

## The presence of witnesses and the writing of charters

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The witness lists (or testing clause) of charters has been an essential resource for generations of medieval historians. They have been used not only to garner information about individuals, and about the households and followings of those whose charter is being witnessed, but also to investigate social and political networks and explore aspects of gender and ethnicity.<sup>1</sup> There has been increasing sophistication in the way this evidence has been deployed. Witness lists are no longer regarded as providing a simple picture of who mixed with whom and how often.<sup>2</sup> It is recognised that the choice of witnesses depended on whose act it was, what the act was about, what form it took and who drafted it.<sup>3</sup> There is also an increasing awareness that a weather-eye must be kept on potential distortions in the available evidence, such as

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<sup>1</sup>For example, in private deeds, David Crouch, *The Birth of Nobility. Constructing Aristocracy in England and France 900–1300* (London, 2005), 291; Susan M. Johns, *Noblenomen, Aristocracy and Power in the Twelfth-Century Anglo-Norman Realm* (Manchester, 2003), ch. 5. In episcopal *acta*, Norman F. Shead, 'Compassed about with so great a cloud: the witnesses of Scottish episcopal *acta* before ca 1250', *Scottish Historical Review* [SHR] 86 (2007), 159–75. And generally, Matthew H. Hammond, 'A Prosopographical Analysis of Society in East Central Scotland with special reference to ethnicity, c. 1100–c. 1260', unpublished Ph.D. dissertation (University of Glasgow, 2005).

<sup>2</sup>Particularly pertinent here are the observations made in Nicholas Vincent, 'The court of Henry II', in *Henry II. New Interpretations*, ed. Christopher Harper-Bill and Nicholas Vincent (Woodbridge, 2007), 278–334, at pp. 284–7.

<sup>3</sup>David Bates, 'The prosopographical study of Anglo-Norman charters', in *Family Trees and the Roots of Politics. The Prosopography of Britain and France from the Tenth to the Twelfth Century*, ed. K. S. B. Keats-Rohan (Woodbridge, 1997), 89–102. David Postles, 'Choosing witnesses in twelfth century England', *The Irish Jurist*, new series 23 (1988), 330–46. See also Emily Zack Tabuteau, *Transfers of Property in Eleventh-Century Norman Law* (Chapel Hill, 1988), 146–57. For a later period, Theron Westervelt, 'Royal charter witness lists and the politics of the reign of Edward IV', *Historical Research* 81 (2008), 211–23, at pp. 214–15.

the patchy survival of archives and the proclivities of cartularists in deciding which documents to include and whether to render testing clauses fully, partially, or not at all.

Despite these recent advances, a vital question remains unresolved. Were those named as witnesses present when the charter was made and/or the transaction concluded? It is readily acknowledged that in certain contexts witness lists might have been merged or transferred from one charter to another.<sup>4</sup> In general, however, it is assumed that, as far as charters in Anglo-Norman Britain are concerned, those listed as witnesses were physically together when their names were recorded.<sup>5</sup> And yet hardly a decade has passed in the last century without some expression of doubt about this.<sup>6</sup> In this study the focus will be on

<sup>4</sup>Monastic foundation-charters are fertile territory: for example, Keith 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 p. 94. On this type of charter in general, see V. H. Galbraith, 'Monastic foundation charters of the eleventh and twelfth centuries', *Cambridge Historical Journal* 4.3 (1934), 205–22 (at pp. 214–22) and 296–8.

<sup>5</sup>This does not include documents subscribed with *signa*—increasingly rare in Anglo-Norman Britain after the eleventh century—rather than listing the names of witnesses. For the problems they pose, particularly in considering the acts of William the Conqueror, see Bates, 'The prosopographical study of Anglo-Norman charters', 91–5.

<sup>6</sup>George F. Warner and Henry J. Ellis, *Facsimiles of Royal & Other Charters in the British Museum*, vol. i, *William I–Richard I* (London, 1903), no. 69 (comment); for Stenton in 1922, see n. 9; L. F. Salzman, 'Medieval witnesses', *Sussex Notes and Queries* 5 (1934–5), 120 ('charters were very likely sent round after their execution to collect additional 'witnesses' . . . More evidence on this point is very desirable'); George L. Haskins, 'Charter witness lists in the reign of King John', *Speculum* 13 (1938), 319–25; for Flower in 1944 and Stones in 1953, see n. 10; Dom Adrian Morey and C. N. L. Brooke, *Gilbert Foliot and his Letters* (Cambridge, 1965), 201 n. 4 ('. . . one can never be entirely sure that witnesses to charters of this period were all present together on one occasion.');

*Fitznells Cartulary. A Calendar of Bodleian Library MS. Rawlinson B 430*, ed. C. A. F. Meekings and Philip Shearman, Surrey Record Society vol. 26 (Guildford, 1968), cxlvii; Dom David Knowles, C. N. L. Brooke and Vera C. M. London, *The Heads of Religious Houses. England and Wales 940–1216* (Cambridge, 1972), 10 ('We have almost no information on how witness lists were compiled: thirteenth-century evidence shows that witnesses did not necessarily have to be present at any stage in the transaction'); Stringer, 'The charters of David, earl of Huntingdon and lord of Garioch' (published in 1985), 93 ('it was not yet a legal requirement [in the early thirteenth century] for a witness to be physically present'); Paul R. Hyams, 'The charter as a source for the early common law', *Journal of Legal History* 12 (1991), 173–89, 188–9 (n. 49) ('appearance on a witness list was no guarantee of presence at the grant'); and Alice Taylor, 'Robert de Londres, illegitimate son of William, king of Scots, c. 1170–1225', *Haskins Society Journal* 19 (2007), 99–119, at

private deeds, where the most fertile ground for uncertainty has been identified. In the case of royal acts, by contrast, no-one has offered a serious challenge to Maitland's observation that the actual presence of those named on each occasion is the only way to account for 'the rapid variations in the lists of witnesses'.<sup>7</sup> Variation in witness lists has also been compellingly invoked in other contexts where a critical mass of charters is available.<sup>8</sup> This confidence in the presence of witnesses has not carried over so readily into the study of private deeds. Indeed, record scholars have been firm in voicing objections. Stenton urged that 'it is . . . unwise to assume that the witnesses to a charter of the late twelfth or thirteenth century were all present in the same place at the

p. 106 ('the strength of evidence based on charter attestation is increasingly called into question: were those recorded as witnessing the act in fact present?').

<sup>7</sup>F. W. Maitland, 'History from the Charter Roll', *English Historical Review* 8 (1893), 726–8, at p. 727. Haskins, 'Charter witness lists', 321, n. 7, declared that he could not agree with Maitland, but without explaining why. A couple of instances have been pointed out in the charter rolls where witnesses are cited in two places on the same day, too distant to be accounted for by travel on horseback, or in places at a time when it is known from other evidence that they were somewhere else: H. C. Maxwell-Lyte, *Historical Notes on the Use of the Great Seal of England* (London, 1926), 235–6 (two charters of Edward III dated 1 July 1336, one at Berwick and the other at Perth; but the one dated at Perth lacks authorisation); see also C. T. Flower, *Introduction to the Curia Regis Rolls, 1199–1230 A. D.*, Selden Society vol. 62 (for 1943) (London, 1944), 281. An important factor in considering the dating of documents issued under the great seal is that, by the fourteenth century, the time-date and/or place-date could be that of the originating warrant. See Pierre Chaplais, *English Royal Documents, King John–Henry VI, 1199–1461* (Oxford, 1971), 18, where also a comment on contradictory dates in documents by the chief justice of the King's Bench in 1290 is cited: the chief justice explained that this could occur 'because in the chancery and elsewhere on one and the same day one clerk puts one date and another another' (T. F. Tout and Hilda Johnstone, *State Trials of the Reign of Edward The First, 1289–1293*, Royal Historical Society, Camden Third Series, vol. 9 (London, 1906), 35). Chaplais showed that, at least until 1230, the dating and witnessing of letters issued under the great seal were only irregular when the great seal was away from the king, when either the dating and witness(es) would be the date of the letter itself, or the dating and witness by the king would be copied from the originating warrant under the privy seal. The overall impression, then, is that dating and attestation assumed the presence of witnesses, but that this was complicated when more than one document was involved (i.e., the privy-seal warrant to produce a great-seal document). For a summary of recent discussion, particularly in relation to the thirteenth century, see M. Morris, *The Royal Charter Witness Lists of Henry III (1226–72) from the Charter Rolls in the Public Record Office*, 2 vols. (Kew, 2001), i. p. viii.

<sup>8</sup>Diana Greenway, 'Ecclesiastical chronology: *Fasti* 1066–1300', in *The Material, Sources and Methods of Ecclesiastical History*, ed. Derek Baker (Oxford, 1975), 53–60, at pp. 57–60.

same time unless there is some definite evidence to that effect—a condition which it is usually impossible to fulfil.<sup>9</sup> Flower and Stones went further and announced that, providing a witness was willing to testify in support of a deed, their presence when the charter was drawn up was ‘immaterial’.<sup>10</sup> For some historians today these may seem like distant voices from a bygone era of scholarship. The reasons given by Stenton, Flower and Stones for their views, however, have yet to be negated, a state of affairs that lies at the root of the anxiety about the presence of witnesses that continues to stalk the work of medievalists. In the first part of this study it will be argued that the evidence adduced against the presence of witnesses is less significant or compelling than has been claimed. The overwhelming likelihood is that witnesses were normally present together on the occasion when their names were recorded. The existence of exceptions to this in the late twelfth and early thirteenth centuries may be explained in relation to the changing role of charters in conveyances. In the remainder of this study palaeographical evidence will be brought to bear on the question of the presence of witnesses for the first time. This will lead to an examination of how the text of a charter took shape, and the stages when witnesses might be recorded, reinforcing the proposition that witnesses were normally present together at whichever point their names were first written down. Questions arise from this about the importance generations of scholars have attached to the distinction between transaction and charter. The study will conclude by providing some indications that charter witnesses were not simply present, but may in some cases have been actively involved in the recording of their names for posterity. If this was so, it suggests that charter witness lists may not yet have yielded all their treasures as a source for historians.

#### LETTERS TO ABSENT WITNESSES

The main reason why confidence in the presence of witnesses in private deeds has been undermined is that there are cases where a letter has

<sup>9</sup>F. M. Stenton, *Transcripts of Charters relating to the Gilbertine Houses of Sixde, Ormsby, Catley, Bullington and Alvingham*, Lincoln Record Society vol. 18 (Hornchurch, 1922), xxxi. See also his comments in F. M. Stenton, *Documents Illustrative of the Social and Economic History of the Danelaw from various collections* (London, 1920), ciii–civ.

<sup>10</sup>Flower, *Introduction to the Curia Regis Rolls*, 282; E. L. G. Stones, ‘Two points of diplomatic’, *Scottish Historical Review* 32 (1953), 47–51, at p. 47.

been written to individuals asking them to witness a transaction contained in a charter in which they already appeared in the witness list. J. C. Russell, in the fullest discussion to date of this phenomenon, published three examples (and two others where a charter is not explicitly mentioned).<sup>11</sup> (These, and other examples that have subsequently come to light, are listed in Appendix C.) Of the three referring to a pre-existing charter, one can be dated roughly to around 1190, and two to the first quarter of the thirteenth century. In all three instances the charter itself survives.<sup>12</sup> This is also true in the case of a letter to witnesses and accompanying charter datable to 1216 × 1222 that has been identified by Keith Stringer in the late-medieval cartulary of Melrose Abbey (Roxburghshire), the only extant example from a Scottish monastic archive.<sup>13</sup> A minor qualification to this pattern of surviving letter and charter is that in one of Russell's cases the letter refers to two charters bearing on the transaction; he was only able to discover one of them (although the other once existed).<sup>14</sup> This letter and one of its two charters is given below: it is the only extant charter

<sup>11</sup>J. C. Russell, 'Attestation of charters in the reign of King John', *Speculum* 15 (1940), 480–98, at pp. 492–4.

<sup>12</sup>These are (i) letter and corresponding charter given in full below, datable to 12 May 1202 × 1 February 1221; (ii) BL Harley Charter 83 A. 45 and Harley Charter 83 A. 51; Warner & Ellis, *Facsimiles of Royal & Other Charters in the British Museum*, i. nos. 69 and 68 (pl. xlv), relating to a gift of land to Sawtry Abbey by Peter de Capella, with the assent of his wife and his son and heir. Warner and Ellis suggested that the charter cannot be earlier than 1185, and probably belongs towards the end of Henry II's reign or early in Richard I's. This would, at least, be consistent with palaeographical indications (see Teresa Webber, 'L'écriture des documents en Angleterre au XII<sup>e</sup> siècle', *Bibliothèque de l'École des chartes* 165 (2007), 139–65, at pp. 159–60), such as the stylistic treatment of long **r**, the long **s** and **f** below the line with extension curling to the left, and the simplified **g**. There are no examples of the 'trailing' **s** in final position. (iii) Maidstone, Centre for Kentish Studies, U1475 T264/135 (letter) and U1475 T264/137 & U1475 T264/136 (duplicates of the charter); Royal Commission on Historical Manuscripts [hereafter HMC], *Report on the Manuscripts of the Right Honourable Viscount De L'Isle and Dudley preserved at Penhurst Place*, 6 vols. (London 1925–1966), i. 70 (no. 118) (letter) and 71 (nos. 117 and 436) (charter), datable to 1215 × 1227, relating to a donation of land by Maud de Meyners, a widow, to the abbey of Robertsbridge. See further, n. 22, below.

<sup>13</sup>BL MS Harley 3960 fols. 1r–2r (charter followed by letter); Stringer, 'The charters of David, earl of Huntingdon and lord of Garioch', 93–4. Both letter and charter were published in C. N. Innes, *Liber Sancte Marie de Melros*, 2 vols. (Edinburgh, 1837), i. 267–9 (nos. 306 and 305). They relate to a donation of land in the lordship of Wooler by Robert III Muschamp to Melrose Abbey.

<sup>14</sup>It is mentioned in confirmations: Russell, 'Attestation of charters', 492 n. 7.

associated with a letter to witnesses that has been neither published nor calendared.

**TNA E 42/497** (12 May 1202 × 1 February 1221)<sup>15</sup>

Karissimis dominis suis Domino Willelmo comiti Warennie, Domino Willelmo de Aubeneio comiti Sussexie, Domini Gileberto de Aquila, Willelmus de Auerenichis et Cecilia mater eiusdem, salutem. Quia ad cartas faciendas inter nos et abbatem et monachos de Ponte Roberti super manerio de Suttonia iuxta Sefordiam presentiam uestram habere non potuimus, precamur et obnixè rogamus ut de cartis nostris in quibus ob securitatem<sup>16</sup> obtinendam testes estis ascripti, testes esse uelitis. Valete.

(‘William d’Avranches and Cecily his mother to their well-beloved lords, William Earl Warenne, William d’Aubigny earl of Sussex and Gilbert de l’Aigle, greeting. Because we were unable to have your presence at the making of the charters between us and the abbot and monks of Robertsbridge [Sussex] concerning the manor of Sutton near Seaford,<sup>17</sup> we pray and earnestly beseech that you may be willing to be witnesses to our charters in which, for the sake of achieving security, you have been included as witnesses. Farewell.’)

**BL Lord Frederick Campbell Charter IV. 3**<sup>18</sup>

Sciant presentes et futuri quod ego Willelmus de Auerenichis concessi et presenti carta mea confirmaui Deo et Beate Marie et monachis de Ponte Roberti pro salute anime mee et antecessorum et heredum meorum elemosinam quam Cecilia de Auerenichis mater mea eisdem monachis dedit et carta sua confirmauit in manerio de Suttonia iuxta Sefordiam, scilicet capitale mesagium cum dominicis culturis et omnibus pasturagiis eiusdem manerii et nouem acras prati et dimidiam de eodem manerio et dennam que uocatur Omble cum omnibus consuetudinibus et libertatibus ad prefatum manerium pertinentibus ut habeant et teneant inperpetuum libere et quiete integre et plenarie in puram et perpetuam elemosinam. Hiis testibus, Willelmo Comite Warennie, Willelmo de Aubeneio tercio, comite Sussexie, Gileberto de Aquila, Simone de Echingham, Willelmo de Denne, Reginaldo Giffart, Roberto filio Alani, Helya Foleht et multis aliis.

<sup>15</sup>Sealed on separate tags by William d’Avranches and Cecily his mother, with both seals preserved. The earliest date is the date of livery of William de Warenne as earl; the latest date is William d’Aubigny III’s death (*Handbook of British Chronology*, 3rd edn, ed. E. B. Fryde and others (London, 1986), 449, 484). The letter was first published by H. Ellis, *Original Letters Illustrative of English History*, 3rd series vol. i (London, 1846), 25–6 (no. 14), and translated by L. F. Salzman in *Sussex Notes and Queries* 5 (1934–5), 120. (The edition and translation here are my own.)

<sup>16</sup>*ob securitatem* is written as one word.

<sup>17</sup>Sutton is now part of Seaford in Sussex.

<sup>18</sup>Only a slit for a seal tag remains.

(‘May all those present and future know that I, William d’Avranches have granted and by my present charter confirmed to God and the Blessed Mary and the monks of Robertsbridge, for the salvation of my soul and of my ancestors and heirs, the alms which Cecily d’Avranches, my mother, gave to the same monks and confirmed by her charter, in the manor of Sutton near Seaford, namely the chief messuage with arable demesne and all pasturages of the said manor and nine acres and a half of meadow from the said manor and the dean which is called *Omble*, with all customs and liberties pertaining to the aforesaid manor so that they shall have and hold it freely and undisturbed, wholly and fully forever in pure and perpetual alms. With these as witnesses: William Earl Warenne, William d’Aubigny III earl of Sussex, Gilbert de l’Aigle, Simon of Etchingam, William of *Denne*, Reginald Giffard, Robert son of Alan, Elias Foleth and many others.’)

