We may speculate that *concedere* comes before *dare* in King David's original charter as well as here in King William's because the monks were already in possession of the land; the king was conceding their tenure of the land and then warranting that possession by adopting the role of donor.

19. *NAS, MS GD 55/117. Original.*

William I 'Confirms to Melrose Abbey the land in the territory of Clifton granted by Walter of Windsor'.⁷¹

1173 × 1185 Sciant presentes et posterii me **dedisse**, et hac mea carta **confirmasse** Deo et ecclesie sancte Marie de Melros et monachis ibidem Deo seruientibus illam terram quam tenent in territorio de Cliftuna per ipsas diuisas que continentur in carta Walteri de Windlesoure, quam habent de eo de eadem terra [. . .] **Dedi** enim eis et **confirmaui** eam

⁶⁹Barrow, *Acts of William I*, 236–7 (no. 175).

⁷⁰Charter of David I with his son Henry, *NAS, MS GD 55/1*, ed. by Barrow, *David I*, 111 (no. 120); *NAS, MS GD 55/2*, ed. by Barrow, *Acts of Malcolm IV*, 157–8 (no. 41).

⁷¹Barrow, *Acts of William I*, 262–3 (no. 214).

liberam ab omnibus auxiliis, placitis, geldis, scutagiis, cornagiis, et ab omni seruitio et consuetudine et exactione seculari, **ita quod ego et heredes mei manutenebimus et warrantizabimus eam illis contra omnes homines in perpetuum**, saluo seruitio meo, de Waltero et heredibus suis. ('Those present and those to come should know that I have **given** and **made firm** by this my charter, to God and to the church of Saint Mary at Melrose and to the monks serving God there, the land they hold in the territory of Clifton by the same boundaries contained in the charter of Walter of Windsor, which they have from him concerning the same land . . . For I have **given** to them and **confirmed** it free from all aids, pleas, gelds, scutages, cornages, and from every service and custom and secular exaction, **so that I and my heirs shall maintain and warrant it to them against all men in perpetuity**, saving my service from Walter and his heirs').

The penultimate clause is one of warrantice. The reason William 'gives' rather than 'grants' the land can explicitly be linked to the king's undertaking to warrant the gift on behalf of one of his tenants, for we know from other evidence the land had been in dispute.⁷²

20. *National Archives of Scotland, MS GD 55/41. Original.*⁷³
Charter of Gervase Avenel in respect of Eskdale.

1180 × 1192 Sciatis me **concessisse** et hac mea carta **confirmasse** deo et ecclesie sancte Marie de Meylros et monachis ibidem deo seruiantibus **donacionem** patris mei scilicet terram de Eschedale quam idem pater meus illis **donauit** in perpetua elemosinam et carta sua **confirmauit**, annuente piissimo rege Melcolmo prius, et propterea illustri rege Willelmo fratre eius, scilicet Thumloher et Weidkerroc, in liberam et puram et perpetuam elemosinam, pro anima gloriosi regis Daudid qui eandem terram **donauit** eidem patri meo pro seruicio suo, et pro anima comitis Henrici, et predicti Melcolmi regis, et pro anima predicti Willelmi regis Scottorum, domini mei, et omnium successorum meorum. Hanc itaque terram, scilicet Thumloher et Weidkerroc, **concessi** predictis monachis, et **dedi** et **confirmauit**, et hac mea carta **incartauit**, per has diuisas [. . .] **Et siquis forte aliquando hanc predictam terram calumpniari uoluerit, ego et**

⁷²See Barrow, *Acts of William I*, 449 (no. 493), a charter which refers to a dispute between Kelso Abbey and Melrose over the lands of Mow and Clifton.

⁷³Printed in *Liber S. Marie de Melros*, i. 33–4 (no. 41).

heredes mei omni claumpnianti respondebimus et sufficienter defendemus eam predictis monachis et warantizabimus ('Know that I have **granted**, and **made firm** by this my charter, to God and to the church of Saint Mary at Melrose and to the monks serving God there, the donation of my father, to wit, the land of Eskdale, which my same father **bestowed** to them in perpetual alms and **made firm** by his charter, with the assent of the most blessed King Malcolm in the first place, and then of the illustrious King William his brother, to wit, Tomleuchar and Watcarrick, in free and pure and perpetual alms, for the soul of the glorious King David, who **bestowed** the same land to my same father in return for his service, and for the soul of Earl Henry, and of the aforesaid King Malcolm, and for the soul of my lord, the aforesaid William, king of Scots, and of all my successors. This land therefore, to wit, Tomleuchar and Watcarrick, I have **granted** to the aforesaid monks, and have **given** and **confirmed**, and by this my charter have **embodied in a charter**, by these boundaries . . . **and if by chance anyone should wish to claim this aforesaid land, I and my heirs shall respond to every claimant and sufficiently defend and warrant it to the aforesaid monks**').

