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**‘It is necessary that the issue be heard to cry or squall within the four [walls]’: Qualifying for Tenancy by the Curtesy of England in the Reign of Edward I**

Gwen Seabourne

**Abstract**

This article considers the test used to determine the presence or absence of life in newborn babies, in relation to a widower’s entitlement to remain in land brought to the marriage by his wife, as tenant by the curtesy of England. To qualify for curtesy, a widower needed to have produced a live and legitimate child, but, since even a short period of life was sufficient, there might be disputes as to whether a child which was now dead had ever been alive. The common law therefore had to develop a way of settling this difficult matter of confirming or denying the presence of life. Several thirteenth-century sources show an emphasis on a sound as an indicator of life. This article considers the use of a sound criterion in this area, arguing that thinking and practice surrounding the appropriate test were more complex, less settled, and more interesting than has been represented in somewhat perfunctory accounts in the work of later lawyers and legal historians. This is significant for the understanding of this area of medieval law, but also has broader implications within legal history and historiography, and for scholars from other fields such as medieval social and medical history.

**I. Introduction**

Nineteen-year-old Richard Danyel brought an action of *mort d’ancestor* in the 1292 eyre of Herefordshire against his stepfather, Richard de la Bere. Richard Danyel claimed that he, as heir to Cecily Danyel, his recently-deceased mother, should hold certain land in Herefordshire.

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Richard de la Bere, who was holding the land, accepted that his stepson was Cecily's heir, but argued that this did not mean Danyel was entitled to hold the land now, since he (de la Bere) claimed that he had an interest in the land for the rest of his life, as tenant 'by the law of England'.<sup>1</sup>

The common law institution of tenancy 'by the law of England', or 'by the curtesy of England',<sup>2</sup> which was at issue in *Danyel v de la Bere*, allowed a widower life tenure of lands which his deceased wife had brought to the marriage. It was part of the common law of England from the medieval period until the twentieth century,<sup>3</sup> and was imposed, adopted or adapted elsewhere.<sup>4</sup> Qualification required a man to overcome a number of obstacles: most importantly,

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<sup>1</sup> Note that in this article, manuscript citations refer to material held at The National Archives. These are followed by references and links to R.C. Palmer, E.K. Palmer, and S. Jenks, *The Anglo-American Legal Tradition* (hereafter AALT, with image number), at <http://aalt.law.uh.edu/>. *Richard Danyel v Richard de la Bere* (1292) JUST 1/302 m. 3d. (AALT IMG 8423); JUST 1/303 m. 6 (AALT IMG 8644).

<sup>2</sup> I use 'curtesy' throughout, for the sake of brevity. For terminology see, e.g., J. Biancalana, *The Fee Tail and the Common Recovery in Medieval England*, Cambridge, 2001, 48.

<sup>3</sup> Administration of Estates Act 1925, s. 45, Trusts of Land and Appointment of Trustees Act 1996, s. 25 and Sch. 4; J.H. Baker, *Introduction to English Legal History* 4th edn., London, 2002, 271.

<sup>4</sup> For Ireland, see G.J. Hand, *English Law in Ireland 1290-1324*, Cambridge, 1967, 2. For Wales, see T.G. Watkin, *The Legal History of Wales* 2nd edn, Cardiff, 2012, 61; 2 Edw. I. On Scots law, see H. MacQueen, *Common Law and Feudal Society in Medieval Scotland*, Edinburgh, 1993, 24; W.D.H. Sellar, 'Courtesy, Battle and the Brieve of Right, 1368 – a Story Continued', in W.D.H. Sellar, ed., *Miscellany II*, Stair Society vol. 35, Edinburgh, 1984, 1;

he must have been married to the woman over whose lands he claimed the right, she must have died, and the couple must have produced live offspring.

The case came to turn on whether or not Richard de la Bere and Cecily had produced a live child so as to qualify for this right. Richard de la Bere claimed that he had produced such a child, but Richard Danyel's case was that he had not. The pleading on Richard Danyel's side emphasized that de la Bere and Cecily had not produced a child which was heard to cry, treating the production of sound as highly significant, if not essential in this context.

The assize jurors, men of property of the county, whose names are not recorded, told an affecting story, stating that a baby had been born alive, but very weak (*debilis*), that it had been given a form of baptism at home, had rallied somewhat (*convalescebat*) and been taken to church, where the remaining parts of the baptismal rite had been completed, but that it had died. They regarded the baby as 'issue which was born alive', and yet also took care to state that the baby 'was never heard to cry, nor did it squall at all'. There is no indication of how they acquired any of this information. Danyel failed to appear, and was only let off an amercement because of his minority, so the plea roll appears to leave matters uncertain as to the importance of the baby's lack of crying, but there is a statement in a connected year book report which seems to explain matters, emphasizing the criterion of sound as requisite for proof of life in offspring in relation to the father's entitlement to curtesy: '[I]n order that the husband

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Succession (Scotland) Act 1964, s. 10. For the United States, see, e.g., G.L. Haskins, 'Curtesy in the United States', 100 *Pennsylvania Law Review* (1951-52), 196.

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may hold the inheritance of his wife by the curtesy of England by reason of issue between them, it is necessary that the issue be heard to cry or squall within the four [walls].<sup>5</sup>

Since the availability of curtesy was a matter of consequence for widowers, for others with a potential interest in the land, including the heir and the lord, and for the law relating to family property and succession more generally. It may, therefore, seem surprising that curtesy has not received much sustained attention from legal historians. Accounts have tended to be short, dismissive or short and dismissive, and several are questionable in their presentation of the important question of how a man qualified for this valuable right,<sup>6</sup> and how it was to be

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<sup>5</sup> ‘*Nota a coe ke le baron tendra la heritage sa femme par la corteyse dengleterre par la resone del issu parenter eus, yl covent ke yl seyt oy cryer ou brayer parenter les quatre [murs]*’: A. J. Horwood, ed., *Year Books of the Reign of Edward I: Years XX and XXI (1292-1293)*, Rolls Series no. 31, part A, vol. 1, London 1866, 38-41; D.J. Seipp, Database of Year Book cases at <http://www.bu.edu/law/faculty-scholarship/legal-history-the-year-books/>\_\_\_\_\_1292.088rs [hereafter, *Seipp*].

<sup>6</sup> See, F. Pollock and F.W. Maitland, *The History of English Law Before the Time of Edward I*, 2 vols., Cambridge, 1895, (hereafter *P & M*), II, 412-418; K. Digby, *An Introduction to the History of the Law of Real Property*, Oxford, 1875, 122-123; T.F.T. Plucknett, *A Concise History of the Common Law* 4th edn, London, 1948, 537-538; A.W.B. Simpson, *A History of the Land Law*, 2nd edn, Oxford, 1986, , 68-70; W. Cornish, ‘Family Law, Family Authority’, in Cornish et al., *Oxford History of the Laws of England vol. XIII*, Oxford, 2010, 739. . Longer treatments can be found in G.L. Haskins, ‘Curtesy at Common Law’, 29 *Boston University Law Review* (1949), 228; F.E. Farrer, ‘Tenant by the Courtesy of England’, 43 *Law Quarterly Review* (1927), 87, and more recent discussion in J. Hudson, *Oxford History of the Laws of England vol. II 871-1216*, Oxford, 2012, 451, 788, 804-805; M. Hicks ‘Crossing Generations:

established whether or not live offspring had been produced. Previous treatments of the question suggest a simple model for the law and legal development: in the medieval period, or in an undefined past, there was an insistence upon proof of the child's having produced a sound as the sole criterion for life in such cases, but that this was changed, in implicitly more enlightened times, so that other indications of life would also be allowed.<sup>7</sup> While it is certainly true that the later common law took into account matters other than sound in such determinations, however, a closer investigation of thirteenth-century sources including and beyond the *Danyel* case demonstrates that the first part of 'progressive' models of the test involves considerable over-simplification. The requirement for sound was less absolute than has been thought, and the medieval evidence on the understanding and application of a sound criterion in this area deserves much greater attention than it has previously been afforded.

## II. Curtesy, an Overview

Given its relative unfamiliarity, it is appropriate to note some salient points relating to curtesy, before focusing on the specific issue of the 'sound test' for proof of life. There is debate on

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Dower, Jointure and Curtesy', in M. Hicks, ed., *The Fifteenth Century Inquisitions Post Mortem: a Companion*, Woodbridge, 2010.

<sup>7</sup> See, e.g., Sir William Blackstone, *Commentaries on the Laws of England*, 1st edn, Oxford, 1765-69, vol. II, book II ch. 8, no. 3, 127; J. Reeves *History of English Law*, 3rd edn, London, 1814, 298; A. Bisset, *A Practical Treatise of the Law of Estates for Life*, London, 1842, 40; R. Wooddeson, *A Systematical View of the Laws of England* vol. 2, Dublin, 1792, Lecture XIX no. 20, fn.; P. Fraser, *A Treatise on the Law of Scotland as Applicable to the Personal and Domestic Relations*, Edinburgh, 1846, 638.

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the date and manner of the introduction of curtesy (whether legislative or not) as well as the rationale behind it, but it was well established by the time of *Danyel*.<sup>8</sup> It has been explained in a number of different ways, emphasizing familial considerations, in particular the need to support widowers acting as guardian or quasi-guardian of the mother's heir, after her death, or 'feudal' considerations, in different proportions.<sup>9</sup> Allowing the widower some provision from land his wife brought to the marriage probably performed more than one function within the interlocking patterns of family and 'feudal' relations, and probably represented something of a compromise between the simplicity of the basic system of common law inheritance, the rights of husbands during marriage and their implications, and the need for support of families after the death of a property-holder.

Curtesy was a rough parallel to the widow's dower,<sup>10</sup> though there were differences in terms of the share of the deceased spouse's land to which the right applied (all of it in the case

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<sup>8</sup> Hudson, *Oxford History vol. II*, 451; *P & M II*, 416; *Mirror of Justices*, i, 3, 14-15; C.S. Kenny, *The History of the Law of England as to the Effects of Marriage on Property and the Wife's Legal Capacity*, London, 1879, 75; Farrer, 'Tenant by the Courtesy', 90.

<sup>9</sup> *P & M II*, 412-413, 415, 417; Farrer, 'Tenant by the Courtesy', 90; Blackstone, *Commentaries*, book II ch. 8, 3.

<sup>10</sup> On dower, see J. Biancalana, 'The Writs of Dower and Chapter 49 of Westminster I', 49 *Cambridge Law Journal* (1990), 91-116 and 'Widows at Common Law: the Development of Common Law Dower', XXIII *Irish Jurist* (1988), 255 328-329; P. Brand, "'Deserving" and "Undeserving" Wives: Earning and Forfeiting Dower in Medieval England', 22 *Journal of Legal History* (2001), 1; S. Sheridan Walker, 'Litigant Agency in Dower Pleas in the Common Law Courts in Thirteenth and Early Fourteenth Century England', 24 *Journal of Legal History* (2003), 1.

of curtesy, a proportion – often a third or half – in the case of dower),<sup>11</sup> and the rules as to which sorts of landholding the rights applied diverged further over the centuries. In particular, curtesy came to apply to land held under a trust,<sup>12</sup> whereas dower did not. Different too were some of the rules relating to the exclusion of a claimant to dower or curtesy: thus, while the adulterous, eloping wife might be unable to claim her dower, there was no parallel exclusion for a husband.<sup>13</sup> Curtesy was, thus, a potentially widespread and significant right. There are, however, difficulties in making definitive statements as to its actual incidence at any given period, since there was no requirement for a widower who regarded himself as tenant by the curtesy to do anything likely to generate a ‘parchment trail’: when his wife died, he simply retained the seisin he was already regarded as having.<sup>14</sup> The fact that land is held or claimed by the curtesy does appear in records of legal practice, for example if another person chose to bring a legal action to challenge the widower’s right to retain seisin, and the widower chose to base his defence to that action on his claim to curtesy, or where a tenant by the curtesy wasted the land or made an illegitimate transfer of land to a third party, but such instances cannot be relied upon for an accurate picture of the incidence of curtesy, problematic and unproblematic. A long-term pattern of decline might be constructed, based on the availability of alternative means of structuring family property provision, but it may be that there was a more complex

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<sup>11</sup> See Simpson, *History of the Land Law*, 69; Hudson, *Oxford History vol. II*, 804-805; *P & M* II, 420 n.1.