Plainly William Earl Warenne, William d’Aubigny III earl of Sussex and Gilbert de l’Aigle were not present as witnesses when the charter was created. None the less, Russell sought to rebuff this reading of the evidence by interpreting these letters as an intermediate stage in the production of a charter. He argued that, first, the document would be written, then invitations would be made to attend its publication, and finally the charter would be read out and attested at an appropriate gathering. These letters, he maintained, were simply invitations to the publication of charters; he recognised, however, that the lack of a specific date and time was problematic.<sup>19</sup> Although this explanation has received some support,<sup>20</sup> it is difficult to sustain a link between witnessing and publication in these cases. In the letters to witnesses both the making of the charter and the inclusion of witnesses are referred to in the past tense. Presumably the testing clause in these instances was written on the same occasion as the rest of the charter—i.e., at the first of Russell’s three stages. This is confirmed on inspecting the originals: the names of witnesses have not been added subsequently (even though this can be shown to have occurred in other charters).<sup>21</sup> Indeed, in two of the three pairs of letter and charter that survive as originals, the same scribe was responsible for both documents.<sup>22</sup> It is

<sup>19</sup>Russell, ‘Attestation of charters’, 491, 495–6.

<sup>20</sup>Greenway, ‘Ecclesiastical chronology: *Fasti* 1066–1300’, 58.

<sup>21</sup>See below, 258–63.

<sup>22</sup>BL Harley Charter 83 A. 45 and Harley Charter 83 A. 51 (letter and charter of Peter de Capella), and TNA E 42/497 and Lord Frederick Campbell Charter IV. 3 (letter of William d’Avranches and his mother Cecily, and charter of William). In each case the writing of the letter is in a slightly lower register than the charter, consistent with being

also significant that, when the letter addresses more than a few individuals, they appear in the same order as in the witness list. In the earliest known example, the letter and charter of Peter de Capella to Sawtry (Hunts), seven witnesses are addressed; nine are addressed in the Melrose example.<sup>23</sup> In each case the letter must have been written in sight of the charter (or vice versa). Where only two or three witnesses are addressed in the letter, it may be assumed that they were absent while the rest were present. In sum, there is no escape from the conclusion that these letters were addressed to people who were named as witnessed in the charter but were absent at the time.

How common were these letters? Two of the three examples of letter and charter involving English monasteries (and one of the two letters which do not mention a charter) relate to the abbey of Robertsbridge in Sussex, whose archive is particularly well represented by about 750 extant original documents (not including administrative records).<sup>24</sup> Although these letters would have served no useful purpose after the death of the witnesses, and would be unlikely to have been retained, in the case of a well-preserved archive like that of Robertsbridge the very small number could indicate not so much a poor rate of survival but the fact that these were only rarely produced in the first place. The same point can be made with reference to Melrose, whose archive is one of the best preserved from a Scottish monastery. Only one example of a letter to witnesses is known, although the original of both it and its accompanying charter are lost.

In the absence of an intact medieval archive from somewhere that is

written in a more fluent style. The letter and charter of Maud de Meyners, by contrast, were written by different scribes. The same scribe was responsible for the duplicate originals of the charter (Maidstone, Centre for Kentish Studies, U1475 T264/137 and U1475 T264/136). They are not exact duplicates: U1475 T264/137 has a significant extra phrase, 'Saluo seruitio domini regis et comitis per manus monachorum predictorum regi et comiti faciendo'. This raises the question of which of the (near) duplicates was referred to in the letter. (The witnesses are identical in each case.)

<sup>23</sup>The first eight addressees appear in the same order as the first eight witnesses; the last addressee is the twelfth witness.

<sup>24</sup>The figure is taken from HMC, *Report on the Manuscripts of the Right Honourable Viscount De L'Isle and Dudley preserved at Penhurst Place*, i. pp. xii–xiii; it is estimated there, however, that there were originally many more. The charters at Penhurst Place datable to c. 1200 to c. 1240 are calendared at pp. 51–99. For the current whereabouts of Robertsbridge's documents classified broadly as charters, see [http://www.ucl.ac.uk/history2/english/monasticarchives/archives/all\\_houses.php?house\\_name=Robertsbridge&Submit=Submit](http://www.ucl.ac.uk/history2/english/monasticarchives/archives/all_houses.php?house_name=Robertsbridge&Submit=Submit) (accessed 19 June 2010).

known to have used these letters, the best evidence for gauging how frequently they may have been deployed would be from a cartulary which—most unusually—could be shown to represent a complete account of the letters and charters held in that monastery when the cartulary was made. Such a cartulary exists for Newbattle Abbey (Midlothian)—or, rather, existed. The earliest scribe of the only extant medieval cartulary from Newbattle—Edinburgh, National Library of Scotland, MS Adv. 34.4.13<sup>25</sup>—produced a remarkably fastidious transcript of his exemplar, probably in the first half of the fifteenth century.<sup>26</sup> Two letters to witnesses are mentioned (but not transcribed).<sup>27</sup> He, or rather the scribe of his exemplar, diligently noted each document—indeed, each single sheet—that he did not copy into the cartulary.<sup>28</sup> More often than not these were ‘repeats’ of a charter that had been included.<sup>29</sup> It appears that all single sheets still in the archive at that time were either copied or their existence recorded.

<sup>25</sup>G. R. C. Davis, rev. Claire Breay, Julian Harrison and David M. Smith, *Medieval Cartularies of Great Britain and Ireland* (London, 2010), 238 (#1173); edited by C. N. Innes, *Registrum S. Marie de Neubottle*, (Edinburgh, 1849).

<sup>26</sup>His work is confined to fols. 1–6, 9–40, and 44–70. An additional section (fols. 72–86) has a preface dating it to 1470, so the original cartulary must have been completed by then: the handwriting suggests a generation or two earlier. A remarkable feature of the original scribe’s work is that charters are identified as ‘A’, ‘B’, ‘C’ (rarely ‘D’) under a sequence of numbers. Charters relating to the same benefaction are grouped together, but the grouping under a number cuts across this. It would appear that the number is the folio number in the exemplar, and ‘A’, ‘B’ etc refers to the sequence of charters on that folio. The references to letters to witnesses appear in the text block (one as a memorandum, the other as a note). They have presumably been copied in this form verbatim from the exemplar.

<sup>27</sup>Fos. 29r and 33v; Innes, *Registrum S. Marie de Neubottle*, 72, 88. They were first noticed by W. Croft Dickinson and published in Stones, ‘Two points of diplomatic’, 48.

<sup>28</sup>Only the scribe of the exemplar would appear to have worked from the original single sheets. See n. 26, above.

<sup>29</sup>As well as the charters referred to in letters to witnesses, these are Innes, *Registrum S. Marie de Neubottle*, nos. 77, 106, and 110 (all probably or certainly from Alexander II’s reign), and two from the reign of Robert I (nos. 150 and 151). Note also the charters of Saer de Quincy which, we are told (p. 53), had similar content to no. 65, but with different seals (which means that they cannot have been produced at the same time: it is significant, no doubt, that the scribe here does not refer to the charters as exact repeats of no. 65). It was not particularly unusual for charters to be produced originally in duplicate, or for a fresh single-sheet copy to be procured sometime after the original. See Michael Clanchy, *From Memory to Written Record. England 1066–1307*, 2nd edn (Oxford, 1993), 321; Barrow, *Acts of William I*, 83; Richard Mortimer, ‘The charters of Henry II’, *Anglo-Norman Studies* 12 (1989), at pp. 128–9.

A cluster of omissions concerned a charter of donation datable to sometime before 1232 (probably in or around the 1220s):<sup>30</sup>

Memorandum quod Maria de Hales triplicavit cartam donacionis sue sub eodem tenore, et super scripsit eis quos testes adhibuit ut acceptum haberent si nomina sua in carta ponerentur. ('Memorandum that Mary of Hailes made the charter of her donation three times in the same words, and that she wrote further to those whom she had exhibited as witnesses supposing that they would have agreed to it if their names were put in the charter.')

On another occasion it was explained that a charter by William Noble had been made twice, and that along with it there was 'a letter of humble request by the said William Noble to all the individuals who might be willing to be witnesses in his charter'.<sup>31</sup> The charter can be dated to *c.* 1215 × 1230.<sup>32</sup> Here, again, we find the same pattern: a monastic archive whose medieval muniments are known in remarkable detail in which this kind of letter is rare.<sup>33</sup> This reinforces the strong suspicion that very few examples survive because these letters were produced only very occasionally.

The addition of examples from Scottish archives to Russell's tally

<sup>30</sup>Innes, *Registrum S. Marie de Neubotle*, 72. The transaction was the subject of two charters by Mary (*ib.* nos. 91 and 92) and a confirmation by Earl Patrick (no. 93) for which two possible date-ranges have been given in Elsa Catherine Hamilton, 'The Acts of the Earls of Dunbar relating to Scotland c.1124–c.1289: a Study of Lordship in Scotland in the Twelfth and Thirteenth Centuries', unpublished Ph.D. dissertation (University of Glasgow, 2003), 361–2: *c.* 1200 × 1209 and 1213 × 31 December 1232.

<sup>31</sup>'littera ... ipsius Willelmi Nobilis suplicatoria cunctis personis que velint testes esse in carta sua': Innes, *Registrum S. Marie de Neubotle*, 88. The use here of the present subjunctive (*velint*) by the cartulary scribe, in contrast to the imperfect subjunctive (*haberent, ponerentur*) in the letter of Mary of Hailes, could suggest that the witnesses were not referred to as already named in the charter, whereas in the letter of Mary of Hailes they were. But this would be the only occasion where a charter was referred to in this way in such a letter.

<sup>32</sup>William Nobles' charter is Innes, *Registrum S. Marie de Neubotle*, no. 116, datable by the appearance of Hugh bishop of Dunkeld (1214 × 1216–1230) as a witness.

<sup>33</sup>There may perhaps have been a third letter (Innes, *Registrum S. Marie de Neubotle*, 111): after noting another charter in duplicate (referring to *ib.* no. 143), it is stated that there was 'a certain letter of humble request whose value expired long ago'. The fact that the scribe was more forthcoming about the others, however, suggests that this letter may have been different. For another kind of letter of request in relation to a charter, see Cosmo Innes, *Registrum de Dunfermelyn*, Bannatyne Club (Edinburgh, 1842), no. 157, in which Saer de Quicy requests that William Malvoisin, bishop of St Andrews, might affix his seal to Saer's charter. I am grateful to Alice Taylor for originally bringing this to my attention.

also allows another common feature to come into focus.<sup>34</sup> In all cases the beneficiary is a Cistercian abbey. As well as Newbattle, Melrose and Robertsbridge, there is also Sawtry, the beneficiary of the donation in the earliest known letter of request to charter witnesses. If we also include the two letters of request to witnesses that do not mention a charter, one involves another Cistercian house, Bruern Abbey (Oxon), as beneficiary;<sup>35</sup> the other concerns a sale to Robertsbridge.<sup>36</sup> Both belong to the same period as the others.<sup>37</sup> In a Scottish context it is possible, given the small numbers involved, that this is simply a function of the significant proportion of monastic archives surviving as cartularies or collections of single sheets that are Cistercian (about a third of the total), but this would not be true for England. Even if a non-Cistercian example were to come to light,<sup>38</sup> a case could be made that letters of this kind were essentially a Cistercian innovation that was rarely deployed and was eventually abandoned soon after *c.* 1225.<sup>39</sup>

It is impossible, given the nature of the evidence, to gain a full picture of the circumstances behind each letter. One key factor, none

<sup>34</sup>False identifications of such letters have been made in Haskins, 'Charter witness lists', 321 n. 6, and Stones, 'Two points of diplomatic', 48 n. 5. In Haskins's case his citation of Stenton, *Transcripts of Charters relating to the Gilbertine Houses*, 28 (Sixle no. 51), is based on a misunderstanding of Stenton's comment at p. xxxi, where this charter is referred to for its use of the term *tenor*, not as an example of a letter to absent witnesses. In Stones's case he referred to TNA E 40/10118 (the charter) and TNA E 40/10119 (the letter). The letter, however, is a request to a local knight to perform livery of seisin, not a request to witnesses. The confusion could be because the addressee shares the same name and patronymic as one of the witnesses in the charter, although the witness is not listed among the knights and lacks the knight's designation 'of Scarning'.

<sup>35</sup>BL Harley Charter 43 B. 17, facsimile in Daniel Gurney, *Record of the House of Gournay* (London, 1848), vol. i, between pp. 614 and 615. In the translation (at p. 615) *feci* is unhelpfully rendered as 'I shall make' rather than in the past tense.

<sup>36</sup>Maidstone, Centre for Kentish Studies, U1475 T264/247; HMC, *Report on the Manuscripts of the Right Honourable Viscount De L'Isle and Dudley*, 95 (no. 191).

<sup>37</sup>Gurney, *Record of the House of Gournay*, i. 614–15, argues that the addressor's seal provides evidence that the Bruern example should be dated to before the addressor's mother's death in 1230 (for which see *ib.* p. 610). The addressor of the other example, 'H' prior of Combwell, allows it to be dated only *c.* 1220 × 1249. See Appendix C.

<sup>38</sup>The supposition by Stones, 'Two points of diplomatic', 48, that 'other examples might be given from English archives' may seem at first sight to be unobjectionable. The pair of letter and charter which he cited (*ib.* 48 n. 5), however, is no such thing: see n. 34.

<sup>39</sup>The inference that these letters were produced by the beneficiaries themselves would also be consistent with the fact that in the two instances discussed above (at p. 241) where letter and charter survive as originals they are by the same scribe.

the less, is made plain in the example that was sent by William d'Avranches and his mother Cecily to William Earl Warenne, William d'Aubigny earl of Sussex and Gilbert de l'Aigle: the letter was necessary, we are told, 'because we were unable to have your presence at the making of the charters between us and the abbot and monks of Robertsbridge concerning the manor of Sutton'. The presence of witnesses was acknowledged as the norm; it was only when witnesses could not be brought together for the occasion that a letter to them might be written. This is reinforced by Maud de Meyner's letter to only two out of ten witnesses named in her charter: presumably only these two were absent.<sup>40</sup> Cistercians would not, of course, have been the only beneficiaries who could have found themselves in this situation. One feature of these letters might, however, explain why they apparently failed to catch on more widely. In each case all the witnesses concerned are addressed together. Presumably the intention was that it should be read out at some assembly where the addressees would learn of the transaction in question—and would be seen to learn of it. Making sure that they were all there to hear the letter is unlikely to have been straightforward.<sup>41</sup> For example, it was not unusual for men of high status to be represented at the shire court by their steward.<sup>42</sup> Presumably the addressees were treated as a group, despite the difficulty this might cause, because witnesses would typically be together when they took on this role. We will return to these letters in due course, and explore why they arose when they did.

#### CHARTER WITNESSES IN ENGLISH LAW IN THE EARLY THIRTEENTH CENTURY

Letters to absent witnesses may possibly have been deployed only by Cistercian monasteries, but they were not the only people who found it necessary or expedient to produce a charter without some or any of the witnesses being present. This is apparent, in England at least, in the rich sources available for investigating the administration of justice in

<sup>40</sup>Maidstone, Centre for Kentish Studies, U1475 T264/135; HMC, *Report on the Manuscripts of the Right Honourable Viscount De L'Isle and Dudley*, i. 70 (no. 118).

<sup>41</sup>It would hardly have been practical to keep a note of who heard it when.

<sup>42</sup>A useful summary of the evidence is provided in John Hudson, *The Formation of the English Common Law. Law and Society in England from the Norman Conquest to Magna Carta* (London, 1996), 36 and n. 43.

English royal courts. Sadly nothing of this kind is available for Scotland in this period. In England, records of cases decided before the King's Bench and *coram rege* begin at the end of the twelfth century,<sup>43</sup> complemented by a manuscript published as *Bracton's Note Book*, containing about 2,000 transcripts of cases from the plea rolls between 1217 and 1239 or 1240.<sup>44</sup> This material is capped by an impressive (if unfinished) treatise, *De Legibus et Consuetudinibus Anglie* ('The Laws and Customs of England'), known to modern scholarship as *Bracton*, written initially in the late 1220s or early 1230s, and finally abandoned before 1259.<sup>45</sup> This abundance of sources therefore coincides roughly with the period when letters to absent witnesses are found. Although they all reflect the machinery of justice introduced by Henry II, 'something quite new and significantly different from anything which had existed before',<sup>46</sup> they are not uniform. The particular characteristic of *Bracton* is that it is rooted in the rolls of cases decided by two of the major figures in the early development of English common law: Martin of Pattishall (d. 1229) and his successor on the King's Bench, William of Raleigh (d. 1250), who retired as justice of the court *coram rege* when he was

<sup>43</sup>The publication of these records in sequence begins from *Curia Regis Rolls of the Reigns of Richard I and John preserved in the Public Record Office*, vol. i, *Richard I–2 John*, ed. H. C. Maxwell Lyte (London, 1922), reaching vol. viii, *3–4 Henry III (1219–20)*, in 1938, an average of one volume almost every two years. After the Second World War the rate declined. The final one is *Curia Regis Rolls of the Reign of Henry III preserved in the Public Record Office*, vol. xx, *34 to 35 Henry III (1250)*, ed. David Crook (Woodbridge, 2006).

<sup>44</sup>*Bracton's Note Book. A collection of cases decided in the king's courts during the reign of Henry the Third*, ed. F. W. Maitland, 3 vols. (London, 1887). See now Paul Brand, 'The Age of Bracton', in *The History of English Law. Centenary Essays on 'Pollock and Maitland'*, ed. John Hudson, *Proceedings of the British Academy*, vol. 89 (Oxford, 1996), 65–89, esp. 79–83. See also Paul Brand, 'Bratton [Bracton], Henry of (d. 1268)', *Oxford Dictionary of National Biography, from the earliest times to the year 2000*, ed. H. C. G. Matthews & Brian Harrison, 60 vols. (Oxford, 2004) [hereafter ODNB], vii. 395–8, at pp. 397–8.

<sup>45</sup>G. E. Woodbine, *Bracton de legibus et consuetudinibus Angliae*, 4 vols. (New Haven, CT, 1915–42); repr. with facing transl. by S. E. Thorne (New Haven, CT, 1968–77) [hereafter *Bracton*]; also published on-line by the Ames Foundation at Harvard Law School, <http://hls15.law.harvard.edu/bracton/Common/index.htm>. On the date and authorship of *Bracton*, and see now Brand, 'The Age of Bracton', 66–78; at p. 78 he concludes that 'we can be reasonably certain that William of Raleigh played a major part in the production of the treatise'.