Hudson thought that 'usage [of *dare*] is inconsistent' in this charter.⁷⁴ This need not be the case, for the use of dispositive verbs may be explained in the following way. Gervase Avenel first makes known that he has granted his father's donation to Melrose Abbey (the land of Eskdale, namely, Tomleuchar and Watcarrick) which had been bestowed to them with the agreement of King Malcolm and later of King William; Gervase thereby establishes the history of the conveyance of the property and concedes that it should continue to be held by the monks. Gervase then goes on to explain that on account of all this he has granted the land to the monks, that he has given and confirmed it, and has embodied it in a charter; finally there is a warrandice clause. The single use of *dare* establishes Gervase as the donor, and the warrandice clause makes explicit his status, and that of his heirs, as warrantors of this donation of land against claimants. The use of *dare* is therefore explicable and consistent.

⁷⁴Hudson, 'Legal aspects', 124, n. 28.

21. *National Archives of Scotland, MS GD 55/44. Original.*⁷⁵

1202 × 1207 Florencius Dei gracia Glasguensis electus uniuersis sancte matris ecclesie filiis tam posteris quam presentibus, salutem in Christo. Sciatis nos **dedisse** et **concessisse** et hac carta nostra **confirmasse** Deo et ecclesie sancte Marie de Melros et monachis ibidem Deo seruientibus in liberam et perpetuam elemosinam illud tophum in burgo de Glasgu, quod Ranulfus de Hadintune edificauit in prima edificacione burgi ad opus domus de Melros, ita plenarie sicut illud edificauit et tenuit, prout etiam prefatum tophum predictis monachis **datum** carta predecessoris nostri pie memorie, Jocelini, episcopi Glasguensis testatur ('Florence by the grace of God elect of Glasgow, to all sons of Holy Mother Church, those to come as well as those present, greeting in Christ. Know that we have **given** and **granted**, and **made firm** by this our charter, to God and to the church of Saint Mary at Melrose and to the monks serving God there, in free and perpetual alms the toft in the burgh of Glasgow that Ranulf of Haddington built at the original construction of the burgh, for the use of the house of Melrose, so fully as it was built and held, just as the charter of our predecessor of blessed memory, Jocelin bishop of Glasgow, bears witness that the aforesaid toft was **given** to the aforesaid monks. Wherefore we wish that the abovementioned monks of Melrose should hold and possess the aforesaid toft so freely and quietly as they more freely and more quietly hold and possess any alms').

22. *National Archives of Scotland, MS GD 55/45. Original.*⁷⁶

1208 × 1218 Walterus Dei gracia episcopus Glasguensis uniuersis sancte matris ecclesie filiis tam posteris quam presentibus salutem in Christo. Sciatis nos **dedisse** et **concessisse** et hac carta nostra **confirmasse** Deo et ecclesie sancte Marie de Melross et monachis ibidem Deo seruientibus in liberam et perpetuam elemosinam illud tophum in burgo de Glasgu, quod Ranulfus de Hadintune edificauit in prima edificacione burgi ad opus domus de Melross, ita plenarie sicut illud edificauit et tenuit, prout etiam prefatum tophum predictis monachis **datum** carta predecessoris nostri pie memorie, Jocelini, episcopi Glasguensis testatur ('Walter by the grace of God bishop of Glasgow to all sons of Holy Mother Church, those to come as well as those present, greeting in Christ. Know that we have **given** and **granted**, and **made firm** by this our charter, to God and to the

⁷⁵*Liber S. Marie de Melros*, i. 37 (no. 44).

⁷⁶*Liber S. Marie de Melros*, i. 37–8 (no. 45).

church of Saint Mary at Melrose and to the monks serving God there, in free and perpetual alms the toft in the burgh of Glasgow that Ranulf of Haddington built at the original construction of the burgh for the use of the house of Melrose, so fully as it was built and held, just as the charter of our predecessor of blessed memory, Jocelin bishop of Glasgow, bears witness that the aforesaid toft was **given** to the aforesaid monks’).

In both the foregoing charters Florence, bishop-elect of Glasgow, and Walter, bishop of Glasgow, have given, granted and made firm by means of their charter the same toft that was given to Melrose Abbey by their predecessor Bishop Jocelin. In this way they not only allow and recognise the continued tenure and possession of this toft by Melrose Abbey, but they also identify themselves as the donors and thereby warrant the monks’ tenure and possession.

23. *BL, MS Stowe 926, fol. 72v (Cartulary of Brinkburn Priory).*

‘William de Warenne earl of Northumberland confirms to Brinkburn Priory the grant made by his father Earl Henry of one saltpan at Warkworth, and also the grant made by Roger Bertram of the place called Brinkburn with its appurtenances.’⁷⁷

1153 Willelmus de Gwarenne comes Northumbr’ Iusticie sue, et baronibus, uiccomitibus et ministris et omnibus probis hominibus tam laicis quam clericis totius Northumberland salutem. Sciatis me **dedisse** et **concessisse** Deo et Sancte Marie et ecclesie Sancti Petri de B[rinkeburne] et canonicis ibidem Deo seruientibus et seruituris, pro anima Henrici comitis dilectissimi patris mei necnon eciam et pro anima mea et animabus antecessorum meorum eandem salinam quam pater meus Henricus comes apud Werkewurth’ in tempore uite sue eis in elemosinam **dedit** et **concessit**. **Concedo** eciam et **confirmo** predictis fratribus totam **donacionem** Rogeri Bertram, scilicet locum qui dicitur Brinkeburne cum omnibus pertinentiis suis. (‘William de Warenne, earl of Northumberland, to his justice, and to the barons, sheriffs and officials, and to all worthy men, laymen as well as clergy, of the whole of Northumberland, greeting. Know that I have **given** and **granted** to God and to Saint Mary and to the church of Saint Peter at Brinkburn and to the canons serving God there now and in the future, for the soul of my beloved father Earl Henry, as well as for my own soul and the souls of my ancestors, the same saltpan