<sup>12</sup> Kenny, *Effects*, 80.

<sup>13</sup> 13 Edw. I c. 34.

<sup>14</sup> Simpson, *History of the Land Law*, 69; Hudson, *Oxford History vol. II*, 804-805; J.M. Kaye, *Medieval English Conveyances*, Cambridge, 2009, 236.



pattern.<sup>15</sup> What is clear is that, despite the lack of interest of some legal historians,<sup>16</sup> curtesy was treated as a 'live' area of law throughout its existence, as can be seen by its appearance in reports of cases, which demonstrate both the use of curtesy and also the fact that it was being adapted to cover new legal, political and medical developments,<sup>17</sup> and by the mention of curtesy as a matter for concern in discussions of the state of the law and law reform.<sup>18</sup>

Curtesy's 'live child requirement', present from at least the late twelfth century and remaining in place to the end of common law curtesy,<sup>19</sup> has been described as 'curious' and

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<sup>15</sup> Biancalana, *Fee Tail*, especially ch. 1 and pp. 142 ff; C.M.A. McCauliff, 'The English Medieval Marriage Portion from Cases of Mort d'Ancestor and Formedon', 38 *Villanova Law Review* (1993), 933.

<sup>16</sup> See, e.g. W.S. Holdsworth, *A History of English Law*, reprint London, 1966, vol. III, 188: 'The later history of curtesy may be briefly dismissed'.

<sup>17</sup> See, e.g., *Seipp* 1278.007ss; 1309.067ss; 1347.199; 1441.059; 1488.019; 1494.037; 4 Co. Rep. 22b, 7 Co. Rep. 2a; *Casborne v Scarfe* (1737) 1 Atk. 603; *Cooper v Macdonald* [1877] 7 Ch.D 288, 295; *Hope v Hope* [1892] 2 Ch. 336; *In Re Williams' Settlement. Greenwell v Humphries* [1929] 2 Ch. 361.

<sup>18</sup> Holdsworth, *History*, vol. III, 188, XV, 171; 27 Hen. VIII c. 10, preamble; First Report of the Real Property Commissioners, *House of Commons Sessional Papers*, 1829, x. 1, 39-56; Kenny, *Effects*, 84.

<sup>19</sup> G.D.G. Hall, ed., *The Treatise on the Laws and Customs of the Realm of England commonly called Glanvill*, Oxford, 1993, VII, 18; 3; *Carlisle v Boythorpe* (1218-19); JUST 1/1040 m.3 (AALT IMG 1118); D.M. Stenton, ed., *Rolls of the Justices in Eyre, being the Rolls of Pleas and Assizes for Yorkshire in 3 Henry, 1218-19*, Selden Society vol. 56, pl. 22: *De L'Isle v Acton* (1311) *Seipp* 1311.351ss; *Seipp* 1498.018; E. Wambaugh, ed., Littleton, *Tenures*, Washington

‘mysterious’,<sup>20</sup> and it is noteworthy that this was a point of divergence from the common law qualification for dower. There was no live child requirement in relation to dower, which moved in the latter thirteenth century towards qualification depending on age and presumed sexual maturity.<sup>21</sup> The basis of the live child requirement may be assumed to include elements of demonstration of maturity and significant contribution to the wife’s family, and a number of legal systems treated production of offspring as a criterion for the acquisition of property rights,<sup>22</sup> though, this does not explain the alternative route taken in the law on qualification for

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DC, 1903, book 1 ch. 4; *Jones v Ricketts* (1862) 54 ER 1087, Farrer, ‘Tenant by the Courtesy’, 87. On the theoretical challenges posed by caesarean sections, see *Reppes’ Case*, described in D. Tankard, ‘Defining death in early Tudor England’, 3 *Cultural and Social History* (2006), 1; 8 Co. Rep. 34a at 35b; Sir E. Coke, *The First Part of the Institutes of the Lawes of England or a Commentarie upon Littleton*, London, 1628 Lib. 1 ch. 4; A. Foscati, ‘Nonnatus Dictus Quod Caeso Defunctae Matris Utero Prodiit’. Postmortem Caesarean Section in the Late Middle Ages and Early Modern Period’, *Social History of Medicine* (2018) (early release online: <https://doi.org/10.1093/shm/hky022>); K. Park, ‘The Death of Isabella Della Volpe: Four Eyewitness Accounts of a Postmortem Caesarean Section in 1545’, 82 *Bulletin of the History of Medicine* (2008), 169; M.H. Green and D. Lord Smail, ‘The Trial of Floreta d’Ays (1403): Jews, Christians, and Obstetrics in Later Medieval Marseille’, 34 *Journal of Medieval History* (2008), 185, 189.

<sup>20</sup> Plucknett, *Concise History*, 537; Baker, *Introduction*, 271.

<sup>21</sup> Brand, ‘“Deserving” and “Undeserving” Wives’.

<sup>22</sup> H. Brunner, ‘Die Geburt eines lebenden Kindes’, 16 *Zeitschrift der Savigny-Stiftung* (1895), 63. Some but not all local customs relating to analogous rights had a similar requirement: M. Bateson, *Borough Customs*, Selden Society vol. 21, London, 1906, 108, 109-110, 112, 114.

dower. Requiring live offspring appears to be more onerous than the rules relating to dower. One possible explanation for the divergence lies in the different extent of the surviving spouse's right in dower and curtesy, with curtesy applicable to a greater proportion of land which would otherwise be available for the usual route of succession. It might, therefore, seem appropriate, in fairness to the heir, to employ a more stringent test in relation to curtesy than that in use for dower.

### III. A Sound Criterion?

Whatever its basis, the requirement to show that there had been a live child meant that the medieval common law had to find a way of deciding what amounted to 'life' for these purposes. Some statements in treatises and law reports appear to set out an exclusive test, requiring the baby to have produced a sound. Nevertheless, there are also lesser-known sources which disturb the idea that sound was always and inevitably the only criterion thought to be relevant.

The statement in the year book note on *Danyel v de la Bere* (1292)<sup>23</sup> appears to be consistent with accounts in treatises and other prescriptive statements of the requirements for the widower's qualification for curtesy from the twelfth century onwards. A sound test can be seen in *Glanvill*, in a 1226 patent roll entry, setting out the rules for common law judges in

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For the relationship between common law and local laws, see, e.g. Hudson, *Oxford History* vol. II, ch. 30; Bateson, *Borough Customs*, introduction. Some customs required the child to survive, and this might also be a specific requirement in a feoffment: *William Lambert of Bruges North v William le Batare et al.* (1275) JUST 1/1217 m. 31 (AALT IMG 2427); *John son of Agnes de Osmundethorpe v Fulk de Hotoft* (1276) JUST 1/663 m.3 (AALT IMG 3688).

<sup>23</sup> Above, n. 3.

Ireland, in *Bracton, Fleta and Britton*, (though not in the popular thirteenth-century treatise, *Fet a saver* nor in the idiosyncratic *Mirror of Justices*).<sup>24</sup>

It is not surprising that the baby's cry would feature in statements of a test for live birth: it was certainly part of the normal expectation with regard to a successful delivery.<sup>25</sup> Furthermore, a sound test fits in with the general importance of sound in medieval common law, with its oral tradition, its hue and cry, its cries and proclamations to announce statutes,

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<sup>24</sup> *Glanvill*, VII, 18; *Patent Rolls of the Reign of Henry III, 1225-32*, London, 1903, 96 ; S.E. Thorne, G.E. Woodbine, eds., *Bracton on the Laws and Customs of England*, 4 vols., Cambridge, 1968, IV: 360 ff; G. O. Sayles, ed., *Fleta vol. IV*, Selden Society vol. 99, London, 1983, book 6 ch. 55; F.M. Nichols, ed., *Britton*, Oxford, 1865, book III ch. 20 no. 5; book II ch. 20 no. 11. See also G.E. Woodbine, *Four Thirteenth Century Tracts*, New Haven, 1910, 182 for *Cum sit necessaria*, which mentions a child heard to cry within the four walls (*enfant qe fut oy crier entre les quatre pareyes*) and, at 106, *Fet a saver*, which sets out the requirement for live issue, but does not specify the test. The *Mirror of Justices* makes no mention of a sound test, since it bases qualification for curtesy on conception of a child rather than live birth: F.W. Maitland and W.J. Whittaker, eds., *The Mirror of Justices*, Selden Society vol. 7, London, 1893, p. 13.

<sup>25</sup> See, e.g., R.C. Finucane, 'The Toddler in the Ditch: a Case of Parental Neglect?', in M. Goodich, ed., *Voices from the Bench: the Narratives of Lesser Folk in Medieval Trials*, New York, 2006, 127-148, 129; S.S. Walker, 'Proof of Age of Feudal Heirs in Medieval England', 35 *Mediaeval Studies* (1973), 306, 318; M. McGlynn, 'Memory, Orality and Life Records: Proofs of age in Tudor England', 40 *Sixteenth Century Journal* (2009), 679; 2 Kings, 4 vv. 31-35, *c.f.* 1 Kings 17 (other factors).

legal process and judicial sessions.<sup>26</sup> Sound as a criterion of neonatal life can also be seen in a number of texts from other jurisdictions. It was discussed in Roman law sources, and the link between the rule as expressed in the common law treatises and certain rules in the earlier medieval *Lex Alamannorum* has been made by many authors.<sup>27</sup> Nevertheless, the idea of an *exclusive* criterion of sound does not seem to have been constant or inevitable. While most

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<sup>26</sup> See, e.g., *P & M*, II, 578-9; S.M. Butler, *Forensic Medicine and Death Investigation in Medieval England*, New York, Abingdon, 2015, 18, 38, 42; M. Mueller, 'Social Control and the Hue and Cry in Two Fourteenth Century Villages', 31 *Journal of Medieval History* (2005), 29; W.M. Ormrod 'Murmur, Clamour and Noise: Voicing complaint and remedy in petitions to the English Crown c. 1300-1460' in G. Dodd, A. Musson, W.M. Ormrod, eds., *Medieval Petitions, Grace and Grievance*, York, 2009, ch.8; M.T. Clanchy, *From Memory to Written Record: England 1066-1307*, 2nd edn., Oxford, 1993, 272-278.