<sup>46</sup>Paul Brand, 'Multis vigiliis excogitatum et inventum?: Henry II and the creation of the English Common Law', *Haskins Society Journal* 2 (1990), 197–222, at p. 221.

consecrated bishop of Norwich in 1239.<sup>47</sup> Raleigh had been Pattishall's clerk, and inherited his rolls in 1229; Henry of Bratton (misnamed 'Bracton') was Raleigh's clerk, and in turn acquired the rolls before being ordered to hand them to the Exchequer in 1258—perhaps one of the reasons why work on the treatise ceased. *Bracton's Note Book* is also associated with Pattishall and Raleigh, being copied from records of the court over which they presided.<sup>48</sup> The record of pleas before the King's Bench and *coram rege*, on the other hand, lacks this particular pedigree, being simply a function of the administration of justice. The legal commentary in *Bracton*, especially when based on the judgments of Pattishall and Raleigh, may reveal more clearly the norms and principles that were being formed out of the substance of judicial experience. The cases—even *Bracton's Note Book*—do not, however, always match what would be expected from reading *Bracton*. For example, it is made clear in *Bracton* that livery of seisin—the act which, for *Bracton*, is essential if a gift of land is to be valid—must be held on the land itself, or at least within sight of it. And yet an instance of the older practice of symbolic livery in court was recognised in 1236, even though it had occurred only a few years earlier.<sup>49</sup>

Constructing a consistent picture from this material is not necessarily a straightforward matter. It is perhaps not surprising, therefore, that the legal importance of the presence of witnesses has been both asserted and denied with equal vigour. Sir Cyril Flower, in his guide to the published rolls of suits before the King's Bench and *coram rege*, led the way in finding evidence against the necessity of the presence of witnesses.<sup>50</sup> His views soon became the established

<sup>47</sup>David Crook, 'Raleigh [Ralegh], William of (d. 1250)', *ODNB*, xlv. 863–4; C. A. F. Meekings, 'Martin Patteshull and William Raleigh', *Bulletin of the Institute of Historical Research* 26 (1953), 157–80.

<sup>48</sup>With regard to the relationship between *Bracton's Note Book* and *Bracton* itself, Paul Brand has suggested that 'it may still have been intended for use in revising it [*Bracton*], or even as a companion to it for those without ready access to the rolls containing the cases cited in the treatise': Brand, 'Bratton', 398.

<sup>49</sup>*Bracton*, ii. 124–8; J. M. Kaye, *Medieval English Conveyances* (Cambridge, 2009), 63, citing *Bracton's Note Book*, iii. 203–6 (no. 1189). On changing conceptions of seisin, see S. E. Thorne, 'Livery of seisin', *Law Quarterly Review* 52 (1936), 345–64, reprinted in Thorne, *Essays in English Legal History* (London, 1985), 31–50, at pp. 45–6.

<sup>50</sup>C. T. Flower, *Introduction to the Curia Regis Rolls, 1199–1230 A. D.*, Selden Society vol. 62 (for 1943) (London, 1944), 281.

orthodoxy among record scholars.<sup>51</sup> Neither he nor his followers, however, made reference to Russell's paper, which, as well as tackling letters of request to absent witnesses, also examined *Bracton* and *Bracton's Note Book* for the legal consequences of absent witnesses for a charter's validity.<sup>52</sup>

Russell identified a number of cases in the late 1220s in which an admission that witnesses had not seen or heard a charter they were supposed to have attested—but were only made aware of subsequently—led to the charter's being rendered null and void.<sup>53</sup> It could be objected that not all his examples showed charters being declared invalid for that reason.<sup>54</sup> There can be no doubt, however, about one of Russell's cases, which is cited in *Bracton*.<sup>55</sup> In *Bracton* the point which it served to illustrate is that

si seisinam probaverint legitimam, quod donatio erit valida licet nihil probaverint de homagio capto nec de carta. Ut si testes et iuratores dicant quod cartam illam numquam antea viderunt, nec umquam audita fuit in

<sup>51</sup>This is apparent, for example, in Stones, 'Two points of diplomatic', which he wrote to instruct Scottish historians in what he regarded as the mainstream view on this issue, observing disapprovingly that, although the 'danger' of witness lists was well known, 'cases still occur, however, when charters are treated as if the witnesses must all have been present on the date of execution'. Flower's view on the presence of charter witnesses as immaterial was soon afterwards transformed into a curious statement along very similar lines on the presence of witnesses at the transaction (rather than the charter, as Flower intended) in R. B. Pugh, *Calendar of Antrobus Deeds before 1625*, Wiltshire Archaeological and Natural History Society, Records Branch, vol. 3 (Devizes, 1947), xlvi.

<sup>52</sup>Flower referred to no other work on the presence of witnesses. It was left to Stones, 'Two points of diplomatic', at pp. 47–8, nearly a decade later, to combine Flower's case heard in 1219 (see 251–2, below) with Stenton's view of the evidence of letters to witnesses (on which see above, 237–8).

<sup>53</sup>Russell, 'Attestation of charters', 493, 497 (where 'early fourteenth century' should read 'early thirteenth century').

<sup>54</sup>In one instance (Russell, 'Attestation of charters', 493 n. 4, 497), the witnesses were asked if they had seen the donor (Beatrice) give the disputed land to the beneficiary (Thomas). They said that they had not, and explained that they had been invited to witness the charter relating to this purported gift only after they had been named in the charter. This was but one episode in a complex case where it was found that Beatrice never had seisin and therefore was in no position to give it to anyone. It was this which led the jury to cancel the charter 'as if false'. *Bracton's Note Book*, ii. 283–4 (no. 342).

<sup>55</sup>Russell, 'Attestation of charters', 493 n. 4, 497; *Bracton's Note Book*, ii. 237–8 (no. 286); *Curia Regis Rolls of the Reign of Henry III*, vol. xiii, 11 to 14 (1227–30) (London, 1959), no. 716.

comitatu nec hundredo, licet dicant quod rogati fuerunt quod essent testes, tamen non valebit carta. Ut de termino Pasche anno regis Henrici duodecimo comitatu Huntingdonie, de Egidio de Mercke. Idem erit si dicant se numquam interfuisse confectioni carte nec recitationi. Hoc enim multum derogat cartæ et ipsius fidei. ('if they prove that the seisin was lawful though they prove nothing with respect to homage taken or the charter, the gift will be valid, but the charter invalid, as where the witnesses and jurors say that they never before saw that charter, nor was it ever heard in the county or hundred court, though they say they were asked to be witnesses [Russell's case is cited at this point] . . . And so it will be if they say they were not present at the making of the charter nor at its reading; for this greatly detracts from the charter and its credibility.')<sup>56</sup>

This is immediately reinforced in *Bracton* with a suit heard before Martin of Pattishall in 1227, in which a claim based on a charter failed because those named as witnesses said that they had been absent when it was made,<sup>57</sup> and another case in 1224 involving Thetford Priory, when a witness could only say that he was present when the charter was confirmed, not when it was made, while another stated that he knew nothing of the charter until he was informed by a monk of Thetford that he had been named as a witness in it; as a result, the priory failed to prove the donation.<sup>58</sup> And yet there were circumstances explicitly countenanced in *Bracton* for the absence of named witnesses from the making of a charter. This was permissible if they were present 'at the making of a minute (*nota*) on which both parties, donor and donee, agreed',<sup>59</sup> or 'if it [the charter] is afterwards read and granted (in their

<sup>56</sup>*Bracton*, iv. 241 (with slight changes to the translation). *Testes* ('witnesses') seems to refer specifically to those named in the charter, whereas *iuratores* ('jurors') refers to members of the hundred or county court. This should not be read as if suitors of the hundred or county court who heard the charter read out (presumably when it was first published) were an adequate alternative to those who witnessed the charter. That is merely cited as a claim that should be rejected. For *Bracton* on witnessing in court after the making of the charter, see below, 250, 258.

<sup>57</sup>*Bracton's Note Book*, iii. 667–8 (no. 1891).

<sup>58</sup>*Bracton's Note Book*, ii. 178–9 (no. 222).

<sup>59</sup>*Bracton*, iv. 241: 'confectioni note in quam utraque pars consentit donator et donatarius', which Thorne translated as 'at the making of the note to which both parties, donor and donee, agreed'. I am grateful to Professor Richard Sharpe for suggesting to me that *nota* in this context refers to a minute. Some manuscripts read 'voce' for 'note', but this is awkward and is presumably a misreading. One, Cambridge, Fitzwilliam Museum, MS McClean 145 (formerly Phillipps 8126), reads *carte*. See

presence), both donor and donee being present'.<sup>60</sup> We will return to this in due course.

Turning away from *Bracton* to the records of cases decided before the King's Bench and *coram rege*, the opposite conclusion was reached by Flower on the basis of a case heard in 1219.<sup>61</sup> In this instance the absence of witnesses when the charter was made was admitted—it was stated that a donor had asked a witness to attest his charter only after it had been made—and yet the deed stood. Flower contrasted this with a case in 1210 in which the absence of witnesses proved fatal.<sup>62</sup> He concluded that, unless the law had changed between these dates, the two judgements could only be reconciled by holding that a witness was 'not necessarily present at the making of the charter; but he was a man of position who was prepared to attest the genuineness of the proceedings. He was, in fact, a referee'. Different outcomes were possible because support might on one occasion be given by witnesses as 'referees', but on another occasion be withheld.

The case in 1219 bears closer examination. The charter in question related to a sale of land. The right of the buyer, Gregory, was upheld against the vendor's heiress who had been called by Gregory to warrant the deed (because the vendor, Henry, had died). The charter was submitted by Gregory, and two named in the charter as witnesses were included in the jury. The critical passage reads:<sup>63</sup>

Juratores dicunt quod intelligent quod predictus Henricus dedit predicto Gregorio terram illam et homagium suum inde cepit pro xl. marcis quas

*Bracton*, iv. 241 n. 23. The case cited from the rolls of Martin of Pattishall in relation to this statement does not appear in *Bracton's Note Book* or the *Curia Regis* rolls.

<sup>60</sup>The sentence begins 'Et si in confectione carte presentes non fuerint, sufficit si postmodum in presentia donatoris et donatarii fuerit recitata et concessa', and continues by saying that it is best if this is performed in front of a public gathering. It is clear from the context that the witnesses should at least be present when the charter is *recitata et concessa*: *Bracton*, ii. 119–20 (translation adapted slightly).

<sup>61</sup>Flower, *Introduction to the Curia Regis Rolls*, 281.

<sup>62</sup>It should be noted, however, that in this case it was not simply the charter that failed (as might be assumed from Flower's summary) but the gift itself. A warrantor's denial of a charter was upheld because the three jurors named as witnesses in the charter testified that 'they were never in the place or the stall where Ralph [the warrantor] gave the land to him [the person vouching the warrantor] or made the charter for him'. *Curia Regis Rolls of the Reigns of Richard I and John preserved in the Public Record Office*, vol. vi, 11–14 *John* (London, 1932), 6.

<sup>63</sup>*Curia Regis Rolls of the Reigns of Richard I and John preserved in the Public Record Office*, vol. viii, 3–4 *Henry III* (London, 1938), 18.

Salomon pater Gregorii ei dedit pro terra illa ad opus ipsius Gregorii, set non fuerunt ad cartam faciendam; set bene sciunt quod post donum illud venit Salomon ad domum ipsius Wernici et dixit ei quod posuerat eum in carta ut testem. Et sciendum quod hec jurata capta fuit per duos predictos testes et per septem alios juratores ex consensu partium. ('The jurors said that they understood that the aforesaid Henry [the vendor] gave that land to the aforesaid Gregory and then took his homage in return for 40 marks which Salomon, Gregory's father, gave him for that land for Gregory's use; but they were not at the making of the charter. But they know well that after that gift Salomon came to the house of Gúerric [one of the charter witnesses] and told him that he had put him in the charter as a witness. And it should be known that this deposition was taken from the two aforesaid witnesses [named in the charter] and seven other jurors by the consent of the parties.')

On the basis of this information the court found for Gregory. What role, however, did the charter play in supporting the verdict? The case did not proceed along the lines stated in *Bracton* when a charter is proffered when vouching a warrantor:<sup>64</sup>

si carta de donatione proferatur, oportet quod warantus utrumque defendat, scilicet cartam et donum, et ex hoc habet tenens necesse probare utrumque propter copulativam interiectam. Et unde si in probatione unius defecerit, perinde haberi debet ac si in probatione utriusque defecerit. ('if a charter of gift is put forward, the warrantor must deny both, that is, the charter and the gift, and thus the tenant must prove both, because of the copulative put between them. Hence if he fails in the proof of one, he ought to be treated as if he has failed in the proof of both.')

Instead of focusing on the gift (which, for *Bracton*, would have had to be perfected by seisin) and the charter, the jurors addressed the question of homage and charter.<sup>65</sup> Elsewhere in *Bracton* homage was regarded in the same light as a charter as something which could be known by hearsay without negating a gift, as long as the jurors had been present when seisin was given.<sup>66</sup> In this case, however, homage was the key consideration in upholding Gregory's claim to warranty. The significance of homage in creating an obligation to warranty was

<sup>64</sup>*Bracton*, iv. 218.

<sup>65</sup>The charter presumably recorded the sale of the land in question. In *Bracton* land acquired by gift, sale and exchange are treated as equivalent when vouching a warrantor (*Bracton*, iv. 192).

<sup>66</sup>*Bracton*, iv. 240–1. It will be recalled that charter and homage could be unproved, but the gift be valid if there was lawful seisin: see above, 249–50.

well established,<sup>67</sup> and was also recognised in *Bracton* as applying without a charter.<sup>68</sup> A different balance of legal assumptions from those articulated in *Bracton* seems to have underpinned this case, with more emphasis given to homage than to seisin. There may also have been an understanding that a charter proffered when vouching a warrantor could not be rejected if the warrantor was found to be liable to answer.<sup>69</sup> It would be premature, none the less, to assume that in this case the charter was upheld in its own right independently of the fact of homage, in the same way as it was stated in *Bracton* that both charter and gift must be proved. Perhaps a situation like this—where (in effect) a charter which was not of itself seen as the crux of the case might be sustained despite the absence of witnesses when it was made—could explain the slight room for manoeuvre that may be detected in *Bracton*'s statement that 'if they say they were not present at the making of the charter nor at its reading . . . this greatly detracts from the charter and its credibility': it detracts from the charter, but does not make it false—in contrast to the perfection of a gift by seisin, which is described in some detail and made absolutely essential.<sup>70</sup>

Both case law and *Bracton* show that, by the mid-1220s, a charter's validity would—at the very least—be seriously compromised if those named in it as witnesses were not present at some stage in its production. It would be difficult, on the basis of the case cited by Flower, to argue that this was not also true before the 1220s, especially given that the outcome evidently hinged on homage, not simply on the charter. Had the charter borne all the weight of the case, or been assessed in its own right, it seems likely that it would have failed. None the less, the suits recorded in extant rolls and cited in *Bracton* show that there were occasions when witnesses named in a private deed were only informed of this after the charter had been written. Why might a donee have taken such a risk? The Cistercian letters to witnesses, seen in this

<sup>67</sup>Sir Frederick Pollock & F. M. Maitland, *The History of English Law before the time of Edward I*, 2nd edn, 2 vols. (Cambridge, 1898), i. 306; *Bracton*, iv. 192.

<sup>68</sup>*Bracton*, iv. 215–16. Note also that, in the balance between charter on the one hand and seisin on the other as proof of a gift, homage is set alongside charter in *Bracton*, iv. 240–1.

<sup>69</sup>This may be what lies behind the statement in *Bracton* (above) that the need to prove both charter and gift when the charter was proffered in vouching for warranty was 'because of the copulative put between them'.

<sup>70</sup>See above, 248.

light, seem even more reckless, in that they effectively advertised their absence. And yet they were presumably produced because they were regarded as enhancing the beneficiary's title, not the reverse. How is this conundrum to be explained?

In the absence of a contemporary narrative that reveals why a charter was commissioned despite the absence of witnesses, any attempt to fill this gap in our knowledge is bound to be conjectural. The best evidence is the letters to witnesses themselves. It will be recalled that it is made explicit in one of them that the normal expectation was that witnesses would, indeed, be there at the making of a charter, and that this can also be inferred from another addressed to only two of the ten witnesses—presumably because they were the only absentees. It may be deduced that there was some pressing reason why the charter in these instances was produced without the presence of some witnesses named in the charter—a reason which could even result in all witnesses being absent. Is there a cause for such haste that might have been triggered particularly at the end of the twelfth century and during the first quarter of the thirteenth? The most convincing explanation would, of course, be one which involved the process of conveyancing itself. If the charter was hurried because it was thought necessary (or at least highly desirable) to have it ready prior to another stage in the process, then this would explain why those present at the next stage could not simply have witnessed the charter, leading on occasion to the curious expedient of naming a series of witnesses in the charter when not one of them was in fact present.

An explanation that matches these criteria can be envisaged arising from the change in the relationship between seisin and charter that occurred in England at precisely this time. In the twelfth century a charter of donation was typically a record of a conveyance which had already occurred. It could follow 'in leisurely fashion'.<sup>71</sup> During the late twelfth and early thirteenth century this changed so that the charter preceded the ceremony of livery of seisin 'on site'.<sup>72</sup> Michael Clanchy has pointed out how this is illustrated vividly in *Bracton* by the use of an

<sup>71</sup>G. W. S. Barrow, 'The Scots charter', in *Studies in Medieval History presented to R. H. C. Davis*, ed. H. Mayr-Harting & R. I. Moore (London, 1985), 149–64, at p. 152.

<sup>72</sup>Note, however, that the evidence cited by Thorne for the beginning of this change—the increasing use of *hiis testibus* in introducing witness lists—does not square with the evidence below (p. 272) for the presence of witnesses when that formula was used. See Thorne, 'Livery of seisin', 45–6.

English phrase, 'he hadde bothe writ and chartre', in describing what a donor's agent had to show before proceeding with livery of seisin on the donor's behalf.<sup>73</sup> This must have been a familiar and widely understood procedure before it became encapsulated like this in a vernacular tag.<sup>74</sup> In the transition towards this new role for the charter there were doubtless occasions when, in making arrangements for performing livery of seisin—which (it will be recalled) was increasingly expected to happen on the land itself, or within sight of it<sup>75</sup>—it was decided only late in the day that it would be better to have the charter ready in time for the ceremony. This is not to say that having a charter prior to livery of seisin had become a legal necessity: production of charters following livery of seisin still occurred.<sup>76</sup> Given the apparent rarity of letters to absent witnesses, however, all that is required is for a few beneficiaries to have regarded it as best practice to obtain a record of the donation prior to livery of seisin, particularly when producing the charter before seisin was becoming common, and for there to have been a few unusual occasions when this was insisted upon even though it was too late to assemble suitable people to witness it.<sup>77</sup> There may have been little choice but to name individuals in their absence in the hope that it would be sufficient to inform them of this afterwards.