⁷⁷Barrow, *Acts of William I*, 123–4 (no. 2).

at Warkworth that my father, Earl Henry, when he was alive, **gave** and **granted** to them in alms. I also **grant** and **confirm** to the aforesaid brothers the whole **donation** of Roger Bertram, to wit, the place called Brinkburn with all its pertinents’).

William (the future king), as earl of Northumberland, has given and granted a saltpan his father had given in the past. By giving this saltpan as well as granting it, he becomes the donor and becomes liable to warrant the property to the canons of Brinkburn. He goes on to grant and confirm the donation of Brinkburn itself, made by Roger Bertram; he does not give in this instance, he rather grants and makes firm, conceding the canons’ possession of this property, implicitly acknowledging that he, as Roger’s lord, has no claim on the property himself. At the same time it is Roger Bertram, as donor, upon whom the responsibility for warranting his donation falls.

24. *Cartulary of Newbattle Abbey.*

William I ‘Confirms to Newbattle the grant made by his mother the Countess Ada of Bearford’.⁷⁸

1165 × 1174 Sciant presentes et futuri me **concessisse** et hac mea carta **confirmasse** in liberam et quietam et perpetuam elemosinam Deo et ecclesie sancte Marie de Neubotle et monachis ibidem Deo seruiantibus **donaciones** quas Ada comitissa mater mea fecit eis de Bereford [. . .] **Mater autem mea et heredes sui contra omnes calumpniantes predictis monachis terras illas debent warrantizare, sicut carta ipsius matris mee testatur et confirmat** (‘Those present and to come should know that I have **granted**, and **made firm** by this my charter, in free and quiet and perpetual alms to God and to the church of Saint Mary at Newbattle and to the monks serving God there, the **donations** that my mother Countess Ada made to them in respect of Bearford . . . **And my mother and her heirs should warrant to the aforesaid monks those lands against all claimants just as the charter of my mother herself bears witness and confirms**’).

King William licenses in the usual fashion the donations made by his mother, but then requires her and her heirs, as donor, to

⁷⁸Barrow, *Acts of William I*, 185–6 (no. 91).

warrant those donations. (Ada is still alive, hence the slightly vague reference to her heirs, when perhaps we might have expected William to refer to himself, being her heir.) And so again we see the obligations of warrandice tied to the donor.

In the foregoing examples, the charters where an explicit clause of warrandice is present help to inform those in which warrandice is implicit. The most obvious explanation for what others have considered to be an apparently discretionary use of *dare* in charters of confirmation, renewal, or succession, or the failure to use *dare* in apparently original gifts, is that the verb *dare* identifies the subject as the donor. As donor, the one giving opens himself to the obligations of warrandice attached to lordship.

In extant royal charters that contain a warrandice clause, which in the published editions relating to our period amounts to eleven, the king identifies himself as donor, with the use of *dare*, in all but two cases. We have already dealt with King William's confirmation of Countess Ada's gift of Bearford (no. 24, above); the other example is King William's grant of the *uilla* of Traverlen to Kelso Abbey, which uses *concedere* without *dare*.⁷⁹ This, in Bailey's analysis, would not appear to be a problem in the case of express warrandice.⁸⁰ We need to ask, however, why these warrandice clauses should have appeared at all in royal charters, if the use of *dare* were sufficient to provide a guarantee.

WARRANTICE IN THE CHARTERS OF DAVID I, MALCOLM IV, AND WILLIAM I

In each case of explicit warrandice, the nature of the gift or the tenure is slightly more complicated than a straightforward gift.

A. King David's gift to Walter of Ryedale of the Whittons, half of Chatto, Lilliesleaf, and the sheilings of west Riccalton (Roxburghshire) is the earliest known example of a warrandice clause in Scotland, and one of the earliest in Britain too, the gift

⁷⁹Cartulary of Kelso Abbey; Barrow, *Acts of William I*, 174 (no. 74); 1165 × 1174.

⁸⁰'Warranties of land [part I]', 276.

being dateable to 1145 × 1153.⁸¹ Whereas the warrantice clause may look suspicious at this stage in Scotland, it is nevertheless comparable to clauses found in England.⁸² Our concerns may also be relieved by noticing that one of the earliest examples of a clause of warranty in England is to be found in a charter made in the court of Earl Warenne (1159/1164), one of King David's kinsmen.⁸³ The perceived insecurity of this gift, and Walter's need for explicit warrantice in the king's charter, is emphasised by the later history of the property; for the Ryedales were in dispute with a certain priest called Uhtred over Lilliesleaf, and they had taken their case to the highest court, namely that of the Pope.⁸⁴

B. Malcolm IV has given to St Frideswide's Priory, Oxford, the manor of Piddington (Oxon.), for the maintenance of five canons in perpetuity, saving the life-tenure of Joan, sister of Thomas Bassett. The king and his heirs will warrant the gift against all men for ever.⁸⁵

The gift is of property in England and to an English beneficiary; secondly, the gift is complicated by the life-tenure of the property by Joan; thirdly, we notice that the gift is to a religious house.