<sup>27</sup> C. Willems, *Justinian als Ökonom: Entscheidungsgründe und Entscheidungsmuster in den quinquaginta decisions*, Vienna, 2017, 382-399. (I am grateful to Professor Willems for allowing me an early look at his book). See also C. Laes, C. Goodey, M. Lynn Rose, eds., *Disabilities in Roman Antiquity. Disparate Bodies a Capite ad Calcem*, Leiden, 2013, 216; *Lex Alamannorum*, XCV; P. Wormald, *Making of English Law: King Alfred to the Twelfth Century vol. I Legislation and its Limits*, Oxford, 1999, 35; J.A. Clyde (tr.), T. Craig, *Jus Feudale*, Edinburgh, 1934, 312; M. Wright, *Introduction to the Law of Tenures* 3rd edn., London, 1768, 194; A. Bisset, *A Practical Treatise of the Law of Estates for Life*, London, 1842, 41; Kenny, *Effects*, London, 1879, 80-81; N. Bacon, *An Historical Discourse of the Uniformity of the Government of England*, London, 1647, 105. For comparable French and Italian rules, see Kenny, *Effects*, 79; P. Viollet, ed., *Les Etablissements de St Louis*, 4 vols, Paris, 1881-86, vol. II, book I ch.13; Foscati, 'Nonnatus dictus'.

local and borough customs relating to qualification for rights analogous to curtesy insisted on a cry to demonstrate live birth,<sup>28</sup> not all did so. Thus, there was no overt sound requirement in fourteenth-century statements of local customs of Godmanchester, Norwich or Exeter.<sup>29</sup> Similarly, the sound test was not specified in contemporary rules from Normandy, which restricted themselves to setting out the mechanism for decision-making, rather than the test to be applied.<sup>30</sup> Neither Roman law nor the *Lex Alamannorum* insisted on a sound criterion in this context: in fact, the *Lex Alamannorum* set out a test based on the baby's performance of apparent capacity to see, rather than to make a sound.<sup>31</sup>

In medieval England, the matter of live offspring is raised both in cases in which the king had a direct interest, where the disputed land was held of him as tenant in chief, and also in common pleas, determining which of two subjects has the stronger claim to hold the land,

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<sup>28</sup> Customs of Northampton, (c. 1190 and fifteenth century versions); the (Scots) *Leges Quatuor Burgorum* (c.1270); Waterford (Ireland) customs (c.1300) c. 52; Bateson, *Borough Customs*, 112.

<sup>29</sup> Bateson, *Borough Customs*, 108-110, 114. Contemporary customs of Kent used not only a crying test but also a visual requirement to confirm production of a live child, in the context of disqualification from dower: T. Robinson, *Common Law of Kent or the Customs of Gavelkind*, 2nd edn., London, 1788, 162; CP 40/14 m. 21d (AALT IMG 4782); JUST 1/1412 m. 1, m. 5d (AALT IMG 0791, 0845); KB 27/333 m. 32 (AALT IMG 0065).

<sup>30</sup> J.A. Everard, ed., *Le Grand Coutumier de Normandie: the laws and customs by which the duchy of Normandy is ruled*, St Helier, 2009, pp. 546, 548, 578, 586; chs.123, 125; E.V. Tardif, ed., *Coutumiers de Normandie* 2 vols., Rouen, 1896, vol. II p. 307 ch. CXIX.

<sup>31</sup> Willems, *Justinian*, 382-395; Kenny, *Effects*, 80; *Lex Alamannorum*, XCV.

particularly in assize cases (*novel disseisin* or *mort d'ancestor*).<sup>32</sup> An investigation of thirteenth-century English records of curtesy cases dealing with the question of whether or not there was ever 'live issue' casts some doubt on the contemporary degree of certainty that sound was the only appropriate criterion for such determinations. Matters other than sound were seen as at least potentially relevant. Questions were asked, and information volunteered, about other aspects of the behaviour, perception and treatment of the child, on whose contested life the widower's claim rested.

Cases from the early thirteenth century give some indication that sound was not always at the forefront of the process. An inquiry as to whether there was a live birth, in general terms, is indicated by one early record.<sup>33</sup> Another early case seems to show that evidence other than sound could prove live birth: *Carlisle v Boythorpe* (1218-1219), has the story of a baby who lived for only a few hours, and notes that suit said they had *seen* the baby alive. There was no particular mention of a crying test.<sup>34</sup> *Thomas son of Richard v Walter le Pestur* (1247) shows that lack of sound was used to argue against a claim of curtesy,<sup>35</sup> but apparently neither side, nor the jurors, brought up the sound criterion in *Wyvill v de Landa* (1251), a *mort d'ancestor*

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<sup>32</sup> It might also appear in other actions, e.g. those brought with a writ of right: Biancalana, *Fee Tail*, 65.

<sup>33</sup> *Curia Regis Rolls Preserved in the Public Record Office vol. III*, London, 1926, 66 (1203).

<sup>34</sup> D.M. Stenton, ed., *Rolls of the Justices in Eyre for Yorkshire in 3 Henry III (1218-19)*, Selden Society vol. 56, London, 1937, pl. 22.

<sup>35</sup> JUST 1/56 m. 8d; (AALT IMG 0979); C.M.A. McCauliff, 'The English Medieval Marriage Portion from Cases of Mort d'Ancestor and Formedon', 38 *Villanova Law Review* (1993), 933, 960-961.

case in which the live birth of a baby was the issue.<sup>36</sup> Even in the reign of Edward I, a petition relating to a curtesy case mentioned the fact that a child had been seen, and said nothing about sound.<sup>37</sup>

In most reports of Edwardian cases, there is more emphasis on the sound criterion, though it is often not the only thing which was considered. Records of some cases appear to show a sound criterion used as the only, and decisive, criterion. Thus, crying was the only factor recorded in the jurors' decision that a live baby had been born, in the successful curtesy plea in *Alan son of Alan de Kyrketon v Robert son of Albert and others* (1277).<sup>38</sup> Some do not make reference to sound at all. In *Humfrey de Veylley and Lucy his wife v Richard de Bomondeby* (1278), for example, the issue appears not to have referred to sound, and the jurors are recorded only as having said that the widower had produced a live child, and confirming his entitlement to curtesy, without mentioning sound.<sup>39</sup> This was a case in which the child had lived for days, rather than hours or minutes, and appears to have been baptized in the parish church, so that insistence on the sound criterion may not have seemed essential. The widower in *John son of Agnes de Osmundethorpe v Fulk de Hotoft* (1276) also gives a length for the baby's short alleged life (a day and a night) without mentioning sound, only to be met with the

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<sup>36</sup> *William de Wyvill v William de Landa* (1251) JUST 1/1046 m.10d (AALT IMG 1843); Biancalana, *Fee Tail*, 48.

<sup>37</sup> SC 1/22/146 (relating to *John de Cantilupe's Case* (1277) discussed below).

<sup>38</sup> JUST 1/1235 m. 30 (AALT IMG 4772).

<sup>39</sup> JUST 1/1239 m. 45 (AALT IMG 5512); and in eyre of Yorkshire 1279-81, JUST 1/1055 m. 23d; AALT IMG 3228; There are several extant rolls relating to this eyre: see also, e.g., JUST I/1058 m. 19 (AALT IMG 4105); JUST 1/1066 m. 2d (AALT IMG 4255).



statement that there was neither a live birth nor sound.<sup>40</sup> In *Adam son of Walter v John del Holm*, although the issue did mention sound, the jurors are recorded to have said that the child in question was born dead (*nata fuit mortua*), without any reference to sound being recorded on the roll.<sup>41</sup> Other cases which do mention sound also show other factors being raised or investigated.<sup>42</sup>

The king's bench roll records of *John Cantilupe's case* (1277) show a list of questions to which the inquest jurors were to have regard as they worked out whether a 'qualifying' child had been produced, as claimed.<sup>43</sup> Sound was mentioned but was not even the first criterion set out: what had to be decided was whether the child had been seen, heard and baptized (*visam, auditam et baptizatam*). The possibility that the baby was 'suppositious' as opposed to being John and Margery's legitimate offspring, was also raised. Assuming that the child had, indeed, been their legitimate issue, further particulars were required, namely the time of day or night, and in which house, the birth took place. Follow-up questions were suggested in relation to baptism too, asking what the baby had been named, and which priest had performed the baptism. It was also suggested it be enquired who had been Margery's midwives, and the list of questions ended with a general instruction to ask 'other questions which were thought necessary'. The inquest jurors did indeed enter into matters other than sound - birth, baptism

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<sup>40</sup> JUST 1/663 m. 3 (AALT IMG 3687 and 3688).

<sup>41</sup> (1279-81), JUST 1/1055 m. 43 (AALT IMG 3069); JUST 1/1055 m. 9 (AALT IMG 2989).

<sup>42</sup> Note variant pleading in *John de Winchester v Henry de la Croyt and Agnes his wife, and others* (1286) JUST 1/1271 m. 5 (AALT IMG 1537): tenants 'do not know whether there was a baby, but if there was, it did not cry'.

<sup>43</sup> KB 27/29 m.1 (AALT IMG 8053); KB 27/30 m.2 (AALT IMG 8197). See also Record Commissioners, *Placitorum Abbreviatio*, London, 1811, 267.

and naming – though, as will be seen below, they did understand sound to be a particularly important criterion. Note also that proceedings in council, the final stage of this case, show acceptance that, at least in theory, sight of a live baby would have sufficed, as an alternative to sound, going against the exclusivity of the sound criterion.<sup>44</sup> The full record of *Cantilupe* seems to suggest an acceptance that this was an involved question, and that there was not a single, key indicator of the presence of life in a newborn.

In *Dispenser v Bigod*,<sup>45</sup> as in *Cantilupe*, some of the questions for the jurors were listed in the court record.<sup>46</sup> Sound was mentioned early on, but there were also further questions which resemble those in *Cantilupe*: ‘whether that offspring was male or female, and in what house such a child was born, and in what church it was baptized, and when and at what time and in whose presence’, though there is no specific reference to midwives, as in the earlier case. A question not in *Cantilupe*: ‘how long the same child lived’, is included, and we are left with a tantalizing ‘etc.’, again suggesting that emphasis on sound might be yet further diluted, with the consideration of other factors. In the last inquisition in *James Keating’s case*,<sup>47</sup> both

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<sup>44</sup> It was, however, assumed to be practically impossible that acceptable witnesses would be able to see a child in these circumstances: see further below.

<sup>45</sup> *Hugh le Dispenser v Roger Bigod* (1281), KB 27/60 m. 27d (AALT IMG 126); KB 27/61 m. 4d (AALT IMG 20); G.O. Sayles, ed., *Select Cases in the Court of King’s Bench vol. I*, London, 1972.

<sup>46</sup> The differences suggest the absence of a standard list of ‘articles’ in such cases.

<sup>47</sup> *James Keating’s Case*, P. Dryburgh and B. Smith, eds., *Inquisitions and Extents of Medieval Ireland; List and Index Society vol. 320* (2007), 38-40. Dr Stephen Hewer kindly alerted me to this litigation.

seeing and hearing the child are mentioned, and other stages of this long and complex process show varying formulations of what must be inquired.<sup>48</sup>

Mention of factors beyond sound is not confined to the 'royal rights' inquisition cases. The set of factors seen in the record of a Warwickshire 'common plea' of 1284, is more succinct than those in *Cantilupe* and *Bigod*, but still specifies matters beyond sound: involving claims as to whether the baby was seen, heard and baptized.<sup>49</sup> Sight, sound, life and breathing are disaggregated in *John de Crofte v Roger son of Hugh de Mortimer et al.* (1288),<sup>50</sup> which also has the jurors noting details of the disputed child's *post partum* movements of hand and lips.<sup>51</sup>

As noted, baptism is mentioned in a number of cases. It was presented as part of the case for the baby having been born alive in *Wyvill v de Landa* (1251),<sup>52</sup> and is mentioned in several Edwardian cases.<sup>53</sup> It is also referred to in both *Bracton* and *Fleta*, in relation to

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<sup>48</sup> Some but not all include mention of crying being heard; some also ask other questions about location and sex.