The Cistercian letters, seen in this light, might have been an attempt to mitigate this perceived deficiency by invoking the time-honoured procedure of calling on appropriate individuals in a public forum to testify to the transaction after it had occurred. Instead of having their names recorded in a charter drawn up in the forum itself, however, the witnesses were perforce called to acknowledge before others the letter

<sup>73</sup>*Bracton*, ii. 125. The 'writ' was the donor's letter authorising the agent.

<sup>74</sup>Clanchy, *From Memory to Written Record*, 2nd edn, 52.

<sup>75</sup>See above, 248.

<sup>76</sup>Examples from the late 1250s and *c.* 1260 are cited in Kaye, *Medieval English Conveyances*, 63 n. 10, where it is also noted (p. 60) that land could also be transferred by livery alone, without ever obtaining a charter, although it is pointed out that the absence of a charter could create serious problems for the donor as well as the beneficiary.

<sup>77</sup>It may be guessed that, if it had become routine for donors' agents to have not only a letter of attorney but also the charter of donation, beneficiaries may have been keen to obtain a charter beforehand if the donor was not going to give livery of seisin in person, and that a last minute rush to produce a charter could therefore have occurred when the donor had arranged to perform livery of seisin in person, but withdrew from it late in the day. There is, however, no way of establishing whether this scenario lies behind any of the letters to witnesses.

informing them of the donation and of their appearance as witnesses in the pre-existing charter.<sup>78</sup> For private individuals, when it was considered to be highly desirable to acquire a charter quickly in time for the ceremonial transferral of the land, a simpler solution was to have the charter drawn up and then visit at least some of the witnesses named in it afterwards.<sup>79</sup> This, as we have seen, did not satisfy royal justices; the letters to absent witnesses are unlikely to have satisfied them either. It may be significant, none the less, that in *Bracton* an alternative procedure was envisaged which would have allowed a charter to be witnessed by those named in it even though none of them had been present when it was made. It will be recalled that, in *Bracton*, the absence of witnesses would not invalidate the charter if it was afterwards 'read and granted' in their presence, and in the presence of both donor and donee.<sup>80</sup> This would, presumably, have posed logistical difficulties similar to those created by a letter to absent witnesses, given that all those already named, as well as the two parties, would need to have been assembled together.

As far as Scotland is concerned, it has to be said that the earliest extant example of a donor producing a charter and then requesting his agent in writing to deliver sasine upon it is not until 1271.<sup>81</sup> It is conceivable, however, that the English practice of making the charter ready for the ceremonial transfer of land had already begun to be deployed north of the Border in the 1220s.<sup>82</sup> Certainly, Cistercian

<sup>78</sup>In the case of the two letters where no charter is mentioned, it could be that this method of retrospectively verifying the list of witnesses was also used where seisin was delivered without a charter (for example, if the donor himself performed the ceremony). In such a situation the letter could have been intended to reinforce the transaction by asking appropriate individuals at some subsequent assembly to witness the donation or sale in public, a function that would earlier have been fulfilled by producing a charter following seisin.

<sup>79</sup>In the case of 1219 discussed above, cited by Flower, for example, the witness was informed by Gregory's father that he had been included in the charter after the sum had been paid to the vendor. It may be inferred, then, that the charter had been drawn up late in the proceedings. The same expedient of visiting a witness after the charter had been drawn up is found in the case of 1224 involving Thetford Priory: see above, 250.

<sup>80</sup>See above, 250–1.

<sup>81</sup>Gordon Donaldson, 'Early Scottish conveyancing', in Peter Gouldesbrough, *Formulary of Old Scots Legal Documents*, Stair Society (Edinburgh, 1985), 153–86, at p. 170.

<sup>82</sup>It may be significant that both the Newbattle transactions also involved more than one copy of the charter, which might reflect a desire to take extra precautions in these

houses such as Melrose and Newbattle might be expected to be aware of developments in England.<sup>83</sup> Indeed, in the case of the letter where Melrose was the beneficiary, the conveyance occurred in England.

The discussion of the presence of witnesses in private deeds has, to date, focused on the law as articulated and applied by royal justices, and (in particular) on letters to absent witnesses. I have argued that the significance of the evidence against the presence of witnesses has been exaggerated. Although there were plainly exceptions, the expectation of the time was that witnesses would be present. It was only in exceptional circumstances that charters were produced in the absence of named witnesses, circumstances which, I have suggested, related to changes in the relationship between charter and seisin towards the end of the twelfth century and in the first quarter of the thirteenth century.<sup>84</sup>

The most direct evidence with a bearing on the general issue of the presence of witnesses at the making of a charter, however, has yet to be explored: the palaeography of extant originals. There is a good reason why this is so. Original charters, by and large, were written in a single continuous process, and as such provide no distinct information about the witness list. On examination, however, it is apparent that this was

particular transactions—extra precautions which could, hypothetically, have included presenting a charter (albeit one produced in a hurry) at the delivery of sasine.

<sup>83</sup>It is an interesting question whether, in establishing the legal transfer of land, this awareness of English developments would have extended to the exclusive emphasis on seisin (now explicitly understood as corporeal possession), which Thorne, 'Livery of seisin', argued occurred in England as a result of the possessory assizes introduced by Henry II. See also T. F. T. Plucknett, 'Deeds and seals', *Transactions of the Royal Historical Society*, Fourth Series, 32 (1950), 141–51, at pp. 145–8. In Scotland the earliest evidence for the introduction of one of these possessory assizes is an enactment of Alexander II in 1230. But this did not relate specifically to land: see Alice Taylor, 'Aspects of Law, Kingship and Government in Scotland c. 1100–1230', unpublished D.Phil. dissertation (University of Oxford, 2009), 257–61. The seminal discussion of the early history of these actions in Scotland is Hector MacQueen, *Common Law and Feudal Society in Medieval Scotland* (Edinburgh, 1993), 136–46 (novel dissasine) and 167–75 (mortancestry). For their early history in England, see now George Garnett, *Conquered England: Kingship, Succession and Tenure, 1066–1166* (Oxford, 2007), 326–52, who argues perceptively that they have their ultimate origins in the intimate association of landholding with kingship that derived from the Conquest.

<sup>84</sup>It will be recalled that only the letter and charter relating to the donation of Peter de Capella to Sawtry Abbey can be dated with any confidence to the late twelfth century (sometime around 1190). The change in the relationship between charter and seisin has been seen as having an effect more generally on the presence of witnesses, but on some dubious grounds: see below, 270–1.

not always the case. There are charters where it is clear that the witness list was added subsequently to the text. A consideration of this not only has the limited goal of adding to the kind of evidence that (for some charters, at least) can be deployed to establish that witnesses were, indeed, present. It can also lead to a wider discussion of the process of producing a charter, and therefore a better understanding of what witnessing a charter could mean in practice. It will be recalled that, in *Bracton*, for a charter to be regarded as legitimate, witnessing was not necessarily restricted to the acts of engrossing and sealing.<sup>85</sup>

#### WITNESS LISTS ADDED SUBSEQUENTLY TO THE TEXT

Many of those who have written on the question of the presence of witnesses have mentioned in passing that there is the occasional charter where the testing clause looks different—the colour of the ink or the scribe changes—suggesting that the witness list has been added after the ink was dry on the body of the text.<sup>86</sup> The odd charter has also been pointed out where a testing clause is lacking.<sup>87</sup> Individual examples of this phenomenon have also been commented on by palaeographers and editors of charters.<sup>88</sup> But, as yet, it has not been discussed at length.

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<sup>85</sup>Above, 250–1.

<sup>86</sup>Stenton, *Documents Illustrative of the Social and Economic History of the Danelaw*, civ (whence Haskins, ‘Charter witness lists in the reign of King John’, 322), Russell, ‘Attestation of charters’, 492. See also Shelagh Bond, ‘The attestation of medieval private charters relating to New Windsor’, *Journal of the Society of Archivists* 4 (1971), 276–84, at p. 278; Maxwell-Lyte, *Historical Notes on the Use of the Great Seal of England*, 235.

<sup>87</sup>Russell, ‘Attestation of charters’, 492 n. 6, notes a charter of Geoffrey, bishop of Ely, that lacks a witness list: this is discussed below, n. 110. Maxwell-Lyte, *Historical Notes on the Use of the Great Seal of England*, 235, notes a charter in favour of the bishop of Hereford in 1241 that was enrolled (presumably from a draft) without witnesses or date: *Calendar of the Charter Rolls preserved in the Public Record Office*, vol. i, *Henry III A. D. 1226–1257* (London, 1903), 259.

<sup>88</sup>G. W. S. Barrow, *The Charters of 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), no. 102 and pl. xvi; T. A. M. Bishop, *Scriptores Regis. Facsimiles to identify and illustrate the hands of royal scribes in original charters of Henry I, Stephen and Henry II* (Oxford, 1961), no. 628; Léopold Delisle, *Recueil des Actes de Henri II, roi d’Angleterre et duc de Normandie concernant les provinces françaises et les affaires de France*, Introduction (Paris, 1909), 281 (also idem, ‘Les formules rex Anglorum et Dei Gratia Rex Anglorum’, *Bibliothèque de l’École des Chartes* 68 (1907), 525–36, at pp. 535–6, whence R. L. Poole, *Studies in Chronology and History* (Oxford, 1934), 305); Robert B. Patterson, *The Scriptorium of Margam Abbey and the Scribes of Early Angevin Glamorgan. Secretarial administration in a Welsh marcher barony, c. 1150–c. 1225*

Although a comprehensive examination is not attempted here, this is the first occasion in which groups of charters have been studied with this in mind, and in which examples from across Anglo-Norman Britain have been considered together.<sup>89</sup> For all that it was not a common occurrence, it was sufficiently widespread to have been a recognised procedure, particularly (but not exclusively) in the twelfth century.

An important aspect of this study is the use of a wider and more detailed range of palaeographical evidence in identifying witness lists as later additions. The instances where a different scribe or a change in the hue of the ink is apparent are only the most readily recognised indications that a testing clause was not written continuously with the rest of the charter. All the examples described in Appendices A and B involve the same scribe who wrote the body of the text, and are naturally more difficult to detect than the rare cases when a different scribe was responsible. Sometimes the character of the writing changes, becoming more current or in a slightly lower register, or the writing betrays the use of a thinner, thicker or less pliable nib. There may also be a clear break in the evenness of the line of writing. The lay-out can also become cramped in a way that suggests that the body of the charter was written without knowing how long the testing clause would be. This suspicion can be supported by examining if and how the charter has been prepared with ruled lines.<sup>90</sup> It can also be corroborated

(Woodbridge 2002), 46; William T. Reedy, *Basset Charters c. 1120 to 1250*, Pipe Roll Society (London, 1995), no. 177 and pl. iii, dated to around 1180 × 1182: see now the discussion (with an image of this charter at §3) by William Stewart-Parker, 'Methodological problems of standardisation in medieval source material: the Compton Bassett charters', <http://www.finerollshenry3.org.uk/content/month/fm-06-2010.html> (I am very grateful to David Carpenter for bringing this to my attention). For a later period, see Bond, 'The attestation of medieval private charters relating to New Windsor', 278.

<sup>89</sup>For an example from Normandy, see Warner & Ellis, *Facsimiles of Royal & Other Charters in the British Museum*, i. no. 50 (pl. xxxii).

<sup>90</sup>A difficulty in assessing a charter with ruled lines only up to the witness list, but no clear change in the character of the writing other than that it becomes less disciplined, is that the lack of ruled lines could on its own have caused the change in the writing. (An example is Oxford, Bodleian Library MS DD Queen's Deeds 73.) The fact that the ruled lines were made without catering for the testing clause could, of course, be evidence that the scribe initially intended to write only the body of the charter. This would only be convincing as a single criterion if it could be safely assumed that a scribe would usually calculate correctly the number of ruled lines he would require for a

by considering the position of slits for a seal-tag or the cutting of a tongue at the bottom for the seal: where it appears that these were made without concern for lack of space, this may suggest that these first steps in preparing a charter for sealing had been carried out after the text was written but before the witnesses were added.<sup>91</sup>

These possibilities have been investigated in two bodies of charters. The first sample is those datable to the twelfth century owned by Oxford colleges which were published in facsimile by H. E. Salter in 1929. After studying the facsimiles for indications that witness lists were later additions, a number were singled out for more scrutiny in the archives. The results are presented in Appendix A. This shows that it is possible—albeit without complete confidence<sup>92</sup>—to identify examples of this phenomenon even in non-photographic reproductions of charters. None of these Oxford examples have been remarked upon before. A more thorough approach is adopted in the second sample, which has been selected with a medieval archive in mind—namely, the forty-three charters before 1286 which survive from St Andrews Cathedral Priory in the National Library of Scotland, MS Adv. 15.1.18. This forms the largest element in a collection of 103 originals pasted into a book by the antiquary, Sir James Balfour of Denmilne (d. 1657).<sup>93</sup> (Each charter has subsequently been detached and is now kept in a brown envelope in a large box.) By taking the parchment itself rather than facsimiles as the starting-point, it is easier to go further than the most obvious indicators in detecting a break in writing between the

charter. Given that ruling was not essential (given the limited amount of writing and the lower scribal expectations than for books), it cannot be certain that this was so.

<sup>91</sup>It is not so unusual, of course, in the case of sealing on a tag attached to the bottom of a charter, for the bottom of the charter to be folded in such a way that parts of the last line of writing have been obscured. For the purposes of this discussion, therefore, particular interest is given to cases where it appears that scribes feared that the folding would obscure names of witnesses altogether. An example where only a very slight change in writing at the witness list can be detected, and the suspected addition of the witness list is supported by the folding for a seal-tag completely obscuring the name of a witness, see Edinburgh, National Archives of Scotland [NAS] GD 45/13/240: Cosmo Innes, *Liber Cartarum Sancte Crucis*, Bannatyne Club (Edinburgh, 1840) [henceforth *Holyrood Liber*], no. 35; Barrow, *Acts of William I*, no. 40 (1165 × 1170, probably 1165 or 1166).

<sup>92</sup>See Appendix AA.

<sup>93</sup>The pasted originals occupied the rectos of fols. 1–74, each accompanied by a brief description of the contents written by Balfour of Denmilne himself. This is followed by transcripts of other charters (fols. 75r–78v).

body of the text and the witness list. This has been identified in seven charters, as explained in Appendix B. The samples have no statistical validity, of course. Appendix B (the ‘St Andrews charters’), and to a lesser extent Appendix A (the ‘Oxford charters’), serve merely to illustrate ways in which closer palaeographical investigation may be conducted and more cases brought to light.

A simple explanation of this phenomenon is that the text of the charter was drawn up in advance of its being witnessed, and the names of the witnesses added only once they had come together.<sup>94</sup> This would, of course, mean that witnesses were present when they were named in the charter. It may be presumed that particular people were identified for inclusion, and that some care would have been taken with the order in which they appeared. On the other hand, there is some indication among the ‘St Andrews charters’ in Appendix B that names might have been added individually, or without previously knowing who would be included.<sup>95</sup> This sense that witnesses were recorded ‘on the spot’ would explain why testing clauses sometimes exhibit aspects of more current writing, or simply appear less disciplined than the rest of the charter, as if the scribe was working at a quicker pace.<sup>96</sup>

It is possible that the charter was prepared somewhere else before being brought to the gathering where it was witnessed. A charter for Margam Abbey dated by Robert Patterson to 1186 × 1191, written by the same scribe throughout, records an action begun at Margam itself

<sup>94</sup>In *Bracton* it is commented that doubt can be cast on a document ‘si in scriptura inveniatur diversitas calami et diversitas scribendi et diversa manus’ (‘if in the text there appears a difference of quill, a difference in writing and different hands’): *Bracton*, iv. 242 (translation adapted). On the face of it this could have applied if the testing clause looked too obviously different from the rest of the charter. It is unlikely that the cases discussed here, all with the same scribe writing text and witness list, would have been sufficiently obvious to cause any anxiety for the beneficiary. The most blatant cases of an added witness list that I have seen, moreover, belong half a century or more before *Bracton*.

<sup>95</sup>Names appear to have been added individually in NLS MS Adv. 15.1.18 no. 62, and lack of prior knowledge of who would be included can be inferred in no. 10.

<sup>96</sup>In addition to examples described in the appendices, note also NAS GD 45/13/223, *Holyrood Liber*, no. 11 (1153 × 1162), where the witness list has clearly been added later: the frequent use of an angled ascender for **d** in the witness list contrasts with the rest of the charter where straight-backed **d** is used throughout. Note also Stewart-Parker, ‘Methodological problems’, §3 (Reedy, *Basset Charters*, pl. iii), where the scribe’s writing, which is fairly ungainly in the body of the charter, becomes more untidy in the witness list.

and subsequently finished at the county court at Cardiff. Patterson drew attention to the fact that the witnesses at the conclusion of the action were added on a different occasion, following the statement ‘Necnon et in antedicto Comitatu de Kaerdif testes hii sunt inscripti’ (‘And moreover these witnesses were recorded at the aforesaid county court of Cardiff’).<sup>97</sup> Presumably the rest of the charter had been written at Margam, and had been brought to Cardiff with space left for the testing clause.<sup>98</sup> It has also been suggested, in the case of a straightforward charter of donation by Thomas Basset to his younger son, Alan, datable to 1180 × 1182, that the text describing the gift was written and the charter then taken to the symbolic transfer of the land where the witnesses to the ceremony were added to it.<sup>99</sup> A striking

<sup>97</sup>Patterson, *The Scriptorium of Margam Abbey*, 46; 108 (App. III, no. 37).

<sup>98</sup>Patterson suggested that the charter had initially been produced at Margam, and was then taken to Cardiff, before being returned to Margam where the Cardiff witnesses were added. The only reason he seems to have assumed (although he does not say so) that the Cardiff witnesses were not added at Cardiff is that they were included by the same Margam scribe who wrote the rest of the charter. It is feasible, however, to envisage that the scribe was one of the party from Margam who travelled with the charter to the county court, especially given his involvement in producing (and maybe also managing) Margam’s muniments: for an endorsement possibly by this scribe (Patterson’s Scribe 10), see *ib.* 108 (App. III, no. 36).