C. William I grants to Kelso Abbey the *villa* of Traverlen together with the land that belonged to Dodin in Berwick; and he gives warrantice against all men.⁸⁶

The *villa* of Traverlen was given by Earl Henry together with his father, King David, to Kelso Abbey in exchange for an annual

⁸¹Barrow, *David I*, 141 (no. 177).

⁸²Barrow (*David I*, 141) compares it with a warranty clause from a mid-twelfth-century English charter, given in Thomas Madox, *Formulare Anglicanum* (London, 1702), 182.

⁸³*Early Yorkshire Charters*, ed. W. Farrer and C. T. Clay (Edinburgh 1914–16), viii. 111.

⁸⁴For the documents in the case, see R. Somerville, *Scotia Pontificia: papal letters to Scotland before the pontificate of Innocent III* (Oxford, 1982), nos. 36, 58, 79; see also Barrow, *David I*, 109–10 (no. 118).

⁸⁵Cartulary of St Frideswide's (*saec.* xv); Barrow, *Acts of Malcolm IV*, 250 (no. 225); 1157 × 1165.

⁸⁶Cartulary of Kelso Abbey; Barrow, *Acts of William I*, 174 (no. 74); 1165 × 1174.

revenue of ten pounds formerly received from the manor of Hardingstone (near Northampton): this alone suggests that there had been an issue of warrandice involved in the first place.⁸⁷ The ten librates must represent the estate there which formed an early part of the endowments of the Tironensian monks before they had moved from Selkirk to Kelso.⁸⁸ The loss of the honour of Huntingdon, of which Hardingstone formed a part, in 1141, seems likely to have prompted this gift by way of exchange, and demonstrates the principle of warrandice in action.

Secondly, the gift is again to a religious house. Thirdly, both Traverlen (Duddingston, Midlothian) and the land of Dodin in Berwick had originally belonged to someone else. The interesting feature of this *actum* is that the king does not identify himself as the donor of the lands for which he is providing warrandice. Neither Earl Henry, Malcolm IV nor King William himself act as donor in respect of this property; rather, they grant King David's gift. Is there an issue over the nature of the tenure of the property and the abbey's relationship with the king in this regard? Could it be that the *actum* is defining terms of tenure rather than possession of the land, and that the commitment to warrandice relates to the terms of tenure? It is also interesting that no reference is made to the original gift, which was made by King David and Early Henry. The original gift makes no mention of tenure in alms; rather it is to be held as an honour. William's charter, however, grants tenure in free and perpetual alms, and to be held of him and his heirs.

The land of Traverlen in the earlier part of the twelfth century had belonged to Uviet the White, a prominent Lothian landowner and noble. The founding endowment of Holyrood Abbey had first of all led to a dispute between Holyrood and Uviet, who had nevertheless made a gift of some of the land to Holyrood. After Uviet's death, the gift of his estate to Kelso Abbey led to a further dispute between Holyrood and Kelso, referred to in the general confirmation to Kelso.⁸⁹

⁸⁷See note to Barrow, *David I*, no. 70 (p. 86).

⁸⁸Barrow, *David I*, 58–9 (no. 14).

⁸⁹Barrow, *Acts of Malcolm IV*, 193 (no. 131).

D. William I has granted and given to Melrose Abbey the land which they have of Patrick of Ryedale in the territory of Whitton, by the same boundaries that are set out in the the charter of Patrick of Ryedale which they have from him in respect of the same land; for King William has given them and confirmed that land free from all aids, pleas, gelds, and from all service and custom and secular exaction, so that he and his heirs shall maintain and warrant it to them against all men for ever, saving his service from Patrick and his heirs.⁹⁰

The king provides warrantice for the same reasons that he provided warrantice to Patrick on the same land (see above).

E. William I has given and granted to Holyrood Abbey, in exchange for the alms that the canons of Holyrood lost through the agency of the (English) garrison in (Edinburgh) castle, four marks from the king's mill of Cramond, 33 s. from the mill of Liberton, 20 s. from the ferme of Merchiston, 8 s. from the land of the furbisher, and 5 s. 8 d. from the ferme of Clerenbaud (Clermiston); to be held in free and quiet alms until the king is able to warrant the alms which the abbey has lost or shall assign it an income of 9 marks elsewhere.⁹¹

This is not a warrantice clause as such, but it demonstrates warrantice in action. The canons of Holyrood have been dispossessed of certain alms by the English garrison in Edinburgh Castle; the king's warrantice has been invoked; the king gives the canons income from his mills until he is able to recover the original alms for them, or until he finds an equivalent income elsewhere.

F. William I has given to Melrose Abbey the land that they hold in the territory of Clifton (in Morebattle, Roxburghshire) by the same bounds that are contained in the charter of Walter of Windsor, which they have from him regarding the same land, so that they

⁹⁰Original (1175 × 1185); Edinburgh, NAS, MS GD 55/170; Barrow, *Acts of William I*, 249 (no. 195).