<sup>49</sup> *William son of John de Raggeley v Richard Riche* (1284), JUST 1/1245 m.95d (AALT IMG 6462).

<sup>50</sup> *John de Crofte v Roger son of Hugh de Mortimer et al.* (1288) JUST 1/1281A m.7 (AALT IMG 2707).

<sup>51</sup> On movement as an indicator of life, see, e.g., A. Fröjmark, 'Childbirth Miracles in Swedish Miracle Collections', 21 *Journal of the History of Sexuality* (2012), 297, 299-300; D. S. Prudlo, 'Mothers and the Martyr: the Unlikely Patronage of a Medieval Dominican preacher', 21 *Journal of the History of Sexuality* (2012), 313, 318.

<sup>52</sup> *William de Wyvill v William de Landa* (1251), above, n. 37; Biancalana, *Fee Tail*, 48.

<sup>53</sup> *Richard Danyel v Richard de la Bere* (1292), above n. 2; *John Cantilupe's Case* (1277), above, n. 44.

qualification for curtesy,<sup>54</sup> though not in other treatises. Baptism had an increasingly important function in theological and social terms, and might also be thought to confer some added validity or individuality to the infant.<sup>55</sup> The perceived importance of baptism is amply demonstrated by the narrative set out in the plea roll records of *Danyel v de la Bere* (1292), in which Richard de la Bere placed a high priority on getting his child to church to complete all stages of the baptism.<sup>56</sup> Aside from its social and theological importance, a baptism in church

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*De Veylley v de Bomondeby* (1278), above, n. 40; *Dispenser v Bigod* (1281), above, n. 46; *John de Winchester v Henry de la Croyt and Agnes his wife, and others* (1286), above, n. 43; *William de Pendlebury v Adam de Pilkinton* (1291), JUST 1/1294 m. 8d (AALT IMG 3893).

<sup>54</sup> *Bracton* IV, 360 ff; *Fleta*, book 6 ch. 55.

<sup>55</sup> On baptism, and emergency baptism by laypeople, see: K.A. Taglia, 'The Cultural Construction of Childhood: Baptism, Communion and Confirmation.' in C.M. Rousseau and J.T. Rosenthal, eds., *Women, Marriage and Family in Medieval Christendom: essays in memory of Michael M. Sheehan CSB*, Kalamazoo, 1998, 255-287; J. Gélis, 'De la mort à la vie: Les 'sanctuaires à répit'', 11 *Ethnologie française* (1981), 211; F.M. Powicke and C.R. Cheney, eds., *Councils and Synods with other Documents related to the English Church Part II AD 1205-1313*, Oxford, 1964, 2 vols. part II AD 1205-1313, Oxford, 1964, 2 vols., 31-32, 68-70, 140, 180, 182, 214, 233, 298, 345, 368, 423, 440, 452, 517, 560, 589, 634-635, 657, 702, 836, 896, 987.

<sup>56</sup> *Richard Danyel v Richard de la Bere* (1292), above, n. 2. Note the tradition that baptism was relevant in such cases in that a father who had, through negligence or 'contumacy', failed to have the child baptised could lose his right to curtesy: see J. Perkins, *A Profitable Book Treating of the Laws of England, Principally as they relate to Conveyancing*, London, 1532, 471. I have not traced this to sources earlier than the sixteenth century.

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would be likely to increase the availability of evidence on the question of presence of life, since a child taken to church for a baptism would encounter a number of people who might be appropriate witnesses to its life.<sup>57</sup> As with the occasionally-encountered reference to the length of the baby's claimed survival, (public) baptism might, perhaps, be seen as a fair proxy or substitute for properly-perceived sound.<sup>58</sup>

The fact that criteria other than sound were discussed and noted in a number of cases is significant in showing that the insistence on sound seen in the *Danyel* year book note was neither timeless nor inevitable. Another indication that the place of sound was unsettled can be seen in the fact that, even when showing acceptance of a role for sound, jurors in a number of Edwardian cases seem to demonstrate incomplete acceptance of its pre-eminence and exclusivity in proving life. Thus, while the record of *Cantilupe* suggests a wide range of matters to be investigated, and the inquest jurors are recorded as having stated that there was a child, which 'was born, baptized and named John, by the women', they also added that it 'was never heard to cry within four walls'. This appears to suggest a view that there had been a live birth, even if the baby had not passed what might be an important test, the jurors leaving final determination of the legal significance of these two facts to the court. Another expression of this doubt or divergence can be seen in the plea roll record of *Danyel v de la Bere*, in the jurors' statement, in which they noted that the child had been born alive, but that it had not cried. Similarly, in *William de Pendlebury v Adam de Pilkinton et al.*, the jurors say that the child in question lived (*vixit*), but that it was not heard to cry nor to make a noise within the four walls

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<sup>57</sup> Not all of the baptisms mentioned were in church: for those conducted at the site of the birth, e.g. *Richard Danyel v Richard de la Bere* (1292), above, n. 2, and by women *John Cantilupe's Case* (1277) above, n. 44; *Pendlebury v de Pilkinton*. (1291), above, n. 53.

<sup>58</sup> See, e.g. *Osmundethorpe v de Hotoft* (1276), above, n. 41.

of the house,<sup>59</sup> jurors in *Philip le Clerk and Johanna his wife v Peter son of Hugh de Blaby* were prepared to say that the man claiming curtesy had had a child with his wife, *but* that it was never heard to cry within four walls,<sup>60</sup> and jurors in *John son of Hugh Laurence v Roger son of Hugh Inchemershe and Joan his wife and another* (1295) appear to have accepted that there was a live baby, but that it was not heard to cry.<sup>61</sup>

Also potentially indicative of uncertainty as to the law is the rather ambiguous ending of *Danyel v de la Bere*, with Danyel's failure to appear. Whether this was a matter of lack of confidence of success, or whether it depended on the dynamics of what was a more wide-ranging dispute about Danyel's rights (also including other land disputes and a plaint concerning a bed and a drinking horn), or whether there was some other reason for the non-attendance is not, however, ascertainable.<sup>62</sup>

The records show a perception or appreciation of a number of difficulties in making the determination, and a more sophisticated level of thought and practice than assumed by later

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<sup>59</sup> '*non fuit audita infra quatuor parietes domus neque clamans, neque strepitum faciens*': *Pendlebury v de Pilkynnton* (1291), above, n. 53.

<sup>60</sup> *Philip le Clerk and Joan his wife v Peter son of Hugh de Blaby* (1284), JUST 1/1245 m. 97 (AALT IMG 6281).

<sup>61</sup> JUST 1/625 m.35 (AALT IMG 0290).

<sup>62</sup> Danyel may have gone on to try an alternative legal route: another year book report refers to a case between the same parties, using a writ of *formedon*: *Seipp* 1292.100rs. See also JUST 1/302 m.81 (AALT IMG 8354) and JUST 1/303 m. 76 (AALT IMG 8798). Richard de la Bere is mentioned as holding the land of Richard Danyel 'by the law of England' in another case involving the family: JUST 1/302 m. 22 (AALT IMG 8231) and JUST 1/303 m. 16d (AALT IMG 8837).

commentators. The year book note on *Danyel v de la Bere*, emphasizing pleading and proof of sound, does, however, appear to indicate the fixing of a divergence between the legal test for proof of life for the purposes of curtesy and what might be considered to be the truth about whether or not a particular baby had ever been alive. A single such decision cannot be regarded as final and unamenable to challenge, and there are some indications of the persistence of alternative legal ideas,<sup>63</sup> but it seems likely that the *Danyel* note did represent a deliberate choice on the part of common law judges. It was decided by a particular group of judges in one eyre, but it is quite possible that it represented a conclusion reached by a larger pool of judicial and legal professional expertise, since a question of qualification for curtesy, live birth and sound was referred to the judges in a case only the previous year, and may therefore have been the subject of wider (but unreported) discussion,<sup>64</sup> with a view to striking an appropriate balance between the interests of heirs and curtesy claimants. There are signs of contemporary concern that curtesy, and tenants by the curtesy, might well be deleterious to the interests of heirs and others with rights relating to the land, as they were the subject of closer control in the later thirteenth century, with the statute of Gloucester 1278 cc. 3 and 5, tightening up rules on how a tenant by the curtesy must conduct himself (in relation to waste and alienations), while the statute of Westminster II (1285), c.1 reduced opportunities for second husbands to claim curtesy.<sup>65</sup> Those working within the common law must have been aware of the consequences

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<sup>63</sup> As noted, the tests which are suggested by surviving documents relating to *James Keating's Case*, Irish litigation which lasted until at least 1295, included questions relating to a variety of matters, and criteria beyond sound.

<sup>64</sup> *Pendlebury v de Pilkynnton et al.* (1291): above, n. 53.

<sup>65</sup> 6 Edw. I; 13 Edw. I, c. 1; Simpson, *History of the Land Law*, 81; Plucknett, *Concise History*, 551; Biancalana, *Fee Tail*, ch.1.

for the incidence of curtesy of stricter or less strict rules for qualification, and may well have felt the influence of statutory and common law trends towards control and definition of the interests of surviving spouses as they decided where to pitch the test for live offspring such as to qualify a widower for curtesy.<sup>66</sup> The existence of live issue in a curtesy case was far from the only situation in which those involved in medieval law recognized and tolerated a gap between that which was true and that which had been, or could be, proved. Another example would be dower cases in which the couple in question had been married as far as canon law was concerned, but, because they had not met certain requirements of publicity, the marriage was not regarded as sufficiently effective to give the woman a right to dower.<sup>67</sup>

It should not be surprising to see some variation and uncertainty about decisions as to whether or not life had ever been present in a particular child, since the attainment of ('counting') life was also a complex, dynamic area in contemporary learned philosophy and theology, and issues relating to the foetus and the pregnant woman, and assessment of the presence or absence of pregnancy or life, were being wrestled with elsewhere in the common law. To summarize a great deal, different factors or indicia of life were emphasized in different works of theology and philosophy, with breathing, 'ensoulment', and sometimes sound, being brought to the fore.<sup>68</sup> Abortion (in the sense of causing death to a foetus by application of force

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<sup>66</sup> Note also contemporary moves to define and control dower actions: Brand, "'Deserving" and "Undeserving"'.

<sup>67</sup> See *P & M II*, 379.