<sup>99</sup>William Stewart-Parker, ‘Methodological problems’, §11 (with an image of this charter at §3); Reedy, *Basset Charters*, no. 177 and pl. iii (TNA E 40/4612). The scribe of the charter identifies himself in the witness list as ‘Bartholomew the clerk who made this charter’, confirming the impression that he wrote both the body of the charter and the later testing clause. (The differences in writing between the body of the charter and the witness list identified by Stewart-Parker, ‘Methodological problems’, §8, can be explained by the scribe’s use of a stiffer nib, e.g., in the head of headed **a**.) The witness list is repeated in two charters in the same hand, nos. 178 and 182 (reproduced digitally in Stewart-Parker, ‘Methodological problems’, §§4 & 5: TNA E 40/4828 & E 40/4847), which are clearly dubious, being designed to represent the original donation as fully acknowledged by the donor’s first-born son and heir, who according to *Glanvill* (G. D. G. Hall, *Tractatus de Legibus et Consuetudinibus Regni Anglie que Glanvilla vocatur. The Treatise on the Laws and Customs of the Realm of England commonly called Glanvill* [hereafter *Glanvill*] (Oxford, 1965), 70) would need to have consented to the gift. Stewart-Parker, ‘Methodological problems’, §§14, 15, dates these convincingly to 1206. Although they are forgeries, there is a possibility that they were genuinely intended as fuller recollections of the ceremonies which attended the gift, but which had not been represented in the original charter. (The scribe, Bartholomew, was still alive: *ib.* §16.) As Stewart-Parker shows, Alan only became anxious about his position on his elder brother’s death. Equally, the forgeries could be an attempt to give retrospective legal force to the fact that his elder brother during his lifetime had allowed Alan to enjoy the lands given to him by their father.

example of the addition of witnesses ‘on site’ is in a chirograph of 1152 recording a purchase of land in Canterbury by the sub-prior of Christ Church from Baldwin Cauvel. Remarkably, both parts survive.<sup>100</sup> In each, the text of the agreement has been written by the same scribe, and a gap left at the bottom.<sup>101</sup> Both are sealed with Christ Church’s seal; in one, however, Baldwin’s autograph *signum* has been added at the bottom, with a statement by a second scribe that it was made on the feast of St Katherine (25 November). Only after this was a list of witnesses in two groups added to each part by a third scribe, spilling over onto the dorse on both occasions.<sup>102</sup> It appears that the text in the chirograph was prepared in advance, and then the chirograph taken to a gathering where the deal was concluded in front of witnesses from each party, and the chirograph cut in two.

It is not necessary to suppose that in every case where a witness list has been added that this was because a charter’s text was written prior to its being taken to the ceremonial completion of a transaction. The break in activity between writing the body of the charter and adding the testing clause could also have occurred because the choice of witnesses was a critical issue that had to be dealt with separately.<sup>103</sup> Not only was it desirable to wait until it was known who would be attending the gathering where the charter was due to be attested, but it was also necessary for both donor and recipient jointly or severally to agree on who, among those present, should be named as witnesses.<sup>104</sup> Finalising

<sup>100</sup>BL Lord Frederick Campbell Charter XXII. 2 (Warner & Ellis, *Facsimiles of Royal & Other Charters in the British Museum*, i. no. 29 (pl. xix) and Canterbury Cathedral Archives, Ch. Ant. C 1086 (William Urry, *Canterbury under the Angevin Kings* (London, 1967), pp. 391–3 (nos. ix and x).

<sup>101</sup>Unusually, both iterations of the text were written facing the same direction (rather than in opposing directions, as became common), which means that, in one part, the seal is attached to the top rather than the bottom.

<sup>102</sup>The first group ends ‘et aliis multis testibus’ (‘and many other witnesses’), followed by the next group, concluding with ‘et aliis multis’.

<sup>103</sup>It was not unknown for parties in a dispute to demand that the testimony of witnesses—even though they had been named in the charter—should be excluded because it was feared that, as the men of one of the protagonists, or blood relatives, they would favour the other side. See, for example, *Curia Regis Rolls of the Reigns of Richard I and John preserved in the Public Record Office*, vol. i, *Richard I–2 John* (London, 1922), 315 (William de Bosco versus William de Coleville re Muston, Leics, in 1200).

<sup>104</sup>If agreement alone, and not the physical presence of witnesses, was the only consideration, then it is difficult to see why the names of witnesses could not have been

the text of the charter and then determining who would be named as witnesses could therefore have taken place as two distinct steps on the same occasion.<sup>105</sup> A graphic example of this is Durham Cathedral Muniments 4. 9. Spec. 30, a draft charter of Roger of Kibblesworth recording an exchange of lands with Durham Cathedral Priory in the presence of Hugh bishop of Durham and the barons of the bishopric in the bishop's full court (the equivalent of a county court) at Durham on 3 March 1180.<sup>106</sup> The main difference between the draft and the final version of the charter (DCM 3. 6. Spec. 18, dated at the same court on the same day) is the witness list. In the draft it is almost wholly ecclesiastical; in the final, sealed version it is entirely lay. The sensitivity of the testing clause in this instance is also vividly revealed in the draft, where the witness list is on a separate piece of parchment from the body of the charter.<sup>107</sup>

Of course, as far as most charters are concerned the entire text, including witnesses, was written without any detectable break. They would, none the less, often have been drafted in some form beforehand. The draft charter of Roger of Kibblesworth captures for posterity not just the rejected witness list, but also some of the negotiations towards the final text, which are revealed by crossings out and additions.<sup>108</sup> It may be presumed that normally, as in this case, both the wording of the charter and the identity of the witnesses would have been established before a scribe finally took pen to parchment to produce the copy that would be sealed and retained. When this was a two-stage process, with the text finalised before the witnesses had been determined, it may not be surprising that, occasionally, the former was

determined at the same time as the rest of the text, and the charter duly written out and sealed at the end of the process.

<sup>105</sup>Presumably the essential facts would have already been agreed in earlier negotiations, possibly in a minute (for which see below, 266).

<sup>106</sup>See [http://www.dur.ac.uk/medieval.documents/pages/4-9-spec-30\\_i.htm](http://www.dur.ac.uk/medieval.documents/pages/4-9-spec-30_i.htm) and [http://www.dur.ac.uk/medieval.documents/pages/4-9-spec-30\\_t.htm](http://www.dur.ac.uk/medieval.documents/pages/4-9-spec-30_t.htm) (viewed 4 March 2010), by A. J. Piper, who corrects the date given in the printed edition: W. Greenwell, *Feodarium Prioratus Dunelmensis. A survey of the estates of the prior and convent of Durham compiled in the fifteenth century. Illustrated by the original grants and other evidences*, Surtees Soc. vol. 58 for the year 1871 (Durham, London, Edinburgh, 1872), 141–2.

<sup>107</sup>Presumably it was retained in the archives of the cathedral priory because it served as a memorandum of which clergy had been present when the charter was drawn up.

<sup>108</sup>The main alterations are discussed by Piper at [http://www.dur.ac.uk/medieval.documents/pages/4-9-spec-30\\_t.htm#](http://www.dur.ac.uk/medieval.documents/pages/4-9-spec-30_t.htm#) (viewed 4 March 2010).

engrossed before the latter was settled,<sup>109</sup> and that a draft charter may be found without a witness list.<sup>110</sup> The testing clause need not, however, have been contentious in every case. It is unlikely, for example, that there was much cause for disagreement between Alan Basset and his father about the choice of witnesses in the charter recording his father's gift of land to him.<sup>111</sup> Also, the exemplar of the sealed charter could even have been a clean version of the text, complete with testing clause, as in a charter for Lindores dated 29 August 1245 concluding a dispute with a neighbouring landholder.<sup>112</sup>

<sup>109</sup>Presumably those instances (such as Oxford, Magdalen College Archives, Sele 52 in Appendix A, below) where one or more witnesses were written along with the body of the text, and the remaining witnesses were added later, were because the first witness(es) were deemed to be uncontroversial.

<sup>110</sup>For an example nearly contemporary with the Durham draft charter discussed above, see Nicholas Karn, *English Episcopal Acta*, 31 *Ely 1109–1197* (Oxford, 2005), no. 113 (charter of Bishop Geoffrey, 6 October 1174 × 21 August 1189). This survives in two versions: one (evidently the final one) was confirmed; the other (with only minor differences, but lacking a witness list) survives as a single sheet (TNA E 326/39). In his discussion (152–3) Karn argues that TNA E 326/39 cannot be authentic. The main reasons he adduces for this (not enough parchment for the text; the script is less fluent than in other of Bishop Geoffrey's charters; charter finishes with 'testibus') all point to this as an original draft. He cites no convincing palaeographical reasons for assigning it to a later date. I am grateful to Dr Teresa Webber for her advice on this.

<sup>111</sup>They were all local or related to the Bassets: Stewart-Parker, 'Methodological problems', §10.

<sup>112</sup>NLS MS Adv. 15.1.18, no. 49. On one side there is the charter of 29 August 1245 recording the resignation to Lindores Abbey of land that had been dispute. There is no significant difference between it and the text found in the cartulary (John Dowden, *Chartulary of the Abbey of Lindores 1195–1479*, Scottish History Society (Edinburgh 1903), 60–1 (no. LV). On the other side there is the text of an agreement between the bishop of Aberdeen and the abbot of Lindores in 1259 (Cosmo Innes, *Registrum Episcopatus Aberdonensis*, Spalding Club, 2 vols. (Edinburgh, 1845), i. 26–7). The bottom of the parchment has been cut away, destroying any evidence of preparation for sealing, and removing the last part of the 1259 agreement, which may therefore have contained the witness list as found in the older cartulary of Aberdeen Cathedral (NLS MS Adv. 34.4.4, fol. 71r–v). (The damage to the side with the 1259 agreement is simply because it was pasted by Balfour of Denmilne into NLS MS Adv. 15.1.18 itself: it was not already defaced.) Again, there is no significant difference between the two copies. The original charter of 1245 cannot have been regarded as the final version, otherwise it would not have been used as scrap parchment for writing the text of the agreement of 1259. Either it was a final draft that was used as the exemplar of the copy that was sealed, or (even more circumstantially) it was intended for sealing, but suffered some accident in the process and was abandoned.

## THE EARLIEST STAGE OF RECORDING A WITNESS LIST

Drafts, not unnaturally, were only rarely retained in archives.<sup>113</sup> Those that do survive can often be envisaged as exemplars of the charter that was engrossed and sealed.<sup>114</sup> Is there any evidence of an earlier stage in the process of rendering a transaction in writing, a stage when the names of witnesses might have been recorded and subsequently repeated in the testing clause of a charter? The possibility that an initial piece of writing of this kind might, at least occasionally, be part of the process leading to a charter appears to have been recognised in *Bracton*. It will be recalled that, in *Bracton*, a charter could be accepted as valid if its witnesses testified that they had been present when a minute (*nota*) was agreed by donor and donee.<sup>115</sup> This suggests something different from the draft charters discussed above.<sup>116</sup> A draft charter was, at least as far as its tenor was concerned, a crucial step in establishing the final text. *Nota*, by contrast, implies something more limited where only the essential facts of a transaction were recorded. For the sake of being able to identify the witnesses, however, their names would presumably have been written in full, much as they would appear in the subsequent charter. In *Bracton* there is no implication that a *nota* alone would have sufficed: it is the charter, not the *nota* itself, which would have been proffered to the court.<sup>117</sup> If it lacked any independent status, then presumably it need not even have existed as a separate piece of parchment. Any writing that captured the essentials of a transaction and included a list of witnesses might notionally have been covered by the term as it appears in *Bracton*. Another potentially important difference between a *nota* and a draft charter is that, whereas a draft charter would

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<sup>113</sup>Some, at least, of the drafts mentioned above were prepared for sealing, and may have been retained as duplicates. For the sealing of draft royal charters as duplicates, even when of poor quality, see Bishop, *Scriptores Regis*, 33–5.

<sup>114</sup>For an exception in the case of a royal charter, see H. A. Cronne & R. H. C. Davis, *Regesta Regum Anglo-Normannorum 1066–1154*, vol. iv (Oxford, 1969), pls. xlvi & xlix, where two versions were prepared in advance. (For comment, see Clanchy, *From Memory to Written Record*, 2nd edn, 321.) On the face of it, it seems unlikely that this would occur in the drafting of a private deed.

<sup>115</sup>See above, 250; *Bracton*, iv. 241.

<sup>116</sup>It is clear from the context that it is quite different from a *notitia*, a note of a gift or concession that is not formally authorised by the donor or grantor, and which does not necessarily include a witness list.

<sup>117</sup>*Bracton*, iv. 241.

have been written on the day—or in anticipation of the day—that the final charter would be witnessed, this would not have been the case for a *nota*. It is conceivable that some time could pass before the engrossing and sealing of the charter itself.

The possibility that a witness list could have been recorded *in toto* in some form of writing preliminary to a charter means that there could, at least theoretically, have been occasions when the testing clause of a charter unwittingly included a witness who had died in the interim. There is very little hope of being able to distinguish this from a case of forgery if the charter otherwise lacks any suspicion of anachronism. The matter could only be settled if there was some indication of a *nota* of some kind from which the charter's witness list had been copied. This is hardly likely to be forthcoming, especially in the twelfth century when time-dates are rare even in royal charters.<sup>118</sup> None the less, one probable example can be identified.

The charter in question records the gift of Balfeith (in the parish of Fordoun in the Mearns) by Humphrey de Berkeley to Arbroath Abbey, and can be dated by the appearance of the future Alexander II in the *pro anima* clause to sometime after his birth on 24 August 1198.<sup>119</sup> One of the witnesses, Walter Scot the elder, however, had almost certainly died the previous winter.<sup>120</sup> Humphrey's charter includes a

<sup>118</sup>Professor Barrow has pointed to a charter of David I for Coldingham Priory dated to the Finding of the Holy Cross (3 May) 1147 (surviving as an original single sheet) which he argued could not have been engrossed and sealed before August, by which time one of the witnesses, John bishop of Glasgow, had died (G. W. S. Barrow, 'Witnesses and the attestation of formal documents in Scotland, twelfth thirteenth centuries', *Journal of Legal History* 16 (1995), 1–20, at p. 2; Barrow, *The Charters of David I*, no. 158, and discussion on pp. 128–9). He surmised that a fair copy was made, complete with witness list, at the time of the transaction in May (Barrow, 'Witnesses and the attestation of formal documents', 2; at p. 14, however, he refers to the witnesses as not being 'entered in the record' until August at the earliest). This hinges entirely on the proposition that no-one at Coldingham on 3 May 1147 could have said—as the scribe of the charter does—that King Louis and many Christians set out for Jerusalem that year. It is true that on 3 May King Louis had not yet departed, but many Scots must have already begun the journey (a point I owe to Professor Richard Sharpe). Could the reference to King Louis be proleptic, written in the belief that the Scots who were leaving or had already gone were part of a force led by the king of France?

<sup>119</sup>Cosmo Innes & Patrick Chalmers, *Liber S. Thome de Aberbrothoc*, 2 vols. Bannatyne Club (Edinburgh, 1848–56), i. 60–1 (no. 89), checked against the unpublished cartulary of Arbroath Abbey: London, British Library, MS Add. 33245, fol. 145v.

<sup>120</sup>What follows will be discussed more fully in an article on recording perambulations which I am preparing for a volume edited by Thomas Owen Clancy.

perambulation, which can be shown to have been copied from a record of the proceedings kept by Mael Brigitte, the king's *brithem* (Latin *judex*). Unfortunately Mael Brigitte's original text no longer survives. If it conformed with what is found in the fuller records of perambulations, it would have listed two groups of people: those who walked the bounds and those who literally oversaw the operation as witnesses, and could be called to testify that it was conducted lawfully.<sup>121</sup> On this occasion Walter was presumably one of the latter. It is likely, on the face of it, that the perambulation was conducted on the occasion when the gift was completed by delivery of sasine 'on site'. Walter and his fellow witnesses would consequently have been recorded as witnessing the ceremonial transaction of which the perambulation was a part. The most likely explanation, therefore, for the inclusion of Walter Scot the elder as a witness in Humphrey de Berkeley's charter, even though he was dead when the charter itself was written, is that Mael Brigitte's original record included a list of witnesses (in which Walter was named), and that this has been copied wholesale into Humphrey's charter to form its witness list.

How much of a time-lag was there between the completion of the gift 'on site' at Balfeith, including the perambulation, and the writing of the charter? If the witness list in Humphrey's charter was taken *en bloc* from Mael Brigitte's original record, then the most fertile source for dating is removed from consideration. The latest possible date for the charter is the date of the royal confirmation in which it is mentioned: 16 March in a year between 1199 and 1205, 'probably 1199' according to Professor Barrow.<sup>122</sup> As far as the perambulation and putative delivery of sasine itself is concerned, the key piece of evidence (assuming again that the witness list in Humphrey's charter was copied in its entirety from Mael Brigitte's record) is the mention of William the king's chaplain as a witness. William became chaplain sometime after 31 December 1196, the earliest date for his predecessor's last known appearance in the post.<sup>123</sup> This yields a date-range of 1 January 1197 × mid-January 1198 (the latest that Walter Scot could have taken to his

<sup>121</sup>Other examples where these two groups are listed separately can be found in Innes & Chalmers, *Liber S. Thome de Aberbrothoc*, i. 162–3 (no. 228); Dowden, *Chartulary of the Abbey of Lindores*, 26 (no. XXIII); Innes, *Registrum de Dunfermelyn*, no. 196. This phenomenon will be discussed more fully in the forthcoming article cited in n. 120.

<sup>122</sup>Barrow, *Acts of William I*, no. 413.

<sup>123</sup>*Ib.* ii. 32; no. 407.

deathbed). It will be recalled that the charter cannot be earlier than the birth of Alexander II on 24 August 1198. It would appear that the charter followed the formal completion of the donation by at least eight or nine months, and possibly by as much as just over two years.