⁹¹Original (1178 × 1186); Edinburgh, NAS, MS GD 45/13/237; Barrow, *Acts of William I*, 253 (no. 199).

should have and possess whatever was within those same bounds in perpetuity; and the king has also given and confirmed it to them (*dedi enim eis et confirmavi eam*) free from all aids, pleas, gelds, scutages, conrages, and from all service and custom and secular exaction, so that the king and his heirs shall maintain and warrant it to them against all men in perpetuity, saving his service from Walter and his heirs.⁹²

We have already encountered this charter, and noted that the land had been in dispute.⁹³ Note that this is a gift to a religious house. Warrandice has to be made explicit (i) because the land has already been in dispute; (ii) the nature of gift is complicated, as it has already been given by someone else, and in order to clarify, the king explicitly states that he will be responsible for warrandice in respect of the property in question.

G. William I has given to Melrose Abbey the part of Blainslie formerly given by King David to his foresters and subsequently granted by King William to William son of *Oein*. The king will give warrandice against all men.⁹⁴

Again, this is a gift to a religious house. The history of the tenure of this property is complicated, and we may suppose that for this reason, the king has made the explicit commitment to give warrandice.

H. William I has given and granted to Roger de Mortemer the land that belonged to William Maule, namely Fowlis, together with Cristina, William's daughter; the land is to be held in feu and heritage; if Cristina should die, the king will warrant the land to Roger as that which he has given him in return for his service; should Roger die, the land will remain to Cristina without conditions.⁹⁵

⁹²Original (1173 × 1185); Edinburgh, NAS, MS GD 55/117; Barrow, *Acts of William I*, 262–3 (no. 214).

⁹³Above, no. 19, pp.146–7.

⁹⁴Original (1180 × 1193, probably 1185); London, BL, MS Cotton Charters XVIII. 15; Barrow, *Acts of William I*, 296–7 (no. 265).

⁹⁵Original (1189 × 1195); Edinburgh, NAS, MS GD 90/9; Barrow, *Acts of William*

Again the gift is complicated: the land has been owned by the father of the beneficiary's new wife, who also comes as part of the gift. The land comes attached to Cristina, but if she should die, it is to be held by Roger, and warranted to him, because the king has given it to him in return for his service; if Roger should die, however, then the land is to remain quit to Cristina.

In cases where the charters could have been drawn up by the beneficiary, that is in charters for monastic beneficiaries, the inclusion of a warrantice clause may have been on the initiative of the monastic draftsmen concerned over the security of the property. What is more, Paul Hyams has perceived that the sensible vassal took nothing for granted, but adopted what safeguards he could. 'Increasingly this meant an express commitment in writing, especially in cases where there had already been some dispute.'⁹⁶ In all the foregoing cases, we can see that the tenorial history of the land in question was complicated.

DAVID I DEALS WITH A CONTROVERSIAL TRANSACTION: GIVING AND GRANTING IN THE DISPUTE OVER EDROM AND NISBET

With such an understanding of the language of giving and granting in mind, we are perhaps able to view some aspects of our charter sources in sharper focus. The study of charters relating to a dispute over the lands of Edrom and Nisbet during the reign of King David shows how a more exact interpretation of dispositive clauses enables us to infer a sequence of events which is not explicitly recorded.

On 16 August 1139 King David made a gift in perpetual alms to Coldingham priory, a dependant house of Durham cathedral priory, of Edrom in Berwickshire with Nisbet in Edrom, 'as Gospatric brother of Dolfin held them on the day that he was alive and dead'. Gospatric was the youngest son of the earl of Northumbria of the

I, 341–2 (no. 338). Another version of this gift, in which Cristina and her father are not mentioned, appears in NAS, MS GD 198/1; Barrow, *Acts of William I*, 370 (no. 375).

⁹⁶Hyams, 'Warranty', 457.

same name (d. 1073 × 1075) who was given lands in Lothian by King Malcolm III. Gospatric, the first earl of Lothian (later to become the earldom of Dunbar) was usually known as the brother of Dolfin, and his son, also named Gospatric (d. 1166), who succeeded him in the earldom, is usually known as Gospatric of Dunbar. Gospatric brother of Dolfin is thought to have died at the battle of the Standard fought at Cowton Moor north of Northallerton, County Durham, on 22 August 1138.

The gift of Edrom and Nisbet made by Gospatric brother of Dolfin gave rise, as Geoffrey Barrow observed, to more documentation than any other Scottish benefaction to Durham in the reign of David I. King David's charter survives in the Durham cathedral archive and runs as follows.