<sup>68</sup> M. van der Lugt, 'L'animation de l'embryon humain dans la pensée médiévale', in L. Brisson, M.-H. Congourdeau, and J.-L. Solère, eds., *L'embryon: Formation et animation. Antiquité grecque et latine, traditions hébraïque, chrétienne et islamique*, Paris, 2008, 233; Willems, *Justinian*, 388ff; A. Swann, 'Childbirth and Midwifery in the Religious Rhetoric of



to the mother) was a dynamic and contested area in the common law at this time,<sup>69</sup> and cases on this matter shared with curtesy cases a certain telling fluidity of vocabulary relating to the offspring which suggests a lack of clear consensus on attribution of life to the foetus or newborn. Both areas use both 'abortive' and 'dead' as adjectives describing deceased offspring, sometimes in relation to the same child.<sup>70</sup> It was in this uncertain intellectual climate that courts and jurors were called upon to make decisions. The response of emphasizing the sound criterion as necessary for legal proof of life was at least clear as a matter of legal theory, though there might be variation in understanding of just what it entailed.

There is some variation in both treatises and case law in this area in the vocabulary used to describe the baby's sound, and variation as to whether the focus is placed upon the making of the sound or its perception. The variation in the 'sound words' is interesting but difficult to

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England 1300-1450', thesis submitted for the degree of Doctor of Philosophy, Arizona State University, 2014.

<sup>69</sup> *Bracton* II, 341, 408; *Fleta vol. II*, Selden Society vol. 72, London, 1955, book I ch. 23, *Britton*, book I, ch.24 no.7; *Mirror of Justices*, 139; W.P. Mueller, *The Criminalization of Abortion in the West: its origins in medieval law*, Ithaca, 2012; S.M. Butler, 'Abortion by Assault: Violence against Pregnant Women in Thirteenth and Fourteenth Century England', 17 *Journal of Women's History* (2005), 9.

<sup>70</sup> See, e.g. JUST 1/1015 m.13 (AALT IMG 1231), JUST 1/302 m. 89 (AALT IMG 8370); JUST 1/303 m. 69 (AALT IMG 8956); JUST 1/541 m. 19 (AALT IMG 3503). The same child described as *mortuus* in one place and *abortivus* in another: JUST 1/1015 m.8. and m. 13 (AALT IMG 1220 and 1230); *Adam son of Walter v John del Holm* and *Osmundethorpe v de Hotoft*, above, nn. 42 and 41. None of the cases found use the idea of the 'half dead' or 'semi-alive' baby seen in *Bracton*, IV, 361.

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interpret, and it seems safest to conclude that they all probably indicate deliberate vocalization.<sup>71</sup> In describing the required or actual sound, 'clamans' (crying) is used in *Kyrketon* (and this crying was noted to have occurred when the baby was lifted from baptismal water at home). *Clamare* also features in *Osmundethorpe v de Hotoft*,<sup>72</sup> *De Veylley v de Bomondeby* (1278),<sup>73</sup> and *Philip le Clerk and Joan his wife v Peter son of Hugh de Blaby*.<sup>74</sup> A broader range of terms can be seen in *William de Pendlebury v Adam de Pilkinton et al.*,<sup>75</sup> in which the jurors use not only *clamans* but also *strepitum faciens* (making a noise) as types of sound which, implicitly, might do.

As far as *Bracton* is concerned, a single cry will suffice,<sup>76</sup> which suggests a relatively low threshold, though it is specified that it has to be a human cry, and not the apparently distinctive roar of a monster (*rugitum*).<sup>77</sup> The importance and the problem of distinguishing humans from non-humans, and from monsters in particular, had long roots in legal scholarship,

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<sup>71</sup> *Glanvill* uses *clamantem*; *Bracton* and *Fleta* use *vocem*, *clamorem* and *sonum*; *Britton* uses *crier*: *Glanvill*, VII, 18; *Bracton*, IV: 364; *Fleta*, book 6 ch. 55; *Britton* book III ch. 20 no. 5, c.f. Cry/bray: *Etablissements de St Louis*, book 1 ch.11 .*Regiam Majestatem* lib. 2 ch. 58 no. 1 also uses *braiantem*: T.M. Cooper, *Regiam Majestatem and Quoniam Attachiamta* (Edinburgh, 1947).

<sup>72</sup> Above, n. 41.

<sup>73</sup> Above, n. 40.

<sup>74</sup> Above, n. 62.

<sup>75</sup> (1291) JUST 1/1294 m. 8d (AALT IMG 3893).

<sup>76</sup> *Bracton* IV, 361.

<sup>77</sup> *Bracton* II, 31; III, 151; IV, 361. *Fleta*, book 6 ch. 55; *Britton*, book III, ch.2, no. 19.

and *Bracton* was adopting and adapting material from civilian sources here.<sup>78</sup> The treatise also drew on learned sources in dealing with the problem of whether and how a ‘dumb’ baby could be accommodated within a system which assigned legal validity based on a sound criterion, finding a solution in contemporary theology concerning the natural response of all humans to birth into a miserable world and a sinful condition: all will make some sound. Even a baby born ‘*naturaliter mutus ... et surdus*’ (naturally ‘dumb’ and deaf) will in fact make a sound at birth, that sound being different for males and females.<sup>79</sup>

In *Dispenser v Bigod*,<sup>80</sup> the jurors were to say whether the child in question ‘was heard to cry out, or give voice’, and there is a fascinating ‘follow-up’ question: if they found that the baby did cry or emit a sound, they were to say ‘in what kind of voice it spoke’ (*cuiusmodi*

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<sup>78</sup> *Bracton* also discusses ‘monsters’ at II, 201ff., IV, 227, following civilian models; see F.W. Maitland, ed., *Select Passages from the works of Bracton and Azo*, Selden Society vol. 8, London, 1894, 60; Willems, *Justinian*, 386-387; L. A. Graumann, ‘Monstrous Births and Retrospective Diagnosis: the Case of Hermaphrodites in Antiquity’, in Laes et al., *Disabilities*, 181-210; M. van der Lugt, ‘L’humanité des monstres et leur accès aux sacrements dans la pensée médiévale’, in A. Caiozzo and A.-E. Demartini, eds., *Monstres et imaginaire social: Approches historiques*, Paris, 2008, 135.

<sup>79</sup> *Bracton* IV, 361; *Fleta*, book 6 ch. 55. For theological antecedents, see R.E. Lewis, ed., Innocent III, *De Miseria Conditionis Humane*, Athens, 1978; C. Stark, ‘Renaissance Anthropologies and the Conception of Man’, in A. Moudarres and C. Purdy Moudarres, eds., *New Worlds and the Italian Renaissance: Contributions to the History of European Intellectual Culture*, Leiden, Boston, 2012, 173-194, 173; Willems, *Justinian*, 394, 397; R. Morris, ed., *The Pricke of Conscience*, Berlin, 1853, lines 499-505.

<sup>80</sup> (1281) KB 27/60 m.27d (AALT IMG 00126); KB 27/61 m. 4d (AALT IMG 00020).

*vocem ediderit*). It is tempting to see this as related to the concern about monsters shown in *Bracton*: asking for confirmation that this had been a human sound rather than a *rugitum* (roar), but it is more likely to have been a way of testing the (unpreserved) story on which the claim was made, which seems to have included specific detail about the location of the live birth, so may have been equally specific about the nature of the crying.<sup>81</sup> Since the case did not proceed to a conclusion, it is impossible to say.<sup>82</sup>

Some cases were pleaded or decided with a focus on the making of sound, and some on its perception. There were also differences along these lines within one case: in *Danyel*, the initial pleading of the heir denied that there had been a baby who had been ‘heard to be alive’ (*p[ro]lem qui auditus fu[er]at vivus*). Richard de la Bere spoke of a live child which had been heard (*prolem vivum qui auditus fuit*) and the jurors stated that the child had never been heard and nor had it made a cry (*numquam auditus fuit nec clamore[m]<sup>83</sup> aliquam emisit*).<sup>84</sup> Such

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<sup>81</sup> *Bracton* III, 151; IV, 361; *Britton* book III ch. 20 no.5. No case has been found in which this question of humanity versus monstrous nature was in issue, though *William de Wyvill v William de Landa* (1251), above, n. 37, shows the jurors considering the physical appearance of the baby in question, and noting that it ‘had human form’. This could indicate both maturity and clear humanity.

<sup>82</sup> Kentish dower cases use French *crie* and Latin *vagiens* and *clamans*: *Robinson, Gavelkind*, 162; above, n. 30 and *Stephen son of Thomas Pytte v Beatrix widow of Thomas Pytte* (1281) JUST 1/1255 m.11d; (AALT IMG 0073).

<sup>83</sup> ‘*vocem*’ in the JUST 1/302 version.

<sup>84</sup> Emphasis on being heard, rather than the making of sound: *Adam son of Walter v John del Holm* (1279-81), above, n. 42. It was contended that the child had not been heard to make a

differences may appear trivial, but may suggest some variation in the way in which the sound criterion was constructed: was it principally about what happened, or about proof of what had happened? Such variation in expression of the sound criterion is also some indication of a lack of consensus as to the function and place of sound in these determinations.

From the later medieval period, the focus on the baby's cry in curtesy cases was first doubted and then, in the early modern period, there was a decisive rejection of an exclusive sound criterion, and the necessity for specific pleading of sound. By the late fifteenth century, *Littleton* discussed the crying requirement with some uncertainty, apparently familiar with such a rule, but querying whether an audible cry was really necessary.<sup>85</sup> Later legal texts, and in particular those of Coke, rejected the idea that a cry must always be heard before a/the? child 'counted' for the purposes of curtesy.<sup>86</sup> The process of definitive rejection awaits its historian

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sound within the four walls of the house in which it was born (*nec umquam fuit audita infra quatuor parietes domus in qua nata fuit*). See also *Raggeley v Riche* (1284), above, n. 50.

<sup>85</sup> Littleton, *Tenures*, book I, ch. 4. Early editions do not refer to a 'query' here, but present the sound requirement in terms that 'some say' or 'some have said' that it is necessary: see e.g. *Tenores nouelli*, London, 1483?; R. Pynson, *Lyttilton tenures newly and moost truly correctyd [et] amendyd*, London, 1525; J. Rastell, *Lyttleton tenures in Englysshe*, London, 1528-30; T. Berthelet, *Lyttilton tenures truely translated into Englysshe*, London, 1538; W. Powell, *Lyttilton tenures truely translated into Englysshe*, London, 1551.

<sup>86</sup> Coke, *Inst.*, lib. 1 c. 4 s. 35; 8 Co. Rep. 34a. Coke's account fluctuated between discussion of pleading forms and of indicia of life, some use of the 'dumb' baby as an argument against an insistence on sound, and some reliance on the *Mirror of Justices* with its conception-based idea of qualification for curtesy. Coke and others mentioned a case *temp.* Henry VIII, stating that it showed that a cry was not required: *Paine's Case* 8 Co. Rep. 34a; 73 ER 55; 1 Dyer 25b,

and the fuller study which it deserves, which would, in particular, involve consideration of procedural differences in the ways in which actions concerning curtesy were brought, and in rules of pleading, over a long period. It does appear, however, that, although Coke portrayed the matter as having been decided by his period, for some time, neither view was unquestionably dominant, and sound continued to be emphasized in some works circulating in the sixteenth and seventeenth centuries.<sup>87</sup>

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Hil. 28 Hen. VIII case (159). *Paine's Case*, however, did not require a decision on the need for crying, in fact evincing the continued existence of a view that it was required, since, it was found, 'to remove all scruples' that there *had* been crying.