Finally, there is no way of knowing how unusual Humphrey's charter might have been in taking its witness list from what is assumed to have been a record of the completion of the transaction 'on site', accompanied by a perambulation of disputed bounds. It is very difficult to see how a witness list with similar origins would be detected: no other evidence exists for any kind of official record of perambulations before the reign of Alexander II, and hardly anything survives from the central records that were kept.<sup>124</sup> At the same time, the circumstances behind it might not have been typical. The Balfeith case is the only indication that a *brithem* maintained such a record. The fact that Mael Brigitte was the first to be designated *judex regis* (*brithem rîg*, 'king's judge') makes it conceivable that he fulfilled novel functions of which this could (for all we know) have been one.<sup>125</sup> It is also possible that Humphrey, as sheriff of the Mearns, had readier access to Mael Brigitte's record for his own purposes than others might have had.<sup>126</sup> In the end, however, there is almost nothing to go on, and the problem has to be left unresolved. What is certain is that this example of how a witness list could have been first rendered in writing would not have occurred in England. Perambulations were not a subject of central record, as in Scotland.<sup>127</sup> Indeed, a concern for noting the bounds of lands has been

<sup>124</sup>Innes & Chalmers, *Liber S. Thome de Aberbrothoc*, i. 162–3 (no. 228), for reference to a perambulation that was 'found in that manner written in the rolls of the Lord King'.

<sup>125</sup>See G. W. S. Barrow, *The Kingdom of the Scots*, 2<sup>nd</sup> edn (Edinburgh, 2003), 61–5, for list of those referred to as *judex*, and 59 for Mael Brigitte (who Barrow calls Brice) as particularly prominent in royal *acta*, and as the possible originator of a royal enactment on *judices*. Mael Brigitte was active 1189 × 1221. Others mentioned as 'judex regis' in Barrow's list are Adam son of Mael Coluim in 1228, his brother Cairell (active as king's *brithem* 1225 × 1239), 'Bridin Potanach' (active 1227 × 1231), Thomas 'squire' (active c. 1250 × 1266), Donnchad (active 1250 × 1289), William of Fordel / Fordell (king's *judex* of Perth c. 1284 × 1290), and Roger 'Kayr' (c. 1330?). Instead of imagining a succession to a single office, though, it seems more likely that a *brithem rîg* was established in at least a few core areas (Angus and the Mearns, Perth(shire?) and Fife).

<sup>126</sup>Norman H. Reid and G. W. S. Barrow, *The Sheriffs of Scotland. An Interim List to c.1306* (St Andrews, 2002), 26 (taking 1199 from what has been reckoned to be the latest possible date of Humphrey's charter).

<sup>127</sup>Thomas Thomson and Cosmo Innes, *The Acts of the Parliament of Scotland*, vol. i, 1124–1423 (London, 1844), 114–15.

described as a distinctive feature of Scottish charters.<sup>128</sup> As such, it cannot have been something that was intended by the reference to a *nota* in *Bracton*. It may, none the less, have included the essential elements of a *nota*: the bare facts of the donation, and a full record of witnesses. The only difference between this and the putative record made by Mael Brigitte, *brithem rīg*, may have been the extra information in the latter about the bounds and the perambulators.

#### THE PRESENCE OF WITNESSES AND THE WRITING OF CHARTERS

In the first part of this study it was argued that the nagging anxiety about the presence of witnesses at the making of private deeds may be calmed by indications that exceptions were rare, and were confined to abnormal circumstances. In particular, letters to absent witnesses may be explained as a response to difficulties that could have arisen from a change in the role of charters in conveyances at the end of the twelfth century and early in the thirteenth. Indeed, one of them betrayed an expectation that witnesses would normally be present, an expectation that was also apparent in cases heard before royal justices and in *Bracton*. In the second part it was argued that palaeographical evidence can provide further reassurance for the presence of witnesses in some cases, while at the same time reinforcing the likelihood that this was generally regarded as an integral part of the process of creating a charter. It also became apparent, however, that text and witness list could be written at different points. The witnesses as a group could have been recorded in a *nota* which was subsequently written up as a charter months (or even a year or more) afterwards. On the other hand, the testing clause could have been the last element to be agreed, either because the selection of witnesses was a contentious issue, or because witnesses were only added when the charter was taken to the ceremony where the transaction was completed.

How does this relate to the argument that witnessing changed in this period, particularly in relation to private deeds recording the transfer of land?<sup>129</sup> At the outset witnesses were normally present at the event that

<sup>128</sup>John Hudson, 'Legal aspects of Scottish charter diplomatic', *Anglo-Norman Studies* 25 (2003) 121–138, at pp. 130, 131.

<sup>129</sup>Articulated in Stenton, *Documents Illustrative of the Social and Economic History of the Danelaw*, civ, followed closely in Thorne, 'Livery of seisin' (Thorne, *Essays in English Legal History*, 31–50, at pp. 45–6), who saw a 'decline of the charter witness' which could help in detecting the rise in livery of seisin. Stenton's discussion was also

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symbolised the transaction, as asserted in the frequent use of phrases such as ‘coram hiis testibus’ (‘in front of these witnesses’) at the beginning of the testing clause. When charters came routinely to precede livery of seisin—a change which, as we have seen, seems to have been well established in England by around 1230, at least in the context of livery of seisin by a donor’s agent<sup>130</sup>—witnessing the document and witnessing the ceremonial completion of the transaction became entirely distinct. In due course separate witness lists are found on the same document for the charter and for the completion of the transaction, as when a charter was endorsed with a memorandum of the livery of seisin, and those who witnessed it.<sup>131</sup> This move away from the presence of charter witnesses at the transaction and towards their witnessing the document alone can be traced, it has been suggested, through the declining frequency of phrases asserting their presence and corresponding increase in bland formulae such as ‘hiis testibus’ or simply ‘testibus’ in the late twelfth and early thirteenth centuries,<sup>132</sup> a change that has also been associated with the emergence of letters to absent witnesses in the same period.<sup>133</sup>

This is, of necessity, only an outline. There are exceptions: for example, it was possible before the last quarter of the twelfth century for witnesses to attest the document itself. The same phrases asserting the presence of charter witnesses at the event symbolising the transaction can also be found explicitly in relation to the making of the

followed closely in Haskins ‘Charter witness lists’, 321–2. Thorne in turn influenced Postles, ‘Choosing witnesses in twelfth century England’, 331, 344–6, although Postles also draws on the trend towards shorter witness lists and the increasing prominence of alternatives to attestation, including the *laudatio parentum*, the consent of the lord (either stated in the charter itself or by a separate charter), pledges, warrandice, and final concords. Most of these were expressed in charters, however, so presumably Postles would not subscribe to Thorne’s ‘decline of the charter witness’, although this is not clear (and is in tension with his idea that there was an ‘eclipse of attestation’).

<sup>130</sup>See above, 254–5.

<sup>131</sup>Kaye, *Medieval English Conveyances*, 64, referring to the fourteenth century. An example from the thirteenth century is cited in Stenton, *Documents Illustrative of the Social and Economic History of the Danelaw*, cv, n. 1, but the reference (BL Harley Charter 55 A. 26) is wrong. I have not succeeded in identifying the charter that Stenton intended.

<sup>132</sup>See Stenton, Thorne and Haskins cited in n. 129, above, in relation to the change in witnessing, and Postles, ‘Choosing witnesses in twelfth century England’, 333–4.

<sup>133</sup>Stenton, *Documents Illustrative of the Social and Economic History of the Danelaw*, civ.

charter.<sup>134</sup> A more serious challenge, however, is to the significance attached to the use of simple formulae introducing witness lists. In most of the charters in this study where the witness were added after the ink was dry on the body of the text, the testing clause begins with a standard form of word(s) ('Hiis testibus' or 'Testibus'), rather than with a phrase asserting their presence. This includes some examples, such as the first charter in Appendix B, in which (like the Basset charter discussed earlier)<sup>135</sup> the witness list appears to have been written at the time of the transaction itself. In the light of this it would be rash to draw any conclusions about the presence or otherwise of witnesses at the ceremony of the transaction because of the increasing use of such stereotyped formulae. It is perfectly feasible to envisage a charter whose testing clause begins 'Hiis testibus' being taken to the symbolic enactment of the transaction and having its witnesses added there. This also highlights a more fundamental point: the relevance of the distinction between transaction and charter in understanding the act of witnessing.<sup>136</sup> Before charters preceded livery of seisin it was possible for witnesses to be present at both transaction and charter, or simply the charter, or conceivably for a record of witnesses at the transaction to be used later to supply the testing clause, as in the case of Humphrey de Berkeley's charter. Even after charters routinely preceded livery of seisin, it is apparent in *Bracton* that witnesses might only have been

<sup>134</sup>For example, 'Huius carte sunt testes...' ('The witnesses of this charter are . . .'), in the charter of the donation of Inverkip church with parish, pennyland and pertinents to Paisley Abbey by Baldwin sheriff of Lanark sometime before 1172; Baldwin also explains that 'I am causing this charter to be written in the presence of men of standing' (cartam istam in presentia proborum virorum scribe facio): Cosmo Innes, *Registrum Monasterii de Passelet*, Maitland Club (Edinburgh, 1832), 112–13. (I am grateful to Professor Barrow for originally drawing this to my attention.) Other examples are cited in Postles, 'Choosing witnesses in twelfth century England', 345 and n. 53. For an example of witnessing the document itself (a royal charter in this case) from early in the Anglo-Norman era, see David Bates, *Regesta Regum Anglo-Normannorum. The Acta of William I (1066–1087)* (Oxford, 1998), no. 340, which provides a putative link with pre-Conquest witnessing of royal diplomas.

<sup>135</sup>See above, 262.

<sup>136</sup>The scholarship on this often important distinction has its roots not in the question of witnessing, but in problems of dating (summarised in A. Giry, *Manuel de diplomatique* (Paris, 1894), 586–9). The distinction (at least as applied in Olivier Guillot, *Le comte d'Anjou et son entourage au XIe siècle*, 2 vols. (Paris, 1972), ii. 17) has been queried in passing in Dominique Barthélemy, *The Serf, the Knight and the Historian*, trans. G. R. Edwards (Ithaca & London, 2009), 20 n. 29.

involved at the stage when a *nota* was written, and need not have seen the charter in its final form, either as text or as a sealed single sheet. This shows that, by this period, the transaction immortalised by the charter was the commitment to make a gift, sale or exchange, not the ceremonial completion of the conveyance by the livery of seisin on the land or within sight of it. The change in the role of charters in the process of conveyancing did not, therefore, alter the relationship between transaction and charter. It was the nature of the transaction immortalised in the charter that changed—from a ceremony combining the statement of the gift with the giving of seisin, to the act of gift-giving alone.<sup>137</sup>

The fact that witnesses could be recorded at different stages suggests that the charter and the transaction it represented were regarded as parts of a single process.<sup>138</sup> Performing the transaction and drawing up the charter doubtless occurred frequently on the same occasion, but when they did not, the witnesses recorded in the charter were still giving an undertaking to support the transaction and its charter should they be challenged in court. In *Glanvill* (probably written in the late 1180s), a witness named in a charter could be asked to fight a duel if the charter was disputed.<sup>139</sup> At whatever stage the witnesses were present, the central idea was that they were there when their names were rendered into writing.

#### INDIVIDUAL WITNESSES AND THE WRITTEN RECORD

How involved might witnesses have been in the process of recording their names? Presumably they would have been aware that this was happening. Even if they were not yet familiar with charters, they would at least have appreciated what Michael Clanchy has referred to as writing's 'rich reserve of awe and faith' derived from the sacred—and

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<sup>137</sup>Thorne, *Essays in English Legal History*, 31–50, at p. 47: 'the preliminary transaction—the *sala*, or as it will now be called, the *donatio*—still retains its predominant place in the conveyance'; and at p. 49, 'the jural act of transfer is found in the *donatio*'.

<sup>138</sup>Note Barrow's observation that those named in the testing clause 'were witnesses of the event, the transaction, the deed or act. They were not, in theory at least, witnesses of the subsequent record or document, although their testimony may have extended to the sealing of the document': Barrow, 'Witnesses and the attestation of formal documents', 2.

<sup>139</sup>*Glanvill*, 127.

thereby eternal—associations of script.<sup>140</sup> In the corpus of Scottish charters before 1286 there are a few individuals who are identified consistently in an unusual manner—so unusual, indeed, that different scribes, left to their own devices, would hardly have done this independently. Could this mean that the witnesses themselves had a say in how they were represented? The regular appearance of someone in an unorthodox guise can be explained without supposing any kind of direct link between witness and scribe. Earl Gospatric (d. 1138), for example, is repeatedly identified simply as ‘brother of Dolfin’ rather than by reference to his father or to his title.<sup>141</sup> If this was how he was generally known, this would naturally have been how a scribe would record his name. No distinction, therefore, could be assumed between standard scribal practice and the witness’s preference. Another approach would be to examine draft charters—very rare though these are—in the hope of catching the odd instance where a scribe has altered a name. If this was not apparently the correction of a mistake, then could it be because the witness wished to be referred to differently? An apparently trivial example could be the crossing out of ‘Puteacensi’ by the scribe who wrote the draft witness list for the charter of Roger of Kibblesworth. He had originally written ‘Willelmo Puteacensi Archidiacono’ (‘William du Puiset, archdeacon’), which was not an error: William du Puiset was archdeacon of Northumberland.<sup>142</sup> But perhaps William preferred to be simply ‘William the archdeacon’. If this is, indeed, an example of a witness insisting that he be rendered a particular way, it can hardly be regarded as indicative of a widespread phenomenon. Not only is the evidence rare and exiguous, but the witness’s literacy is likely to have been a factor, an advantage that only a minority would have had, of course.

To take this forward, what is needed is an aspect of recording names which scribes had a standard way of dealing with, but which none the

<sup>140</sup>Clanchy, *From Memory to Written Record*, 2nd edn, 327.

<sup>141</sup>The evidence is fully discussed in Richard Sharpe, *Norman Rule in Cumbria 1092–1136*, Cumberland and Westmorland Antiquarian and Archaeological Society, Tract Series vol. xxi (Kendal, 2006), 34 n. 80, where it is also pointed out that Gospatric’s brother, Waltheof lord of Allerdale, is described as ‘brother of Dolfin’ in a Scottish rather than Cumbrian context. Gospatric’s designation and his rare appearance with his title are also discussed in Elsa Hamilton, *Mighty Subjects. The Dunbar Earls in Scotland, c.1072–1289* (Edinburgh, 2010), 260–1.

<sup>142</sup>Diana E. Greenway, ‘Archdeacons: Northumberland’, *Fasti Ecclesiae Anglicanae 1066–1300*, vol. ii, *Monastic cathedrals* (London, 1971), 39–42.

less allowed for some exceptions. These exceptions, if found consistently applied to a particular witness, could therefore represent that individual's choice, rather than the scribe's. Scotland offers fertile ground for this in the treatment of Gaelic names. There are some for which Latin forms soon became established (some probably through English rather than directly from Gaelic). The most notable examples are 'Mael Coluim' and 'Donnchad', which were rendered 'Malcolmus' and 'Dunecanus' (with minor variation in the spelling of each). There were also Gaelic names which acquired conventional Latin equivalents (probably through French), such as 'Gillebertus' for Gaelic 'Gille Brigte', 'Bricius' for Gaelic 'Mael Brigte', and (in one case, at least) 'Rolandus' for Gaelic 'Lachlann'.<sup>143</sup> Not all witnesses were bedecked in such Latin garb, however, providing scope for exceptions that could be significant—although only if there is striking consistency for a particular individual.

One example is Mael Coluim, *brithem* of Fife in 1165–6 (at the very least), who is always represented as a version of Gaelic 'Mael Coluim' rather than Latin 'Malcolmus'.<sup>144</sup> Given his position as *brithem* it is likely that he was literate (probably in Gaelic as well as Latin), and so might have been able to engage more readily in the process of having his name recorded than would most other witnesses. Literacy in Gaelic can less readily be assumed, however, in the case of Gille Brigte, earl/*mormaer* of Angus (who died in 1189, and first appears as a witness in a charter of David I). He is always 'Gille Brigte' (usually rendered 'Gillebride', or simply 'G' or 'G'), rather than 'Gillebertus', the

<sup>143</sup>Roland son of Uhtred appears in a witness list as 'Lohlan filius Huddredi' in Keith J. Stringer, 'Acts of lordship: the records of the lords of Galloway to 1234', in *Freedom and Authority. Scotland c. 1050–c. 1650. Historical and Historiographical Essays presented to Grant G. Simpson*, ed. Terry Brotherstone & David Ditchburn (East Linton, 2000), 203–34, at p. 213 (no. 6).

<sup>144</sup>Mael Coluim appears as a witness in four charters, two with identical witness lists: *St Andrews Liber*, 241–4, 246–7, two datable to 31 December 1163 × 8 April 1178, the others to 31 December 1163 × 8 December 1166 and 28 March 1165 × 1171, which means he must have been active as *brithem* at least 28 March 1165 × 8 December 1166. In all four occasions he is 'Malcolm iudice' (with 'de Fife' added in the last). A previous *brithem* of Fife is attested 1160 × 1162 (Norman Shead, *Scottish Episcopal Acta*, vol. i (forthcoming), no. 154: I am grateful to Norman Shead for giving me access to his edition in advance of publication). 'Malcolm' was the form used on the seal of King Mael Coluim IV (1153–1165): Barrow, *Acta of Malcolm IV*, 72; for comment, see Dauvit Broun, 'Gaelic literacy in eastern Scotland between 1124 and 1249', in *Literacy in Medieval Celtic Societies*, ed. Huw Pryce (Cambridge, 1998), 183–201, at p. 184.

conventional Latin equivalent, in the thirty-two charters (mainly royal) where he is a witness.<sup>145</sup> In contrast, the earl/*mormaer* of Strathearn from 1171 to 1223 is (with one dubious exception) always ‘Gillebertus’ rather than ‘Gille Brigte’,<sup>146</sup> at least when he was earl—again, possibly reflecting deliberate choice: his background and earldom was at least as Gaelic as that of Gille Brigte of Angus.<sup>147</sup> He may not always have been ‘Gillebertus’ in this context, though. In the only charter attested by him before he became earl (Mael Coluim IV’s charter establishing Scone as an abbey, 1163 × 1164), he appears in the oldest copy as ‘Gillebride’ (i.e., ‘Gille Brigte’).<sup>148</sup> This would reinforce the impression that his appearance as ‘Gillebertus’ was his choice, a decision he may have made on becoming earl.<sup>149</sup>

Perhaps we should imagine that Mael Coluim, *brithem* of Fife, and Gille Brigte, earl/*mormaer* of Angus, always gave their names in Gaelic

<sup>145</sup><http://www.poms.ac.uk/db/record/person/110/>. The one exception is Barrow, *Acts of Malcolm IV*, no. 190 (pp. 228–9), which survives only in a copy by Sir James Balfour of Denmilne. In the introduction to his edition of this charter, Professor Geoffrey Barrow observed that, ‘although Balfour was incapable of making a correct and careful copy of a medieval Latin document, it must be said that the purported charter of Malcolm IV here given shows fewer traces of blundering inaccuracy than are usually to be looked for in a document of this provenance’: G. W. S. Barrow, ‘The earls of Fife in the twelfth century’, *Proceedings of the Society of Antiquaries of Scotland* 87 (1952–3), 51–62, at p. 52 (edition at p. 60; discussion of authenticity at pp. 52–4). There can be little doubt that ‘Gilberto’ here is a mistranscription by Balfour. For an example of a copy with ‘Gilleb’, see n. 148, below.