25. *Durham Cathedral Muniments, Misc. Ch. 571. Original.*⁹⁷

16 Aug. 1139 Dauid dei gratia rex scot<torum> omnibus sancte ecclesie fidelibus presentibus et futuris salutem. Sciatis me **dedisse** et **concessisse** ecclesie sancte Marie, et sancti Cuthberti de Coldingham, et conuentui ibidem deseruienti, Ederham, et Nesebitam, in perpetuam elemosinam sicut Cospatricus frater Dalfini eas tenuit die qua fuit uiuus et mortuus cum suis rectis diuisis, ita liberas et quietas sicut alias terras tenent que ad Coldingham pertinent, in ecclesiis et aquis et pratis ('David by the grace of God king of Scots to all the faithful of Holy Church present and to come greeting. Know that I have **given** and **granted** to the church of Saint Mary and Saint Cuthbert at Coldingham, and to the religious community ministering there, Edrom and Nisbet in perpetual alms, just as Gospatric brother of Dolfin held them on the day that he was alive and dead, with their right bounds, so free and quiet as they hold the other lands that pertain to Coldingham, in churches and waters and meadows').

A further charter bearing the same date is almost a duplicate, but there are some subtle and important differences: after the first *sicut* clause the second charters adds,⁹⁸

sicut carta eorum testatur, in ecclesiis, et aquis, et pratis, et pascuis, et molendinis, et omnibus aliis locis ('as their charter bears witness, in

⁹⁷Barrow, *David I*, 85 (no. 68).

⁹⁸Durham Cathedral Muniments, Misc. Ch. 572; Barrow, *David I*, 86 (no. 69).

churches, and waters, and meadows, and pastures, and mills, and all other places’).

The second charter therefore makes reference to what we may take to be Gospatric’s charter, and in the specification of what is to be free and quiet, adds ‘pastures, mills, and all other places’.

A charter of Gospatric making the gift of Edrom and Nisbet also survives in the Durham cathedral archive.

26. *Durham Cathedral Muniments, Misc. Ch. 778. Original.*⁹⁹

Before 1138 Omnibus sancte ecclesie dei filiis sublimioribus et inferioribus ordinatis et laicis, Gospatricus comes frater Dolfini salutem. Sciatis me **concessisse** et **dedisse** Deo et sancto Cuthberto, et monachis eius in elemosinam, uillam de Ederham et ecclesiam eiusdem uille cum omnibus capellis suis, et aliam uillam que dicitur Nesebite, liberas et quietas in perpetuum possidendas, cum omnibus que ad easdem uillas pertinent, in terris et aquis, et pratis, et pascuis, pro anima Malcolmi regis, et filiorum eius regum Ædgari, Alexandri, et pro rege Dauid et filio eius Henrico et pro me ipso, et uxore mea, et filiis meis et pro animabus omnium parentum meorum, Et si aliquis huic elemosine mee uult contradicere, inter eum et Deum sit (‘To all sons of the holy Church of God, eminent and lowly, ordained and lay, Gospatric the earl, brother of Dolfin, greeting. Know that I have **granted** and **given** in alms to God and to Saint Cuthbert and to his monks the *uilla* of Edrom and the church of the same *uilla* with all its chapels, and another *uilla* which is called Nisbet, to be possessed freely and quietly in perpetuity with everything that pertains to the same *uillae* in lands and waters and meadows and pastures, for the soul of King Malcolm and of his sons the kings Edgar and Alexander, and for King David and his son Henry, and for me myself and my wife and my sons, and for the souls of all my forebears; and if anyone should wish to object to this charitable gift, let it be between him and God’).

This, however, may not be the charter referred to in King David’s charter, for it does not specify mills.¹⁰⁰ A confirmation of Gospatric’s donation by Robert, bishop of St Andrews (d. 1159),

⁹⁹Lawrie, *Early Scottish Charters*, 90 (no. 117).

¹⁰⁰There is also serious suspicion over the authenticity of this document raised by its palaeography: I thank Dr Alice Taylor for her information on this matter.

on 25 October 1150, refers to the 'pastures and mills', as well as to the charters of the king and of Gospatric.¹⁰¹ The charter above does not mention mills, but does specify the chapels of Edrom, not mentioned in Bishop Robert's confirmation. Another confirmation by the same Bishop Robert, given on the same day, 25 October 1150, does speak of the chapels of Edrom.¹⁰² One may therefore guess that there were perhaps two charters laying out the terms of Gospatric's original gift.

Whatever the case, the gift of Edrom and Nisbet made by Gospatric brother of Dolfin was to give rise to a dispute. Soon after Gospatric's death in 1138 we learn that his son Gospatric of Dunbar had renewed his father's gift, because the king issued the following brieve.

27. *Durham Cathedral Muniments, Misc. Ch. 575. Original.*¹⁰³

<D. rex> Scot', G. Ridell', vicecomite de Rokesburg, salutem. <Tibi> precipio <ut> terra monacorum Dunelm' quam Gospatric de Dunbar dedit <patris> decessu ponatur in respectum donec in illam uenero prouinciam. <Nemo> de monacis nec de Gospatrico aliquam operat<ionem> nec seruitium [capiet sed] monac<i> teneant illam terram bene et in pace quiete <infra suum> termin<um>. Et non permittas quod aliquis eis iniuriam <faciat sed fac inde si>c<ut> meam dominiam faceres. t. Hugone de M<oruill> ('David, king of Scots, to Gervase Ridel, sheriff of Roxburgh, greeting. I instruct you that the land of the monks of Durham which Gospatric of Dunbar gave upon the death of his father be sequestrated until I shall have come into that district. No one should demand of the monks nor of Gospatric any work or service, but the monks should hold that land well and in peace, quietly within its bounds. And you should not permit anyone to cause them injury, but you should treat it just as you would treat my demesne').