<sup>87</sup> *Institutions, or Principal Grounds of the Lawes and Statutes of England Newly and Very Truly Corrected and Amended*, London, 1543, m. 7d (reproduced in the 1604, 1617, 1625 editions); N. Bacon, *An Historical and Political Discourse of the Laws and Government*, London, 1689, 65-66; (original printed version: *An Historical Discourse of the Uniformity of the Government of England*, London, 1647, p. 105). See also T.E. Tomlins, ed., *Lyttleton his Treatise of Tenures in French and English: a new edition*, London, 1841, 44. A move away from insistence upon sound was not favoured in other jurisdictions: see Tomlins, ed., *Lyttleton*, 44, Kenny, *Effects*, 80, but Coke's view prevailed in England and Wales: *Baron et Feme*, London, 1700, reprinted 1979, 75; Blackstone, *Commentaries*, vol II. book II ch. 8, no. 3, 127; R. Wooddeson, *A Systematical View of the Laws of England* vol. 2, Dublin 1792, Lecture XIX no. 20, fn; O. Flintoff, *An Introduction to Conveyancing and the History, Nature, Incidents and Titles of Legal Estates*, London, 1840, 181; *Littleton's Tenures with notes and copious questions of the Text and Notes, by the editors of the Law Students' Magazine*, London, 1854, 12; Farrer, 'Tenant by the Courtesy', 99; *Brock v Kellock*, 30 LJ Ch. 498; *Jones v Ricketts* 31

Both this long period of uncertainty and the evidence from cases, discussed above, show that the sound test in curtesy does not deserve the rather condescending judgement of a nineteenth-century legal academic that it was a manifestation of an inability on the part of medieval common lawyers to find ways of taking more than one factor into account in such decisions.<sup>88</sup>

In fact, other matters were clearly taken into account in practice, providing clear evidence, if it was needed, that an understanding of medieval common law requires us to go beyond apparently definitive statements in treatises and year books, and look to the plea rolls for clues as to how decisions were made in practice. In addition, Victorian and Edwardian commentators might have been expected to recognize that determining the presence or absence of life was and is difficult, and the state of the law with regard to this was not particularly clear in the late nineteenth and early twentieth century, despite the establishment and growth of a medical profession in the period between the medieval common law and their own time.<sup>89</sup>

#### IV. 'Within the Four Walls'

References to the sound made by the baby being heard 'within four walls',<sup>90</sup> seen in most of the well-known treatise definitions, and the *Danyel* note, appeared to some later commentators

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LJ Ch. 793; S.B. Atkinson, 'Life, Birth and Live-Birth', 20 *Law Quarterly Review* (1904), 134, 154.

<sup>88</sup> Digby, *Introduction*, 123.

<sup>89</sup> Atkinson, 'Life, Birth and Live-Birth'; Butler, *Forensic Medicine*, 97; Tankard, 'Defining Death'; R.H. Robbins, 'The Signs of Death in Middle English', 32 *Mediaeval Studies* (1970), 282.

<sup>90</sup> *Glanvill* vii, 18; *Patent Rolls 1225-32*, 96; *Bracton* IV, 361; *Fleta*, book 6 ch. 55. *Britton* mentions the need for a cry which is heard, though does not make any mention of 'the four

to be a ‘quaint’ addition,<sup>91</sup> and given its frequent occurrence, it is worthy of some discussion. It will be clear that the import of the ‘four walls’ aspect of the sound test has potential implications both for the strength of sound which was contemplated as sufficient, and also for the audience potentially to be deemed acceptable as witnesses to the sound and the life.

A literal reading of the formulations appears to show an emphasis on events and perceptions within the birthing chamber, not the penetration of sound through walls to ‘ear-witnesses’. The cry is to be heard ‘within’ the walls,<sup>92</sup> not ‘from within’ or ‘through’ the walls. This could well be interpreted to mean that the sound need only be audible to those within the room, not that those waiting outside must hear that it is being made within the room.<sup>93</sup>

Not all curtesy cases turning on the transient life of a baby include the four walls formulation. In the initial list of questions for the inquiry in *Cantilupe*, although there is an assumption that the baby would have been born in a house, there is no overt reference to the ‘four walls’. Nevertheless, the formulation seems to have been well known in the time of Edward I, since the jurors bring it in themselves, before the walls disappear once more from

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walls’. *Modus Componendi Brevia*, in Woodbine, *Four Thirteenth Century Tracts*, 182. See further n. 7 above. Note also that the ‘four walls’ aspect is not in *Littleton* book I, ch. 4, though it mentions crying.

<sup>91</sup> *P & M* II, 417; Simpson, *A History of the Land Law*, 69.

<sup>92</sup> *inter, infra, intra, entre*

<sup>93</sup> Note that the *Lex Alamannorum*, regarded by a number of commentators as a precursor (however distant) of the common law rule, includes reference to the ‘four walls’, not as a barrier to be penetrated by sound but the boundaries to the scene in which ‘qualifying’ activity must be observed. The ‘penetrating cry’ idea is present in other medieval and later jurisdictions, however: Brunner, ‘Die Geburt’, 64; Willems, *Justinian*, 390; Kenny, *Effects*, 80.



the section recording the council's decision. The four walls were absent from the record in *Danyel* (though, as we have seen, they were part of the year book formulation of the test). Considering the possibility of using the 'four walls' test within factual matrix of this case, we may ask which four walls would be relevant: those of the birthing chamber or church? The walls do not appear anywhere in the voluminous records relating to *Keating*.<sup>94</sup>

The location of crying 'within four walls' is indicated by the jurors' finding in *Kyrketon* (1277), but there is a variation from other formulations: the four walls are specifically those of the house in which the child was born, and the cry comes when the child is raised from the water (presumably that of a hasty, emergency, baptism, performed on an infant thought unlikely to live long).<sup>95</sup> The idea that the correct formula includes 'the house in which [the child was] born' can be seen in *De Veylley v de Bomondeby* (1278), and a similar formulation appears in argument in *Adam son of Walter v John del Holm* (1279-81).<sup>96</sup> *Dispenser v Bigod* may relate the four walls to a specific geographical area, the manor of Woking.<sup>97</sup> More succinct references to 'within four walls' are found elsewhere.<sup>98</sup> The intermediate 'within the four walls of the house' is seen in *William de Pendlebury v Adam de Pilkinton et al.* in which the jury say that

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<sup>94</sup> *James Keating's Case*, above, n. 48.

<sup>95</sup> *Kyrketon v Robert son of Albert* (1277), above, n. 39.

<sup>96</sup> *De Veylley v de Bomondeby* (1278); *Adam son of Walter v John del Holm* (1279-81), above, nn. 40 and 42.

<sup>97</sup> *Dispenser v Bigod* (1281), above, n. 46. This is likely to represent an instruction to investigate the details of the claim made by Roger Bigod.

<sup>98</sup> *Osmundethorpe v de Hotoft* (1276), above, n. 41; *Philip le Clerk and Joan his wife v Peter son of Hugh de Blaby* (1284), above, n. 62. *Raggeley v Riche* (1284), above, n. 50, has '*infra quatuor parietes*'.

the child in question had lived for some time, but had not been heard to cry, or to make a noise, within the four walls (*infra quatuor parietes*).<sup>99</sup>

What should we make of these appearances, disappearances and variations of the ‘four walls’ formulation? One secure conclusion seems to be that nobody ever lost a case for failure to mention the four walls. In a practical sense, C.S. Kenny may have been correct to describe the ‘within four walls’ criterion as an ‘apparently aimless addition’.<sup>100</sup> Later texts also suggest an ambiguous place or the lack of a place for the famous walls.<sup>101</sup> Nevertheless, the formulation gives important clues to some, at least, of the lineage of the test, and the range of ideas which seem to be attached to the walls provide an interesting indicator of the different concerns relevant to the test for live birth in relation to curtesy, including, perhaps, location of the birth in a settled, respectable, domestic context, and some idea of connecting the birth with the land being claimed. Another important place has, however, been given to the walls in the construction of the test seen in Kenny and Maitland, who link them to a requirement for male witnessing.<sup>102</sup> This must be considered next.

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<sup>99</sup> *Pendlebury v de Pilkinton* (1291), above, n. 53.

<sup>100</sup> Kenny, *Effects*, 80.

<sup>101</sup> Note, however, that the four walls are mentioned in a Kentish dower case in the early part of Edward III’s reign, in one of several formulations of the test for proof of live birth: *Roberge widow of John atte Cumbe v Thomas son of John atte Cumbe* (above, n. 25).

<sup>102</sup> Kenny, *Effects*, 80-81; P.R. Hyams, ‘Maitland and the Rest of Us’ in J. Hudson, ed., *The History of English Law, Centenary Essays on ‘Pollock and Maitland’*, Oxford, 1996, 232; *P & M II*, 418.

## V. Walls and Witness Gender

If they encounter it at all, most legal historians will come across the issue of the sound criterion in tests for live birth in relation to curtesy through a passage in ‘Pollock and Maitland’, discussing a statement in *John Cantilupe’s Case*. Maitland’s account constructs an explanation of the sound requirement as a way of ensuring that there will be first-hand male testimony, with the sound being required to be such sound as to penetrate ‘the four walls’, so that it could be perceived by male ‘ear-witnesses’ waiting outside the birthing chamber,<sup>103</sup> since women’s testimony is not acceptable.

This account, which followed that of C.S. Kenny in its import and choice of source, has been influential,<sup>104</sup> but appears to be something of an over-simplification. Neither Kenny nor Maitland went beyond that section of the king’s bench plea roll which appears in the later *Placitorum Abbreviatio* to consider the whole record of the *Cantilupe* case. Had they looked at the full record, they might have treated this statement as less general, less straightforwardly authoritative, and less of a secure foundation for a logically-derived criterion of sound

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<sup>103</sup> *P & M* II, 412-418, 416, referring to a statement from *John Cantilupe’s Case* (1277); Record Commissioners, *Placitorum Abbreviatio*, London, 1811, 267. There are fuller records of this case at: KB 27/29 m.1 (AALT IMG 8053); KB 27/30 m.2 (AALT IMG 8197). ‘Ear-witnesses’ is my own coining.

<sup>104</sup> See, e.g. Willems, *Justinian*, 394; Brunner, ‘Die Geburt; F. Harris-Stoertz, ‘Pregnancy and Childbirth in Twelfth-and Thirteenth-Century French and English Law’, 21 *Journal of the History of Sexuality* (2012), 263, 265; F. Harris-Stoertz, ‘Midwives in the Middle Ages: Birth Attendants 600-1300’, in W.J. Turner and S.M. Butler, eds., *Medicine and the Law in the Middle Ages*, Leiden, 2014, 58, 72; R. Jacob, ‘Le cri du nouveau-né’, in D. Lett, N. Offenstadt, eds., *Haro, Noel, Oye! Pratiques du cri au moyen age*, Paris, 2003, 43, 51.

perception in relation to qualification for curtesy. This more nuanced, if less neat, view would have been confirmed by an examination of other records relating to the practicalities of obtaining proof of life in curtesy cases. Study of the records suggests that the exclusion of women was not as absolute as Maitland supposed, and this makes the 'sound requirement' seem less inevitable.

The plea roll record of *Cantilupe* does, as Kenny and Maitland stated, include a limitation in terms of who is able to bear witness in the king's court to having perceived life in the child: only men are allowed to do so. Comment relating to expectations of who will and will not be present in a birthing chamber is also included: men are barred from attending 'such secret things'. A similar statement is found in a damaged report of a 'common plea', *William son of John de Raggeley v Richard Riche* (1284).<sup>105</sup> This states that the widower, Richard Riche, cannot be tenant by the curtesy by reason of the live birth which he alleges took place, because men are not admitted to 'such secrets',<sup>106</sup> and it cannot be shown that the baby was heard to cry by anyone except women, who are not admitted to make proof in the king's court [in such cases].<sup>107</sup> These two records appear to be good evidence against the witness of women in curtesy cases involving disputed life, whether or not royal interests are involved.