<sup>146</sup>This is also true in charters written in his name. No charter of Earl Gille Brigte of Angus survives.

<sup>147</sup>This contrast between Earl Gille Brigte of Angus and Earl Gilbert of Strathearn is noted in Hammond, ‘A Prosopographical Analysis’, 67. The one occasion when Earl Gilbert of Strathearn appears in a witness list as ‘Gille Brigte’ is in a cartulary copy: Barrow, *Acts of William I*, no. 282, where, significantly, he appears immediately after Earl Gille Brigte of Angus. Of the two manuscripts cited, the later one (NLS MS Adv. 34.4.2, mid-fourteenth century: Davis, rev. Breay, Harrison & Smith, *Medieval Cartularies*, #1118) renders Gilbert as ‘Gille Brigte’; the earlier one (Dundee, City Archives, GD 130/25/17, the ‘Ethie MS’, mid-thirteenth century: ib. #1117) gives the earl of Angus as ‘Gillebrid’, and the earl of Strathearn as ‘Gilleb’. A similar discrepancy is found between two manuscripts in Barrow, *Acts of Malcolm IV*, no. 243 (see next note), but in this instance the Gaelic form is found in the earlier copy.

<sup>148</sup>Barrow, *Acts of Malcolm IV*, no. 243 (n. 1). The oldest cartulary of Scone Abbey is NLS MS Adv. 34.3.29 (incomplete) from the second quarter of the fourteenth century (Davis, rev. Breay, Harrison & Smith, *Medieval Cartularies*, #1179). The later cartulary, NLS MS Adv. 34.3.28, is fifteenth century (and later) (ib. #1180), and reads ‘Gilleb’.

<sup>149</sup>Or perhaps on his marriage to Matilda d’Aubigny, although the date is unknown.

when scribes noted them down as witnesses, while Gille Brigitte (or should we say Gilbert, or Gilebert), as earl/*mormaer* of Strathearn, always gave it in French. It would be easier, however, to assume that scribes would normally apply the conventional Latin form or equivalent name regardless of the language used by the witness themselves. For example, Mael Coluim, earl/*mormaer* of Atholl, who was the same generation as Gille Brigitte of Angus (he died 1187 × 1198 and first appears in the 1150s), and also came from and operated within a Gaelic milieu, is almost always ‘Malcolmus’. In one of the twenty-five charters in which he is a witness—a charter of William I for St Andrews Cathedral Priory datable to 1173 × 1178—however, he is rendered in Gaelic (as ‘Malcolm’).<sup>150</sup> This cannot have been the only time he would have identified himself as ‘Mael Coluim’. It must be assumed that, on most occasions, the scribe ‘translated’ this into Latin ‘Malcolmus’ in keeping with the language of the document. This would confirm the expectation that scribal preferences (or simply habits) would often have been decisive in most cases. This could extend to scribal idiosyncrasy, as in two original royal charters for Melrose Abbey in the same hand, where some witnesses are rendered in French.<sup>151</sup>

The picture that emerges from this evidence is of a range of possible relationships between scribe and witness. At one end of the spectrum, the scribe is wholly in charge, as in the case of the Melrose scribe with a penchant for French. At the other extreme, there were witnesses who seem to have insisted that Gaelic or Latin be used. This is particularly obvious in those charters where Gilbert, earl/*mormaer* of Strathearn, and Gille Brigitte, earl/*mormaer* of Angus, appear together.<sup>152</sup> It is possible

<sup>150</sup><http://www.poms.ac.uk/db/record/person/238/>. The one occasion is Barrow, *Acts of William I*, no. 150.

<sup>151</sup>Barrow, *Acts of William I*, nos. 264 and 265 (1180 × 1193, probably 1185); G. W. S. Barrow, ‘French after the style of Petithachengon’, in *Church, Chronicle, and Learning in Medieval and Early Renaissance Scotland. Essays presented to Donald Watt*, ed. B. E. Crawford, (Edinburgh, 1999), 187–93, at p. 189. See also Richard Sharpe’s discussion at p. 86, above. Both these charters survive as original single sheets (NAS GD 55/42 and BL Cotton Charter XVIII. 15); the same scribe was responsible for NAS GD 55/39 and GD 55/41, neither of which exhibit the same propensity for French forms. For a scribe who showed knowledge of Gaelic orthography in his rendering of proper nouns, see Broun, ‘Gaelic literacy in eastern Scotland’, 194–6.

<sup>152</sup>In Barrow, *Acts of William I*, nos. 150, 197 and 251 the names are rendered without abbreviation; in nos. 137, 153, 205 and 272 they are distinct. In no. 345 (from the latest cartulary of Arbroath Abbey, BL Additional MS 33245, written after 1531: Davis, rev.

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that there were others who, like the earl of Strathearn, actively preferred a non-Gaelic equivalent of their name, but cannot—particularly in the absence of a foil like Earl Gille Brigte—be distinguished from those whose names were rendered according to standard scribal practice.<sup>153</sup> In the middle there were, no doubt, the majority of scribes and witnesses who did not have strong feelings either way, and for whom the Latin of the documents meant that Latin forms or equivalents, if available, would have seemed the most natural option. The degree of variation that could occur, at least in the reigns of David I and Mael Coluim IV, is vividly illustrated by David I's *rannaire*, Alguine mac Arcuil. He appears in twelve witness lists with 'mac' and in twelve others with 'filius' (and four more as simply 'Alfwinus').<sup>154</sup> There is no obvious pattern to this in relation to his career or the place-date of the charter, or the company he was in. He is, however, the only case with 'mac' that shows this flexibility.<sup>155</sup>

If some witnesses, even if only a tiny minority, were more actively engaged than others in how they were recorded for posterity, this could allow charter witness lists to yield more information about at least a few individuals than what can be seen and deduced from their presence with others in attesting a particular deed. It could reveal something vital about how they wished to be known. It is true that, if we wish to access someone's public identity, we would first look at their seal. For many in this period, of course, no legible seal survives. The public identity in the act of witnessing is, however, significantly different. Unlike a seal, it would have involved a repeated announcement of who you were. As such it has the potential—perhaps only in some special cases—to bring

Breay, Harrison & Smith, *Medieval Cartularies*, #1119) they are both 'Gilleb' (which is hardly sufficient evidence to break the pattern).

<sup>153</sup>There is no simple trend of 'Gillebertus' replacing 'Gille Brigte' in the East during the twelfth century. For a 'Gille Brigte' (rendered 'Gilbrid') as a witness in the early thirteenth century, see the charter of Fergus, earl of Buchan, in J. Robertson, *Collections for a History of the Shires of Aberdeen and Banff*, Spalding Club (Aberdeen, 1843), 407–9.

<sup>154</sup><http://www.poms.ac.uk/db/record/person/206> (with thanks to Amanda Beam).

<sup>155</sup>There are even two charters on the same day (11 June 1150) and therefore potentially by the same scribe in which Alguine appears with 'filius' alongside others in the witness list (Mac Bethad and Gille Coluim) who have 'mac' (Barrow, *The Charters of David I*, nos. 171 and 172). The simplest explanation would be that 'mac' here was functioning as a surname rather than as a patronymic, i.e., Mac Bethad Mac Torfinn and Gille Coluim Mac Cimbaetha. The latter surname is found about thirty years earlier attached to a certain Gille Pátraic (<http://www.poms.ac.uk/db/record/person/597/>).

us closer to some individuals than would have been thought feasible. In a Scottish context this allows us to glimpse some of the choices that those with a Gaelic background made in this period of cultural interaction and change, showing both the espousal of French, and the continuing vitality of Gaelic in a public context in the kingdom's historic core throughout most of the twelfth century. An awareness of the circumstances in which witnesses were recorded, and of how there was a possibility for witness as well as scribe to take an active interest in this process, should, however, give this evidence not only greater freedom from anxieties about whether witnesses were actually present or not, but also a clearer grasp of its validity and potential as a resource for historians.

## APPENDIX A

Charters with witnesses written on a separate occasion identified in H. E. Salter, *Facsimiles of Early Charters in Oxford Muniment Rooms* (Oxford, 1929).<sup>156</sup>

Salter no. 4 (27 January 1144).

**Oxford, Magdalen College Archives, Sele 52**

*William de Braose's confirmation of the gifts of his grandfather and father to Sele. The testing clause begins 'ad hanc confirmationem Willelmi de Braosia fuit'.*

The first three names of those present are in the same bold bookhand as the body of the charter; the following names are written with a thinner nib and smaller letters—but very likely by the same scribe (note the curious **W**, and forms of **g** and ampersand). The opening words of the testing clause assert the presence of the witnesses at the transaction. The first two witnesses are the bishop of Chichester and the prior of Sele; the third is Oliver the clerk. It may be surmised that the first two were so important that they were bound to be included. Oliver the clerk may have been included because he was the scribe and knew he would be present. A large amount of parchment has been left over—about 15cm, with the bottom 4.5cm folded up with two holes inserted for a chord for the seal. The parchment has been folded in advance: the bottom is uneven.

Salter no. 7 (?1139 × 1160).<sup>157</sup>

**Oxford, Magdalen College Archives, Clapham 1**

*Ralph de St Ouen gives half the tithes from an assart to Sele Priory. The testing clause begins 'Hii sunt testes'.*

The writing is by the same scribe throughout, but is thicker from final syllable of 'hii sunt testes'—although it is not consistent prior to this. The most significant feature is that it is less disciplined after 'testes'. Also, despite there being no sign of ruling, the writing before this point is straight and orderly, but slopes down in the witness list. In lines 1–5 there is 0.5cm between each line; there is less of a gap between lines 5 and 6 (the last complete line of text before the witness list). In the witness list (lines 7–10) lines 7 and 8 slope down; line 9 is more even; line 10 (which only runs half the length of a line) is uneven and squashed. The last line is about 1.7cm from the bottom of the parchment. There is a slit for a seal tag 0.4cm below 'valet'.

<sup>156</sup>I would like to thank the librarians and archivists who made it possible for me to examine these charters, particularly Eva Oledzka (Special Collections and Western Manuscripts, Bodleian Library), for her assistance in locating the Christ Church deeds, and Dr Robin Darwall-Smith (Archivist, Magdalen College), for making me so welcome.

<sup>157</sup>The dates throughout are Salter's (expressed in a more modern fashion).

Salter no. 14 (1120s).

**Oxford, Bodleian Library MS DD Queen's Deeds 120**

*Gift by Henry de Port of a manor, church, mill, tithes and other lands to the monks of Cerisy-le-Foret. The witness list is introduced with small crosses above the names of the first, second, third, fourth and sixth witnesses.*

Only a small proportion of this sheet of parchment is occupied by the text of the charter. There is, moreover, a substantial gap between the body of the charter and the witness list. The sheet is 31×43cm. Just over half its length (25cm out of 43cm) is ruled in plummet, of which only 14cm is used for the body of the charter. The writing is careful to avoid the central horizontal fold in the parchment. Between the body of the charter and the witness list there is a gap of about 18cm. The witness list occupies 4.2cm of unruled parchment, leaving a gap of 6cm at the bottom which has been folded to the bottom edge of the writing. The witness list is therefore treated on the parchment as a separate entity which even avoids the unused plummet lines. It appears that the parchment sheet is much too large for the text, and the division of witness list from the body of the charter is an attempt to claim the whole sheet for the charter-text. The writing in the witness list is larger, slightly darker, and more angular (notice especially the contrast between **e** in the witness list and the body of the charter, and also the tail of **g**). This could suggest that a stiffer quill was used when writing the witness list. It is probable that the same scribe wrote both charter-text and witness list.

Salter no. 52 (1160s).

**Oxford, Magdalen College Archives, Brackley D. 248**

*Gift of twenty-three acres by Gilbert de Monte to the hospital of Brackley, and confirmation of agreement. The testing clause begins 'His testibus'.*

Text and witness list have been written by the same scribe. From 'his testibus' the nib is noticeably thicker and the writing less disciplined. 5.1cm has been left blank at the bottom, allowing the parchment to be folded over twice and a hole inserted through which a chord for the seal has been passed.

Salter no. 60 (1149/50).

**Oxford, St John's College Muniments V. A. 3**

*Notification by Walter, archdeacon of Oxford, that his rustici of Walton, on the occasion of the dedication of the church of St Giles outside the north gate of Oxford, gave their tithes to that church, with his assent and goodwill. He grants, desires and instructs that this be so for God's sake. The testing clause begins 'Teste'.*

The parchment is small (11.2cm×5.1cm) with 0.6cm blank at bottom above the tongue for the seal. There are 8 lines of writing: the first 4 lines are written neatly in light brown ink, followed by 4 lines of witnesses written in darker brown ink with a slightly stiffer pen. The stiffer pen in the witness list, perhaps combined with a willingness to use a slightly lower register, could account for differences in the treatment of **a**: in the witness list either **a** has no head or,

when it does, the head is small and squashed in appearance, while in the body of the charter (lines 1–4) the body of the **a** is fuller and is usually headed (with some instances of a pronounced longer head). It is very likely that the same scribe wrote both body and witness list: note the **W**, the tail of **g**, and elongated squashed appearance of **E**. (Occasional blotches in the writing are presumably due to the quality of the parchment.)

Salter no. 65 (1130 × 1142).

**Oxford, Bodleian Library, MS DD Christ Church Blue Box 7 O. 882**

*Robert d'Oilli gives and grants various mansions to the monastery of Osney. The testing clause begins 'Test[ibus]'.*

The parchment measures 20.5×9cm before folding of the bottom by 1cm, obscuring part of last line of writing. From 'Testibus' a finer nib has been used in writing the witness list. It is very likely written by the same scribe throughout: note the Tironian 'et', **W** and **H**.

Salter no. 75 (before 11 October 1163).

**Oxford, Bodleian Library, MS DD Christ Church Blue Box 21 O. 883**

*Henry d'Oilli grants and by this charter confirms the gifts of his father to Osney. The testing clause begins 'T[estibus]'.*

The parchment measures 22.5cm×10cm, with the bottom 1.7cm folded up. From 'Testibus' the character of the writing changes, the body of letters is smaller and the ink lighter. It is very likely the work of one scribe (notice **W** and **S** in particular), but writing in a slightly lower register in the witness list (note also the occasional long **r**). The parchment has been ruled in plummet: before folding four lines were left blank at the bottom with a gap below the last ruled line; this was folded almost up to the descenders of the last line of writing.

#### APPENDIX AA

Charter appearing in facsimile to have had witnesses written on a separate occasion, but this was not confirmed in the original.

Salter no. 24 (before Michaelmas 1162).

**Oxford, Bodleian Library, MS DD Queen's Deeds 30**

The writing of the witness list is slightly larger (compare, for example, **W**) and the nib might be slightly less pliable. The increasing size in the writing, however, becomes more apparent as the list continues. Also, the untidier appearance of the witness list compared with the body of the charter could simply be a function of the greater use of capital letter-forms (majuscule or enlarged miniscule). The charter is written by the same scribe throughout. It is not clear, therefore, that the witness list—despite the differences with the main body of the charter—was written on a separate occasion.

## APPENDIX B

Palaeographical indications for the addition of the witness list on a separate occasion in charters originally from the archive of St Andrews Cathedral Priory surviving in NLS MS Adv. 15.1.18.<sup>158</sup> (In all these cases it is clear that the same scribe wrote both the body of the charter and the witness list.)

**No. 10** (20 November 1160 × 24 January 1162, very likely soon after 20 November 1160).<sup>159</sup>

*Bishop Arnold decreed that the altar oblation formerly held by seven 'persone' not living communally should be granted to the regular canons. The attestation begins 'T. his'. Twenty-six witnesses are named.*

On the face of it this looks like a scribe who badly misjudged the space he needed for the text before him when engrossing the charter. On closer inspection there are a number of indications that he was unaware when writing the charter that he would have to include so many witnesses.

There are thirteen lines of writing (the last runs to only a third of a line). Lines 1 to 9 have been ruled with gaps of between 85mm and 100mm between

<sup>158</sup>See above, n. 93, for the nature of this collection. Unless otherwise indicated, dates have been taken from Professor Donald Watt's typescript handlist of the charters in MS Adv. 15.1.18 which is kept in a folder along with the charters.

<sup>159</sup>Barrow, *Acts of Malcolm IV*, 14–15, suggests plausibly that the witness list of this charter should be read with that of Bishop Arnold's general confirmation of the possessions and revenues of St Andrews Cathedral Priory (*St Andrews Liber*, 130–2), and with Barrow, *Acts of Malcolm IV*, no. 176, as giving some indication of those who stayed on with the king after the consecration of Bishop Arnold on 20 November and the king's celebration of Christmas at Perth. Certainly the impressive line up of prelates and magnates, led by William bishop of Moray and papal legate and three other bishops, and including the earls of Strathearn, Atholl, Angus and Fife, in the witness list of this charter would be consistent with a major event which, given the nature of the deed, might naturally have occurred at St Andrews. The most likely occasion would have been Bishop Arnold's consecration—all the more so given the presence of Bishop William as legate. All twelve witnesses of the royal confirmation-charter at Perth (Barrow, *Acts of Malcolm IV*, no. 176) (not including Bishop Arnold himself) were among the witnesses of Bishop Arnold's charter. (Barrow is surely correct in suggesting that 'Comite Feregus' in Barrow, *Acts of Malcolm IV*, no. 176 is a miscopying of 'Comite Ferther': *ib.* 220 n. 1.) It is highly probable, therefore, that those named as witnesses in the confirmation charter followed the king when he retired to Perth after the consecration, so that this, too, should be dated to probably soon after 20 November. (The latest absolute date-limit of 13 September 1162 given by Barrow should be amended to 24 January 1162, the date of Bishop William's death given in the Holyrood Chronicle: M. O. Anderson, with additional notes by A. O. Anderson, *A Scottish Chronicle known as the Chronicle of Holyrood*, Scottish Texts Society (Edinburgh, 1938), 139.)

them. There is no ruling for line 10, leaving a gap of 150mm between the ruling for lines 9 and 11. There is ruling for lines 11 and 12, with a gap of 60mm between. There is no ruling for the last line. This suggests that the scribe originally expected only nine lines of writing, which would correspond to the body of the text (which runs to four-fifths of line 8) and space for about half a dozen witnesses (with the possibility of adding a few more in the area below the last ruled line). It appears, then, that the scribe had no forewarning that the charter would be attested by more than four times this number. Needless to say, the writing becomes noticeably cramped from line 10 as he tried to squeeze more names into the remaining space.