Barrow placed this brieve in sequence after his nos 68 and 69 (see above); but the content suggests that it came before. The brieve

¹⁰¹Durham Cathedral Muniments, Misc. Ch. no. 5960; Raine, *North Durham*, App., no. 449; Lawrie, *Early Scottish Charters*, no. 213.

¹⁰²Durham Cathedral Muniments, Misc. Ch. 978 (now missing).

¹⁰³Barrow, *David I*, 89 (no. 75).

refers to ‘the land that Gospatric of Dunbar gave on the death of his father’, which seems to mean that Gospatric the son had renewed his father’s gift of Edrom and Nisbet; Gospatric of Dunbar is therefore identified as the donor. In David I’s charters of 16 August 1139, however, the king becomes the donor of Edrom and Nisbet and no reference is made to the gift given by Gospatric brother of Dolfín. The king’s brieve shows that whatever problem there is revolves around service, for it is to be demanded of neither the monks nor of Gospatric; until the king comes to the district to judge the matter, the sheriff is to suspend any action in relation to the land.

When the king did come to Roxburgh the case was pled and decided before him and Robert de Brus and others of the king’s barons. But despite King David’s judgment, the king’s son Henry in the following year had to command Earl Gospatric of Dunbar to allow the charitable gift of the latter’s father, viz. the gift of Edrom and Nisbet, to be free and quit and in peace, and to restore the monks’ oxen at once. Gospatric, we may presume, had been pointing or distraining the monks’ cattle, for the question of service had evidently not been satisfactorily settled.¹⁰⁴

28. *Durham Cathedral Muniments, Misc. Ch. 753. Original.*¹⁰⁵

1139 or 1140 H. filius regis Scot’, Gospatrico comiti, salutem. Mando tibi et firmiter precipio quatinus permittas terram de elemosina patris tui, uidelicet de Hederham, et Nesebita, ita esse liberam et quietam, et in bene et in pace, sicuti in anno preterito coram patre meo et Roberto de Brus, et aliis suis baronibus proloqutum et finitum fuit, donec rex pater meus reueniat, et reddere facias boues eorum cito per plegios. r’. Roberto de Vnfranuill’, et Ada uicecomite (‘Henry, son of the king of Scots, to Gospatric the earl, greeting. I command and firmly instruct you to allow the land of your father’s charitable gift, namely Edrom and Nisbet, to be free and quiet, both properly and peacefully, just as in the year gone by it was pled and concluded before my father and Robert de Brus and his other barons, until the king my father should return; and you are to give

¹⁰⁴Gifts in perpetual alms still attracted service: see Alice Taylor, ‘Common Burdens’, above.

¹⁰⁵Barrow, *David I*, 90 (no. 78).

back their oxen at once by pledges. With the witnesses Robert d'Umfraville and Adam the sheriff).

One suspects that it was either about this time or immediately after the judgment that the king made the gift that appears in no. 25 (above) and its associated charter. The king himself became the donor of Edrom and Nisbet, and thereby guaranteed the lands to Coldingham. The monks were to hold the lands on the same terms that Gospatric brother of Dolfin had held them on the day he died. We may infer that they were therefore responsible for performing whatever service was required from the land.

In 1141 Earl Henry (King David's son) gave Edrom and Nisbet to Coldingham priory in the same terms as his father had done in 1139. In other words, he became the donor.

29. *Durham Cathedral Muniments, Misc. Ch. 757. Original.*¹⁰⁶

1141 Henricus dei gratia comes filius Dauid regis scottorum Omnibus Sancte Ecclesie fidelibus presentibus et futuris salutem. Sciatis me **dedisse** et **concessisse**, Ecclesie Sancte Marie et Sancti Cuthberti de Coldingham et Monachis ibidem deseruiantibus Ederham, et Nesebitam, in perpetuam elemosinam, sicut Cospatricus frater Dolfini eas tenuit die qua fuit uiuus et mortuus cum suis rectis diuisis, ita liberas et quietas sicut alias terras tenent que ad Coldingham pertinent, in ecclesiis et aquis et pratis. ('Henry, earl by the grace of God, son of David king of Scots, to all the faithful of Holy Church present and future, greeting. Know that I have **given** and **granted** to the church of Saint Mary and Saint Cuthbert at Coldingham and to the monks ministering there Edrom and Nisbet in perpetual alms, just as Gospatric brother of Dolfin held them on the day that he was alive and dead, with their right bounds, as free and quiet as they hold other lands that pertain to Coldingham, in churches and waters and meadows').

This charter of donation is based on no. 25 (above).

Finally, six years later, on 3 May 1147, King David confirmed the gift that Gospatric brother of Dolfin gave to Coldingham priory.

¹⁰⁶Barrow, *David I*, 103 (no. 102).