The statements echo contemporary ideas as to the 'secret' nature of women's bodies and reproductive capabilities, and an acceptable discourse of reservations against male contact with women and their reproducing bodies, or attendance in the birthing chamber. There is

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<sup>105</sup> *Raggeley v Riche* (1284), above, n. 50.

<sup>106</sup> *Hujusmodi secretis*.

<sup>107</sup> *Non admittuntur probacioni*. Note that *in casu illo* ('in such a case') is interlined.

considerable medieval literature on ‘the secrets of women’,<sup>108</sup> and there are also contemporary ideas of the desirability of avoiding contact with women’s tainted and tainting menstrual blood, and with the immediate scene of childbirth.<sup>109</sup> Recent work has shown that the gender divides which these suggest were not absolute. Medieval saints, including male saints, were not thought to withhold their presence from parturient women,<sup>110</sup> and the idea of medieval obstetrics and

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<sup>108</sup> See, in particular, M. Green, ‘From ‘Diseases of Women’ to ‘Secrets of Women’: the Transformation of Gynaecological Literature in the Later Middle Ages’, 30 *Journal of Medieval and Early Modern Studies* (2000), 5; H. Rodnite Lemay, *Pseudo-Albertus Magnus’s De Secretis Mulierum with Commentaries*, New York, 1992, 34; M. Green, *Making Women’s Medicine Masculine: The Rise of Male Authority in Pre-Modern Gynaecology*, Oxford, 2008, ch. 5, especially at p. 217. Note that it is unclear whether the ‘secrets’ relate to the woman’s body, the process of childbirth, or, the room or area set aside for the birth.

<sup>109</sup> M.C. Seymour et al., eds., *On the Properties of Things: Trevisa’s Translation of De Proprietatibus Rerum*, 2 vols., Oxford, 1975, book 4, ch. 8; D. Elliott, *Fallen Bodies: Pollution, Sexuality and Demonology in the Middle Ages*, Philadelphia, 1998, 2-7. Works on English birthing chambers’ exclusively female character deal with royal births at a later period: see, e.g., K. Staniland, ‘Royal Entry into the World’, in D. Williams, ed., *England in the Fifteenth Century*, Oxford, 1987, 297, 301-302; R. Olson, ‘Margaret Beaufort, Royal Tapestries, and Confinement at the Tudor Court’, 48 *Textile History* (2017), 233.

<sup>110</sup> See, e.g., C.A. Frazee, ‘The Origins of Clerical Celibacy in the Western Church’, 41 *Church History* (1972), 149; C. Rawcliffe, ‘Women, Childbirth and Religion in Later Medieval England’, in D. Wood, ed., *Women and Religion in Medieval England*, Oxford, 2003, ch. 5, 91; M. Green, ‘The *De genecia* attributed to Constantine the African’, 62 *Speculum* (1987), 299, 311 n. 46; H. Powell, ‘The ‘Miracle of Childbirth’: the Portrayal of Parturient Women in

gynaecology as always and exclusively ‘women’s business’ has been disturbed.<sup>111</sup> Similarly, it appears to be an over-simplification to see the common law as insisting that only men could provide reliable information as to the presence or absence of life in this area.

No other case or statement of the law which I have found includes a passage similar to those in *Cantilupe* and *Raggeley*, and there are reasons to question the extent to which evidence proceeding from women was actually excluded. The issue of women’s role as witnesses in common law is under-researched, and considerably bigger than can be accommodated in an article on curtesy,<sup>112</sup> and different legal proceedings may have had different rules, but one thing which seems clear is that it is necessary to separate the idea of evidence used in legal

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Medieval Miracle Narratives’, 25 *Social History of Medicine* (2012), 185; Fröjmark, ‘Childbirth Miracles’; Prudlo, ‘Mothers and the Martyr’; D.M. Webb, ‘Friends of the Family: Some Miracles for Children by Italian Friars,’ 31 *Studies in Church History* (1994), 183.

<sup>111</sup> See, in particular, M. Green, ‘Women’s Medical Practice and Health Care in Medieval Europe’, in her *Women’s Healthcare in the Medieval West: Texts and Contexts*, Aldershot, 2000, Essay I, 39; and Green, *Making Women’s Medicine Masculine*; F. Harris-Stoertz, ‘Pregnancy and Childbirth in Twelfth-and Thirteenth-Century French and English Law’, 21 *Journal of the History of Sexuality* (2012), 263; B.K. Lee, ‘A Company of Women and Men: Men’s Recollections of Childbirth in Medieval England’, 27 *Journal of Family History* (2002), 92, 94; R. Wynne Johnson, ‘Divisions of Labor: Gender, Power, and Later Medieval Childbirth, c. 1200–1500’, 14 *History Compass* (2016), 383.

<sup>112</sup> On women as witnesses more generally, see, e.g., M. Madero, ‘Savoirs féminins et construction de la vérité: les femmes dans la preuve testimoniale en Castille au XIII<sup>e</sup> siècle’, 3 *Crime, Histoire et Sociétés* (1999), 5. I will be exploring this further in a forthcoming monograph, *Women and the Medieval Common Law c.1170-1509*

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proceedings, which originates with women, from that of women giving evidence in court. In the context of curtesy at least, there is no sign that women came in person to give evidence in court as to whether a baby was born alive, but the system could probably not have worked without using some female-derived evidence.

There is no clear prohibition on female-derived evidence in curtesy cases in the treatise accounts. The closest thing is the expression of suspicion of midwives seen in *Bracton* and *Fleta*, and echoing the intermittent suspicion of midwives or birth attendants which appears in legal records from Rome onwards,<sup>113</sup> in connection, in particular, with the fear of the suppositious child. *Bracton* and *Fleta* suggested that midwives might be complicit in frauds against the heir to land, lying to the effect that a child born dead was, for some period, alive, or, perhaps, passing off an unrelated baby as the required 'live issue'.<sup>114</sup> Presumably, the implication is that they would have been bribed by the father to do so. There is no way of knowing whether such fraud was practised with any regularity, whether there was really a suspicion that this was the case, or whether *Bracton* was simply repeating old misogynist tropes. We might construct a widespread suspicion of such fraud on the basis of questions about

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<sup>113</sup> Willems, *Justinian*, 396 ff; B.W. Frier and T.W.J. McGinn, *A Casebook on Roman Family Law*, Oxford, 2004, 108; E. J. Ackerknecht, 'Midwives as Experts in Court', *52 Bulletin of the New York Academy of Medicine* (1976), 1224; M. Green, 'Caring for Gendered Bodies', in J. Bennett and R.M. Karras, eds., *Oxford Handbook of Women and Gender in Medieval Europe*, Oxford, 2013, 345.

<sup>114</sup> *Bracton*, III, 311; II, 201; 4, 361; *Fleta*, book 6 ch. 55. For a story of fraud, see J.C. Holt, 'Presidential Address: Feudal Society and the Family in Early Medieval England: IV. The Heiress and the Alien', *35 Transactions of the Royal Historical Society* (1985), 1, 22; D.L. Douie and H. Farmer, eds., *Magna Vita Sancti Hugonis*, 2 vols., Oxford, 1961, ii. 20-27.

midwives in *Cantilupe* and *Despenser v Bigod*, but it was not only midwives who were the subject of questioning in the legal cases examined: in *Cantilupe*, questions were also asked about the baptising priest. We should also note that, despite the apparent understanding in *Bracton* and *Fleta* that midwives were inclined to fraud, it is not altogether clear either that ‘midwife’ was a clear and separate category,<sup>115</sup> nor that there was a clear and dominant view that the honesty of those acting as midwives was to be distrusted. Complaints about midwives are more likely to criticize their competence, medical or theological, than their honesty,<sup>116</sup> more popular depictions of midwives were not altogether negative,<sup>117</sup> and those acting as midwives were well enough regarded to be entrusted with the crucial task of baptising very unwell babies, to ensure their salvation.<sup>118</sup> In the common law case reports, women are shown taking a leading

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<sup>115</sup> See M. Cabré, ‘Women or Healers? Household Practices and the Categories of Health Care in Late Medieval Iberia’, 82 *Bulletin of the History of Medicine* (2008), 18; Harris-Stoertz, ‘Midwives in the Middle Ages’, 58; Harris-Stoertz, ‘Pregnancy and Childbirth’. Some of the common law sources do refer to *obstetrices* (midwives) others to the more neutral *matrones* (suggesting married women) (*Pendlebury v Adam de Pilkinton et al.* (1291)), and yet others use the most general term, *feminas* (women) (*Cantilupe*, *Raggeley*).

<sup>116</sup> See, e.g., P. Biller, ‘Childbirth in the Middle Ages’, 36 *History Today* (1986), 42, 46; Green, *Making Women’s Medicine Masculine*, 306.

<sup>117</sup> For popular characterization of midwives, see A. Swann, ‘“By expresse experiment”: the Doubting Midwife Salome in Late Medieval England’, 89 *Bulletin of the History of Medicine* (2015), 1.

<sup>118</sup> See, e.g., T.D. Vann Sprecher, R. Mazo Karras, ‘The Midwife and the Church: Ecclesiastical Regulation of Midwives in Brie, 1499-1504’, 85 *Bulletin of the History of Medicine* (2011), 171; K. Taglia, ‘Delivering a Christian Identity: Midwives in Northern French Synodal



role in emergency baptism and in naming of the child. This happens in *Cantilupe*, perhaps in *Danyel*. Emergency baptism is also seen in *Alice daughter of William Trussebut v Roger Trussebut*,<sup>119</sup> in which, as in *Danyel*, we see an apparent ‘split’ baptism: an emergency baptism and naming by women at the birth, when it seemed that the child was in imminent danger of death, and then a further baptism at church.<sup>120</sup> Given the awful consequences of a child dying unbaptized, including failure to attain salvation, possible suffering in the afterlife and a bar on burial in consecrated ground,<sup>121</sup> it is not difficult to imagine that midwives might be over-zealous, erring on the side of caution if it was not clear whether the child was alive or not, and this may have been the case in some of the curtesy cases seen here.<sup>122</sup>

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Legislation, c. 1200–1500’, in P. Biller and J. Ziegler, eds., *Religion and Medicine in the Middle Ages*, York, 2001.

<sup>119</sup> JUST 1/1055 m.73 (AALT IMG 3140), Yorkshire Eyre (1279–81) (not a curtesy case).

<sup>120</sup> There is also a name change between these baptisms, and a dispute as to the length of the life of the baby (though the issue of whether it lived at all is not raised. The birth attendants are described as the ‘*matrones* who were with the mother of Richard and Thomas when she gave birth to Thomas’.

<sup>121</sup> See, e.g., R.H. Helmholz, ‘Baptism in the Medieval Canon Law’, 21 *Rechtsgeschichte Legal History* (2013), 118; N. Orme, *Medieval Children*, New Haven, 2001, 21. The fate of the unbaptized infant was debated in the thirteenth century: D. Mowbray, ‘A Community of Sufferers and the Authority of Masters: the Development of the Idea of Limbo by Masters of Theology at the University of Paris (c. 1230 - c. 1300)’, in D. Mowbray, Rh. Purdie and I. Wei, eds., *Authority and Community in the Middle Ages*, Stroud, 1999, 43.