There are other indications that support this view. Looking at the writing itself, the scribe showed no concern for space earlier on, allowing the last few lines of the body of the text to be written slightly larger than lines 2 to 5. This lack of concern is most marked at the beginning of the attestation itself, where a gap has been left between the last word of the body of the text ('confirmamus') and 'T. his' (standing for 'Testibus his'). The first two witnesses (William bishop of Moray, legate of the apostolic see; Gregory bishop of Dunkeld) are written smaller than the last lines of the body of the text, but not smaller than the smallest writing earlier in the charter. From the next witness (Andrew, bishop of Caithness) the nib is thinner. To compensate for the effect of this on the articulation of the writing, there is more pronounced clubbing at the top left of minims or similar strokes (note especially the **r** in 'Andrea, Brechens', Mailr', Aluredo, archid' ', but less pronounced from 'camerario' onwards, line 11); note also that the feet of minims and **r** take the shape of flicks following the tracery of the hand. Although the writing changes in these ways, there is no reason to doubt that it is by the same scribe (notice, for example, **A**, **W** and **g**).

The overall impression, then, is that scribe was still unaware of the number of witnesses that would be recorded even after he had started to write the attestation clause, and took measures to remedy the problem as it unfolded. Presumably the ruling for lines 11 and 12 but not line 10 is because, as the process of adding witnesses continued, he felt that having ruled lines would help him to squeeze names in without creating an unsightly mess. Judging by the torn-off section where the seal-tag would have been, a couple of lines of witnesses would have been obscured when the parchment was folded in preparation for sealing. This could not have been avoided, given the small amount of space left at the bottom after the witnesses had been added.

**No. 12** (1152 × 1159).

*Bishop Robert of St Andrews has given and granted Kinninmonth with the toft of Kilrimund to the cathedral priory of St Andrews. Includes anathema. Attestation clause begins with 'T'. Fifteen witnesses are named.*

There is regular ruling in plummet from top to the bottom of the parchment before it was cut and trimmed: twelve ruled lines in all (not including the

remains of a ruled line at the top edge of the parchment). The witness list (from the last quarter of line 5 to the first third of line 8) is in same hand as the text, but the writing is larger and lateral compression less, giving the impression that it was written with less discipline on a different occasion. This could also explain a curious feature of the slits for the seal-tag. Unlike no. 10, a more than adequate amount of the parchment has been left spare for folding in preparation for sealing. There are two slits of similar proportions (on the eighth and twelfth ruled line), and another longer, more uneven slit just below the top one (roughly on the ninth ruled line). The two similar slits may have been intended originally to take the seal-tag. If so, the folded parchment would have obscured the last witnesses. This could have been adjusted by folding the parchment in line with the lower of the top slits. If this slit was an afterthought, then this could account for its irregular nature. Perhaps, therefore, the similar pair of slits had been made before the witnesses had been added. Once it was realised that the folded parchment would obscure some names, a slightly lower slit was made to prevent this. There are, of course, cases where the folded parchment obscures names without this implying that the witnesses were added on a separate occasion. This typically occurs where there is not enough parchment at the bottom to avoid this without weakening the support for the seal-tag. The point here is that there was more than enough parchment to spare, making it feasible to make the appropriate adjustment.

**No. 21** (1153 × 1159).

*Bishop Robert of St Andrews has 'granted and with the defence of this present writing confirmed' to Robert first prior of St Andrews and his successors a priory of canons, and their blessing and profession of obedience, and he has also granted the free election of the prior by the brethren. Attestation clause begins 'His assistentibus testibus' ('These standing as witnesses'). Ten witnesses are named.*

No ruling is visible, but the lines of writing are consistently straight except for a slight rise at the end, except where the attestation clause begins (about two-fifths of the way through line 6), where the line of writing dips uncharacteristically. There is also a slight change of register in the writing of the witness list, with occasional use of a slanted ascender in **d** and a single example (in 'archid') of **r** extended below the line of writing. The writing is by the same scribe throughout. The position of the slits for the seal-tag would mean that the last line of witnesses would have been largely obscured. Only a limited amount of parchment was free at the bottom for folding, however. It is conceivable that (like what was suggested for no. 12), the slits were made before the witnesses were added, but that (unlike no. 12) there was not the scope to make an adjustment. It is also conceivable, however, that the slits were made after the witnesses were added, and that it was considered more

important to have enough parchment to support the seal-tag effectively than it was to have the final witnesses readily in view.

**No. 46** (no later than *c.* 1210).<sup>160</sup>

*Henry Revel and Margaret his wife have given and granted and by this charter confirmed to St Andrews Cathedral Priory the land which lies west of the road from Balmerino to Coultra. Attestation clause begins 'Hūs test''. Nine witnesses are named.*

The witness list occupies the last half of line 11, line 12, and finishes with a half-line with space for another line above the slits for the seal tag (which has been torn out, leaving a hole). The nib becomes thicker as text of the charter progresses until it suddenly becomes thinner at the beginning of the witness list. It is possible that the scribe wrote the charter in one sitting, and simply changed pen because the first one was becoming difficult. There is no obvious indication, though, that the pen was failing so badly that it could not have been used to complete the charter. It seems more likely that the change in pen was because the witness list was written on a separate occasion.

**No. 55** (October 1266).<sup>161</sup>

*Margaret of Lascelles daughter of Alan of Lascelles has granted and by this charter confirmed to St Andrews Cathedral Priory the mother church of Naughton which Alan of Lascelles gave and granted to the priory. Attestation clause begins 'Testibus'. Seven witnesses are named.*

The witness list fits in exactly into the last line of the charter, sitting above the slits for the seal-tag. It would not have been obscured after the parchment had been folded. The nib, however, is thinner throughout the witness list compared with the text. There is no indication that the pen used in the body of the charter was failing and would not have lasted for one more line, so the most likely explanation is that the testing clause was added on a separate occasion.<sup>162</sup>

**No. 60** (1189 × 1198).

*Henry earl of Atholl confirms the gift of the church of Dull by Earl Mael Coluim to St Andrews Cathedral Priory. Attestation clause begins 'Testibus', and has seven witnesses.*

The parchment has been ruled throughout before being used for the charter (the last four lines are left blank), and so this provides no indication about the

<sup>160</sup>Dated *c.* 1210 in Gilbert Márkus, 'Reading the Place-names of a monastic community: Balmerino abbey', *Cîteaux. Commentarii cistercienses*, vol. 59 (2008), *Life on the Edge. The Cistercian Abbey of Balmerino, Fife (Scotland)*, 119–61, at pp. 138, 142. Henry Revel probably died *c.* 1210: <http://www.poms.ac.uk/db/record/person/966/>.

<sup>161</sup>In the cartulary copy a dating clause has been added that is not found in the original charter: 'Datum apud Sanctum Andree mense Octobris anno gracie . m<sup>o</sup> . cc<sup>o</sup> . sexagesimo sexto' (*St Andrews Liber*, 109).

<sup>162</sup>No. 65 (*c.* 1210 × 1244) offers a useful comparison with nos. 46 and 55 because the writing gets thicker during the witness list.

process of writing the charter itself. Despite the regularity of the pre-existing ruled lines, however, the gap between the lines of writing in the witness list is smaller. Also, a thinner nib has been used from 'Testibus' (although it is not so obviously thinner by the end of the witness list). The last line of the witness list fills only a third of a line. Space would only have been an issue if the charter had been made ready for sealing before the witnesses were added, which would suggest that this occurred at a separate occasion. The slits for the seal-tag and corresponding folds show that the parchment would have been folded right up to the line of the last witnesses. Alternatively the charter was produced in the normal order, with the preparation for the seal-tag made after all the writing had been completed, in which case the scribe (who was the same for both the body of the charter and the witness list) would seem simply to have adopted a different approach in the testing clause, which might best be explained by supposing that it was written on a different occasion.

**No. 62** (1153 × 1178).

*Agnes countess of Mar gave and granted and by her charter confirmed to St Andrews Cathedral Priory the church of Migvie with land and teinds. Attestation clause begins 'T'. Eleven witnesses are named.*

No ruling is visible, but the lines of writing are spaced regularly until the attestation, when it becomes a little cramped. The charter was sealed on a tongue of parchment cut from the bottom. This has been torn away, leaving a stub at the bottom right. If the tongue had been cut after the body of the text had been written, but before the names of witnesses had been added, then this would account for the cramped nature of the witness list.

The manner of the writing also suggests that the testing clause has been added on a separate occasion from the rest of the text. Although the lines of writing are not entirely straight, it is fairly consistent until lines 6 and 7, where there is a slight tendency for words to rise a fraction. This becomes more pronounced in the word before the testing clause ('successorum'), and is a feature of each name in the witness list. As a result, the witness list looks markedly less disciplined than the rest of the text, as if each name was entered individually rather than copied out in a string. Possibly the scribe simply misjudged the amount of space needed when engrossing a draft. It seems more likely, however, that the text of the charter was produced without knowing how many witnesses would need to be accommodated, and each witness was added as they were identified to the scribe for inclusion.

## APPENDIX C

## Handlist of letters to absent witnesses

## I. Letters with an explicit reference to a charter

*a) Surviving as a single sheet*

1. London, British Library Harley Charter 83 A. 45 (optimal dating palaeographically would be late 1180s or early 1190s).<sup>163</sup>

*Peter de Capella to 'his dearest friends', all seven witnesses (each named) of his charter of donation to Sawtry Abbey (O.Cist.). The charter is London, British Library Harley Charter 83 A. 51.*<sup>164</sup>

Printed: (1) George F. Warner and Henry J. Ellis, *Facsimiles of Royal & Other Charters in the British Museum*, vol. i, *William I–Richard I* (London, 1903), no. 69.  
(2) J. C. Russell, 'Attestation of charters in the reign of King John', *Speculum* 15 (1940), 480–98, at p. 494 (without the names of the addressees).

Facsimile: Warner & Ellis, *Facsimiles of Royal & Other Charters in the British Museum*, i. no. 69.

2. Kew, The National Archives E 42/497 (12 May 1202 × 1 February 1221).<sup>165</sup>

*William d'Avranches and his mother Cecily to three of the eight named witnesses of their charter of donation to Robertsbridge Abbey (O.Cist.). The addressees are their 'well beloved lords' William Earl Warenne, William d'Aubigny earl of Sussex and Gilbert de l'Aigle. William's charter is BL Lord Frederick Campbell Charter IV. 3.*<sup>166</sup>

Printed: (1) H. Ellis, *Original Letters Illustrative of English History*, 3rd series vol. i (London, 1846), no. 14 (pp. 25–6).  
(2) Russell, 'Attestation of charters', pp. 492–3.  
(3) Above, p. 240.

Translated: (1) L. F. Salzman, *Sussex Notes and Queries* 5 (1934–5), 120.

(2) Above, p. 240.

3. Maidstone, Centre for Kentish Studies, U1475 T264/135 (1215 × 1229).<sup>167</sup>

*Maud de Meyners to two of the ten named witnesses of her charter of donation to Robertsbridge Abbey (O.Cist.). The two are 'her revered lords' William Earl Warenne and Matthew fitz Herbert, sheriff of Sussex, who appear as second and third witnesses in the*

<sup>163</sup>See above, p. 239 n. 12. This is not to say that a slightly later date can be ruled out.

<sup>164</sup>Warner & Ellis, *Facsimiles of Royal & Other Charters in the British Museum*, i. no. 68.

<sup>165</sup>The date of livery of William de Warenne as earl × William d'Aubigny III's death: *Handbook of British Chronology*, 3rd edn, ed. Fryde and others, 449, 484.

<sup>166</sup>Printed for the first time, above, pp. 240–1.

<sup>167</sup>Beginning of Richard's abbacy at Battle ('Houses of Benedictine monks: Abbey of Battle', *A History of the County of Sussex: Volume 2* (1973), 52–6. URL: <http://www.british-history.ac.uk/report.aspx?compid=36583>, accessed: 15 April 2011) × appointment of Matthew fitz Herbert's successor as sheriff: *Patent Rolls of the Reign of Henry III A.D. 1225–1232* (London, 1903), 237. I am grateful to David Carpenter for this information.

charter (after Richard, abbot of Battle). Maud's charter survives in duplicate: Centre for Kentish Studies U1475 T246/136 and /137.<sup>168</sup> The latter adds 'salvo seruitio domini regis et comitis per manus monachorum predictorum regi et comiti faciundo'.

Printed: (1) *Report on the Manuscripts of the Right Honourable Viscount De L'Isle and Dudley preserved at Penhurst Place*, 6 vols. (London 1925–1966), i. no. 118 (p. 70).

(2) Russell, 'Attestation of charters', p. 494.

**b) Surviving as a cartulary copy**

4. London, British Library MS Harley 3960 fols. 1v–2r (1216 × 1222).<sup>169</sup>

Robert III Muschamp to 'his dearest lords and friends',<sup>170</sup> nine of the fifteen witnesses<sup>171</sup> of his charter of donation to Melrose Abbey (O.Cist.). The nine are the first eight witnesses in the charter (in the same order) plus the twelfth.

Printed: C. N. Innes, *Liber Sancte Marie de Melros*, 2 vols. (Edinburgh, 1837), i. no. 306 (p. 269).

Translated (partially): Keith 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 p. 94.

**c) Mentioned in cartulary, but not copied**

5. Mary of Hailes to witnesses of her charter of donation to Newbattle Abbey (O.Cist.) (either c. 1200 × 1209 or 1213 × 31 December 1232).<sup>172</sup>

Although the letter was not copied into the cartulary, its tenor has been summarised in a memorandum (Edinburgh, National Library of Scotland, MS Adv. 34. 4. 13, fo. 29r). Two of Mary's charters relating to the donation have been copied into the cartulary.<sup>173</sup>

Memorandum printed:

(1) C. N. Innes, *Registrum S. Marie de Neubotle*, (Edinburgh, 1849), 72.

(2) E. L. G. Stones, 'Two points of diplomatic', *SHR* 32 (1953), 47–51, at p. 48.

Translated: above, p. 244.

6. William Noble to witnesses of his charter of donation to Newbattle Abbey (O.Cist.) (1214 × 1230).<sup>174</sup>

<sup>168</sup>*Report on the Manuscripts of the Right Honourable Viscount De L'Isle and Dudley*, i. nos. 117 and 436 (p. 71).

<sup>169</sup>Stringer, 'The charters of David, earl of Huntingdon and lord of Garioch', 93.

<sup>170</sup>Earl Patrick of Dunbar, the first lay addressee and witness, is referred to in the letter's address as 'my lord'.

<sup>171</sup>Counting the dean and chapter of 'Northumbria' as two witnesses.

<sup>172</sup>These are the date-ranges for Earl Patrick's confirmation of the charter referred to in the letter: Elsa Catherine Hamilton, 'The Acts of the Earls of Dunbar relating to Scotland c.1124–c.1289: a Study of Lordship in Scotland in the Twelfth and Thirteenth Centuries', unpublished Ph.D dissertation (University of Glasgow, 2003), 361–2.

<sup>173</sup>Innes, *Registrum S. Marie de Neubotle*, nos. 91 and 92.

<sup>174</sup>This is the date-range of the charter of donation: see above, p. 244 n. 32.

*The letter's tenor was summarised in a memorandum in the cartulary (Edinburgh, National Library of Scotland, MS Adv. 34. 4. 13, fo. 33v). William Noble's charter of donation is given in the cartulary.*<sup>175</sup>

Memorandum printed: Innes, *Registrum S. Marie de Neubotle*, 88.

## II. Letters lacking an explicit reference to a charter

7. London, British Library Harley Charter 43 B. 17 (× 1230).<sup>176</sup>

*Robert de Gournay requesting nine named addressees to witness the exchange he has made with Bruern Abbey (O.Cist.).*

Printed: Russell, 'Attestation of charters', p. 493.

Translated: Daniel Gurney, *Record of the House of Gournay* (London, 1848), i. 615.

Facsimile: *Ib.*, between pp. 614 and 615.

8. Maidstone, Centre for Kentish Studies, U1475 T264/247 (c. 1220 × 1249).<sup>177</sup>

*'H' prior of Combwell (OSA) requesting twelve named individuals, addressed as 'his friends', to witness a sale to Robertsbridge Abbey (O.Cist.).*

Printed: (1) *Report on the Manuscripts of the Right Honourable Viscount De L'Isle and Dudley preserved*, i. no. 191 (p. 95).

(2) Russell, 'Attestation of charters', p. 493–4.

## III. Rejected

See above, p. 245 n. 34, for discussion.

### *a) published*

Stenton, *Transcripts of Charters relating to the Gilbertine Houses*, Sixle no. 51 (p. 28).

Appears in list of letters to absent witnesses given in George L. Haskins, 'Charter witness lists in the reign of King John', *Speculum* 13 (1938), 319–25, at p. 321 n. 6. This is based on a misreading of Stenton's comments (*Transcripts*, p. xxxi).

### *b) unpublished*

Kew, The National Archives E 40/10119.

Identified as a letter to absent witnesses in Stones, 'Two points of diplomatic', 48 n. 5, along with accompanying charter: TNA E 40/10118. It is, in fact, a letter of request to perform livery of seisin.

<sup>175</sup>Innes, *Registrum S. Marie de Neubotle*, no. 116. Stones, 'Two points of diplomatic', 48, regarded it only as a 'possible' example of a letter to absent witnesses. For partial text and discussion, see above, p. 244 and n. 31.

<sup>176</sup>Gurney, *Record of the House of Gournay*, i. 610, 614–15.

<sup>177</sup>The dating depends on the identity of 'H' prior of Combwell: he could be either Hugh, attested as prior in 1227 (and probably the first prior after the monastery lost its abbatial status c. 1220), or Henry, attested as prior in 1236, and whose successor, Robert, is attested in 1249: see <http://www.british-history.ac.uk/report.aspx?compid=38206> (accessed 4 October 2010).