30. *Durham Cathedral Muniments, Misc. Ch. 573. Original.*¹⁰⁷

3 May 1147 D. dei gratia rex scottorum, omnibus sancte ecclesie fidelibus presentibus et futuris, salutem. Sciatis me **concessisse** ecclesie sancte Marie, et sancti Cuthberti de Coldingham, et monachis ibidem deo servientibus donum quod Gospatricus frater Dolfini **dedit** praedictae ecclesiae et monachis, scilicet Ederham, et Nesbitam in perpetuam elemosinam, cum ecclesiis, et aquis, et pratis, et pascuis, et molendinis, et omnibus aliis locis, et cum eisdem rectis divisis, quibus eas tenuit die quo fuit uiuus et mortuus, liberas et quietas, ab omni seruitio, et omni consuetudine, exceptis triginta solidis, quos praefati monachi dabunt filio eius Gospatrico, et heredibus suis post eum pro conredio Regis, unoquoque anno ad festum sancti Martini, et excepto exercitu regis, unde monachi erunt attendentes ipsi regi, et ipse Gospatricus de exercitu erit quiete in perpetuum ('David, by the grace of God king of Scots, to all the faithful of Holy Church present and to come greeting. Know that I have **granted** to the church of Saint Mary and Saint Cuthbert at Coldingham and the monks serving God there the gift that Gospatric brother of Dolfin **gave** in perpetual alms to the aforesaid church and monks, to wit, Edrom and Nisbet with churches and waters and meadows and pastures and mills and all other places, and with the same right bounds by which he held them on the day that he was alive and dead, free and quit from all service and every custom except thirty shillings that the aforesaid monks shall give to his son Gospatric and his heirs after him in return for the king's corrody every year at the feast of Saint Martin, and except the king's army service, whereupon the monks shall be responsible to the king directly, and Gospatric himself shall be quit of army service for ever').

This confirms the gift described in Barrow, *David I*, no. 69, but makes it explicit that the monks are to be responsible for the king's corrody and army service due from these lands. This matter of payments due to the earl in return for the king's corrody and the obligations in relation to army service appear to have been the root of the problem. This charter lays out the terms clearly. Now that the matter has apparently been settled to the satisfaction of all parties the gift of Edrom and Nisbet originally made by Gospatric brother of Dolfin is reinstated and confirmed by the king, who relinquishes his role as donor.

¹⁰⁷Barrow, *David I*, 129 (no. 158).

At length, and most likely in 1147, Earl Henry confirms the same gift of Gospatric brother of Dolfin, ‘just as the charters of my father bear witness and confirm’.¹⁰⁸

The documentation relating to this donation provides a record of the change in dispositive language in the course of a dispute. A gift is made by the earl of Dunbar; the terms of that gift are then disputed by the heir; the king and his barons hear the case and make a judgment; the king then makes the same gift himself, thereby becoming the donor and guaranteeing the donation; the king’s heir, Earl Henry, soon afterwards provides his own charter of donation in the same terms as his father’s, taking upon himself the obligations of a donor; the heir of the original donor continues to challenge the terms of tenure and engages in pointing (seizing the landholder’s cattle and goods). In the end an agreement is reached and the terms of the original gift are clarified; the king then relinquishes his role as donor of the land in question and finally confirms the original gift, reinstating Gospatric brother of Dolfin as donor; Earl Henry then provides his own confirmation of the original donation in terms of his father’s confirmation.

Whereas previous commentators have regarded King David’s two charters of 1139 as confirmations of Earl Gospatric’s original donation, I should argue, on the other hand, that they are no such thing.¹⁰⁹ We have seen, rather, that it took the king eight years before he was prepared to ‘grant’ or confirm Earl Gospatric’s original donation of Edrom and Nisbet to Coldingham priory. In the meantime the king took upon himself the role of donor, and in doing so became responsible for guaranteeing the monks of Coldingham in their property.

CONCLUSION

The argument implicit in this study has been that we should pay attention to the terminology used in charters, and interpret it in the light of what we are able to deduce about legal practice. Rather than

¹⁰⁸Durham Cathedral Muniments, Misc. Ch. 752; Barrow, *David I*, 130 (no. 160).

¹⁰⁹Barrow, *David I*, 85–6 (nos 68 and 69); for Gospatric’s original donation, see Lawrie, *Early Scottish Charters*, 355.

asking how a lord might have been demonstrating his authority through the dispositive verbs of his charters, we might ask instead what the use of such verbs tells us about their subject. When one gives (*dare*) or bestows (*donare*), one is identifying oneself as the donor of a gift or donation (*donum* or *donatio*); this is not the rhetoric of power but exact legal terminology stated for the benefit of the donee; it is the donee's right in relation to the donor which is being expressed, not vice-versa. Elsewhere in this volume Richard Sharpe has stressed that the evidence being discussed comes from legal documents, drafted by experienced draftsmen on the basis of conventions widely understood by those who practised this craft, and that there should be a fundamental expectation that an adaptable expression has a meaning in the documentary context.¹¹⁰ In other words, we should not expect charters to be the natural media of political rhetoric, especially not those parts of the text which dealt with the legal core of the matter in hand. Charters are, rather, legal documents whose language has a precise meaning in order to serve the purpose for which they were drawn up. One therefore hopes that the more readily historians cultivate the sources in this manner, the more willingly they will yield fruit.

¹¹⁰Above, pp. 103–4.