<sup>122</sup> *Adam son of Walter v John del Holm* (1279–81), above, n. 42. See also *Osmundethorpe v de Hotoft* (1276), above, n. 41, in which there is no mention of baptism, but a name had been

For all the suspicion of midwives expressed in *Bracton* and *Fleta*, these treatises did not say anything about male evidence requirements, or that women or midwives could not provide evidence. It is also worth noting that not all local rules appear to have seen a problem with female evidence in this context, and nor did all comparable foreign rules exclude female witnesses.<sup>123</sup> Furthermore, it would seem somewhat odd to have a rule excluding women in relation to matters of reproduction, when, in other common law proceedings in this area, they had a particularly prominent role.<sup>124</sup>

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given, suggesting baptism had taken place. See also Orme, *Medieval Children*, 126; L. McTavish, 'Blame and Vindication in the Early Modern Birthing Chamber', 50 *Medical History* (2006), 447, 459.

<sup>123</sup> See Bateson, *Borough Customs*, 112; Everard, ed., *Le Grand Coutumier de Normandie*, 548; Foscati, 'Nonnatus'; Fröjmark, 'Childbirth Miracles', 299-300.

<sup>124</sup> S.M. Butler, 'Pleading the Belly: a Sparing Plea? Pregnant Convicts and the Courts in Medieval England', in S.M. Butler and K.J. Kesselring, eds., *Crossing Borders: Boundaries and Margins in Medieval and Early Modern Britain: Essays in Honour of Cynthia J. Neville*, Leiden, 2018, 131; J.C. Oldham, 'On "Pleading the Belly": a Concise History of the Jury of Matrons', 6 *Criminal Justice History* (1985), 1; *Bracton* II, 201-203; F.W. Maitland, ed., *Bracton's Note Book: a Collection of Cases Decided in the King's Courts During the Reign of Henry III*, 3 vols., London, 1887 vol. 2, 161-162, 112, 116-117; E. de Haas and G. D. G. Hall, eds., *Early Registers of Writs*, Selden Society vol. 87, London, 1970, lii, and note also Roman law's entrusting to midwives of the assessment of whether or not a woman was pregnant: T. Mommsen, P. Krüger, R. Schöll, W. Kroll eds., *Corpus Iuris Civilis*, 3 vols., (Berlin, 1911, 1915, 1904), vol. I, D. 25.4.1; B.W. Frier, T.A. McGinn, eds., *A Casebook on Roman Family Law*, Oxford, 2003, 108. On female involvement in the assessment of male impotence, in

In fact, it seems certain that women's accounts were used in determinations, but the point they made was only 'heard' in an official sense when made by a man or men.<sup>125</sup> Sometimes, the female source of evidence is made clear. Jurors relate the observations of the 'matrones' in a 1291 case, without any suggestion that there is a problem in doing so,<sup>126</sup> and a case of 1295 suggests some credence being given to the report of the midwives (*obstetrices*). In *John son of Hugh Laurence v Roger son of Hugh Inchemershe and Joan his wife and Richard Goscel*,<sup>127</sup> the jurors in an assize reported what they had been told by the midwives who had attended the birth of the child whose life was being relied upon to justify John son of Hugh Laurence's claim to tenancy by the law of England.<sup>128</sup> This was that the child had been born alive, but had died very soon. The jurors noted that the child had not been heard to cry nor to emit any sound, but this is not clearly to contradict the report of the midwives. There is nothing to suggest a requirement for masculine confirmation of the cry, nor that the word of the midwives is not trusted. Even where the midwives or women are not given credit, if it is true

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(church court) divorce proceedings, see R.H. Helmholz, *Marriage Litigation in Medieval England*, Cambridge, 1974, 88-89; J. Murray, 'On the Origins and Role of 'Wise Women' in Causes for Annulment on the Grounds of Male Impotence', 16 *Journal of Medieval History* (1990), 235.

<sup>125</sup> There is a parallel with the procedure seen in proof of age inquests, in which, despite an apparent restriction on women providing evidence in person, female evidence was used, as long as it had the endorsement of a male: Lee, 'A Company of Women and Men', 93; Walker, 'Proof of Age', 308, 314.

<sup>126</sup> *Pendlebury v de Pilkinton* (1291) above, n. 53.

<sup>127</sup> *Laurence v Inchemershe* (1295), above, n. 63.

<sup>128</sup> *ut ex relatu obstetricu[m] acceper[un]t*.

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that males were not present at the births in question, then some of the facts given in jury accounts seem likely to have derived from female statements. Who could have observed the movements of the baby in *Crofte v Mortimer*,<sup>129</sup> and who could have known at first hand of the names given to babies in a number of the cases, apart from the women or matrons or midwives in the birthing chamber? In contrast with the evidential *impasse* suggested by the *Cantilupe* and *Raggeley* statements, according to which the cries of a live child, heard by women, could not be brought forward in court, where only men could be heard, and the statements in *Bracton* and *Fleta* concerning the need for first hand evidence,<sup>130</sup> the Edwardian plea roll entries show that a desire to ensuring male witnesses did not always mean ensuring first-hand male witnesses.<sup>131</sup> Cases in which the location of the birth and the location of the land over which curtesy was claimed were different show that it was accepted by the later thirteenth century that jurors would not necessarily have first-hand experience of the baby's cries, since they might be drawn from both places. *Humfrey de Veylley and Lucy his wife v Richard de Bomondeby* (1278) ordered the matter to be tried by six or eight men from the area of the claimed land and six or eight from the location of the baby's alleged life. The former men

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<sup>129</sup> *Crofte v Mortimer* (1288), above, n. 51.

<sup>130</sup> *Bracton* IV, 361 and *Fleta*, book 6 ch. 55 emphasize the need for suit to have heard the cries in person, rather than by report, though this did not mention gender. There was not a consistent disapproval of 'hearsay' in general: Walker, 'Proof of Age', 308, 314, 318; Lee, 'A Company of Women and Men', 93.

<sup>131</sup> *William de Wyvill v William de Landa* (1251), above, n. 37, shows the jurors pronouncing upon the appearance of a baby, with no sign of the origin of this information.

would seem unlikely to have been first hand ‘ear-witnesses’, so that the information would have had to come from somewhere: most obviously from those present at the birth.<sup>132</sup>

If there was an attempt to exclude female-derived evidence it does not seem to have been practical or effective. The fact that it was stated is, of course, interesting from the perspective of gender and the law, showing the adoption of readily-available ideas about female inferiority and male avoidance of parturient women. It is also important to note the specificity of the statements regarding women: both *Cantilupe* and *Raggeley* limit the exclusion of female evidence to ‘this sort of case’, suggesting that these misogynist ideas are being wielded with a particular purpose, in an attempt to insist on particular strictness with regard to qualification for tenancy by the curtesy. The two examples of this limitation occur over a relatively short period of time and have some similarities in wording, so that influence, or a view of a small number of people at a particular time, may be the explanation. The statement of the stricter rule may have been an innovation in the *Cantilupe* case itself, since it is only given at the council stage of proceedings and is not, for example, mentioned in the lengthy instructions to the jurors.<sup>133</sup> It is not mentioned in any of the treatise or year book formulations, nor in most later sources: in fact, the idea that there might be a bar on female-derived evidence in this case comes to be seen as ‘a most unaccountable peculiarity’<sup>134</sup> The signs are that this was a short-lived insistence, which was not as influential as the emphasis on perception of sound as opposed to

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<sup>132</sup> *De Veylley v de Bomondeby* (1278), above, n. 40; *Bracton* III, 151.

<sup>133</sup> One might read an unfamiliarity of the formula into the fact that *hominibus* (‘by men’) is interlined in one version of the record: KB 27/29 m.1 (AALT IMG 8053).

<sup>134</sup> Notes by editor in C. Butler, ed., E. Coke, *The First Part of the Institutes of the Laws of England*, London, 1817; J.H. Thomas, *Systematic Arrangement of Lord Coke’s First Institute*, Philadelphia, 1836, 440.

other indicia of life. Nevertheless, like the latter emphasis, the fact that there seems to have been an attempt to limit evidence based on the gender of its originator suggests care to ensure that only a man who had undoubtedly fulfilled the requirements for qualification for curtesy, producing a live child to seal his association with his wife's family, would be allowed to enjoy the land in question for the rest of his life.

## VI. Conclusion

The year book note relating to *Danyel*, alluded to in my title, setting out the requirements for a widower who claimed to be tenant by the curtesy, mentioned the need for sound, and the relevance of 'the four walls'. As can be seen through study of a wider body of contemporary legal records, however, behind this apparently straightforward statement lies a hinterland of alternative ideas relating to the indicia of life and acceptable ways of establishing them for the purposes of curtesy. The records do not tell us everything we might wish to know – for example, their terse nature makes it difficult to gauge the relative roles of parties, witnesses, lawyers, jurors and judges, or to see their interactions – but there is enough material to allow a conclusion that insistence on the production of sound was not inevitable. It represented one of the possible routes which the law could take, and it did not correspond to more general understandings of the factors which indicated the presence or absence of life. It can also be concluded that the role of the 'four walls', mentioned in several texts, was somewhat marginal in terms of practical function, and that attempts to link them to a requirement for male-only first-hand 'ear-witnesses' appear to give an excessively neat encapsulation of an area of law which was less static, less impractical, and much more worthy of the attention of legal historians than has hitherto been recognized.

There may be a number of reasons why curtesy has been treated in such a perfunctory fashion by legal historians, but one, at least, may be that the nineteenth and early twentieth

century flourishing of a particularly influential species of legal history – the lawyers’ legal history of Maitland – coincided with a dislike of fetters on testamentary freedom and a paradigm of the husband as provider rather than one who is supported by his wife’s property. From this point of view, curtesy was not a particularly attractive institution.<sup>135</sup> From a modern perspective, and a comparative one, the idea of compulsory provision of property for a surviving spouse looks less peculiar,<sup>136</sup> and legal historians should not feel the same unwillingness to explore curtesy in order to obtain a more complete picture of succession and the organization of land-holding within families. Much remains to be researched, in particular in relation to the incidence of curtesy and changes in understanding of the requirements for proof of live offspring in the period from *Danyel* to *Lyttleton*, and, as is clear from the details of some of the cases noted above, this legal material has much to contribute to wider areas of historical scholarship, from medical history to the study of fatherhood and step-fatherhood.

#### Notes on Contributor

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<sup>135</sup> See, e.g., S. Anderson, ‘Succession, Inheritance and the Family’, in W. Cornish, J. S. Anderson, R. Cocks, M. Lobban, P. Polden and K. Smith, eds., *Oxford History of the Laws of England vol. XII*, Oxford, 2010, 3, 6-7; Dower Act 1833 (3 & 4 Will. IV, c.105); L. Davidoff and C. Hall, *Family Fortunes: men and women of the English middle class, 1780-1850*, London, 1987, ch.4.

<sup>136</sup> See, e.g., Law Commission, *Intestacy and Family Provision Claims on Death* (2011) (LAW COM no. 331); R. Kerridge with A. H. Brierley, *Parry and Kerridge, The Law of Succession*, 13th edn., London, 2016, ch. 8.

